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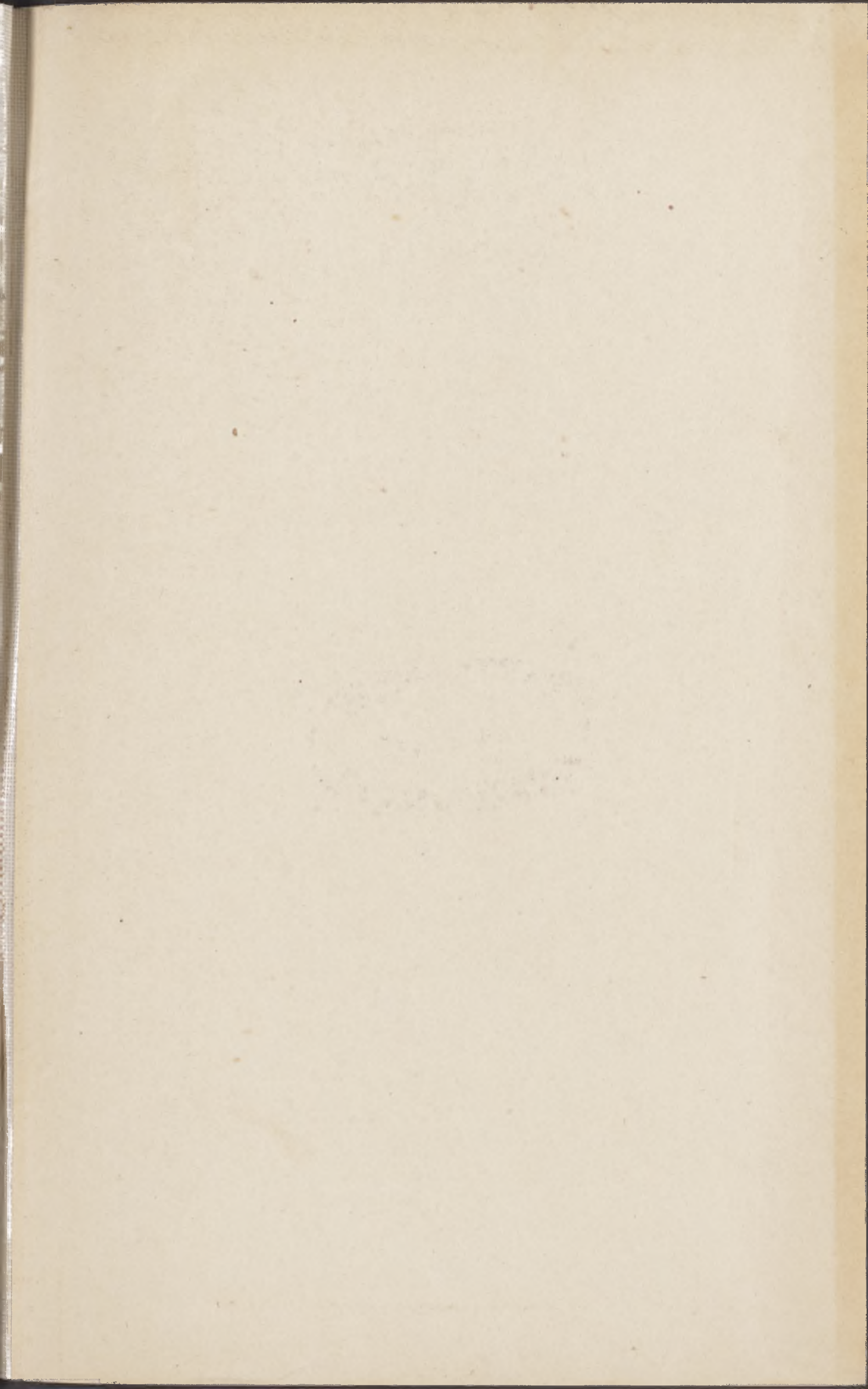

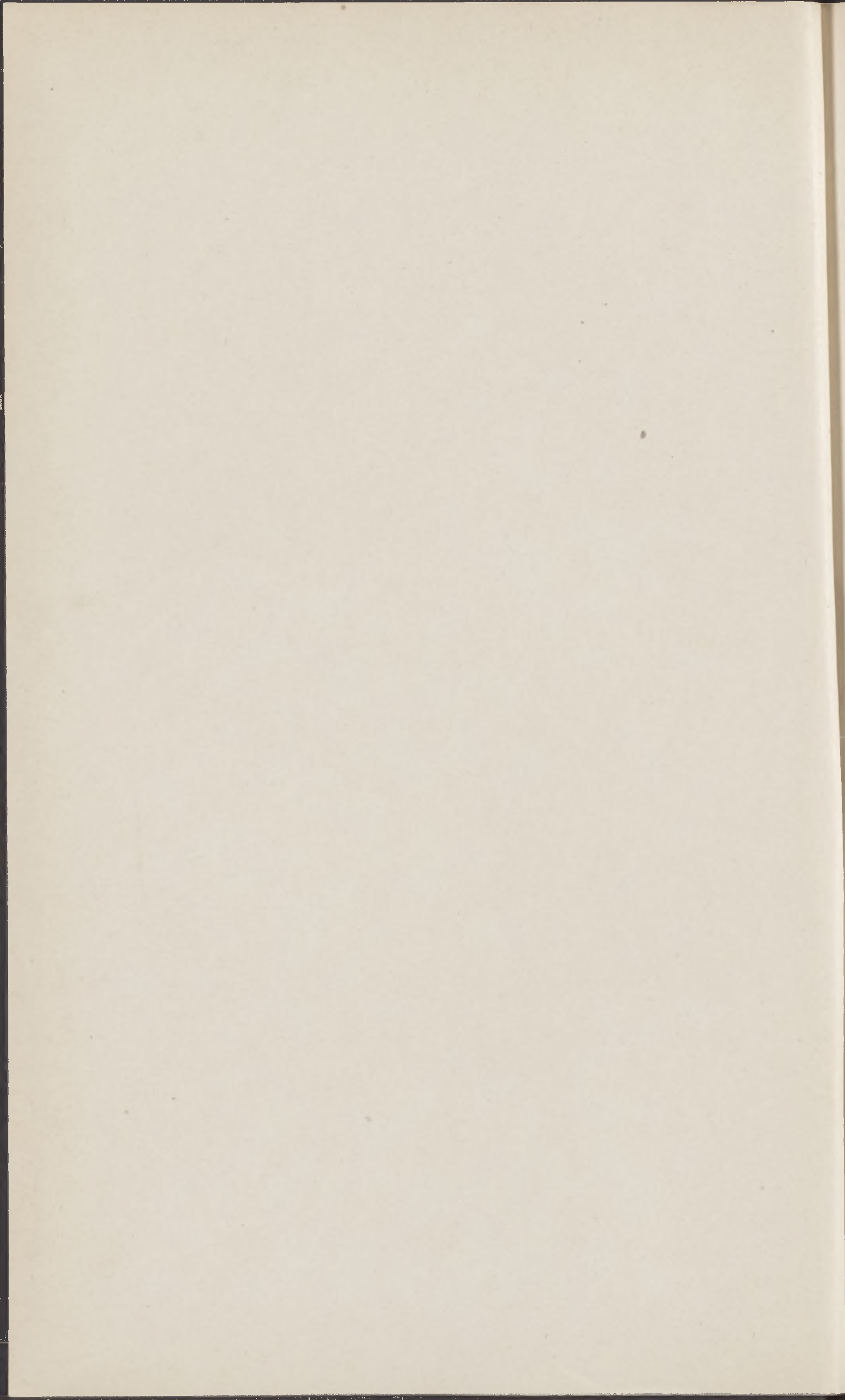

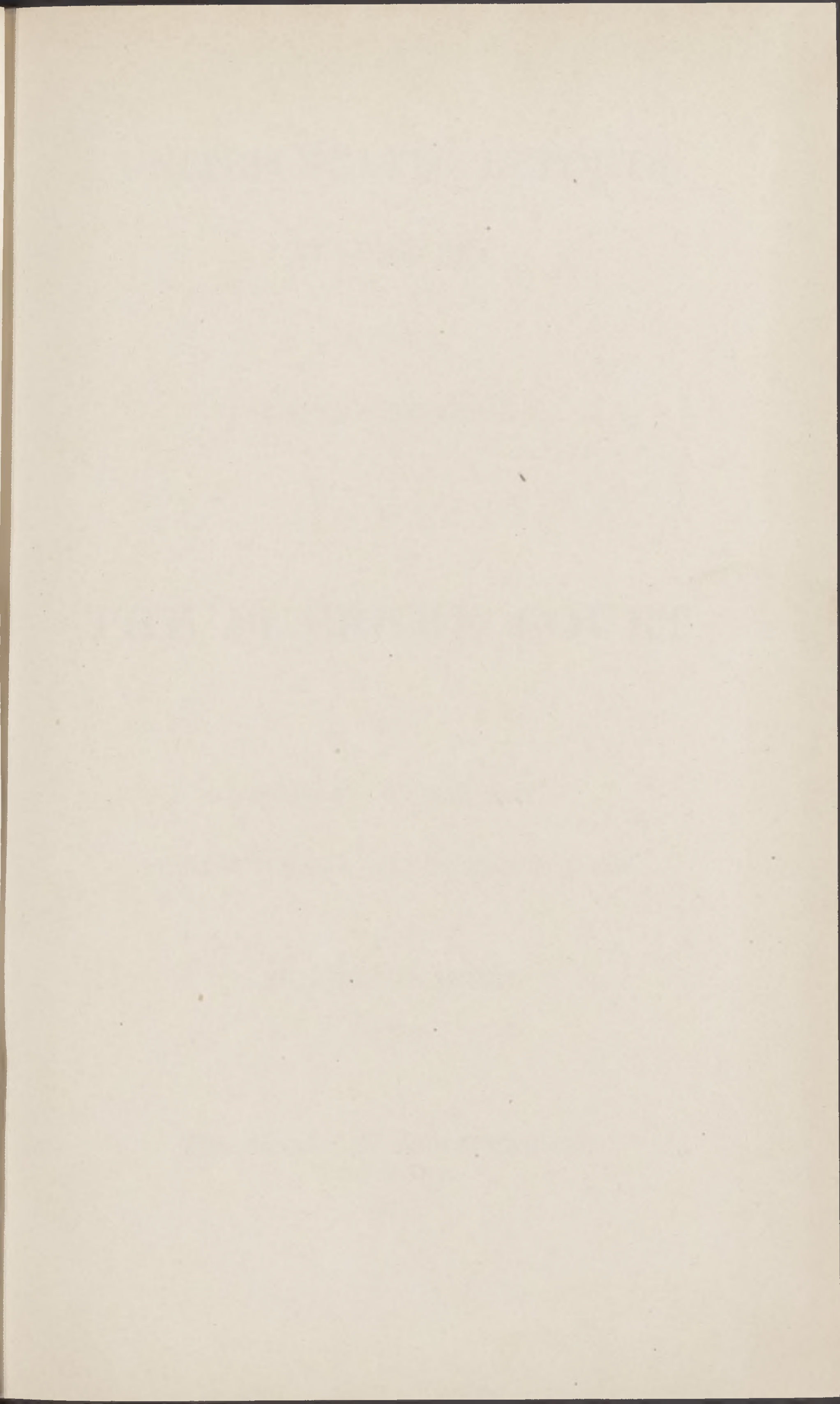

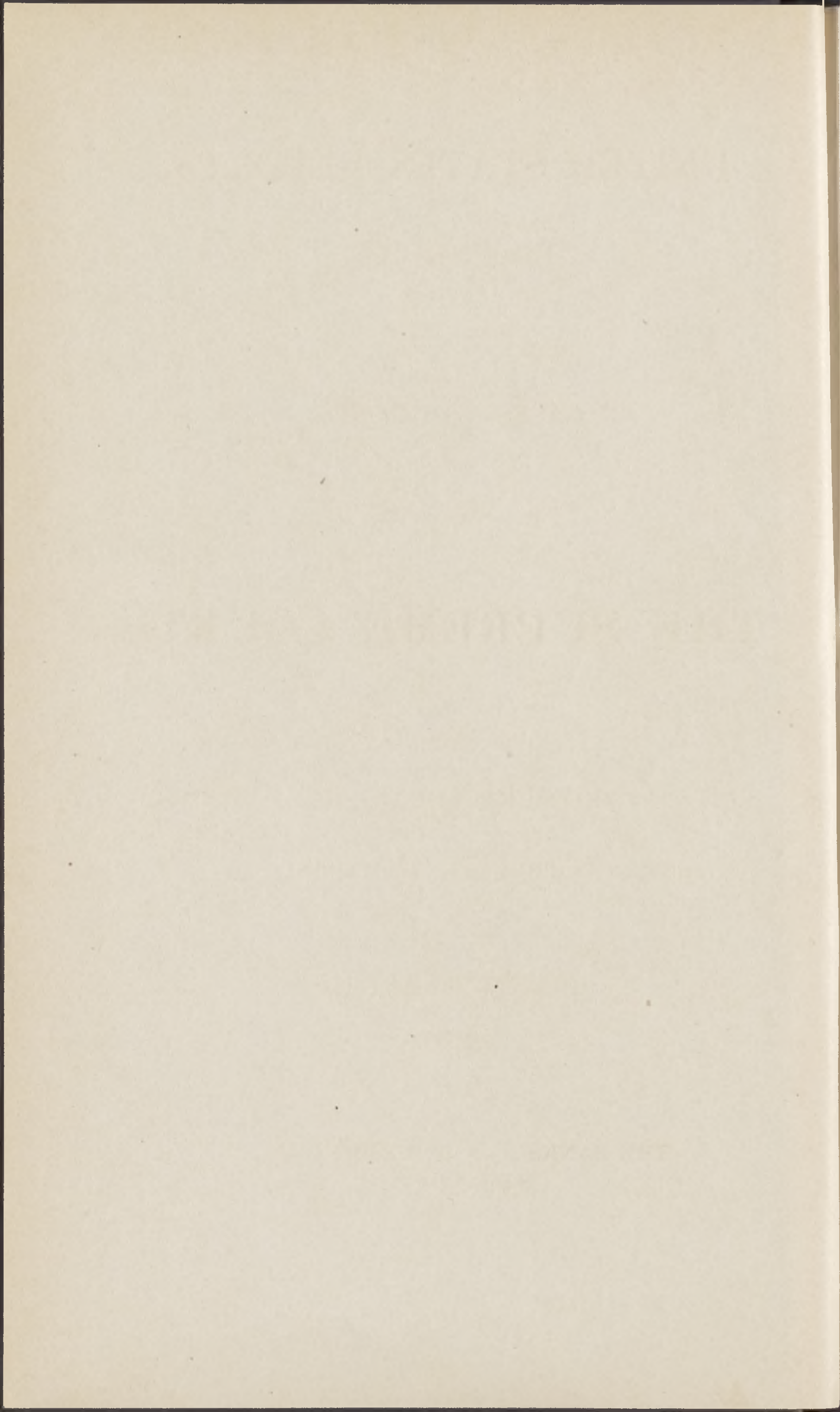

# UNITED STATES REPORTS

## VOLUME 245

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1917

FROM OCTOBER 1, 1917, TO MARCH 4, 1918

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.
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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, 1917.

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## UNITED STATES *v.* LEARY ET AL., ADMINISTRATORS OF LEARY, ET AL.

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

No. 194. Argued October 4, 1917.—Decided October 15, 1917.

Where a defendant, under indictment for defrauding the United States of money, deposited stocks with a representative by whom another person was induced to execute the defendant's bail bond on the faith of the deposit as indemnity, and neither surety nor depositary had notice of any defect in the depositor's title, the surety's equity in the deposit was superior to that of the United States, though the stocks were procured with the proceeds of the fraud.

In such case, where, after the first bond, the surety executed several renewals in removal and *habeas corpus* proceedings, the parties repeatedly treating the proceedings and the indemnity agreement as continuing matters, *held*, by inference that the same understanding attached to a further bond for appearance at trial, and that the depositary's conduct in retaining only shares constituting the deposit, while settling with the defendant for others, confirmed such intention.

During the proceedings the shares originally deposited were sold by the depositary, with others belonging to the defendant, and, of new shares purchased with the proceeds, some were selected and retained by the depositary in lieu of those first deposited. *Held*, that the equity of the surety attached to them.

Upon an issue of fact as to whether stock claimed by plaintiff was held by defendant as indemnity for interveners, defendant's sworn answer, filed before the intervention and averring that he so held the

stock, was evidence for the interveners as an act, if not as a statement of facts.

Whether defendant should have an allowance as trustee is left to the trial court.

229 Fed. Rep. 660, affirmed.

THE case is stated in the opinion.

*Mr. Marion Erwin*, Special Assistant to the Attorney General, for the United States:

There was no extension to the bond of 1902 of the agreement to indemnify Leary. That required an express agreement, which was lacking. *United States* v. *Ryder*, 110 U. S. 729.

The averments of the intervention show, as matter of law, that the temporary bail bond for appearance of Greene before the commissioner had long prior to January 20, 1902, become *functus officio.*

Even if Leary had proved an express contract relative to the bond of 1902, her claim would be inferior to that of the Government. *Boone* v. *Childs*, 10 Pet. 177; *Shirras* v. *Cary*, 7 Cranch, 34; *Vattier* v. *Hinde*, 7 Pet. 252; *Hallett* v. *Collins*, 10 How. 174; *Grimstone* v. *Carter*, 3 Paige Ch. 420.

A promise to pay a debt out of a particular fund creates no equitable lien or right in the fund. *Seymour* v. *Railroad Co.*, 25 Barb. 284; *Grinnel* v. *Suydam*, 3 Sandf. 132; *Drake* v. *Taylor*, 7 Fed. Cas., No. 4067; *Boone* v. *Childs*, 10 Pet. 193; *Christmas* v. *Russell*, 14 Wall. 69.

As to the law relative to the tracing of trust funds, see *May* v. *LeClaire*, 11 Wall. 217, 236; *Smith* v. *Vodges*, 92 U. S. 186; *Moore* v. *Crawford*, 130 U. S. 122; *Oliver* v. *Piatt*, 3 How. 333; *Van Allen* v. *Bank*, 52 N. Y. 1–5; *National Bank* v. *Insurance Co.*, 104 U. S. 70; *Knatchbull* v. *Hallett*, 13 Ch. Div. 696; *Cook* v. *Tullis*, 18 Wall. 332; *Richardson* v. *Shaw*, 209 U. S. 365; *Sexton* v. *Kessler*, 225 U. S. 90.

*Mr. Aubrey E. Strode*, with whom *Mr. J. T. Coleman, Jr.*, was on the brief, for Leary *et al.*, Administrators.

*Mr. Abram J. Rose*, with whom *Mr. Alfred C. Petté* was on the brief, for Kellogg, appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This proceeding began as a suit by the United States to charge the defendant Kellogg with a trust in respect of funds alleged to have been received by him from Greene and to have been obtained from the plaintiff by Greene through his participation in the well-known Carter frauds. *United States* v. *Carter*, 217 U. S. 286. After the evidence had been taken, leave to intervene was granted, on terms, to the administratrix of the estate of James D. Leary, predecessor of the present Leary appellees. 224 U. S. 567. The fund now in question is four hundred shares of the stock of the Norfolk and Western Railway Company, which the Learys and Kellogg say were held by Kellogg as security to their intestate against his liability upon a bail bond for Greene. A judgment upon the bond has been paid by them. The Circuit Court of Appeals has sustained the Learys' claim and the United States appeals. 229 Fed. Rep. 660. 144 C. C. A. 70.

Although Kellogg argues the contrary, it may be assumed for the purposes of decision that the United States traces its money into the stock, since Kellogg makes no personal claim to it. On the other hand it appears that before the intestate Leary became bondsman for Greene on December 14, 1899, Kellogg wrote to him on the same day, stating that Greene had placed in his hands three hundred shares of stock of the Delaware, Lackawanna and Western Railroad Company "as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor and others, now pending in the district court" to hold until Leary was released from the said bond or to apply in payment of the obliga-

tion. We agree with the Circuit Court of Appeals that neither Kellogg nor Leary had notice of any defect in Greene's title. The only question requiring discussion is whether the present stock is held upon the same terms against a later bond that Leary signed.

The proceedings in which the bond of December, 1899, was given were for the removal of Greene from New York to Georgia. On February 20, 1900, the United States Commissioner found that there was probable cause. Greene was committed to the marshal and the bond was cancelled. On the same day another bond seems to have been given by Leary that was satisfied on May 28, 1901, when the district judge issued a warrant for removal. On May 21 Kellogg wrote to Leary that it would be necessary "to renew the bail given by you for Captain Greene, and for which I hold security for your protection," fixing a time, and adding "This new bond is to take the place of the old one without additional liability." The bond was given on May 28 and Greene was enlarged. On June 8 Greene was surrendered into the custody of the marshal in New York and a new bail bond was executed by Leary after having received a letter from Kellogg, dated June 6, saying "I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter" fixing the time and adding "The reason for the matter is not that you have to incur any additional liability, but simply to enable them to carry their case to the United States Supreme Court."

The case was taken to this court and an order of the Circuit Court refusing a writ of *habeas corpus* was affirmed on January 6, 1902. *Greene* v. *Henkel*, 183 U. S. 249. Thereafter, on January 20, Leary signed, as surety for Greene, the bond for $40,000, conditioned for Greene's appearance in Georgia, which was forfeited and which the Learys have paid.

More words could not make it plainer than it is made

by the letters that the "matter" was regarded by the parties as a continuing one and that the bond of June 8, 1901, was executed on the agreement that the security also should continue. The only natural inference as to the later one of 1902 that took its place is that the understanding remained in force without the requirement of a repetition of the already repeated assurance. This inference is confirmed by the conduct of Kellogg. He had held stocks and bonds for Greene and settled with him, retaining only this stock. Even if his original answer under oath filed before the Learys intervened is not evidence for them as a statement of facts, it was an act as well as a statement and showed that at that time he asserted that the stock was security given by Greene. It is true that the stock was not the same that was mentioned in the first letter. Greene was allowed to make changes and substitutions. But this and other purchases were made with the proceeds of the sale of the first and other stocks before the letters of May and June, 1901 were written, and without considering whether in the interest of good faith the stock retained should or should not be attributed to the portion of the funds coming from that previously pledged, the selection and retention of it in place of the other is enough when taken with the agreement disclosed. See *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68; *In re Hallett's Estate*, 13 Ch. Div. 696. It seems to us unnecessary to add more to the discussion by the Circuit Court of Appeals. Whether Kellogg should receive an allowance as trustee may be left to the District Court.

*Decree affirmed.*

# PENNSYLVANIA RAILROAD COMPANY, LESSEE OF THE NORTHERN CENTRAL RAILWAY COMPANY, *v.* TOWERS ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND.

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

No. 31. Argued April 25, 26, 1917.—Decided October 15, 1917.

Whether the statutes of Maryland intend to authorize the Public Service Commission to revise intrastate commutation rates when such rates have already been established by voluntary action of the railroad company, is a question of state law concerning which the conclusion of the Court of Appeals of Maryland binds this court upon a writ of error to review its judgment.

State regulation, through a public service commission, requiring a carrier to maintain commutation service between points within the State and fixing rates therefor, which are less than the intrastate rate lawfully established for one-way intrastate travel in general, does not deprive the carrier of due process of law when the service so regulated was established by the carrier voluntarily and the rates fixed by the State are reasonable. *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684, is distinguished, and the views expressed in that case which are inconsistent with the decision in this one are disapproved.

126 Maryland, 59, affirmed.

The case is stated in the opinion.

*Mr. F. D. McKenney*, with whom *Mr. Henry Wolf Biklé*, *Mr. Shirley Carter* and *Mr. John Spalding Flannery* were on the brief, for plaintiff in error, in support of the contention that the order of the Public Service Commission here in question was unconstitutional, relied principally upon *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684, and *Northern Pacific Ry. Co.* v.

*North Dakota*, 236 U. S. 585, citing in addition the following as sustaining the authority of the *Lake Shore Case: Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, 297; *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 701; *Chicago &c. R. R. Co.* v. *Wisconsin*, 238 U. S. 491, 499; *Beardsley* v. *New York C. &c. R. R. Co.*, 162 N. Y. 230; *Commonwealth* v. *Atlantic Coast Line Ry. Co.*, 106 Virginia, 61; *State* v. *Bonneval*, 128 Louisiana, 902; *State* v. *Great Northern Ry. Co.*, 17 N. Dak. 370; *Attorney General* v. *Old Colony R. Co.*, 160 Massachusetts, 62.

*Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79, they distinguished upon the ground that the constitutionality of the state statute there in question—requiring street car companies to carry school children at half fare—was not involved. The statute was an exercise of the State's reserved power over the corporation. The reasoning of the decision in no way detracts from the authority of the *Lake Shore Case*.

The analogy between the *Lake Shore Case* and the case at bar would seem to be complete, for the difference between a 1,000-mile ticket and a 100-trip ticket, both required to be issued contrary to the managerial will of the carrier and at rates less than the maximum or standard one-way single fare, is not fundamental.

*Mr. W. Cabell Bruce* for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This was an action in the Circuit Court No. 2 of Baltimore City, Maryland, to enjoin the Public Service Commission of Maryland from enforcing an order to sell commutation tickets at certain rates specified. The injunction was refused, and on appeal the Court of Appeals of Maryland affirmed the decree and held that although the order fixing the rates declared the same to be

in force for ten years, there should be reserved to the railroad company the right to apply to the Commission after the lapse of a reasonable time for a rescission or modification of its order if experience demonstrated that the revenue derived under the tariff as established by the Commission was not properly compensatory for the services performed. 126 Maryland, 59.

The order of the Commission required the Pennsylvania Railroad Company, lessee of the Northern Central Railway, to sell tickets for the transportation of passengers between Baltimore and Parkton within the State of Maryland on the line of the Northern Central Railway.

A table appearing in the opinion of the Court of Appeals shows the relative rates under the former schedules and the new order of the Public Service Commission to be as follows:

| Rates Prior to Nov. 25, 1914. | Rates as per Schedule filed Nov. 25, 1914. | Rates under Order P. S. Com., Dec. 23, 1914. |
|---|---|---|
| 1: Round trip, 10 day, 2¼c. per M. | Round trip, no limit, 2½c. per M. | Round trip, 2¼c. per M. |
| 2: Exc. 2–10 days, 2¼c. per M. | Discontinued. | No ruling made. |
| 3: 10-strip ticket, 1 yr., 1 8/10c. per M. | 10-trip, 3 mos., 2¼c. per M. | 10-strip, 3 mos. 2c. per M. |
| 4: 60-trip 1 mo., 2c. for first 3 M., ¼c. for ea. addl. ½ M. | 60-trip, 1 mo. former rate plus 25c. flat. | 60-trip, 1 mo. former rate plus 25c. |
| 5: 100-trip, 1 yr. at double 60-trip. | Discontinued. | 100-trip, 4 mos., former rate, plus $1. |
| 6: 180-trip 3 mos. same as 4, less 10% | 180-trip, 3 mos. at 3 times 60-trip. | 180-trip, 3 mos., former rate plus 75c. |
| 7: 46-trip School, 1 mo., 46/60 of 60-trip. | 46-trip School, 1 mo., 46/60 of 60-trip. | 46-trip School, 1 mo., 46/60 of 60-trip. |

The attack upon the order of the Commission in this court is based upon the contention that its effect is to take the property of the railroad company without due process of law, contrary to the Fourteenth Amendment to

the Constitution of the United States. It is also averred in the bill that the order, if enforced, will work a discrimination against interstate travel in favor of travel within the State, and is otherwise unreasonable and void.

The Court of Appeals of Maryland stated the question to be whether it is within the power of the Public Service Commission to require the establishment of a schedule of commutation rates by the railroad company, not where no such rates had theretofore been established, but where a new system of commutation rates had been proposed by the railroad company and submitted to the Commission. Whether commutation rates should be established was declared to be a question of policy to be decided by the company. The court found authority in the Commission under the statutes of Maryland to revise commutation rates where such rates had already been established by the action of the company. We must accept this definition of authority in the Commission, so far as the state law is concerned, and direct our inquiry to the federal question presented.

The question, as counsel for plaintiff in error states it, is whether a state legislature, either directly or through the medium of a public service commission, under the guise of regulating commerce, may compel carriers engaged in both interstate and intrastate commerce to establish and maintain intrastate rates at less than both the interstate and intrastate standard and legally established maxima. It is asserted that there is no constitutional authority to compel railroad companies to continue the sale of commutation or special class tickets at rates less than the legally established standard or normal one-way single passenger fare upon terms more favorable than those extended to the single one-way traveler.

To maintain this proposition plaintiff in error relies upon and quotes largely from the opinion of this court in *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173

U. S. 684. In that case a majority of this court held a statute of the State of Michigan to be invalid. A previous statute of the State had fixed a maximum passenger rate of three cents per mile. The statute in controversy required the issuing of mileage books for a thousand miles, good for two years, at a less rate. This court held that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service, and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the Fourteenth Amendment to the Federal Constitution by depriving the railroad company of its propery without due process of law and denying to it the equal protection of the law.

The *Lake Shore Case* did not involve, as does the present one, the power of a state commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the States to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it.

In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, this court held that a "party rate ticket" for the transportation of ten or more persons at a less rate than that charged a single individual did not make a discrimination against an individual charged more for the same service, or amount to an unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce. In the course of the opinion the

right to issue tickets at reduced rates good for limited periods upon the principle of commutation was fully recognized. See pp. 277, 278, 279, 280.

Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions and rates fixed with reference to the particular character of the service to be rendered.

In *Norfolk & Western Ry. Co.* v. *West Virginia,* 236 U. S. 605, 608, after making reference to *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, this court said:

"It was recognized [in the *North Dakota Case*] that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."

That the State may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the State the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service. The service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets as well as the cost of selling them is less than

is involved in making and selling single tickets for single journeys to one-way passengers.

The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the single-way passenger.

It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. After such recognition of the propriety and necessity of such service, we see no reason why a State may not regulate the matter, keeping within the limitation of reasonableness.

On the strength of these commutation tariffs, it is a fact of public history that thousands of persons have acquired homes in city suburbs and nearby towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic. This fact has been recognized by the courts of the country, by the Interstate Commerce Commission, and quite generally by the railroad commissions of the States.[1]

The question of the power of the Public Service Commission of the State of New York in this respect was before the Appellate Division of the Supreme Court of

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[1] Forty-fourth Annual Report of the Railroad Commission for the year 1912 (Mass.), pp. 67, 107, 113; P. U. R. 1915B (Mass.), p. 362; P. U. R. 1915E (R. I.), p. 269; Public Service Commission Reports, Second District of N. Y. (New York), Vol. III, pp. 212, 461; *idem*, Vol. IV, p. 11; P. U. R. 1915B (N. J.), p. 161; Public Utilities Commission Reports, 1914 (Ill.), Vol. I, pp. 553, 590; Public Utilities Commission Reports, 1913–1914 (Colo.), p. 131; P. U. R. 1915D (Idaho), p. 742; Opinions and Orders of the Railroad Commission (Cal.), Vol. I, pp. 451, 855; *idem*, Vol. II, p. 910; *idem*, Vol. III, pp. 5, 30, 32, 749, 800, 807, 973; *idem*, Vol. V, p. 555; *idem*, Vol. VI, pp. 853, 1008; *idem*, Vol. VII, pp. 179, 894; *The Commutation Rate Case*, 21 I. C. C. 428.

that State in *People ex rel. New York, New Haven & Hartford R. R. Co.* v. *Public Service Commission*, 159 App. Div. Rep., Supreme Court, 531. In that case it was said:

"Subdivision 4 of section 33 of the Public Service Commissions Law (Consol. Laws, chap. 48 [Laws of 1910, chap. 480], as amd. by Laws of 1911, chap. 546) empowers the Commission to fix reasonable and just rates for such service. It is urged, however, that the statute is invalid under the rule of *Lake Shore &c. R. Co.* v. *Smith* (173 U. S. 684). In that case the statutes of Michigan had fixed a maximum passenger rate at three cents per mile. A subsequent enactment required the issuing of mileage books for 1,000 miles, good for two years, at a less rate. The court held that having fixed a uniform maximum rate as to all passengers, such rate was the reasonable compensation for the service, and that the fixing of a less rate to particular individuals was an unreasonable and arbitrary exercise of legislative power; that it was not for the convenience of the public and thus within the police power, but was for the convenience of certain individuals who were permitted to travel upon the railroads for less than the reasonable rate prescribed by law; that the law was, therefore, in violation of the Fourteenth Amendment of the Federal Constitution in depriving the company of its property without due process of law and by depriving it of the equal protection of the laws.

"In *Beardsley* v. *N. Y., L. E. & W. R. R. Co.* (162 N. Y. 230) the Court of Appeals felt constrained by the *Smith* case to declare the Mileage Book Law of this State invalid as to companies in existence at the time of its passage, but in *Purdy* v. *Erie R. R. Co.* (162 N. Y. 43) that law was held valid as to companies organized after the statute was passed.

"In *Louisville & Nashville R. R. Co.* v. *Kentucky* (183 U. S. 503), after citing the *Smith* case and like cases, the court says (at p. 511): 'Nor, yet, are we ready to carry the

doctrine of the cited cases beyond the limits therein established.'

"In the Minnesota Rate Case (*Simpson* v. *Shepard*, 230 U. S. 352) the legality of an order of the Commission of that State was recognized which fixed a maximum freight rate and passenger rate, the latter at two cents a mile as the maximum fare for passengers twelve years of age or over, and one cent a mile for those under twelve years of age.

"In *Interstate R. Co.* v. *Massachusetts* (207 U. S. 79) the Massachusetts law prescribing special rates less than the maximum for school children was held valid. These cases indicate that the *Smith* case is not to be extended beyond the facts upon which it rests.

"The *Smith* case distinguishes itself from this case where the court (at p. 693) says: 'This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.'

"Our flourishing cities owe their position and prosperity, in part, to the commutation rates for suburban service; the health and welfare of the public are concerned that people doing business in the large cities may live in the

country where the surroundings are pleasanter, more healthy and to the advantage of themselves and their families. It is a known fact that such rates exist upon all railways entering large cities, and have usually been established by the companies voluntarily in the interest of themselves and the public. The service is different in its nature from the other passenger service. It is so universal, of such large proportion, has become so necessary to the public that it cannot be said that the fixing of reasonable and just rates for it is unusual or unreasonable, or the granting of a benefit to individuals and not for convenience to the public.

"Nearly one-half of the passengers handled by the relator at the Grand Central Terminal were of this class. Perhaps the same ratio would exist upon the other railroads serving the city. We conclude that the statute in question is valid as conferring a power on the Commission to regulate rates for the public convenience and welfare."

That decision was affirmed by the Court of Appeals of New York on the opinion of the Appellate Division. 215 N. Y. 689.

The subject was elaborately considered by the Interstate Commerce Commission in the *Commutation Rate Case*, 21 I. C. C. 428, in which the authority of the Commission to fix reasonable rates was sustained. In the course of the opinion, Commissioner Harlan, speaking for a unanimous Commission, said:

"Another case strongly relied upon by the defendants is *L. S. & M. S. R. R. Co.* v. *Smith*, 173 U. S. 699. It there appeared that the legislature of the state of Michigan had fixed the maximum passenger fare to be charged by railroad companies for local journeys within the state. By a subsequent enactment it required the carriers to sell 1,000-mile tickets for use within the lower peninsula at a price not exceeding $20 and in the upper peninsula at a price not exceeding $25. Various conditions affecting the

use of the tickets were also fixed by the act, and among others that they should be valid for two years after the date of purchase. It was held that in the exercise of its general police power a state may fix maximum fares, but that it may not fix a rate for 1,000-mile tickets that involves a discrimination in favor of those who buy them. The statute was held to be invalid. The case, however, involved mileage tickets which, we must repeat, differ very essentially in character from commutation tickets.

"We have been referred to no other adjudication by the courts and are left to conclude that the precise point now before us has not been passed upon by the courts.

"It will not be necessary to dwell here upon the importance of the question not only to the particular suburban communities involved on the record before us, but to many other such communities throughout the country, the prosperity and growth of which largely depend upon an efficient and reasonable commutation service. Many such communities have not only been encouraged by the carriers, but were, in fact, originally established largely on their initiative. Suburban property has been bought, homes have been established, business relations made, and the entire course of life of many families adjusted to the conditions created by a commutation service. This may not have been done on the theory that the fares in effect at any particular time would always be maintained as maximum fares, but countless homes have been established in suburban communities in the belief that there would be a reasonable continuity in the fares and that the carriers in any event would perform the service at all times for a reasonable compensation.

"Nor need we stop to point out the distinction between commutation tickets on the one hand and excursion and mileage tickets on the other. Compared with the normal one-way fare all such tickets may be said to be abnormal. But the resemblance stops at that point. Although they

are mentioned together in section 22, the force and effect of that provision must necessarily differ with the differing character of the several kinds of tickets. It seems to be settled under that section that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one-way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets. That has been the view of this Commission, and is the view generally entertained, although there may be exceptional circumstances where a different conclusion would be required. It by no means follows, however, that a carrier under section 22 may exercise the same scope and freedom of action with respect to commutation tickets."

The reasoning of these decisions is sound and involves no violation of the Federal Constitution. True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & Michigan Southern Ry. Co.* v. *Smith, supra.* The views therein expressed which are inconsistent with the right of the States to fix reasonable commutation fares when the carrier has itself established fares for such service, must be regarded as overruled by the decision in this case.

We find no error in the decree of the Court of Appeals of Maryland, and the same is

*Affirmed.*

Dissenting: THE CHIEF JUSTICE, MR. JUSTICE McKENNA and MR. JUSTICE McREYNOLDS.

## BRUCE, ADMINISTRATOR OF TOBIN ET AL., *v.* TOBIN.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 645. Petition for a writ of certiorari submitted October 1, 1917.—Denied October 22, 1917.

The remedy by certiorari which, in certain classes of cases, is substituted by the Act of September 6, 1916, c. 448, 39 Stat. 726, for the remedy by writ of error previously allowed by Rev. Stats., § 709, Jud. Code, § 237, is confined to final judgments, and finality, in the one case as in the other, is determined by the face of the record and the formal character of the judgment rendered by the state court.

In an action by a father to recover a share of a fund collected by his deceased son's administrator as damages under the Employers' Liability Act, the state trial court rejected the father's claim entirely. The state supreme court, upholding his right but not specifically fixing the amount to which he was entitled, directed a new trial to accomplish that result. Assuming the judgment final in the sense that it determined the ultimate right and the general principles by which it was to be measured, *Held*, nevertheless, that it was not final in the sense of the Act of September 6, 1916, *supra*, and that an application for certiorari under that statute was premature.

Petition for a writ of certiorari to review 39 S. Dak. 64, denied.

THE case is stated in the opinion.

*Mr. E. A. Burgess*, *Mr. B. I. Salinger*, *Mr. L. H. Salinger* and *Mr. Joseph Janousek* for petitioners, in support of the petition. Their printed argument was confined to the merits.

No brief filed for respondent.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

A railroad in whose service Tobin lost his life while actually engaged in carrying on interstate commerce, ad-

mitting liability under the Act of Congress, paid the conceded loss to his administrator. A father and mother, but no widow or children survived. The father, the respondent, sued in a state court to recover half the amount as his share of the loss. Setting aside the action of the trial court rejecting the claim, but not specifically fixing the amount of the father's recovery, the Supreme Court of South Dakota directed a new trial to accomplish that result. Application for certiorari was then made by the petitioner on the ground that such decision involved questions under the Employers' Liability Act reviewable by certiorari under the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726.

The act in question, although it deprived of the right of review by writ of error which had hitherto obtained in certain cases and substituted as to such cases the right of petitioning for review by certiorari, subjected this last right to the same limitation as to the finality of the judgment of the state court sought to be reviewed which had prevailed from the beginning under § 709, Rev. Stats., § 237, Judicial Code. Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916.

It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open as it was settled under § 709, Rev. Stats., § 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered,—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. *Haseltine* v. *Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Louisiana Navigation Co.* v. *Oyster Commis-*

*sion of Louisiana*, 226 U. S. 99; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418, 419. The reënactment of the requirement of finality in the Act of 1916 was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

There being then no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is

*Denied.*

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## CONTRIBUTORS TO THE PENNSYLVANIA HOSPITAL *v.* CITY OF PHILADELPHIA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 349. Argued October 16, 1917.—Decided November 5, 1917.

So vital a governmental power as the power, upon just compensation, to take private property for public use, cannot be divested through contracts made by the State. Such contracts are not within the protection of the contract clause of the Constitution.

Proceedings taken by a city to condemn land for a street through the grounds of a charitable corporation were resisted, in reliance on an act by which for valuable considerations the legislature had prohibited such takings without the corporation's consent. The city undertook to condemn not only the land but also the right under the contract. *Held*, that the contract could not be successfully opposed to the power of condemnation; and this quite apart from the attempt to condemn the contract right itself, since, if the contract exemption were otherwise valid, its defeat by such a method would be a mere evasion.

Without departing from the settled rule that a writ of error will be dismissed if its total want of merit is shown conclusively by decisions of this court extant at time of decision below, in this case the course and resulting aspect of the proceedings below warrant a decree of affirmance.

254 Pa. St. 392, affirmed.

The case is stated in the opinion.

*Mr. Owen J. Roberts*, with whom *Mr. Charles Biddle* and *Mr. J. Rodman Paul* were on the brief, for plaintiff in error.

*Mr. John P. Connelly* and *Mr. Ernest Lowengrund*, with whom *Mr. Joseph G. Magee* was on the brief, for defendants in error.

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

Whether contract obligations were impaired in violation of rights of the plaintiff in error protected by the Constitution of the United States as the result of the decision below, is the sole question we are called upon to decide on this record. It thus arises:

The plaintiff in error, a charitable institution, was organized under the laws of Pennsylvania and in 1841 it established on a tract of land in the City of Philadelphia a hospital for the care and cure of the insane. Solicitous lest the opening of streets, lanes and alleys through its grounds might injuriously affect the performance of its work, in 1854 a committee of the managers of the hospital memorialized the legislature on that subject and this resulted in the passage of a law specially forbidding the opening of any street or alley through the grounds in question without the consent of the hospital authorities. The act was conditioned upon the hospital making certain payments and furnishing ground for a designated public street or streets and these terms were accepted by the hospital and complied with. In 1913 the city, within the authority conferred upon it by the State, took the necessary preliminary steps to acquire by eminent domain land for the opening of a street through the hospital

grounds and to prevent the accomplishment of this result the present suit was begun by the hospital to protect its right of property and its alleged contract under the Act of 1854. As the result of proceedings in the state court the purpose of the city was so shaped as to cause it to seek to take under the right of eminent domain not only the land desired for the street, but the rights under the contract of 1854, and there was a judgment against the hospital and in favor of the city in the trial court which was affirmed by the Supreme Court by the judgment which is under review on this writ of error. 254 Pa. St. 392.

The conclusions of the court were sustained in a *per curiam* opinion pointing out that there was no question involved of impairing the contract contained in the Act of 1854 since the express purpose of the city was to exert the power of eminent domain not only as to the land proposed to be taken, but as to the contract itself. The right to do both was upheld on the ground that the power of eminent domain was so inherently governmental in character and so essential for the public welfare that it was not susceptible of being abridged by agreement and therefore the action of the city in exerting that power was not repugnant either to the state constitution or to the contract clause of the Constitution of the United States.

It is apparent that the fundamental question, therefore, is, did the Constitution of the United States prevent the exertion of the right of eminent domain to provide for the street in question because of the binding effect of the contract previously made excluding the right to open the street through the land without the consent of the hospital. We say this is the question since if the possibility were to be conceded that power existed to restrain by contract the further exercise by government of its right to exert eminent domain, it would be unthinkable that the existence of such right of contract could be ren-

dered unavailing by directing proceedings in eminent domain against the contract, for this would be a mere evasion of the assumed power. On the other hand, if there can be no right to restrain by contract the power of eminent domain, it must also of necessity follow that any contract by which it was sought to accomplish that result would be inefficacious for want of power. And these considerations bring us to weigh and decide the real and ultimate question, that is, the right to take the property by eminent domain, which embraces within itself, as the part is contained in the whole, any supposed right of contract limiting or restraining that authority. We are of opinion that the conclusions of the court below in so far as they dealt with the contract clause of the Constitution of the United States were clearly not repugnant to such clause. There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties. *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Stone* v. *Mississippi*, 101 U. S. 814; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Douglas* v. *Kentucky*, 168 U. S. 488; *Manigault* v. *Springs*, 199 U. S. 473; *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408. And it is unnecessary to analyze the decided cases for the purpose of fixing the criteria by which it is to be determined in a given case whether a power exerted is so governmental in character as not to be subject to be restrained by the contract clause, since it is equally true that the previous decisions of this court leave no doubt that the right of government to exercise its

power of eminent domain upon just compensation for a public purpose comes within this general doctrine. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *West River Bridge Co.* v. *Dix*, 6 How. 507; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Offield* v. *New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390.

The principle then upon which the contention under the Constitution rests having been, at the time the case was decided below, conclusively settled to be absolutely devoid of merit, it follows that a dismissal for want of jurisdiction might be directed. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 137. In view, however, of the course of the proceedings below and the aspect which the case took as resulting from those proceedings, without departing from the rule settled by the cases referred to, we think our decree may well be one, not of dismissal, but of affirmance.

*Affirmed.*

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## LEE WILSON & COMPANY *v.* UNITED STATES.

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

No. 110. Argued October 4, 5, 1917.—Decided November 5, 1917.

If, in the making of a survey of public lands, an area is through fraud or mistake meandered as a body of water or lake where no such body of water exists, riparian rights do not accrue to the surrounding lands, and the Land Department, upon discovering the error, has

power to deal with the meandered area, to cause it to be surveyed, and lawfully to dispose of it.

The fact that its administrative officers, before discovery of the error, have treated such a meandered tract as subjected to the riparian rights of abutting owners, under the state laws, and consequently as not subject to disposal under the laws of the United States, can not estop the United States from asserting its title in a controversy with an abutting owner; and even as against such an owner, who acquired his property before the mistake was discovered and in reliance upon actions and representations of federal officers carrying assurance that such riparian rights existed, the United States may equitably correct the mistake and protect its title to the meandered land. The equities of the abutting owner, if any, in such circumstances, are not cognizable judicially, but should be addressed to the legislative department of the government.

The Swamp Land Act of September 28, 1850, c. 84, 9 Stat. 519, did not convey land of its own force, without survey, selection or patent.

A suit by the United States to quiet its title to land which was excluded from survey through an erroneous meander, against a defendant owning abutting land under federal patent and erroneously claiming, in virtue of his patent, riparian rights in the meandered area, is not a suit to vacate or annul the defendant's patent, and the statute of limitations of March 3, 1891, c. 561, 26 Stat. 1095, is not applicable in defense.

In the survey of a township in Arkansas, part of the land was erroneously meandered and described on the plat as a "lake," and the lands abutting on the meander line were subdivided into lots. The State selected the township under the Swamp Land Act of 1850, describing it by number and stating an acreage equal to the entire area within the township lines minus the area meandered. After the Act of March 3, 1857, c. 117, 11 Stat. 251, by which Congress confirmed "the selection of swamp and overflowed lands granted to the several States . . . heretofore made and reported to the Commissioner of the General Land-Office," and provided that such selection should be approved and patented, a patent was issued to Arkansas purporting to convey "the whole of the township" (giving its number,) except section 16; and stating the acreage conveyed at a figure substantially the same as the total acreage within the township lines minus that section and the meandered area. *Held*, that the effect of the meander was to exclude the meandered area from the township, and that neither the selection, the confirmatory act nor the patent could be construed as embracing it.

*Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186.

*Held*, further, that the State could have derived no title to the meandered area through the Compromise Act of April 29, 1898, c. 229, 30 Stat. 367, as a result of such selection and confirmation.

227 Fed. Rep. 827, affirmed.

The case is stated in the opinion.

*Mr. Charles T. Coleman* and *Mr. Henry D. Ashley* for appellant.

*The Solicitor General*, with whom *Mr. W. W. Dyar* was on the brief, for the United States.

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

The United States, asserting that designated parcels of land were part of its public domain, sought a decree quieting its title. Sustaining the title thus asserted and rejecting a claim to the contrary on the part of the defendant, the trial court awarded the relief prayed (214 Fed. Rep. 630), and the appellant, who was defendant, seeks on this appeal to reverse the decree of the court below sustaining the trial court. 227 Fed. Rep. 827. A reference to the origin and subject-matter of the controversy and a statement of some undisputed and indisputable facts will clarify and limit the issues to be passed upon.

The public survey of the United States concerning the area in which the land was situated (Township 12 North, Range 9 East of the Fifth Principal Meridian, County of Mississippi, State of Arkansas) was filed in 1841. By that survey and the plat and field notes thereof it appeared that in sections 22, 26 and 27 there was stated to be a body of water styled a lake which was excluded from

the survey by means of a meander line, diminishing to the extent of the excluded area the acreage surveyed in the sections in question and thereby causing them to become fractional. As a matter of course also the meander line to the extent that it excluded the body of water from the survey diminished the area of surveyed land lying within the exterior boundaries of the township. In 1853 the State of Arkansas, it may be assumed, complying with legal requisites and conforming to the administrative regulations of the Land Department, filed a list of selections under the grant made to it of swamp and overflowed lands by the Act of Congress of 1850, 9 Stat. 519. The selections included Township 12 and stated the acreage which it embraced conformably to the reduction of such acreage made by the meander line. In 1857 Congress confirmed "the selection of swamp and overflowed lands granted to the several States . . . heretofore made and reported to the Commissioner of the General Land-Office" and provided that such selection "shall be approved and patented to the said several States . . ." (c. 117, 11 Stat. 251). In 1858 a patent was issued by the United States to the State of Arkansas, the land patented being described as follows: "Township Twelve (12) North Range Nine (9) East. The whole of the township except Section sixteen (16) containing fourteen thousand five hundred and sixty-five acres and three hundredths of an acre, according to the official plats of survey of the said lands returned to the General Land Office, by the Surveyor-General." The acreage thus stated substantially conformed to the reduction brought about by the omission of section 16 which had already been given to the State and of the area of the lake which had been meandered and excluded from the survey.

Undoubtedly following the patent for a considerable period of time the officers of the Land Department treated the meandered and excluded surface of the lake as not

being part of the public domain subject to survey and to disposal by the United States, upon the theory that the same by the operation of the meander had been excluded from the survey and made subject to the riparian rights of the several abutting owners under the state law. And it may be admitted that the State of Arkansas acted upon the assumption that all the land, whether surveyed or unsurveyed, within the exterior limits of the township had passed to it. In 1907 or thereabouts, growing out of some asserted right to have the meandered and unsurveyed area surveyed and disposed of as part of the public domain, on the ground that, through fraud, error or mistake, the area in question had been stated in the survey to be a lake when in fact it was not and was on the contrary land which should have been surveyed, the Land Department after due notice undertook an investigation of the subject. Without stating the proceedings which ensued, it suffices to say that in 1909 it was definitely found that the alleged fraud, error or mistake of the survey was established because there was no lake to meander at the time the survey was made, it being found that all the evidence conclusively so established. Giving effect to this the unsurveyed area was ordered surveyed and homestead entries were initiated thereon. This controversy arose between the rights of the United States and such entrymen and those asserted by the defendant below who held the rights of the State of Arkansas, if any, to the area in question as evidenced by the patent or as embraced by the grant of swamp and overflowed lands and the action of the United States authorities taken on the subject.

It thus becomes apparent that the subject of the controversy relates solely to the unsurveyed area resulting from the erroneous assumption as to the existence of a lake and embraces only 853.60 acres. It also is certain that as the result of the concurrent findings of fact by the two courts and the admission made by the parties

there is no controversy as to the facts concerning the error committed as to the supposed lake, leaving therefore to be decided only the legal questions which arise from the admitted facts. As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions.

*First.* Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin* v. *Jordan*, 140 U. S. 371; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452, 459; *Hardin* v. *Shedd*, 190 U. S. 508, 519.

*Second.* But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it. *Niles* v. *Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47; *Security Land & Exploration Co.* v. *Burns*, 193 U. S. 167; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186.

Coming to test the questions for decision in the light of these propositions there can be no doubt that the case is taken out of the reach of the first and is brought under the control of the second, as the result of the conclusive finding as to the mistake committed concerning the existence of the lake and the consequent error in the survey,

unless it be that for some reason the unquestioned rule which the second proposition embodies is inapplicable. Indeed, putting aside a contention made as to the face of the patent, which we are of opinion is sufficiently disposed of by what we have already said, all the other contentions proceed not upon a challenge of the doctrine embodied in the second proposition but upon the erroneous theory that it is inapplicable to the case in hand—an error which we shall briefly demonstrate by separately considering the contentions.

*a.* In the first place it is in many forms of statement insisted that although the patent expressly referred to the plat and survey and purported only to grant the acreage surveyed as reduced by the exclusion from the survey of the body of the lake, that becomes negligible since the right of the State depended upon the grant made by the Swamp Land Act, the selection made under that act and the approval of that selection by the Act of Congress of 1857, all of which must be considered in determining the grant made to the State and give rise when considered to the irresistible implication that all the land embraced in Township 12 passed to the State. Concretely stated the proposition is this: That as the selection made by the State was of Township 12, the exterior bounds of that township became the measure of the State's title irrespective of what was surveyed or unsurveyed within those exterior lines. But it is at once obvious that this proposition rests upon a contradictory assumption, since it treats the designation of Township 12 as the measure of the rights conferred and immediately proceeds to exclude from view the criteria by which alone the existence and significance of the insisted upon designation (Township 12) are to be determined. Aside from this, however, it is further apparent that the contention disregards the very basis upon which the decided cases upholding the doctrine stated in the second proposition

rest, which is that the effect of a meander line is to exclude absolutely from the township the area meandered and to cause therefore its nature and character to depend not upon the exterior lines of the township but upon the condition existing within those lines made manifest and fixed by the necessary legal consequences resulting from the meander line. This conclusive view is clearly pointed out in *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District, supra,* pp. 196, 197. And that case also, p. 198, completely answers the argument that although the land was not embraced in the selection, was not included in the township because unsurveyed and did not pass by the patent or the selection independently considered, it yet must be treated as having passed to the State under the Swamp Land Act of 1850 because it was eligible to be selected under that act.

*b.* The proposition that title to the land must be considered as being in the State because of the Compromise Act of 1898 (c. 229, 30 Stat. 367) is on the face of that act, we think, in view of what we have said, devoid of merit. We say this because the contention rests upon the assumption which we have already disposed of that the land excluded by the meander line was embraced by the selection approved by the Act of Congress of 1857.

*c.* The assertion that an estoppel against the United States arose from the fact that the administrative officers of the government before the discovery of the fraud or error as to the existence of the lake had treated the area meandered as subjected to the riparian rights of the abutting owners under the state law and consequently not subject to be disposed of by the United States, in substance but disregards the right to correct such error conclusively recognized as existing in the administrative officers of the Land Department by the decisions which we have previously cited.

*d.* The contention that power did not exist on the dis-

covery of a mistake to survey and dispose of public land which had been excluded from a survey by the drawing of a meander line on the mistaken assumption of the existence of a body of water, because of the five years' limitation on the right of the United States to vacate or annul a patent (Act of March 3, 1891, 26 Stat. 1095), again but disputes the settled doctrine as to the existence of such power and besides rests upon the unsound assumption that the correction of such a mistake is an attempt to vacate or annul the patent. When rightly considered we think, as pointed out by the United States in argument, the ruling in *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, instead of sustaining, is in conflict with the proposition.

Finally, the suggestion that as the defendant holding under the State acquired its rights before the mistake was discovered in reliance upon the actions and representations of the officers of the United States as to the existence of riparian rights in accordance with the state law as the result of the meander line, the United States should not be permitted to correct the mistake committed as to the meander line and thus protect its title, but in a different form restates the argument which we have already disposed of. Besides, if for the sake of the argument we assume the existence of the equitable considerations insisted upon, it is manifest that the prayer for their enforcement is in the nature of things beyond the sphere of judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government.

There being then no error, it follows that the decree below must be and it is

*Affirmed.*

# SMITH *v.* INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 337. Argued October 2, 3, 1917.—Decided November 5, 1917.

The Senate, by resolution, directed the Interstate Commerce Commission to investigate, take proof and report to it, among other things, what amount, if any, certain railroad companies, or any of them, had subscribed, expended or contributed to prevent other railroads from entering any of their territory, for maintaining political or legislative agents, for contributing to political campaigns, or for creating sentiment in favor of any of the plans of any of the railroads. In pursuance of this resolution, the Commission ordered an investigation, which was consolidated with another, arising from a complaint made by an individual and limited to the alleged improper issuance of free passes. At the hearing the president of one of the companies, subpœnaed as a witness, was asked by the counsel for the Commission what, if any, funds his company expended, in certain States, in certain years, for political campaign purposes, and charged upon its books to operating or legal expenses or construction account; also to explain certain vouchers, showing expenditures by the company but not the purpose; also whether the company expended funds in a certain State "in a campaign against rate reductions," and whether it was the company's policy to make political compaign contributions. The witness having refused to answer, upon advice of counsel, the court below, upon the petition of the Commission, ordered him to do so.

*Held:* (1) That the investigation, particularly as related to and defined by the questions asked, was not to be regarded as directed to the political activities of the carrier or to its efforts to suppress competition, but as seeking to ascertain the amounts of expenditures made by the carrier, their allocation, and the manner in which they were charged upon its books.

(2) That such an investigation was within the competency of the Commission and the questions proper, in view of the general purposes and objects of the Act to Regulate Commerce, the regulatory power of the Commission in relation thereto, and the particular authority and

means given to enable it to perform its duty—viz: Authority under § 12 to inquire into the management of the business of carriers, keep itself informed as to the manner and method in which the same is being conducted, and to obtain from carriers full and complete information; under § 13, to institute inquiries of its own motion; under § 20, to require detailed accounts of the expenditures and revenues of carriers and exhibits of their financial operations;—and that the questions were pertinent to the duty of the Commission under § 21 to report information collected by it to Congress.

Under § 13 of the Act to Regulate Commerce, as amended by the Act of June 18, 1910, c. 309, 36 Stat. 550, § 11, the Commission's power of investigation is not necessarily confined to cases in which evils or abuses are definitely charged, and remedies are proposed, in words, either by the Commission or by parties complaining before it; nor, *semble*, is its right of inquiry in a particular proceeding necessarily to be measured by the scope of the proceeding as defined by the order instituting it.

44 W. L. Rep. 626, affirmed.

Petition of the Interstate Commerce Commission to require the attendance before it of appellant, president of the Louisville & Nashville Railroad Company, an interstate carrier, to answer certain questions theretofore asked him in a proceeding then pending before the Commission.

The petition described the Commission as an administrative tribunal and recited the powers conferred upon it by §§ 1, 15, 12, 13, 20 and 21 of the Act of Congress to Regulate Commerce, approved February 4, 1887, as subsequently amended.

That by a resolution of the United States Senate of November 6, 1913, the Commission was directed to investigate, take proof and report to the Senate as soon as practicable upon certain practices and financial relations of the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway and other carriers. The resolution was set out. Its twelfth paragraph is as follows:

"What amount, if any, the Louisville and Nashville Railroad, the Nashville, Chattanooga and St. Louis Railway, the Nashville and Decatur Railroad, and the Lewis-

burg and Northern Railroad, all or any of them, have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads, for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads."

The other paragraphs concern the relation of the railroads to one another, the control, if any, exercised by the Louisville & Nashville over the others, by stock ownership, leases or arrangements, and whether but for these the roads would be competitive and if through such means rates were fixed and maintained. The resolution is set out in full in *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 324.

That thereafter the Commission instituted a proceeding in pursuance of such resolution and it was ordered that the proceeding be set for hearing at such times and places and that such persons be required to appear and testify or to produce books, documents and papers as the Commission might thereafter direct; and that the investigation be carried on in the meantime by such other means and methods as might be deemed appropriate. A copy of the order was served on the Louisville & Nashville and other railroads.

That subsequently, on March 20, 1916, the order of the Commission was amended by adding to the order the provision that after the hearings and investigations authorized the Commission might issue such order or orders in the matter as might be proper and necessary in the premises and that Case No. 8488, *Luke Lea* v. *Louisville & Nashville Railroad Company et al.*, be consolidated for hearing with the proceeding upon one record at such times and places as the Commission might direct. Copies of the order and original order were served on the railroads.

That pursuant to such orders a meeting was had April

27, 1916, and pursuant to adjournment resumed in the City of Washington May 4, 1916. At such hearings appellant appeared in response to a subpœna and certain questions were addressed to him.

He testified that there was no connection between the reckless dissipation of the funds of a railroad in political campaigns and the adjustment of reasonable rates, even if the contribution was of the sum of $500,000 or $20,000,000, as the adjustment of rates is governed by conditions entirely independent of the revenues of a railroad. In illustration he adduced the adjustment of rates of bankrupt roads operated by receivers of courts which he testified are handled in the same way and arrived at in the same manner as they are by solvent roads.

The following questions were then asked him by counsel for the Commission, omitting those not now relevant. We number them for convenience of reference:

1. "I will ask you, Mr. Smith, if you know of any funds of the Louisville & Nashville Railroad expended in Tennessee for political campaign purposes during the year 1915 and charged upon the books of that carrier to operating expenses.

2. "Can you tell us what funds of the Louisville & Nashville Railroad Company were expended in the State of Alabama during the years 1912 and 1913 for political campaign purposes and charged on the books of that carrier to operating expenses or to construction account?

3. "Can you tell us of your own knowledge whether these expenditures of the funds of the Louisville & Nashville Railroad Company for political purposes were charged in the operating expense account or construction account of either the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway? Can you tell us whether these expenditures were charged on the books of the Louisville & Nashville Railroad to legal expenses?

4. "Among the vouchers in the files of the Louisville & Nashville Railroad, found by the examiners of the Interstate Commerce Commission, there appears one, No. 2282, February, 1910, in favor of the Columbia Trust Company for $20,715.06 for special fees paid under the direction of the president. The examiners were refused all information regarding this voucher. Can you tell us what it was about and what the voucher was for?

5. "Can you tell us why the entry in reference to this $20,000 voucher was made in such a way as to give no information as to the purpose of this expenditure?

6. "Among the vouchers found by the accountants for the Commission in the files of the Lousiville & Nashville Railroad, appears one numbered 391, dated May 5, 1907, in favor of the National Bank of Commerce, for $15,000 issued for certain expenditures authorized by the president. All further information was refused the accountants. The books give no further information. Can you advise us or enlighten us as to the purposes of this $15,000 voucher?

7. "Did the Louisville & Nashville Railroad Company, through you or by your direction, expend approximately $34,800 in Alabama through the Johnson-Dallas Agency in a campaign against rate reductions as advocated by former Governor Comer, of that State?

8. "Have you personal knowledge of any funds of the Louisville & Nashville Railroad Company expended in Alabama through the Johnson-Dallas Agency in a campaign against rate reductions?

9. "Is it the policy of the Louisville & Nashville Railroad Company to make political campaign contributions, if you know?"

All of the questions the witness declined to answer upon the advice of counsel.

The answer of appellant to the petition challenged in general and in detail the power of the Commission and

urged that the Commission is entirely a ministerial tribunal, having only the powers given it by act of Congress, and that those, with few exceptions, are confined to the enforcement of the act, and that the latter as amended "does not attempt to regulate the politics or the political activities of common carriers, nor the subject of their endeavoring to exclude competitors from their territories."

That the object of the questions asked by the Commission "was to delve into questions purely political" and to ascertain whether the witness or the company believed that a railroad company had a right to engage in political campaigns and to make political contributions and whether it had been the policy of the company to make contributions of funds to such campaigns and whether the company had in the past engaged in such practices. It is asserted that all such matters are outside of the jurisdiction of the Commission.

That the proceeding is a consolidation of two proceedings, Nos. 6319 and 8488, that Luke Lea is the open and sole complainant in the latter and the instigator and real complainant in the other, which was instituted by the Commission without there being a nominal complainant, but pursuant to a resolution of the United States Senate introduced by Lea, then a member of the Senate and the complainant in No. 8488, which is confined to an alleged improper issue of free passes.

Certain activities of Lea are stated and certain resentments and motives of his are urged as having actuated him and a want of power upon the part of the Commission is repeated and the refusal to answer the questions hence asserted to be justified.

The Commission moved to strike out certain portions of the answer, which was denied.

The court required appellant to answer the questions, and from its order this appeal is prosecuted.

*Mr. Helm Bruce* and *Mr. Edward S. Jouett,* with whom *Mr. Henry L. Stone* was on the brief, for appellant:

A witness may lawfully refuse to answer if the testimony called for does not relate to the matter under investigation or if the matter broached by the Commission is one which it is not legally entitled to investigate. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447. The subject of an investigation is defined by the order of the Commission instituting the investigation. Every investigation which the Commission makes is not as broad as its power to investigate. The matter here under investigation according to the Commission's order was the matter "directed" to be investigated by the Senate Resolution. The language of the order is too plain for doubt. Nothing outside of the "several matters and things set forth and referred to in the said resolution" is ordered to be investigated. See Solicitor General's brief in *United States* v. *Louisville & Nashville R. R. Co.,* 236 U. S. 318. And the case is confined to the twelfth paragraph of the resolution, the witness not having refused answers concerning other subjects. This paragraph relates exclusively to expenditures for political purposes and for suppressing competition. Neither the question of reasonable rates nor any direction or supervision of the manner of keeping accounts of expenditures was being investigated by the Commission. The questions as to amounts expended on political activities and suppression of competition were simply asked as a measure of the extent of the company's activities in those ways. Even if the investigation had concerned the reasonableness of rates, expenditures would not have become material unless the company had claimed that its rates could not be lowered without making its receipts less than cost, and if that claim had been made it would have been idle to investigate merely expenditures upon political activities—necessarily slight as compared with all expenditures.

The subject of political activity is not one which the Commission is "legally entitled to investigate." Nor is what a carrier may do to mould public opinion. The Commission's powers are confined to administering the Act to Regulate Commerce, and these subjects are not covered by that act. The Commission repeatedly has said that its powers are limited to enforcing the act. 2d Annual Report, p. 21; 13th Annual Report, p. 11; 14th Annual Report, p. 10; *Traders & Travellers Union* v. *Philadelphia R. &c. Co.*, 1 I. C. C. 371, 374; *New York Produce Exchange* v. *Baltimore & Ohio R. R. Co.*, 7 I. C. C. 612, 658; *Spring* v. *Baltimore & Ohio R. R. Co.*, 8 I. C. C. 443, 456; *Haines* v. *Chicago, Rock Island R. R. Co.*, 13 I. C. C. 214, 216. See *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 221.

Neither does the act relate to the matter of suppressing competition. This is left to the Anti-Trust Act. *Spring* v. *Baltimore & Ohio R. R. Co., supra; United States* v. *Joint-Traffic Association*, 171 U. S. 505, 565. The only possible exception is the fifth section of the former act forbidding pooling and division of earnings—a subject which the Commission's order in no way involves. The amendment of § 13 by the Act of June 18, 1910, does not change the principle settled by the *Brimson Case, supra.* Whatever may be the Commission's power of investigation, when the subject as limited and defined by its order is not "one which the Commission is legally entitled to investigate," then no question relating to it can properly be asked. The amendment confines the power strictly to matters covered by the Commerce Act. Such are its words. It does not empower the Commission to inquire into everything pertaining to commerce. Whether the language of the amendment, "concerning which any question which may arise under any of the provisions of this act," refers to questions which have arisen before investigation or questions which may possibly arise in the

future, is not material in this case where the Commission chose to limit the investigation by the language of its order. But these words of the amendment are not susceptible of the broader meaning. The granting of "such autocratic power" would require "explicit and unmistakable words." *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407. Although the amendment was passed after the decision in the *Harriman Case,* Congress did not use the "explicit and unmistakable words" and could not, therefore, have intended to make such a grant. A question may not be said to *have arisen* merely because it is asked by the counsel for the Commission in the examination of a witness, where the question does not relate to the subject of investigation fixed by the order. The questions concerning expenditures in political campaigns in Tennessee and in Alabama manifestly related to political activities merely, and were clearly beyond the Commission's power to investigate.

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

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

The fundamental contention of appellant is that the Interstate Commerce Commission has no power to ask the questions in controversy and in emphasis of this he asserts "the inquiry was confined exclusively to supposed political activities and efforts to suppress competition." And these, it is further asserted, "are not matters which the Commission 'is legally entitled to investigate.'" The contention is attempted to be supported by the insistence that the investigation was provoked and prosecuted solely in obedience to the Senate resolution and neither in exercise of the judgment of the Commission nor in pursuance of a complaint made to it. And the twelfth paragraph of

the resolution is dwelt upon as directing and controlling the inquiry as to what amount, if any, the railroads "have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads, for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads."

If, however, we advert to the questions we observe that the matters dwelt on by appellant are incidents only, having the purpose, it may be, in one sense to ascertain the "amount, if any," subscribed or expended, but not having the purpose in the sense of the questions, which is: Whether the amount subscribed or expended was charged to operating or legal expenses. The latter purpose is more special than the other, and, we may say in passing, does not necessarily involve even a criticism of the other, involves only the display in the accounts of the carriers of the amount expended and its allocation. To this limitation the investigation is reduced, and the question is, being so reduced, Is it within the powers of the Commission?

The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this court has refused by construction to limit it so far as the business of the carriers is concerned and their relation to the public.[1] And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents

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[1] *Wilson* v. *New*, 243 U. S. 332; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *United States* v. *White Star Line*, 224 U. S. 194; *Hale* v. *Henkel*, 201 U. S. 43; *Interstate Commerce Commission* v. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 88.

of the public. If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that "there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce."

Turning to the specialties of the Interstate Commerce Act we find there that all charges and treatment of all passengers and property shall be just and reasonable, and there is a specific prohibition of preferences and discriminations in all the ways that they can be executed, with corresponding regulatory power in the Commission. And authority and means are given to enable it to perform its duty. By § 12 it is authorized to inquire into the management of the business of carriers and keep itself informed as to the manner and method in which the same is conducted, and has the right to obtain from the carriers full and complete information. It may (§ 13) institute an inquiry of its own motion, and may (§ 20) require detailed accounts of all the expenditures and revenues of carriers and a complete exhibit of their financial operations and prescribe the forms of accounts, records and memoranda to be kept. And it is required to report to Congress all data collected by it.

It would seem to be an idle work to point out the complete comprehensiveness of the language of these sections and we are not disposed to spend any time to argue that it necessarily includes the power to inquire into expenditures and their proper assignment in the accounts, and the questions under review, we have seen, go no farther. They are incidental to an investigation as to the "manner and method" (§ 12) in which the business of the carriers is conducted; they are in requisition of a detailed account of their expenditures and revenues and an exhibit of their

financial operations (§ 20), and the answers to them may be valuable as information to Congress (§ 21).

A limitation, however, is deduced from § 13. It is said to be confined to cases where an inquiry is instituted "as to any matter or thing concerning which a complaint is authorized to be made, . . . or concerning which any question may arise under any of the provisions" of the act "or relating to the enforcement of any of the provisions" of the act. In other words, that the inquiry is determined by the manner of procedure. The objection overlooks the practical and vigilant function of the Commission. To sustain it appellant seems to urge that there must be put into words by some complainant or by the Commission, if it move of itself, some definite charge of evil or abuse, and put into expression some definite remedy; and that an inquiry must not transcend either charge or remedy. To so transcend, appellant urges, would be an exercise of autocratic power and is condemned in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

Appellant presses that case beyond its principle. And we may observe that § 13 has been amended and broadened since the decision of that case.[1] The inquiry in the present case is more immediate to the function of the

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[1] Prior to the decision § 13 read as follows: "Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

After the decision the section was amended to read as follows: . . . "and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act."

Commission than the inquiry in that and comes within *Interstate Commerce Commission* v. *Chicago, R. I. & Pac. Ry.*, *supra*, where it was said, at p. 103: "The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided." And they must necessarily be expressed in generalities. A precise specification of powers might work a limitation and all not enumerated be asserted to be withheld.

We find it difficult to treat counsel's argument as seriously as they urge it. The expenditures of the carriers essentially concern their business. Section 20 declares it and gives the Commission power to require a detail of them, and necessarily not only of their amount but purpose and how charged. And the Commission must have power to prevent evasion of its orders and detect in any formal compliance or in the assignment of expenses a "possible concealment of forbidden practices."

It may be said that our comments are not applicable to questions numbered 7 and 8, which relate to the expenditure of money in Alabama "in a campaign against rate reductions." That is, those questions are not directed to "political activities" strictly so called, nor to the suppression of competition. They are directed, however, to the use of funds in a campaign against state legislative action. But this, appellant asserts, is at the farthest an attempt to "influence legislation or to mould public opinion" and that there is nothing in the Interstate Commerce Act "which forbids it or gives to the Commission any power to investigate the subject." And it is besides urged, as it is urged against the other questions, that they do not relate to "the subject under investiga-

tion," which is strictly defined by the Senate resolution, to which, it is contended, the order of the Commission was responsive and subservient, and was to be and is confined to the efforts simply "of the railroad companies in political matters and in attempts to suppress competition." Indeed, the servility of the Commission to the Senate's resolution is the basic and insistent contention of appellant and taints, he further contends, all that the Commission did.

The contention ascribes too much dominance to the resolution and puts out of view or unduly subordinates the invocation of the powers of the Commission by the complaint of Lea and the interval of two years between it and the resolution, and puts out of view besides the independent and inherent powers of the Commission to which we have adverted.

Abstractly speaking, we are not disposed to say that a carrier may not attempt to mould or enlighten public opinion, but we are quite clear that its conduct and the expenditures of its funds are open to inquiry. If it may not rest inactive and suffer injustice, it may not on the other hand use its funds and its power in opposition to the policies of government. Beyond this generality it is not necessary to go. The questions in the case are not of broad extent. They are quite special, and we regard them, as the learned judge of the court below regarded them, as but incident to the amount of expenditures and to the manner of their charge upon the books of the companies. This, we repeat, is within the power of the Commission. The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any way affect their relation to the public. We cannot assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling.

*Order affirmed.*

# SMITH v. INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 339. Argued October 3, 1917.—Decided November 5, 1917.

Decided on the authority of *Smith* v. *Interstate Commerce Commission*, *ante*, 33.

Affirmed.

The case is stated in the opinion.

*Mr. Edward S. Jouett*, with whom *Mr. Helm Bruce* and *Mr. Henry L. Stone* were on the brief, for appellant.

*Mr. Joseph W. Folk* for the Interstate Commerce Commission, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was heard with No. 337, just decided, *ante*, 33. Like the latter case it was based on a proceeding brought by the Interstate Commerce Commission in the Supreme Court of the District of Columbia to enforce answers to certain questions asked of appellant by the Commission and which he refused to answer upon the advice of counsel.

The petition and reply thereto are the same as in No. 337 and present for decision the same propositions.

The court entered an order requiring appellant to answer questions to the following effect:

1st. Whether he had personal knowledge of funds of the Louisville & Nashville Railroad used for political

campaign purposes in the State of Tennessee and charged on the books of the carrier to operating expenses or construction account; and, 2nd, whether he had personal knowledge of funds of the Louisville & Nashville Railroad used for campaign purposes in the State of Kentucky and charged on the books of the carrier to construction account or operating expenses.

It will be observed that the questions are limited, as some of the questions in No. 337 were, to the allocation upon the books of the company of the funds expended, if any. They are within the reasoning of the opinion in No. 337, and on the authority of that case the order is

*Affirmed.*

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## JONES *v.* INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 340. Argued October 3, 1917.—Decided November 5, 1917.

Decided on the authority of *Smith* v. *Interstate Commerce Commission, ante*, 33.

Affirmed.

THE case is stated in the opinion.

*Mr. Edward S. Jouett*, with whom *Mr. Helm Bruce* and *Mr. Henry L. Stone* were on the brief, for appellant.

*Mr. Joseph W. Folk* for the Interstate Commerce Commission, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted with Nos. 337 and 339, *ante*, 33 and 47. Like them it is a proceeding to compel appellant to

answer certain questions asked him by the Interstate Commerce Commission. It was based on a petition like the petitions in those cases to which there was a like reply.

The court entered an order requiring appellant to answer the following questions asked by counsel for the Commission:

"I will ask you if you distributed in the State of Alabama on behalf of the Louisville & Nashville Railroad, campaign funds favoring the election of a certain candidate?

"I show you Ledger H, folio 454, from the records of the Louisville & Nashville Railroad, showing certain vouchers sent you in Alabama for various amounts, and will ask you how you expended the money represented by these vouchers, taking the first voucher as a beginning.

"I will ask you whether or not you have personal knowledge of funds of the Louisville & Nashville Railroad and of the Nashville, Chattanooga & St. Louis Railway used to the extent of thousands of dollars for political campaign purposes in the State of Alabama.

"I will ask you do you know of any campaign funds being expended by the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway in the State of Alabama through any attorney under a subterfuge of paying the attorney a bill for professional services?

"Do you know of any funds of the Louisville & Nashville Railroad expended in the State of Alabama for political purposes and charged on the books of the carrier to operating expense?

"I will ask you if you know of any funds of the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway expended in the State of Alabama for political purposes and charged on the books of these carriers or on the books of either carrier to construction?

"I will ask you if you have any knowledge of funds of the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway used for political campaign purposes in the State of Tennessee?

"Do you know of any funds of the Louisville & Nashville Railroad expended in the State of Tennessee for political campaign purposes and charged on the books of that carrier to operating expense or construction account?"

The questions are similar to those passed on in the other two cases, and the order is

*Affirmed.*

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## COHEN, TRUSTEE IN BANKRUPTCY OF SAMUELS, *v.* SAMUELS.

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

No. 359. Argued October 17, 1917.—Decided November 5, 1917.

A policy of insurance held by a bankrupt, which has a cash surrender value at the time of the adjudication, becomes an asset, to the extent of such value, in the trustee, under § 70-a of the Bankruptcy Act, even when the policy is payable to a beneficiary other than the bankrupt, his estate or personal representatives, if the bankrupt has reserved absolute power to change the beneficiary.

237 Fed. Rep. 796, reversed.

The case is stated in the opinion.

*Mr. Lawrence B. Cohen*, with whom *Mr. Adolph Boskowitz* was on the briefs, for petitioner.

*Mr. Samuel Sturtz* for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

On May 13, 1915, Elias W. Samuels filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. On the same day Cohen, petitioner herein, was duly elected his trustee. Samuels at the time of the adjudication held five life insurance policies in various life insurance companies.

On September 16, 1915, Cohen made motions before the referee in bankruptcy to require Samuels to deliver to him, Cohen, the policies or pay to him the cash surrender value of them as of the date of the adjudication. The motions were denied.

Subsequently Cohen filed petitions to review the rulings of the referee as to three of the policies, which petitions came on for hearing before the United States District Court for the Southern District of New York February 14, 1916.

The policies were respectively for the sums of $3,000, $3,000 and $1,000 and had respectively a cash surrender value of $193.85, $753, subject to a deduction of a loan of $555 and interest, and $396. The policies were payable to certain relatives of Samuels as beneficiaries and it was provided in each that Samuels reserved the absolute right to change the beneficiary without the latter's consent.

The District Court affirmed the orders of the referee, following what the court conceived to be the ruling in *In re Hammel & Co.*, 221 Fed. Rep. 56.

Cohen petitioned the Circuit Court of Appeals to revise the ruling of the District Court as provided in § 24-b of the Bankruptcy Act and for such other and further relief as might be proper.

The Circuit Court of Appeals affirmed the ruling of the District Court, one judge dissenting. 237 Fed. Rep. 796.

The facts are not in dispute. The policies had a cash surrender value at the time Samuels was adjudicated a

bankrupt which the companies were willing to pay to him and in all of them he had the absolute right to change the beneficiaries.

The question in the case is the simple one of the construction of § 70-a. By it the trustee of the bankrupt is vested by operation of law with title to all property of the bankrupt which is not exempt, "(3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person, . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . ."

Regarding the section in its entirety there would seem to be no difficulty in its interpretation, but we are admonished by the decision of the Circuit Court of Appeals and its reasoning and also by the argument of counsel that there are considerations which give particular control to the proviso and distinguish between insurance policies and other property which the bankrupt can transfer or which can be levied upon and sold under judicial process against him (subdivision 5). We have given attention to those considerations and feel their strength, but they are opposed by other considerations. It might indeed be that it would better fulfill the protection of insurance by considering the proviso alone and literally, regarding the

policy at the moment of adjudication, and, if it be not payable then in words to the bankrupt—no matter what rights or powers are reserved by him, no matter what its pecuniary facility and value is to him—to consider that he has no property in it. But we think such construction is untenable. The declaration of subdivision 3 is that "powers which he might have exercised for his own benefit" "shall in turn be vested" in the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be, a refuge for fraud. And our conclusions would be the same if we regarded the proviso alone.

This court has been careful to define the interest of bankrupts in the insurance policies they may possess. In *Hiscock* v. *Mertens*, 205 U. S. 202, we gave a bankrupt the benefit of the redemption of a policy from the claims of creditors, though a cash surrender value was not provided by it but was recognized by the insurance company. In *Burlingham* v. *Crouse*, 228 U. S. 459, 473, we said that it "was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to the insured the benefit of his life insurance." See also *Everett* v. *Judson*, *Id*. 474. Judgment of the Circuit Court of Appeals affirming the order of the District Court is reversed and the case remanded to the District Court for further proceedings in accordance with this opinion.

*Reversed.*

# FIDELITY & COLUMBIA TRUST COMPANY, EXECUTOR AND TRUSTEE OF EWALD, *v.* CITY OF LOUISVILLE.

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

No. 424. Argued October 16, 17, 1917.—Decided November 5, 1917.

A person domiciled in Kentucky carried on a business in Missouri and deposited in bank in the latter State moneys derived from the business, but not used in it, and belonging absolutely to him. The resulting credits—ordinary bank accounts not represented by certificates and subject to his order only—were included by Kentucky authorities in assessing his taxes in that State. *Held*, that the tax, whether considered as a tax on property or as a tax on the individual measured by property, was within the power of the State imposing it.

A state court's decision does not deprive the complaining party of the equal protection of the laws merely because it departs from decisions made by the court in earlier cases.

168 Kentucky, 71; 171 Kentucky, 509; 172 Kentucky, 451, affirmed.

THE case is stated in the opinion.

*Mr. William W. Crawford* for plaintiff in error:

Taxing property whether tangible or intangible not located within the taxing district violates the Fourteenth Amendment to the United States Constitution. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Foreign-held Bonds*, 15 Wall. 300.

Bank deposits growing out of business done in a State have a situs there and nowhere else. *Commonwealth* v. *R. G. Dun & Co.*, 126 Kentucky, 111; *Commonwealth* v. *Peebles*, 134 Kentucky, 121, 134; *Commonwealth* v. *West India Oil Refining Co.*, 138 Kentucky, 828; *Commonwealth* v. *Ky. Distilleries & Warehouse Co.*, 143 Kentucky,

314; *Hillman L. & L. Co.* v. *Commonwealth,* 148 Kentucky, 331; *Commonwealth* v. *B. F. Avery & Sons,* 163 Kentucky, 829.

Intangible property may acquire a business situs apart from the domicile of the owner and be taxable there and nowhere else. See cases cited above. *Adams Express Co.* v. *Ohio,* 166 U. S. 218, 223; *Lou. & Jeff. Ferry Co.* v. *Kentucky,* 188 U. S. 397; *Selliger* v. *Kentucky,* 213 U. S. 205; *New Orleans* v. *Stempel,* 175 U. S. 313; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Wheeler* v. *New York,* 233 U. S. 434.

Judicial decisions come within the prohibition of the "equal protection" clause. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Ex parte Virginia,* 100 U. S. 339, 347; *Blake* v. *McClung,* 172 U. S. 239, 260.

The Kentucky Court of Appeals having, both before and after the decision of this case, held that § 4020, Kentucky Statutes, does not apply to bank deposits having a business situs outside of Kentucky, can not apply it to the bank deposits here. *Commonwealth* v. *West India Co.,* 138 Kentucky, 828; *Commonwealth* v. *Prudential Life Ins. Co.,* 149 Kentucky, 380, 385; *Commonwealth* v. *B. F. Avery & Sons,* 163 Kentucky, 828.

*Mr. Pendleton Beckley* and *Mr. George Cary Tabb,* with whom *Mr. Stuart Chevalier* was on the brief, for defendant in error:

Under the circumstances the principle of *mobilia sequuntur personam* applies, and the taxable situs of these deposits was Louisville, Kentucky. *Egan* v. *Hart,* 165 U. S. 188; *Board of Assessors* v. *New York Life Ins. Co.,* 216 U. S. 515; *Pacific Coast Savings Society* v. *San Francisco,* 133 California, 14; *Pyle* v. *Brennemann,* 122 Fed. Rep. 787; *Pendleton* v. *Commonwealth,* 110 Virginia, 229; *State* v. *Clement National Bank,* 84 Vermont, 167; *State* v. *Tennessee Coal, Iron & R. R. Co.,* 94 Tennessee, 295.

The amount and character of business done in St. Louis, as compared with the amount and character of business done in Louisville, were such as to make the "business situs" of these deposits in Louisville rather than in St. Louis.

Money on deposit must either arise out of business done within the State with the residents thereof or be under the control of a local agent, if it is to acquire a "business situs." *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool, London & Globe Ins. Co.* v. *Board of Assessors*, 221 U. S. 346; *Walker* v. *Jack*, 88 Fed. Rep. 576; *Bluefield's Banana Co.* v. *New Orleans Board of Assessors*, 49 La. Ann. 43.

Cases involving taxes on franchises and on tangible property are distinguishable from the case at bar. *Adams Express Co.* v. *Ohio*, 166 U. S. 218; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 397; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 202; *Delaware, L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 357.

As to the contention that the deposits were permanent deposits, it has never been held that the mere presence of a deposit in a State gives that State a right to levy a "property tax" upon it, no matter how long continued. *Buck* v. *Beach*, 206 U. S. 392; *Commonwealth* v. *Northwestern Mutual Life Ins. Co.*, 32 Kentucky, 796; *Wheeler* v. *Sohmer*, 233 U. S. 434.

This court has never held that intangible property, such as is involved here, could not be taxed by the State of the domicile of the owner, even though another State might have imposed a tax. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Southern Pacific* v. *Kentucky*, 222 U. S. 63; *Adams Express Co.* v. *Ohio*, 166 U. S. 218; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 397.

Two States may levy an inheritance tax upon the same

property. *Blackstone* v. *Miller,* 188 U. S. 189; *Coe* v. *Errol,* 116 U. S. 517.

The fact that state decisions may be inconsistent raises no federal question. *Lombard* v. *Chicago Park Commissioners,* 181 U. S. 33.

Kentucky decisions have been consistent throughout in upholding taxes following the rule of intangible property.

The city is entitled to recover the amounts of the tax bills herein, irrespective of the taxing situs of the money in St. Louis. Section 2996, Kentucky Statutes; *City of Louisville* v. *Courier Journal Co.,* 140 Kentucky, 644; *Bell's Trustee* v. *City of Lexington,* 120 Kentucky, 199; *Security Trust & S. V. Co.* v. *Lexington,* 203 U. S. 323.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the City of Louisville, Kentucky, to recover annual taxes for the years 1907 and 1908 in respect of personal property omitted from the original assessments to the owner L. P. Ewald in his lifetime. The facts as simplified for the purposes of argument here are that Ewald was domiciled in Louisville but continued to carry on a business in St. Louis, Missouri, where he formerly had lived. Deposits coming in part if not wholly from this business were made and kept in St. Louis banks subject to Ewald's order alone. They were not used in the business and belonged absolutely to him. The question is whether they could be taken into account in determining the amount of his Louisville tax. It would seem that some deposits were represented by certificates of deposit but it was stated at the argument that no point was made of that. See *Wheeler* v. *Sohmer,* 233 U. S. 434, 438. We are to take it that all the sums are to be dealt with as ordinary bank accounts. The decision of the state court upheld the tax. 168 Kentucky, 71. 171 Kentucky, 509. 172 Kentucky, 451.

So far as the present decision is concerned we may concede without going into argument that the Missouri deposits could have been taxed in that State, under the decisions of this court. *Liverpool & London & Globe Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, 354. *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395. But liability to taxation in one State does not necessarily exclude liability in another. *Kidd* v. *Alabama,* 188 U. S. 730, 732. *Hawley* v. *Malden,* 232 U. S. 1, 13. The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. *Kirtland* v. *Hotchkiss,* 100 U. S. 491. See also *Tappan* v. *Merchants' National Bank,* 19 Wall. 490.

It is true that the decision in *Kirtland* v. *Hotchkiss,* concerned Illinois bonds, and that if they were physically present in the taxing State, Connecticut, a special principle might apply, as explained in *Wheeler* v. *Sohmer,* 233 U. S. 434, 438. See *Commissioner of Stamps* v. *Hope,* [1891], A. C. 476, 481; Dicey, Confl. of Laws, 2d ed., 312. But the decision was not made to turn upon such considerations; indeed its reasoning hardly is reconcilable with them or with anything short of a general rule for all debts. It is argued that in a later case this court has held the power of taxation not to extend to chattels perma-

nently situated outside the jurisdiction although the owner was within it; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; and that the power ought equally to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax. But this court has not attempted to press the principle so far and there is opposed to it the long established practise of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax.

The notion that a man's personal property upon his death may be regarded as a *universitas* and taxed as such, even if qualified, still is recognized both here and in England. *Bullen* v. *Wisconsin*, 240 U. S. 625, 631. *Eidman* v. *Martinez*, 184 U. S. 578, 586. *Attorney-General* v. *Napier*, 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in *Kirtland* v. *Hotchkiss*, *supra*, has been affirmed or assumed to be law in every subsequent case. *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 29, 31. *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 431. *New Orleans* v. *Stempel*, 175 U. S. 309, 321. *Liverpool & London & Globe Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 355, 356. It was admitted to apply to debts in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 205. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 146, 162 *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained.

It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision in this case is inconsistent with earlier decisions of the Ken-

tucky court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. *Lombard* v. *West Chicago Park Commissioners,* 181 U. S. 33, 44, 45. We presume that like other appellate courts the Kentucky Court of Appeals is free to depart from precedents if on further reflection it thinks them wrong.

*Judgment affirmed.*

The CHIEF JUSTICE dissents.

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## BUCHANAN *v.* WARLEY.

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

No. 33. Argued April 10, 11, 1916; restored to docket for reargument April 17, 1916; reargued April 27, 1917.—Decided November 5, 1917.

A city ordinance which forbids colored persons to occupy houses in blocks where the greater number of houses are occupied by white persons, in practical effect prevents the sale of lots in such blocks to colored persons, and is unconstitutional. A white owner, who has made an otherwise valid and enforceable contract to convey such a lot to a colored person, for the erection of a house upon it for occupancy by the vendee, is deprived, in violation of the Fourteenth Amendment, of an essential element of his property,—the right to dispose of it to a constitutionally qualified purchaser,—and may attack the prohibition under the Fourteenth Amendment in a suit for specific performance of the contract against the vendee.

A city ordinance forbidding colored persons from occupying houses as residences, or places of abode or public assembly, on blocks where the majority of the houses are occupied by white persons for those purposes, and in like manner forbidding white persons when the conditions as to occupancy are reversed, and which bases the interdiction upon color and nothing more, passes the legitimate bounds of police power and invades the civil right to acquire, enjoy and use

property, which is guaranteed in equal measure to all citizens, white or colored, by the Fourteenth Amendment.

Such a prohibition can not be sustained upon the grounds that, through race segregation, it serves to diminish miscegenation and promotes the public peace by averting race hostility and conflict, or that it prevents deterioration in value of property owned and occupied by white people; nor does the fact that upon its face it applies impartially to both races relieve it from the vice of discrimination or obviate the objection that it deprives of property without due process of law. *Plessy* v. *Ferguson*, 163 U. S. 537, and *Berea College Case*, 211 U. S. 45, distinguished.

165 Kentucky, 559, reversed.

THE case is stated in the opinion.

*Mr. Clayton B. Blakey* and *Mr. Moorfield Storey*, with whom *Mr. Harold S. Davis* was on the briefs, for plaintiff in error:

The plaintiff's rights are directly involved and the court has jurisdiction. *Truax* v. *Raich*, 239 U. S. 33, 39. He does not complain of discrimination against the colored race or seek to enforce their rights, but seeks to enforce a contract—a property right—on the ground that the ordinance violates rights secured by the Fourteenth Amendment and therefore is no bar to performance of the contract.

It is manifest that the effect of the ordinance is to cause continual controversy as to whether particular houses may be occupied by white or colored persons; it does not prevent the two races from living in close propinquity, and in many cases this condition is perpetuated rather than eliminated; conditions existing at the time of its passage are not disturbed. It deprives an owner of the right to live upon his own land, or to sell or lease it to any person who may wish to buy or hire, thereby causing depreciation in value. It is apparent therefore that it does not accomplish its declared purpose, "to prevent conflict and ill-feeling between the white and colored

races" and "to preserve the public peace." There is nothing in the conduct of the negro which is the foundation of the ordinance, but simply the prejudice of race and color. Its predominant purpose was to place the negro, however industrious, thrifty and well-educated, in as inferior a position as possible with respect to his right of residence, and to violate the spirit of the Fourteenth Amendment without transgressing the letter.

The general presumption is that a law is enacted in good faith for the purpose declared, but where, as in this case, it is obvious that the real purpose was very different, the courts will determine the purpose from the natural and legal effect of the language employed when put into operation. *Bailey* v. *Alabama*, 219 U. S. 219; *Lochner* v. *New York*, 198 U. S. 45, 64; *Guinn* v. *United States*, 238 U. S. 347, 364; *Austin* v. *Murray*, 16 Pick. 121.

The constitutional guaranty of equal protection, without discrimination on account of color, race, religion, etc., includes "the right to acquire and possess property of every kind," *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 381; *Slaughter House Cases*, 16 Wall. 36, 76; to dispose of it and to live upon one's own land. The ordinance under review prevents the plaintiff from selling his property for the only use to which it can be put. If he cannot sell to a colored person, he cannot sell at all, for the lot is so situated with reference to other colored men's residences that no white man would buy it. It thus destroys, without due process of law, fundamental rights attached by the law to ownership of property; it destroys without compensation rights which had become vested before it took effect. It differs only in degree from the ordinances held void in *State* v. *Gurry*, 121 Maryland, 534; *State* v. *Darnell*, 166 N. Car. 300; and *Carey* v. *Atlanta*, 143 Georgia, 192.

The ordinance also abridges the privileges and immunities guaranteed by the Fourteenth Amendment, and deprives those affected of the equal protection of the laws.

*Slaughter House Cases*, 16 Wall. 36, 70–72; *Ex parte Virginia*, 100 U. S. 339, 344; *Strauder* v. *West Virginia*, 100 U. S. 303, 306; *Washington, Alexandria & Georgetown R. R. Co.* v. *Brown*, 17 Wall. 445; *State* v. *Darnell*, 166 N. Car. 300, 302, 303. It forbids, under penalty of criminal proceedings, an owner of land in many parts of the city to live thereon if he happens to be a negro, although he would be free to do so if he were white. This inequality is not removed by forbidding white owners to live on their own land in other parts of the city, for the Constitution cannot be satisfied by any such offsetting of inequalities. A plainer case of racial discrimination cannot well be imagined.

The cases upholding laws providing for separate railroad accommodations are inapplicable here, for if equal facilities be furnished and the rates are reasonable and nondiscriminatory the carrier may determine what vehicle the passenger shall occupy. *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 218 U. S. 71; *West Chester & Philadelphia R. R. Co.* v. *Miles*, 55 Pa. St. 209; *The Sue*, 22 Fed. Rep. 843. No right otherwise existing is impaired and hence such statutes are not within the prohibitions of the Fourteenth Amendment. See *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151.

The cases of public schools are even more remote from that under consideration. The States are not bound to provide schools for anybody. Statutes regulating attendance at schools do not cut down rights previously recognized, but grant privileges which would not otherwise exist. If, therefore, the privileges granted to white and to colored children are in general similar, there can be no complaint. It is true that a statute requiring segregation in *private* schools was sustained in the *Berea College Case*, 211 U. S. 45, but there the statute was construed as an amendment to the defendant's charter. If defendant had been an individual, it is plain that the statute must have been declared void. See dissenting opinion, p. 68.

The cases upholding statutes against miscegenation are also irrelevant, since marriage is a matter of status in which the interests of the State are vitally concerned. Such statutes are equal in their operation since they impose no penalty upon the members of one race for doing that which is lawful for members of the other race. *Pace* v. *Alabama*, 106 U. S. 583.

The ordinance cannot be justified as an exercise of the police power. Like any other law police regulations are subject to the equal protection clause of the Fourteenth Amendment, *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56, 69; *Geiger-Jones Co.* v. *Turner*, 230 Fed. Rep. 233, 244, 245; and a regulation which forbids citizens of one color to do acts which those of another color are permitted to do does not afford equal protection of the laws. *Truax* v. *Raich*, 239 U. S. 33, 41; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Opinion of the Justices*, 207 Massachusetts, 601, 605; *Ah Kow* v. *Nunan*, 5 Sawy. 552. The ordinance cannot be justified as a measure to protect property rights, since it is designed to protect the rights only of a certain class; or as a measure to prevent conflict between the races, since the means adopted are beyond the constitutional power of the State to employ. If such legislation can be sustained, there is no limit to possible discrimination between citizens. An attempt to segregate Irish from Jews, foreign from native citizens, Catholics from Protestants, would be fully as justifiable in communities where there is feeling between them.

*Mr. Stuart Chevalier* and *Mr. Pendleton Beckley* for defendant in error:

The ordinance is fair and equal on its face and effects no discrimination for or against either race. It is a valid police regulation, enacted in good faith, and clearly and fairly designed to accomplish its declared purpose. It

does not interfere with the ownership but merely regulates the occupancy of property. The right of an owner to occupy his own property, previously acquired, is expressly secured by § 4, so that every constitutional objection that it is an undue interference with property rights is removed.

The court will not declare invalid a police regulation unless it clearly appears from the law itself, or from facts of which the court may take judicial notice, that it violates constitutional guaranties; whether the legislation is wise, expedient or necessary, or the best calculated to promote its object, is a legislative and not a judicial question. *Chicago, Burlington & Quincy Ry. Co.* v. *McGuire*, 219 U. S. 568, 569; *McLean* v. *Arkansas*, 211 U. S. 547, 548; *Noble State Bank* v. *Haskell*, 219 U. S. 575, 580; *Munn* v. *Illinois*, 94 U. S. 113; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Tenement House Department* v. *Moeschen*, 179 N. Y. 325; 203 U. S. 583; *Hyman* v. *Boldrick*, 153 Kentucky, 77, 79; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357, 366; *Tanner* v. *Little*, 240 U. S. 369, 385; *Cusack Co.* v. *Chicago*, 242 U. S. 526, 530.

Legislation segregating the white and colored races has universally been recognized by the courts as a constitutional exercise of the police power. Thus regulations requiring separate railroad accommodations, laws establishing separate schools, and laws against miscegenation have been sustained. *Plessy* v. *Ferguson*, 163 U. S. 537, 545; *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 218 U. S. 71; *West Chester & Philadelphia R. R. Co.* v. *Miles*, 55 Pa. St. 209; *Roberts* v. *City of Boston*, 5 Cush. 198; *People* v. *Gallagher*, 93 N. Y. 438; *Berea College Case*, 123 Kentucky, 209; 211 U. S. 45. The same reasons, constitutional and practical, which justify the segregation of the races in these instances apply with redoubled force here. Unlike the ordinance declared invalid in *Yick Wo* v. *Hopkins*, 118 U. S. 356, this ordinance operates equally upon both

classes, and does not vest the municipal authorities with the arbitrary power in its enforcement to discriminate against any particular class.

The Constitution does not prohibit a State from abridging under its police power privileges and immunities of citizens of the State; the fact that privileges thereby regulated may not in fact be equal or identical does not amount to a denial of equal protection of the laws; nor does the Constitution guarantee social or economic equality. The "privileges and immunities of citizens of the United States" are in nowise affected or abridged by legislation of this character. *Slaughter House Cases*, 16 Wall. 36; *Maxwell* v. *Dow*, 176 U. S. 581; *Twining* v. *New Jersey*, 211 U. S. 96; *Hadacheck* v. *Los Angeles*, 239 U. S. 394; *Guinn* v. *United States*, 238 U. S. 347; *Myers* v. *Anderson*, 238 U. S. 368; *Ex parte Kinney*, 3 Hughes, 9; *Cummings* v. *County Board of Education*, 175 U. S. 528; *People* v. *Gallagher*, 93 N. Y. 438; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703. Every police regulation necessarily restrains, limits or destroys certain personal or property rights, or both. This does not make the law unequal in the legal sense, as the inequalities arise from matters with which the law has no concern, such as geographical location, economic or educational condition, etc. The investigation of these matters is for the legislative, not the judicial, determination. *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 413. If neither race is denied any privilege in the cases of schools, coaches, or marriage, there is no denial of an advantage or privilege here. The objection that the ordinance limits the negroes to the "undesirable" sections of the city, therefore, does not go to the validity of the ordinance. But in fact, it neither restricts the negroes to the places where they are now living nor to the undesirable sections. There is nothing in the law to prevent the indefinite expansion of the present negro neighborhoods or the building up of new

negro sections. The improvement of the negro's condition is limited only by his own character and efforts.

The use of property and the liberty of contract are subject to reasonable police regulations, and their enforcement does not deprive a person of property without due process of law. *Slaughter House Cases, supra; Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Mugler* v. *Kansas*, 123 U. S. 623; *Tenement House Department* v. *Moeschen*, 179 N. Y. 325; 203 U. S. 583; *O'Bryan* v. *Highland Apartment Co.*, 128 Kentucky, 282; *Welch* v. *Swasey*, 214 U. S. 91. But the present ordinance, far from impairing such rights, will have the effect of protecting property from the most serious and destructive results.

The objection that segregation laws impair property values and prevent individuals from living where they please is fully answered by this court in *L'Hote* v. *New Orleans*, 177 U. S. 587. The injury is merely incidental to the city's right to segregate and does not warrant the overthrow of police regulations.

Police regulations prohibiting the carrying on in defined areas of certain industries, lawful in themselves, having for their object the protection, enjoyment and stability of the home, have frequently been sustained, even though discriminating in favor of persons engaged in the same industry in other parts of the city. *Hadacheck* v. *Los Angeles*, 239 U. S. 394; *Reinman* v. *Little Rock*, 237 U. S. 171; *Fischer* v. *St. Louis*, 194 U. S. 361; *Schefe* v. *St. Louis*, 194 U. S. 373; *Ex parte Quong Wo*, 118 Pac. Rep. 714; *Ex parte Montgomery*, 125 Pac. Rep. 107; *People* v. *Ericsscn*, 105 N. E. Rep. 315. So with respect to regulations prohibiting the erection of tall buildings, *Welch* v. *Swasey*, 214 U. S. 91; and the erection in residential sections of billboards. *Cusack Co.* v. *Chicago*, 108 N. E. Rep. 340.

The fact that the ordinance interferes with the *jus disponendi* or restricts the right of the individual to contract with reference to his property is no valid objection.

These rights are subject to the police power, provided its exercise is not so arbitrary as to deny due process. *Crowley* v. *Christensen*, 137 U. S. 86; *Berea College Case*, 211 U. S. 45; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583.

The ordinance is not discriminatory because it is prospective only or because it is not as drastic as it might be made. *Welch* v. *Swasey*, 214 U. S. 91; *L'Hote* v. *New Orleans*, 177 U. S. 587; *Rideout* v. *Knox*, 148 Massachusetts, 368.

A sufficient answer to the contention that if this law is upheld there is no limit to the extremes to which such legislation might ultimately extend, e. g., separation of natives from aliens, Catholics from Protestants, etc., is found in the majority opinion in *Plessy* v. *Ferguson*, 163 U. S. 550.

The right to enact laws providing for reasonable residential segregation, similar to that under consideration, has been sanctioned by the courts of other States. *Hopkins* v. *City of Richmond*, 117 Virginia, 692. In *State* v. *Gurry*, 121 Maryland, 534, and *Carey* v. *Atlanta*, 143 Georgia, 192, the right was recognized; and the reason for not upholding the ordinances involved was that they did not protect vested rights. The ordinance in the *Carey Case* also contained the absurd provision that a person of one color occupying a house in a mixed block could object to one of another color moving next door to him. In *State* v. *Darnell*, 166 N. Car. 300, the ordinance was also held open to the objection that it impaired vested rights, but that case turned principally upon the extent of the charter powers of the town of Winston, N. C., the court expressly refraining from passing upon the power of the State to authorize the ordinance.

*Mr. S. S. Field*, by leave of court, filed a brief on behalf of the Mayor and City Council of Baltimore as *amicus curiæ*.

*Mr. W. Ashbie Hawkins,* by leave of court, filed a brief on behalf of the Baltimore Branch of the National Association for the Advancement of Colored People as *amicus curiæ.*

*Mr. Frederick W. Lehmann* and *Mr. Wells H. Blodgett,* by leave of court, filed a brief as *amici curiæ.*

*Mr. Alfred E. Cohen,* by leave of court, filed a brief as *amicus curiæ*

*Mr. Chilton Atkinson,* by leave of court, filed a brief on behalf of the United Welfare Association of St. Louis as *amicus curiæ.*

*Mr. H. R. Pollard,* by leave of court, filed a brief on behalf of the City of Richmond, Virginia, as *amicus curiæ.*

*Mr. Wells H. Blodgett, Mr. Charles Nagel, Mr. James A. Seddon, Mr. Selden P. Spencer, Mr. Sidney F. Andrews, Mr. W. L. Sturdevant, Mr. Percy Werner, Mr. Everett W. Pattison* and *Mr. Joseph Wheless,* by leave of court, filed a brief as *amici curiæ.*

MR. JUSTICE DAY delivered the opinion of the court.

Buchanan, plaintiff in error, brought an action in the Chancery Branch of Jefferson Circuit Court of Kentucky for the specific performance of a contract for the sale of certain real estate situated in the City of Louisville at the corner of 37th Street and Pflanz Avenue. The offer in writing to purchase the property contained a proviso:

"It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct

part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence." This offer was accepted by the plaintiff.

To the action for specific performance the defendant by way of answer set up the condition above set forth, that he is a colored person, and that on the block of which the lot in controversy is a part there are ten residences, eight of which at the time of the making of the contract were occupied by white people, and only two (those nearest the lot in question) were occupied by colored people, and that under and by virtue of the ordinance of the City of Louisville, approved May 11, 1914, he would not be allowed to occupy the lot as a place of residence.

In reply to this answer the plaintiff set up, among other things, that the ordinance was in conflict with the Fourteenth Amendment to the Constitution of the United States, and hence no defense to the action for specific performance of the contract.

In the court of original jurisdiction in Kentucky, and in the Court of Appeals of that State, the case was made to turn upon the constitutional validity of the ordinance. The Court of Appeals of Kentucky, 165 Kentucky, 559, held the ordinance valid and of itself a complete defense to the action.

The title of the ordinance is: "An ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively."

By the first section of the ordinance it is made unlawful for any colored person to move into and occupy as a

residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

Section 2 provides that it shall be unlawful for any white person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of public assembly by colored people than are occupied as residences, places of abode or places of public assembly by white people.

Section 4 provides that nothing in the ordinance shall affect the location of residences, places of abode or places of assembly made previous to its approval; that nothing contained therein shall be construed so as to prevent the occupancy of residences, places of abode or places of assembly by white or colored servants or employees of occupants of such residences, places of abode or places of public assembly on the block on which they are so employed, and that nothing therein contained shall be construed to prevent any person who, at the date of the passage of the ordinance, shall have acquired or possessed the right to occupy any building as a residence, place of abode or place of assembly from exercising such a right; that nothing contained in the ordinance shall prevent the owner of any building, who when the ordinance became effective, leased, rented, or occupied it as a residence, place of abode or place of public assembly for colored persons, from continuing to rent, lease or occupy such residence, place of abode or place of assembly for such persons, if the owner shall so desire; but if such house should, after the passage of the ordinance, be at any time leased, rented or occupied as a residence, place

of abode or place of assembly for white persons, it shall not thereafter be used for colored persons, if such occupation would then be a violation of section one of the ordinance; that nothing contained in the ordinance shall prevent the owner of any building, who when the ordinance became effective leased, rented or occupied it as a residence, place of abode, or place of assembly for white persons from continuing to rent, lease or occupy such residence, place of abode or place of assembly for such purpose, if the owner shall so desire, but if such house should, after the passage of the ordinance, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for colored persons, then it shall not thereafter be used for white persons, if such occupation would then be a violation of section two thereof.

The ordinance contains other sections and a violation of its provisions is made an offense.

The assignments of error in this court attack the ordinance upon the ground that it violates the Fourteenth Amendment of the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws.

The objection is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons, and the plaintiff in error is a white person. This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such persons, it has been settled, can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle.

The property here involved was sold by the plaintiff

in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved. See *Truax* v. *Raich,* 239 U. S. 33, 38.

We pass then to a consideration of the case upon its merits. This ordinance prevents the occupancy of a lot in the City of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists colored persons are excluded. This interdiction is based wholly upon color; simply that and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color.

This drastic measure is sought to be justified under the authority of the State in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to main-

tain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden* v. *Hardy*, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127.

True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be

controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district, such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court, and other courts, of this principle, but these cases do not touch the one at bar.

The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

Following the Civil War certain amendments to the Federal Constitution were adopted, which have become an integral part of that instrument, equally binding upon all the States and fixing certain fundamental rights which all are bound to respect. The Thirteenth Amendment abolished slavery in the United States and in all places subject to their jurisdiction, and gave Congress power to enforce the Amendment by appropriate legislation. The Fourteenth Amendment made all persons born or naturalized in the United States citizens of the United States and of the States in which they reside, and provided that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty, or property without due process

of law, nor deny to any person the equal protection of the laws.

The effect of these Amendments was first dealt with by this court in *The Slaughter House Cases*, 16 Wall. 36. The reasons for the adoption of the Amendments were elaborately considered by a court familiar with the times in which the necessity for the Amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment, and the States were prohibited from abridging the privileges and immunities of such citizens, or depriving any person of life, liberty, or property without due process of law. While a principal purpose of the latter Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights irrespective of the race or color of the complainant. In *The Slaughter House Cases* it was recognized that the chief inducement to the passage of the Amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the States.

In *Strauder* v. *West Virginia*, 100 U. S. 303, this court held that a colored person charged with an offense was denied due process of law by a statute which prevented colored men from sitting on the jury which tried him. Mr. Justice Strong, speaking for the court, again reviewed the history of the Amendments, and among other things, in speaking of the Fourteenth Amendment, said:

"It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . . It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States. . . . It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? . . .

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution."

Again this court in *Ex parte Virginia,* 100 U. S. 339, 347, speaking of the Fourteenth Amendment, said:

"Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty,

without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

In giving legislative aid to these constitutional provisions Congress enacted in 1866, c. 31, § 1, 14 Stat. 27, [Rev. Stats., § 1978] that:

"All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

And in 1870, by c. 114, § 16, 16 Stat. 144 [Rev. Stats., § 1977] that:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."

In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

The statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat. 27, and practically reënacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and

use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir*, 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.

The defendant in error insists that *Plessy* v. *Ferguson*, 163 U. S. 537, is controlling in principle in favor of the judgment of the court below. In that case this court held that a provision of a statute of Louisiana requiring railway companies carrying passengers to provide in their coaches equal but separate accommodations for the white and colored races did not run counter to the provisions of the Fourteenth Amendment. It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races. In *Plessy* v. *Ferguson*, classification of accommodation was permitted upon the basis of equality for both races.

In the *Berea College Case*, 211 U. S. 45, a state statute was sustained in the courts of Kentucky, which, while permitting the education of white persons and negroes in different localities by the same incorporated institution, prohibited their attendance at the same place, and in this court the judgment of the Court of Appeals of Kentucky was affirmed solely upon the reserved authority of the legislature of Kentucky to alter, amend, or repeal charters of its own corporations, and the question here involved was neither discussed nor decided.

In *Carey* v. *City of Atlanta*, 143 Georgia, 192, the Su-

preme Court of Georgia, holding an ordinance, similar in principle to the one herein involved, to be invalid, dealt with *Plessy* v. *Ferguson*, and *The Berea College Case*, in language so apposite that we quote a portion of it:

"In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform with reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law. In the recent case of *McCabe* v. *Atchison &c. Ry. Co.*, 235 U. S. 151, where the court had under consideration a statute which allowed railroad companies to furnish dining-cars for white people and to refuse to furnish dining-cars altogether for colored persons, this language was used in reference to the contentions of the attorney-general: 'This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one.' . . .

"The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the constitution."

That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution

cannot be promoted by depriving citizens of their constitutional rights and privileges.

As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

It is the purpose of such enactments, and, it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.

The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand. *Booth* v. *Illinois*, 184 U. S. 425, 429; *Otis* v. *Parker*, 187 U. S. 606, 609.

Reaching this conclusion it follows that the judgment of the Kentucky Court of Appeals must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

*Reversed.*

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# EX PARTE PARK & TILFORD, PETITIONER.

## PETITION FOR WRIT OF MANDAMUS.

No. 24. Original. Argued October 15, 16, 1917.—Rule discharged November 5, 1917.

Mandamus will not issue from this court to compel a subordinate court to make a particular decision. The jurisdiction of this court in that regard is no greater in a case in which the lower court's decision is by law made final than in those in which decisions are reviewable in the ordinary ways.

The Court of Customs Appeals decided that under the last clause of paragraph I, § 3, of the Tariff Act of 1913, c. 16, 38 Stat. 114, 184, the collector was required to assess certain goods upon their entered

value, unless directed otherwise by the Secretary of the Treasury; and that the Secretary's refusal to give a contrary direction was discretionary and not reviewable by the Board of General Appraisers or by the Court of Customs Appeals; and, upon these grounds, affirmed the Board's decision. *Held*, that the court had taken jurisdiction and decided the case upon its merits and that mandamus would not lie to compel it to inquire into and pass upon the Secretary's refusal.

Rule discharged.

THE case is stated in the opinion.

*Mr. Vincent P. Donihee*, with whom *Mr. Edward S. Hatch* was on the brief, for petitioner.

*Mr. Assistant Attorney General Warren*, with whom *The Solicitor General* was on the brief, for respondents.

MR. JUSTICE DAY delivered the opinion of the court.

This is a petition for a writ of mandamus to require the Judges of the United States Court of Customs Appeals to take jurisdiction of a certain cause, and to consider and decide the same upon its merits. The rule to show cause having issued, the judges made return, and set forth the proceedings in the Court of Customs Appeals, and averred that the court had decided the case of the petitioner, and if the writ of mandamus issued, it would only require the court to do that which it had already done.

From the return and the record attached to the petition it appears: Park & Tilford, petitioner, imported certain merchandise at the port of New York under the Tariff Act of 1913. The Collector of Customs assessed and liquidated the duties at the entered value. The importer claimed assessment at the value decided upon on final reappraisement, which was less than the amount of the

entered value. This claim was made under paragraph I of § 3 of the Act of 1913, 38 Stat. 114, 184, which provides:

"The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor."

The importers entered the goods upon an invoice which stated the gross price and allowed 15% deduction therefrom; at entry the importers advanced the value by reducing the deduction to 6%. At the time of entry the importer, in each case, made an addition to the invoice value to make market value, stating the additions were made to meet advances in similar cases then pending upon appeal for reappraisement.

On appeal for reappraisement the goods were appraised at a value which differed from the invoice value, being 2½% more than invoice price of the goods, and 6½% less than the entered value.

The petitioner requested the Secretary of the Treasury to reliquidate the entries; this the Secretary refused to do, stating his reasons as follows:

"You are advised that in all cases where the importer has failed to make a specific contention as to market value, the department regards the contention as being for the invoice value; and where the final reappraised value is below the entered value, but not as low as the value

contended for by the importer, it is the practice of the department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained. This practice is based upon the department's knowledge of the purpose and intent of the law, and is of such long standing that it will not make any change therein.

"You are advised therefore that if the entries enumerated in your petition come within the class mentioned above, the department's final action with reference thereto would necessarily be in accordance with its practice outlined above."

In a subsequent letter the Secretary reiterated this view, the petitioner protested, and the protest was submitted to the Board of General Appraisers, and was overruled, and the importer appealed to the Court of Customs Appeals.

An inspection of the opinion of the court, which accompanies the petition, makes it apparent that the court did take jurisdiction of the case and decided it, placing its decision upon the ground that the statute requires the assessment made by the Collector in the absence of a direction of the Secretary of the Treasury to the contrary. The court held that the Secretary's refusal to so direct the Collector was not reviewable by the Board of General Appraisers nor by the Court of Customs Appeals; that neither the Board nor the court could control the discretion lodged by the statute in the Secretary, and affirmed the decision of the Board.

It is elementary that the writ of mandamus will not issue to require the court to make a particular decision, and may only be invoked where the purpose is to require action of a court of competent jurisdiction, where such court has refused to exercise the power of decision with which it is invested by law. We think it clear that the Court of Customs Appeals did take jurisdiction of the

case of the petitioner on appeal from the order of the Board of General Appraisers, and decided it according to its interpretation of the statutes of the United States. These facts warrant the statements of the respondents in their return—that if the writ should issue, requiring a decision of the case, they could only repeat the decision which they have already made.

The fact that the law makes the decision of the United States Court of Customs Appeals final in this class of cases does not broaden the authority of this court to issue writs of the character now invoked; it follows that the rule must be discharged.

*And it is so ordered.*

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## GAUZON *v.* COMPAÑIA GENERAL DE TABACOS DE FILIPINAS.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 437. Motion to dismiss or affirm submitted October 15, 1917.—Decided November 5, 1917.

In a proceeding for the registration of land, begun in the Philippine Court of Land Registration and appealed to the Supreme Court of the Islands, where the former court decreed registration of a part of the land to a petitioner claiming all under a mortgage and foreclosure, but refused registration of the rest upon the ground that it was not shown to have been included in the mortgage, and where the latter court, finding as a fact that all was so included, modified the judgment so as to decree that all should be registered: *Held*, that the last mentioned judgment was properly reviewable by writ of error, and, the case being before this court upon such writ, an appeal which was also taken must be dismissed.

Upon writ of error to a judgment of the Supreme Court of the Philippine Islands, in a case which was decided upon issues of fact, this

court will not reconsider the conclusions of the court below which find support in the record.

Section 4 of the Act of September 6, 1916, c. 448, 39 Stat. 726, does not abolish the distinction between writs of error and appeals, but only requires that the party seeking review shall have it in the appropriate way notwithstanding a mistake in his choice of proceeding.

The court is not disposed to disturb the judgment of the Supreme Court of the Philippine Islands in this case denying the right of a mortgagor to redeem after foreclosure and sale, the rule announced by the court below being derived from a construction of laws applicable in the Islands.

Affirmed.

THE case is stated in the opinion.

*Mr. F. C. Fisher* for appellee and defendant in error, in support of the motion.

*Mr. Alex. Britton, Mr. Evans Browne* and *Mr. F. W. Clements* for appellant and plaintiff in error, in opposition to the motion.

Memorandum opinion by direction of the court, by MR. JUSTICE DAY.

In this case, submitted upon motion to dismiss or affirm, the present appellee and defendant in error, herein called the Company, made application in the Philippine Court of Land Registration for registration of certain property under the Torrens System. As described and claimed by the Company the hacienda contained 611 hectares, 33 ares, and 82 centares.

The case was twice in the Supreme Court of the Philippines. After its first judgment that court granted a rehearing, and ordered a new trial, and we are concerned now with the writ of error and appeal to this court from the second judgment of the Supreme Court of the Philip-

pines. The Supreme Court states that so far as Romana Gauzon was concerned the hacienda was made up of two portions, one consisting of 465 hectares, 33 ares and 82 centares, by royal grant, while the remaining portion was made up of 146 hectares obtained from other sources. Romana Gauzon had mortgaged the hacienda, and the same was bought by the Company at sheriff's sale; some time thereafter it made the application for registration.

On the retrial, after the first judgment of the Supreme Court, Romana Gauzon claimed to be the owner of the 146 hectares, alleging that they were not included in the mortgage. The Court of Land Registration refused registration of the 146 hectares. That court held that while Romana Gauzon had not shown herself to be the owner of the 146 hectares, the Company had not clearly demonstrated that it was the owner thereof.

The Supreme Court, in the judgment now under review, held that the Company had, as between itself and Romana Gauzon, shown title to the 146 hectares, and modified the judgment of the Court of Land Registration so as to decree the registration of all the land described in the application. This judgment evidently proceeded upon the determination of questions of fact.

The writ of error was the proper method by which to review the judgment of the Supreme Court of the Philippines. *Cariño* v. *Insular Government,* 212 U. S. 449; *Tiglao* v. *Insular Government,* 215 U. S. 410; *Jover y Costas* v. *Insular Government,* 221 U. S. 623. The case being properly here upon writ of error the appeal must be dismissed. Upon such writ the case having been decided upon issues of fact, this court will not reconsider the conclusions of the lower court, which find support in the record, in reaching its judgment.

Whether § 4 of the Act of September 6, 1916, 39 Stat. 726, applies to this action in view of the fact that the appeal and writ of error were taken December 5, 1916,

it is unnecessary to decide, as the section does not change the result. Section 4 provides that the reviewing court shall not dismiss a writ of error because an appeal should have been taken, or dismiss an appeal because a writ of error should have been sued out, but shall disregard such mistakes and take the action appropriate if the proper appellate procedure had been followed. This section does not abolish the distinction between writs of error and appeals, but only requires that the party seeking review shall have it in the appropriate way nowithstanding a mistake in choosing the mode of review.

Upon petition for rehearing in the Supreme Court the plaintiff in error contended that she should have been allowed the right of redemption. Upon that question the court adhered to its first judgment denying the right, and affirmed the doctrine announced in *Benedicto* v. *Yulo*, 26 Phil. Rep. 160. We are not disposed to disturb this judgment of the Supreme Court construing local laws and announcing a rule applicable in the Islands.

The judgment of the Supreme Court of the Philippines is

*Affirmed.*

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## UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, ET AL., v. CHASE.

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

No. 146. Argued October 2, 1917.—Decided November 5, 1917.

The assignment of land provided for by Article IV of the treaty of March 6, 1865, 14 Stat. 667, with the Omaha Indians, was merely an apportionment of the tribal right of occupancy to the members of the tribe in severalty, leaving the fee in the United States and

leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become appropriate in view of changing conditions, the welfare of the Indians and the public interests.

The facts that the treaty does not say that the fee shall pass, that it makes no provision for patents, and does not relieve assignees from federal guardianship or subject them to state laws, or dissolve the tribe, or abridge its power to speak and act for its members, while it does expressly provide that all the lands, assigned and unassigned, shall remain an Indian reservation, subject to the Indian trade and intercourse laws of Congress, and upon which white persons, other than federal employees, shall not be allowed to reside or go without written permission from the Indian agent or a superior officer, confirm this construction of Article IV.

This construction also is confirmed by the practical construction placed upon the treaty by the United States and the tribe, as evidenced by the terms of the certificates of assignment, the petition of a number of the assignees, including chiefs who had participated in the treaty, for a better tenure, the passage of the Act of August 7, 1882, c. 434, 22 Stat. 341, to become operative when consented to by the tribe, the acceptance of that act by the tribe, and the execution of the act through the surrender and accounting for outstanding certificates of assignment, and the making and acceptance of allotments under it—a construction of the treaty which has become practically a part of it and could not be now rejected without seriously disturbing the titles of those who not unreasonably relied upon it.

Possessory rights based on assignments made under Article IV of the treaty of 1865, *supra*, were terminated by the Act of 1882, *supra*. An assignee who failed to exercise his preferred right of selection waived it, and his assigned tract became allottable to any other qualified selector.

The provision in § 4 of the Act of August 7, 1882, *supra*, that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act" was not intended to qualify the plan of allotment defined in § 5, but only to prevent the sale under the earlier and separable portion of the act of tracts subject to Indian rights in severalty acquired under treaties.

A patent for an allotment issued under the Act of August 7, 1882, *supra*, in the name of an Indian who was dead at the time, inures to the benefit of his heir under § 2448, Rev. Stats.; the fact that the patentee had died before requisite proceedings had been taken

upon his selection would not render the patent void but at most voidable in an appropriate proceeding. Such a patent cannot be attacked by a mere occupant of the allotment in an action brought by the United States and the patentee's heir to recover damages for wrongful use and occupation of the premises.

222 Fed. Rep. 593, reversed.

THE case is stated in the opinion.

*The Solicitor General* for the United States.

*Mr. Hiram Chase, pro se,* and *Mr. Thomas L. Sloan,* with whom *Mr. William R. King* was on the brief, for respondent.

*Mr. O. C. Anderson* and *Mr. Charles J. Kappler,* by leave of court, filed a brief as *amici curiæ.*

*Mr. Harry L. Keefe,* by leave of court, filed a brief as *amicus curiæ.*

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

This is an action to recover for the wrongful use and occupancy of forty acres of land in Nebraska to which two Omaha Indians assert conflicting claims. The land is within the Omaha Indian Reservation, was assigned in 1871 under the treaty of March 6, 1865, 14 Stat. 667, to Clarissa Chase, a member of the Omaha tribe, and was allotted in 1899 under the Act of August 7, 1882, c. 434, 22 Stat. 341, to Reuben Wolf, another member of the tribe. The defendant, who has been using and occupying the land for some time, claims as the sole heir of Clarissa Chase, and the other claimant—for whom the United States sues as trustee and guardian—claims as the sole heir of Reuben Wolf. In the District Court judgment went against the defendant, but he prevailed in the Cir-

cuit Court of Appeals. 222 Fed. Rep. 593. Whether the assignment to Clarissa Chase under the treaty passed the full title in fee or only the Indian right of occupancy, and whether all right under the assignment was extinguished prior to the allotment to Reuben Wolf under the Act of 1882, are the controlling questions.

The reservation was established and maintained under early treaties as the tribal home. The Indian right of possession was in the tribe and the fee in the United States. The possessory right was enjoyed by all the members in common, none having a several right in any part of the reservation. While this was so the treaty of 1865 was negotiated. By it the tribe ceded a portion of the reservation to the United States and the latter, in consideration of the cession, engaged to make certain payments to the Indians and to take certain measures, not material here, for their benefit. The treaty then proceeded:

"Article IV. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians.

The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress."

Some of the Omahas sought and received assignments under this article, while others, although having the requisite status, neither sought nor received anything under it. Clarissa Chase was among those who obtained an assignment of 160 acres as the head of a family, and in 1870 a certificate evidencing her assignment was issued to her by the Commissioner of Indian Affairs. The 160 acres included the 40 acres now in question.

Without any doubt the fourth article contains provisions which, in other situations, would suggest a purpose to pass the full title in fee. This is true of the provisions that the assignments, when approved by the Secretary of the Interior, "shall be final and conclusive," that the certificates to be issued by the Commissioner of Indian Affairs shall specify that the tracts assigned are for the exclusive use and benefit of the assignees, "their heirs and descendants," and that the tracts shall not be "alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe." But as applied to the situation then in hand these provisions are consistent with a purpose to apportion the Indian possessory right, leaving the fee in the United States as before. The assignments, when approved, could well operate as a final and conclusive apportionment of that right without affecting the fee; and the right of each assignee to occupy and use the tract assigned to him, to the exclusion of other members, could well pass to his heirs and descendants, upon his death, without his being invested with the fee. If not invested with it, he, of course, could not alienate it, and a cautious provision intended to prevent him from attempting to do so hardly would enlarge his right. True, the provision says, "except to the United States or to other members of the tribe," but, as the restriction is also directed against leasing or other disposal, it is not improbable that the real purpose of the excepting clause is to qualify this part of the restriction. In any event, the implication attributed to the provision is too uncertain to afford a substantial basis for thinking the assignee was to take the fee.

Other provisions and considerations suggest that an apportionment of the tribal possessory right is all that was intended. The article directly provides for a change in tenure—an "assignment or division" in severalty of communal property. Nothing is said about passing the

fee held by the United States, and there is no provision for patents. The assignees are neither relieved from federal guardianship nor subjected to state laws. And there is no dissolution of the tribal organization, nor any abridgment of the accustomed power of the tribe, as such, to speak and act for its members. But there is express provision that all the lands, assigned and unassigned, shall remain an Indian reservation over which the Indian trade and intercourse laws of Congress shall be in force, and upon which no white person, not in the employ of the United States, shall be allowed to reside or go without written permission from the Indian agent or a superior officer. All this persuasively points to the absence of any purpose to do more than to individualize the existing tribal right of occupancy.

A like question was presented and considered in *Veale* v. *Maynes,* 23 Kansas, 1, a case arising out of the treaties of 1861 and 1867 with the Pottawatomie Indians. The earlier treaty provided in language similar to that now under consideration for the assignment of portions of the tribal reservation to individual members in severalty and for the issue by the Commissioner of Indian Affairs of certificates for the assigned tracts, "specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs." Assignments were made and certificates issued under that treaty and thereafter the treaty of 1867 was negotiated. Following its provisions a tract assigned under the earlier treaty to one member was conveyed by a patent in fee to another. This was claimed to be violative of the right conferred by the assignment, but the right under the patent was sustained. Speaking for the Supreme Court of Kansas, and particularly referring to the earlier treaty, Mr. Justice Brewer, then a member of that court, said:

"Now what was intended by this division—that the title be thus divided up, or the mere matter of occupancy? Of course either was within the power of the contracting parties. They might provide for a division among the several Indians which should vest an absolute title in each, beyond the power of the tribe or the government to disturb without the personal consent of the individual; or they might provide for an individualizing of the right of occupancy, giving to each person a sole right of occupancy in a particular tract, a right guaranteed against invasion by any individual, but still within the power of the tribe as a tribe to convey by treaty. In other words, while that remained the tribal home each individual desiring it should have separate control of certain lands, yet subject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of lands. The power of the tribe, *as a tribe*, remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty, we are constrained to hold, and this notwithstanding many expressions which, if used in ordinary contracts between individuals, would have marked significance to the contrary.

" . . . At present it is enough to notice that the allottee remained a member of the tribe, and if the intention had been to enlarge his title from the ordinary Indian title, one of occupancy, to that of a fee-simple, the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that that difference was made clear, and language used to indicate that should not be carried to some further meaning."

In *Wiggan* v. *Conolly*, 163 U. S. 56, 63, where the rights of an allottee, who was still a tribal Indian, were restricted by treaty after the allotment was made, this court said:

"The land and the allottee were both still under the charge and care of the Nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge."

But if the terms of the treaty of 1865 be regarded as confused or uncertain the question still must be resolved in the same way, for the parties—the United States and the tribe—have in practice placed upon the treaty the construction to which we are inclined. In the certificates issued by the Commissioner of Indian Affairs and accepted by the assignees it was declared that "the said [assignee] is entitled to and may take immediate possession of said land and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of [the assignee] and—heirs so long as such occupancy shall continue." The obvious import of this is that the assignee was to have a right of occupancy, but not the fee. In January, 1882, a considerable number of the assignees, some being chiefs who had participated in the negotiation of the treaty and whose names were signed to it, memorialized Congress as follows (Sen. Misc. Doc., No. 31, 47th Cong., 1st sess.):

"We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three to ten years; each farm has from five to fifty acres under cultivation; many of us have built houses on these lands, and all have endeavored to make permanent homes for ourselves and our children.

"We therefore petition your honorable body to grant to each one a *clear and full title* to the land on which he has worked.

"We earnestly pray that this petition may receive

your favorable consideration, for we now labor with discouragement of heart, *knowing that our farms are not our own, and that any day we may be forced to leave* the lands on which we have worked. We desire to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, *we ask of you, titles to our lands.*"

Shortly after the presentation of this memorial a bill providing for the sale of the western part of the Omaha Reservation passed the Senate. At that time the only provision in the bill having any possible reference to the existing assignments was a saving clause in its fourth section declaring that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." In the House of Representatives four new sections were added, and in that form the bill became the Act of August 7, 1882, before cited. The new sections, 5 to 8, contain elaborate provisions for making allotments in severalty out of the unsold portion of the reservation, for adjusting the situation to which the Indian memorial invited attention, for the issue of trust patents and patents carrying the fee, for disposing of the surplus lands in the reservation and for ultimately bringing the Indians within the operation of state laws. The fifth section, the one providing for allotments and dealing with the existing assignments, was both comprehensive and easily understood. It was in the nature of a proposal and in terms required "the consent of the Omaha tribe of Indians, expressed in open council," to make it operative. Shortly stated, what it proposed was this: All unsold lands, including those theretofore assigned under the treaty of 1865, were to be available for allotments. The right to receive allotments was to be accorded to the members generally, including those holding assignments under the

treaty. The allotments were to be on a scale [1] of 160 acres to each head of a family, 80 acres to each single person over eighteen years of age, 80 acres to each orphan child under eighteen years and 40 acres to each other person under eighteen years. The Indians were severally to select the lands to be allotted to them, heads of families selecting for their children and the agent selecting for orphan children. These allotments were to be "deemed and held to be in lieu of" the assignments under the treaty of 1865, but each assignee, when selecting the lands to be allotted to him, was to be accorded "a preference right" to select the tract embracing his improvements. In short, all rights under the assignments, as such, were to be extinguished, and each assignee was to have the same right to take an allotment as was accorded to other members, but with a preferred right to make his selection in such way that his allotment would include his improvements. The sixth section provided for the issue of trust patents covering a period of twenty-five years, and for full patents conveying the fee at the end of that period.

The tribe, in open council, gave its consent to this plan of allotment and adjustment, and, through the co-operation of the administrative officers and the tribe, the plan was carried to completion. The report of the allotting agent shows that of the 297 outstanding certificates of assignment 230 were produced and surrendered and 67 were accounted for as lost by fire, flood or other accident, and that most of the certificate holders took the assigned tracts for their allotments—others selecting different lands. Thus it is apparent that the parties to the treaty—the United States and the tribe—have in all their dealings relating to the subject proceeded upon the theory that what was intended by Article IV and what

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[1] The quantity of some of the allotments was subsequently enlarged with the consent of the tribe. C. 209, 27 Stat. 630.

was accomplished by the assignments under it was merely a distribution or apportionment of the tribal right of occupancy, leaving the fee in the United States and leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests. This construction of the treaty by those who entered into it and to whom its proper administration and application were of obvious importance has become practically a part of it and could not be rejected now, after the lapse of many years, without seriously disturbing the titles of those who, not unreasonably, relied upon it.

Concluding, as we do, that the assignment to Clarissa Chase passed only the Indian or tribal right of occupancy, the remaining question is not difficult of solution. She took that right as it was held by the tribe, without enlargement or diminution. It was merely individualized. Upon her death, in 1875, it passed to the defendant, he being her sole heir. The Act of 1882, consented to by the tribe, put into effect a general plan of allotment which completely displaced the Indian right of occupancy and in that sense terminated all right under the assignment. Under that plan the assigned tract was available for allotments and the defendant was entitled to an allotment. He could select the assigned tract for his allotment—indeed, he had a preferred right to do so. He could exercise that right or waive it and select other lands. But he could not select other lands and also hold the assigned tract. He was entitled to one allotment, not two. If not selected by him, the tract in question would be open to selection by another. He does not assert that he selected it, or that he was denied the right to do so, or that he received less than a full allotment without this tract. But he claims that the assignment

passed the title in fee and in consequence was an insurmountable obstacle to the allotment of the tract under the Act of 1882. This claim, as has been shown, is untenable. All that passed by the assignment was a possessory right, and this was terminated by the Act of 1882.

Some reliance is had upon the provision in § 4 that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." But this, as an examination of the act discloses, is merely a saving clause in that part of the act providing for the sale of a distinct portion of the reservation. If the provision be read in connection with what is said in § 5 in dealing with allotments and with assignments under the treaty it becomes manifest that it was not intended to interfere with or qualify the plan of allotment as defined in that section, but only to prevent the sale, under the earlier and separable portion of the act, of any tract to which an Indian had a right in severalty under a treaty. The legislative history of the act also sustains this view. See Cong. Rec., 47th Cong., 1st sess., pp. 3028–3032, 3077–3079.

According to the pleadings, Reuben Wolf died at some time after selecting the tract for his allotment and before the issue of the patent in his name, and this is set up as an obstacle to a recovery on behalf of his heir. If there be any merit in this objection, it does not render the patent void but only voidable. A statute in force for many years, and which this court has applied to a patent issued under an Indian treaty for Indian lands, provides that where the person to whom the patent issues is dead at the time the title shall inure to and become vested in his heirs, devisees or assigns, as if the patent had issued in his lifetime. Rev. Stats., § 2448; *Crews* v. *Burcham*, 1 Black, 352, 357. Thus the fact that Reuben Wolf was dead when the patent issued is in itself of no moment. If his selection had not advanced before his death to the

point where the patent properly could be issued thereafter that is a matter of which only the United States and the tribe can complain—and then only in an appropriate proceeding. Apparently both are content to let the patent stand, and certainly it is not open to the defendant to make the objection.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

*It is so ordered.*

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## EICHEL ET AL. *v.* UNITED STATES FIDELITY & GUARANTY COMPANY.

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

No. 571. Motion to dismiss or affirm submitted October 8, 1917.—Decided November 5, 1917.

Appellant having brought a number of actions against appellee in the District Court, all cognizable there because arising under a law of the United States, appellee filed in that court a bill ancillary and dependent in form setting up a partial equitable defense to all the actions and other partial defenses to some, and praying that the whole matter be tried in equity and the legal proceedings enjoined. The bill also showed diversity of citizenship. Relief was decreed accordingly in the District Court and Circuit Court of Appeals. *Held*, that the bill was dependent and ancillary, that the jurisdiction to entertain it was referable to that invoked in the actions at law, and that the decree of the Circuit Court of Appeals was therefore reviewable by appeal. Jud. Code, §§ 128, 241.

In a much litigated case, presenting only questions of fact and well-settled questions of general law, unaffected by any ruling on any federal question, where the federal courts of two circuits had reached the same conclusions of fact independently, this court, being satis-

fied from the record and assignments, examined in the light of the opinions below, that the rulings were so clearly right that the appeal seemed to be taken without reasonable justification, and therefore for delay, sustained a motion to affirm the decree.

241 Fed. Rep. 357, affirmed.

The case is stated in the opinion.

*Mr. William E. Schoyer* and *Mr. B. M. Ambler* for appellee, in support of the motion.

*Mr. Wm. M. Hall* for appellants, in opposition to the motion.

Memorandum opinion by Mr. Justice Van Devanter, by direction of the court.

A motion to dismiss or affirm is presented.

In its simplest form the case is this: Laura Eichel as use plaintiff began eighteen separate actions at law against the guaranty company in the District Court for the Western District of Pennsylvania, all being cognizable in that court because arising under a law of the United States. The guaranty company, conceiving that it had a partial equitable defense, not admissible at law, which was common to all the cases, and other partial defenses in particular cases, exhibited in that court a bill describing the actions at law, setting forth the defenses, showing that nothing was in controversy beyond the defenses, and praying that the entire matter be examined and adjudicated in a single proceeding in equity and further proceedings at law enjoined. Although showing that the parties were citizens of different States, the bill was framed as a dependent and ancillary bill and the court was asked to entertain it as such in virtue of the jurisdiction already acquired. The court did entertain it and ultimately sustained the equitable defense, partly sustained some

of the others, ascertained the amount of the liability of the guaranty company upon the claims set forth in the actions at law, and ordered that this amount, with interest, be paid in satisfaction of those claims. The Circuit Court of Appeals made a small reduction in the amount of the company's liability, made provision for subrogating the company to the rights of Mrs. Eichel against a bankrupt's estate in process of administration, and affirmed the decree as so modified. 241 Fed. Rep. 357.

Plainly the bill was dependent and ancillary and the jurisdiction to entertain it was referable to that invoked and existing in the actions at law out of which it arose. *Jones* v. *Andrews*, 10 Wall. 327, 333; *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, 333; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633; *Krippendorf* v. *Hyde*, 110 U. S. 276, 281; *Johnson* v. *Christian*, 125 U. S. 642, 645; *Carey* v. *Houston & Texas Central Ry. Co.*, 161 U. S. 115; *Cortes Co.* v. *Thannhauser*, 9 Fed. Rep. 226; *Hill* v. *Kuhlman*, 87 Fed. Rep. 498. This being so, the decree of the Circuit Court of Appeals is open to review here. See Jud. Code, §§ 128, 241. The motion to dismiss the appeal is therefore denied.

The decree, as the record shows, turned upon questions of fact and of general law, unaffected by any ruling upon any federal question. The case is part of a prolonged litigation which is now brought to our attention for the fourth time. 225 U. S. 205; 239 U. S. 628; *ibid.* 629. It has engaged the attention of the courts of two circuits on several occasions, some of the decisions being reported and others not. 170 Fed. Rep. 689; 218 Fed. Rep. 987; 219 Fed. Rep. 803; 233 Fed. Rep. 991; 241 Fed. Rep. 357. Upon the questions of fact the courts in the two circuits, proceeding independently, have reached identical conclusions. The questions of law are few and well settled. After examining the record in the light of the opinions below and the assignments of error here we are convinced

that the rulings were right, so clearly so that the appeal seems to be without reasonable justification, and therefore to have been taken for delay. The motion to affirm is accordingly sustained.

*Decree affirmed.*

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# HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, v. APPERSON.

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

No. 427. Argued October 11, 1917.—Decided November 5, 1917.

A valid judgment was recovered against Taylor County, Kentucky, upon bonds which it had issued under a refunding act. 1 Acts Ky., 1877-78, p. 554. Under the law existing when the bonds were issued (Ky. Stats., 1894, § 4131), as construed by the highest court of the State, it was the duty of the county court when the office of sheriff was vacant to appoint a single collector, under a single bond, to collect all county taxes, including those levied to pay the county's debts. An amendment (Acts 1906, p. 153, § 3), as construed by the highest court of the State, authorized the county court to appoint more than one collector, under separate bonds, each charged with the duty of collecting such part of the taxes as should be designated in his appointment—an arrangement which made it possible to evade the satisfaction of the county's debts without interrupting its revenue for general county purposes. In a mandamus proceeding, the courts below directed the members of the fiscal court of the county to levy taxes to satisfy the judgment at the same time and by the same order which should provide for other county taxes and to place the tax bills for collection in the hands of the sheriff, and in case the sheriff, or successor, should not give bond and qualify, directed the county judge, when appointing a special collector, to include in his order of appointment a direction to collect both the levies to satisfy the judgment and all other levies of county taxes, and to continue such direction until a collector

should qualify and give bond, and to exact of him but one bond covering the collection of all the taxes. It was insisted on behalf of the county that, under the amendment, the county judge might appoint more than one collector and that his discretion in that regard could not be controlled by mandamus. *Held*, that the county's action in other cases, viewed with the present controversy, revealed well-defined plans of its officials, in notorious operation long before the passage of the amendment, to avoid payment of the county's adjudicated indebtedness and a deliberate design to deprive its creditors of an efficacious remedy provided by law and incorporated into its contracts; that this court could not ignore actual conditions and ought not, through assumptions out of harmony with patent facts, to facilitate the practical destruction of admitted legal obligations; that the circumstances made it clear that the right to have taxes levied to discharge the judgment collected along with taxes for general county purposes was a substantial and valuable one, and that, accepting as this court must the state court's construction of the laws involved, the amendment could not be sustained as a provision merely for the ordinary and orderly readjustment of administrative matters, but impaired the obligation of the contract under which the judgment creditors' bonds were issued.

In view of the decision of the Kentucky Court of Appeals declaring that an attempt to impose on the Circuit Court or judge thereof the duty of levying and collecting taxes is void under the state constitution, a provision for the satisfaction of bonds in that way, which is made in the Refunding Act of 1878, Acts 1877-78, p. 554, is ineffectual.

238 Fed. Rep. 473, affirmed.

THE case is stated in the opinion.

*Mr. Helm Bruce*, with whom *Mr. Abel Harding* was on the brief, for petitioner, in dealing with the constitutional question, urged the analogy between the case at bar and cases in which the repeal of the remedy of imprisonment for debt has been held not to impair the obligation of existing contracts. *Sturgess* v. *Crowninshield*, 4 Wheat. 122; *Mason* v. *Haile*, 12 Wheat. 370; *Beers* v. *Haughton*, 9 Pet. 329; *Vial* v. *Penniman*, 103 U. S. 717.

Like the threat of imprisonment for debt, the threat

of governmental paralysis overhanging a county if it cannot collect moneys for governmental purposes without collecting them also to satisfy debts is a kind of personal duress; and experience, in both cases, has shown that the duress is not productive of payment. Changes are allowable if reasonable, and of reasonableness the legislature is primarily the judge. If a state of facts could exist which would justify the change of remedy, it must be presumed that it did exist and that the law was passed on account of it. *Antoni* v. *Greenhow*, 107 U. S. 769. The Kentucky legislature may well have found that the provision for collecting all taxes through one collector under one bond was in practice of no value to the county's creditors, while productive of much public harm in the administration of the county government. The change in the law was therefore reasonable. The fact that the new remedy may be less convenient or more tardy than the old one does not render it objectionable. *Bronson* v. *Kinzie*, 1 How. 311. It has often been held that a remedy for collection is not inadequate merely because it does not produce satisfaction promptly. *Rees* v. *City of Watertown*, 19 Wall. 107. The condition of the law existing at the time of the contract, for collection of taxes through one collector, was not part of the contract. *Morley* v. *Lake Shore Ry. Co.*, 146 U. S. 162. All that the creditors have lost is a certain power growing out of the fear of anarchy or disruption of the county government, if the debt is not paid. The creditor has no vested right to the influence of such a fear as a part of his contract.

*Mr. L. A. Faurest*, with whom *Mr. A. E. Richards* and *Mr. Lewis Apperson* were on the briefs, for respondent.

*Mr. Ernest Macpherson*, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Seeking to enforce a long-standing judgment against Taylor County, respondent instituted this proceeding (May, 1916) in the United States District Court at Louisville against County Judge Hendrickson and justices of the peace constituting the Fiscal Court. The judgment was based on bonds authorized by a special act of the Kentucky legislature approved in 1878 and entitled, "An Act for the benefit of Taylor county, empowering it to compromise its debts, issue bonds, and levy and collect taxes to pay the same" (1 Acts 1877–78, p. 554); they had been used to compromise and take up others issued under an Act of 1869, entitled "An Act to incorporate the Cumberland and Ohio Railroad Company" (1 Acts 1869, p. 463).

He asked a "writ of mandamus, commanding and requiring the defendants to levy a tax upon each one hundred dollars of property assessed for valuation in said county for the year 1916, sufficient to pay plaintiff's aforesaid judgment, interest and costs, and that they be required to include in the order making the levy for ordinary county purposes the aforesaid levy for the purpose of paying the aforesaid judgment; and to further direct the said W. T. Hendrickson, as county judge of Taylor county, that when he next appoints a collector whose duty it shall be to collect any or all items by a levy made by the Fiscal Court of Taylor county for any purpose, he shall embrace in said order of appointment a direction to the officer appointed to collect both the levy made to pay this judgment and the levy made and to be made for any item which may be levied by said Fiscal Court, and that said county judge shall continue to so embrace said directions in the same order of appointment until a collector is appointed who shall qualify as such collector, and said

county judge shall exact of him but one and a single bond to cover the collection of the levy made to pay this judgment, as aforesaid, and the item or items of any levy made by the Fiscal Court of Taylor county for any other purpose."

Answering, defendants set up: "That under the statutes of Kentucky, as construed by the Court of Appeals of Kentucky, the County Court of Taylor county has a discretion as to whether it will appoint one person to collect all moneys due the state and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes, such as the payment of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond. And they respectfully submit that this honorable court cannot, by its judgment, control the aforesaid discretion of the County Court of Taylor county, given it by the statutes of Kentucky as construed by the Court of Appeals of Kentucky."

Having heard the cause on demurrer to the answer, the trial court directed that appropriate levies be made during 1916, 1917, and 1918, to raise funds to satisfy respondent's judgment at the same time and by the same order which should provide for other county taxes. And further, "that said defendants and their successors in office, as the Fiscal Court of Taylor county, be, and they are hereby, ordered to place the tax bills for each of the aforesaid levies for collection in the hands of the sheriff of Taylor county, and his successor in office, if any, and

upon default of said sheriff to execute bond and qualify for said office, then W. T. Hendrickson, county judge, and his successor in office, if any, constituting the county court of said county, is directed when he next appoints a collector whose duty it shall be to collect any or all items of any levy made, or which may hereafter be made by the Fiscal Court of Taylor county for any purpose, to embrace in said order of appointment a direction to such officer appointed to collect both the levy made or which may hereafter be made to pay this judgment and the levy made or which may hereafter be made for any and all items which are levied or which may be levied by said Fiscal Court; and said county judge, acting as said county court, shall continue to so embrace such directions in the same order of appointment until a collector is appointed who shall qualify as such collector by executing proper bond; and said county judge shall exact of him but one and a single bond to collect the levy made, or which may hereafter be made to pay this judgment as aforesaid, and the item or items for any levy made, or which may hereafter be made by said Fiscal Court for any other purpose, . . ."

The Circuit Court of Appeals affirmed the action of the District Court, but upon a different view, following *Tucker* v. *Hubbert*, 196 Fed. Rep. 849, and *Graham* v. *Quinlan*, 207 Fed. Rep. 268.

Petitioner maintains that § 4131, Kentucky Statutes, as amended in 1906 and construed by the Court of Appeals (*Commonwealth &c.* v. *Moody*, 150 Kentucky, 571), empowers the Taylor County Court to appoint one collector of all county taxes; or, if so advised, to designate more than one and direct each to collect certain taxes, under a bond covering only those specified; and that such discretion cannot be interfered with by mandamus.

Respondent maintains, that properly construed, § 4131 permits appointment of only one such collector; and that

if the 1906 amendment means what petitioner asserts, it impairs his contract with the county, contrary to the Federal Constitution, Article 1, § 10.

It is stated, without contradiction, that prior to 1906 § 4131 embodied the applicable statutory provision concerning a collector in effect when the refunding bonds were issued. See Kentucky General Statutes, 1873, c. 92, Art. 8, § 2; Kentucky Statutes of 1894, § 4131.

The original section follows:

"Section 4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the county court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required by the sheriff, to be approved by the county court, and if the bond be not executed within said time the appointment of another collector may in like manner be made and qualified."

The amendment of 1906 added these words: "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the county court appointing him."

In *Commonwealth &c.* v. *Wade's Admr.* (Oct., 1907), 126 Kentucky, 791, the Court of Appeals held, that, under the original section, where there was no sheriff only one person could be appointed to collect all county taxes.

In *Commonwealth &c.* v. *Moody* (Nov., 1912), 150 Kentucky, 571, the same court construed the amendment, and held, we are constrained to conclude, notwithstanding some grave doubts, that it authorized appointment of special collectors, each charged with the duty of collecting only some designated part of assessed county taxes. And, of course, this construction by the State's highest court must be accepted.

But so construed, we are of opinion that the amendment would impair the contract under which the bonds were issued, and upon which respondent has a right to rely. It cannot, therefore, be permitted to defeat the remedy theretofore available to him.

The doctrine of this court here to be applied has long been established.

In *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550, 552, 553, through Mr. Justice Swayne, we said:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. . . . Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. . . . It is competent for the States to change

the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void."

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." *Louisiana* v. *New Orleans*, 102 U. S. 203, 206. And see *Seibert* v. *Lewis*, 122 U. S. 284, 294, 295.

Considered in the light of Taylor County's notable and repeated successful efforts to avoid payment of adjudicated indebtedness and also in connection with the present controversy, we think it clear that the right to have any tax levied to discharge respondent's claim collected along with taxes for general county purposes was a substantial and valuable one. The circumstances indicate a deliberate design upon the part of county officials to deprive its creditors of an efficacious remedy provided by law and incorporated into its contracts. To give the amendment the effect claimed would render easier of accomplishment well defined plans obviously designed to defeat proper judicial process and in notorious operation long before its passage. There is here something more than provision for the ordinary and orderly readjustment of administrative matters evidently intended to facilitate public business. Actual conditions cannot be ignored, and

certainly we ought not, through assumptions out of harmony with patent facts and over-nice refinements, to facilitate the practical destruction of admitted legal obligations.

The declarations of the Court of Appeals of Kentucky in *Commonwealth &c.* v. *Wade's Admr.* (pp. 801, 802), are illuminating. Referring to the appointment of a separate collector charged with the sole duty of collecting a special tax ostensibly levied to satisfy a judgment against Taylor County, it said:

"There can be little doubt that the fiscal court, by what they did in the matter, were undertaking to nullify the judgment of the circuit court. The appointment of the special collector, Trotter, of whom nothing was ever afterward heard, and who in no way attempted to qualify as collector, or discharge the duties of that office, point to the fact that this was an arrangement by which the fiscal court could seemingly comply with the judgment, but without, in fact, accomplishing anything. This unlawful purpose could only be successful by the failure of the regular collector of the revenue to do his duty in the premises, and to collect the taxes provided for by the special levy. Such juggling with the decrees and judgments of the courts cannot be tolerated. Ours, as has often been said, is a government of laws, and, if the judgments of the courts enforcing the law may be thus nullified or disregarded either by overt act or culpable negligence, government is at an end. The county is as amenable to the law as an individual, and it is the high duty of its officials to enforce the law wherever and whenever they are its ministers. . . . It seems to us high time that it should be taught as a practical lesson, as well as a theory, that there are none so high as to be above the restraints of the law, or so low as to be beneath its protection."

The argument for petitioner, that the Refunding Act

of 1878 provided an exclusive remedy through application to the Circuit Court in case the County Court should fail in its duty, is not well founded. The decisions of the Court of Appeals in *Muhlenburg County* v. *Morehead*, 20 Ky. Law Rep. 376, and *Pennington* v. *Woolfolk*, 79 Kentucky, 13, make it quite plain that an "attempt to impose on the Circuit Court or judge thereof the duty of levying and collecting taxes is unconstitutional and void" under the jurisprudence of Kentucky.

The judgment of the court below is

*Affirmed.*

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## HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, *v.* CREAGER.

## SAME *v.* GARDNER.

## SAME *v.* HOCKER.

## SAME *v.* STERLING LAND & INVESTMENT COMPANY.

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

Nos. 428, 429, 430, 431. Argued October 11, 1917.—Decided November 5, 1917.

Decided on the authority of *Hendrickson* v. *Apperson*, *ante*, 105.
238 Fed. Rep. 473, affirmed.

*Mr. Helm Bruce*, with whom *Mr. Abel Harding* was on the brief, for petitioner.

*Mr. L. A. Faurest*, with whom *Mr. A. E. Richards* was on the brief, for respondents.

Mr. Justice McReynolds announced the decision of the court:

The essential questions involved in these cases are the same as those considered and decided in No. 427, *ante*, 105. The judgment of the Circuit Court of Appeals in each of them is accordingly

*Affirmed.*

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## KELLEY, TRUSTEE OF THE GIBRALTAR INVESTMENT AND HOME BUILDING COMPANY, BANKRUPT, *v.* GILL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 411. Submitted October 2, 1917.—Decided November 5, 1917.

A court of bankruptcy has no jurisdiction over a suit in equity brought by the trustee of a bankrupt corporation in the State of the corporation's domicile, against a number of its shareholders there residing, for the purpose of collecting from each an ascertained sum of money which by the terms of such shareholder's individual subscription contract had become unconditionally due and payable to the corporation at times specified and without regard to the obligations of other shareholders.

Where the liabilities of the shareholders of a corporation to pay stock subscriptions are several, independent, and unconditional, and no issue with the corporation touching such liabilities is common to the shareholders, the remedy of the corporation, or its trustee in bankruptcy, is by action at law against each shareholder separately; the equitable jurisdiction to avoid multiplicity of actions does not arise merely because the claims are very numerous; and a single

suit by the corporation, or by its trustee in bankruptcy, against many of the shareholders, to collect their subscriptions, cannot be maintained on that ground.

An order of the court of bankruptcy, calling for the payment of shareholders' subscriptions to a bankrupt corporation which, before and independently of the order, were ascertained and payable, adds nothing to the liabilities of the shareholders or to the rights of the trustee in bankruptcy, and cannot justify a single suit by the trustee against many of the shareholders to collect their subscriptions which, in the absence of the order, would not have been cognizable in equity; and neither can an order of the bankruptcy court directing the trustee "to institute a suit in equity" to make such collections confer such equitable jurisdiction.

The amendment to § 47, clause (2) of subdivision *a* of the Bankruptcy Act, made by the Act of June 25, 1910, 36 Stat. 840, § 8, did not confer new means of collecting ordinary claims due the bankrupt.

Where causes of action and citizenship of parties are such that a bankrupt, before bankruptcy, could have sued only in a state court, the bankruptcy court is without jurisdiction to enforce them at the suit of the trustee, even if as a matter of equity jurisdiction the trustee might join all causes in one bill to prevent a multiplicity of suits, while the bankrupt would have been obliged to sue upon each of them independently at law.

Contested claims of a bankrupt corporation against persons alleged to be shareholders, for moneys alleged to be due and payable on subscriptions to the corporate stock, are not to be regarded as property in the possession of the trustee in bankruptcy for the purpose of determining whether the bankruptcy court has jurisdiction to enforce them; nor does the fact that such alleged debtors are shareholders of the corporation enable the trustee to sue them in that forum to collect their subscriptions.

238 Fed. Rep. 996, affirmed.

THE case is stated in the opinion.

*Mr. Wm. B. Ogden* and *Mr. Ralph E. Esteb* for appellant.

*Mr. William Ona Morton*, *Mr. Porter C. Blackburn* and *Mr. A. L. Abrahams* for appellee.

Mr. Justice Brandeis delivered the opinion of the court.

The Gibraltar Investment and Home Building Company, a California corporation with a capital stock of $2,000,000 divided into 20,000,000 shares of ten cents each, was adjudicated a bankrupt in the Southern District of that State. Its debts were about $150,000. Its assets consisted of amounts aggregating $480,971.23 unpaid and overdue on subscriptions to its stock. The subscription of each stockholder was contained in a separate contract which provided for payment unconditionally at specified dates. The court of bankruptcy found that a large majority of the subscribers were non-residents of the district or were insolvent and that the full amount due from resident solvent stockholders would be required to pay the claims of creditors and the cost of administration. It ordered payment of all unpaid subscriptions and directed the trustee in bankruptcy "to institute a suit in equity" to enforce collection thereof. Such a suit was brought in that court against Gill and about 3,000 other residents of the district. A motion to dismiss for want of jurisdiction was sustained; and a decree was entered dismissing the bill. (238 Fed. Rep. 996.) The case comes here on appeal under § 238 of the Judicial Code.

The question presented is of importance in the administration of bankrupt corporations. To enable the trustee, by means of a single suit in the court of bankruptcy, to determine and enforce payment of all amounts due from stockholders would obviously promote the effective administration of the bankrupt estate; but the aggregate burden thereby cast upon the individual stockholders might be correspondingly heavy. Whether the right to choose the court and the place in which litigation shall proceed should be conferred upon the trustee or upon the defendant, is a legislative question with which Con-

gress has dealt in the Bankruptcy Act (1898, c. 541, 30 Stat. 544). Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." But § 23-b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened.[1] The corporation is a citizen of California. It could not have sued these stockholders except in the state courts. The court of bankruptcy was, therefore, without jurisdiction of this suit unless there is something either in the nature of the cause of action or in the relation of stockholders to a corporation or in the character of the suit, which prevents the application of the prohibition contained in § 23-b.

The trustee seeks to sustain the jurisdiction on the ground:

*First:* That the suit—a bill in equity against all resident stockholders—is not one which the corporation could have brought "if proceedings in bankruptcy had not been instituted"; and that a right to bring it arises in the trustee under the amendment of 1910 to § 47, Clause *a* (2).[2]

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[1] The Bankruptcy Act of 1867 as amended conferred expressly upon the federal courts jurisdiction of actions by the assignees for the collection of debts owing the bankrupt or other assets. *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 531. And independently of any statute, a receiver of an insolvent corporation, appointed by a federal court on a judgment creditor's bill under its general equity jurisdiction, had been held in 1895 entitled to sue a debtor of the corporation in that court on the ground that the proceeding was ancillary. *White* v. *Ewing*, 159 U. S. 36.

[2] 1910, c. 412, § 8 (36 Stat. 840).

"Sec. 8. That section forty-seven, clause two, of subdivision *a* of

*Second:* That the suit is a proceeding concerning property in the actual or constructive possession of the trustee or the bankrupt.[1]

The cause of action sued on is the failure of the several stockholders to perform their several unconditional promises to pay definite amounts at fixed times which have elapsed. The amount payable by one is in no way dependent upon what is due from another. The corporation had a separate right against each alleged stockholder; and the remedy open to it was a separate action at law against each. The trustee rightly assumes that the corporation could not have brought a single suit in equity against all these stockholders, although a very large number of actions at law would be required to make collection of the balances unpaid on the stock. There was no common issue between these alleged stockholders and the corporation; and the liability of each would have presented a separate controversy unconnected with that of any other. Thus elements essential to jurisdiction in equity to avoid multiplicity of actions at law by the corporations were lacking. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight,* 244 U. S. 368, 375.[2] That

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said Act as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest: and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

[1] See *Mueller* v. *Nugent,* 184 U. S. 1; *Whitney* v. *Wenman,* 198 U. S. 539, 552.

[2] In *White* v. *Ewing,* 159 U. S. 36, 38, where this court was requested, on certificate from the Circuit Court of Appeals, to answer a question

lack is not supplied by the assignment to the trustee. No other property has become involved. No new issues have been raised. The order of the court of bankruptcy that subscriptions be paid up was not a condition precedent to the existence of the causes of action against the several stockholders; and it added nothing to the rights which had already passed to the trustee. For him, also, the appropriate remedy was a separate action at law against each stockholder. The amendment of 1910 to § 47 of the Bankruptcy Act did not confer new means of collecting ordinary claims due the bankrupt; and the order directing the trustee "to institute a suit in equity" was impotent to confer equity jurisdiction.

But even if there had been equity jurisdiction, the suit could not have been brought in the federal court. The cause of action sued on would still have been the broken promise of the individual stockholder to pay the balance on his stock. That was a cause of action on which the bankrupt could have sued and sued only in the state court. The cause of action would remain the same, although equity, to avoid multiplicity of actions at law, undertook to deal with three thousand separate claims in a single suit. The mere fact that the bankrupt could not have brought the particular suit would not confer on the court of bankruptcy jurisdiction of the suit of the trustee. *Bardes* v. *Hawarden Bank,* 178 U. S. 524.

Nor can the jurisdiction of the court of bankruptcy be maintained on the ground that this is a suit brought to determine a controversy concerning property in the possession of the trustee. He had possession merely of contested claims against alleged stockholders. Many

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arising in an ancillary suit similar in character, brought by a receiver, the opinion of the court called attention to the fact that "no exception was taken to the form of the bill by demurrer or otherwise, but defendants answered, denying liability"; and the fact had been also noted by the Circuit Court of Appeals. (66 Fed. Rep. 2.)

of the defendants may prove not to be stockholders. And even those confessedly stockholders are, in respect to the matters in controversy, as much strangers to the corporation and to the estate as any other person against whom the corporation had a cause of action. The fact that an alleged debtor of a corporation is a stockholder, or even an officer, does not enable the trustee to sue him in the court of bankruptcy. *Park* v. *Cameron*, 237 U. S. 616.

We have no occasion to consider whether a different rule applies in those cases where an order of the court of bankruptcy is a condition precedent to the existence of any liability, either because stockholders are liable only after a call, or because the liability of stockholders is *pro rata* and limited to such sums as may, in the aggregate, be necessary to satisfy the claims of creditors.

*Decree affirmed.*

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## SCHARRENBERG *v.* DOLLAR STEAMSHIP COMPANY ET. AL.

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

No. 192. Argued October 12, 1917.—Decided November 5, 1917.

Inducing and assisting aliens to come from abroad, working as seamen on the way, for *bona fide* service as seamen on an American ship during her voyage from American ports to foreign countries and while she lies in such ports preparatory to or in the course of such voyage, is not an assisting or encouraging of the importation or migration of alien "contract laborers" "into the United States," within §§ 4 and 5 of the Act of February 20, 1907, 34 Stat. 898, as amended by the Act of March 26, 1910, 36 Stat. 263.

As these acts of Congress apply to all alien contract laborers without regard to their origin or nationality, in a suit to enforce their highly penal provisions the circumstance that the aliens in question were Chinese subjects is without significance.

An American ship engaged in foreign commerce is not a part of the territory of the United States in the sense that seamen employed upon her while in American ports or on voyages can be said to be performing labor in this country within the meaning of the statutory provisions above cited.

229 Fed. Rep. 970, affirmed.

THE case is stated in the opinion.

*Mr. H. W. Hutton*, with whom *Mr. J. H. Ralston* and *Mr. W. E. Richardson* were on the briefs, for petitioner.

*Mr. Nathan H. Frank*, with whom *Mr. Irving H. Frank* was on the brief, for respondents.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit to recover penalties upon the claim that the defendants "knowingly assisted and encouraged the importation and migration" of certain alien contract laborers into the United States, for the purpose of having them perform labor therein in violation of §§ 4 and 5 of the Act of Congress of February 20, 1907, 34 Stat. 898.

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, sustaining a general demurrer to the second amended complaint and the case is here for review on certiorari.

The complaint is in nineteen separate counts in identical form and each relating to the employment of a single man. The essential allegations of each count, with a difference only in name of the man employed, are as follows:

That in 1913 the three defendant corporations were

operators of the British steamship "Bessie Dollar," and also of the American steamship "Mackinaw," and that the defendant Abernethy was the master of the former; that when the "Bessie Dollar" was in the port of Shanghai, China, the defendants formed the design of procuring a crew of alien laborers to be transferred to the "Mackinaw" at San Francisco, and to that end, although the "Bessie Dollar" had a full crew of officers and men, they procured one Dung Pau to sign shipping articles as a "purported seaman" for service on her as follows, viz:

"On voyages from Shanghai to San Francisco, there to join the S. S. 'Mackinaw,' or any other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of local authorities. Term of service not to exceed two years. The master has the option to transfer any or all of the within mentioned persons to any other British or Foreign ship bound to Shanghai in the same capacity and at the same rate of wages."

It is also alleged that Pau "worked as a seaman" on the voyage to San Francisco, and on arrival there was discharged from the "Bessie Dollar," and that on the same day, pursuant to the design formed in Shanghai, he signed shipping articles before the United States Shipping Commissioner for the Port of San Francisco for a voyage on the "Mackinaw" as follows:

"From San Francisco, Cal., to Shanghai, China, and such other Asiatic Ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific Coast as the master may direct; final port of discharge shall be Shanghai, China."

And, finally, it is averred that, pursuant to the second contract, Pau worked "as a seaman" on board the "Mackinaw" in the Port of San Francisco for some days, and on the voyage from San Francisco to Grays Harbor,

Washington, and at Grays Harbor until the time of the commencement of this action.

The employment of the man to serve as a *bona fide* seaman on the "Mackinaw" is not questioned, and the allegations of the complaint negative any suspicion that the employment of him in China was a subterfuge adopted for the purpose of unlawfully securing his entry into the United States.

Basing his right upon the allegations of the complaint, which we have thus epitomized, the claim of the petitioner is, that by employing and bringing an alien laborer as a seaman to San Francisco, in the manner described, for the purpose of shipping him, followed by his actually being shipped, as a seaman on board a vessel of American registry, the defendants violated the Act of Congress of February 20, 1907, 34 Stat. 898.

The argument in support of this claim is that the seaman, described in each count of the complaint, was an alien contract laborer; that the steamship "Mackinaw" was a part of the territory of the United States, and that therefore the contracting to bring such alien to San Francisco and to there employ him upon such a vessel was to knowingly assist and encourage the migration of an alien contract laborer into the United States, for the purpose of having him perform labor therein, in violation of the fourth and fifth sections of the act.

The validity of this claim, and of the argument in support of it, calls for the construction of three short provisions of two statutes.

Section 2 of the Act of 1907, as amended in 1910 (36 Stat. 263), furnishes this definition of "contract laborers," which must be read into §§ 4 and 5 of the Act of 1907:

"Persons . . . who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written

or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled."

Section 4 makes it a misdemeanor for any corporation "in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States."

Section 5 imposes severe penalties for every violation of the act "by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States."

Thus a contract laborer is one who under the conditions described in the first of these statutes comes "*to perform labor in this country*," and the penalties denounced by the sections of the other act are against persons who knowingly assist or induce the importation or migration of such laborer "*into the United States.*"

The purpose of this alien labor legislation was declared by this court almost thirty years ago, in *Holy Trinity Church* v. *United States*, 143 U. S. 457, to be, to arrest the bringing of an ignorant, servile class of foreign laborers into the United States, under contract to work at a low rate of wages, and thus reduce other laborers engaged in like occupations to the level of the assisted immigrant.

Having these terms of the statutes and this history in mind, can it with reason be said that the men shipped on the "Mackinaw" as "seamen" were "laborers," and that when employed upon that vessel in foreign commerce they were performing labor "in this country" within the meaning of the acts?

In familiar speech a "seaman" may be called a "sailor" or a "mariner," but he is never called a "laborer," although he doubtless performs labor when assisting in the care and management of his ship; and a "seaman" is defined in the United States statutes applicable to "Merchant Seamen," as being, any person (masters and appren-

tices excepted) who shall be employed to serve in any capacity on board a vessel, Rev. Stats., § 4612. In the shipping articles, which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are designated as "seamen" or "mariners." Thus, neither in popular nor in techinical legal language would the men employed on the "Mackinaw" be called or classed as "laborers," and such seamen are not brought "into this country" to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them or on another, as soon as employment can be obtained.

Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring "in the United States" or "performing labor in this country." It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, vol. I, § 174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible. Thus the seamen employed on the "Mackinaw" were not within either the spirit or the letter of the law on which the petitioner bases his action and in any point of view his contention is fanciful and unsound and must be denied.

In the result thus reached we are adopting the construction given to another section of this Act of Congress of 1907 in *Taylor* v. *United States*, 207 U. S. 120, and we are approving the construction placed upon the sections we are here considering of the act, and upon earlier acts

relating to the immigration of alien laborers, in the long-standing decisions of many lower courts and of the Department of Justice, in all of which it is held that seamen employed in foreign commerce cannot be considered alien contract laborers within the terms of the various statutes. *United States* v. *Sandrey*, 48 Fed. Rep. 550; *United States* v. *Burke*, 99 Fed. Rep. 895; *Moffitt* v. *United States*, 128 Fed. Rep. 375; *United States* v. *Jamieson*, 185 Fed. Rep. 165; Immigration—Deserting Seamen—23 Opinions of the Attorney General, 521; Chinese Seamen—Transfer of Crew—Alien Laborers, 24 Opinions of the Attorney General, 553. This construction of the act has also long been applied by the Department of Labor in its practical administration of the law. See Immigration Rules 1911, No. 10, Subdivision 1, (a), (c), and (d); subdivision 3.

The fact that the aliens in this case were Chinese subjects is without significance. The suit is to enforce the highly penal provisions of acts of Congress which apply to all alien contract laborers without regard to their origin or nationality.

It results that the judgment of the Court of Appeals must be

*Affirmed.*

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## BIDDINGER *v.* COMMISSIONER OF POLICE OF THE CITY OF NEW YORK.

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

No. 426. Argued October 10, 11, 1917.—Decided November 5, 1917.

Article IV, § 2, of the Constitution intends, not to express the law of extradition as usually prevailing among independent nations, but to provide a summary executive proceeding whereby the States may promptly aid one another in bringing accused persons to trial. Its

provisions, and the statutes passed in execution of them, should be construed liberally to effectuate this purpose.

A person indicted in due form for an offense against the laws of a State, who was present in that State at the time when the offense is so alleged to have been committed and subsequently leaves it, becomes, within the meaning of the Federal Constitution and laws, a fugitive from justice; and upon the making of demand, accompanied by certified papers, as required by § 5278 of the Revised Statutes, the governor of the State in which he is found must cause him to be arrested and delivered for extradition into the custody of the authorized agent of the State whose laws are alleged to have been violated.

An accused person arrested in interstate extradition proceedings, who sues out *habeas corpus* to obtain his discharge on the ground that he is not a fugitive from justice, is not entitled to introduce evidence to prove that after the date of the alleged offense he was "usually and publicly resident" within the demanding State for a time sufficient to bar the prosecution under its limitation statutes. The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases; and this court has frequently decided that matters of defense can not be heard on *habeas corpus* to test the validity of an arrest in extradition, but must be heard and decided, at the trial, by the courts of the demanding State.

Affirmed.

THE case is stated in the opinion.

*Mr. Walter H. Pollak*, with whom *Mr. Charles H. Griffiths* and *Mr. Moses H. Grossman* were on the brief, for appellant.

*Mr. Louis Marshall* and *Mr. Robert S. Johnstone*, with whom *Mr. Edward Swann*, *Mr. George F. Turner* and *Mr. Isidor J. Kresel* were on the briefs, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

In various indictments returned in the State of Illinois on May 5th, 1916, against appellant, Guy B. Biddinger, he was charged with having committed crimes in that

State at various times between the 15th day of October, 1908, and the 2nd day of September, 1910. Each of these indictments contained the allegation required by the Illinois practice that "the said Guy B. Biddinger since the 10th day of May, 1911, and from thence hitherto, was not usually and publicly a resident within this State of Illinois."

Transmitting the papers required by the United States statutes, duly certified, the Governor of Illinois demanded of the Governor of New York the extradition of Biddinger as a fugitive from justice. The Governor of New York, after according the accused a full hearing, issued to the Commissioner of Police of the City of New York an executive warrant for his arrest and delivery to the agent authorized to receive and convey him to Illinois, there to be dealt with according to law. Upon this warrant the appellant was taken into custody.

Thereupon, on the petition of the appellant, a writ of *habeas corpus* issued from the District Court for the Southern District of New York, and the Commissioner of Police, making return thereto, gave the executive warrant as his justification for the imprisonment and detention of the accused. An elaborate traverse was filed to this return, but, upon the hearing, the court discharged the writ and remanded Biddinger to the custody of the appellee.

On appeal to this court thirty-five errors are assigned, but on argument only one is relied upon, viz: The action of the District Court in excluding evidence offered to prove that the accused had been, publicly and usually resident within the State of Illinois continuously for more than three years after the dates on which he was charged with having committed the crimes. This evidence was tendered for the claimed purpose of proving that Biddinger was not a fugitive from justice and therefore was not subject to extradition.

This claim of error requires the consideration of § 2 of Art. IV, of the Constitution, and of § 5278 of the Revised Statutes, of the United States, as well as §§ 315 and 317 of the statutes of the State of Illinois, which read as follows:

Constitution, Art. IV, § 2: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

United States Revised Statutes, § 5278: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. . . ."

The statutes of Illinois [Hurd's Rev. Stats., 1915–16] are:

Section 315. "For other felonies. § 3. All indictments for other felonies [including the crimes charged] must be found within three years next after the commission of the crime, except as otherwise provided by law."

Section 317. "Time of absence not counted. § 5. No period during which the party charged was not usually

and publicly resident within this state shall be included in the time of limitation."

Relying upon these constitutional and statutory provisions, the argument is pressed upon our attention with much plausibility that one who continues "usually and publicly" resident within the State of Illinois for a longer period than that within which, under the laws of that State, he may be prosecuted for the crimes charged, cannot, with due regard to the meaning of the language used, be said to "flee" or "to have fled," from justice, or to be "a fugitive from justice" if he afterwards leaves that State and is found in another.

Thus is presented the question whether the order remanding the accused into custody to be conveyed to the State of Illinois for trial is in violation of the rights secured to him by the Federal Constitution and laws which we have quoted.

The provision of the Federal Constitution quoted, with the change of only two words, first appears in the Articles of Confederation of 1781, where it was used to describe and to continue in effect the practice of the New England Colonies with respect to the extradition of criminals. *Kentucky* v. *Dennison*, 24 How. 66. The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one State an asylum against the processes of justice of another. *Lascelles* v. *Georgia*, 148 U. S. 537. Such a provision was necessary to prevent the very general requirement of the state constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than a defense for the innocent, which it was intended

to be. Its design was and is, in effect, to eliminate, for this purpose, the boundaries of States, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land.

Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose, with the result that one who leaves the demanding State before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, or who, having committed a crime in one State, returns to his home in another, is nevertheless decided to be a fugitive from justice within their meaning. *Roberts* v. *Reilly*, 116 U. S. 80; *Appleyard* v. *Massachusetts*, 203 U. S. 222; *Kingsbury's Case*, 106 Massachusetts, 223.

Courts have been free to give this meaning to the Constitution and statutes because in delivering up an accused person to the authorities of a sister State they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution but in the manner provided by the State against the laws of which it is charged that he has offended.

The discussion of these provisions of the Constitution and statutes for now much more than a century has resulted in the formulation of this conclusion, more than once announced by this court (*Appleyard* v. *Massachusetts*, 203 U. S. 222, 227):

"A person charged by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within

the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the Supreme law of the land, which may not be disregarded by any State."

The appellant admits: That he was in the State of Illinois at the time it is charged that he committed the crimes for which he was indicted; that the indictments are in the form, and are certified as, required by law, and that he was found in the State of New York. This satisfies the requirement of the statute and by its terms makes it the duty of the Governor of New York to cause Biddinger to be arrested and given into the custody of the Illinois authorities.

With these facts and this legal history before us, what shall be said of the claim that in a *habeas corpus* hearing the court erred in not permitting the appellant to introduce evidence tending to prove that the prosecution was barred by showing that he was "usually and publicly" in the demanding State during the three years next after the date at which the crime is alleged to have been committed, and that he therefore could not be a fugitive from justice and subject to extradition?

The scope and limits of the hearing on *habeas corpus* in such cases has not been, perhaps it should not be, determined with precision. Doubt as to the jurisdiction of the courts to review at all the executive conclusion that the person accused is a fugitive from justice has more than once been stated in the decisions of this court, *Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilly*, 116 U. S. 80; *Appleyard* v. *Massachusetts*, 203 U. S. 222; but the question not being necessary for the disposition of the

cases in which it is touched upon, as it is not in this, it is left undecided. This much, however, the decisions of this court make clear; that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding State.

The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases, *United States* v. *Cook*, 17 Wall. 168; and the form of the statute in Illinois, which the appellant seeks to rely upon, makes it especially necessary that the claimed defense of it should be heard and decided by the courts of that State. *Pierce* v. *Creecy*, 210 U. S. 387; *Charlton* v. *Kelly*, 229 U. S. 447; *Drew* v. *Thaw*, 235 U. S. 432; *Reed* v. *United States*, 224 Rep. Fed. 378; *Depoilly* v. *Palmer*, 28 App. D. C. 324.

It results that the decision of the District Court must be

*Affirmed.*

# ST. LOUIS SOUTHWESTERN RAILWAY COMPANY ET AL. *v.* UNITED STATES AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 199. Argued October 12, 15, 1917.—Decided November 12, 1917.

Meanings and relations of the terms "through route," "through rate," "joint rate," "sum of the locals," "division of joint rate," "rate-breaking point" and "combination rate" explained and defined.

Railroad companies, which, though chartered by different States, are all operating interstate railroads and otherwise engaged in interstate commerce, and which have established a through route between interstate points with a through rate consisting of the sum of the local rates, or of a combination of a local rate with a joint rate to an intermediate point, are not deprived of their rights under the Fifth Amendment when required, by an order of the Interstate Commerce Commission, to substitute a joint through rate (of reasonable amount) for the through rate thus existing, and to maintain the same through route or, at their election, substitute a modification of it which the Commission has found preferable.

Such an order is within the power conferred upon the Commission by the Act to Regulate Commerce, as amended.

The Commission's order, establishing through routes and a joint rate on logs and lumber from the "blanket territory" of Arkansas to Paducah, Kentucky, which permitted complaining carriers to maintain their route via Cairo, Illinois, or to substitute a route via Memphis, Tennessee, which the Commission found to be the more natural one, the joint rate fixed by the Commission to be the same in either case, is consistent with that provision of § 15 of the Act to Regulate Commerce, forbidding the Commission to embrace in a through route "less than the entire length" of a railroad "unless to do so would make such through route unreasonably long."

The power of Congress and of the Commission to prevent interstate carriers from discriminating against a particular locality applies to carriers the lines of which do not reach the locality but which bill through traffic to it over connecting lines.

An order of the Commission requiring carriers to reduce existing through rates by establishing joint rates, or, in the alternative, new through routes with joint rates, rests on § 15 of the Act to Regulate Commerce. It is not to be regarded as primarily an order to remove discrimination in violation of § 3, even though discrimination in rates as between two localities may have furnished the occasion for the complaint upon which the Commission acted and may have afforded reason for the rate fixed by its order.

234 Fed. Rep. 668, affirmed.

THE case is stated in the opinion.

*Mr. Henry G. Herbel,* with whom *Mr. Daniel Upthegrove, Mr. John R. Turney, Mr. Fred G. Wright, Mr. W. F. Dickinson, Mr. W. T. Hughes* and *Mr. Henry Moore* were on the briefs, for appellants.

*Mr. Assistant Attorney General Frierson,* with whom *Mr. Alex Koplin* was on the briefs, for the United States.

*Mr. Charles W. Needham,* with whom *Mr. Joseph W. Folk* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the District Court of the United States for the Western District of Kentucky by three railroad companies [1] against the United States and the Interstate Commerce Commission. Plaintiffs seek to enjoin the enforcement of and to set aside an order entered by the Commission on January 21, 1916, directing these and other carriers to establish certain through routes and joint rates on logs and lumber to

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[1] A fourth carrier, the Louisiana & Arkansas Railway Company, was permitted to intervene as party plaintiff and joined in the appeal; but the special facts concerning it are not of importance.

Paducah, Kentucky, and reducing existing rates. An application was made for a temporary injunction. Both defendants moved to dismiss the bill. The Commission also answered. The case was fully heard upon the evidence before three judges "as upon final submission upon the merits"; a decree was entered dismissing the bill without costs (234 Fed. Rep. 668); and the case comes to this court by direct appeal.

Paducah is situated on the south bank of the Ohio River, 42 miles above Cairo, Illinois, which lies on the north bank of the Ohio near its confluence with the Mississippi. An important business in each city is manufacturing and jobbing lumber. They compete in both the buying and the selling markets. Each draws its supplies of logs and lumber, in part, from the extensive region lying west of the Mississippi and south of the Arkansas River, known in the trade as the "blanket territory." [1] The distances from this region to Paducah are not greater than to Cairo; but, prior to the order of the Interstate Commerce Commission herein complained of, the through freight rate on logs and lumber was 22 cents per hundred pounds to Paducah while it was only 16 cents to Cairo.

The principal railroads serving the "blanket territory" are the St. Louis and Southwestern, the St. Louis, Iron Mountain and Southern, and the Chicago, Rock Island and Pacific. The first two have their own lines from the "blanket territory" to Cairo; but can reach Paducah only over a connecting line. The Rock Island reaches both Cairo and Paducah only over a connecting line. The most direct route to Paducah from the lines of each

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[1] This region is called "blanket territory," because a "blanket" rate on logs and lumber is made from all shipping points within the territory to points beyond. That is, the rate is the same regardless of the distance hauled *within* the territory, which extends about 400 miles from north to south and 300 from east to west.

of the three complainants is via Memphis, Tennessee; but prior to the order of the Interstate Commerce Commission herein complained of only the Rock Island had established its through route via Memphis. The other two companies had through routes to Paducah via Cairo. These, which had been in operation for many years, are materially longer than possible routes via Memphis; and also necessitate crossing the Ohio as well as the Mississippi. Both the Cairo and the Memphis routes to Paducah involve using as connecting carrier the Illinois Central, which has a line extending from Memphis through Paducah to Cairo.[1] The 22-cent rate from the "blanket territory" to Paducah via Cairo is made by adding to the "joint rate" or "local" of 16 cents to Cairo, the local rate of 6 cents from Cairo to Paducah, Cairo being a "rate-breaking" point.[2] The connection of the Rock

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[1] The distance on the Illinois Central from Memphis to Paducah is about 169 miles. The Nashville, Chattanooga and St. Louis Railroad also has a line from Memphis to Paducah, but it is much longer.

[2] A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. *Through Routes and Through Rates*, 12 I. C. C. 163, 166. Ordinarily "through rates" lower than "the sum of the locals" are "joint rates." Prior to the amendment of the Act to Regulate Commerce (1906, c. 3591, § 4, 34 Stat. 584, 590) authorizing the Commission to establish through routes and joint rates, all "joint rates" were (as most still are) the result of agreements between carriers, which fix also the "divisions"; that is, the share of the "joint rate" to be received by each. *New York, New Haven & Hartford R. R. Co.* v. *Platt*, 7 I. C. C. 323, 329. The bases of such divisions differ greatly in practice. Sometimes all the carriers participate in the joint rate in the proportions which their local rates bear to the sum of the locals;

Island with the Illinois Central at Memphis is made under similar conditions.

On February 8, 1915, the Paducah Board of Trade filed with the Interstate Commerce Commission a complaint charging (1) that the 22-cent rate to Paducah was unjust and unreasonable; (2) that it was discriminatory and gave an undue preference and advantage to Cairo; and (3) that the route from the "blanket territory" via Cairo was unduly long as compared with the route via Memphis. The complainant asked that through routes be established via Memphis "with joint rates . . . which shall not exceed the rates contemporaneously charged for the transportation of logs and lumber from the same points to Cairo."

Fifty-three railroads, which participate in this traffic, including those named above, were joined as respondents. Hearings were duly had; much evidence was introduced;

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in other words, the percentage of reduction from the local rate is the same for each. Sometimes one carrier is allowed the full local, while the rate of another is seriously reduced. The share of each being a matter of bargain, it may be fixed at an arbitrary amount. *Chamber of Commerce of Milwaukee* v. *Flint & Pere Marquette R. R. Co.*, 2 I. C. C. 553, 567-8. In constructing the joint rates the charge per mile ordinarily decreases with the increase of the length of haul. But even where the through route and through rates are matters of express agreement between the carriers, a continuous "joint rate" does not always extend from the point of origin to point of destination. There may be, on the "through route," an intermediate point at which, in common railroad practice, the rate "breaks." That is, the "joint rate" from the point of origin ends at this "rate-breaking point" and there is charged for the distance beyond the same local rate or joint rate that would have been charged had the business originated at this intermediate point. That is, instead of a "joint through rate," there is a "combination." The so-called "Ohio River crossings" or "gateways" are among the "rate-breaking" points. See *Rates on Lumber from Southern Points*, 34 I. C. C. 652, 654; *Lehigh Portland Cement Co.* v. *B. & O. S. W. R. R. Co.*, 35 I. C. C. 14, 17; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 90.

and on January 21, 1916, the Commission filed a report in which it found:

(*a*) That the 16-cent rate to Cairo was not unduly low;

(*b*) That the 22-cent rate to Paducah was unreasonable to the extent that it exceeded the existing rate to Cairo;

(*c*) That the existing disparity of rates gave to Cairo an undue preference and advantage over Paducah;

(*d*) That the distances to Paducah via Cairo were so much greater than the distances via Memphis "that the natural route is via Memphis rather than via Cairo";

(*e*) That through routes and joint rates not higher than the Cairo rate should be established from the "blanket territory" to Paducah via either Memphis or Cairo.

An appropriate order was entered prohibiting the carriers from continuing to charge the existing rate to Paducah and directing them to establish and thereafter maintain through routes to Paducah via either Memphis or Cairo, and joint rates "not in excess of the rates at present in effect . . . to Cairo." *Paducah Board of Trade* v. *Illinois Central R. R. Co.*, 37 I. C. C. 719.[1]

Before the effective date of the order, this bill was filed. It sets forth sixteen reasons for holding the order void; and most of them are repeated in the assignment of errors in this court. One is a charge, left wholly unsupported by evidence, that a 16-cent rate to Paducah is confiscatory. Eight deal with the sufficiency or weight

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[1] The log and lumber rates from blanket territory to Cairo and Paducah or competitive points had been investigated by the Commission also in earlier proceedings. *Rates on Lumber from Southern Points*, 34 I. C. C. 652; *Wisconsin & Arkansas Lumber Co.* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 33 I. C. C. 33; *Paducah Board of Trade* v. *Illinois Central R. R. Co.*, 29 I. C. C. 583; *Lumberman's Exchange of St. Louis* v. *Anderson & Saline River R. R. Co.*, 24 I. C. C. 220; *Chicago Lumber & Coal Co.* v. *Tioga Southeastern Ry. Co.*, 16 I. C. C. 323; *Central Yellow Pine Association* v. *Illinois Central R. R. Co.*, 10 I. C. C. 505. See also *St. Louis, Iron Mountain & Southern Ry. Co.* v. *United States*, 217 Fed. Rep. 80.

of the evidence before the Commission, of which there was ample to sustain its findings. Some relate to the form of the order, which was clearly appropriate. Few, only, of the errors assigned require discussion here.

*First:* The carriers deny that the Commission has the power to compel them to establish through routes and joint rates. It is admitted that all the complaining carriers were interstate railroads and were engaged otherwise in interstate commerce. It is undisputed that for many years there has been over the lines of two of these carriers a through route to Paducah via Cairo, and over the other a through route via Memphis; and that on all the lines there were through rates. But it is contended that if a carrier establishes a through route and joint rate with its connections, it creates in effect a relation of partnership; that this relation must be entered into, if at all, voluntarily; and that to "compel a carrier chartered by a State" to enter into such a relation with a carrier chartered in another State violates the Fifth Amendment of the Federal Constitution.

The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills,* 219 U. S. 186. No reason appears why the regulation might not take the form of compelling the substitution of a joint rate for a through rate made by a combination of local rates or by a combination of a local rate with a joint rate to an intermediate point. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 184. So far as the order relates to the existing routes via Cairo and Memphis respectively it did no more than this. It substituted for the through rate of 22 cents (made up on two of the lines of a combination of a joint rate or local rate of 16 cents to Cairo with a local rate on the Illinois Central of 6 cents from Cairo to Paducah), a joint rate of 16 cents from

the "blanket territory" to Paducah; thus reducing the existing through rate. The carrier connecting at Cairo (the Illinois Central) and all but one of the carriers connecting with these complainants in the "blanket territory" acquiesced in the order establishing this joint rate. The Illinois Central's share of the 22-cent rate was its local rate of 6 cents. If these complaining carriers cannot reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under § 15 of the Act to Regulate Commerce, apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through route and a joint rate of 16 cents to Paducah. If they elect to continue the existing through route via Cairo, the order operates merely to introduce reduced joint rates. If they elect to discontinue the through routes via Cairo, the order operates to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify.

That Congress has power to authorize the Commission to enter an order for through routes and joint rates, like that here complained of, has been heretofore assumed.[1] No reason is shown for questioning its existence now. The provisions of the Act to Regulate Commerce as amended (1887, c. 104, §§ 1, 12, 15, 24 Stat. 379; 1906, c. 3591, § 4, 34 Stat. 584; 1910, c. 309, § 12, 36 Stat. 539, 552) are also appropriate to confer this authority upon

[1] *O'Keefe* v. *United States*, 240 U. S. 294; *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538.

the Commission. And there is no foundation in fact or law for the contention of complainants that the Commission disregarded the provision of § 15, by which it is prohibited from embracing in a through route "less than the entire length" of a railroad "unless to do so would make such through route unreasonably long." Whether a carrier engaged solely in intrastate commerce could be compelled by Congress to enter interstate commerce; or even whether a carrier, having entered into some interstate commerce, may be compelled to enter into all, we have no occasion to consider;[1] for the complaining carriers had voluntarily entered into the particular class of interstate commerce with Paducah to which alone the order related.

*Second:* Carriers insist also that the order is void on the ground that, since their "rails do not reach Paducah, they cannot be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.*

Furthermore, the order in the case at bar is not merely

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[1] But see *Michigan Central R. R. Co.* v. *Michigan Railroad Commission,* 236 U. S. 615, 631; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota,* 186 U. S. 257; *Wisconsin, Minnesota & Pacific Railroad* v. *Jacobson,* 179 U. S. 287. Compare *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.,* 228 U. S. 593, 595; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace,* 223 U. S. 481, 491.

one to prevent discrimination. Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624. The order here complained of gives the carriers no such option. It directs that the rates to Paducah shall be "not in excess of the rates at present in effect from the same points or groups to Cairo, Ill." In other words, the Commission, having found the 22-cent rate unduly high, reduces it to 16 cents, by establishing joint through rates. The injury resulting from discrimination was doubtless the reason which induced the Paducah Board of Trade to institute the proceedings; and the Commission may have considered the existence of the lower rate to Cairo persuasive evidence that the 22-cent rate to Paducah was unreasonably high and the resulting discrimination strong reason for establishing the 16-cent joint rate. But the order is strictly one under § 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of § 3.

*Decree affirmed.*

# HARTFORD LIFE INSURANCE COMPANY *v.* BARBER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Nos. 252, 253. Argued November 5, 6, 1917.—Decided November 19, 1917.

In a suit against a life insurance company by its certificate holders, it was adjudged by a court of the State of the company's domicile and in which were its funds that, subject to a limitation as to amount, the company might keep up as theretofore a mortuary fund which it had been its custom to replenish and maintain through assessments made by the executive officers under supervision and control of the board of directors. In a later action in a court of another State, such an assessment was held void, in spite of the judgment, upon the grounds, first, that the assessment exceeded the power of the company and the limit fixed by the judgment, and, second, that it was not made by the board of directors as required by the company's charter. *Held,* that the second ground of the decision, even if it did not itself deny full faith and credit to the judgment and the charter, was at most a mere make weight, which could not be treated as an independent local basis of decision, and that this court was therefore at liberty to review and reverse the decision upon the first ground, as one denying full faith and credit to the judgment with respect to the amount of the assessment.

The Connecticut judgment considered in *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662, providing that any excess in the mortuary fund above the average amount of the four preceding quarterly assessments, in the Men's Division of the Insurance Company's Safety Fund Department, must be distributed to certificate holders by crediting such excess on account of the next succeeding assessment, authorized the company, in assessing for a given quarter, to levy an amount sufficient not only to reimburse the fund for losses accrued at the time of levy, but also sufficient, when added to the balance on hand, to maintain the fund up to the average amount of the last four quarterly assessments, for the purpose of meeting future losses promptly, as they occurred. In holding that an assessment was void because it exceeded the difference between such average amount and the amount remaining in the fund after de-

ducting death losses up to the time of levy only, the Supreme Court of Missouri failed to accord the judgment full faith and credit.

269 Missouri, 21, reversed.

The cases are stated in the opinion.

*Mr. James C. Jones*, with whom *Mr. F. W. Lehmann* was on the briefs, for plaintiff in error.

*Mr. Charles E. Morrow*, with whom *Mr. Robert Kelley* was on the briefs, for defendant in error, while contending that the court below had correctly applied the Connecticut judgment, urged that this court was without jurisdiction because the decision rested on an independent non-federal ground, viz: That the assessment was void because not levied by proper authority, and because no record was made or kept of it. The charter of the company places the management of its affairs in its board of directors and the assessment made by the president and secretary was a nullity. It called for the exercise of discretion on the part of the directors and this power cannot be delegated. *Farmers Milling Co.* v. *Insurance Company*, 127 Iowa, 314; *Farmers Mutual Ins. Co.* v. *Chase*, 56 N. H. 341; *Garretson* v. *Equitable &c. Assn.*, 93 Iowa, 403; Bacon on Benefit Soc. & Ins., § 377. No such delegation was attempted. It is incompetent to show that it was a custom of the president and secretary to make assessments without authority, unless it further appears that the insured had knowledge of it. Niblack on Benefit Societies, § 252; *Underwood* v. *Legion of Honor*, 66 Iowa, 134.

The assessment in one of the suits was void because it included money for taxes erroneously claimed to be exacted under the laws of Missouri.

Counsel also contended that the court below gave full faith and credit to the company's charter, as to the powers

of the officers and directors respecting assessments, and that the constitutional objection in this regard was made too late under the Missouri practice; also that this court had no jurisdiction to pass upon the questions whether there was a delegation and whether the insured knew of the alleged custom if it existed, etc., because they involved determination of fact, which this court may not do on writ of error.

Mr. Justice Holmes delivered the opinion of the court.

These are suits upon two certificates of qualified life insurance issued to Frank Barber and payable at his death to his wife, the plaintiff—defendant in error here. The defence in both suits was the same; that Barber failed to pay a mortuary assessment levied on January 29, 1910, known as quarterly call No. 126, and that the failure avoided the policies by their terms. It set up further that, in a suit brought by one Dresser on behalf of himself and all certificate holders, including the plaintiff, in the Connecticut court having jurisdiction over the defendant and the mortuary fund from which alone, by the contract, death losses were payable, it was adjudicated on March 23, 1910, that if a certificate holder failed to pay a mortuary assessment the company could not pay the insurance in case of his death.

At the trial the Connecticut judgment was offered and excluded and the jury were instructed that the defendant must prove that an assessment was made by the directors of the company and that it was not for a larger amount than was necessary to pay death losses up to that time after giving Barber credit for his *pro rata* share in the mortuary fund; that if there was money on hand in that fund, and unless the defendant had "so proved," it could not declare the insurance forfeited on that account. This instruction was in the teeth of the Connecticut adjudica-

tion which held that it was proper and reasonable for the company to hold a fund collected in advance in order to enable it to pay losses promptly. The plaintiff recovered judgments and these were sustained by the Supreme Court of Missouri. 269 Missouri, 21. The defendant says that it was denied its constitutional rights by a failure to give due faith and credit to the judgment of the Connecticut court.

The transactions were of the class before this court in *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662, which arose on a similar contract and a failure to pay the call next after the one in question here. In that case the character of the business arrangements was explained and it was decided that the Dresser judgment binds all certificate holders of the class to which Barber belonged. The Missouri court, indicating some dissatisfaction with the company and the judgments in Connecticut and here, sought to justify a different result by distinctions that seem to us unreal. The first is that at the end of the quarter for which the assessment was levied, that is on December 31, 1909, after deducting all losses in respect of which the assessment was laid, there was still left, of the fund out of which the losses were paid, over $50,000, which the assessment would increase to over $375,000; that $300,000 was all that was allowed by the contract "as modified by the [Connecticut] judgment"; and that the assessment therefore was excessive and void. The other distinction attempted is that the charter requires all of the affairs of the company to be managed and controlled by a board of not less than seven directors, and that the assessment was not levied by the board.

It is obvious on the evidence that this assessment was levied in the usual way adopted by the company and tacitly sanctioned by the Connecticut judgment. Quarterly mortality calls were provided for and were regularly made in this way for the appointed dates. A jury would

have been justified, at least, in finding that the call was made by the directors within the meaning of the instructions although it did not appear that the directors went over the figures of the officers who made it up, and voted it specifically. It clearly was made under the directors' management and control. The verdicts for the plaintiff hardly could have been rendered except upon the other ground opened by the instructions, that the assessment was for a larger amount than was necessary to pay death losses up to that time. Upon that ground the verdicts were a matter of course, and we regard the reference to the directors' part in the assessment as a make weight which adds nothing to the substantial basis for the decision below. See *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, 589. The powers given by the Connecticut charter are entitled to the same credit elsewhere as the judgment of the Connecticut court. *Supreme Council of the Royal Arcanum* v. *Green*, 237 U. S. 531, 542.

As we have said the instruction was in the teeth of the Connecticut judgment by which under the *Ibs Case* the plaintiff was bound. The verdicts were based upon fundamental error, and the only real question in the case is whether it appears as matter of law that under correct instructions the same result must have been reached. The Connecticut judgment was that any excess in the mortuary fund above the average of the four preceding quarterly assessments in the Men's Division of the Safety Fund Department (taken for the purposes of these cases to be $300,000), shall be distributed to certificate holders in diminution of assessments by crediting the excess on account of the next succeeding assessment. This contemplates a possible excess and does not limit the assessment to a sum equal to the difference between $300,000 and the fund on hand after deducting the deaths that had occurred at the time when the assessment was levied,

as was assumed by the Missouri court. Deaths were occurring between the time of the levy and the time when so much of it as might be paid would be paid in. The assessment was for the purpose of keeping up a fund of $300,000 to meet deaths promptly, as they occurred. Without giving the figures in detail it is enough to say that it clearly appears that the amount of the assessment, $322,378.48, was not in excess of what the subsequently rendered Connecticut judgment allowed. It necessarily was levied as an estimate. There was no probability that it would lead to even a temporary excess over $300,000, to be applied to the next assessment laid. We are of opinion that full faith and credit was not given to the Connecticut record and that for that reason the present judgments must be reversed.

*Judgments reversed.*

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## GOULD *v.* GOULD.

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

No. 41. Submitted November 8, 1917.—Decided November 19, 1917.

Alimony paid monthly to a divorced wife under a decree of court is not taxable as "income" under the Income Tax Act of October 3, 1913, 38 Stat. 114, 166.

In the interpretation of taxing statutes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. Doubts are resolved against the Government.

168 App. Div. 900, affirmed.

The case is stated in the opinion.

*Mr. Martin W. Littleton* and *Mr. Owen N. Brown* for plaintiff in error.

*Mr. John L. McNab* for defendant in error.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

A decree of the Supreme Court for New York County entered in 1909 forever separated the parties to this proceeding, then and now citizens of the United States, from bed and board; and further ordered that plaintiff in error pay to Katherine C. Gould during her life the sum of three thousand dollars ($3,000.00) every month for her support and maintenance. The question presented is whether such monthly payments during the years 1913 and 1914 constituted parts of Mrs. Gould's income within the intendment of the Act of Congress approved October 3, 1913, 38 Stat. 114, 166, and were subject as such to the tax prescribed therein. The court below answered in the negative; and we think it reached the proper conclusion.

Pertinent portions of the act follow:

"SECTION II. A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; . . .

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce,

or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent: . . ."

In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. *United States* v. *Wigglesworth,* 2 Story, 369; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468, 474; *Benziger* v. *United States,* 192 U. S. 38, 55.

As appears from the above quotations, the net income upon which subdivision 1 directs that an annual tax shall be assessed, levied, collected and paid is defined in division B. The use of the word itself in the definition of "income" causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed.

In *Audubon* v. *Shufeldt,* 181 U. S. 575, 577, 578, we said: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. . . . Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; . . ."

The net income of the divorced husband subject to taxation was not decreased by payment of alimony under the court's order; and, on the other hand, the sum received by the wife on account thereof cannot be regarded as income arising or accruing to her within the enactment.

The judgment of the court below is

*Affirmed.*

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## WEAR, IMPLEADED SUB. NOM. WEAR SAND COMPANY, ET AL. *v.* STATE OF KANSAS EX REL. BREWSTER, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 30. Argued November 12, 1917.—Decided November 26, 1917.

A specific intent to accept the tidal test of navigability, and so to extend riparian ownership *ad filum aquæ* on non-tidal streams which are navigable in fact, is not predicable of a statute adopting the common law of England in general terms only, particularly if enacted later than the decision in *The Genessee Chief*, 12 How. 443. Hence such a statute, passed by Kansas Territory in 1859 and retained by the State, affords no basis even in purport for denying the power of the Supreme Court of Kansas to apply the test of navigability in fact, as part of the common law, in determining the ownership of a river bed as between the State and riparian owners deriving title under a federal patent issued, before statehood, in 1860.

In a mandamus proceeding to test the right of a State to levy charges on sand dredged from a stream by a riparian owner under claim of title *ad filum aquæ*, the latter has not a constitutional right to have the question of navigability determined by a jury.

Whether in such a case the state court may take judicial notice that the stream is navigable is a question of local law. So *held* where judicial notice was taken of the navigability of the Kaw River, the principal river of Kansas, at the state capital, and the decision was supported by the meandering of the stream in original public surveys, and by various state and federal statutes and decisions cited.

Assuming that the taking of sand from the bed of a navigable stream be of common right, the State may nevertheless exact a charge from those who take it.

River sand appertains to the river bed when at rest; its tendency to migrate does not subject it to acquisition by mere occupancy.

92 Kansas, 169, affirmed.

THE case is stated in the opinion.

*Mr. Francis C. Downey*, with whom *Mr. Armwell L. Cooper* and *Mr. Denis J. Downey* were on the brief, for plaintiffs in error.

*Mr. J. L. Hunt*, Assistant Attorney General of the State of Kansas, with whom *Mr. S. M. Brewster*, Attorney General of the State of Kansas, and *Mr. J. P. Coleman* and *Mr. S. N. Hawkes*, Assistant Attorneys General of the State of Kansas, were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for mandamus to require the Treasurer of the State to transfer certain funds from a special account to the general revenue funds of the State, so that they can be used for paying the expenses of government. The money in question was collected under the State Laws of 1913, c. 259, requiring payment of ten per cent. of the market value on the river bank of sand taken by private persons or corporations from the bed of streams subject to the control of the State. It was paid by the plaintiffs in error for sand taken from the Kansas River at Topeka, and it was kept as a separate fund because the plaintiffs in error paid it under duress and protest and claimed the right to recover it before it should lose its identity by the transfer demanded. Under the state procedure the plaintiffs in error were made parties and came in and set up title to the fund. The Supreme Court of the State over-

ruled the claim and directed the issue of the peremptory writ.

This case was decided on a motion to quash the answers; the allegations of which, so far as now material, may be summed up as follows. In 1859 the Territorial Legislature of Kansas enacted that the Territory should be governed by the common law of England, which still remains the law of the State. On October 1, 1860, the United States conveyed land adjoining the Kansas River to the predecessor in title of the plaintiffs in error, and, as the tides do not ebb and flow in the river, they allege that the conveyance carried title to the middle of the stream; that they were the owners of the sand dredged from the same; that to enforce the provisions of the Act of 1913 against them would infringe the Fourteenth Amendment, and that they paid the sums exacted under protest and duress, the circumstances of which are detailed. The river was meandered on both sides by the surveys of the United States up to above this land, and with the Missouri and Mississippi constitutes an open and unobstructed water way from the up stream end of the meander lines to the Gulf of Mexico and the high seas. But the plaintiff in error Fowler, while adopting this allegation, alleges that it is not and never has been a navigable stream, and in 1864 the Kansas Legislature made a declaration to that effect. There follow allegations that the sand is migratory, and, in short, of the nature of animals *feræ naturæ*, and that ever since the admission of the State the persons within it have taken the sand as of common right. The presence of the sand is alleged to interfere with the use of the stream for its proper purpose of navigation as a valuable commercial highway, the river being alleged to be a public highway the use of which, including the right to take sand, belongs to the people in the State. It also is suggested that if the court should entertain jurisdiction and determine the questions of fact arising in the proceeding the

plaintiffs in error would be deprived of the equal protection of the laws contrary to the Constitution of the United States.

The argument of the plaintiffs in error does not need a lengthy response or a statement of all the answers that might be made to it. It was said that the territorial statute gave to the patent of the United States the effect of a grant *ad filum aquæ.* But this attributes too detailed and precise an effect to a general provision of law. We should be slow to believe that a State beginning its organized life with an express adoption of the common law of England stood any differently from one where the common law was assumed to prevail because the citizens were of English descent. Therefore when the Supreme Court of Kansas regards the principle of the common law to be that the fact of navigability, not the specific test of navigability convenient for England, is what excludes riparian ownership of river beds, it is impossible for us to say that the territorial statute even purports to give greater rights. *The Genessee Chief,* 12 How. 443, had been decided before the Territorial Act of 1859 was passed, and as was observed by Mr. Justice Bradley in *Barney* v. *Keokuk,* 94 U. S. 324, after that decision there seemed to be no sound reason for adhering to the old rule as the proprietorship of the beds and shores of waters held navigable by that case. See further *Shively* v. *Bowlby,* 152 U. S. 1, 58. *Kansas* v. *Colorado,* 206 U. S. 46, 93, 94. *Donnelly* v. *United States,* 228 U. S. 243, 261. We think it too plain for extended argument that the Territorial Act created no constitutional obstacle to the present decision of the Kansas court.

Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact, as it was in 1860, the date of the original grant, and the Supreme Court of the State was not entitled to take judicial notice that the river was navigable at Topeka.

But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital of the State we certainly cannot pronounce it error. In this aspect it is a question of state law. *Donnelly* v. *United States,* 228 U. S. 243, 262. See *Archer* v. *Greenville Sand & Gravel Co.,* 233 U. S. 60, 68, 69. The fact is of a kind that should be established once for all, not perpetually retried. The court had too, in favor of its decision, the circumstance that the stream was meandered in the original surveys; the decisions of its predecessors; *Wood* v. *Fowler,* 26 Kansas, 682; *Topeka Water Supply Co.* v. *Potwin,* 43 Kansas, 404, 413; *Johnston* v. *Bowersock,* 62 Kansas, 148; *Kaw Valley Drainage District* v. *Missouri Pacific Ry. Co.,* 99 Kansas, 188, 202; *Kaw Valley Drainage District* v. *Kansas City Southern Ry. Co.,* 87 Kansas, 272, 275, *s. c.,* 233 U. S. 75; legislation of the State; Private Laws of 1858, c. 30, § 4, c. 31, § 4, c. 34; 1860, c. 20, § 3, etc.; and of the United States; Act of May 17, 1886, c. 348, 24 Stat. 57; Act of January 22, 1894, c. 15, 28 Stat. 27; Act of July 1, 1898, c. 546, 30 Stat. 597, 633, etc.; and the assent, so far as it goes, of this court; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District,* 233 U. S. 75, 77, not to speak of the allegations in the answers of the Wear Sand Company, adopted, notwithstanding his denial of navigability, by Fowler, the other plaintiff in error before this court.

The allegation that the sand is migratory and belongs to whoever may reduce it to possession, and the allegation of the public right, are inconsistent, of course, with the claim of title and hardly consistent with the allegation that it is got by dredging. But the fact that it is liable to be shifted does not change its character while at rest upon the river bed, and if there were the public right alleged, it would not hinder the State from collecting, for the good of the whole public, a charge from those individuals who withdraw it

from public access. We see nothing in the case of the plaintiffs in error that requires further answers that might be made, or discussion at greater length.

*Judgment affirmed.*

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# DAY ET AL., PARTNERS UNDER THE FIRM NAME OF J. G. & I. N. DAY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 43. Argued November 13, 1917.—Decided November 26, 1917.

Modern tendencies to depart from the strict letter in discovering intent do not alter the principle that, within the scope of his undertaking, a party contracting assumes the risks of intervening obstacles.

A contractor agreed with the United States to furnish, at specified rates, such labor and material in place as might be necessary to complete a canal and locks, already built in part, the total payment not to exceed a sum fixed in acts of Congress authorizing the contract. The Government had erected a bulkhead, deemed of sufficient height, to safeguard the work from river floods; the contract, however, did not guarantee protection, referring to freshets, and other natural causes, merely as grounds for time extension. The contractor had been required to base his proposal upon personal investigation, and the specifications provided that he should be held responsible, without expense to the Government, for the preservation and good condition of the work already in place, and that to be added from time to time under the contract, until the contract should be terminated or the whole work turned over in a completed condition as required. To protect the work from an extraordinary flood which exceeded the bulkhead, the contractor necessarily expended work and materials in building new structures, for which he sought reimbursement in the Court of Claims. *Held*, that the contract was for the completion of the works and that the cost of protecting them from floods in the meantime was within the contractor's undertaking.

48 Ct. Clms. 128; 50 *id.* 421, affirmed.

THE case is stated in the opinion.

*Mr. Benjamin Carter*, with whom *Mr. Frank Carter Pope* was on the briefs, for appellants.

*Mr. Assistant Attorney General Thompson* for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by a contractor to recover for work and material furnished to build a bulkhead and temporary dams in order to protect a canal and locks at the cascades of the Columbia River against an extraordinary flood. The facts of the case are simple. An Act of Congress of July 13, 1892, c. 158, 27 Stat. 109, appropriated $326,250 for continuing an improvement at the cascades that had been under way for a number of years, and authorized a contract for completing it, to be paid for as subsequent further appropriations, not exceeding $1,419,250, should be made. On December 27, 1892, the claimants made a contract to "furnish such labor and material in place," etc., "as may be necessary to complete" the canal and locks, at certain rates, the total of all payments not to exceed $1,745,500, the amount of the two just-mentioned sums. The contractor was required in the usual way to base his proposal upon his personal investigation and the specifications provided in reiterated words that the contractor would "be held responsible, without expense to the government, for the preservation and good condition of all the work now in place, and such as he may, from time to time, under this contract put in place, until the termination of the contract, or until the whole work is turned over to the government in a completed condition, as required."

The Government had built a bulkhead to protect the

work, 142 feet high, which was the height of the projected work and was supposed to be high enough for floods, but in May and June, 1894, the flood in question rose three feet above it, necessitating the extra work now sued for, and leading to a change in the project so as to add six feet to the height of the protecting dam. The Government, however, had not guaranteed that the bulkhead should be sufficient or that it would protect the work while going on. On the contrary the contract contemplated, in terms, that the contractor might be prevented from commencing or completing the work by freshets or other forces or violence of the elements and provided in that event that the representative of the United States might allow such additional time as in his judgment should be just and reasonable, but gave no other relief.

One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. *The Kronprinzessin Cecilie*, 244 U. S. 12, 22. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent. *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, 543, 544. There can be no doubt of the scope of the undertaking in this case. If the unqualified agreement to complete the work were not enough by itself, *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Hoyt*, 149 U. S. 1, 14, 15, the provisions to which we have referred would make it plain. Freshets were contemplated as possible but were not allowed to qualify the absoluteness of the contractor's promise, beyond the possibility that they might be considered in the discretion of the other party on the question

of time. It is impossible for us to say that if the flood had destroyed the work that the claimants had added and for which they had received nearly $300,000, they would have been excused under the contract from replacing what they had done.

It follows, without the need of referring to clauses in the contract excluding claims for extra work, that if the claimants put up temporary defences against the water, even though not bound to do so by the contract, they were doing what it was for their own interest and safety to do, and that in the absence of an actual contract to pay for it by the other party there is no ground for shifting the cost on to the United States. The arguments that are based by the claimants upon public documents outside of the record do not seem to us to raise a doubt that the construction adopted and conclusion reached by the Court of Claims were correct.

*Judgment affirmed.*

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## PHILADELPHIA & READING COAL & IRON COMPANY *v.* GILBERT.

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

No. 454. Argued November 6, 1917.—Decided November 26, 1917.

A Pennsylvania corporation was sued in New York, where it transacted but a part of its business, upon a cause of action for personal injuries arising in Pennsylvania, and the summons was served upon a New York agent which it had designated to receive service of process, conformably to the New York laws. It moved to set aside the service as void in that consent to be sued in New York could be implied only in respect of causes arising out of its business there, and that the attempt to compel it to respond to the action was an invasion of its rights under the Constitution, particularly § 1 of the Fourteenth Amendment. *Held* that, as the motion did not draw

in question the validity of the state law but only the validity of the service and the power of the court, consistently with § 1 of the Amendment, to proceed upon such service, no basis was laid for reviewing in this court by writ of error a subsequent judgment on the merits but only for application for certiorari. Jud. Code, § 237, as amended by Act of Sept. 6, 1916.

Writ of error to review 176 App. Div. 889, dismissed.

THE case is stated in the opinion.

*Mr. Pierre M. Brown*, for plaintiff in error, besides suggesting that, under § 4 of the Act of September 6, 1916, the writ of error if improper might be taken as an application for certiorari, contended that error was proper because the validity of the New York statute upon which the service and jurisdiction in the New York courts depended was challenged. This statute—§ 16, General Corporation Laws of New York, c. 28, Laws 1909; c. 23, Consolidated Laws—reasonably construed, does not intend that, by merely designating an agent upon whom process can be served, a foreign corporation shall be deemed to have submitted itself to be sued in New York upon causes of action having no relation whatever to its business in that State. In construing it otherwise (*Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432; see also *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259), the New York courts have made it an unlawful burden on interstate commerce. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; and other cases.

*Mr. William M. Seabury* and *Mr. Samuel Seabury* for defendant in error, submitted.

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

This was an action in a state court in New York by a resident of that State against a Pennsylvania corporation

to recover for a personal injury sustained by the former while employed in the latter's coal mine in Pennsylvania. In addition to mining coal in Pennsylvania, the defendant was doing business in New York and, conformably to the laws of the latter State, had designated an agent therein upon whom process against it might be served. The summons was served upon this agent. After an unsuccessful effort to have the service set aside as invalid, the defendant answered and the further proceedings resulted in a judgment for the plaintiff, which was affirmed, without opinion, by the Appellate Division of the Supreme Court. An appeal to the Court of Appeals was denied, and the defendant sued out this writ of error. A motion to dismiss the writ is made upon the ground that the judgment, if open to review here, cannot be reviewed upon a writ of error, but only upon a writ of certiorari.

Under § 237 of the Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726, a final judgment or decree of a state court of last resort in a suit "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity," may be reviewed in this court upon writ of error; but, if the suit be one "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute

of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority," the judgment or decree can be reviewed in this court only upon a writ of certiorari. The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused in the exercise of a sound discretion.

By a timely motion the defendant sought to have the service of the summons set aside upon the ground—"that said service is void, in that the defendant's consent to be sued in the State of New York by service upon its aforesaid designated agent, can only be implied with respect to causes of action arising in connection with business the defendant transacts in the State of New York; the plaintiff's cause of action herein did not arise in connection with the business defendant transacts in the State of New York but is brought to recover damages for personal injuries alleged to have been sustained in the State of Pennsylvania. An attempt to compel the defendant to respond to this suit in the Supreme Court of the State of New York, sitting in Westchester County, is an invasion of the defendant's rights under the Constitution of the United States, particularly Section 1 of the 14th Amendment of the said Constitution."

The motion was overruled and the defendant, having first excepted to the ruling, answered to the merits.

All that was drawn in question by the motion was the validity of the service and the power of the court, consistently with the first section of the Fourteenth Amendment—probably meaning the due process of law clause, to proceed upon that service to a hearing and determination of the case. It did not question the validity of any

treaty or statute of, or authority exercised under, the United States. Neither did it challenge the validity of a statute of, or an authority exercised under, any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Challenging the power of the court to proceed to a decision of the merits did not draw in question an authority exercised under the State, for, as this court has said, the power to hear and determine cases is not the kind of authority to which the statute refers. *Bethell* v. *Demaret*, 10 Wall. 537, 540; *French* v. *Taylor*, 199 U. S. 274, 277.

It follows that the judgment cannot be reviewed upon writ of error. If a review was desired it should have been sought under that clause of the certiorari provision which reads, "or where any title, right, privilege, or immunity is claimed under the Constitution," etc.

*Writ of error dismissed.*

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## UNITED STATES EX REL. ARANT *v.* LANE, SECRETARY OF THE INTERIOR.

### CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 44. Argued November 13, 14, 1917.—Decided December 10, 1917.

Judgments or decrees of the Court of Appeals of the District of Columbia are not made final by Judicial Code, § 250, in cases involving the interpretation and effect of acts of Congress which are general in character, or the general duties or powers of officers under the law of the United States, as distinguished from merely local authority.

By Judicial Code, § 251, the power of the Court of Appeals of the District of Columbia to certify questions to this court is confined to cases where the judgments or decrees of that court are made final by § 250.

This limitation being plain in the letter and spirit of the statute would not be overridden by the fact (if there were such) that this court had overlooked it in former cases where it was not brought in question.

Certificate dismissed.

THE case is stated in the opinion.

*Mr. H. Prescott Gatley*, with whom *Mr. Samuel Maddox* and *Mr. J. H. Carnahan* were on the brief, for relator.

*Mr. Assistant Attorney General Warren*, with whom *The Solicitor General* was on the brief, for respondent.

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

Without competitive examination or certification under the Civil Service law in 1903 William F. Arant, the relator and appellant, was appointed by the Secretary of the Interior superintendent of a national park in Oregon. Following his refusal in 1913 to resign, when requested by the Secretary, he was summarily removed without specification of charges or hearing, and upon his refusal to vacate was ousted by the United States Marshal. Nearly two years afterwards this proceeding for mandamus to restore the relator to office was commenced. The return, referring to the act of Congress governing the Civil Service (Act of August 24, 1912, c. 389, 37 Stat. 555), especially challenged the assertion that the relator was within the provisions of that law inhibiting removal without charges and hearing and asserted that the right to appoint and remove from the office in question was excepted out of such provisions. A demurrer to the return as stating no defense was overruled and from the judgment dismissing the proceeding the case was taken to the Court of Appeals of the District, which, desiring to be

instructed as to its duty, after certifying the case as above stated, propounded two questions for our consideration: First, whether the relator was subject to be summarily removed without charges or hearing thereon; and second, if not, whether in consequence of the long delay he was barred by laches from the right to relief.

As the power of the court below to submit the questions for our solution is challenged, that subject requires first to be considered. The power must find its sanction in the following provision of § 251 of the Judicial Code: "It shall also be competent for said Court of Appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision;" this being followed by a clause conferring authority on this court in such case either to answer the questions or to order up for review the whole case and dispose of it.

It is not open to controversy that the judgments or decrees of the court below are not made final by § 250 in cases involving the interpretation and effect of an act of Congress general in character or the general duty or power of an officer under the law of the United States as contradistinguished from merely local authority. *American Security & Trust Co.* v. *District of Columbia,* 224 U. S. 491; *McGowan* v. *Parish,* 228 U. S. 312; *United Surety Co.* v. *American Fruit Co.,* 238 U. S. 140; *Newman* v. *Frizzell,* 238 U. S. 537. This being true, it is apparent that as this case is of the character just stated, it was not one coming within the authority conferred to certify, which is confined to cases where the judgments or decrees of the court are made final under § 250. The unambiguous command of the text excludes the necessity for interpretation. But, if it be conceded for the sake of argument that there is necessity for interpretation, the

briefest consideration will reveal the coincidence between the animating spirit of the provision and the obvious result of its plain text. It is undoubted that the authority to certify conferred upon the Court of Appeals of the District by § 251 did not previously exist in that court in any case. The Circuit Courts of Appeals, however, had undoubtedly under the Act of 1891, a power to certify. (§ 6, 26 Stat. 828, c. 517.) But, while by the terms of that act such authority apparently extended to "every such subject within its appellate jurisdiction," it came to be settled that by limitations found in the text such power to certify was restricted to cases in which the judgments or decrees of the Circuit Courts of Appeals were final and therefore not susceptible of being of right otherwise reviewed in this court. *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266, 268; *Bardes* v. *Hawarden First National Bank*, 175 U. S. 526, 527. Coming to provide concerning this situation the Judicial Code enlarged the power of a Circuit Court of Appeals by conferring authority to certify "any case within its appellate jurisdiction" (§ 239), but in giving power to certify for the first time to the Court of Appeals of the District expressly limited it to cases "in which its judgment or decree is made final" (§ 251). The expansion of authority conferred upon the Circuit Courts of Appeals at the same time that the restricted authority was conferred upon the Court of Appeals of the District makes manifest the legislative intent to give a greater power in the one case than in the other.

It is true that in *Bauer* v. *O'Donnell*, 229 U. S. 1, and *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448, controversies were determined on certificates made and questions based thereon by the Court of Appeals of the District. But in both cases the judgment or decree of the court below if rendered would have been final within the purview of § 250 of the Judicial Code; the first, because it arose under the patent laws, and the second, because it

concerned an act of Congress of local application. Even, however, upon the assumption that the cases are susceptible of a different view, as no question was raised in either concerning the power to certify and the limitation to which it was subjected by the statute, the mere fact that the cases were entertained affords no ground for holding them as authoritative on the question before us and thereby causing the statute to embrace a power which it excluded by both its letter and spirit. *United States* v. *More*, 3 Cranch, 159, 172; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236.

As therefore there was no authority in the court below to certify and propound the questions, the certificate must be and it is

*Dismissed for want of jurisdiction.*

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## PETERSEN ET AL., LEGATEES OF ANDERSON, *v.* STATE OF IOWA EX REL. THE STATE TREASURER, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 74. Argued November 21, 1917.—Decided December 10, 1917.

Article 7 of the treaty with Denmark of April 26, 1826, 8 Stat. 340, (renewed April 11, 1857, 11 Stat. 719,) places no limitation upon the right of either government to deal with its own citizens and their property, within its dominion.

Therefore, where a native of Denmark, who became a naturalized citizen of the United States, died a resident and property owner in the State of Iowa, and in the settlement there of his estate inheritance taxes were imposed in respect of legacies to subjects and residents of Denmark, the treaty affords the legatees no basis for complaining of the discrimination of the Iowa law (1907 Supp. Code,

§ 1467), which taxes legacies to nonresident aliens higher than those given under similar conditions to residents of the State without regard to the residence or nationality of the testator.

The favored nation clause in Article 1 of the above cited treaty with Denmark is applicable only "in respect of commerce and navigation;" it does not apply where the discrimination complained of is in the rates of state inheritance taxes.

166 Iowa, 617, affirmed.

THE case is stated in the opinion.

*Mr. Hugh O'Neill* for plaintiffs in error.

*Mr. Freeman C. Davidson*, with whom *Mr. H. M. Havner*, Attorney General of the State of Iowa, and *Mr. C. A. Robbins*, Assistant Attorney General of the State of Iowa, were on the brief, for defendants in error.

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

Anna M. Anderson, a native of Denmark, but a naturalized citizen of the United States, died in the State of Iowa where she resided and owned property. By her will she gave money legacies to her nephews and nieces who were subjects of the Kingdom of Denmark and resided therein. By the death duties imposed by the law of the State of Iowa a higher rate was imposed on legacies made to nonresident aliens than was payable on those given under similar conditions to residents of Iowa whether made by a citizen or by resident or nonresident aliens. (§ 1467, 1907 Supplement to the Code of Iowa.) The representative of the estate of Anderson in filing his accounts having credited himself with the sum due to the State on the legacies, which he had paid, the foreign legatees opposed the allowance of such

credit on the ground that the charge of a greater sum to them because they were aliens and nonresidents than would have been charged against them had they been residents, was illegal because in conflict with a treaty between the United States and Denmark. The case is here to review the action of the court below rejecting such contention and upholding the validity of the charge. 166 Iowa, 617.

The court, conceding that if the treaty were applicable it would be controlling, based its conclusion solely on the ground that the treaty when rightly considered did not apply, and in the argument at bar the error of this conclusion is the sole ground relied upon .

The treaty is that of April 26, 1826 (8 Stat. 340), renewed in 1857 (11 Stat. 719), and the particular clauses invoked are Article 1, the favored nation clause, and Article 7, dealing more directly with the subject under consideration. We postpone momentarily the first to come at once to the latter. The article is as follows:

"The United States and his Danish Majesty mutually agree, that no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money, or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively."

It is obvious that the article places restrictions upon the authority of the respective countries to impose taxes, duties or charges under the circumstances and conditions for which it provides. Conceding that it requires construction to determine whether the prohibitions embrace taxes generically considered, or death duties, or excises on the right to transfer and remove property, singly or

collectively, we are of the opinion that the duty of interpretation does not arise since in no event would any of the prohibitions be applicable to the case before us. We are constrained to this conclusion because the case here presented concerns only the power of the State of Iowa to deal with a citizen of that State and her property there situated, while the prohibitions of the treaty, giving to them their widest significance, apply only to a citizen of Denmark and his right to dispose of his property situated in the State of Iowa. This is undoubted because there is no controversy as to the first, the citizenship in Iowa, and there is not room for substantial doubt as to the latter, since on the face of the treaty the contractual limitations which it provides are manifestly intended not to control or limit the right of either of the governments to deal with its own citizens and their property within its borders, but were solely intended to restrict the power of both of the governments to deal with citizens of the other and their property within its dominions. But, if the mere letter of portions of the article when separately considered would leave room for any doubt on the subject, it would be dispelled by the context and by the consideration that the foundation of the provision is the recognition of the plenary power of each country to legislate according to its conceptions of public welfare as to its own citizens and their property within its jurisdiction. Indeed that which is contracted against is merely a departure by discrimination by either one of the countries against the citizens of the other and their property therein from the legislation governing their own citizens. In other words, the right of the citizens of each of the contracting countries reciprocally to own, dispose of or transmit their property situated in the other country, free from provisions or restrictions discriminating because of alienage, is in the largest possible sense that which is protected by the treaty. And conversely this being true, it follows also that the

treaty did not protect the right of the citizens of either country to acquire by transfer or inheritance property situated in the other belonging to its own citizens free from the restraints imposed by the law of such country on its own citizens even although such restraints would not have been applicable in case the property had been disposed of or transmitted to a citizen.

The ruling in *Frederickson* v. *Louisiana*, 23 How. 445, while it concerned a treaty with a different country, is here aptly illustrative and persuasively controlling. In that case the contention was that limitations contained in a treaty between the United States and the King of Wurttemburg forbidding discrimination as to the disposal or transmission of their property by subjects of the King of Wurttemburg were applicable to property in the State of Louisiana of a citizen of that State because of the accidental circumstance that the property had passed by the death of such citizen to subjects of the King of Wurttemburg, nonresidents in the United States. In holding the contention to be unfounded it was said (p. 447):

"But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting Powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting Powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contem-

plation of the contracting Powers, and is not embraced in in this article of the treaty."

And this view disposes of the elaborate argument concerning the right of the foreign legatees to remove the property as there is here no question of a burden placed by the State of Iowa on the right to remove other than that which the argument assumes may have indirectly resulted from the payment of the lawful duty imposed by the State of Iowa upon its own citizens and as to their property within its own borders. The duty to pay on such property which preceded and accompanied the right of such foreign legatees was not a burden upon their right to remove their property, as such right of property on their part was dependent on the payment and could not and did not arise until the payment was made. *United States* v. *Perkins*, 163 U. S. 625.

This leaves only the contention as to the favored nation clause contained in the first article of the treaty. But as to that it suffices to say that the argument does not take into view, but disregards the words by which the clause is limited and which expressly make it applicable only "in respect of commerce and navigation," a limitation which it has been settled does not embrace the subject we are now dealing with. *Mager* v. *Grima*, 8 How. 490, 494.

*Affirmed.*

## DUUS, ADMINISTRATOR OF PETERSON, *v.* BROWN, TREASURER OF THE STATE OF IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 85. Argued November 23, 1917.—Decided December 10, 1917.

A naturalized citizen of the United States, residing in Iowa, died there intestate, leaving property which passed under its laws to collaterals, some of whom were naturalized citizens residing in other States of the Union, and others natives and subjects of Sweden, residing there. Under the Iowa law, the inheritance taxes upon the portion of the estate accruing to the nonresidents were higher in rate than those upon the portions accruing to the residents. *Held*, following *Petersen* v. *Iowa, ante*, 170, that such discrimination was not violative of either Article VI, or Article II (the favored nation clause), of the treaty with Sweden of April 3, 1783, 8 Stat. 60, renewed and revived by later treaties.

168 Iowa, 511, affirmed.

The case is stated in the opinion.

*Mr. Nelson Miller*, with whom *Mr. G. T. Struble* was on the brief, for plaintiff in error.

*Mr. Freeman C. Davidson*, with whom *Mr. H. M. Havner*, Attorney General of the State of Iowa, and *Mr. C. A. Robbins*, Assistant Attorney General of the State of Iowa, were on the brief, for defendant in error.

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

John Peterson, a native of Sweden, but a naturalized citizen of the United States and a resident of Iowa, there died unmarried and intestate. His property in the State passed under the laws of Iowa to his heirs who were his

nephews and nieces or their representatives, some of whom were naturalized citizens of the United States residing in States other than Iowa and the remainder were natives and citizens of the Kingdom of Sweden and there resided. The property in Iowa was administered under the laws of that State and the administrator paid upon the portion of the estate accruing to the nonresident alien heirs the death duties provided by the law of Iowa which were higher than those provided by that law upon the portion accruing to the resident heirs. (§ 1467, 1907 Supplement to the Code of Iowa.) This controversy arose from a contest over the right of the State to make that charge and the duty of the administrator to pay it, the contention being that the duties in so far as they discriminated against the nonresident alien heirs were void because in conflict with a treaty between the United States and the King of Sweden (Treaty of April 3, 1783, 8 Stat. 60, renewed by Article 12 of the Treaty of September 4, 1816, 8 Stat. 232, and revived by Article XVII of the Treaty of July 4, 1827, 8 Stat. 346). The case is here to review the judgment of the court below holding that contention to be unsound. 168 Iowa, 511.

Two clauses of the treaty are relied upon: Article VI, which it is asserted directly prohibited the discriminating charge, and Article II, which by the favored nation clause accomplished a like result. Article VI is in the margin,[1]

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[1] "Article VI. The subjects of the contracting parties in the respective states, may freely dispose of their goods and effects either by testament, donation or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called '*droit de detraction*,' on the part of the government of the two states respectively. But it is at the same time agreed, that nothing

and from its text it plainly appears that it embraces only citizens or subjects of Sweden and their property in Iowa and therefore as we have just pointed out in *Petersen* v. *Iowa*, *ante*, 170, has no relation whatever to the right of the State to deal by death duties with its own citizens and their property within the State. And from the same case it also appears that the favored nation clause has also no application, since that clause in the treaty relied upon, as was the case in the Treaty with Denmark which came under consideration in the previous case, is applicable only "in respect to commerce and navigation."

For the reasons stated in the *Petersen Case* and in this, it follows that the judgment must be and it is

*Affirmed.*

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## LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, *v.* CRANE COMPANY.

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

No. 16. Argued May 3, 1916; restored to docket for reargument May 21, 1917; reargued November 6, 1917.—Decided December 10, 1917.

Neither the right of a State to attach conditions when licensing a sister state corporation to do local business, nor its power to tax the corporation in respect of such business, when licensed, can sustain impositions which, in the guise of permit charges or franchise or excise taxes, result in direct burdens on interstate commerce or in the

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contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigour. The United States on their part, or any of them, shall be at liberty to make respecting this matter, such laws as they think proper."

taxation of property beyond the confines and jurisdiction of the State.

These principles, repeatedly affirmed by the court, are in nowise qualified by *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, and other recent cases, involving particular state statutes which were not inherently repugnant to the commerce clause or the due process clause of the Fourteenth Amendment, and which, because of their own restrictive provisions, avoided such repugnancy in their necessary operation and effect. Those cases lend no sanction to the proposition that the duty of enforcing the Constitution may depend upon the degree of violation or of resulting wrong.

In 1889, Texas exacted of foreign corporations a charge, graduated upon capital stock, but limited to $200, for a permit to do business for 10 years. In 1893, a so-called franchise tax of $10 per annum was exacted of domestic and licensed foreign corporations alike, which was increased in 1897 to a maximum of $50 for domestic corporations, while for foreign corporations the minimum was raised to $25, and the tax was otherwise calculated by fixed percentages upon capital stock without maximum limit. After some intervening modification, it was enacted in 1907, as to both classes of corporations, that, in case the capital stock, issued and outstanding, plus surplus and undivided profits, should exceed the capital stock authorized, the franchise tax should be calculated upon the aggregate of such amounts. In the same year the permit provisions were altered by abolishing the maximum limit ($200) and increasing the percentages on authorized capital stock. An Illinois manufacturing and trading corporation engaged largely in interstate commerce obtained a 10 year permit under the Act of 1889, purchased real estate, erected warehouses and engaged in business in Texas; paid its taxes on its local property, and also those laid under the franchise laws, until its permit (obtained in 1905) was about to expire, when it brought suit against the Secretary of State and the Attorney General to enjoin the enforcement by them of the permit and franchise laws of 1907. Its authorized capital stock was $17,000,000, issued and paid up, and its surplus and undivided profits over $8,000,000. The total assessed value of its property in Texas was about $300,000. Its gross receipts and gross sales in all its business in 1913 were $39,831,000, of which only $1,019,750 had any relation to Texas, and of this nearly one-half had resulted from sales and shipments in interstate commerce. Its franchise tax had increased from $480 in 1904 to $1,948 in 1914, under the franchise Act of 1907. Its permit fee under the permit Act of 1907 would have been $17,040.

*Held*, that the franchise and permit taxes both violated the due process clause of the Fourteenth Amendment and directly burdened interstate commerce.

A suit to enjoin state officials from enforcing an unconstitutional tax is not a suit against the State.

218 Fed. Rep. 260, affirmed.

THE case is stated in the opinion.

*Mr. C. M. Cureton*, Assistant Attorney General of the State of Texas, with whom *Mr. Ben F. Looney*, Attorney General of the State of Texas, and *Mr. C. A. Sweeton*, Assistant Attorney General of the State of Texas, were on the briefs, for appellant:

The statutes in question do not seek to lay a charge or tax upon any foreign corporation seeking to do an interstate business only. *Alden* v. *Jones Buggy Co.*, 91 Texas, 22; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468; and other Texas cases. The State has a perfect right to charge for and tax the privilege of doing local business and measure the amount of the charge or tax by the capital of the corporation, including receipts or property employed in part in interstate commerce; and this is the rule although the transaction of intrastate business might not exceed one-fourth of its aggregate business and although the same might be a source of profit and convenience to it and in that way an aid to its interstate business. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *White Dental Mfg. Co.* v. *Massachusetts*, *ib.*; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Barron* v. *Burnside*, 121 U. S. 186; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Pembina Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181. It is important to bear in mind the distinction

between an ordinary trading corporation, like the appellee, and a corporation, such as a railroad or telegraph company, which by the very nature of its business is an instrument of commerce. Corporations of the latter class, when engaged in both kinds of commerce, cannot be made to pay a franchise tax measured by their entire capital stock because, by burdening the instrument of interstate commerce, the tax would be a burden upon interstate commerce itself. A trading corporation, *per contra*, can engage in interstate commerce or not, as it sees fit, and a tax according to its capital therefore cannot be said to burden the interstate commerce in which it elects to engage. The case is ruled by *Baltic Mining Co.* v. *Massachusetts, supra*, and *White Dental Mfg. Co.* v. *Massachusetts, supra*. Here, as there, the tax is not a property but a franchise tax. *Gaar, Scott & Co.* v. *Shannon*, 52 Tex. Civ. App. 644. The appellee has a substantial local business, subject to local franchise and privilege taxes. It would be an entirely new doctrine to hold that a prohibition of the business, or a tax in the nature of a condition upon its permission, amounts to a burden on the interstate business merely because appellee's voluntary methods make success in the one line of business in some measure dependent on the other.

The cases relied upon by appellee are either those in which the corporations were engaged exclusively in interstate commerce, or those in which they were operating instrumentalities of such commerce. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Adams Express Co.* v. *City of New York*, 232 U. S. 14; *Platt* v. *City of New York*, 232 U. S. 35; *Myer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Williams* v. *City of Talladega*, 226 U. S. 404; *Buck Stove &*

*Range Co.* v. *Vickers*, 226 U. S. 205; *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

Appellee's Texas business was mainly intrastate. One-fourth of the goods was sold in broken packages. The original packages were mingled with these and exposed with them for sale, thus becoming incorporated with the mass of the property in the State. *Brown* v. *Houston*, 114 U. S. 622; *State* v. *Intoxicating Liquors*, 65 Maine, 556.

If the statutes in question be valid, the suit is in essence a suit against the State.

The permit fee and franchise tax acts are distinct and independent. The fee is calculated on the basis of authorized capital stock, not on actual capital, and the tax would be the same whether the corporation had no capital or had capital greatly in excess of the amount authorized. In no sense is it a property tax. In this case it is of relatively small amount. Payable only once every ten years, it comes to but 1% of the authorized capital in 100 years. This is small compared with the enormous authorized capital; and the charge is not exacted from the capital used in interstate commerce. The absence of a limit is immaterial, for just as the tax could not be saved, however small, if levied on the receipts from interstate commerce, so its mere amount could not condemn it if it does not touch property at all. See *Pick & Co.* v. *Jordan*, 169 California, 1, affirmed by this court in 244 U. S. 647. If the fee were large, so is the privilege granted. It was for the legislature to value the privilege and for the Crane Company to decline it if unwilling to pay the price.

The other tax is not a property but a privilege or franchise tax. *Gaar, Scott & Co.* v. *Shannon*, 52 Tex. Civ. App. 644. Surplus or undivided profits are considered, but only for the purpose of measuring the value of the franchise. The legislature doubtless found a reasonable relationship between that value and the capital in use. The tax does

not necessarily fluctuate with the amount of interstate business. The real question is whether or not it is greater than the value of the privilege granted. If the tax should be held void in so far as measured by surplus and profits, it may still be upheld in so far as measured by the authorized capital stock. *Field* v. *Clark*, 143 U. S. 696; *Huntington* v. *Worthen*, 120 U. S. 102; *Zwerneman* v. *Von Rosenberg*, 76 Texas, 522; *State* v. *Laredo Ice Co.*, 96 Texas, 461.

If the present acts be void, their predecessors are not and the company, refusing to comply with the latter, is not entitled to injunctive relief.

*Mr. Joseph Manson McCormick*, with whom *Mr. Francis Marion Etheridge* was on the briefs, for appellee.

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

Chartered in 1865 by the legislature of Illinois, the Crane Company had its domicile and principal establishment at Chicago. It carried on its chartered business of manufacturing and dealing in hardware, railway supplies, building materials, agricultural implements, etc., not only in Illinois but in other States, by the shipment of merchandise on orders obtained through the solicitation of its agents and sent to Chicago for execution, or orders sent to Chicago through the mail. The company, moreover, established agencies in other States to which goods were also shipped from Chicago or from other points where they were bought and shipment directed, from which agencies such goods were sold and delivered either in the original or broken packages as was most convenient. Such agencies also became supply depots from which interstate commerce was carried on by filling orders received from other States.

In the State of Texas for the purpose of facilitating the carrying on of its business by all the methods stated, the company acquired real estate at Dallas, and built a depot or warehouse, and also had a warehouse at another place in the State.

In 1889 Texas enacted a statute entitled, "An act to require foreign corporations to file their articles of incorporation with the secretary of state, and imposing certain conditions upon such corporations transacting business in this state. . . ." (Acts of 1889, p. 87.) This act not only compelled the filing of the charter with the Secretary of State, but exacted for a permit to do business a minimum charge of $25 based upon $100,000 of capital stock and an increased amount predicated upon capital stock until the exaction amounted to $200, which was the limit, and the permit which was authorized to be issued by the Secretary of State was limited to ten years' duration. The tax imposed therefor, if the permit was enjoyed for the stated period, could not in any event exceed $20 a year, whatever might be the amount of capital stock of the corporation.

As early as 1893 what was denominated a franchise tax was provided, imposing upon each and every domestic as well as foreign corporation having a permit the duty of paying $10 a year. (Acts of 1893, p. 158.) In 1897 this described franchise tax was modified. (Acts of 1897, p. 168.) As to domestic corporations, while retaining the minimum charge of $10, the maximum was raised to $50. And as to foreign corporations the minimum was raised from $10 to $25 and the maximum limit was removed by fixing percentages of charges upon the capital stock, increasing without limitation. Without in detail following the legislation as to taxes denominated as franchise from the date stated down to the period when this suit was commenced, it suffices to say that the tax itself was preserved with some increases in the bases upon which

it was to be calculated; but in 1907 it was enacted both as to domestic and permitted foreign corporations that in case the capital stock of a corporation "issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock," the franchise tax should be calculated upon the aggregate of such amounts, thereby increasing to that extent the levy. (Acts of 1907, p. 503; Revised Statutes, 1911, Art. 7394.)

The authorized capital stock of the Crane Company was $17,000,000, which was paid up and issued, and just prior to the institution of this suit the surplus and undivided profits of the company amounted to $8,139,000. The total assessed value in Texas of its real estate, money there employed and merchandise there held amounted to $301,179. The company's gross receipts and gross sales in all its business in all the States for the year 1913 amounted to $39,831,000, of which only $1,019,750 had any relation to the State of Texas and nearly one-half of this amount was the result of transactions purely of an interstate commerce character arising from the sale and shipment of goods from other States to purchasers in Texas who ordered them and from the shipment from Texas to other States for the purpose of filling orders sent from such States.

The Crane Company was assessed and paid taxes in Texas as other taxpayers on its real estate, its money on hand in Texas and its stock in trade in that State. In 1905, having filed its articles of incorporation with the Secretary of State, it paid the permit tax of $200 for the ten-year period as prescribed by the permit Act of 1889. From 1904 down to and including 1914 the company paid the yearly franchise tax, the amount increasing from $480 in 1904 to $1948 in 1914, the increase presumably resulting from the increase of rate of such tax by the legislation which we have indicated and from the fact that by the amendment of the Act of 1907 the surplus and un-

divided profits of the company became susceptible of being taken into view in addition to its authorized capital stock.

In the same year in which the legislation was enacted providing for the taxation on the basis of surplus and undivided profits for the purpose of the franchise tax there was also enacted a law vastly increasing the amount of the permit tax. (Acts of 1907, S. S., p. 500; Revised Statutes, 1911, Art. 3837.) We say vastly increasing because, although the standard for the levy of that tax, the authorized capital stock, was retained, the maximum limit which was $200 for ten years under the previous law was removed and the percentages of levy on the authorized capital stock were so augmented that the permit for which the company paid to the Secretary of State $200 for ten years in 1905 under the new law would have required the company to pay in order to do business in the State the sum of $17,040.

Shortly before its existing permit for ten years taken in 1905 expired the company commenced the present suit in the court below against the Secretary of State and the Attorney General to enjoin the enforcement by them of the statutes embracing the permit tax and the franchise tax on the grounds that both were repugnant, *a*, to the commerce clause of the Constitution of the United States because imposing a direct burden on interstate commerce; *b*, to the due process clause of the Fourteenth Amendment because constituting a taking of property; and *c*, to the equal protection clause of the Fourteenth Amendment based upon what were urged to be discriminatory provisions in the acts. The parties having been fully heard on an application for an interlocutory injunction on the pleadings and by affidavits from which the case as we have stated it indisputably results, by a court organized under the Act of Congress of June 18, 1910 (36 Stat. 557, c. 309, § 17; Judicial Code, § 266), the in-

terlocutory injunction was granted and the enforcement of the laws restrained, the matter being now before us on an appeal from such order. 218 Fed. Rep. 260.

Passing the contention as to the denial of the equal protection of the laws, which as we shall see it is unnecessary to consider, we come to dispose of the two other contentions, that is, the direct burden on interstate commerce and the want of due process.

It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed, that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intrastate business of such corporation carried on as the result of permission to come in. The sole contention, then, upon which the acts can be sustained is that although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is

unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established. Indeed the cases referred to were concerned in various forms with the identical questions here involved and authoritatively settled that the States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution, or because of the right to exclude to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223, U. S. 280, 285.

The dominancy of these adjudications is plainly shown by the fact that as the result of the decision in the leading case (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1), the Supreme Court of the State of Texas, recognizing the repugnancy of the permit tax law here in question to the Constitution of the United States, enjoined its enforcement (*Western Union Telegraph Co.* v. *State*, 103 Texas, 306), and following that ruling the legislature of the State has amended both the permit tax law and the franchise tax law now before us, presumably in an effort to cure the demonstrated repugnancy of the statutes, before amendment, to the Constitution of the United States. Of course, whether the amendments as adopted accomplished the purpose intended, is a matter which we are not called upon to consider and as to which we express no opinion.

But despite the controlling decisions dealing with cases in substance identical in fact and principle with the case here presented and the effect given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are not repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas,* 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles,* 242 U. S. 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases.

The demonstration of error in the argument which results from this situation might well cause us to go no further in its consideration. In view, however, of the gravity of the subject to which the argument relates and the misconception and resulting confusion in doctrine which might result from silence, we briefly notice it. In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 698, that "The substance and not the shadow

determines the validity of the exercise of the power." In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution.

It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable.

Some suggestion is made in argument of the possibility of treating the franchise tax as not repugnant to the Constitution although that result be necessarily reached as to the permit tax. But we are of opinion that the proposition is without merit as the interdependence of the two provisions obviously results from the character of the subjects with which they deal and the mode in which the statutes deal with them. Indeed that conclusion would seem to necessarily follow from the legislative history of both and the concordant nature of their develop-

ment. It finds additional and strongly persuasive support from the fact that although the controlling effect of the ruling in *Western Union Telegraph Co.* v. *Kansas, supra,* was applied by the state court to only one of the statutes, the permit tax, when the curative power of legislation was exerted it was made applicable to both and both were therefore modified. Aside from this view, however, as, from the history which we have given of the franchise tax, its provisions were clearly intended to reach all activities and property of the corporation wherever situated, that statute when separately considered would come directly within the control of the doctrine of the previous cases upon which our conclusion is based.

There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was in substance and effect a suit against the State within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. *Ex parte Young,* 209 U. S. 123; *Western Union Telegraph Co.* v. *Andrews,* 216 U. S. 165; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278.

It follows from what we have said that the court below was right in awarding an interlocutory injunction to restrain the enforcement of the assailed statutes and its order so doing must be and the same is

*Affirmed.*

## SWEET ET AL. *v.* SCHOCK, TREASURER OF OKMULGEE COUNTY, STATE OF OKLAHOMA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 52. Argued November 15, 1917.—Decided December 10, 1917.

Under the Act of April 26, 1906, § 19, c. 1876, 34 Stat. 137, and the Act of May 27, 1908, § 4, c. 199, 35 Stat. 312, providing that allotments in the Five Civilized Tribes from which restrictions on alienation have been removed shall be subject to taxation, land allotted to a Creek Freedwoman as a homestead under the Act of June 30, 1902, c. 1323, 32 Stat. 500, lost its tax exemption when the restrictions were removed by the Secretary of the Interior upon the petition of the allottee under the townsite provision of the Act of March 3, 1903, c. 994, 32 Stat. 996. *Choate* v. *Trapp*, 224 U. S. 665, distinguished.

45 Oklahoma, 51, affirmed.

THE case is stated in the opinion.

*Mr. Francis W. Clements*, with whom *Mr. Herbert E. Smith*, *Mr. Wellington Lee Merwine*, *Mr. John L. Newhouse*, *Mr. Grant Foreman* and *Mr. James D. Simms* were on the briefs, for plaintiffs in error.

*Mr. S. P. Freeling*, Attorney General of the State of Oklahoma, with whom *Mr. Smith C. Matson* and *Mr. R. E. Wood*, Assistant Attorneys General of the State of Oklahoma, and *Mr. R. E. Simpson* were on the brief, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of the Supreme Court of Oklahoma sustaining the taxation of lands which were

allotted to a Creek freedwoman under § 16 of the Allotment Act. 32 Stat. 500, c. 1323.

The suit was instituted by plaintiffs in error in the District Court of Okmulgee County to enjoin defendant in error, as treasurer of the county, from selling the lands and placing a penalty thereon or taking any steps towards collecting the taxes.

Plaintiffs in error are the owners of certain lots in the City of Okmulgee, Oklahoma, deriving title to the same through mesne conveyance from Sarah Smith, a freedwoman and citizen of the Creek Nation, to whom the lands had been patented as a homestead.

A certain part of the lands was conveyed by Sarah Smith to one Nathan Boyd and was by him surveyed, platted and laid out in blocks, lots and streets as the Capitol Heights Addition to the City of Okmulgee, and it is now a part of that city.

The remaining portion of the homestead land Sarah Smith also caused to be surveyed, laid out and platted in lots, blocks and streets as the Capitol Heights Second Addition to the City of Okmulgee.

The county board of commissioners placed the lots upon the tax duplicates of the county and refused to remove them therefrom upon petition of plaintiffs in error, who thereupon commenced this suit. Decree was entered for plaintiffs in error, which was reversed by the Supreme Court of the State.

The land allotted to Sarah Smith and laid out in lots as described was allotted to her by deed executed April 23, 1904, under the Acts of Congress of March 1, 1901, and June 30, 1902. 31 Stat. 861; 32 Stat. 500.

By the former act it was provided that the land should "be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years." By the latter act it was provided, in amendment of the other act, that the land should "be and remain non-taxable, inalienable,

and free from any incumbrance whatever for twenty-one years from the date of the deed therefor."

Both acts provided for the laying out of townsites under certain circumstances, and by the Indian Appropriation Act of March 3, 1903, 32 Stat. 996, it was enacted "that nothing herein contained shall prevent the survey and platting, at their own expense, of townsites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

Sarah Smith availed herself of these provisions, that is, she petitioned the Commission to the Five Civilized Tribes for the removal of the restrictions against alienation for the purpose of permitting her to sell part of the land for townsite purposes. The Commission, after investigation, made a report to the Secretary of the Interior, recommending the removal of the restrictions. The Indian Office concurred in the recommendation and granted the petition and authorized her to sell the land. Thereupon (February 28, 1907) she conveyed 1.69 acres of the land by warranty deed to one Nathan Boyd, as has been said, who platted the land deeded to him in town lots, and Sarah Smith, after July 26, 1908, so platted the remainder of the land, and plaintiffs in error derive title from her and him.

The contentions of the parties are quite accurately opposed and are in short compass. Plaintiffs in error contend that when the land was allotted to Sarah Smith non-taxability was given it by a valid act of Congress and accompanied the land to her grantees, and this in consideration of the surrender by her of the rights she had in common with other members of the Creek Tribe to the tribal lands. The opposing contention is that she devested the land of non-taxability by petitioning for and accepting

a right to alienate it. A determination between the contentions depends upon certain acts of Congress in addition to those we have mentioned, and their consideration and construction therefore become necessary.

The deed allotting the land to Sarah Smith, as we have seen, provided, in accordance with the act of Congress under which it was executed, that it should "be non-taxable and inalienable . . . for twenty-one years." It will be observed that the right (non-taxability), and the restriction (inalienability) were concomitants and necessarily they concerned alone the Indian, benefited her to the extent of the right, protected her by the extent of the restriction.

Accommodation to new conditions became necessary, and Congress, by an act passed March 3, 1903, hereinabove quoted, provided for the survey and platting of townsites out of allotted lands, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior, and permitted the "unrestricted alienation of lands for such purposes." A consequence of the exercise of the privilege so given was imposed by certain acts of Congress—(1) That of April 26, 1906, 34 Stat. 137, § 19 of which provides as follows: "That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee." (2) That of May 27, 1908, 35 Stat. 312, § 4 of which reads as follows: "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes; . . ."

It was after the passage of the Act of April 26, 1906, that Sarah Smith petitioned for the removal of the restrictions upon her homestead, that is, its alienation for townsite purposes, and conveyed to Boyd; and it was

after the passage of the Act of May 27, 1908, that she platted the land as stated. She and her grantees must, therefore, be deemed to have accepted the consequences of her acts, to-wit, that the land thereafter should be subject to taxation. And this is not taking from her or them a vested right; it is simply enforcing against her and them the results of a bargain, and, it may be presumed, a beneficial bargain.

The contention of plaintiffs in error overlooks the fact that the Commission to the Five Civilized Tribes and the Secretary of the Interior are instruments of the Government, delegated, it is true, to extend a privilege, but bound, in extending it, by the laws of the United States; that is, that they in granting it and Sarah Smith in accepting it did so under the conditions imposed by those laws; and *Choate* v. *Trapp*, 224 U. S. 665, is not opposed.

In that case it was decided that an Indian of one of the Five Civilized Tribes had an equitable interest in tribal lands which when given up constituted a consideration for his allotment and its exemption from taxation, and a law of the State of Oklahoma taxing the allotment while in possession of the Indians was declared invalid.

The acts of Congress, confirming previous agreements, provided that the lands allotted should be non-taxable while the title remained in the original allottee and provided for alienation within certain periods. The State argued nevertheless that there was in fact no tax exemption but that the provision for it was but an additional prohibition against a forced sale,[1] and that when restrictions against alienation were removed by the Act of Congress of 1908 (35 Stat. 312) the provision for tax exemption went as a necessary part thereof. The contention was rejected, and rightly so, and, as was aptly said by Mr.

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[1] Section 16 of the Allotment Act (32 Stat. 500) contains a prohibition of any incumbrance or sale of allotted lands in satisfaction of any debt or obligation of the allottee.

Justice Lamar, speaking for the court: "The exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation." Under the circumstances it was a complete answer to the attempt which was made to make the right depend upon the limitation. And that, too, without the removal of the limitation being availed of by the Indian. As we have seen, to have availed himself of it would have relinquished the right, for by the express provision of the statute it only existed while the title remained in him.

The elements are different in the case at bar. Sarah Smith invoked a removal of the limitation, the restriction upon alienation, and could only receive the benefit of the law by accepting the consequences of the law. It would indeed have been anomalous to give her power to erect a town and convey its lots free from taxation.

*New Jersey* v. *Wilson*, 7 Cranch, 164, is adduced by plaintiffs in error to sustain their contention. That case passed upon a grant of the State of New Jersey to certain Indians, "with the privilege of exemption from taxation." It was decided that the privilege, though for the benefit of the Indians, was annexed by the terms which created it to the land itself, not to their persons. And this was an advantage to the Indians, it was said, "because, in the event of sale, on which alone the question could become material, the value would be enhanced by it." But it was further said it was not doubted that the State might have insisted on a surrender of the privilege as the sole condition on which a sale of the property should be allowed. Such condition is imposed by the acts of Congress which we have mentioned, when voluntarily invoked by an allottee. And there is no hardship in this. The right or privilege of exemption from taxation cannot be taken from an allottee's land while he retains the title. Its surrender may not be forced from him, but he may yield it in bargain for another right or privilege; and any

improvident estimate of the right to be given up or to be received is guarded against by the requirement of the approval by the Commission to the Five Civilized Tribes and the Secretary of the Interior. And it can easily be seen that if exemption from taxation gave value to the land, the power to constitute towns was of greater value. The record shows the value of the lots to plaintiffs in error in the erected town, ranging from $25 to $1700, a number being valued at $100, others at $200, $300, $400, and $1500. We may observe that Sarah Smith was authorized to sell for not less than $125 an acre.

*Judgment affirmed.*

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## ABERCROMBIE & FITCH COMPANY ET AL. *v.* BALDWIN ET AL.

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

No. 67. Argued November 19, 20, 1917.—Decided December 10, 1917.

The Baldwin patent, original No. 821,580, reissue No. 13,542, for improvements in acetylene gas generating lamps, *held* valid and infringed as to claim 4.

The patent relates to an acetylene gas generating lamp, with an upper reservoir for water and a lower receptacle for calcium carbide, connected by a tube, with a rod extending through the tube and subject to manipulation from above. The inventive features involved lie in securing a proper flow of the water through the tube and access for it to the unslaked carbide, the first, by adopting a comparatively large tube with a size of rod suitably restricting its capacity; the second, by manipulating the rod when necessary to break up slaked carbide at the mouth of the tube in the lower receptacle.

*Held*, upon the evidence, that the invention is meritorious and entitled to invoke the doctrine of equivalents. *Paper Bag Patent Case*, 210 U. S. 405.

The original patent having figured the tube as extending to and embedded in the carbide, and described the rod as a means, when manipulated, of breaking up slaked carbide at the lower mouth of the tube, to permit the water to percolate to the unslaked carbide, *held*, that an amendment in the reissue explicitly describing the tube as so extended and embedded did not enlarge the patent.

In the original patent specification, the rod or "stirrer" was described as bent at the lower extremity, while the specification of the reissue declared, "it is obvious that the stirrer need not always be formed with a bent end." *Held*, that the reissue did not enlarge the original patent; the function of the rod as a "stirrer," clearly described in the original, is the same whether its end be bent or straight; the two forms are but interchangeable equivalents.

In the original patent proceedings the applicant was required to surrender a claim describing the rod as "extending from a point outside the lamp through the tube into the carbide receptacle." *Held*, on the evidence, that this was not a surrender of the straight form of stirring rod.

In view of the facts of the case, *held*, that one of the petitioners, which entered the field when the patent was unquestioned and after the patentee by his efforts had created an extensive market, acquired in equity no intervening rights against the patent as subsequently reissued.

228 Fed. Rep. 895, affirmed.

THE case is stated in the opinion.

*Mr. James R. Offield*, with whom *Mr. Charles K. Offield* was on the brief, for petitioners.

*Mr. James Q. Rice* for respondents.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit for infringement of a patent embraced in letters patent No. 821,580 and a re-issue thereof, No. 13,542.

The suit was originally brought by Frederick E. Baldwin, patentee. John Simmons Company, licensee, having the exclusive right to manufacture and sell the patented device, subsequently intervened and became complainant.

The patents are for a lamp designed to generate and burn acetylene or similar gas "intended for use," to quote the description of the patents, "and adapted to use as a bicycle, automobile, yacht, or miner's lamp, or for any other analogous purpose, it being necessary only to change its form or dimensions to adapt it to any one of the purposes mentioned." Stress in this case, however, is put upon the use of the asserted invention as a miner's lamp, such use conspicuously displaying its commercial utility.

Answer was filed by the Justrite Manufacturing Company, which was made a party defendant to the suit as manufacturer of the asserted infringing lamp, and by stipulation its answer was considered the answer of the Abercrombie & Fitch Company. It denied invention with great detail, set up anticipating patents, denied its utility, attacked the validity of the re-issue on the ground that the 1st and 4th claims of the original patent were held invalid by the United States Circuit Court of Appeals for the Seventh Circuit, 199 Fed. Rep. 133, and for the further reason that the application for the re-issue was not made until seven years after the original letters patent were issued and rights had accrued in the meantime to defendants (petitioners here) and to others. Infringement was denied.

A decree was passed sustaining the validity of the original patent and of the re-issue, the originality of the invention and its utility and adjudging that defendants (petitioners) had infringed claim 4 of the re-issue, that plaintiffs recover the damages they had incurred by reason of the infringement and the profits defendants had received, an accounting being ordered for this purpose. A perpetual

injunction was also adjudged against further infringements. 227 Fed. Rep. 455. The decree was affirmed in all respects by the Circuit Court of Appeals, 228 Fed. Rep. 895, and subsequently this certiorari was granted.

The plaintiffs (we shall so designate respondents) struggled through some years and some litigation to the success of the decrees in the pending case. In a suit brought in the District Court for the Southern District of Illinois a device like that of the defendants herein was held to be an infringement of certain claims of the original patent. The holding was reversed by the Circuit Court of Appeals for the Seventh Circuit. *Bleser* v. *Baldwin*, 199 Fed. Rep. 133.

Subsequently, the re-issue having been granted, suit was brought in the Western District of Pennsylvania against an asserted infringer. Unfair competition was also alleged, and, holding the latter to exist, the court granted a preliminary injunction. 210 Fed. Rep. 560. Upon final hearing that holding was repeated, and infringement of a claim of the re-issue patent decreed. 215 Fed. Rep. 735. The decree was reversed by the Circuit Court of Appeals (Third Circuit) on the ground that the claim of the re-issue patent found to have been infringed was broader than a corresponding claim of the original letters patent and therefore void. The holding of the District Court as to unfair competition was sustained. 219 Fed. Rep. 735. Aided by the reasoning in the opinions of those cases and the discussion of counsel, we pass to the consideration of the propositions in controversy.

First, as to the original patent. Its contribution to the world's instrumentalities was, as we have said, an acetylene lamp and was represented by the following figure, designated as Figure 1.

It will be observed that the device consists of a receptacle divided into two compartments, an upper one for

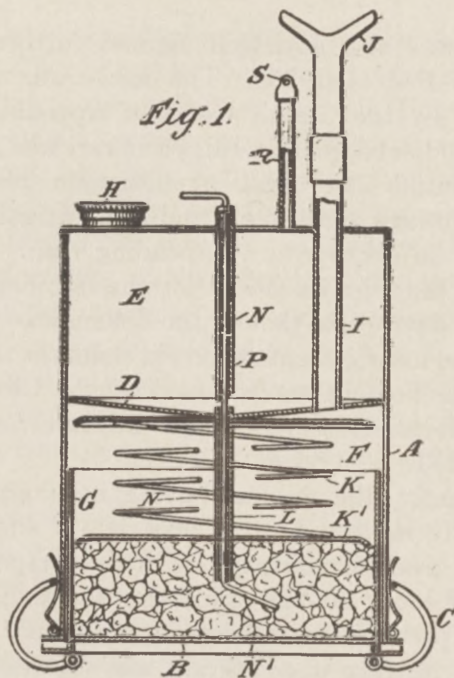


Fig. 1.

water and a lower one designed to serve as a gas-generating chamber, adapted to contain a receptacle for calcium carbide, which is attached to and forms the detachable bottom. There are means of introducing water into the reservoir and thence to the carbide and means of conducting the gas to the burner.

The device is a means of using the gas (acetylene) formed by the decomposition of water with calcium carbide and necessarily must bring them into contact in an effectual way and use the gas generated in a controlled flow. A tube (L) hence leads from the water reservoir into the carbide receptacle and forms a duct which introduces the water into the body of the carbide. Various means, the specifications recite, have been employed to regulate or control the flow of water to the carbide, which were found objectionable or not adequate.

The patentee then says that the method which he has invented "for securing the proper feed under all circumstances" without "objectionable features is to make the bore of the duct of comparatively large size and then restrict it by means of a wire or rod preferably centrally located therein to leave a channel of the proper size."

It is then said: "This arrangement is simple; but in a long experience it has been found to be entirely successful. It is possible to secure the correct drop-by-drop feed with a duct of considerable size, since the friction of the water on the large area of the tube-wall and wire reduces its flow. This retarding friction may be regulated by varying the size of wire used. The duct does not become choked, since if foreign particles are deposited therein the water can take a zigzag course around it without the supply being appreciably affected. If it is at any time necessary to clean the tube, the wire is simply reciprocated and rotated a few times from the outside of the lamp without disturbing the position of other parts. This nice regulation of the flow enables me to entirely dispense with the troublesome adjustment of the valve. . . . In some cases, however, there is employed in connection with the means for introducing the water into the mass of carbid a device in the nature of a stirrer, which on proper manipulation may be used to break up the mass of carbid surrounding the outlet of the water duct and which by having become slaked and caked by the action of water prevents the proper percolation of the latter to the unslaked carbid in the receptacle G, Fig. 1. As such device I employ a stem or rod N, which extends down through the tube L and is bent at substantially right angles to form an arm N′."

There is also a figure attached to the patent which shows a valve upon the constricting rod and it is said "this rod may form a prolongation of the valve stem . . . or in case no valve is used may extend from the top of the

lamp down through the water-reservoir," and this is illustrated by figures.

"As calcium carbid possesses strongly absorptive properties, the introduction of water through the tube L will result in the gradual slaking of the material about its outlet; but the lime thus produced becomes gradually less permeable to the water, so that an insufficient quantity of gas is generated to maintain the proper flame. When this becomes noticeable, the rod N is turned, so as to cause the arm N′ to break up to a greater or less extent the mass of lime, and in practice I have found that under ordinary conditions this is amply sufficient to insure a substantially uniform generation of gas until all of the carbid in the receptacle G is exhausted."

There are some further descriptive details not necessary to be repeated, and this was said: "The specific construction of the various parts of my lamp may be, as will be seen from a consideration of the nature of the improvements, very greatly varied without departing from the invention."

The claims of the patent which are pertinent to our inquiry are as follows:

"1. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a tube extending from the former a considerable distance into the latter so as to be embedded in the mass of carbid contained in said receptacle, and a rod or stem extending through said tube into the carbid-receptacle and having its end formed as a stirrer to break up the slaked carbid around the outlet of the water-tube, as set forth.

"2. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a tube extending from the former into the latter so as to be embedded in the mass of carbid contained in the receptacle, a rod extending from a point outside of the

lamp through the tube and into the carbid-chamber and having its end bent to form a stirrer for breaking up the slaked carbid around the outlet of the water-tube, as set forth.

* * * * * * * *

"4. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a water-tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water-tube, and constituting a stirrer to break up slaked carbid around the outlet of the water-tube, *the rod operating to restrict and thus control the flow of water to the carbid,* as set forth."

The words in italics are the addition of the re-issue.

Whether the lamp exhibits invention, when both patents are considered, we shall discuss later. Our attention is more immediately challenged by the stress put upon other defenses, especially upon the contention that the patent is confined to a special form and, so confined, is not infringed; and that the extension of the patent by the re-issue is void. The controversy is, therefore, brought to a consideration of the original patent as added to or developed by the re-issue. And their comparison centers in the water-feeding duct or tube and its restriction by means of a wire or rod and the shape and use of the rod to pierce or stir the carbide. In the original patent, as we have seen, it was said that the invented method for securing a proper feed (flow of the water to the carbide) without certain specific objectionable features was "to make the bore of the duct of comparatively large size and then restrict it by means of a wire or rod preferably centrally located therein to leave a channel of the proper size." In the re-issue, after the words "comparatively large size," it was added—"extend the tube which forms the duct downward so that its end will be always em-

bedded in the carbid." In other words, the tube is explicitly described as extending to and its end embedded in the carbide, and this, it is contended, was an enlargement of the original patent.

The contention is untenable if there was in the original patent an implication of such length and termination of the tube, and we think there was. To conduct water to the carbide it necessarily had to extend to the carbide receptacle and as necessarily had to penetrate the carbide if the rod located in it, whether straight or bent, was to act "in the nature of a stirrer, which on proper manipulation" might "be used to break up the mass of carbid surrounding the outlet of the water duct," which is the purpose that the patent ascribes to it. And Fig. 1 shows such ending and embedding. It would be impossible otherwise to perform its function or secure the "proper percolation" of the water "to the unslaked carbid in the receptacle G, Fig. 1."

But there was another addition in the re-issue which, it is contended, enlarges the invention and assigns a new shape and function to the stirrer of the original. In the latter the rod is described as extending "from the top of the lamp down through the water-reservoir, as shown in Fig. 3." To this the re-issue adds:

"It will be understood from what has been said that the function of the stirrer is to break up, pierce or disturb the particles of the slaked carbid mass which, when the lamp is in use, forms at the delivery end of the tube. This slaked carbid mass tends to solidify and either shuts the water off altogether or restricts it so that less water is delivered from the water tube than the lamp demands for efficient operation. As it is sufficient, under certain circumstances, to insure the requisite water flow by so manipulating the stirrer, as to pierce, break up, or loosen the slaked carbid mass immediately around or at the mouth of the tube, it is obvious that the stirrer need not

always be formed with a bent end or so as to extend radially from the mouth of the tube."

There is nothing in this but what was clearly implied in the original, except the shape of the stirrer. In the original it is described and represented as bent. In the re-issue it is stated to be obvious that the stirrer need not always be bent "or extend radially from the mouth of the tube."

We are unable to assign to this the extent of alteration that counsel do, nor do we think it necessary to rehearse the details of their argument. We have given it attention and the cases it cites, especially the decision and reasoning of the Circuit Court of Appeals for the Third Circuit in *Grier Bros. Co.* v. *Baldwin*, 219 Fed. Rep. 735, but we are constrained to a different conclusion. Indeed, we are of opinion that the original patent did not need the exposition of the re-issue. It exhibited an invention of merit, certainly one entitled to invoke the doctrine of equivalents. *Paper Bag Patent Case*, 210 U. S. 405. Baldwin, the patentee, complied with the statute (§ 4888, Rev. Stats.) by explaining the principle of his invention and the mode of putting it to practical use; there was a clear exposition of the principle and the instruments of its use were defined and their purpose and manner of operation. It left nothing in either for further experiment or contrivance. As we have said, the invention was a means of using the gas formed by the decomposition of water with calcium carbide, and necessarily the water and carbide must be brought into contact and under a controlled flow; hence the tube and its centrally located rod extending downward to the carbide. It was foreseen and stated that the carbide might become torpid or slaked by the action of the water and might have to be disturbed or dispersed in order that there might be percolation of water to unslaked carbide, and this was provided to be performed by a simple manipulation of the

rod. Whether the rod was bent or made straight was unimportant. In either form it removed the slake and secured the continuous operation of the water and carbide and through them the formation of the gas and its illuminating purpose. One or the other might be better, according to the extent of the dispersion required, and one naturally suggested the other.

It is, however, contended that plaintiffs were required to give up and did give up in the Patent Office a claim which had the extent which we have indicated. A claim, numbered in the application as 6, described the rod as: "A rod extending from a point outside the lamp through the tube into the carbide receptacle."

Counsel say, "It is to be particularly noted" that while other claims "mentioned the stirring function of the rod, claim 6 omitted this feature," but that the solicitor who drew the claim "unquestionably had in mind the straight form of rod construction without any stirrer at the end, for the claim specifies 'through the tube into the carbide receptacle.'" It is hence argued that when the claim was given up the straight form of construction was given up, and, having been given up to secure the patent, it cannot be insisted upon to prevent its use by others. But counsel is in error as to the extent of the surrender. The straight construction was not given up, but such construction through the tube into the carbide receptacle, and this was in deference, and only in deference, to other patents that showed such use, that is, showed a penetration into the receptacle but not its duct ending and embedded in the carbide.

We do not think the case calls for extended discussion. It is best considered in broad outline. The scope and merit of the patents are of instant and assured impression, and to the attempt to defeat or limit their invention by the state of the prior art we adduce the discussion and reasoning of the opinions of the lower courts, which we approve.

The denial of infringement is also easily disposed of. Indeed, it has been in effect disposed of. It is based on the contention that the stirrer is an essential of plaintiff's lamp and that a stirrer is absent from defendants' lamp, which is in all other particulars, as far as this case is concerned, similar to the plaintiff's lamp. To the contention of defendants, therefore, we cannot assent. There is a stirrer in both, and its form, as we have seen, is not of the essence of the invention. There is nothing occult in the act of stirring; it is causing movement or disturbance, and this may be performed by a straight rod as by a bent one. There may be difference in their dispersing power, but no difference in function, and one or the other would be instantly selected according to the need, under the clear description of the patent. This ready adaptation of the form of stirrer to the work to be performed Baldwin demonstrated even before the grant of the patent. Early in 1906 he put upon the market a lamp with a straight rod, "which, among other things," as the District Court has said, "has characterized the commercial lamp ever since."

To the contention that the Justrite Company, the manufacturing defendant, acquired rights before the re-issue we again may oppose the reasoning and conclusion of District Judge Mayer and their affirmance by the Circuit Court of Appeals. The learned judge said: "It will be remembered that this company entered the field with its lamp at a time when the validity and scope of the Baldwin patent were still unquestioned and when after some five years of capable effort, the Baldwin lamp had created an extensive market. The Justrite Company took its chances and, in view of the necessities of the situation, it is relieved of all accountability for the period prior to the granting of the reissue patent; but when the reissue was granted the Justrite Company again took its chances.

"By the reissuance of the patent, the patentee loses all in the way of an accounting under the original patent,

but the dominant purpose of the reissue statute was to save to the inventor the future remaining after the reissue.

"I see nothing in the course of plaintiffs or defendants which would allow a court of equity to conclude that defendants are to be relieved because of intervening rights."

*Decree affirmed.*

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## STEVIRMAC OIL & GAS COMPANY *v.* DITTMAN ET AL.

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

No. 131. Submitted October 22, 1917.—Decided December 10, 1917.

A party against whom a default judgment had been rendered in the District Court eighteen months previously, applied there to have it set aside for lack of personal jurisdiction, alleging that there was no service and that the return of service, upon which the default was based, was unauthorized and false. After hearing the application and affidavits, the court sustained its jurisdiction to enter the judgment and overruled the application. *Held,* that the proceeding to set aside the judgment amounted to an independent action, and that the question of jurisdiction, as it related only to the power of the court in the original action, could not be made the basis of a direct writ of error, under Judicial Code, § 238, to determine the correctness of the order overruling the application.

Writ of error dismissed.

THE case is stated in the opinion.

*Mr. George S. Ramsey, Mr. Edgar A. de Meules, Mr. Malcolm E. Rosser* and *Mr. Sol H. Kauffman* for plaintiff in error, in support of this court's jurisdiction, cited: *Kendall* v. *American Automatic Loom Co.*, 198 U. S. 477;

*Merriam* v. *Saalfield*, 241 U. S. 26; *Stewart* v. *Ramsay*, 242 U. S. 128; and *St. Louis Cotton Comp. Co.* v. *American Cotton Co.*, 125 Fed. Rep. 196.

*Mr. Jesse H. Wise*, *Mr. C. R. Thurlwell* and *Mr. William E. Minor* for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

On October 4, 1913, the defendants in error brought suit in the United States District Court for the Eastern District of Oklahoma against The Stevirmac Oil & Gas Company and Virgil Hicks to recover a money judgment. Process was issued naming November 3, 1913, as answer date. On October 15, 1913, the marshal made return certifying that he had delivered a copy of the summons to Virgil Hicks, Treas., in person, and that the other defendant named was not served. On November 25, 1913, the court ordered the marshal to amend the return to conform to the facts, and thereupon the marshal amended his return so as to certify that he had served The Stevirmac Oil & Gas Company by leaving a copy of the summons with Virgil Hicks personally and as treasurer of the company at Sapulpa, Oklahoma, in said district, on October 13, 1913, the president, chairman of the board of directors, or other chief officer not being found in the district, and Virgil Hicks being in charge of the place of business of the corporation.

On December 1, 1913, the court rendered judgment by default against The Stevirmac Oil & Gas Company. Under the laws of Oklahoma service can be made upon a corporation's treasurer only when the president, chairman of the board of directors, or other chief officer, cannot be found in the jurisdiction, and this fact must be stated in the return. *Cunningham Commission Co.* v. *Rorer Mill & Elevator Co.*, 25 Oklahoma, 133.

About eighteen months after the default judgment The Stevirmac Oil & Gas Company filed an application to set aside the default judgment; it was averred that the Stevirmac Oil & Gas Company, a corporation, was named in the summons issued with Virgil Hicks; that on October 13, 1913, the United States Marshal delivered to said Virgil Hicks at Sapulpa, Oklahoma, a copy of the summons; that at that time H. H. McFann was the president of the corporation and was in the town of Sapulpa, was well known therein and had a regular place of business and residence in said town; that Virgil Hicks was not in charge of the place of business of the defendant corporation; that at the time of the delivery of the copy of the summons to him the marshal did not tell or inform him in any way that the copy was for the defendant, The Stevirmac Oil & Gas Company, or that said delivery was intended for service upon said defendant corporation, and that Virgil Hicks understood and believed that the service was upon him individually; that the United States Marshal inquired of Virgil Hicks for the name of the president of the defendant corporation and where he could be found, and was told that H. H. McFann was the president of the corporation, was then in Sapulpa, Oklahoma, wherein he could be found; that this constituted all the service of summons made in the case; that no service was ever made on McFann or upon The Stevirmac Oil & Gas Company; that on October 15, 1913, the marshal made return certifying that he had delivered a copy of the return to Virgil Hicks, treasurer, in person at Sapulpa, Oklahoma, the other defendant named "not served;" that on November 25, 1913, without notice to The Stevirmac Oil & Gas Company the court made an order requiring or directing the marshal to amend the return to conform with the facts; that thereafter the return was amended so as to certify that the summons had been served upon The Stevirmac Oil & Gas Company by handing to and leaving a true

and attested copy with Virgil Hicks personally, treasurer of said corporation, at Sapulpa, Oklahoma, on October 13, 1913, the president, chairman of the board of directors, or other chief officers not being found in the district; that the said Virgil Hicks was the person in charge of the place of business of the defendant corporation; that the said marshal had not at any time served the said summons on The Stevirmac Oil & Gas Company; that plaintiff in the original suit caused and procured said false amended return to be made by the said marshal; that The Stevirmac Oil & Gas Company had no notice or knowledge of the said order of the court amending said return until long after the judgment was rendered; that the record does not show that the marshal asked leave of court, or that the court granted leave to make such amended return; that it is true that the court ordered the marshal to amend the original return; that said return was complete upon its face, and that the court had no power to order the marshal to make another or different return; that, therefore, said judgment was obtained without service of process upon The Stevirmac Oil & Gas Company as required by law, and is void. The Stevirmac Oil & Gas Company filed certain affidavits in support of this application.

Upon hearing the application, with accompanying affidavits, the court refused to set aside the former judgment and overruled the application of The Stevirmac Oil & Gas Company. The court made a certificate setting forth that the order refusing to set aside and vacate the judgment rendered December 1, 1913, involved and determined the question whether the court had jurisdiction over the person of The Stevirmac Oil & Gas Company; it being contended that the court had no jurisdiction to render said judgment on account of lack of jurisdiction of the person of the defendant, and that the order entered was a denial of that contention.

The case is brought here solely upon the question of

the jurisdiction of the District Court. It was submitted upon briefs which argue the question of the authority of the court to order the amendment of the return and thereby acquire jurisdiction over The Stevirmac Oil & Gas Company. The plaintiff in error contends that the proceeding to vacate the judgment was in effect a separate proceeding, and as it resulted in a judgment refusing to vacate the former judgment, the latter is final and reviewable here. We agree that it is a final judgment, reviewable in the proper court. The question now presented is whether it can be reviewed by direct writ of error from this court to the District Court. This court looks after its own jurisdiction, whether the point is raised by counsel or not. *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan,* 111 U. S. 379. Section 5 of the Court of Appeals Act of 1891, now Judicial Code, § 238, 36 Stats. 1157, provides for direct appeals to and writs of error from this court in cases in which the jurisdiction of the District Court is in issue, in which case the question of jurisdiction only must be certified here for decision. Such appeals or writs of error do not bring here the merits of the controversy, and impose upon this court the single duty of determining whether the District Court had jurisdiction of the case. In the present case while it is certified that the jurisdiction of the court rendering the original judgment was presented and decided against the contention of the plaintiff in error, it is apparent that no question is made concerning the jurisdiction of the court to entertain the proceeding to set aside the former judgment, and that the real controversy arises from the attack upon the authority of the court to order an amendment of the marshal's return, and to render the original judgment. In such cases we are of opinion that former decisions of this court have settled the construction of the statute to be against the right to entertain direct appeals or writs of error upon the question of jurisdiction.

*Carey* v. *Houston & Texas Central Ry. Co.*, 150 U. S. 170, presents an action upon a bill in equity to impeach and set aside a decree of foreclosure in the Circuit Court on the ground of fraud. It was held that no question of jurisdiction over that suit could be availed of to sustain a direct appeal to this court under § 5 of the Court of Appeals Act. In that case Mr. Chief Justice Fuller, speaking for the court, expounding the fifth section of the Act of March 3, 1891, said:

"But the fifth section of the act of March 3, 1891, does not authorize a direct appeal to this court in a suit upon a question involving the jurisdiction of the Circuit Court over another suit previously determined in the same court. It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it and duly certified, justifies such appeal directly to this court. This suit to impeach the decree of May 4, 1888, and to prevent the consummation of the alleged plan of reorganization, was a separate and distinct case, so far as this inquiry is concerned, from the suit to foreclose the mortgages on the railroad property; and no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein can be availed of to sustain the present appeal from the decree in this proceeding.

"The collusion and fraud charged in the institution and conduct of the prior litigation, and in the procurement of the decree against the railway company, and in the other transactions in respect of which relief was sought against the defendants, seem to form the gravamen of the case; but whether the bill be treated as a bill of review, an original bill of the same nature, or an original bill on the ground of fraud, it was a distinct proceeding in which the moving parties were shifted, and the fact that it put in issue the jurisdiction in the proceedings it assailed would

not change the appeal from this, into an appeal from the prior decree."

That case was followed and approved in *In re Lennon*, 150 U. S. 393, wherein Lennon filed a petition in *habeas corpus* in the Circuit Court of the United States for the Northern District of Ohio seeking to be relieved from punishment for contempt because of violation of an injunction issued in the same court, upon the ground that the court had no jurisdiction in the original case in which the order had been issued, and had no jurisdiction over the person of Lennon because he was not a party to the original suit, not having been served with process. This court held that while the proceeding in *habeas corpus* undertook to attack the jurisdiction of the court to make the order, the right to entertain the petition for *habeas corpus* was not in issue, but on the contrary, jurisdiction had been entertained, and conceding that the jurisdiction to discharge the prisoner would depend upon want of jurisdiction to commit in the original case, still that would not present a question reviewable by direct appeal in the *habeas corpus* suit. See also *Empire State-Idaho Mining and Developing Co.* v. *Hanley*, 205 U. S. 225, 232.

The plaintiff in error correctly contends that the proceeding to set aside the original judgment is in effect an independent action, and the judgment therein final and reviewable. The proceeding to set aside the original judgment is based upon the theory that no jurisdiction was acquired over The Stevirmac Oil & Gas Company by the service of the process as amended by the court's order, and hence the company was never properly subject to the jurisdiction of the court in the original suit. No contention is made that the court could not entertain the proceeding to set aside that judgment, indeed it did entertain jurisdiction and decided against the contention of the plaintiff in error. In such case we have no doubt that in view of the nature of the attack made upon the

original judgment, the judgment in the present proceeding was final, and reviewable in the Court of Appeals. *Rust* v. *United Waterworks Co.*, 70 Fed. Rep. 129. But the attempt now made is to convert the writ of error into a means of reviewing the question of the jurisdiction of the court to render the original judgment. For the reasons stated, and following the construction of the statute already given, the writ of error must be dismissed, and it is so ordered.

*Dismissed.*

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## JONES ET AL v. CITY OF PORTLAND.

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

No. 77. Argued November 22, 1917.—Decided December 10, 1917.

Establishing and maintaining a public yard for the sale of wood, coal and other fuel, without financial profit, to the inhabitants of a municipality, *held*, a public purpose for which taxes may be levied without violating the Fourteenth Amendment.

Revised Statutes of Maine, 1903, c. 4, § 87, sustained.

113 Maine, 123, affirmed.

The case is stated in the opinion.

*Mr. Eben Winthrop Freeman* for plaintiffs in error:

The legislature may not make a use public by declaring it such. *Brown* v. *Gerald*, 100 Maine, 251, 373; *Lawton* v. *Steele*, 152 U. S. 133; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159; *Allen* v. *Jay*, 60 Maine, 124, 136. The business of selling fuel is essentially private and taxes laid to support it are unconstitutional. *Citizens' Savings Loan Assn.* v. *Topeka*, 20 Wall. 655; *State* v. *Switzler*, 143

Missouri, 287; *Brooks* v. *Brooklyn*, 146 Iowa, 136; *Baker* v. *Grand Rapids*, 142 Michigan, 687; *Opinion of Justices*, 155 Massachusetts, 601; *Opinion of Justices*, 182 Massachusetts, 610; *Muller* v. *Thompson*, 149 Wisconsin, 488; *North Dakota* v. *Nelson County*, 1 N. Dak. 88; *Geneseo* v. *Gas Company*, 55 Kansas, 358; *Vail* v. *Attica*, 8 Kans. App. 668; *Keen* v. *Waycross*, 101 Georgia, 588; *Hayward* v. *Redcliff*, 20 Colorado, 33; *Mauldin* v. *Greenville*, 33 S. Car. 1; *Attorney General* v. *Detroit*, 150 Michigan, 310; *State* v. *Guilbert*, 56 Ohio St. 575; *Toledo* v. *Lynch*, 88 Ohio St. 71.

*Bussey* v. *Gilmore*, 3 Maine, 191, 197; *Opinion of Justices*, 58 Maine, 590; *Libby* v. *Portland*, 105 Maine, 370.

*Laughlin* v. *Portland*, 111 Maine, 486, is unsound.

The right of a municipality to establish and operate a municipal fuel plant was denied in *Opinion of Justices*, 155 Massachusetts, 598; *Prince* v. *Crocker*, 166 Massachusetts, 347, 361; *Opinion of Justices*, 182 Massachusetts, 605. See also *Opinion of Justices*, 190 Massachusetts, 611, 613; *Wheelock* v. *Lowell*, 196 Massachusetts, 220, 225; *Opinion of Justices*, 211 Massachusetts, 624.

It is permissible for the government to embark in the enterprise of furnishing the public with the necessities and conveniences of life whenever the exercise of a governmental function, as the exclusive use of a portion of the public street or the exercise of the power of eminent domain, is required to carry on the enterprise. *Opinion of Justices*, 155 Massachusetts, 598, 605; *Opinion of Justices*, 182 Massachusetts, 605, 608; *State* v. *Toledo*, 48 Ohio St. 112.

*Mr. Carroll S. Chaplin*, with whom *Mr. Guy H. Sturgis* and *Mr. Henry P. Frank* were on the brief, for defendant in error:

While custom and usage have been adopted as guides in determining whether a use is public or private (*Citizens'*

*Savings Loan Assn.* v. *Topeka*, 20 Wall. 655), recent cases have governed themselves more by the needs of the public arising from new and changed conditions. *State* v. *Toledo*, 48 Ohio St. 112; *Matter of Tuthill*, 36 App. Div. 500; *Holton* v. *Camilla*, 134 Georgia, 560; *Laughlin* v. *Portland*, 111 Maine, 486, 491, 502.

The establishment and maintenance of a municipal fuel yard is a public use. *Laughlin* v. *Portland, supra; Opinion of Justices*, 155 Massachusetts, 607; *Opinion of Justices*, 182 Massachusetts, 611; *Baker* v. *Grand Rapids*, 142 Michigan, 687. Likewise, the furnishing of ice. *Holton* v. *Camilla*, 134 Georgia, 560.

The operation of water works, and gas and electric systems for lighting and heating purposes, are public uses. *Gibbs Consolidated Gas Co.* v. *Baltimore*, 130 U. S. 393; *State* v. *Toledo, supra; Opinion of Justices*, 211 Massachusetts, 624. The means or method by which the commodity is furnished is a mere incident to the use, not determinative of its character. *Opinion of Justices*, 150 Massachusetts, 595. In *Opinion of Justices*, 182 Massachusetts, 605, and *Opinion of Justices*, 211 Massachusetts, 624, the conclusion of the court was influenced by the question whether or not the distribution of the commodity involved the use of the public streets and the exercise of eminent domain; but that question is immaterial. *Laughlin* v. *Portland*, 111 Maine, 486, 495, 496.

If the use be public, the legislative determination that a public exigency exists and that the proposed law is necessary is conclusive. *Allen* v. *Jay*, 60 Maine, 124, 138; *Opinion of Justices*, 58 Maine, 590, 619; *Laughlin* v. *Portland*, 111 Maine, 486, 499; *Talbot* v. *Hudson*, 82 Massachusetts, 417, 424; *Lowell* v. *Boston*, 111 Massachusetts, 454, 463; *Opinion of Justices*, 155 Massachusetts, 598, 607; *Livingston County* v. *Darlington*, 101 U. S. 407, 416.

It is to be presumed that the circumstances warranting the action of the legislature did in fact exist and that it

acted with full knowledge, and the judgment of the highest court of the State on the question of public use will be accepted by this court unless clearly without foundation.

MR. JUSTICE DAY delivered the opinion of the court.

By an act of the legislature of the State of Maine approved March 19, 1903, P. L. 1903, c. 122; § 87, c. 4, Revised Statutes of Maine, 1903, it was provided:

"Any city or town may establish and maintain, within its limits, a permanent wood, coal and fuel yard, for the purpose of selling, at cost, wood, coal and fuel to its inhabitants. The term 'at cost,' as used herein, shall be construed as meaning without financial profit."

The City of Portland, Maine, voted to establish and maintain within its limits a permanent coal and fuel yard for the purposes of selling at cost wood, coal and fuel to its inhabitants and that the money necessary for such purposes be raised by taxation, and that the term "at cost" as used in said vote should be construed as meaning without financial profit. On February 3, 1913, the common council of the city at a legal meeting passed the vote, and on the same date it was passed by the board of aldermen of the city, and on February 4, 1913, the mayor of the city approved it, whereupon it became the vote of the City of Portland. The city voted to appropriate the sum of one thousand dollars to be devoted to carrying out the purposes of the vote, and the appropriation was passed by the common council, the board of aldermen, and approved by the mayor of the city.

This suit was brought by citizens and taxpayers of Portland in the Supreme Judicial Court of Maine in equity to enjoin the establishment of the yard. The Supreme Judicial Court sustained a demurrer to the bill, and dismissed it. 113 Maine, 123. A writ of error brings the case here because of alleged violation of rights se-

cured to the plaintiffs in error by the Fourteenth Amendment. The contention is that the establishment of the municipal wood yard is not a public purpose, that taxation to accomplish that end amounts to the taking of the property of the plaintiffs in error without due process of law.

The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. *Citizens' Saving & Loan Association* v. *Topeka,* 20 Wall. 655.

The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the State upon the authority of a previous decision of that court. *Laughlin* v. *City of Portland,* 111 Maine, 486.

The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the State passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect. *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 607. In *Union Lime Co.*

v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211, this court declared that a decision of the highest court of the State declaring a use to be public in its nature would be accepted unless clearly not well founded, citing *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 160; *Clark* v. *Nash*, 198 U. S. 361, 369; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield* v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372, 377; *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 607. This doctrine was reiterated in *O'Neill* v. *Leamer*, 239 U. S. 244, 253.

In the case of *Laughlin* v. *City of Portland*, 111 Maine, *supra*, the matter was fully considered by the Supreme Judicial Court of that State. After reviewing the cases which established the general authority of municipalities in the interest of the public health, convenience, and welfare to make provisions for supplying the inhabitants of such communities with water, light and heat by means adequate for that purpose, the court came to consider the distinction sought to be made between the cases which sustain the authority of the State to authorize municipal action for the purposes stated, and the one under consideration, because of the fact that in the instances in which municipal authority had been sustained the use of the public streets and highways for mains, poles and wires in the distribution of water, light and heat had been required under public authority, whereas in supplying fuel to consumers, under the terms of the law in question, no such permission was essential, the court said (111 Maine, 486, 496):

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal

itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution and, if the Legislature has the power to authorize municipalities to furnish heat to its inhabitants 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams travelling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the Legislature authorizing the former is constitutional but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the Legislature which is the only question before the court and not the wisdom of its exercise which is for the Legislature alone."

Answering the objection that sustaining the act in question opens the door to the exercise of municipal authority to conduct other lines of business and commercial activity to the destruction of private business, the court said (111 Maine, 500):

"But it is urged, why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market or a bakery. The answer has already been indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensible necessity of life, and more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition in the ordinary channels of private

business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle it would be our duty to pronounce the act unconstitutional, but in our opinion it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost) nor for the sake of the indirect gains that may result to purchasers through reduction in price by governmental competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole."

Bearing in mind that it is not the function of this court under the authority of the Fourteenth Amendment to supervise the legislation of the States in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in *State of Ohio* v. *Toledo*, 48

Ohio St. 112. We see no reason why the State may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a State authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the State to be a public one, the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Judicial Court of Maine must be affirmed.

*Affirmed.*

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## KIRK ET AL. v. OLSON.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 81. Argued November 23, 1917.—Decided December 10, 1917.

A finding of mineral character made in allowing an entry under the placer mining law is subject to be reconsidered and reversed by the Land Department at any time before the patent issues, upon due notice to the parties interested.

Where land embraced in conflicting placer and homestead entries is found, upon hearing in the Land Department, to be non-mineral and therefore is patented to the homesteader, the finding does not conclude a claimant under the placer entry who was not notified and given opportunity to be heard; a trust might be declared in his favor if he proved the land mineral; but not when the evidence confirms the Department's finding.

35 S. Dak. 620, affirmed.

THE case is stated in the opinion.

*Mr. William G. Porter, Mr. Ed. L. Grantham* and *Mr. C. C. Croal* for plaintiffs in error, submitted.

*Mr. Samuel Herrick,* with whom *Mr. Clifford A. Wilson* was on the brief, for defendant in error.

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

This was a suit to quiet the title to a small tract of land in South Dakota which had been the subject of conflicting claims under the public land laws. One claim was made under the placer mining law and the other under the homestead law. Both claims embraced other lands, the tract in question being all that was common to both. It was subject to disposal under the placer mining law if valuable for placer mining, and under the homestead law [1] if valuable only for agriculture. Whether it was valuable for the one purpose or the other was a question of fact to be determined by the officers of the Land Department. The claim under the placer mining law was first brought to the attention of those officers and, upon *ex parte* proofs presented in support of that claim, they found the tract to be valuable for placer mining and permitted it to be included in a placer entry. The homestead claim was next brought to their attention and, upon *ex parte* proofs presented in support of that claim, they found the tract to be valuable only for agriculture and permitted it to be included in a homestead entry. Thus the findings upon the *ex parte* proofs were incon-

[1] The tract was in the Black Hills Forest Reserve and, if agricultural land, was brought within the operation of the homestead law by the Acts of March 3, 1899, c. 424, 30 Stat. 1095, and April 15, 1902, c. 507, 32 Stat. 106.

sistent and the tract was included in conflicting entries. This was discovered before either entry was passed to patent, and so a hearing was ordered to determine the true character of the land. The placer entry had been made by two brothers and through some inadvertence one of these was not notified of the hearing. The other brother and the homestead entryman appeared and the hearing proceeded as if all parties in interest were present; that is to say, there was no reference to the absence of the placer claimant not notified. Upon the proofs produced at this hearing the land officers found the tract to have no value for placer mining and to be valuable only for agriculture, and as a result of the finding the tract was eliminated from the placer entry and the homestead entry was passed to patent. The patentee afterward sold and transferred the tract to the plaintiff, who knew that a right to it was still being asserted under the placer entry.

By their answer, which was in the nature of a cross bill, the defendants, who were the placer claimants, asserted that they had located and were entitled to the mining claim before mentioned, that the tract in question was lawfully included in that claim and was valuable for placer mining, that the entry of the claim at the land office was lawful and entitled them to a patent, and that the subsequent elimination of the tract from that entry was unlawful and violative of their rights, because the earlier finding that the tract was valuable for placer mining was conclusive upon that point, and, if not conclusive, could not be recalled or disturbed except upon due notice to both placer claimants and after giving them a reasonable opportunity to sustain their entry by evidence and otherwise. The right of the homestead claimant to have the tract patented to him was questioned on other grounds, but these need not be noticed, for they plainly were such as could not be urged by the defendants. The answer con-

cluded with a prayer that the plaintiff be decreed to hold the title to the tract in trust for the defendants and compelled to convey the same to them.

At the trial the evidence bearing upon the character of the tract disclosed, without any contradiction, that it had no value for placer mining, but was strictly agricultural land, and that its only use by the placer claimants had been for farming purposes.

The plaintiff was given a decree, which was affirmed, 35 S. Dak. 620, and the defendants seek a review here.

A statement of the case leaves little to be said, for the pertinent rules of decision are well settled and easily applied.

The original finding respecting the character of the tract was not in itself final or conclusive, but essentially interlocutory. It was only a step in the proceedings looking to the ultimate disposal of the title, and, until the issue of a patent, was as much open to reconsideration and reversal as are the interlocutory orders or decrees of a court of equity until the entry of a final decree. *New Orleans* v. *Paine*, 147 U. S. 261, 266; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 592 *et seq.*; *Hawley* v. *Diller*, 178 U. S. 476, 488. In the last case this court said: "The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the act of Congress."

Without any doubt both placer claimants were entitled to notice of the intended reconsideration of the character of the tract and to an opportunity to sustain the original finding by evidence and otherwise. *Parsons* v. *Venzke*, 164 U. S. 89, 91, and cases *supra*. One was not notified and so was not accorded the opportunity to which he was entitled. This irregularity prevented the ultimate finding, upon which the homestead patent rested, from being conclusive of the character of the tract, as against him. *Thayer* v. *Spratt*, 189 U. S. 346, 351. He,

therefore, was entitled in this suit to assert and show, if such was the fact, that the tract was valuable for placer mining, as originally found by the land officers; and had he shown that this was its real character, he would have been entitled to a decree charging the title with an appropriate trust for his benefit. *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 453, 454; *Thayer* v. *Spratt*, *supra*. But no such showing was made at the trial. On the contrary, the evidence established that the tract was strictly agricultural, and therefore not subject to entry or acquisition under the placer mining law. Thus it appears that the irregularity complained of was not prejudicial and did not result in the issue of a patent to one when it should have gone to another. See *Bohall* v. *Dilla*, 114 U. S. 47; *Sparks* v. *Pierce*, 115 U. S. 408; *Johnson* v. *Riddle*, 240 U. S. 467, 481.

*Judgment affirmed.*

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## HITCHMAN COAL & COKE COMPANY *v.* MITCHELL, INDIVIDUALLY, ET AL.

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

No. 11. Argued March 2, 3, 1916; restored to docket for reargument March 13, 1916; reargued December 15, 18, 1916.—Decided December 10, 1917.

The District Court has no power to decree an injunction against parties who were not served with process and who appeared only to object to the jurisdiction over them.

In order that the declarations and conduct of third parties may be admissible against persons sued with respect to acts done to carry out an alleged conspiracy, a combination between them and the defendants must be shown by independent evidence; but the criminal or otherwise unlawful character of the combination may be shown by the declarations themselves.

The same liberty which enables men to form unions, and through the unions to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case as in the former the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make.

The right of action for persuading an employee to leave his employer, universally recognized, rests upon fundamental principles of general application.

The right of workingmen to form unions and to enlarge their membership by inviting other workingmen to join is conceded, provided the objects of the union be proper and legitimate.

The right of workingmen to enlarge the membership of unions by inviting other workingmen to join, like other civil rights, must be exercised with reasonable regard for the conflicting rights of others; and the members of a union having notice that the employees of an establishment are under contract with their employer not to remain in his employ after joining the union, may not lawfully, for the purpose of unionizing the establishment through an actual or threatened strike, induce or seek to induce such employees to violate their contract by joining the union, or (what in equity is the same) by secretly agreeing to join, and thereafter remaining at work until sufficient new members can be obtained so as to bring about a strike, thus uniting with the union in a plan to subvert the system of employment to which they voluntarily have agreed and upon which their employer and their fellow-employees are relying.

An employer is entitled to the good-will of his employees, irrespective of the fact that they are employed at will and that the relation is terminable by either party at any time; he is entitled to the benefit of the reasonable probability that by properly treating them he will be able to retain them in his employ and to fill vacancies occurring from time to time by the employment of other men on the same terms. It is unlawful for a third party, having notice of this relation, to interfere with it without just cause or excuse.

Intentionally to do that which is calculated in the ordinary course of

events to damage and which does in fact damage another person in his property or trade, is malicious in law and actionable if done without just cause or excuse.

A proffered excuse can not be deemed a just cause or excuse where it is based upon an assertion of conflicting rights that are sought to be attained by unfair methods and for the very purpose of interfering with plaintiff's rights of which defendants have notice.

Any violation of plaintiff's legal rights, contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect—for example, a combination to procure concerted breaches of contract by plaintiff's employees—is as plainly unlawful as if it involved a breach of the peace.

The purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose; and the methods resorted to by defendants—the inducing of employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there—were unlawful and malicious methods, not to be justified as a fair exercise of the right to increase the membership of the union.

Convinced by costly strikes of the futility of attempting to operate under a closed-shop agreement with a certain union, plaintiff established its mine on a non-union basis, with the unanimous approval of its employees and under a mutual agreement, assented to by them all, that plaintiff would continue to run its mine non-union and not recognize the union; that if any man wanted to become a member of the union he was at liberty to do so, but he could not be a member and remain in plaintiff's employ. Under that agreement plaintiff ran its mine for a year and more, and, so far as appears, without the slightest disagreement between it and its men, and without any grievance on their part. Thereupon, defendants, having full notice of the agreement, and acting without any agency for the men, but as representatives of an organization of mine workers in other States, and in order to subject plaintiff to such participation by the union in the management of the mine as necessarily results from the making of a closed-shop agreement, sent their agent to the mine, who, with full notice of, and for the very purpose of subverting, the status arising from plaintiff's agreement and subjecting the mine to the union control, proceeded, without physical violence, indeed, but by persuasion accompanied with threats of a reduction of wages and deceptive statements as to the attitude of the mine management,

to induce plaintiff's employees to join the union and at the same time to break their agreement with plaintiff by remaining in its employ after joining; and this for the purpose not of enlarging the membership of the union, but of coercing plaintiff, through a strike or the threat of one, into recognition of the union. *Held,* that plaintiff was clearly entitled to an injunction.

214 Fed. Rep. 685, reversed.

The case is stated in the opinion.

*Mr. Hannis Taylor,* with whom *Mr. George R. E. Gilchrist* was on the briefs, for petitioner.

*Mr. Charles E. Hogg* for respondents.

Space will not permit an adequate presentation of the elaborate arguments submitted by opposing counsel.

Mr. Justice Pitney delivered the opinion of the court.

This was a suit in equity, commenced October 24, 1907, in the United States Circuit (afterwards District) Court for the Northern District of West Virginia, by the Hitchman Coal & Coke Company, a corporation organized under the laws of the State of West Virginia, against certain citizens of the State of Ohio, sued individually and also as officers of the United Mine Workers of America. Other non-citizens of plaintiff's State were named as defendants but not served with process. Those who were served and who answered the bill were T. L. Lewis, Vice President of the U. M. W. A. and of the International Union U. M. W. A.; William Green, D. H. Sullivan, and "George" W. Savage, (his correct Christian name is Gwilym), respectively President, Vice President, and Secretary-Treasurer of District No. 6, U. M. W. A.; and A. R. Watkins, John Zelenka, and Lee Rankin, respectively President, Vice President and Secretary-Treasurer of Sub-district No. 5 of District No. 6.

Plaintiff owns about 5,000 acres of coal lands situate at or near Benwood, in Marshall County, West Virginia, and within what is known as the "Pan Handle District" of that State, and operates a coal mine thereon, employing between 200 and 300 men, and having an annual output, in and before 1907, of about 300,000 tons. At the time of the filing of the bill, and for a considerable time before and ever since, it operated its mine "non-union," under an agreement with its men to the effect that the mine should be run on a non-union basis, that the employees should not become connected with the Union while employed by plaintiff, and that if they joined it their employment with plaintiff should cease. The bill set forth these facts, *inter alia*, alleged that they were known to defendants and each of them, and "that the said defendants have unlawfully and maliciously agreed together, confederated, combined and formed themselves into a conspiracy, the purpose of which they are proceeding to carry out and are now about to finally accomplish, namely: to cause your orator's mine to be shut down, its plant to remain idle, its contracts to be broken and unfulfilled, until such time as your orator shall submit to the demand of the Union that it shall unionize its plant, and having submitted to such demand unionize its plant by employing only union men who shall become subject to the orders of the Union," etc. The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employees in order to compel plaintiff to "unionize" the mine.

A restraining order having been granted, followed by a temporary injunction, the served defendants filed answers, and thereupon made a motion to modify the injunction, which was refused. 172 Fed. Rep. 963. An appeal taken by defendants from this order was dismissed by the Circuit Court of Appeals. 176 Fed. Rep. 549. Afterwards

they applied for and obtained leave to withdraw their answers and file others; the order, however, prescribed that the withdrawn answers were "not to be removed from the file." The new answers denied all material averments of the bill, some of which had been admitted in the former answers. Plaintiff, having filed replications, obtained an order that the former answers should be treated as evidence on behalf of the plaintiff upon the issue joined. Upon this evidence and other evidence introduced before the court orally, the case was submitted, with the result that a final decree was made January 18, 1913, granting a perpetual injunction. 202 Fed. Rep. 512. This was reversed by the Circuit Court of Appeals June 1, 1914 (214 Fed. Rep. 685), but the mandate was stayed pending an application to this court for a writ of certiorari. Afterwards an appeal was allowed. This court dismissed the appeal, but granted the writ of certiorari (241 U. S. 644), the record on appeal to stand as a return.

The final decree of the District Court included an award of injunction against John Mitchell, W. B. Wilson, and Thomas Hughes, who while named as defendants in the bill were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection (*Harkness* v. *Hyde*, 98 U. S. 476, 479; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 206; *Mexican Central Ry. Co.* v. *Pinkney*, 149 U. S. 194, 209; *Goldey* v. *Morning News*, 156 U. S. 518; *Davis* v. *C., C., C. & St. L. Ry. Co.*, 217 U. S. 157, 174), and since the injunction operates only *in personam*, it was erroneous to include them as defendants. It also was erroneous to include personal relief by injunction against certain named parties who, pending suit, were chosen to succeed some of the original defendants as officers of the international, district, and sub-district

unions, but who were not served with process and did not appear, they being included upon the ground that they were "before the court by representation through service having been had upon their said predecessors in office." This suit was commenced, and was carried to final decree in the trial court, before the taking effect of the present Equity Rules (226 U. S. 629), and hence is governed by the former Rule 48 (210 U. S. 524), under which the rights of absent parties were expressly reserved.

But these procedural difficulties do not affect that part of the decree which awarded an injunction against the answering defendants (Lewis, Green, Sullivan, Savage, Watkins, Zelenka, and Rankin) "individually" and not as officers of the Union or its branches except as to Savage, against whom the decree goes in both his individual and official capacities, he alone having retained at the time of the final decree the same office he held at the beginning of the suit. If there was error in excluding the "official" responsibility of the others, it was not one of which they could complain, and it was not assigned for error upon their appeal to the Circuit Court of Appeals. If they were subject to injunction at all, they were so in their individual capacities. Whether the decree will bind their successors in office, or their fellow-members of the Union, is a question to be determined hereafter, if and when proceedings are taken to enforce the injunction against parties other than the answering defendants.

We proceed, therefore, to consider the case as it stands against the answering defendants.

The District Court based its decision upon two grounds: (1) That the organization known as the United Mine Workers of America, and its branches, as conducted and managed at the time of the suit and for many years before, was a common-law conspiracy in unreasonable restraint of trade, and also and especially a conspiracy against the rights of non-union miners in West Virginia;

and (2) That the defendants, in an effort to compel the plaintiff to enter into contractual relations with the Union relating to the employment of labor and the production of coal, although having knowledge of express contracts existing between plaintiff and its employees which excluded relations with the Union, endeavored by unlawful means to procure a breach of these contracts by the employees.

A brief recital of previous transactions between the parties becomes material. The Union is a voluntary and unincorporated association which was organized in the year 1890 in the States of Ohio and Indiana, and afterwards was extended to other States. It is made up of national or "international," district, sub-district, and local unions. District No. 6 comprises the coal districts of Ohio and the Panhandle of West Virginia. Sub-district No. 5 of that district comprises five counties and parts of counties in Ohio, and the Panhandle.

The answering defendants were and are active and influential members—leaders—of the Union, as well as officers. Savage, Lewis, and Sullivan have been members from its formation in 1890, and have held important offices in it and attended the national conventions. The others are long-time members, and possessed an influence indicated by the offices they held, but not limited to the duties of those offices.

From 1897 to 1906 what were known as joint interstate conferences were held annually or biennially between officials of the Union and representatives of the operators in the "Central Competitive Field" (which includes Western Pennsylvania, Ohio, Indiana, and Illinois, but not West Virginia), for the purpose of agreeing upon the scale of wages and the conditions of employment in that field. In addition there were occasional conferences of the same character affecting other States and districts.

Plaintiff's mine is within the territorial limits of Subdistrict No. 5 of District No. 6. Coal-mining operations were commenced there in the early part of the year 1902, and the mine was operated "non-union" until April, 1903, when, under threats from the Union officials, including defendants Watkins and Sullivan, that a certain unionized mine in Ohio, owned by the same proprietors, would be closed down if the men at the Hitchman were not allowed to organize, plaintiff consented to the unionization of the latter mine. This went into effect on the 1st of April, 1903, and upon the very next day the men were called out on strike because of a disagreement with the company as to the basis upon which mining should be paid for. The strike continued until May 23, requiring plaintiff to cease operations and preventing it from fulfilling its contracts, the most important of which was one for the daily supply of engine coal to the Baltimore & Ohio Railroad at a coaling station adjoining the mine. The financial loss to plaintiff was serious. The strike was settled and the men resumed work upon the basis of a modification of the official mining scale applicable to the Hitchman mine.

Again, in the spring of 1904, there was difficulty in renewing the scale. A temporary scale, agreed upon between operators and miners for the month of April, 1904, was signed in behalf of the Hitchman Company on the 18th of April. Two days later the men at the Hitchman struck, and the mine remained idle for two months, during which time plaintiff sustained serious losses in business and was put to heavy expense in obtaining coal from other sources to fill its contract with the Baltimore & Ohio Railroad Company. The strike was settled by the adoption of the official scale for the Panhandle District, with amendatory local rules for the Hitchman mine.

After this there was little further trouble until April 1,

1906, when a disagreement arose between the Union and an association of operators with which plaintiff was not connected—the association being in fact made up of its competitors—about arranging the terms of the scale for the ensuing two years. At the same time a similar disagreement arose between the operators and the Union officials in the Central Competitive Field. The result was a termination of the interstate conferences and a failure to establish any official scale for the ensuing two years, followed by a widespread strike, or a number of concurrent strikes, involving the most of the bituminous coal-producing districts. There was absolutely no grievance or ground of disagreement at the Hitchman mine, beyond the fact that the mining scale expired by its own terms on March 31, and the men had not received authority from the Union officials either to renew it or to agree to a new one in its place. Plaintiff came to an understanding with the local union to the effect that if its men would continue at work the company would pay them from April 1st whatever the new scale might be, except that if the new scale should prove to be lower than that which expired on March 31, there should be no reduction in wages, while if the scale was raised the company would pay the increased amount, dating it back to April 1st. This was satisfactory to the men; but as the question of a new scale was then under discussion at a conference between the officials of the Union and the representatives of the Operators' Association, and plaintiff's employees wished to get the sanction of their officers, the manager of the Hitchman mine got into communication with those officials, including defendant Green, President of District No. 6, and endeavored to secure their assent to the temporary arrangement, but without success. Then a committee of the local union, including Daugherty, its President, took up the matter with Green and received permission to mine and load engine coal

until further notice from him. Under this arrangement the men remained at work for about two weeks. On April 15th, defendant Zelenka, Vice President of the sub-district, visited the mine, called a meeting of the miners, and addressed them in a foreign tongue, as a result of which they went on strike the next day, and the mine was shut down until the 12th of June, when it resumed as a "non-union" mine, so far as relations with the U. M. W. A. were concerned.

During this strike plaintiff was subjected to heavy losses and extraordinary expenses with respect to its business, of the same kind that had befallen it during the previous strikes.

About the 1st of June a self-appointed committee of employees called upon plaintiff's president, stated in substance that they could not remain longer on strike because they were not receiving benefits from the Union, and asked upon what terms they could return to work. They were told that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run non-union, and the company would deal with each man individually. They assented to this, and returned to work on a non-union basis. Mr. Pickett, the mine superintendent, had charge of employing the men, then and afterwards, and to each one who applied for employment he explained the conditions, which were that while the company paid the wages demanded by the Union and as much as anybody else, the mine was run non-union and would continue so to run; that the company would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so; but he could not be a member of it and remain in the employ of the Hitchman Company; that if he worked for the company he would have to work as a non-union man. To this each man employed gave his assent, un-

derstanding that while he worked for the company he must keep out of the Union.

Since January, 1908 (after the commencement of the suit), in addition to having this verbal understanding, each man has been required to sign an employment card expressing in substance the same terms. This has neither enlarged nor diminished plaintiff's rights, the agreement not being such as is required by law to be in writing.

Under this arrangement as to the terms of employment, plaintiff operated its mine from June 12, 1906, until the commencement of the suit in the fall of the following year.

During the same period a precisely similar method of employment obtained at the Glendale mine, a property consisting of about 1,200 acres of coal land adjoining the Hitchman property on the south, and operated by a company having the same stockholders and the same management as the Hitchman; the office of the Glendale mine being at the Hitchman Coal & Coke Company's office. Another mine in the Panhandle, known as the Richland, a few miles north of the Hitchman, likewise was run "non-union."

In fact, all coal mines in the Panhandle and elsewhere in West Virginia, except in a small district known as the Kanawha field, were run "non-union," while the entire industry in Ohio, Indiana, and Illinois was operated on the "closed-shop" basis, so that no man could hold a job about the mines unless he was a member of the United Mine Workers of America. Pennsylvania occupied a middle ground, only a part of it being under the jurisdiction of the Union. Other States need not be particularly mentioned.

The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the Union in the

Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the Union. This was the subject of earnest and protracted discussion in the annual international convention of the U. M. W. A. held at Indianapolis, Indiana, in the month of January, 1907, at which all of the answering defendants were present as delegates and participated in the proceedings. The discussion was based upon statements contained in the annual reports of John Mitchell, as President of the Union (joined as a defendant in the bill but not served with process), and of defendant Lewis, as Vice President, respecting the causes and consequences of the strike of 1906, and the policy to be adopted by the Union for the future. In these reports it was made to appear that the strike had been caused immediately by the failure of the joint convention of operators and miners representing the central and southwestern competitive fields, held in the early part of the year 1906, to come to an agreement for a renewal of the mining scale; that the strike was widespread, involving not less than 400,000 mine workers, was terminated by "district settlements," with variant results in different parts of the territory involved, and had not been followed by a renewal of the former relations between the operators and miners in the Central Competitive Field. Another result of the strike was a large decrease in the membership of the Union. Two measures of relief were proposed: first, that steps be taken to reëstablish the joint interstate conferences; and second, the organization of the hitherto unorganized fields, including the Panhandle District of West Virginia, under closed-shop agreements, with all men about the mines included in the membership of the United Mine Workers

of America. In the course of the discussion the purpose of organizing West Virginia in the interest of the unionized mine workers in the Central Competitive Field, and the probability that it could be organized only by means of strikes, were repeatedly declared and were disputed by nobody. All who spoke advocated strikes, differing only as to whether these should be nation-wide or sectional. Defendant Lewis, in his report, recommended an abandonment of the policy of sectional settlements which had been pursued in the previous year. This recommendation, interpreted as a criticism of the policy pursued under the leadership of President Mitchell in the settlement of the 1906 strike, was the subject of long and earnest debate, in the course of which Lewis said: "When we organize West Virginia, when we organize the unorganized sections of Pennsylvania, we will organize them by a strike movement." And again, towards the close of the debate: "No one has made the statement that we can organize West Virginia without a strike." Defendant Green took part, favoring the view of Mr. Lewis that strikes should be treated nationally instead of sectionally. In the course of his remarks he said: "I say to you, gentlemen, one reason why I opposed the policy that was pursued last year was because over in Ohio we were peculiarly situated. We had West Virginia on the south and Pennsylvania on the east, and after four months of a strike in eastern Ohio we had reached the danger line. We felt keenly the competition from West Virginia, and during the suspension our mines in Ohio chafed under the object lesson they had. They saw West Virginia coal go by, train-load after train-load passing their doors, when they were on strike. This coal supplied the markets that they should have had. There is no disguising the fact, something must be done to remedy this condition. Year after year Ohio has had to go home and strike in some portion of the district to enforce the

interstate agreement that was signed up here. . . . I confess here and now that the overwhelming sentiment in Ohio was that a settlement by sections would not correct the conditions we complained of. Now, something must be done; it is absolutely necessary to protect us against the competition that comes from the unorganized fields east of us." Mr. Mitchell opposed the view of defendant Lewis, reiterating an opinion, repeatedly expressed before, that West Virginia and the other unorganized fields, "would not be thoroughly organized except as the result of a successful strike"; but declaring that "they will not be organized at all, strike or no strike, unless we are able to support the men in those fields from the first day they lay down their tools. . . . Now, I believe it is possible, indeed I believe it is probable, that in the not distant future we will be able to inaugurate a movement in West Virginia and the other unorganized fields that will involve them in a strike, and then we will expect you to furnish the sinews of war, as you have done in the past, to keep these men in idleness."

The discussion continued during three days, and at the end of it the report of a committee which expressed disagreement with Vice President Lewis' opposition to sectional settlements and recommended "a continuation in the future of the same wise, conservative business-like policies" that had been pursued by President Mitchell, was adopted by a *viva voce* vote.

The plain effect of this action was to approve a policy which, as applied to the concrete case, meant that in order to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the non-union mines of West Virginia, the West Virginia mines should be "organized" by means of strikes local to West Virginia, the strike benefits to be paid by assessments upon the union miners in the other States mentioned, while they remained at work.

This convention was followed by an annual convention of Sub-district 5 of District 6, held in the month of March, 1907, at which defendants Watkins and Rankin were present as President and Secretary of the sub-district. Defendant Lewis, as National Vice President, occupied the chair during several of the sessions. Defendant Zelenka was present as a delegate, and also Thomas Hughes, who, while named as a defendant in the present suit, was not served with process. Watkins and Rankin in their reports recommended the complete unionization of the mines in the Panhandle counties, with particular reference to the Hitchman, the Glendale, the Richland, and two others; and as a result it was resolved "that the Sub-District officers, together with the District officers, be authorized to take up the work of organizing every mine in the Sub-District as quickly as it can be done."

Evidently in pursuance of this resolution, defendants Green, Zelenka, and Watkins, about July 1, 1907, called at plaintiff's office and laid before its general manager, Mr. Koch, a proposition for the unionization of the mine. He declined to consider it, but at their request laid it before plaintiff's board of directors, who rejected the proposition, and the manager informed Green of this. In one of the interviews Koch informed these defendants of the terms of plaintiff's working agreement with its employees to the effect that the mine was to be run non-union and they were not to become members of the Union.

About the same time, a Mr. McKinley, who was operating the Richland mine non-union, was interviewed by the Union leaders, notified of the resolution adopted by the sub-district convention, and, having asked that his mine be let alone, was met with the threat that they would secure the support of his men, and that if he did not recognize the Union they would shut down his mine.

In one of the interviews that ensued he was told that it was their purpose to organize the Glendale, the Hitchman, the Richland, and some other mines; that at the Glendale they had twenty-four men who had joined the organization, "and that they had sixty men who had signed up or had agreed to join the organization at Hitchman, and that they were going to shut the mine down as soon as they got a few more men." With respect to their progress at his own mine he was kept in the dark until about the middle of October, 1907, when, through the activities of the organizer Hughes, they succeeded in shutting it down, and it remained closed until a restraining order was allowed by the court, immediately after which it resumed non-union.

The evidence renders it clear that Hughes was sent into the Panhandle to organize all the mines there, in accordance with the resolution of the sub-district convention. The bill made a statement of his activities, and alleged that he was acting as an organizer for the Union. Defendants' final answers made a complete denial, but in this are contradicted by admissions made in the earlier answers and by other and undisputed evidence. The only defendant who testified upon the subject declared that Hughes was employed by District No. 6 as an organizer, but denied that he had power or authority to shut down the Hitchman mine.

He arrived at that mine some time in September, 1907, and remained there or in that vicinity until the latter part of October, conducting a campaign of organization at the Hitchman and at the neighboring Glendale and Richland mines.

The evidence shows that he had distinct and timely notice that membership in the Union was inconsistent with the terms of employment at all three mines, and a violation of the express provisions of the agreement at the Hitchman and Glendale.

Having unsuccessfully applied to Koch and McKinley for their coöperation, Hughes proceeded to interview as many of the men as he could reach and to hold public meetings in the interest of the Union. There is clear and uncontradicted evidence that he did not confine himself to mere persuasion, but resorted to deception and abuse. In his public speeches he employed abusive language respecting Mr. Pickett, William Daugherty, and Jim Jarrett.[1] He prophesied, in such a way that ignorant, foreign-born miners, such as he was addressing, naturally might believe him to be speaking with knowledge, that the wages paid by the Hitchman would be reduced unless the mine was unionized. The evidence as to the methods he employed in personally interviewing the miners, while meagre, is significant. Myers, a Hitchman miner, testified: "He told me that he was a good friend of Mr. Koch, and that Mr. Koch had nothing against having the place organized again. He said he was a friend of his, and I made the remark that I would ask Mr. Koch and see if it was so; and he said no, that was of no use because he was telling me the truth." He did not confine his attentions to men who already were in plaintiff's employ, but in addition dissuaded men who had accepted employment from going to work.

A highly significant thing, giving character to Hughes' entire course of conduct, is that while his solicitation of the men was more or less public, as necessarily it had to be, he was careful to keep secret the number and the names of those who agreed to join the Union. Myers, being asked to allow his name to be entered on a book

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[1] Mr. Pickett was superintendent of the Hitchman and Glendale mines, and it was with him that the miners made their agreements to refrain from membership in the Union; Daugherty and Jarrett were miners at the Hitchman, and had been, respectively, President and Financial Secretary of the local union at the time of the 1906 strike, when the local deserted the U. M. W. A.

that Hughes carried, tried to see the names already entered, "but he would not show anything; he told me he had it, and I asked him how many names was on it, and he said he had about enough to 'crack off.'" To Stewart, another Hitchman miner, he said "he was forming a kind of secret order among the men; he said he had a few men—he did not state the number of them—and he said each man was supposed to give him so much dues to keep it going, and then he said after he got the majority he would organize the place." Pickett, the mine superintendent, had learned of only five men at the Glendale who were inclined to join Hughes' movement; but when these were asked to remain outside of the mine for a talk, fifteen other men waited with them, and upon being reminded that while the company would not try to prevent them from becoming mem- of the Union, they could not be members and at the same time work for the Glendale Company, they all accepted this as equivalent to a notice of discharge. And, as has been stated, the owner of the Richland, while repeatedly threatened with unionization, was kept in the dark as to the progress made by the organizer amongst his employees until the mine was actually shut down.

The question whether Hughes had "power or authority" to shut down the Hitchman mine is beside the mark. We are not here concerned with any question of *ultra vires*, but with an actual threat of closing down plaintiff's mine, made by Hughes while acting as agent of an organized body of men who indubitably were united in a purpose to close it unless plaintiff would conform to their wishes with respect to its management, and who lacked the power to carry out that purpose only because they had not as yet persuaded a sufficient number of the Hitchman miners to join with them, and hence employed Hughes as an "organizer" and sent him to the mine with the very

object of securing the support of the necessary number of miners. They succeeded with respect to one of the mines threatened (the Richland), and preparations of like character were in progress at the Hitchman and the Glendale at the time the restraining order was made in this cause.

If there be any practical distinction between organizing the miners and organizing the mine, it has no application to this case. Unionizing the miners is but a step in the process of unionizing the mine, followed by the latter almost as a matter of course. Plaintiff is as much entitled to prevent the first step as the second, so far as its own employees are concerned, and to be protected against irreparable injury resulting from either. Besides, the evidence shows, without any dispute, that defendants contemplated no half-way measures, but were bent on organizing the *mine*, the "consent" of plaintiff to be procured through such a control of its employees as would render any further independent operation of the mine out of the question. This is evident from the discussions and resolutions of the international and sub-district conventions, from what was said by defendants Green, Zelenka, and Watkins to plaintiff's manager, and to the operator of the Richland, and from all that was said and done by Hughes in his effort to organize the Hitchman, Glendale, and Richland mines.

In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into "recognizing the union" at the cost of its own independence. The methods resorted to by their "organizer" were such as have been described. The legal consequences remain for discussion.

The facts we have recited are either admitted or else proved by clear and undisputed evidence and indubitable inferences therefrom. The proceedings of the international and sub-district conventions were shown by the introduction of official verbatim reports, properly authenticated. It is objected that these proceedings, especially in so far as they include the declarations and conduct of others than the answering defendants, are not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence *aliunde*. The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. *Pleasants* v. *Fant*, 22 Wall. 116, 119; *Connecticut Mutual Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218; Story Part., §§ 107, 108; 1 Greenleaf Ev., §§ 112, 113 (184 b, c); 2 Starkie Ev. (2d ed.) 25, 26; *King* v. *Hardwick*, 11 East, 578, 585, 589; *Sandilands* v. *Marsh*, 2 Barn. & Ald. 673, 679; *Wood* v. *Braddick*, 1 Taunt. 104, 105; *Van Reimsdyk* v. *Kane* (Story, J.), 1 Gall. 630, 635; 28 Fed. Cas. 1067, 1069; *Aldrich* v. *Warren*, 16 Maine, 465,

468; *Pierce* v. *Wood*, 23 N. H. 519, 531; *Page* v. *Parker*, 40 N. H. 47, 62; *State* v. *Thibeau*, 30 Vermont, 100, 105; *Jenne* v. *Joslyn*, 41 Vermont, 478, 484; *Locke* v. *Stearns*, 1 Metc. 560, 563; *Lowe* v. *Dalrymple*, 117 Pa. St. 564, 568; *Main* v. *Aukam*, 4 App. D. C. 51, 56.

Upon a kindred principle, the declarations and conduct of an agent, within the scope and in the course of his agency, are admissible as original evidence against the principal, just as his own declarations or conduct would be admissible. *Barreda* v. *Silsbee*, 21 How. 146, 164, 165; *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99, 104; *LaAbra Silver Mining Co.* v. *United States*, 175 U. S. 423, 498. And since the evidence of Hughes' agency is clear and undisputed—that as the representative of a voluntary association of which the answering defendants were active members, and in the execution of a purpose to which they all had given consent, and in which some of them were actively coöperating, he was engaged in an effort to organize the coal mines of the Panhandle District—it is equally clear that his declarations and conduct while so doing are evidential against the defendants.

What are the legal consequences of the facts that have been detailed?

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "non-union," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining," it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agree-

ments with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. *Adair* v. *United States*, 208 U. S. 161, 174; *Coppage* v. *Kansas*, 236 U. S. 1, 14. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was "at will," and terminable by either party at any time, is of no consequence. In *Truax* v. *Raich*, 239 U. S. 33, 38, this court ruled upon the precise question as follows: "It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight

of authority, the unjustified interference of third persons is actionable although the employment is at will." (Citing many cases.)

In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. See *Brennan* v. *United Hatters*, (cited with approval in *Truax* v. *Raich*, *supra*,) 73 N. J. L. 729, 749; *Brown* v. *Honiss*, 74 N. J. L. 501, 514 *et seq.*; *Jersey City Printing Co.* v. *Cassidy*, 63 N. J. Eq. 759, 767; *Walker* v. *Cronin*, 107 Massachusetts, 555, 565–566; *Moran* v. *Dunphy*, 177 Massachusetts, 485, and cases there cited; *L. D. Wilcutt & Sons Co.* v. *Driscoll*, 200 Massachusetts, 110, 117, etc.

The right of action for persuading an employee to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of general application, not upon the English statute of laborers. *Thacker Coal Co.* v. *Burke*, 59 W. Va. 253, 255; 8 Ann. Cas. 885, 886; *Walker* v. *Cronin*, 107 Massachusetts, 555, 567; *Angle* v. *Chicago, St. Paul &c. Ry. Co.*, 151 U. S. 1, 13; *Noice Adm'x.* v. *Brown*, 39 N. J. L. 569, 572.

We turn to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

The case involves no question of the rights of employees.

Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed non-union mine through individual agreements with its employees, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the Union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: first, that there was no middle ground open to plaintiff; no option to have an "open shop" employing union men and non-union men indifferently; it was the Union that insisted upon closed-shop agreements, requiring even carpenters employed about a mine to be members of the Union, and making the employment of any non-union man a ground for a strike; and secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that unless this were done union organizers might gain access to its mine in the guise of laborers.

Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the Union here in question. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439. The cardinal error of defendants' position lies

in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. *Brennan* v. *United Hatters*, 73 N. J. L. 729, 749. The familiar maxim, *Sic utere tuo ut alienum non lædas*—literally translated, "So use your own property as not to injure that of another person," but by more proper interpretation, "so as not to injure *the rights* of another," (Broom's Leg. Max., 8th ed., 289)—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it. And a most familiar application is the action for enticing an employee, in which it never was a justification that defendant wished to retain for himself the services of the employee. 1 Black. Com. 429; 3 *Id.* 142.

Now, assuming defendants were exercising, through Hughes, the right to invite men to join their Union, still they had plain notice that plaintiff's mine was run "non-union," that none of the men had a right to remain at work there after joining the Union, and that the observance of this agreement was of great importance and value both to plaintiff and to its men who had voluntarily made the agreement and desired to continue working under it. Yet defendants, far from exercising any care to refrain from unnecessarily injuring plaintiff, deliberately and advisedly selected that method of enlarging their membership which would inflict the greatest injury upon plaintiff and its loyal employees. Every Hitchman miner who joined Hughes' "secret order" and permitted his name to be entered upon Hughes' list was guilty of a breach of his contract of employment and

acted a lie whenever thereafter he entered plaintiff's mine to work. Hughes not only connived at this, but must be deemed to have caused and procured it, for it was the main feature of defendants' plan, the *sine qua non* of their programme. Evidently it was deemed to be necessary, in order to "organize the Panhandle by a strike movement," that at the Hitchman, for example, man after man should be persuaded to join the Union, and having done so to remain at work, keeping the employer in ignorance of their number and identity, until so many had joined that by stopping work in a body they could coerce the employer and the remaining miners to "organize the mine," that is, to make an agreement that none but members of the Union should be employed, that terms of employment should be determined by negotiation not with the employees but with union officers—perhaps residents of other States and employees of competing mines—and that all questions in controversy between the mine operator and the miners should likewise be settled with outsiders.

True, it is suggested that under the existing contract an employee was not called upon to leave plaintiff's employ until he actually joined the Union, and that the evidence shows only an attempt by Hughes to induce the men to *agree* to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after *actually joining*. But in a court of equity, which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to *agree* to join is but a mode of inducing them to join, and that when defendants "had sixty men who had signed up or agreed to join the organization at Hitchman," and were "going to shut the mine down as soon as they got a few more men," the sixty were for practical purposes, and therefore in the sight of equity, already members of the

Union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the Union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employees were relying, was sufficient.

But the facts render it plain that what the defendants were endeavoring to do at the Hitchman mine and neighboring mines cannot be treated as a *bona fide* effort to enlarge the membership of the Union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the Union, *unless they could organize the mines*. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while non-union men would take their places in the Panhandle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the union membership.

In any aspect of the matter, it cannot be said that defendants were pursuing their object by *lawful* means. The question of their intentions—of their *bona fides*—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the *Mogul Steamship Case*, 23 Q. B. Div. 613, "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205, 223; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 744 *et seq.*, and cases cited. Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we cannot deem

the proffered excuse to be a "*just* cause or excuse," where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights, of which defendants have full notice.

Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation. *Flaccus* v. *Smith,* 199 Pa. St. 128; 54 L. R. A. 640; *South Wales Miners' Federation* v. *Glamorgan Coal Co.,* [1905] A. C. 239, 244, 250, 253; *Jonas Glass Co.* v. *Glass Bottle Blowers Association,* 77 N. J. Eq. 219, 223.

The present is not a case of merely withholding from an employer an economic need—as a supply of labor—until he assents to be governed by union regulations. Defendants have no supply of labor of which plaintiff stands in need. By the statement of defendant Lewis himself, made in his formal report to the Indianapolis convention of 1907, out of more than 370,000 coal miners in the States of Pennsylvania, Maryland, Virginia, and West Virginia, less than 80,000 (about 22 per cent.) were members of the Union. Considering the Panhandle separately, doubtless the proportion was even smaller, and the supply of non-union labor ample. There is no reason to doubt that if defendants had been actuated by a genuine desire to increase the membership of the Union without unnecessary injury to the known rights of plaintiff, they would have permitted their proselytes to withdraw from plaintiff's employ when and as they became

affiliated with the Union—as their contract of employment required them to do—and that in this event plaintiff would have been able to secure an adequate supply of non-union men to take their places. It was with knowledge of this, and because of it, that defendants, through Hughes as their agent, caused the new members to remain at work in plaintiff's mine until a sufficient number of men should be persuaded to join so as to bring about a strike and render it difficult if not practically impossible for plaintiff to continue to exercise its undoubted legal and constitutional right to run its mine "non-union."

It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine, another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the Union, that defendants sought to exert upon plaintiff, and it renders pertinent what was said by this court in the *Gompers Case* (221 U. S. 418, 439), immediately following the recognition of the right to form labor unions: "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one."

Defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the Union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the Union.

There can be no question that plaintiff was threatened with danger of an immediate strike as a result of the activities of Hughes. The effect of his arguments and representations is not to be judged from the testimony of those witnesses who rejected his overtures. Naturally, it was not easy for plaintiff to find men who would testify that they had agreed with Hughes to break their contract with plaintiff. One such did testify. But the true measure of the extent of his operations and the probability of his carrying them to success are indicated by his

declaration to Myers that he had about enough names at the Hitchman to "crack off," by the statement to McKinley that twenty-four men at the Glendale mine had joined the organization, and sixty at the Hitchman, and by the fact that they actually succeeded in shutting down the Richland about the middle of October. The declaration made concerning the Glendale is corroborated by the evidence of what happened at that mine.

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

Therefore, upon the undisputed facts of the case, and the indubitable inferences from them, plaintiff is entitled to relief by injunction. Having become convinced by three costly strikes, occurring within a period of as many years, of the futility of attempting to operate under a closed-shop agreement with the Union, it established the mine on a non-union basis, with the unanimous approval of its employees—in fact upon their suggestion—and under a mutual agreement, assented to by every employee, that plaintiff would continue to run its mine non-union and would not recognize the United Mine Workers of America; that if any man wanted to become a member of that Union he was at liberty to do so, but he could not be a member and remain in plaintiff's employ. Under that agreement plaintiff ran its mine for a year and more, and, so far as appears, without the slighest disagreement between it and its men, and without any grievance on their part. Thereupon defendants, having full notice of the working agreement between plaintiff and its men, and acting without any agency for those men, but as representatives of an organization of mine workers in other States, and in order to subject plaintiff to such participation by the Union in the management of the mine as necessarily results from the making of a closed-shop agreement, sent their agent to the mine, who, with full notice of, and for the very purpose of subverting,

the status arising from plaintiff's working agreement and subjecting the mine to the Union control, proceeded, without physical violence, indeed, but by persuasion accompanied with threats of a reduction of wages and deceptive statements as to the attitude of the mine management, to induce plaintiff's employees to join the Union and at the same time to break their agreement with plaintiff by remaining in its employ after joining; and this for the purpose not of enlarging the membership of the Union, but of coercing plaintiff, through a strike or the threat of one, into recognition of the Union.

As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated.

Respecting the sweep of the injunction, we differ somewhat from the result reached by the District Court.

So far as it restrains—(1) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the Union, or because plaintiff runs a non-union mine; (2) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and wilfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees; (3) Knowingly and wilfully enticing plaintiff's employees, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a non-union mine,

etc.; (4) Interfering or attempting to interfere with plaintiff's employees so as knowingly and wilfully to bring about the breaking by plaintiff's employees, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and wilfully enticing such employees, present or future, to leave plaintiff's service without plaintiff's consent; (5) Trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employees to refuse or fail to perform their duties as such; and (6) Compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employees to leave its service or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mine and works from so accepting employment therein;—the decree is fully supported by the proofs. But it goes further, and awards an injunction against picketing and against acts of physical violence, and we find no evidence that either of these forms of interference was threatened. The decree should be modified by eliminating picketing and physical violence from the sweep of the injunction, but without prejudice to plaintiff's right to obtain an injunction hereafter against these forms of interference if proof shall be produced, either in proceedings supplemental to this action or in an independent action, that such an injunction is needed.

*The decree of the Circuit Court of Appeals is reversed, and the decree of the District Court is modified as above stated, and as so modified it is affirmed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.*

MR. JUSTICE BRANDEIS, dissenting.

This suit was begun October 24, 1907. The Hitchman Coal & Coke Company, plaintiff below, is the owner of a coal mine in West Virginia. John Mitchell and nine others, defendants below, were then the chief executive officers of the United Mine Workers of America and of its district and sub-district organizations having "jurisdiction" over the territory in which plaintiff's mine is situated; and were sued both individually and as such officers. The mine had been "unionized" about three years prior to April 16th, 1906; and until about that date was operated as a "union" mine, under a collective agreement with a local union of the United Mine Workers of America. Then a strike was declared by the union; and a short shut-down followed. While the strike so declared was still in force, as the bill alleges, the company re-opened the mine as a closed non-union mine. Thereafter persons applying for work were required as a condition of obtaining employment to agree that they would not, while in the service of the company, be a member of the union, and if they joined the union would withdraw from the company's employ.[1]

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[1] About two months *after* the restraining order was issued in this case the plaintiff company began the practice of requiring applicants for work to sign employment cards, in the following terms:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employee of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any efforts amongst its employees to bring about the union-

Alleging that efforts were being made illegally to unionize its mine "without its consent," the company brought in the United States Circuit (now District) Court for the Northern District of West Virginia this suit to enjoin such efforts. District Judge Dayton granted a restraining order upon the filing of the bill. An order was entered May 26, 1908, continuing it as a temporary injunction. A motion to modify the same was denied, September 21, 1909. 172 Fed. Rep. 963. An appeal from this order was dismissed by the Circuit Court of Appeals, March 11, 1910. 176 Fed. Rep. 549. The case was then heard on the merits; defendants having denied in their answer all the charges of unlawful conduct set forth in the bill; and on January 18, 1913, a decree was entered for a perpetual injunction substantially in the form of the restraining order. 202 Fed. Rep. 512. This decree was reversed by the Circuit Court of Appeals on June 1, 1914 (214 Fed. Rep. 685); but a stay was granted pending an application to this court for a writ of certiorari. The company appealed to this court and also applied for a writ of certiorari. The appeal was dismissed, as the jurisdiction of

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izing of that mine against the company's wish. I have either read the above or heard the same read."

Prior to that time, the agreement rested in oral understanding merely, and is sufficiently indicated in the following excerpts from the testimony of the mine superintendent as to what he told the men applying for employment:

"I also told them that any man who wanted to become a member of the United Mine Workers—that that was his business—but he could not be a member of the United Mine Workers and be affiliated with the United Mine Workers and be under the employ of the Hitchman Coal & Coke Company, or be under the jurisdiction of the United Mine Workers; that the mine was run non-union so far as the United Mine Workers of America were concerned.

"Q. You mean you made every man understand that while he worked for the Hitchman Company he must keep out of the union?

"A. Yes, sir; or at least they said they understood it."

the Circuit (District) Court was rested wholly upon diversity of citizenship, plaintiff being a corporation organized under the laws of West Virginia and all the defendants citizens and residents of other States. 241 U. S. 644. A writ of certiorari was granted, however, March 13, 1916. The case was argued at that term and a reargument was ordered.

The District Court held that the United Mine Workers of America with its subordinate branches constitutes an unlawful organization—illegal both under the law of West Virginia and under the Federal Anti-Trust Act; that its long continued effort to unionize the mines of West Virginia had not been "in the interest either of the betterment of mine labor in the State or of upholding that free commerce in coal between the States guaranteed by Federal law," but to restrain if not destroy it for the benefit of "rival operators and producers in Ohio, Western Pennsylvania, Illinois, and Indiana, competitive fields" in which the mines had been unionized; and that "in pursuit of its unlawful purposes" the union "have sought and still seek to compel the plaintiff . . . to submit to contractual relations with it as an organization relating to the employment of labor and production contrary to the will and wish of said company; that its officers, in pursuance of such unlawful effort to monopolize labor and restrain trade, and with knowledge of the express contracts existing between this plaintiff and its employees, have unlawfully sought to cause the breach of the said contracts on the part of its said employees."

The decree, besides the usual injunction against threat, intimidation, force or violence, and against inducing breaches of employees' contracts or trespassing upon plaintiff's property, enjoined defendants (and others hereinafter described), among other things, from—

1. "Representing ["for the purpose of unionizing plaintiff's mine without plaintiff's consent"] . . . to

any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person . . . is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, . . . representing . . . to such employee . . . that such loss or trouble . . . may come by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a non-union mine."

2. " . . . knowingly and wilfully enticing ["for the purpose of unionizing plaintiff's mine without plaintiff's consent"] plaintiff's employees, present or future, . . . to leave plaintiff's service, giving or assigning . . . as a reason for . . . leaving of plaintiff's service, that plaintiff does not recognize the United Mine Workers of America, or that plaintiff runs a non-union mine."

3. " . . . knowingly and wilfully enticing plaintiff's employees, present or future, . . . to leave plaintiff's service, without plaintiff's consent, against plaintiff's will, and to plaintiff's injury."

4. " . . . establishing a picket . . . for the purpose of inducing . . . by . . . persuasion . . . any person . . . coming to plaintiff's mine to accept employment . . . to refuse . . . to accept service with plaintiff."

5. " . . . interfering in any manner whatsoever, either by . . . persuasion or entreaty with any person in the employ of plaintiff who has contracted with and is in the actual service of plaintiff to . . . induce him to quit the service of plaintiff . . . or assisting, or abetting in any manner" his doing so.

Three of the defendants—Mitchell, Wilson and Hughes—were never served with process and did not enter any appearance except to object to the jurisdiction of the court over them. Of the remaining seven all but two had, prior to the entry of the final decree, ceased to hold

any office either in the United Mine Workers of America or in any of the district or sub-district organizations. Nevertheless the decree directed that the injunction issue against each of the ten original defendants, "individually"; and also in their official capacities against their successors in office (who were named in the decree) although these had not been served with process or been named in the bill; the court declaring such persons to be "before the court by representation through service having been made upon their said predecessors in office, sued as such officers and as members of the United Mine Workers of America." The decree extended the injunction, among others, also to "all persons now members of said United Mine Workers of America, and all persons who though not now members do become members of said United Mine Workers of America."

The Circuit Court of Appeals, reversing the decree of the District Court, held that the United Mine Workers of America was not an unlawful organization under the laws of West Virginia, that its validity under the Federal Anti-Trust Act could not be considered in this proceeding; that so long as defendants "refrained from resorting to unlawful measures to effectuate" their purpose "they could not be said to be engaged in a conspiracy to unionize plaintiff's mine"; that "the evidence fails to show that any unlawful methods were resorted to by these defendants in this instance"; and specifically that there was nothing in the individual contracts which barred defendants from inducing the employees to join the union. With these conclusions I agree substantially.

*First: The alleged illegality of the United Mine Workers of America under the law of West Virginia.*

The United Mine Workers of America does not appear to differ essentially in character and purpose from other international unions which, like it, are affiliated with the American Federation of Labor. Its membership is said

to be larger than that of any other; and it may be more powerful. But the common law does not limit the size of unions or the degree to which individual workmen may by union increase their bargaining power. As stated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439: "The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association." We do not find either in the decisions or the statutes of West Virginia anything inconsistent with the law as declared by this court. The union is not an unlawful organization, and is not in itself an unlawful conspiracy. We have no occasion to consider the legality of the specific provisions contained in its constitution or by-laws.

*Second: The alleged illegality of the United Mine Workers of America under the Federal Anti-Trust Act.*

The District Judge undertook to pass upon the legality of the United Mine Workers of America under the Federal Anti-Trust Act; but the question was not in issue in the case. It had not been raised in the bill or by answer. Evidence bearing upon the issue was properly objected to by defendants and should have been excluded.

*Third: The alleged conspiracy against the West Virginia Mines.*

It was doubtless the desire of the United Mine Workers to unionize every mine on the American continent and especially those in West Virginia which compete directly with the mines of Western Pennsylvania, Ohio, Indiana, and other States already unionized. That desire and the purpose to effect it were not unlawful. They were part of a reasonable effort to improve the condition of workingmen engaged in the industry by strengthening their bargaining power through unions; and extending the field of union power. No conspiracy to shut down or otherwise injure West Virginia was proved, nor was there

any averment in the bill of such conspiracy, or any issue otherwise raised by the pleadings which justified the consideration of that question by the District Court.[1]

*Fourth: "Unionizing plaintiff's mine without plaintiff's consent."*

The fundamental prohibition of the injunction is against acts done "for the purpose of unionizing plaintiff's mine without plaintiff's consent." Unionizing a shop does not mean inducing the employees to become members of the union.[2] It means inducing the employer

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[1] This alleged conspiracy not being in issue, the District Court improperly allowed the introduction of, and considered, a mass of documents referring to various mine workers' conventions, and joint conventions of miners and operators held years previous to the filing of the bill. Judge Dayton laid great stress on reported declarations of the delegates to these conventions, although the declarations of alleged co-conspirators were obviously inadmissible, there being no foundation for the conspiracy charge.

[2] A witness for the defendants testified as follows:

"There is a difference between unionizing a mine and unionizing the employees in a mine; unionizing the employees is having the men join the organization; unionizing a mine is creating joint relations between the employers and employees; a mine cannot be unionized unless the employer enters into contractual relations with the union; it is not the policy or purpose of the United Mine Workers as an organization to coerce a man into doing a thing against his will; this distinction between unionizing a mine and unionizing the employees of a mine has existed since the organization came about, and this method of unionizing a mine existed in 1906 and 1907."

A witness for the plaintiff testified that "the term 'union,' when applied to mining, means the United Mine Workers, and a union mine is a mine that is under their jurisdiction and so recognized . . ." The contrary is "non-union or open shop." And further, "The men might be unionized at a mine and the mine owners not recognize the union. That would in effect be an open shop. When I said 'unionize the employees' I meant practically all of the employees; but a union mine, as I understand it, is one wherein the closed shop is practically enforced." In such case, the witness explained, the operator would be practically in contract relation with the organization.

It was also testified: "The difference between organizing the men at

to enter into a collective agreement with the union governing the relations of the employer to the employees. Unionizing implies, therefore, at least *formal* consent of the employer. Both plaintiff and defendants insisted upon exercising the right to secure contracts for a closed shop. The plaintiff sought to secure the *closed non-union shop* through individual agreements with employees. The defendants sought to secure the *closed union shop* through a collective agreement with the union. Since collective bargaining is legal, the fact that the workingmen's agreement is made not by individuals directly with the employer, but by the employees with the union and by it, on their behalf, with the employer, is of no significance in this connection. The end being *lawful*, defendant's efforts to unionize the mine can be illegal, only if the methods or means pursued were unlawful; unless indeed there is some special significance in the expression "unionizing without plaintiff's consent."

It is urged that a union agreement curtails the liberty of the operator. Every agreement curtails the liberty of those who enter into it. The test of legality is not whether an agreement curtails liberty, but whether the parties have agreed upon some thing which the law prohibits or declares otherwise to be inconsistent with the public welfare. The operator by the union agreement

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the mine and organizing the mine is that when the miners are organized the work of organizing the mine is only just started. They next proceed to meet with the operator who owns the mine, or operates it, for the purpose of making contracts or agreements. Under the constitution and methods of the United Mine Workers a mine cannot be organized without the consent of the owner, and it is not the object or purpose of the United Mine Workers to do so, and never has been; it has never been attempted as far as witness knows. After a mine has been organized, the agreement between the employer and the organization is paramount. The constitution of the organization has nothing to do with the workings afterwards; that agreement does not take away from the operator the control of his men."

binds himself: (1) to employ only members of the union; (2) to negotiate with union officers instead of with employees individually the scale of wages and the hours of work; (3) to treat with the duly constituted representatives of the union to settle disputes concerning the discharge of men and other controversies arising out of the employment. These are the chief features of a "unionizing" by which the employer's liberty is curtailed. Each of them is legal. To obtain any of them or all of them men may lawfully strive and even strike. And, if the union may legally strike to obtain each of the things for which the agreement provides, why may it not strike or use equivalent economic pressure to secure an agreement to provide them?

It is also urged that defendants are seeking to "coerce" plaintiff to "unionize" its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agreement or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop. The employer may sign the union agreement for fear that *labor* may not be otherwise obtainable; the workman may sign the individual agreement for fear that *employment* may not be otherwise obtainable. But such fear does not imply coercion in a legal sense.

In other words an employer, in order to effectuate the closing of his shop to *union* labor, may exact an agreement to that effect from his employees. The agreement

itself being a lawful one, the employer may withhold from the men an economic need—employment—until they assent to make it. Likewise an agreement closing a shop to *non-union* labor being lawful, the union may withhold from an employer an economic need—labor—until he assents to make it. In a legal sense an agreement entered into, under such circumstances, is voluntarily entered into; and as the agreement is in itself legal, no reason appears why the general rule that a legal end may be pursued by legal means should not be applied. Or, putting it in other words, there is nothing in the character of the agreement which should make *unlawful* means used to attain it, which in other connections are recognized as *lawful.*

*Fifth: There was no attempt to induce employees to violate their contracts.*

The contract created an employment at will; and the employee was free to leave at any time. The contract did not bind the employee *not* to join the union; and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ, if he joined the union. There is evidence of an attempt to induce plaintiff's employees to *agree* to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the union *and* failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employees that they would join the union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the union

together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

*Sixth: Merely persuading employees to leave plaintiff's employ or others not to enter it was not unlawful.*

To induce third persons to leave an employment is actionable if done maliciously and without justifiable cause although such persons are free to leave at their own will. *Truax* v. *Raich*, 239 U. S. 33, 38; *Thacker Coal Co.* v. *Burke*, 59 W. Va. 253. It is equally actionable so to induce others not to enter the service. The individual contracts of plaintiff with its employees added nothing to its right in this connection, since the employment was terminable at will.

As persuasion, considered merely as a means, is clearly legal, defendants were within their rights if, and only if, their interference with the relation of plaintiff to its employees was for justifiable cause. The purpose of interfering was confessedly in order to strengthen the union, in the belief that thereby the condition of workmen engaged in mining would be improved; the bargaining power of the individual workingman was to be strengthened by collective bargaining; and collective bargaining was to be ensured by obtaining the union agreement. It should not, at this day, be doubted that to induce workingmen to leave or not to enter an employment in order to advance such a purpose is justifiable when the workmen are not bound by contract to remain in such employment.

*Seventh: There was no "threat, violence or intimidation."*

The decree enjoined "threats, violence or intimidation." Such action would, of course, be unlawful though employed in a justifiable cause. But there is no evidence that any of the defendants have resorted to such means. The propaganda among plaintiff's employees was conducted almost entirely by one man, the defendant Hughes, a District No. 6 organizer. His actions were orderly and

peaceable, consisting of informal talks with the men, and a few quietly conducted public meetings,[1] in which he argued the benefits of organization and pointed out to the men that, although the company was then paying them according to the union scale, there would be nothing to prevent a later reduction of wages unless the men united. He also urged upon the men that if they lost their present jobs, membership in the union was requisite to obtaining employment in the union mines of the neighboring States. But there is no suggestion that he exceeded the moderate bounds of peaceful persuasion, and indeed, if plaintiff's witnesses are to be believed, men with whom Hughes had talked, his argument made no impression on them, and they expressed to him their satisfaction with existing conditions at the mine.

When this suit was filed no right of the plaintiff had been infringed and there was no reasonable ground to believe that any of its rights would be interfered with; and, in my opinion, the Circuit Court of Appeals properly reversed the decree of the District Court, and directed that the bill be dismissed.

MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur in this dissent.

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[1] Following is a notice of one of Hughes' meetings which was torn from a telegraph pole in the street by the plaintiff's mine superintendent:

"Notice to the miners of the Hitchman mine. There will be a mass meeting Friday evening at 6.30 P. M. at Nick Heil's Base Ball Grounds, for the purpose of discussing the princip*als* of organization. President William Green will be present. All miners are cordially invited to attend."

# EAGLE GLASS & MANUFACTURING COMPANY *v.* ROWE, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN FLINT GLASS WORKERS' UNION, ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 23. Submitted December 18, 1916.—Decided December 10, 1917.

In a suit to restrain alleged concerted wrongful conduct upon the part of officials of a labor union, a temporary injunction should not be granted against those who were not served and did not submit themselves to the jurisdiction.

The bill alleged that the answering defendants had constituted other persons named as defendants their agents and representatives and had assisted and were supporting them in their alleged wrongful conduct. *Held,* in view of specific denials and supporting affidavits, not rebutted, that the Circuit Court of Appeals did not err in dissolving the temporary injunction.

Where an application for a temporary injunction has been submitted upon affidavits taken *ex parte,* without opportunity for cross-examination, and without any consent that the court proceed to final determination of the merits, it is error for the Circuit Court of Appeals upon interlocutory appeal to direct a dismissal of the bill unless on its face there is no ground for equitable relief.

The plaintiff's bill set up a contract with its employees identical in form with the contract involved in *Hitchman Coal & Coke Co.* v. *Mitchell, ante,* 229, and charged defendants with the formation and pursuit of a scheme to "unionize" the plaintiff's shop by interfering with its employees similar in nature, motive and methods to the scheme held illegal in that case. *Held,* that the bill stated an equitable cause of action, and that it was error for the Circuit Court of Appeals to dismiss it on interlocutory appeal without affording plaintiff an opportunity to prove the allegations upon final hearing, as against the defendants within the jurisdiction.

219 Fed. Rep. 719, affirmed in part and reversed in part.

THE case is stated in the opinion.

*Mr. George R. E. Gilchrist* and *Mr. Hannis Taylor* for appellant and petitioner.

*Mr. John A. Howard* for appellees and respondents.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case is quite similar to *Hitchman Coal & Coke Co.* v. *Mitchell*, No. 11, this day decided, *ante*, 229, and was submitted at the time of the argument of that case. It was a suit in equity, commenced July 28, 1913, in the United States District Court for the Northern District of West Virginia. This was after that court had rendered its final decree in the *Hitchman Case* (202 Fed. Rep. 512), and the decree awarding a temporary injunction herein was made before the reversal of the final decree in the *Hitchman Case* by the Circuit Court of Appeals (214 Fed. Rep. 685).

The plaintiff, Eagle Glass & Manufacturing Company, is a West Virginia corporation, having its principal office and its manufacturing plant in that State. The object of the bill was to restrain the defendants, officers and members of the American Flint Glass Workers' Union, a voluntary association having its principal office at Toledo, in the State of Ohio, from interfering with the relations existing between plaintiff and its employees for the purpose of compelling plaintiff to "unionize" its factory. The original defendants, Thomas W. Rowe, Joseph Gillooly, and three others, were among the chief executive officers of the Union, and were sued individually and as such officers. The federal jurisdiction was invoked on the ground of diversity of citizenship, it being alleged that all of the defendants were citizens of the State of Ohio.

Upon the filing of the bill, with numerous affidavits verifying its averments, and showing that plaintiff's factory was run as a non-union shop under individual agreements with its employees, each employee having signed a

paper declaring that he was not a member of the American Flint Glass Workers' Union and would not become a member while an employee of the Eagle Company, that the company agreed that it would run non-union while he was in its employ, that if at any time while so employed he desired to become connected with the Union he would withdraw from the employ of the company, and that while in its employ he would not make any effort amongst its employees to bring about the unionizing of the plant against the company's wish; that the defendants, with notice of this, were making efforts, through Gillooly as organizer, and threatening further efforts to induce some of plaintiff's employees to quit its employ, and to persuade others secretly to join the Union and remain at work in plaintiff's factory contrary to the terms of their agreement until a sufficient number had joined so as to be able by threatening to quit in a body to compel the unionization of the shop; and that by the activities of defendants the plaintiff was threatened with irreparable injury; the District Court granted a restraining order.

Process requiring defendants to answer the bill was promptly issued, but was served upon Gillooly alone, together with the restraining order. At the request of an attorney, a general appearance was entered for the other defendants. Gillooly filed an answer, amounting to a plea to the jurisdiction of the court, based upon the allegation that he was a resident and citizen of the State of West Virginia, and not of the State of Ohio as alleged in the bill. Upon this answer and affidavits in support of it he moved to dissolve the restraining order and dismiss plaintiff's suit, and thereupon, on the ground that he was a citizen of West Virginia, an order was made dismissing the bill as to him, without prejudice, and retaining the suit as to the other defendants. Plaintiff moved for a temporary injunction against them, whereupon the attorney at whose request their appearance had been entered moved to strike

it out on the ground that his request was due to inadvertence and in fact he had no authority to appear for them. His motion was granted; but in the meantime plaintiff obtained leave to file and did file an amended bill, adding as defendants Peter J. Glasstetter and seven other parties named, residents of Steubenville, Ohio, and citizens of that State, and averring that they were members of the American Flint Glass Workers' Union, had constituted the original defendants, including Gillooly, their agents and representatives, and had assisted and were supporting them in their efforts to unionize plaintiff's employees and to force plaintiff to recognize the Union. Process to answer the amended bill was issued and was served upon the added defendants, the remaining original defendants being returned "not found." Afterwards, and upon proper notice to the served defendants, plaintiff renewed its motion for a temporary injunction, basing it upon the original bill, exhibits, and accompanying affidavits, the amended bill, and some additional affidavits. Meanwhile the served defendants, who may be called the Steubenville defendants, filed answers denying knowledge of the matters alleged in the bill, denying that they had constituted Gillooly and the other original defendants their agents or representatives, or had assisted or supported them in the effort to unionize plaintiff's employees and force plaintiff to recognize the American Flint Glass Workers' Union, admitting that they were members of a local union of glass workers at Steubenville which was affiliated with the principal Union, and averring that except their relation as members of the local union they had no connection or relation with the other defendants, were not officers, agents, representatives, or organizers of the Union, and even in their capacity as members of their local had not by act, word, or deed authorized, assisted, aided, or encouraged any of the other defendants in doing any of the things alleged in the bill or amended bill.

These answers were supported by affidavits of the answering defendants which were not specifically rebutted by the plaintiff.

The court, having struck out the entry of appearance for the original defendants other than Gillooly, made a decree granting a temporary injunction to restrain the defendants in the cause from interfering with plaintiff's employees, the form of the injunction being modeled upon that ordered by the final decree made in *Hitchman Coal & Coke Co.* v. *Mitchell.*

The answering defendants appealed to the Circuit Court of Appeals, and that court (219 Fed. Rep. 719) reversed the decree: holding that as the Steubenville defendants submitted affidavits that they were only members, not officers, of a local union, that the original defendants, who were the general officers of the Union, were not authorized to represent them in the alleged illegal acts, and that they knew nothing of the efforts to unionize plaintiff's factory, and as plaintiff had made no showing to the contrary, it was erroneous to issue a temporary injunction against the defendants (other than Gillooly) named in the bill and amended bill; that as Rowe and the other general officers were not served, no relief could be given against them unless it could be said that they were brought before the court by representation when the Steubenville defendants were brought in; and that as plaintiff had no case against the latter defendants for participation in the alleged torts, there was no such common or general interest as authorized a decree against the defendants not served by virtue of the service upon and appearance of the Steubenville defendants. Having said this to show error in the decree awarding a temporary injunction, the court concluded its opinion as follows: "All the questions involved in the merits of the appeal were decided adversely to the appellee by this court in *Mitchell* v. *Hitchman Coal & Coke Co.*, 214 Fed. Rep. 685."

Thereupon a decree was made reversing the decree of the District Court, and remanding the cause with directions not only to dissolve the injunction, but to "dismiss the bill in accordance with the opinion of this court." The mandate was stayed pending application to this court for a writ of certiorari. Afterwards an appeal was allowed by one of the Circuit Court judges, together with a supersedeas. The transcript on appeal having been filed in this court, an application for a writ of certiorari was afterwards presented, consideration of which was postponed to the hearing of the appeal.

Since it appears from the averments of the bill and amended bill that the federal jurisdiction was invoked solely upon the ground of diversity of citizenship, it is evident that, as in the *Hitchman Case*, the appeal must be dismissed. 241 U. S. 644. But, as in that case, we grant the writ of certiorari, the record on appeal to stand as the return to the writ. And, as the case was submitted on the merits, we proceed to dispose of them.

So far as the decision of the Circuit Court of Appeals dissolved the temporary injunction upon the ground that the Steubenville defendants had denied, and plaintiff had not adduced sufficient evidence to sustain, the averment of the amended bill that they had constituted Gillooly and the other original defendants their agents and representatives and had assisted and supported them in their efforts to unionize plaintiff's employees and force plaintiff to recognize the American Flint Glass Workers' Union, we see no reason to disturb the decision.

But the court went further, and directed a dismissal of the bill. Since the cause had not gone to final hearing in the District Court, the bill could not properly be dismissed upon appeal unless it appeared that the court was in possession of the materials necessary to enable it to do full and complete justice between the parties. Where by consent of parties the case has been submitted for a final de-

termination of the merits, or upon the face of the bill there is no ground for equitable relief, the appellate court may finally dispose of the merits upon an appeal from an interlocutory order. *Smith* v. *Vulcan Iron Works,* 165 U. S. 518, 525; *Mast, Foos & Co.* v. *Stover Mfg. Co.,* 177 U. S. 485, 494; *Castner* v. *Coffman,* 178 U. S. 168, 184; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 287; *U. S. Fidelity Co.* v. *Bray,* 225 U. S. 205, 214; *Denver* v. *New York Trust Co.,* 229 U. S. 123, 136. But in this case the application for a temporary injunction was submitted upon affidavits taken *ex parte,* without opportunity for cross-examination, and without any consent that the court proceed to final determination of the merits. Hence there was no basis for such a determination on appeal unless it appeared upon the face of the bill that there was no ground for equitable relief. That this was in effect the decision of the Circuit Court of Appeals is evident from the fact that it was rested upon the authority of *Mitchell* v. *Hitchman Coal & Coke Co.* In that case the same court had expressed the following opinion (214 Fed. Rep. 685, 714):

"The court below also reached the conclusion that the defendants have caused and are attempting to cause the nonunion members employed by the plaintiff to break a contract which it has with the nonunion operators. The contract in question is in the following language:

"'I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employé of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run nonunion and agrees with me that it will run nonunion while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree

to withdraw from the employment of said company, and agree that while I am in the employ of that company (that) I will not make any efforts amongst its employes to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read.'

"It will be observed that by the terms of the contract (that) either of the parties thereto may at will terminate the same, and while it is provided that so long as the employé continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employés to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the contract recover damages for a breach of the same. In other words, the employés under this contract, if they deem proper, may at any moment join a labor union, and the only penalty provided therefor is that they cannot secure further employment from the plaintiff. Therefore, under this contract, if the nonunion men, or any of them, should see fit to join the United Mine Workers of America on account of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the nonunion miners to become members of their organization.

"Under these circumstances, we fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for the purpose of inducing the parties to the contract to join the organization."

This reasoning, essential to the decision reached, is

erroneous for several reasons, as we have now held in reversing the *Hitchman* decree, viz: (a) because plaintiff was entitled by law to be protected from interference with the good will of its employees, although they were at liberty to quit the employment at pleasure; (b) because the case involved no question of the rights of employees, and their right to quit the employment gave to defendants no right to instigate a strike; and (c) because the methods pursued by the defendants were not lawful methods.

The present case, according to the averments of the bill and amended bill, differs from the *Hitchman Case* principally in this: that it appeared that Gillooly, as organizer, had used money and had threatened to use dynamite to reinforce his other efforts to coerce plaintiff into agreeing to the unionization of its works. The system of employment at the Eagle Glass Co. factory was precisely the same as that at the Hitchman mine. The written contract of employment inaugurated at the Eagle Glass Works more than a month prior to the filing of the bill in this case followed precisely the form established at the Hitchman mine shortly after the filing of the bill in that case. And the activities of Gillooly among the plaintiff's employees, and the motive and purpose behind those activities, as alleged in the bill, show the same elements of illegality to which we have called attention in our opinion in the *Hitchman Case*. Plaintiff is entitled to an opportunity, on final hearing, to prove these allegations as against those defendants who are within the jurisdiction of the court, and to connect them with the activities of Gillooly.

The decree of the Circuit Court of Appeals, so far as it directed that the temporary injunction be dissolved will be affirmed, but so far as it directed a dismissal of the bill it must be reversed, and the cause will be remanded to the District Court for further proceedings in conformity to this opinion.

*Decree reversed.*

MR. JUSTICE BRANDEIS, dissenting.

This suit was commenced July 28, 1913, in the District Court of the United States for the Northern District of West Virginia. The plaintiff, the Eagle Glass and Manufacturing Company is a West Virginia corporation having its principal place of business in that State. The defendants, Rowe and four others, were then the chief executive officers of the American Flint Glass Workers' Union. The defendants were sued individually and as such officers. Jurisdiction was rested wholly on diversity of citizenship, defendants being alleged to be all citizens of Ohio.

Plaintiff's factory was run as a non-union shop under individual agreements with its employees by which each was required, as a condition of employment, to sign an agreement that he would withdraw from plaintiff's employment if he joined the union. The employment was terminable at the will of either party. The bill alleged that defendants were conspiring to unionize its factory, and prayed that they, their agents and associates be enjoined from interfering with plaintiff's employees "for the purpose of unionizing your orator's glass factory without your orator's consent." District Judge Dayton granted a sweeping restraining order, which enjoined defendants, among other things, from picketing "for the purpose of interviewing or talking to any person or persons on said railroad or street cars coming to or near plaintiff's glass factory to accept employment with plaintiff, for the purpose . . . of inducing . . . them by . . . persuasion . . . to refuse or fail to accept service with plaintiff" and from the use of "persuasion or entreaty" to induce any person in its employ to leave the same.

Only one of the five defendants named in the bill was served with process. He, Gillooly, filed an answer alleging that he was a citizen and resident of West Virginia; and

a hearing was had upon the issue thus raised. The court, being satisfied that Gillooly was a citizen of West Virginia, ordered, on August 13, 1913, that the bill be dismissed as to him "without prejudice"; and directed that the bill be retained as to all other defendants named therein. Plaintiff then moved for a temporary injunction. But the counsel who had formerly represented Gillooly called the attention of the court to the fact that there was then before the court no person against whom an injunction could issue, since he had entered his appearance only for Gillooly and did not intend to appear for the other defendants who had not been served. He accordingly moved, on his own behalf, that the record be corrected. This motion was heard October 27, 1913, was taken under advisement and was granted on January 17, 1914. But meanwhile, on November 27, 1913, the District Judge granted plaintiff leave to amend its bill by adding as defendants eight other citizens of Ohio who, it alleged, were members of the American Flint Glass Workers' Union and "have assisted and are now supporting" the five persons originally named as defendants.

The eight members of the union, so joined as defendants by the amended bill, being served with process within the State of West Virginia, filed on January 14, 1914, their sworn answers to the bill, alleging among other things:

"Fourth. These respondents admit that they are members of a local union of glass workers at Steubenville, Ohio, which local union is affiliated with the American Flint Glass Workers' Union, and that, except their relation as members of their local union, they have no connection or relation whatever with the other defendants, that they are not officers, agents, representatives or organizers of their local union, or of the American Flint Glass Workers' Union, and that even in their capacity as members of their local union they have not by any act, word, or deed of

theirs in any manner, authorized, assisted, aided or abetted or encouraged any of the other defendants in doing any of the things alleged against them, (the other defendants) in the bill of complaint or the amended bill of complaint."

The allegation in the answer was supported by further affidavits of the parties, which were uncontradicted. The District Court, nevertheless, granted on January 17th, 1914, a temporary injunction against all the then defendants (including these eight) substantially in the terms of the restraining order.

On January 30, 1914, the eight took an appeal to the Circuit Court of Appeals, assigning as errors, among others:

"3. The court had no jurisdiction to grant an injunction because there was no service of process on any of the parties named as defendants except on these defendants, and the record shows that they are not really defendants, but are named as defendants merely as a pretext resorted to by the plaintiff in order to get jurisdiction.

"4. Because the temporary injunction is granted against these defendants on the sole ground that they are members of the union named in the bill."

On January 13, 1915, the Circuit Court of Appeals unanimously reversed the decree of the District Court with directions to dissolve the injunction and dismiss the bill, (219 Fed. Rep. 719), saying, among other things:

"Rowe and others, general officers of the Union, were not served, and, therefore, no relief could be given against them, unless it could be said they were brought before the court by representation when Glasstetter and others, mere members of the local union, were ordered to be made parties and appeared. . . .

"When the allegation of a general or common interest to many persons is denied, the duty devolves on the court to determine whether the common or general interest exists before decreeing against those who are alleged to be in

court by representation. The plaintiff had no pretense of a case against Glasstetter and the other defendants brought in by amendment for participating or aiding the defendants not served, in the alleged torts committed by them, and, therefore, there was no such common or general interest as authorized the court's decree against the defendants served, by virtue of the service and appearance of the defendants brought in by amendment."

Plaintiff took an appeal to this court, and also filed a petition for writ of certiorari. The decision upon the petition was postponed.

It is clear that the appeal must be dismissed, as the jurisdiction of the District Court rests wholly upon diversity of citizenship. *Hitchman Coal & Coke Co.* v. *Mitchell*, 241 U. S. 644. The petition for certiorari having been granted, the decree should, in my opinion, be affirmed for the reasons stated by the Circuit Court of Appeals and in the dissent in *Hitchman Coal & Coke Co.* v. *Mitchell*, *ante*, 229.

MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur in this dissent.

# SCHNEIDER GRANITE COMPANY *v.* GAST REALTY & INVESTMENT COMPANY ET AL.

# GAST REALTY & INVESTMENT COMPANY ET AL. *v.* SCHNEIDER GRANITE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Nos. 461, 473. Argued October 11, 12, 1917.—Decided December 10, 1917.

A street improvement tax having been laid upon abutting property under a city ordinance, partly according to frontage and partly according to area, and the state court having sustained it *in toto*, this court reversed its judgment upon the sole ground that the assessment based on area had produced results in conflict with the Fourteenth Amendment, and sent the case back for further proceedings not inconsistent with the opinion. Upon a second review, *held*, that the questions whether the part of the tax based on frontage was severable, though the other part was void, and whether, and by what agency, a new and just area assessment should be made, were questions of state law, untouched by this court's decision and mandate, and left for determination by the state court. *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, explained.

269 Missouri, 561, affirmed.

THE case is stated in the opinion.

*Mr. Hickman P. Rodgers* and *Mr. William K. Koerner* for Schneider Granite Company.

*Mr. Thomas G. Rutledge* and *Mr. David Goldsmith*, with whom *Mr. Robert A. Holland, Jr.*, and *Mr. J. M. Lashly* were on the brief, for Gast Realty & Investment Company *et al.*

MR. JUSTICE PITNEY delivered the opinion of the court.

These are cross writs of error, bringing under review a judgment rendered by the Supreme Court of Missouri

after the reversal by this court of a previous judgment in the same action.

The action was brought to collect a tax bill for paving one of the streets in St. Louis, levied upon land fronting upon the street, under an ordinance that imposed one-fourth of the cost of the improvement upon all the abutting property according to its frontage, and three-fourths according to area upon all the property in an improvement district whose boundaries were to be fixed in a manner specified in the ordinance, the effect of which, as applied to the property in question, was to extend the area assessment upon defendants' land to a depth of between 400 and 500 feet, while other lands similarly benefited by the improvement were subjected to the area assessment to a much less depth. A judgment of the Supreme Court, which had affirmed a judgment of the Circuit Court of the City of St. Louis sustaining the tax (259 Missouri, 153), was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court. 240 U. S. 55.

Upon the going down of the mandate, the case was transferred to the Supreme Court *in banc*, whereupon the plaintiff prayed that the cause be remanded to the Circuit Court (the trial court) with directions, first, to render judgment for the amount of the frontage assessment in the original tax bill, with interest, and second, to charge against the land a proper area assessment, in some mode to be prescribed by the Supreme Court in its mandate; it being plaintiff's contention that the decision of this court did not condemn the entire area assessment, but only so much of it as was in excess of benefits received. On the other hand, the landowners moved for a reversal of the judgment of the Circuit Court *in toto*, with directions for the entry of a general judgment in their favor. The Supreme Court, interpreting our decision as limited to holding the ordinance invalid only so far as concerned

the area assessment, reversed the judgment of the trial court, and remanded the cause with directions to enter judgment for the amount of the frontage assessment, with interest.

Both parties sued out writs of error from this court, plaintiff on the ground that the state court refused its application for an area assessment, the landowners upon the ground that there was error in directing judgment for any part of the tax bill sued on.

These contentions must be tested by the true intent and meaning of the mandate of this court, and, so tested, both must be overruled. The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this court. It left the tribunals of the State at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the landowners under the Fourteenth Amendment as established by our decision. As our former opinion shows, the conflict with federal rights was due solely to the mode in which that portion of the tax which was levied according to area was distributed. The subsequent judgment of the state court sustaining the tax to the extent of the frontage assessment was not inconsistent with it.

The landowners insist that the two elements were inseparable, and that the tax, being void in part, was entirely void. But the Supreme Court of the State held in this case, following *Collier Estate* v. *Western Paving & Supply Co.*, 180 Missouri, 362, 375, that the tax was severable. This, like the kindred question of the severability of a statute of the State, is a question of state law. See *Guinn* v. *United States*, 238 U. S. 347, 366; *Myers* v. *Anderson*, 238 U. S. 368, 380. In those cases we passed upon the question of severability, in the absence of controlling state

rulings; but we were there reviewing the proceedings of federal courts, and were called upon to consider questions of state as well as of federal law, while in reviewing the judgments of state courts we are confined to the federal questions.

Plaintiff's contention that our mandate required a new assessment in lieu of the former area assessment is likewise unfounded. It is true that there would be nothing inconsistent with our former judgment and mandate in imposing a new area assessment, so long as it did not infringe the landowners' rights under the Constitution of the United States. But whether such new assessment should be made, and, if made, whether it should be done by a court or by an assessing board or other appropriate instrumentality, and whether further legislation was needed for the purpose, were and are matters of state law, it being well settled that where a special assessment to pay for a particular improvement has been held to be illegal, the Constitution of the United States does not prevent the making of a new and just assessment to pay for the completed work. *Spencer* v. *Merchant,* 125 U. S. 345; *Bellingham Bay &c. R. R. Co.* v. *New Whatcom,* 172 U. S. 314; *Lombard* v. *West Chicago Park Commissioners,* 181 U. S. 33, 42. Our former decision left the Supreme Court of Missouri, and the other agencies of the State, entirely unhampered in this regard.

No. 461, *Affirmed.*
No. 473, *Affirmed.*

# CREW LEVICK COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 499. Argued October 17, 1917.—Decided December 10, 1917.

This court determines the constitutionality of a state tax upon its own judgment of the actual operation and effect of the tax, irrespective of its form and of how it is characterized by the state courts.

A state tax on the business of selling goods in foreign commerce, measured by a percentage of the entire business transacted, is both a regulation of foreign commerce and an impost or duty on exports, and is therefore void. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, distinguished.

256 Pa. St. 508, reversed.

THE case is stated in the opinion.

*Mr. David Wallerstein*, with whom *Mr. Charles A. Frueauff* was on the brief, for plaintiff in error.

*Mr. Joseph L. Kun*, Deputy Attorney General of the State of Pennsylvania, with whom *Mr. Francis Shunk Brown*, Attorney General of the State of Pennsylvania, was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The State of Pennsylvania, by an Act of May 2, 1899, P. L., p. 184,[1] imposes an annual mercantile license tax

[1] "Section 1. Be it enacted, &c., That from and after the passage of this act, each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of

of three dollars upon each wholesale vender of or dealer in goods, wares, and merchandise, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually," and like taxes at another rate upon retail venders, and at still another upon venders at an exchange or board of trade. In the year 1913 plaintiff in error sold and delivered at wholesale, from a warehouse located in that State, merchandise to the value of about $47,000 to purchasers within the State, and merchandise to the value of about $430,000 to customers in foreign countries: the latter sales usually having been negotiated by agents abroad who took orders and transmitted them to plaintiff in error at its office in the State of Pennsylvania, subject to its approval, while in some cases orders were sent direct by the customers in foreign countries to plaintiff in error; and the goods thus ordered, upon the acceptance of the orders, having been shipped direct by plaintiff in error from its warehouse in Pennsylvania to its customers in the foreign countries. Under the Act of 1899 a mercantile license tax was imposed upon plaintiff in error, based upon the amount of its gross annual receipts. Plaintiff in error protested against the assessment of so much of the tax as was based upon the

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the whole volume, gross, of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. Each dealer in or vender of goods, wares or merchandise at any exchange or board of trade shall pay a mercantile license tax of twenty-five cents on each thousand dollars worth, gross, of goods so sold.

"Section 2. And it is provided that all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this act [to] be wholesalers; and all other venders of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers."

gross receipts from merchandise shipped to foreign countries. The Court of Common Pleas of Philadelphia and, upon appeal, the Supreme Court of the State (256 Pa. St. 508) sustained the tax, overruling the contention that it amounted to a regulation of foreign commerce and also was an impost or duty on exports levied without the consent of Congress, contrary to §§ 8 and 10 of Art. I of the Constitution of the United States.[1]

Whether there was error in the disposition of the federal question is the only subject with which we have to deal.

As in other cases of this character, we accept the decision of the state court of last resort, respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. *Galveston, Harrisburg, & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227, 231.

In this case, however, the characterization of the tax by the state court of last resort is a fair index of its actual operation and effect upon commerce. Soon after the passage of the act, in *Knisely* v. *Cotterel*, 196 Pa. St. 614,

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[1] Literally, the objection was that a tax based upon the gross receipts for merchandise shipped to foreign countries would be a "tax levied by the *United States of America* upon commerce with foreign nations, in violation of Article I, Section 8, of the Constitution of the United States, and would also be an impost or duty on exports levied by the State of Pennsylvania without the authority of an Act of Congress in violation of Article I, Section 10, of the Constitution of the United States." The description of the tax as "levied by the United States of America" evidently was a slip, and so understood by both courts, as appears from the opinion of the Court of Common Pleas (unreported), of which only the conclusion is quoted in the opinion of the Supreme Court.

that court was called upon to construe it and to answer objections raised under the constitution of the State and the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and in the course of an elaborate opinion declared (p. 630): "An examination of the details of the provisions of the present act makes it clear that the tax, as held by the learned judge below, is upon the business of vending merchandise, and that the classification is based on the manner of sale, and within each class the tax is graduated according to the gross annual volume of business transacted. This is apparent from the fact that the amount of the tax over the small fixed license fee is determined in every case by the volume of business, measured in dollars, and the rate at which it is to be levied is according to the manner of sale."

The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.

We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale venders doing business within the State in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of

it; and, for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent. *Case of the State Freight Tax*, 15 Wall. 232, 276–277; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230, 244; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648; *McCall* v. *California*, 136 U. S. 104, 109; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 227.

Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned.

The principal reliance of the Commonwealth is upon *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1. Undoubtedly that case is near the border line; but we think its authority would have to be stretched in order to sustain such a tax as is here in question. Consistently with due regard for the constitutional provisions, we are unable thus to extend it. In that case the complaining parties were established in business within the taxing district as general merchandise brokers, and had taken out general and unrestricted licenses to do business of all kinds, both internal and interstate. As it happened, one of them (Ficklen), during the year in question, did an interstate business exclusively, and the other (Cooper & Co.) did a business nine-tenths of which was interstate. And the court, by Mr. Chief Justice Fuller, said (p. 21): "Where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution;" and again (p. 24): "What position

they [the plaintiffs in error] would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an en-entirely different question, which does not arise upon this record." Besides, the tax imposed in the *Ficklen Case* was not directly upon the business itself or upon the volume thereof, but upon the amount of commissions earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional.

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695, the court, again speaking by Mr. Chief Justice Fuller, said: "It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; for, as was said in *Case of the State Freight Tax*, 15 Wall. 232, 277, "The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State." That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the

volume of that commerce, and hence is a direct burden upon it.

So obvious is the distinction between this tax and those that were sustained in *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, 347; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227, 232, 235; and some other cases of the same class, that no time need be spent upon it.

The judgment under review must be

*Reversed.*

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## SEABOARD AIR LINE RAILWAY *v.* STATE OF NORTH CAROLINA.

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

No. 18. Submitted November 7, 1917.—Decided December 10, 1917.

The power of a State under the Webb-Kenyon Law to forbid shipment into its territory of intoxicating liquor from other States includes the lesser power to prescribe by law the conditions under which such shipments may be allowed.

The Webb-Kenyon Law having subjected interstate shipments of intoxicating liquor to state legislation, a state law requiring carriers to keep records of such shipments, open for the inspection of any officer or citizen, is valid, notwithstanding the prohibition of § 15 of the Act to Regulate Commerce, as amended June 18, 1910, against the divulging of information by interstate carriers.

Section 5, North Carolina Public Laws, 1913, c. 44, p. 76, sustained.

169 N. Car. 295, affirmed.

THE case is stated in the opinion.

*Mr. Murray Allen* for plaintiff in error.

*Mr. James S. Manning*, Attorney General of the State of North Carolina, and *Mr. Robert H. Sykes*, Assistant Attorney General of the State of North Carolina, for defendant in error.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Pertinent provisions of "An Act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquors" established by the General Assembly of North Carolina March 3, 1913, (P. L., 1913, c. 44, p. 76), are copied in the margin.[1] Section 5 requires rail-

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[1] Public Laws of North Carolina, 1913, c. 44, p. 76:

"Sec. 1. That it shall be unlawful for any person, firm, corporation, association or company, by whatever name called, other than druggists and medical depositories duly licensed thereto, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous or malt liquors in the State of North Carolina. Any person, firm or corporation or association violating the provisions of this act shall be guilty of a misdemeanor.

"Sec. 2. That it shall be unlawful for any person, firm, association or corporation by whatever name called, other than druggists and medical depositories duly licensed thereto, to have or keep in his, their or its possession, for the purpose of sale, any spirituous, vinous or malt liquors; and proof of any one of the following facts shall constitute *prima facie* evidence of the violation of this section:

"First: The possession of a license from the government of the United States to sell or manufacture intoxicating liquors; or

"Second: The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or

"Third: The possession of more than three gallons of vinous liquors at any one time, whether in one or more places; or

"Fourth: The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or

"Fifth: The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or

road companies to keep a separate book in which shall be entered the name of every person to whom intoxicating liquor is shipped, together with amount, kind, date of receipt, etc., to be followed by the consignee's signature acknowledging delivery. And it further provides that the

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"Sixth: The possession of intoxicating liquors as samples to obtain orders thereon: . . . .

"Sec. 3. Upon the filing of complaint, under oath, by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by law to issue warrants, charging that any person, firm, corporation, association or company, by whatever name called, has in his, their or its possession, at a place or places specified, more than one gallon of spirituous or vinous liquors or more than five gallons of malt liquors for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information, . . .

"Sec. 5. All express companies, railroad companies, or other transportation companies doing business in this State are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which said book shall be open for inspection to any officer or citizen of the State, county, or municipality any time during business hours of the company, and said book shall constitute *prima facie* evidence of the facts therein and will be admissible in any of the courts of this State. Any express company, railroad company, or other transportation company or any employee or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor: *Provided*, upon the filing of a certificate signed by a reputable physician or two (2) reputable citizens that the consignee is unable, by reason of sickness or infirmities of age, to appear in person, then the said company is authorized to deliver any package to the agent of said consignee, and the agent shall sign the name of the consignee and his own name, and the certificate shall be filed of record."

book shall be open for inspection by any officer or citizen, and makes failure so to do a misdemeanor.

Plaintiff in error was indicted at the May Term, 1914, Superior Court, Wake County, upon a charge of violating § 5 by refusing, in the preceding January, to permit a citizen to inspect its record showing shipments of spirituous and malt liquors transported from Virginia into that county, said record containing the "names of the consignors, consignees, date of the receipt and delivery of said shipments, and to whom delivered."

The jury returned a special verdict in which they found: "That R. L. Davis, on a date prior to the starting of this prosecution, he being at that time a citizen of the county of Wake, State of North Carolina, went to the office of the defendant company during its business hours, and while said office was open, and demanded of the agent that he be allowed to inspect the book kept by the defendant showing shipments of liquor from points outside of the State of North Carolina to the city of Raleigh"; "the agent of the defendant stated that he was instructed to and did refuse to allow . . . the inspection"; "Davis had no legal process and did not make any demand under any legal process, and at the time of the alleged demand he was neither a State nor Federal officer of any kind of any State or Territory"; "he was seeking information from said book for the purpose of prosecuting persons suspected of violating the law of North Carolina"; and "was seeking general information as to shipments of whiskey into the city of Raleigh from points in another State, and that he had in his mind specially an effort to see what evidence could be procured against one or more specific parties in the city of Raleigh, meaning by the words 'general information' that he was seeking to ascertain who were the consignees of liquor and the quantities they were receiving, for the purpose of prosecuting such parties as may be charged or suspected with the violation

of the prohibition laws of the State"; and that he "had no authority except that which existed, if any, by virtue of the fact that he was at that time a citizen of the State."

Upon this special verdict the State Supreme Court adjudged plaintiff in error guilty as charged, 169 N. Car. 295; and it now maintains the judgment is erroneous, for reasons following:

I. Section 5, c. 44, *supra*, is void because an attempt by the State to regulate interstate commerce, in that it imposes as a condition precedent to delivery that the carrier shall keep a separate book containing name of person to whom liquor is shipped, amount and kind received, date of receipt and delivery, by whom and to whom delivered; and the consignee is required to receipt therefor before delivery.

II. In order to comply with § 5 by permitting records of interstate shipments of liquor to be inspected by a mere citizen, the carrier would necessarily violate the provisions of § 15, Act to Regulate Commerce, as amended June 18, 1910 (36 Stat. 539, 551, 553), which prohibit such action except under circumstances specified. (These are copied below.) [1]

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[1] "An Act to Regulate Commerce," as amended June 18, 1910 (36 Stat. 539, 551, 553).

"Section 15. . . .

"It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so

III. The Webb-Kenyon Law (Act of Congress, March 1, 1913, entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," 37 Stat. 699) cannot affect the application of these principles to shipments destined to points in Wake County, because it relates to liquors intended to be received, possessed, sold or used in violation of state law; and to receive or possess liquor in any quantity in that county is not unlawful.

For some years it has been the established policy of North Carolina, "approved by popular vote and expressed and enforced by the general and many local statutes, that, except in very restricted instances, the manufacturing and sale of intoxicating liquors shall not be allowed." *Smith* v. *Express Company* (1914), 166 N. Car. 155, 157. Since our decision in *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320, 324, it has not been open to serious question that the Webb-Kenyon Law is a valid enactment; that "its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught"; and that under it a State may inhibit ship-

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used; *Provided,* That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carried to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

"Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars."

ments therein of intoxicating liquors from another by a common carrier although intended for the consignee's personal use where such use is not actually forbidden. Plainly, therefore, after that enactment, nothing in the laws or Constitution of the United States restricted North Carolina's power to make shipment of intoxicants into Wake County a penal offence irrespective of any personal right in a consignee there to have and consume liquor of that character.

The challenged act instead of interposing an absolute bar against all such shipments, as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less.

The provisions of § 15, Act to Regulate Commerce, here relied on were intended to apply to matters within the exclusive control of the Federal Government; and when by a subsequent act Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect of them.

The judgment of the court below is

*Affirmed.*

MR. JUSTICE VAN DEVANTER dissents.

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## CRANE *v.* CAMPBELL, SHERIFF OF LATAH COUNTY, IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 53. Argued November 15, 1917.—Decided December 10, 1917.

A State may prohibit and punish the possession of intoxicating liquor for personal use. Idaho Laws, 1915, c. 11, p. 41, sustained.

27 Idaho, 671, affirmed.

THE case is stated in the opinion.

*Mr. J. H. Forney* and *Mr. A. H. Oversmith* for plaintiff in error, submitted.

*Mr. T. A. Walters*, Attorney General of the State of Idaho, with whom *Mr. Frank L. Moore* and *Mr. Wayne B. Wheeler* were on the briefs, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

An Act of the Legislature of Idaho, approved February 18, 1915, "defining prohibition districts and regulating and prohibiting the manufacture, sale . . . transportation for sale or gift, and traffic in intoxicating liquors &c." (Session Laws of Idaho, 1915, c. 11), provides:

"Sec. 2. It shall be unlawful for any person, firm, company or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district or have in his or its possession or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided: Provided, That so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the State by the Constitution or by general law applicable by its terms to the State as a whole, it shall not be unlawful for any person, company or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of the prohibition district: Provided, That nothing in this Act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol."

"Sec. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this Act."

Plaintiff in error was arrested and held in custody by the sheriff, in default of bail, solely because charged with having "in his possession a bottle of whiskey for his own use and benefit and not for the purpose of giving away or selling the same to any person" within Latah County, Idaho—a prohibition district—on May 16, 1915, in violation of the quoted sections. He sued out a writ of *habeas corpus* from the State Supreme Court and sought discharge upon the ground that those sections were in contravention of the Fourteenth Amendment, Federal Constitution, and therefore void. The court held: "The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whiskey, or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited." And further, "we have reached the conclusion that this act is not in contravention of Section one of the Fourteenth Amendment to the Constitution of the United States . . . ; that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects and that it is, therefore, a reasonable exercise of the police power of the

State." (*In re Ed. Crane*, 27 Idaho, 671.) The writ was accordingly quashed and the petitioner remanded to custody.

The question presented for our determination is whether the Idaho statute, in so far as it undertakes to render criminal the mere possession of whiskey for personal use, conflicts with that portion of the Fourteenth Amendment which declares "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law." Its validity under the state constitution is not open for our consideration; with its wisdom this court is not directly concerned.

It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Company* v. *Massachusetts*, 97 U. S. 25, 33; *Mugler* v. *Kansas*, 123 U. S. 623, 662; *Crowley* v. *Christensen*, 137 U. S. 86, 91; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320, 321; *Seaboard Air Line Ry.* v. *North Carolina*, *ante*, 298.

As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. *Booth* v. *Illinois*, 184 U. S. 425; *Silz* v. *Hesterberg*, 211 U. S. 31; *Murphy* v. *California*, 225 U. S. 623; and *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 364. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary

and unreasonable or without proper relation to the legitimate legislative purpose.

We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State.

The judgment of the court below must be

*Affirmed.*

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## DUNCAN TOWNSITE COMPANY *v.* LANE, SECRETARY OF THE INTERIOR.

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

No. 51. Argued November 15, 1917.—Decided December 10, 1917.

An allotment certificate issued under the Choctaw-Chickasaw agreement of July 1, 1902, c. 1362, 32 Stat. 641, passes the equitable title only; the legal title remains in the United States until conveyed by patent, duly recorded, as provided by § 5 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and the allotment in the meantime is subject to be set aside, by the Secretary of the Interior, for fraudulent procurement.

The doctrine of *bona fide* purchase will not aid the holder of an equity to overcome the holder of both the legal title and an equity.

Mandamus is a discretionary remedy, largely controlled by equitable principles; it will not be granted to promote a wrong—to direct an act which will work public or private mischief, or which, while within

the letter, disregards the spirit of the law. So *held* where the relator, purchaser in good faith and without notice of a fraudulent Indian allotment, sought to get in the legal title as against the United States by compelling the Secretary of the Interior to issue and record a patent.

44 App. D. C. 63, affirmed.

THE case is stated in the opinion.

*Mr. Charles H. Merillat,* with whom *Mr. Charles T. Kappler* was on the brief, for plaintiff in error.

*Mr. Assistant Attorney General Kearful* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is a petition for a writ of mandamus brought in the Supreme Court of the District of Columbia to compel the Secretary of the Interior to restore the name of Nicholas Alberson, deceased, to the rolls under the Choctaw-Chickasaw Agreement of July 1, 1902 (32 Stat. 641), and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission.

Under that act only the names of persons alive September 25, 1902, were entitled to entry on the rolls. Alberson had died before that date. The entry of his name and the issue of the certificate were procured by fraud and perjury. These facts, now conceded, were established by the Commission to the Five Civilized Tribes; and the Secretary of the Interior upon recommendation of the Commission removed Alberson's name from the rolls, held the certificates for cancellation and allotted the land to others. Notice of the hearing before the Commission was given to Alberson's administrator and attorney of record, but not

to the relator, who had, under the Oklahoma law, recorded the deed assigning the certificates and was in actual possession of the premises. The certificates had issued on or before April 7, 1906. The notation removing Alberson's name from the rolls was made January 11, 1908. The relator purchased the certificates before January 11, 1908, for value in good faith without knowledge of the fraud or notice of the proceedings for cancellation hereinbefore referred to. The Supreme Court entered judgment for the relator, commanding issue and record of the patent, but making no order in respect to restoring Alberson's name to the rolls. The relator acquiesced in the judgment; but on writ of error sued out by respondent the judgment was reversed by the Court of Appeals (44 App. D. C. 63); and the relator brings the case here on writ of error.

The nature of the Choctaw-Chickasaw Agreement [1] and the rights incident to enrollment and allotment have been frequently considered by this court. Enrollment confers rights which cannot be taken away without notice and opportunity to be heard. *Garfield* v. *Goldsby*, 211 U. S. 249. Certificates of allotment, like receiver's receipts under the general land laws, entitle the holder to exclusive possession of the premises; Act of July 1, 1902, § 23, 32 Stat. 641–644; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337–8. But enrollment and certificates may be cancelled by the Secretary of the Interior for fraud or mistake, *Lowe* v. *Fisher*, 223 U. S. 95; because although the equitable title had passed, *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 593, the land remains subject to the supervisory power of the Land Department, *Knight* v. *Lane*, 228 U. S. 6, until issue of the patent, *United States* v. *Wildcat*, 244 U. S. 111, unless under the statute the power expires earlier by lapse of time. *Bal-*

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[1] See, e. g., *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Woodward* v. *de Graffenried*, 238 U. S. 284.

*linger* v. *Frost,* 216 U. S. 240. Under § 5 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, the legal title can be conveyed only by a patent duly recorded. *Brown* v. *Hitchcock,* 173 U. S. 473, 478. The provision in § 23 of the Act of July 1, 1902, that "allotment certificates issued by the Commission to the Five Civilized tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein" has relation to rights between the holder and third parties. The title conferred by the allotment is an equitable one, so that supervisory power remained in the Secretary of the Interior.

We are not required to decide whether (as suggested in *Lowe* v. *Fisher,* 223 U. S. 95, 107) the power to remove Alberson's name from the rolls had, because of § 2 of the Act of April 26, 1906, expired before the Secretary acted. For the Supreme Court of the District did not order the name restored, and its judgment was acquiesced in by the relator. The claim which the relator makes in this court rests wholly upon the fact that the relator was a *bona fide* purchaser for value. But the doctrine of *bona fide* purchaser for value applies only to purchasers of the legal estate. *Hawley* v. *Diller,* 178 U. S. 476, 484. It "is in no respect a rule of property, but a rule of inaction." Pomeroy, Equity Jurisprudence, § 743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. *Boone* v. *Chiles,* 10 Pet. 177, 210.

Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the

strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles.[1] The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose. See *Turner* v. *Fisher*, 222 U. S. 204. The judgment of the Court of Appeals is

*Affirmed.*

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## HULL, TRUSTEE IN BANKRUPTCY OF PALMER, *v.* FARMERS' LOAN & TRUST COMPANY ET AL.

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

No. 66. Argued November 19, 1917.—Decided December 10, 1917.

A New York testator bequeathed a fund in trust to pay the income to his son during life, with remainder over to others, subject to the condition that the principal also be paid to the son whenever he became able to pay his just debts and liabilities from other resources—a condition recognized as valid by the law of New York. The son secured his discharge in bankruptcy, whereupon the principal was paid over to him by order of the Surrogate Court. *Held*, that no right to the principal passed to his trustee in bankruptcy under the Bankruptcy Act, § 70a (5).

155 App. Div. 636; 213 N. Y. 315, affirmed.

THE case is stated in the opinion.

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[1] *People ex rel. Wood* v. *Assessors*, 137 N. Y. 201; *People ex rel. Durant Land Co.* v. *Jeroloman*, 139 N. Y. 14; *Commonwealth ex rel. Van Dyke* v. *Henry*, 49 Pa. St. 530; *Indiana Road Machine Co.* v. *Keeney*, 147 Mich. 184; *United States ex rel. McManus* v. *Fisher*, 39 App. D. C. 176, 181.

*Mr. Walter S. Heilborn*, with whom *Mr. David J. Gallert* was on the brief, for plaintiff in error.

*Mr. Frederick Geller*, with whom *Mr. Edward H. Blanc* was on the brief, for Farmers' Loan & Trust Company.

*Mr. Henry B. Twombly*, with whom *Mr. Gerrit Smith* was on the brief, for Palmer.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Charles Palmer, of New York City, by will executed shortly before his death, bequeathed to the Farmers' Loan & Trust Company the sum of $50,000, in trust, to pay the income to his son Francis, during his life, with a remainder over to others, subject to the "wish . . . that . . . my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund."

Promptly after probate of the will, Francis filed a voluntary petition in bankruptcy, and in due time received his discharge. Then the Trust Company instituted proceedings in the Surrogate Court for a judicial settlement of the estate; and, the court adjudging that Francis had become entitled to the principal of the trust fund (65 Misc. N. Y. 418), it was paid over to him. Later, the trustee in bankruptcy who had not been a party to proceedings in the Surrogate Court, brought suit in the Supreme Court of New York against the Trust Company and Francis to recover the principal. He claimed that the right to it had passed to him under § 70a (5) of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, and that the whole fund was required to satisfy the balance due on debts proved against the bankrupt estate and the expenses of

administration. No claim was asserted against the income of the trust fund. A complaint setting forth these facts was dismissed on demurrer; and the judgment entered by the trial court was affirmed both by the Appellate Division (155 App. Div. 636) and by the Court of Appeals (213 N. Y. 315). The case comes here on writ of error.

Plaintiff asserts that the case presents this federal question: Does a contingent interest in the principal of personal property assignable by the bankrupt prior to the filing of the petition necessarily pass to his trustee in bankruptcy? And, to sustain his claim to recovery, he contends, that under the law of New York (1) the words used by the testator create a trust; (2) vesting in the beneficiary a contingent interest in personal property; (3) which is an expectant estate; (4) assignable by him; and (5) that, in view of the Surrogate's decision and the action thereon, the defendants are estopped from denying that the contingency requiring payment of the principal had arisen. Plaintiff contends also that, under the federal law, (6) this assignable estate in expectancy passed to the trustee when Francis was adjudged bankrupt, and (7) the trustee, as holder of the estate, became entitled to the principal when the discharge rendered Francis solvent.

We need not enquire whether the several propositions of state and federal law which underlie this contention are correct. This is not a case where a testator seeks to bequeath property which shall be free from liability for the beneficiary's debts. *Ullman* v. *Cameron*, 186 N. Y. 339, 345. Here the testator has merely prescribed the condition on which he will make a gift of the principal. Under the law of New York he had the right to provide, in terms, that such payment of the principal should be made, only if and when Francis should have received in bankruptcy a discharge from his debts and that no part of the fund should go to his trustee in bankruptcy. The lan-

guage used by the testator is broader in scope, but manifests quite as clearly, his intention that the principal shall not be paid over under circumstances which would result in any part of it being applied in satisfying debts previously incurred by Francis. The Bankruptcy Act presents no obstacle to carrying out the testator's intention. *Eaton* v. *Boston Safe Deposit and Trust Co.*, 240 U. S. 427. As the Court of Appeals said: "The nature of the condition itself determines the controversy." The judgment is

*Affirmed.*

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## BURTON *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

## HEEREN *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

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

Nos. 71, 72. Argued November 21, 1917.—Decided December 10, 1917.

Article IV, § 2, subdivision 2, of the Constitution places no limitation upon the power of the States to arrest in advance of extradition proceedings; with Rev. Stats., § 5278, it deals merely with the conditions under which one State may demand rendition from another and under which the alleged fugitive may resist compliance by the State upon which the demand is made.

147 App. Div. 557; 210 N. Y. 567, affirmed.

THE cases are stated in the opinion.

*Mr. William F. Connell* for plaintiffs in error.

*Mr. Robert A. Kutschbock*, with whom *Mr. Charles C. Paulding* and *Mr. Alex. S. Lyman* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These actions, which were tried together in the Supreme Court of New York and argued together here, arise out of the same facts and involve the same question of law. The plaintiffs, mother and daughter, both residents of Pennsylvania, occupied the same berth in a Pullman car while travelling from their home to New York City. At Syracuse, New York, police officers of that city entered the car, arrested the plaintiffs and, at the next station, removed them from the train. The officers in making the arrest acted without a warrant, upon telegraphic orders from the police department of Rochester, New York, in the belief that one of the plaintiffs was the woman implicated in atrocious murders which had recently been committed in Indiana. Investigation soon disclosed that this belief was unfounded; and they were promptly discharged from custody. These suits were then brought against the defendant to recover damages for the annoyance and indignities suffered. Plaintiffs contended that defendant had an affirmative duty to protect them as passengers from a wrongful arrest, and had failed to perform it. The trial court refused to permit plaintiffs to go to the jury and dismissed the complaints. Exceptions to these orders were overruled by the Appellate Division (147 App. Div. 557); the judgments entered for defendant were affirmed by the Court of Appeals (210 N. Y. 567–8); and the cases come here on writs of error.

Plaintiffs duly claimed that they had been denied rights secured by Article IV, § 2, subdivision 2, of the Federal Constitution.[1] The contention is that by reason of this

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[1] Article IV, § 2, subdivision 2:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on de-

clause of the Constitution, they could not legally be arrested in New York for a crime committed in another State, except upon compliance with the provisions of § 5278 of the Revised Statutes [1] of the United States; that such being the law defendant's representatives were bound to know it and to protect them, its passengers, from arrest, unless all steps had been taken which would have justified their rendition upon application of another State. But these provisions of the Constitution and statutes have no application here. They deal merely with the conditions under which one State may demand rendition from another and the alleged fugitive may resist the latter's complying with the demand.[2] Here no demand had been made upon the executive of New York. Proceedings for

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mand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

[1] Rev. Stats., § 5278 (Act of February 12, 1793, § 1, 1 Stat. 302):

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

[2] The provisions are so narrow in scope, that if the removal is actually effected without the interposition of the State's executives—though it be by kidnapping and breach of the peace—the federal law affords no redress, and interposes no obstacle to the prosecution of the alleged fugitive by the State which has by wrongful act acquired jurisdiction over him. *Mahon* v. *Justice*, 127 U. S. 700; see also *Cook* v. *Hart*, 146 U. S. 183; *Pettibone* v. *Nichols*, 203 U. S. 192; *Ker* v. *Illinois*, 119 U. S. 436.

rendition had not even been initiated. And there was no attempt at removal from the State. The arrest, so far as appears, was made by the New York police department of its own initiative.

These provisions of the Constitution and federal statutes do not deal with arrest in advance of a requisition. They do not limit the power of a State to arrest, within its borders, a citizen of another State for a crime committed elsewhere; nor do they prescribe the manner in which such arrest may be made. These are matters left wholly to the individual States. Whether the asylum State shall make an arrest in advance of requisition; and if so, whether it may be made without a warrant, are matters which each State decides for itself. Such has been the uniform practice, sanctioned by a long line of decisions and regulated by legislation in many of the States.[1] The alleged federal right which plaintiffs assert is not immunity from arrest without a warrant; it is immunity from arrest

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[1] The decisions appear to be uniform that at common law arrest in advance of requisition is legal. *People* v. *Schenck*, 2 Johns. 478 (1807); *Simmons* v. *Commonwealth*, 5 Binney, 617 (1813); *People* v. *Goodhue*, 2 John Ch. 198 (1816); *Commonwealth* v. *Deacon*, 2 Wheeler Cr. Cases, 1, 17 (1823); *State* v. *Anderson*, 1 Hill, Law (S. C.), 327, 350–8 (1833); *State* v. *Loper*, 2 Ga. Dec. 33 (1842); *State* v. *Buzine*, 4 Harr. (Del.) 572 (1846); *In the Matter of Fetter*, 23 N. J. L. 311 (1852); *Morrell* v. *Quarles*, 35 Ala. 544 (1860); *Ex parte Romanes*, 1 Utah, 23 (1867); *Simmons* v. *Van Dyke*, 138 Ind. 380 (1894); *State* v. *Taylor*, 70 Vt. 1, 4 (1896). But some deny that it can be made without a warrant even in case of a felony. *Botts* v. *Williams*, 17 B. Monr. 687 (1856). The right of arrest and detention in advance of requisition is in many States regulated by statute. *Ex parte Rosenblat*, 51 Cal. 285; *Wells* v. *Johnston*, 52 La. Ann. 713; *Ex parte Lorraine*, 16 Nev. 63; *State* v. *Shelton*, 79 N. C. 605, 608; *Ex parte Ammons*, 34 Oh. St. 518; *State* v. *Whittle*, 59 S. C. 297. See Moore on Extraditions and Interstate Rendition, Appendix II. And under the statutes of some States arrest cannot be made until after proceedings charging the person have been had in the State where the crime is alleged to have been committed. *State* v. *Hufford*, 28 Iowa, 391, 395.

until after requisition granted. The Constitution grants no such immunity. To restrict the right of arrest as claimed would rob interstate rendition of much of its efficacy. As no federal right of plaintiffs was denied the judgments must be

*Affirmed.*

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## UNITED STATES *v.* NESS.

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

No. 284. Argued November 5, 1917.—Decided December 10, 1917.

The filing of a certificate of arrival, as provided in § 4, subdivision 2, of the Naturalization Act, is an essential prerequisite to a valid order of naturalization.

The court of naturalization having assumed to dispense with this requirement upon proof of reasons why the certificate of arrival could not be obtained, *held*, that the certificate of naturalization was subject to be set aside, in a suit by the United States under § 15 of the act, as a certificate "illegally procured."

Sections 11 and 15 of the Naturalization Act afford cumulative protection against fraudulent or illegal naturalization. In a suit under the latter to set aside a certificate granted in disregard of an essential requirement of the statute, the United States is not estopped by the order of naturalization, although, pursuant to the former section, it entered its appearance in the naturalization proceedings and there unsuccessfully raised the same objection.

230 Fed. Rep. 950, reversed.

THE case is stated in the opinion.

*The Solicitor General* for the United States.

*Mr. Denis M. Kelleher*, with whom *Mr. B. J. Price* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought under § 15 [1] of the Naturalization Act (June 29, 1906, 34 Stat. 596), in the District Court of the United States for the Northern District of Iowa, to cancel a certificate of naturalization issued to Ness by a state court of Iowa on May 21, 1912. The naturalization is alleged to have been "illegally procured," because the petitioner failed to file with the clerk the certificate from the Department of Commerce and Labor "stating the date, place and manner" of arrival as provided in § 4, subdivision second.[2] Ness admitted this failure; but contended that on the facts hereinafter stated he was nevertheless entitled to naturalization, and that, in any event, his right thereto had become *res judicata* for the following reason: The United States entered its appearance under § 11 [3] (by the chief naturalization examiner of

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[1] "Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. . . ."

[2] "Sec. 4. Second: . . . At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of [Commerce and] Labor, if the petitioner arrives in the United States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition."

[3] "Sec. 11. That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and

the Department of Commerce and Labor) "in opposition to the granting" of naturalization and submitted a motion that the petition be dismissed on the ground that the certificate of arrival was not attached. The motion was duly considered by the court and denied. Then, after hearing the petitioner and his witnesses, the order of naturalization was granted. This bill was filed within six months thereafter.

The facts relied upon by Ness as entitling him to naturalization, although he had not filed the certificate of arrival, were as follows:

He emigrated from Norway and arrived at the port of Buffalo by rail via Canada in August, 1906. Ignorant of the requirements of the immigration and naturalization laws of the United States and unobserved by officials of the Government and of the railroad, he entered this country without submitting himself to physical examination, without paying the alien head tax, and without having his entry registered. After filing his petition for naturalization he learned that it was defective for failure to file the certificate of arrival and immediately applied to the Bureau of Immigration and Naturalization for such certificate, but found it could not be furnished, because no registry of his entry had been made. After receiving his certificate of naturalization, he offered to pay the head tax and to submit himself to medical examination; but his offer was refused. He possessed the personal qualifications which entitle aliens to admission and to citizenship.

The District Court dismissed the bill (217 Fed. Rep. 169). Its decree was affirmed by the Circuit Court of Appeals (230 Fed. Rep. 950); and this court granted a writ of certiorari. The case presents questions of importance in the administration of the Naturalization Act.

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shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

*First:* Whether filing the certificate of arrival as provided in § 4, subdivision second, is an essential prerequisite to a valid order of naturalization.

It is urged that the certificate of arrival is merely a form of proof which the naturalization court has power to dispense with for cause. The uses served by the certificate, the history of the provision and its relation to other parts of the act show that this contention is unsound.

Section 1 requires that a registry be made of certain facts concerning each alien arriving in the United States; and that "a certificate of such registry with the particulars thereof" be granted to each alien.[1] Section 5 re-

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[1] The requirement of such registry was first introduced by the Act of June 29, 1906; but its importance in connection with naturalization had long been recognized and had been pressed upon Congress. The Commissioner General of Immigration recommended, in his report for 1898, p. 36: "Each arriving immigrant, when admitted to the United States, should be provided with a landing certificate setting forth the name, age, sex, birth place of the immigrant, government to which allegiance is due, the port from which the vessel sailed, the name of the vessel, the line it belongs to, the port it arrives at, and the date of landing. The immigrant should be instructed, by means of a circular, to retain the certificate for presentation when applying for naturalization papers. A record of the facts stated in the said circular [certificate] as to each immigrant, to be known as an Immigrant Directory should be kept for each fiscal year by the Bureau of Immigration. An act of Congress authorizing such a course of procedure and requiring of the alien presenting himself for naturalization to produce such a certificate or a duplicate from the Immigrant Directory would facilitate the work of the courts and go far toward preventing the issuance of fraudulent naturalization papers in future." Without express authority from Congress the Bureau of Immigration undertook, in 1900, to make such a registry and issue certificates of arrival (Mr. Bonynge, 40 Cong. Rec., p. 3644) and in 1902–3 a card system was introduced "by means of which such an accurate and accessible record is kept at every port of arrival that at any subsequent time the name, date of arrival, and other particulars in regard to every alien entering the United States can be readily ascertained." (Report of Commissioner General, 1903, p. 120.) For this reason, while other provisions of the Act of June 29,

quires clerks of court to give public notice of each petition for naturalization filed. Section 6 prohibits courts from taking final action upon any petition until 90 days after such notice has been given. That period is provided so that the examiners of the Bureau of Naturalization and others may have opportunity for adequately investigating whether reasons exist for denial of the petition. The certificate of arrival is the natural starting point for this investigation. It aids in ascertaining (*a*) whether the petitioner was within any of the classes of aliens who are excluded from admission by §§ 2 and 38 of the Immigration Act of February 20, 1907, 34 Stat. 898; (*b*) whether he is among those who are excluded from naturalization under § 7 of the Naturalization Act—for political beliefs or practices; (*c*) whether he is the same person whose declaration of intention to become a citizen is also attached to the petition under § 4, subdivision second; (*d*) whether the minimum period of five years' continuous residence prescribed by § 4, subdivision fourth, has been complied with. The certificate of arrival is in practice deemed so important that in the regulations issued by the Secretary of Labor under § 28 "for properly carrying into execution the various provisions" of the act, the clerk of court is advised that he "should not commence the execution of the petition until he has received the certificate of arrival." [1]

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1906, did not take effect until 90 days after its passage, (see § 31), it was possible to make § 1 effective immediately; and under § 4, subdivision second, the certificate of arrival is required "if the petitioner arrives in the United States after the passage of this Act."

[1] Beginning with regulations issued May 22, 1911, and including those issued February 15, 1917. (See § 5 of the Regulations.) For a description of the practice pursued see Report of the Commissioner of Naturalization for 1914, pp. 22–23. Until Act of March 4, 1913, creating the Department of Labor, the Bureau of Naturalization was in the Department of Commerce and Labor.

Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. Section 4 declares: "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." Section 27 declares: "That substantially the following forms shall be used in the proceedings to which they relate"; and the form of petition therein prescribed recites: "Attached hereto and made a part of this petition" is "the certificate from the Department of [Commerce and] Labor required by law." Experience and investigation had taught that the wide-spread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization" embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And, in view of the large number of courts to which naturalization of aliens was entrusted and the multitude of applicants,[1] uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced. The value of contemporary documentary evidence was recognized; and the certificate of arrival was, therefore, specifically included among the prerequisites to naturalization.[2] Naturalization granted

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[1] The average number of aliens naturalized for several years preceding 1906 was estimated at 100,000. Report of Special Commission on Immigration appointed by the President March 1, 1905 (59th Cong. 1st sess., Doc. 46, p. 26). In the year ending June 30, 1916, 93,911 certificates of naturalization were granted and 11,927 petitions were denied. Of these, 399 were denied for failure to file certificate of arrival. Report of Commissioner of Naturalization, pp. 4, 6.

[2] The Act of June 29, 1906, embodies in the main the legislation recommended in the Report of the Special Commission. The requirement

without the certificate having been filed, is, therefore, "illegally procured"[1]; *United States* v. *Ginsberg*, 243 U. S. 472; and it may, at least where the proceedings were *ex parte*, be set aside under § 15.

*Second:* Whether an order entered in a proceeding to which the United States became a party under § 11 is *res judicata* as to matters actually litigated therein, so that the certificate of naturalization cannot be set aside under §15, as having been "illegally procured."

This question discussed, and left undecided, in *Johannessen* v. *United States*, 225 U. S. 227, 238, is, in effect: Do § 11 and § 15 afford the United States alternative or cumulative means of protection against illegal or fraudulent naturalization under the Act of June 29, 1906?

The remedy afforded by § 15 for setting aside certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments, *United States* v. *Throckmorton*, 98 U. S. 61; *Kibbe* v. *Benson*, 17 Wall. 624; but it is narrower in scope than the protection offered under § 11. Opposition to the granting of a petition for naturalization may prevail, because of objections to the competency or weight of evidence or the credibility

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therein proposed (p. 98) concerning the certificate of arrival was adopted in terms except that the Commission had proposed it should apply to all aliens arriving after January 1, 1900. The Report of Special Examiner Van Deusen, thereto annexed, states (p. 80): "The code should also specifically set forth the exact proof to be adduced by the alien and his witnesses as a precedent to the admission of the alien. Such proof should include documentary or other evidence of the date and place of birth and a certificate of immigration showing the date of arrival and the port or place of entry of the alien into the United States." See Mr. Hayes, 40 Cong. Rec., pp. 7043-4. Report of Commissioner General of Immigration for 1909, p. 209.

[1] In *In re Liberman*, 193 Fed. Rep. 301, and *In re Hollo*, 206 Fed. Rep. 852, where naturalization was refused on this ground, the petitions were dismissed without prejudice. Compare Report of Commissioner General of Immigration for 1908, p. 191.

of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under § 11. For Congress did not see fit to provide for a direct review by writ of error or appeal.[1] But where fraud or illegality is charged, the act affords, under § 15, a remedy by an independent suit "in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit." If this suit is brought in the federal District Court, its decision will also be subject, under the general law, to review by the Circuit Court of Appeals, and, on certiorari, by this court. Such an independent suit necessarily involves considerable delay and expense; and it may subject the individual to great hardship. On the other hand, a contest in the court of naturalization is usually disposed of expeditiously and with little expense. The interest of all concerned is advanced by encouraging the presentation of known objections to naturalization at the earliest possible stage of the proceedings; so that the petitioner may, if the defects are remediable, remove them, and if not, may adopt, without delay, such course, if any, as will ultimately entitle him to citizenship. It would have defeated this purpose to compel the United States to refrain from presenting any objection, or the objection of illegality, in the court of naturalization, unless it is willing to accept the decision of that court as final.

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[1] The bill submitted by the Commission on Naturalization provided for such appellate proceedings and its proposal was recommended to the House by the Committee on Immigration and Naturalization as § 13 (Report of February 6, 1906, p. 5); but after debate in the Committee of the Whole (40 Cong. Rec., pp. 7784–7787) was stricken from the bill. The bill proposed by the Commission and recommended by the House Committee contained in addition (as § 17) the provision for cancellation proceedings enacted as § 15.

It was the purpose of Congress, by providing for appearances under § 11, to aid the court of naturalization in arriving at a correct decision and so to minimize the necessity for independent suits under § 15. In most cases this assistance could be given best by an experienced examiner of the Bureau of Naturalization familiar with the sources of information. Section 11, unlike § 15, does not specifically provide that action thereunder shall be taken by the United States district attorneys; and if appearance under § 11 on behalf of the Government should be held to create an estoppel, no good reason appears why it should not arise equally whether the appearance is by the duly authorized examiner or by the United States attorney.[1] But in our opinion § 11 and § 15 were designed to afford cumulative protection against fraudulent or illegal naturalization. The decision of the Circuit Court of Appeals is therefore

*Reversed.*

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[1] In *United States* v. *Mulvey*, 232 Fed. Rep. 513, where an order for naturalization was cancelled under § 15, on grounds which the Examiner of the Bureau of Naturalization had presented in opposition to the granting of naturalization, stress was laid upon the fact that the representative of the Bureau was not a law officer of the Government and that he appeared as *amicus curiæ;* but in view of the language of § 11, the distinction does not seem of importance. See also Report of Commissioner of Naturalization for 1915, pp. 20–21.

## JONES ET AL. *v.* BUFFALO CREEK COAL & COKE COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 293. Argued November 5, 1917.—Decided December 10, 1917.

Error committed by the District Court in admitting former judgments in evidence and in rendering judgment on such evidence against a party who objects that they do not bind him but who is fully heard does not constitute a denial of due process of law.

Writ of error dismissed.

The case is stated in the opinion.

*Mr. Maynard F. Stiles* for plaintiffs in error.

*Mr. William R. Lilly* and *Mr. Robert C. Alston,* with whom *Mr. Philip H. Alston, Mr. C. W. Campbell, Mr. Douglas W. Brown, Mr. Cary N. Davis* and *Mr. R. L. Shrewsbury* were on the briefs, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

This is an action of ejectment brought by the Buffalo Creek Coal & Coke Company in the District Court of the United States for the Southern District of West Virginia. Jurisdiction of that court was invoked solely on the ground of diversity of citizenship. A verdict was directed for the plaintiff below; and the case was brought here by direct writ of error, defendants below claiming that, by the action of the lower court, they have been deprived of their property without due process of law in violation of the Fifth and Fourteenth Amendments of the Federal Constitution.

Plaintiff below set up title from the State derived through mesne conveyances, by virtue of sales made for the benefit of the school fund under statutes which have repeatedly been held valid by this court.[1] The action of which defendants complain as depriving them of due process of law, is the admission in evidence herein of the records and papers in three proceedings brought in the state courts of West Virginia under these statutes, and the rendering of judgment herein against them. As the action now complained of is not the action of a State, the Fourteenth Amendment can have no application. And the claim that the action of the court violates the Fifth Amendment is likewise unfounded.

It was the contention of the plaintiff below that the records and papers in the three suits established title in those under whom it claims; and also that the decrees in those suits created *res judicata* as against the defendant, because their predecessors in title had been parties or privies to those suits. The defendants below contended, among other things, that the premises in question were not within the tracts affected by one or more of the decrees in those suits and that they were not bound by any of them. It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112. The writ of error must be

*Dismissed.*

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[1] *King* v. *Mullins*, 171 U. S. 404; *King* v. *Panther Lumber Co.*, 171 U. S. 437; *Swann* v. *Treasurer of West Virginia*, 188 U. S. 739; *King* v. *West Virginia*, 216 U. S. 92; *Fay* v. *Crozer*, 217 U. S. 455; *King* v. *Buskirk*, 231 U. S. 735.

# KORBLY, RECEIVER OF THE PYNCHON NATIONAL BANK, *v.* SPRINGFIELD INSTITUTION FOR SAVINGS ET AL.

# SPRINGFIELD INSTITUTION FOR SAVINGS ET AL. *v.* KORBLY, RECEIVER OF THE PYNCHON NATIONAL BANK.

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

Nos. 26, 27. Argued November 8, 1917.—Decided December 10, 1917.

Under the National Banking Act the Comptroller has discretionary power to withdraw an assessment on shareholders before it is paid, or when partly paid.

Upon the evidence, *held*, that certain sums paid by savings banks to the receiver of a national bank in which they held shares were intended to be applied against their liabilities under the National Banking Act, to enforce which an assessment, made by the Comptroller, was then outstanding. A second assessment, exceeding the differences between their statutory liabilities and the amounts so paid, was void.

In determining the effect of certain payments made by the trustees of savings banks, the court here assumes, in the absence of contrary evidence, that it was the purpose of the trustees to act within their powers, and heeds the settled rule that when neither debtor nor creditor has applied payments before the controversy has arisen the courts will apply them in a manner to accomplish the ends of justice.

218 Fed. Rep. 814, affirmed.

THE cases are stated in the opinion.

*Mr. Charles G. Gardner*, with whom *Mr. Edwin S. Gardner* and *Mr. Ralph W. Stoddard* were on the brief, for Korbly, Receiver.

*Mr. Boyd B. Jones*, with whom *Mr. William H. Brooks* was on the brief, for Springfield Institution for Savings *et al.*

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases are appeals from the Circuit Court of Appeals for the First Circuit, which were heard and will be decided together.

The Pynchon National Bank, of Springfield, Massachusetts, with a capital stock of $200,000, divided into 2000 shares of $100 each, became insolvent and in June, 1901, the Comptroller of the Currency appointed a receiver to liquidate its affairs.

Upon examination there were found among its assets bonds of the American Writing Paper Company, of the par value of $577,000, which the bank had purchased at a discount, but which, at the time of the transaction we are about to consider, had so depreciated that they were worth on the market only 65 cents on the dollar.

A consideration of the condition of the bank resulted on March 18, 1902, in an assessment by the Comptroller on the shareholders of their full statutory liability of 100%, payable on the 15th day of the following May.

Thereupon a plan was devised under which it was proposed that all of the shareholders, except the three defendant Savings Banks, should purchase from the Receiver the Paper Company bonds at 95 cents on the dollar, each shareholder to purchase one bond of $1,000 for every three shares of stock owned by him. This purchase price was an advance over the market price of 30 cents on the dollar and the excess payment by each shareholder would equal 82% of the assessment which had been made by the Comptroller. Because they lacked corporate power to invest in such bonds the Savings Banks with the approval of the Comptroller and shareholders were to pay to the Receiver the required advance over the market price without purchasing their quota of the bonds.

The Comptroller cordially approved of this proposed purchase and in a letter to the Board of Directors of the

insolvent Bank, the contents of which were intended to be and were communicated to its shareholders while the plan was under consideration, he stated that it would result in a settlement of the affairs of the Bank highly satisfactory for all interests concerned and that he was satisfied that if such sale of the bonds were made the Receiver would be able to promptly pay all of the creditors in full; but that if the plan failed and it became necessary to sell the bonds on the market there would be no escape from an assessment of 100% against the shareholders.

This proposed settlement was approved by all of the shareholders, and the defendant banks made payment to the Receiver as follows: The Springfield Institution for Savings $30,360.17; the Springfield Five Cents Savings Bank, $9,820.00, and the Hampden Savings Bank, $5,319.16. For these payments the banks did not receive any consideration other than the joining of the other shareholders in the plan, together with the anticipated saving of eighteen (18) per cent. of the assessment which the Comptroller had made against them. The bonds allotted the banks were sold at the market price.

After the completion of this bond transaction, the Receiver, under instructions from the Comptroller, on July 22, 1902, wrote to the shareholders as follows:

"Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptroller has accordingly decided to withdraw this assessment and I have been instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary."

The results anticipated from this action on the part of the shareholders were not realized and in order to satisfy the still unpaid debts of the bank and interest and costs of administration, the Comptroller on December 28, 1906,

made a second assessment of $49 on each share of stock. The banks refusing to pay this second assessment this suit was instituted against them in the District Court and resulted in a holding in favor of the defendants, which was affirmed by the Circuit Court of Appeals in the decision which is now under review.

It will be necessary to consider but two questions, viz: (1) Was the second assessment invalid because the Comptroller did not withdraw and had no legal authority to withdraw the first assessment? and

(2) Was it the understanding that the payments made by the Savings Banks should be applied on the assessment for their statutory liability, so that they remained liable for only 18% additional?

From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. *Studebaker* v. *Perry*, 184 U. S. 258; *Kennedy* v. *Gibson*, 8 Wall. 498; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; and *Bowden* v. *Johnson*, 107 U. S. 251. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further payment is not necessary, and no form is prescribed in which such action shall be taken by him. A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the

money for any reason cannot be advantageously used. The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. All persons interested in this bond transaction were convinced, in July, 1902, that further payment than that which had been made would not be needed, and a construction should not be given to the act, its specific terms not requiring it, which would prevent such action as was taken by the Comptroller in withdrawing for the time being the unpaid portion of the first assessment. We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions.

The remaining question is: Was it the understanding that the payments to the Receiver should be applied upon the statutory liability of the Savings Banks for which assessment, then in full force, had been made by the Comptroller?

The case was tried in large part upon a stipulation as to the facts, which contains the following:

"Inasmuch as it was *ultra vires* of Savings Banks under the statutes of the Commonwealth, as the Receiver and Comptroller at the time well knew, to purchase such bonds as an investment, it was arranged with the knowledge and approval of the Comptroller and the Receiver that the Savings Banks in question, instead of purchasing their proportion of the bonds, should pay the difference between their then market value and what the National Bank paid for them."

And also this:

The checks of the banks were received "Without any agreement on the part of the Comptroller or Receiver that the payments thereby made should in whole or in part discharge the liability of the Savings Banks for or on account of the indebtedness of the National Bank and

any stock assessments, excepting so far, if at all, as such agreement or obligation may be lawfully implied from the facts stated in this stipulation and such evidence as may be introduced."

It is argued for the Receiver that if it had been understood or intended that the payments by the banks should be credited on the outstanding assessment this would very certainly have found written expression, if not elsewhere, in the receipts given and received for the payments.

It is notable that, although this bond purchase involved more than half a million dollars, the terms and purposes of it were not expressed in any writing, either between the shareholders themselves or between the Receiver and the shareholders, which indicates that the transaction, while large, seemed simple to the men of affairs engaged in it and that to their minds, at least, the implication from the payments to be made could not be doubtful. The shareholders who purchased the bonds had the prospect—how valuable it was the record does not indicate, but still a prospect—of recouping their losses through a later increase in the market value of the bonds, but the Savings Banks had no such prospect, because, not having legal authority to make such purchase their payment of what equalled 82% of the assessment against them was a naked payment, without chance of reimbursement, in whole or in part, from any source.

The evidence introduced in addition to the stipulation of facts is slight, consisting of contemporaneous entries in the corporation record and account books of the banks, and the endorsement on the checks by which payment was made. This evidence is not conclusive, but the implications from it, such as they are, are favorable to the contention of the banks.

Since no clearly definite expression is found in the record either that these payments were or were not to be applied on the shareholding liability of the Savings Banks, we are

required to decide which contention of the parties is the more reasonable and probable, having regard to all the facts and circumstances, stipulated and proved in the case.

There being no evidence to the contrary, we must adopt the assumption of ordinary life and of law that the trustees for the Savings Banks acted lawfully, within the limits of their powers, and we must also have regard to the long settled rule of law that where neither the debtor nor the creditor has applied payments before controversy has arisen the courts will make application of them in a manner to accomplish the ends of justice. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *National Bank* v. *Mechanics Bank*, 94 U. S. 437, 439. When to this we add that natural justice, as distinguished from a technical conclusion, requires that the Savings Banks be allowed credit for the payments that they have made, since thereby the creditors of the insolvent bank may get the benefit of the full statutory liability of the shareholders without a new and unanticipated obligation being imposed on the stockholding banks, we are compelled to resolve any doubt in which the record might otherwise leave us in favor of the defendants. It is impossible for us to conclude that the officials of these savings banks, trustees as they were for their depositors and stockholders, and having in mind the limitations on their powers, as the stipulation declares that they and the Receiver did have, should have made these considerable payments in such a manner as not to at all diminish the statutory liability of their banks, especially since payments not made to be applied on the assessment would be substantially unauthorized gifts, for, as we have said, the banks had no prospect, as the other stockholders had, of being reimbursed for such payments by the possible rise in the market value of the bonds.

It results that the decree of the Circuit Court of Appeals must be affirmed, but not on the ground stated in the opin-

ion of that court, and that the second assessment must be held void because excessive. This, however, without prejudice to the making of another assessment by the Comptroller upon the shareholding banks for the difference, if needed, between the amount paid and the amount of an assessment for the full statutory liability.

*Affirmed.*

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.

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## UNITED STATES v. CALIFORNIA BRIDGE & CONSTRUCTION COMPANY.

## CALIFORNIA BRIDGE & CONSTRUCTION COMPANY v. UNITED STATES.

### APPEALS FROM THE COURT OF CLAIMS.

Nos. 39, 40. Argued November 9, 12, 1917.—Decided December 10, 1917.

Claimant entered into a contract with the United States to erect certain structures "at the United States navy yard, Mare Island." *Held*, upon the facts, as found by the court below, that the site selected before the execution of the contract was selected provisionally and subject to be changed by the Government for some other location within the navy yard, and that claimant so understood when the contract was made.

A judgment exonerating a surety on a government construction contract, upon the ground that the location of the work was changed by the United States without the surety's consent, is not *res judicata* in respect of the right of the United States to make the change as against the principal contractor, when the latter was not a party to the action in which the judgment was rendered and when the right is dependent, not upon the terms of the written contract, but upon notice and representations *aliunde*, which in the case of the surety

may have been different, and so have produced a different understanding, than in the case of the principal.

Having annulled a construction contract for default, the United States re-let the contract at higher cost. Under supplemental agreements with the new contractor, certain deviations from the contract were made, involving a cost of about 6% of the total contract price and requiring estimates of the attendant expenses. Notwithstanding that these changes, on the whole, reduced the cost of the work, *held*, because of the deviations, that the difference between the cost and the original contract price was not a proper measure of the original contractor's liability.

In view of the history of the negotiation preceding the contract here in question, *held*, that it would be highly inequitable to allow the Government's claim of liquidated damages.

50 Ct. Clms. 40, affirmed.

THE cases are stated in the opinion.

*Mr. Assistant Attorney General Thompson*, with whom *Mr. Chas. F. Jones* was on the brief, for the United States.

*Mr. George A. King*, with whom *Mr. Archibald King* was on the brief, for California Bridge & Construction Co.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases are appeals from the Court of Claims which were heard and will be decided together, the second being a cross appeal from the judgment denying recovery on the Government's counterclaim.

The California Bridge & Construction Company, hereinafter referred to as the Bridge Company, on December 21, 1898, with the American Surety Company of New York, Albert Brown and Thomas Prather as its sureties, entered into a written contract with the United States to furnish the materials for and to completely construct, within six months from the date of the contract, a saw mill, boiler house and steel chimney "at the United States navy yard, Mare Island, California."

On January 2, 1901, claiming to act under an option therein contained, the Government declared the contract void, and the Bridge Company was notified that the work would be completed at its expense. Under a second contract the work was completed by another contractor.

In its amended petition the Bridge Company claimed that the Government had terminated the contract without warrant and sought to recover for materials furnished, expenses incurred and anticipated profits. The Government denied all liability to the plaintiff and in a counterclaim prayed for a judgment for the difference between the amount of the plaintiff's contract and the cost of completing the work, plus liquidated damages.

The substance of the Bridge Company's first claim is, that when, for the purpose of informing itself with a view to bidding on the proposed work, its President and Secretary visited the Navy Yard, a location for the construction, hereinafter designated the "first location," was shown to them, duly staked out, and that its bid was based upon this representation; that after the contract was executed, without the consent of the Bridge Company, this location was changed to another, hereinafter designated the "second location," still within the Navy Yard but one upon which it was much more difficult and expensive to construct the work than upon the first location; and that the Government refused to agree to make a reasonable allowance for such increased expense, and wrongfully annulled the contract to the damage of the claimant.

To this branch of the case the defense is that, at the time the officials of the plaintiff visited the Navy Yard and also when the contract was signed, the precise location of the plant had not been officially determined upon, that they were then so informed, and made their bid with that understanding, and that the contract was lawfully annulled for delay in going forward with the performance of it.

The case is here for review on a finding of facts by the Court of Claims, in which it is stated that when the President of the Bridge Company visited the Navy Yard before the contract was signed he was authoritatively informed "that the site of said structure was not definitely fixed," and that "the location was liable to be changed to some other place within the limits of the navy yard." The correspondence, appearing in the finding of facts, which passed between the parties before the contract was annulled makes it clear beyond controversy that the Bridge Company when it executed the contract fully understood that another location than the one pointed out might finally be selected.

Not long after the contract was signed, as if concluding that it was an improvident one, which it wished to modify, the Bridge Company, for various reasons, some with and more without merit, delayed in going forward with the work, with the result that after much discussion, on January 2, 1901, in a letter addressed to the Bridge Company, the Government, asserting that it was acting under the option reserved in the contract, declared it void and gave notice to the Bridge Company that the work would be completed at its expense.

The contract contained a provision giving to the Government the option to declare it void if the parties of the first part should fail in any respect to perform their obligations under it and we agree with the Court of Claims in concluding that this action by the Government, taken upon the recommendation of a board of three naval officers, was entirely justified.

The Bridge Company further relies upon a judgment rendered in the federal Circuit Court for the Eastern District of Pennsylvania in favor of its surety, the American Surety Company of New York, as estopping the Government from claiming, either in defense or in aid of its counterclaim, that it had the lawful right to require the com-

pany to erect the structure contracted for on the second site.

As a general proposition, the claim that the principal and surety in a contract of suretyship are in such privity that a judgment in favor of the latter works an estoppel in favor of the former arrests attention more by its novelty than by its difficulty, having regard to the several defenses which a surety may have on its contract which the principal may not have. Especially is this true in such a case as we have here, in which the contract of suretyship consists simply in the signing of the construction contract by the Surety Company "as surety," so that the rights and obligations of the parties to it must be derived wholly from the law of suretyship.

In dealing with this contention of the Bridge Company, it will not be necessary for us to enter into the refinements of the decisions with respect to privity and privies.

The doctrine of estoppel by judgment, or *res judicata,* as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue, which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment *in personam* in a former suit. *Hopkins* v. *Lee,* 6 Wheat. 109, 113; *Washington, Alexandria & Georgetown Packet Co.* v. *Sickles,* 24 How. 333; *s. c.,* 5 Wall. 580; *Lovejoy* v. *Murray,* 3 Wall. 1, 18; *Litchfield* v. *Goodnow,* 123 U. S. 549; *Southern Pacific Co.* v. *United States,* 168 U. S. 1, 48; *Fayerweather* v. *Ritch,* 195 U. S. 276; *Bigelow* v. *Old Dominion Copper Mining Co.,* 225 U. S. 111, 127; Bigelow on Estoppel, c. 3.

The suit in which this judgment claimed as an estoppel was rendered was commenced by the Government against the American Surety Company and others, as sureties of

the Bridge Company on the building contract, to recover the difference between the amount which the Government was compelled to pay for the completed work and the amount for which the Bridge Company had contracted to complete it. The Surety Company was the only defendant which was served or appeared in the suit. With respect to this judgment the Court of Claims finds that in the Circuit Court the Surety Company pleaded *non assumpsit* and a special plea based on the action of the United States "in assuming to change the contract by changing the site for the buildings to be erected, to which change said surety company had not assented." And also that the Circuit Court "submitted to the jury the question whether under the contract and the circumstances attending its execution the United States could require claimants to erect the structures contemplated by the contract at a site other than the first site," and that "the jury brought in a verdict for the defendant surety company and judgment was entered accordingly." No writ of error was procured to review this judgment.

Obviously, the finding and judgment thus described by the Court of Claims must be understood as deciding that the Government was not justified in requiring the construction to be on the "second location" as against the Surety Company, which was the only defendant served or appearing in that action, but not as so holding as against the Bridge Company, which was a stranger to it, and therefore the judgment in that case cannot serve as an estoppel in this one unless the issue relied upon by the Surety Company in the Circuit Court case to defeat the claim of the Government for damages was precisely the same as is relied upon in this case by the Bridge Company for the same purpose, and a brief discussion of the record will show that such is not the fact.

It is to be noted that the contract provides for the completing of the required construction "at the United States

navy yard, Mare Island, California" without designation of the precise location in the Navy Yard, and therefore since the "first" and "second" locations were both within the limits of the Yard it was necessary to determine from evidence *aliunde* the writing whether the "first location" was represented to either the Surety Company or to the Bridge Company as having been finally determined upon before they executed the contract, and the information which each received as to this fact would determine its legal rights with respect to the claim of the Government for damages.

The defense in the former case turned on the information which the Surety Company received as to the precise location in the Navy Yard of the proposed construction before it executed the contract,—whether it was informed as to the "first location" and as to whether that location had been finally or only tentatively determined upon,—and the claim of the Bridge Company in this case turns on the information, also with respect to the "first location," which that company received before signing the contract. But since there was no relation between the two companies, such that either was or is chargeable with the knowledge which the other had on this disputed subject, and since the notice which one of them had may have been entirely different from that which the other received, clearly the Surety Company may have been informed that the "first location" had been definitely determined upon and may have executed the contract with that understanding, as the judgment in its favor in the Circuit Court implies, while, at the same time, as the Government claims in this case, the Bridge Company, prior to and at the time of the signing of the contract, may have been informed that the "first location" was tentative only and subject to change, as the Court of Claims has found to be true.

Thus, since the legal liability of the Surety Company and the Bridge Company depend as to each upon peculiar

facts, of each case, and as one could very well be liable and the other not, it is plain that the issue determined in the Circuit Court case was not the same as that which was presented in this case and that therefore the claim of estoppel by former judgment is without merit and must be denied.

There remains to be considered the cross appeal of the Government.

After the contract with the Bridge Company was annulled the Government entered into a contract with another contractor, identical with the former one, except for some unimportant additions to the specifications. But, in the progress of the work, four supplemental contracts were deemed necessary by the Government, and were entered into in writing with the second contractor and his surety.

The first of these supplemental contracts related to change in the length and size of the foundation piles to be used, involving an estimated reduction in payment to be made of almost $3,000; the second provided for an addition to the number of piles provided for in the second contract; the third covered changes in the character of various parts of the foundation to be constructed, and the fourth provided for changes in walls, doors, stairways and for the adding a foundation for a bulkhead wall. While the additional cost involved in the changes provided for in three of these supplemental contracts is less than the reduction in cost of the changes provided for in the other one of them, yet, since they constitute a deviation from the original contract, involving a cost of about six per cent. of the total contract price, and since each of these supplemental contracts required an agreement with the new contractor which involved an estimate of the expense of making the changes contemplated by them, we agree with the Court of Claims in concluding that it cannot be said that the work performed under the second contract

was so substantially that which the Bridge Company contracted to perform as to permit the recovery of the difference in cost between the two under the familiar rules applicable to the subject.

The history of the negotiation between the Bridge Company and the Government before the first contract was annulled, as it appears in the finding of facts, makes it highly inequitable that the claim of liquidated damages should be allowed. The recovery of the Bridge Company, limited as it was to the value of the materials delivered by it and used by the Government, is approved. It results that the judgment of the Court of Claims is

*Affirmed.*

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## PEOPLE OF THE STATE OF NEW YORK EX REL. NEW YORK & QUEENS GAS COMPANY *v.* McCALL ET AL., COMMISSIONERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT.

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

No. 407. Argued November 6, 7, 1917.—Decided December 10, 1917.

An order of a state public service commission requiring a city gas company to extend its mains and service pipes to meet the reasonable needs of a growing community within the city can not be deemed arbitrary or capricious, and so contrary to the due process clause of the Fourteenth Amendment, where it appears that the company was accorded full hearing before the commission and on review in the state courts, that it is the only one authorized to serve the community in question with gas, and that the rate of return upon the cost of the extension, though low initially—from 2¼% to 4% per annum—, will probably soon become ample with the growth of the community; and

where, moreover, the record does not show, and the company does not claim, that the comparatively small loss asserted would render its business as a whole unprofitable.

171 App. Div. 580; 219 N. Y. 84, 681, affirmed.

THE case is stated in the opinion.

*Mr. John A. Garver* for plaintiff in error.

*Mr. Godfrey Goldmark*, with whom *Mr. George S. Coleman*, *Mr. Arthur DuBois*, *Mr. William L. Ransom* and *Mr. George H. Stover* were on the briefs, for defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

It sufficiently appearing that the Court of Appeals retained practical control over the record and judgment in this case, while the motion for reargument in that court was pending, the motion to dismiss the writ of error, on the ground that the application for it came too late, will be denied, and the case will be disposed of upon its merits.

The Public Service Commission of the State of New York for the First District ordered the New York & Queens Gas Company to extend its gas mains and service pipes in such a manner as would be "required reasonably to serve with gas" the community known as Douglaston, including Douglas Manor, which was located about a mile and a half beyond the then terminus of the company's gas mains, but within the Third Ward of the Borough of Queens, City of New York.

When this order of the Public Service Commission was reviewed by the Supreme Court at the Appellate Division, that court assumed that it had authority to review generally the reasonableness of the order of the Public Service Commission, and upon such review found the order unreasonable and annulled it.

From the decision of the Appellate Division an appeal was taken to the Court of Appeals, which reversed that decision, and held that the Appellate Division had no power under the New York law to substitute its own judgment for the determination of the Public Service Commission as to what was reasonable, under the circumstances of the case. The case is now in this court for review of the judgment entered upon the decision of the Court of Appeals and it is presented upon a single assignment of error, viz: "That the order of the Public Service Commission . . . was illegal and void, in that it deprived the above named New York and Queens Gas Company of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the said company to extend its distributing system, under great physical difficulties and at enormous expense, to an independent and remote community which the said company was under no present duty to supply with gas, when it appeared that the said Gas Company would not obtain an adequate return from the expenditure required to make such extension."

More compactly stated, this assignment of error is, that the order deprived the gas company of its property without due process of law, because obedience to it would require an expenditure of money upon which the prospective earnings would not provide an adequate return.

The Court of Appeals of New York decided that the Public Service Commission was created to perform the important function of supervising and regulating the business of public service corporations; that the state law assumes that the experience of the members of the Commission especially fits them for dealing with the problems presented by the duties and activities of such corporations; that the courts in reviewing the action of the Commission

have no authority to substitute their judgment as to what is reasonable in a given case for that of the Commission, but are limited to determining whether the action complained of was capricious or arbitrary and for this reason unlawful; and that it was clearly within the power of the Commission to make the order which is here assailed.

This interpretation of the statutes of New York is conclusive, and the definition, thus announced, of the power of the courts of that State to review the decision of the Public Service Commission, based as it is in part on the decision in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470, differs but slightly, if at all, from the definition by this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under examination. Typical cases are: *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481–494; *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 443–4; *Louisiana R. R. Commission* v. *Cumberland Telephone & Telegraph Co.*, 212 U. S. 414, 420–2; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541–547, and *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668.

It is the result of these and similar decisions, that while in such cases as we have here this court is confined to the federal question involved and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing or such arbitrary or

capricious action on the part of the Commission as to violate the due process clause of the Constitution.

The result of the application of this rule to the record before us cannot be doubtful. The Gas Company appeared at the hearing before the Commission, cross-examined witnesses, introduced testimony and argued the case. On writ of certiorari the case was reëxamined by the Appellate Division of the Supreme Court, and it was again reviewed on appeal, by the Court of Appeals. In the matter of procedure plainly the company cannot complain of want of due process of law.

The record shows that the company at the time of the hearing had franchises authorizing it to manufacture and sell gas throughout the Third Ward of the Borough of Queens, in the City of New York, and that, it being the only company which had franchises for any part of that area, the community to which it was ordered to extend its distributing system must continue without gas if the order does not become effective.

The community of Douglaston, including Douglas Manor, was a rapidly growing settlement of three hundred and thirty houses, of an average cost of $7,500, thus giving assurance that the occupiers of them would be probable users of gas, and which, with very few exceptions, were occupied by families the entire year. While the community is described in the assignment of error as "independent and remote" the record shows that it was served at the time by franchise holding companies, which supplied water, electric light and telephone to its inhabitants, and that the number of houses had doubled within a few years.

The length of the extension ordered was about one and one-half miles but the mains of the company, which extended to the point nearest to Douglaston, were being used to almost their full capacity, and for this reason the estimated cost of making the improvement included new

mains of some eight miles in length. The engineer of the Gas Company testified that the cost of the ordered extension would be approximately $86,000, while the engineer for the Commission estimated the cost at $61,000. The Commission found that only $45,000 of the new investment required would be properly chargeable against the extension ordered, since the newer and larger mains would be available in part for other business.

On the basis of the company's estimate of the cost of the extension the income would be about 2¼% per annum, and, on the basis of the estimate by the Commission of the part of the cost properly chargeable to the Douglaston community the income would be 4%. There is no showing in the record as to the fair value of the entire property of the Gas Company used in the public service, nor of the rate of return which it was earning thereon, and therefore even if the return on the cost of complying with the order be conceded to be inadequate, this would not suffice to render the order legally unreasonable. *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 24–6; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574, 580.

It is significant also that within a year preceding the hearing by the Commission the Gas Company proposed in writing to the residents of Douglaston that it would extend its mains to the settlement if they would advance $10,000, to be returned in semi-annual credits upon the amount of gas consumed.

These references to the evidence will suffice. They show this Public Service Commission ordering a public service corporation to render an important public service, under conditions such that in the aspect least favorable to the Gas Company the initial return upon the investment involved would be low but with every prospect of its soon becoming ample, and also that no claim was made by the

company that the comparatively small loss which the company claims would result would render its business as a whole unprofitable.

Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents, and we agree with the Court of Appeals of New York in concluding that the action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even if the courts differed with the Commission as to the expediency or widsom of the order, they are without authority to substitute for its judgment their views of what may be reasonable or wise. Since no constitutional right of the plaintiff in error is invaded by the order complained of, the judgment under review must be

*Affirmed.*

# McGOWAN ET AL. *v.* COLUMBIA RIVER PACKERS' ASSOCIATION ET AL.

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

No. 78. Argued November 22, 23, 1917.—Decided December 17, 1917.

As decided by this court in *Washington* v. *Oregon*, 211 U. S. 127; 214 U. S. 205; Sand Island, in the Columbia River, is part of the State of Oregon, the boundary between that State and Washington being the ship channel north of the Island.

An alleged nuisance consisting of nets connected with buoys and heavily anchored to the bottom of the Columbia River between the line of extreme low tide and the channel, in Oregon,[1] is not subject to abatement by the District Court sitting in the Western District of Washington; assuming that concurrent jurisdiction "on the Columbia" is enjoyed by the State of Washington in virtue of the act organizing Washington Territory (c. 90, § 21, 10 Stat. 179) and the act admitting Oregon into the Union (c. 33, § 2, 11 Stat. 383), such jurisdiction does not reach the bed of the stream in Oregon.

Plaintiff filed its bill in the Western District of Washington to abate a nuisance on the Columbia River, assuming *bona fide* and not without some reason that the *locus in quo* was within that State and District, but later, before taking proofs and before final hearing, moved to dismiss without prejudice because of an intervening decision of this court which fixed the *locus* in Oregon. The motion having been refused and the case retained upon the ground that Washington had concurrent jurisdiction over the River, *held*, (1) that, in face of the doubt concerning the power to abate the nuisance as prayed, the District Court erred in refusing the motion, and (2) that the possibility of granting relief against the defendants *in personam* did not justify retaining the case, against the plaintiff's will.

When a decree dismissing a bill is meant to be without prejudice, the better practice is to express it so.

219 Fed. Rep. 365, affirmed.

THE case is stated in the opinion.

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[1] The place was on the south side of Sand Island.

*Mr. Bert W. Henry*, with whom *Mr. Franklin T. Griffith*, *Mr. R. A. Leiter* and *Mr. Harrison Allen* were on the brief, for appellants:

Besides diverse citizenship, the amended bill showed on its face that federal questions were involved. It based the alleged right to exclusive fishery upon the government ownership of the premises and the lease thereof from the Secretary of War. To sustain this contention requires a construction of the President's proclamation withdrawing the Island and a definition of the powers of the Secretary under the act of Congress authorizing leases (27 Stat. 231), as well as a determination of the question of fact whether or not, as also is alleged, defendants' nets were placed in the waters in violation of the Constitution and laws of the United States prohibiting the obstruction of navigable waters. The case is like *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526. See also *Wilson Cypress Co.* v. *Enrique Del Pozo y Marcus*, 236 U. S. 635; *Doolan* v. *Carr*, 125 U. S. 618; *Cummings* v. *Chicago*, 188 U. S. 410. Jurisdiction of this court exists also because the jurisdiction of the trial court was involved.

The clause relative to concurrent jurisdiction on the Columbia and other boundary waters in § 2 of the act admitting Oregon as a State appears also in the acts admitting the States bordering upon the Mississippi River and its tributaries. It is undoubtedly a grant of jurisdiction, not only to the courts, but to the legislative and executive departments as well. This court recognized the concurrent jurisdiction of the courts of Oregon and Washington on the Columbia. *Nielsen* v. *Oregon*, 212 U. S. 315. The federal court for Oregon and the Supreme Court of that State have done likewise. *In re Mattson*, 69 Fed. Rep. 535; *State* v. *Nielsen*, 51 Oregon, 588.

The concurrent jurisdiction so granted is *on* the river, and does not include jurisdiction of its bed. *McFall* v. *Commonwealth*, 2 Metc. 394; *Carlisle* v. *State*, 32 Indiana,

55; *Sherlock* v. *Alling*, 44 Indiana, 184; *Gilbert* v. *Moline Water Power Co.*, 19 Iowa, 319; *State* v. *Mullins*, 35 Iowa, 199; *State* v. *Metcalf*, 65 Mo. App. 681; *Memphis C. & P. Co.* v. *Pikey*, 142 Indiana, 304; *Opsahl* v. *Judd*, 30 Minnesota, 126; *Roberts* v. *Fullerton*, 117 Wisconsin, 222; *State* v. *Moyers*, 155 Iowa, 678. It was undoubtedly the intention of Congress in granting such concurrent jurisdiction that acts on the river should be within the jurisdiction of either State. Congress undoubtedly intended also that objects of a permanent nature, which are affixed to or are a part of the bed should not be subject to the grant. Such objects are a part of the real estate, or their location is fixed and permanent so that no question can arise in regard to the State where they are located. There is no need for concurrent jurisdiction over such objects, for they are always in the same place; and so it is that objects which float upon the water, or which move about in the water, and which rest in part on the bed of the stream and in part upon the water, and all rights and liabilities in connection therewith, are within the grant of concurrent jurisdiction, while the bed of the river, together with all permanent structures built upon or into it, are not.

Counsel then described the set nets in question, showing that they must be taken from the water whenever fish were removed and are in no sense attached to or part of the river bed, but are subject to be moved from place to place, and, when anchored, are no more affixed than are boats when at anchor. Such objects, they contended, were peculiarly within the purpose of the grant of concurrent jurisdiction as explained by the courts.

The regulation of the fishing industry is also peculiarly within the grant. How are the two States to enforce their policy of maintaining that industry, if the execution of their laws depends on proof in each case that the act complained of was on one side or the other of the invisible state line? And how are fishermen to enjoy their

rights under either State without danger of exceeding them?

The trial court had jurisdiction of this suit by reason of its jurisdiction over the parties, regardless of the *situs* of the property. *Massie* v. *Watts*, 6 Cranch, 148; *Muller* v. *Dows*, 94 U. S. 444; *Phelps* v. *McDonald*, 99 U. S. 298; *Cole* v. *Cunningham*, 133 U. S. 107; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Robertson* v. *Howard*, 229 U. S. 254; *Louisville & N. R. Co.* v. *Western Union Telegraph Company*, 207 Fed. Rep. 1; *Jennings* v. *Beale*, 157 Pa. St. 630; *Schmaltz* v. *York Mfg. Co.*, 204 Pa. St. 1; *Kirklin* v. *Atlas S. & L. Assn.*, 60 S. W. Rep. 149; *Allen* v. *Buchanan*, 97 Alabama, 399; *Steele* v. *Bryant*, 116 S. W. Rep. 755.

*Mr. G. C. Fulton*, with whom *Mr. C. W. Fulton* was on the brief, for appellees:

The jurisdiction of the trial court was dependent entirely on diverse citizenship and the case therefore is not reviewable here by writ of error.

Assuming that the State of Washington fell heir to the concurrent jurisdiction on the Columbia which was given to the Territory by the organic act, such jurisdiction, by the terms of that act, was limited to criminal offenses committed on the river. The act admitting Washington as a State, however, does not purport to grant even that measure of concurrent jurisdiction, and the earlier act admitting Oregon grants concurrent jurisdiction to Oregon alone. In any case, the grant is of jurisdiction "on" or "upon" the river. All the States bordering on the Missouri, Mississippi and other great rivers and waters have similar provisions in their enabling acts. Numerous cases have involved the construction of such provisions, but in no case has it been held or even seriously considered that such jurisdiction empowers the courts of one State to regulate or determine property rights in the beds or shores of rivers or waters within the boundaries of the opposite

State. See *Gilbert* v. *Moline Water Power Co.*, 19 Iowa, 319; *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485; *Roberts* v. *Fullerton*, 117 Wisconsin, 222. The present case is within these authorities. The action is local, the *locus* is in Oregon, and hence the Washington court had no power to proceed. It could not send its officers into Oregon to remove the obstructions complained of.

Appellants base their right to operate appliances fixed to the bed of the river in Oregon solely upon licenses issued by the Fish Commissioner of Washington. But Washington had no power to license such acts beyond her boundaries. *In re Mattson*, 69 Fed. Rep. 535. To be lawful in Oregon they must be licensed by Oregon under her law. Laws 1901, p. 338.

The trial court was without jurisdiction and the decree of the court below should be affirmed.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the appellee, the Columbia River Packers' Association, as lessee from the United States of fishing sites and riparian rights on Sand Island in the Columbia River, to compel the appellants to remove certain obstructions placed by them upon the bottom of the channel of the river in front of the plaintiff's premises, and to refrain from longer maintaining them there. Upon a bond being given a restraining order was issued on July 7, 1908; answers and a cross-bill were filed in the following August, and a demurrer to the cross-bill was overruled on October 21 of the same year. The suit had been brought in the Western District of Washington upon the belief that Sand Island was in Washington and subject to the jurisdiction that that State exercised in fact. But on November 16, 1908, it was decided by this court that the boundary between Oregon and Washington was the ship channel north of Sand Island, and that Sand Island belonged to the former State. *Washington* v.

*Oregon*, 211 U. S. 127; *s. c.* 214 U. S. 205. Thereupon, in June, 1909, the plaintiff filed a petition that the suit be dismissed without prejudice for want of jurisdiction, since it turned out that the land concerned was not within the district for which the court sat.

The District Court dismissed the petition and retained jurisdiction of the cause on the ground that by the Act of Congress of March 2, 1853, c. 90, § 21, 10 Stat. 172, 179, organizing the Territory of Washington, and by the Act of February 14, 1859, c. 33, § 2, 11 Stat. 383, admitting Oregon into the Union, concurrent jurisdiction on this part of the river was reserved to Washington, when it subsequently became a State. The plaintiff then filed a supplemental bill in which again it prayed that the suit might be dismissed without prejudice if the court had no jurisdiction; the case proceeded to the taking of evidence and final hearing, the temporary injunction was dissolved, an injunction was issued against the plaintiff's interfering with the defendants' appliances, and a final decree for damages caused by the temporary injunction was entered in favor of the defendants. The plaintiff appealed to the Circuit Court of Appeals, and that court, being of opinion that the bill should have been dismissed on the plaintiff's petition, reversed the decree and ordered the bill to be dismissed. 219 Fed. Rep. 365. 134 C. C. A. 461.

The nuisance complained of consisted of set nets, each anchored by a stone weighing about three hundred pounds to which was attached a short cable which was clamped to a wire rope about twenty-five feet long, to which in its turn was attached a buoy of large timbers. The nets were placed between the line of extreme low tide and the channel of the river; they were alleged to interfere with the exercise of the plaintiff's rights, and an abatement of the obstruction was prayed for in the bill. We agree with the Circuit Court of Appeals that, assuming for the pur-

poses of decision that the State of Washington had concurrent jurisdiction "on the Columbia," in the words of the statute (1859, c. 33, § 2), *Nielsen* v. *Oregon*, 212 U. S. 315, 319, the jurisdiction did not extend to the removal of such a nuisance as this. It did not reach the bed of the stream, and the officers of the State would have had no authority to intermeddle with the defendants' nets anchored to the bottom. See *Wedding* v. *Meyler*, 192 U. S. 573, 585. This was an important part of the relief that the plaintiff sought and when it found that it could not have it, it naturally endeavored to dismiss the bill.

It ordinarily is the undisputed right of a plaintiff to dismiss a bill before the final hearing. *Carrington* v. *Holly*, 1 Dickens, 280. *Cummins* v. *Bennett*, 8 Paige, 79. *Kempton* v. *Burgess*, 136 Massachusetts, 192. The discussions have been directed more to the question of costs. When a bill was filed under a mistake common to both parties and in other like cases the plaintiff was allowed to dismiss his bill without costs. *Lister* v. *Leather*, 1 DeG. & J. 361, 368 (1857). *Broughton* v. *Lashmar*, 5 My. & Cr. 136, 144 (1840). Here the decision of this court put the plaintiff in an unexpected position. The question before the District Court was not whether the bill ought to be retained for a decree *in personam* if the plaintiff so desired, or even one of costs, but whether it should be retained against the plaintiff's will for a trial that could not, or at least very possibly might be held unable to, give it what it asked. Upon this point also we are of opinion that the Circuit Court of Appeals was right. Its decree of course meant that the bill was dismissed without prejudice, as prayed, but it is better that it should express the fact and with that modification it is affirmed.

*Decree affirmed.*

# SOUTHERN PACIFIC COMPANY *v.* STEWART.[1]

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

No. 348. Motion to dismiss submitted November 5, 1917.—Decided December 17, 1917.

Where the complaint states a cause of action against a common carrier for loss or damage in transit to goods shipped in interstate commerce, the case is removable from the state to the District Court, as one arising under a law of the United States (the Carmack Amendment) if, as required by the Act of January 20, 1914, c. 11, 38 Stat. 278, the amount in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs.

In a case of interstate shipment governed by the Carmack Amendment, it is to be presumed—the complaint being silent on the subject—that the carrier issued a receipt or bill of lading, as the Amendment requires.

Though an action be removable from the state to the District Court as one arising under a federal law, yet, if the defendant remove it upon a petition resting solely on the ground of diverse citizenship, the jurisdiction of the District Court must be deemed to have been invoked upon that ground alone, and, consequently, under Judicial Code, §§ 128, 241, a judgment of the Circuit Court of Appeals in the case is not reviewable in this court by writ of error.

Writ of error to review 233 Fed. Rep. 956, dismissed.

THE case is stated in the opinion.

*Mr. Thomas Armstrong, Jr.*, and *Mr. P. H. Hayes* for defendant in error, in support of the motion.

*Mr. Henley C. Booth* and *Mr. William F. Herrin* for plaintiff in error, in opposition to the motion.

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[1] This case was restored to the docket for rehearing January 28, 1918. For the reasons, see memorandum opinion, *infra*, 562.

Mr. Justice Day delivered the opinion of the court.

Frank R. Stewart began this action against the Southern Pacific Company, a common carrier, in the Superior Court of Arizona for the County of Maricopa. In his complaint he set out that he delivered certain cattle to the Southern Pacific Company to be carried from San Luis Obispo, California, to Phoenix, Arizona, in consideration of the freight to be paid to the Company as measured by the rate applicable to the shipment and carriage of live stock in car-load lots from the point of shipment to the point of destination as the same was published and on file with the Interstate Commerce Commission. The complaint alleged that in consideration of the freight charges the Company undertook to deliver the cattle in good condition at Phoenix, Arizona, and set forth that the cattle were handled and transported in such a negligent and careless manner that five of them died in Yuma, Arizona, a station on the line of the Company; that the remainder were delivered to the plaintiff at Phoenix, Arizona, in such injured condition that six more of them died, and eighty-seven of them were seriously injured, and depreciated in value as a result of negligent handling and transportation of the cattle as set forth in the complaint.

The Company upon petition and bond duly filed removed the case to the United States District Court for the District of Arizona, the same was tried in the District Court, and resulted in a verdict and judgment against the Company, which was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; a writ of error brings the case here.

The case is before us on motion to dismiss on the ground that the judgment of the Circuit Court of Appeals is final. The judgment of the Circuit Court of Appeals is final, among other cases, in those in which the jurisdiction,

meaning that of the District Court, is dependent entirely upon the opposite parties to the suit or controversy being citizens of different States. (Judicial Code, § 128; 36 Stat. 1157.)

The removal to the District Court of the United States was made upon a petition which set forth as a ground for removal the diversity of citizenship of the parties; no other ground for removal was in any manner alleged in the petition.

A suit is removable from a state court to the United States District Court when it arises under the Constitution or laws of the United States, or treaties made under their authority, and of which the District Courts of the United States are given original jurisdiction; any other suit of a civil nature at law or in equity, of which the District Courts of the United States are given jurisdiction, may be removed into the District Court of the United States by the defendant, or defendants, being nonresidents of the State. (Judicial Code, § 28.)

By the amendment of January 20, 1914, 38 Stat. 278, it is provided that no suit brought in any state court of competent jurisdiction against a railroad company, or other common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier, under § 20 [which includes the Carmack Amendment] of the act to regulate interstate commerce as amended, shall be removed to any court of the United States where the amount in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000.00. In this case the plaintiff sought to recover more than $3,000.00, and in view of the allegations of the complaint it may be conceded that the action being for loss or injury to cattle shipped in interstate commerce for transportation by a common carrier this suit is one which arose under a law of the United States, and might have been removed to a federal court on that

ground. See *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319; *St. Louis, Iron Mt. & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, 595, 596, 597.

The Carmack Amendment requires the carrier receiving property for transportation between points in different States to issue a receipt or bill of lading therefor and makes the carrier liable to the lawful holder thereof for any loss, damage or injury to such property. While there is no specific allegation in the complaint that such bill of lading or receipt was issued, as the law makes it the duty of the carrier to issue the same the presumption is that such duty was complied with. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin, supra*, 319, 327; *New York Central &c. R. R. Co.* v. *Beaham*, 242 U. S. 148, 151.

While it thus appears that the suit might have been removed to the federal court because of the federal nature of the cause of action upon which it was brought, it was nevertheless within the jurisdiction of the state court, and that court might have proceeded to final judgment had not the defendant seen fit to remove the suit to the federal court.

Congress has not only provided for classes of cases wherein removal may be effected from the state to the federal courts, but has provided process by which such removals may be effected. Section 29 of the Judicial Code provides that the party desiring to remove the suit from the state court to the United States District Court may apply for removal by petition duly verified in the suit in the state court, at the time, or at any time before the defendant is required by the laws of the State or the rules of the court to answer or plead to the declaration of the plaintiff. Provision is also made for the filing of a

bond requiring that the defendant shall enter in the District Court of the United States within thirty days of filing such petition a certified copy of the record in the suit, and for paying costs in the event that the United States District Court holds that such suit was improperly removed; it is then made the duty of the state court to accept the petition and bond and proceed no further in the suit.

It is essential to the removal of a cause that the petition, provided for by the statute, be filed with the state court within the time fixed by statute, unless the time be in some manner waived. *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673. True, there are cases in which it has been held that a removal may be accomplished after the time to answer or appear has expired, when the complainant changes the cause of action by amendment so as to make a case removable, which was not so before, as in *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92. Amendments have been permitted so as to make the allegations of the removal petition more accurate and certain when the amendment is intended to set forth in proper form the ground of removal already imperfectly stated. See *Kinney* v. *Columbia Savings & Loan Assn.*, 191 U. S. 78, and the review of previous cases in this court contained in the opinion in that case.

The petition for removal in this instance made no reference to any ground of removal because of a cause of action arising upon a federal statute. The petition which required the state court to give up its own jurisdiction, and transfer the cause to the federal court, was based solely upon the allegation of diversity of citizenship.

We are thus presented with the question whether a case removed solely upon the ground of diversity of citizenship, although the complaint contained a cause of action arising under a federal statute, after judgment in the Circuit Court of Appeals, may be brought by a writ of

error to this court. Cases not made final in the United States Circuit Court of Appeals may be brought to this court when the matter in controversy exceeds $1,000.00 besides costs. (Judicial Code, § 241.) As the amount in controversy herein exceeds $1,000.00 the jurisdiction of this court depends upon whether the jurisdiction of the District Court, to which the cause was removed, depended entirely upon the opposite parties being citizens of different States. The jurisdiction referred to, it has come to be settled, means the jurisdiction of the United States District Court as originally invoked. *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, and previous cases in this court cited in the opinion of Mr. Chief Justice Fuller, who spoke for the court in that case.

In *Macfadden* v. *United States*, 213 U. S. 288, the subject was examined under §§ 5 and 6 of the Court of Appeals Act now incorporated into the Judicial Code in §§ 128 and 241. Mr. Justice Moody, who spoke for the court in that case, pointed out that finality of cases in the Circuit Court of Appeals, as governed by § 6, was determined, not by the nature of the case nor by the questions of law raised, but by the sources of jurisdiction of the trial court; whether its jurisdiction rested upon the character of the parties or the nature of the case, and he quoted with approval the language of Mr. Chief Justice Fuller in *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, *supra*, wherein it was said the jurisdiction referred to is the jurisdiction of the Circuit Court "as originally invoked." This principle was applied in *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, in which a suit was brought by a trustee in bankruptcy in a state court against the Silk Company to recover in trover for certain lumber the property of the bankrupt wrongfully converted, it was alleged, to the use of the defendant. The case was removed from the state court upon a petition alleging that the controversy in the suit was wholly between citizens of different States. A trial

was had resulting in a verdict in favor of the plaintiff, this judgment was reversed by the Circuit Court of Appeals for the Third Circuit, and a writ of error was allowed from this court. The writ of error was dismissed as being within the rule which made the judgments of the Circuit Courts of Appeals final when the jurisdiction of the trial court depended entirely upon diversity of citizenship. Mr. Chief Justice Fuller, speaking for the court, in the course of the opinion reached the conclusion that the case was not to be treated as one commenced in the federal court by consent of the defendant under § 23 of the Bankruptcy Act. In concluding the discussion of the subject, the Chief Justice said:

"Plaintiff brought his action in the state court, and its removal on the ground of diverse citizenship placed it in the Circuit Court as if it had been commenced there on that ground of jurisdiction, and not as if it had been commenced there by consent of defendant under section 23 of the bankruptcy act. The right to removal is absolute and cannot be trammeled by such a consequence."

It may be conceded, for the sake of the argument, that the grounds of removal might have been amended by including in the petition the federal ground of action set up in the complaint, but no attempt at amendment was made, and the removal to the District Court of the United States was upon a petition resting solely on the ground of diverse citizenship. We are of opinion that it follows that the jurisdiction of the federal court was invoked solely on that ground, and that fact determines the right to a review in this court of the judgment of the United States Circuit Court of Appeals against the contention of the plaintiff in error. It follows that the writ of error must be dismissed.

*Dismissed.*

THE CHIEF JUSTICE dissents.

# SELECTIVE DRAFT LAW CASES.[1]

ERROR TO THE DISTRICT COURTS OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA AND THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 663, 664, 665, 666, 681, 769. Argued December 13, 14, 1917.—Decided January 7, 1918.

The grant to Congress of power to raise and support armies, considered in conjunction with the grants of the powers to declare war, to make rules for the government and regulation of the land and naval forces, and to make laws necessary and proper for executing granted powers (Constitution, Art. I, § 8), includes the power to compel military service, exercised by the Selective Draft Law of May 18, 1917, c. 15, 40 Stat. 76. This conclusion, obvious upon the face of the Constitution, is confirmed by an historical examination of the subject.

The army power, combining the powers vested in the Congress and the States under the Confederation, embraces the complete military power of government, as is manifested not only by the grant made but by the express limitation of Art. I, § 10, prohibiting the States, without the consent of Congress, from keeping troops in time of peace or engaging in war.

The militia power reserved to the States by the militia clause (Art. I, § 8), while separate and distinct in its field, and while serving to diminish occasion for exercising the army power, is subject to be restricted in, or even deprived of, its area of operation through the army power, according to the extent to which Congress, in its discretion, finds necessity for calling the latter into play.

The service which may be exacted of the citizen under the army power is not limited to the specific purposes for which Congress is

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[1] The docket titles of these cases are: *Arver* v. *United States*, No. 663, *Grahl* v. *United States*, No. 664, *Otto Wangerin* v. *United States*, No. 665, *Walter Wangerin* v. *United States*, No. 666, in error to the District Court of the United States for the District of Minnesota; *Kramer* v. *United States*, No. 681, *Graubard* v. *United States*, No. 769, in error to the District Court of the United States for the Southern District of New York.

expressly authorized, by the militia clause, to call the militia; the presence in the Constitution of such express regulations affords no basis for an inference that the army power, when exerted, is not complete and dominant to the extent of its exertion.

Compelled military service is neither repugnant to a free government nor in conflict with the constitutional guaranties of individual liberty. Indeed, it may not be doubted that the very conception of a just government and its duty to the citizen includes the duty of the citizen to render military service in case of need and the right of the government to compel it.

The power of Congress to compel military service as in the Selective Draft Law, clearly sustained by the original Constitution, is even more manifest under the Fourteenth Amendment, which, as frequently has been pointed out, broadened the national scope of the government by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, thus operating generally upon the powers conferred by the Constitution.

The constitutionality of the Selective Draft Law also is upheld against the following objections: (1) That by some of its administrative features it delegates federal power to state officials; (2) that it vests both legislative and judicial power in administrative officers; (3) that, by exempting ministers of religion and theological students under certain conditions and by relieving from strictly military service members of certain religious sects whose tenets deny the moral right to engage in war, it is repugnant to the First Amendment, as establishing or interfering with religion; and (4) that it creates involuntary servitude in violation of the Thirteenth Amendment.

Affirmed.

THE cases are stated in the opinion.

*Mr. T. E. Latimer*, with whom *Mr. Herbert L. Dunn* and *Mr. Frank Healy* were on the briefs, for plaintiffs in error in Nos. 663, 664, 665 and 666.

*Mr. Harry Weinberger* for plaintiff in error in No. 681.

*Mr. Edwin T. Taliferro*, with whom *Mr. I. M. Sackin* was on the brief, for plaintiff in error in No. 769.

*Mr. Hannis Taylor* and *Mr. Joseph E. Black*, by leave of court, filed a brief as *amici curiæ.*

*Mr. Walter Nelles*, by leave of court, filed a brief as *amicus curiæ.*

*The Solicitor General*, with whom *Mr. Robert Szold* was on the brief, for the United States.

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These cases were argued and submitted together with *Jones* v. *Perkins*, *infra*, 390; *Goldman* v. *United States*, *infra*, 474; *Kramer* v. *United States*, *infra*, 478; and *Ruthenberg* v. *United States*, *infra*, 480. The briefs filed by the parties and *amici curiæ* opposed to the Government attack the constitutionality of the statute from every standpoint. As it is manifestly impracticable to restate these arguments separately, perhaps the best recourse available is to exhibit their leading features reflexly, by summarizing the answers to them contained in the single brief of the United States, viz:

The highest duty of the citizen is to bear arms at the call of the nation. This duty is inherent in citizenship; without it and the correlative power of the State to compel its performance society could not be maintained. Vattel, Law of Nations, Book III, c. 2, §§ 8, 10. It is a contradiction in terms to say that the United States is a sovereign and yet lacks this power of self-defense. Hence, the power was expressly granted by the Constitution. Art. I, § 8. It is found in the power to declare war, which means a power to carry on war successfully, i. e., with the means necessary. Vattel, Book III, c. 2, § 7; *United States* v. *Sugar*, 243 Fed. Rep. 423, 436; *Kneedler* v. *Lane*, 45 Pa. St. 238. Also in the power to raise and support armies, which is conferred broadly, and without limitation, other than the restriction that appropriations to support armies shall not exceed two years. There is no provision

limiting the means to voluntary enlistment. On the contrary, Congress is expressly empowered to use all means necessary and proper to carry out the express grant. Hence, the power to resort either to voluntary enlistment or to enforced draft is express. Selective draft is not only an appropriate means but under the conditions of modern warfare the most prudent, just, and equitable method which can be employed. That the power to compel military service is an incident of sovereignty appears from the custom of nations. Compulsory service is now exacted by practically all the nations of the globe. The compulsory draft was a normal method of raising armies in the United States in 1787 when the Constitution was adopted. It was expressly recognized in many state constitutions, was enforced by the States for local purposes in calling out the militia, and also for obtaining levies to fill the ranks of the Continental Army. The constitutions of five States during the Revolutionary War period express the principle of universal military service. Militia duty was imposed upon all arms-bearing citizens of the original thirteen States during the eighteenth century. The Continental Congress recommended it to the States as a means of recruiting the Continental Army; and the numerous statutes enacted pursuant to those recommendations [space will not permit of their citation here] conclusively determine the meaning which the framers of the Constitution attached to the power to raise armies. The history of this clause in the Convention shows a definite intent not to limit the nation to voluntary enlistments. Supp. Elliot's Debates, vol. 5, pp. 378, 379, 443, 510, 511, 553; Farrand's Records of the Federal Convention, vol. 2, pp. 323, 330, 505, 509, 570, 595. Several of the States, in ratifying the Constitution, proposed amendments to limit the power of Congress to raise armies by draft, Journals of Congress, vol. 13, appendix, pp. 176, 184, Folwell's Press, 1801;

Elliot's Debates, vol. 1, p. 336; vol. 3, p. 659; vol. 4, pp. 242, 244, 251, 252; and their rejection shows not only that the language employed was intended to include the power to draft but also that this was the contemporary interpretation. A prime object of the Constitution was to cure the impotence of the Continental Congress directly to require military service from the citizens of the States. Articles of Confederation, 7, 9 (1 Stat. 6, 7); Federalist, No. 22, p. 143, No. 23, pp. 152, 153; 7 Sparks, Writings of Washington, pp. 162, 167.

Our national history demonstrates the existence of the power by its exercise. It was resorted to in the War of Independence and by both sides in the Civil War; near the conclusion of the War of 1812, James Monroe, then Secretary of War, submitted to Congress a draft bill with an unanswerable argument supporting the power. See Niles' Weekly Register, vol. 7, p. 137. [The Government also referred to state statutes requiring compulsory militia service in force before and after the adoption of the Constitution; Rev. Stats., § 1998, amended in 1912, 37 Stat. 356; and the following acts of Congress providing for drafting the militia: Feb. 28, 1795, 1 Stat. 424, amended April 18, 1814, 3 Stat. 134; July 17, 1862, 12 Stat. 597.]

Court decisions uniformly have recognized the power. *Tarble's Case*, 13 Wall. 397, 408; *Grimley's Case*, 137 U. S. 147, 153. See also *Presser* v. *Illinois*, 116 U. S. 252, 265; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29; *Butler* v. *Perry*, 240 U. S. 328, 332, 333. In *Kneedler* v. *Lane*, *supra*, the Conscription Act of 1863, was sustained under the power to raise armies; and in *United States* v. *Scott*, 3 Wall. 642, and *United States* v. *Murphy*, 3 Wall. 649, that act was construed, no question of its constitutionality being raised. Under the similar clause in the Constitution of the Confederacy, draft acts were sustained in the confederate

courts. Compulsory militia service has also been enforced by the courts. *Houston* v. *Moore*, 5 Wheat. 1; *Martin* v. *Mott*, 12 Wheat. 19. The Act of 1862, *supra*, requiring performance of militia duty, was sustained in *McCall's Case*, 15 Fed. Cas. No. 8669, p. 1225; *In re Griner*, 16 Wisconsin, 423; *Druecker* v. *Salomon*, 21 Wisconsin, 621; *In re Spangler*, 11 Michigan, 298; *Allen* v. *Colby*, 47 N. H. 544. As to the power of the State to draft, see *Lanahan* v. *Birge*, 30 Connecticut, 438, 443; *People ex rel. German Ins. Co.* v. *Williams*, 145 Illinois, 573, 583; *In re Dassler*, 35 Kansas, 678, 684; *State* v. *Wheeler*, 141 N. Car. 773, 777. The present act has been sustained in every case which has come before the federal courts.

There is not, as asserted, any common-law right of a soldier not to be sent out of the country. The status of a citizen properly drafted and that of one who has voluntarily enlisted are the same. Our armies have served in all parts of the world, and such service has never been regarded as illegal. *Fleming* v. *Page*, 9 How. 603, 615. Numerous statutes of the original States provided that the militia might be sent into neighboring States. Compulsory military service is not contrary to the spirit of democratic institutions, for the Constitution implies equitable distribution of the burdens no less than the privileges of citizenship. Whatever the limitations sought to be set upon the Crown, there can be no doubt that power to impress for foreign service resided in Parliament, and was actually exerted. [The discussion of this subject is supported by many references to history.]

The act infringes no provision of the Constitution concerning the militia. The fact that a citizen is a militiaman does not exempt him from service in the National Army. The militia and the National Army are separate institutions, created for separate purposes; and the power of Congress over the former (Art. I, § 8, cl. 15, 16) is not

in limitation but in extension of the power to raise armies (cl. 12). The law infringes no reserved right of the States over the militia. If there be a conflict between the state and federal powers in this respect, the latter must prevail. *Ex parte Coupland*, 26 Texas, 386, 396, 402; *Burroughs* v. *Peyton*, 16 Gratt. 470, 475, 483–485; *Jeffers* v. *Fair*, 33 Georgia, 347, 351, 353; *Ex parte Tate*, 39 Alabama, 254, 268; *Ex parte Bolling*, *id.*, 609; *Barber* v. *Irwin*, 34 Georgia, 27, 37; *Simmons* v. *Miller*, 40 Mississippi, 19, 26; *Kneedler* v. *Lane*, *supra*. Otherwise, the power of Congress to raise armies must be nullified. But there is no conflict in fact. The National Government has never impaired the right of the States to keep up the militia. The present law draws into the National Army but a small portion of the militia as a whole, and the withdrawal from possible call for local service is only temporary. Act of June 15, 1917, § 4, 40 Stat. 217. The right of the States to organize and train the militia remaining has been recognized and safeguarded. Act of June 14, 1917, 40 Stat. 181; National Defense Act of June 3, 1916, § 61, 39 Stat. 198. The restrictions of the militia clause are inapplicable. The draft is not based on liability to perform militia duty, but on liability of citizens to render national military service. When Congress has made provision for calling the militia in the past, the words have been addressed to the militia expressly. [Citing numerous federal acts.] The opposing briefs are in conflict as to whether this act calls the militia. The National Defense Act of 1916, in designating all able-bodied male citizens between the ages of 18 and 45 as militiamen, does not call them to militia service, and clearly does not intend to relinquish the power to call citizens into the National Army. The Draft Act does not call the National Guard in its organized form, but operates upon the individuals, for reorganization in national units. Thus to select the trained members of the

National Guard from the body of citizenship is not arbitrary, but reasonable and prudent. However, even if plaintiffs in error were called as militiamen, they would not be entitled to relief in the courts. *Martin* v. *Mott*, *supra; Luther* v. *Borden*, 7 How. 1, 44. It is true that the President may not call out the militia for foreign service in time of peace, but in this instance it could not even be said that an emergency had not arisen, or that the President had not wisely exercised his discretion, to repel invasion. 29 Op. Atty. Gen. 322; *Martin* v. *Mott*, 12 Wheat. 29.

The law imposes neither slavery nor involuntary servitude. The Thirteenth Amendment was intended to abolish only the well-known forms of slavery and involuntary servitude akin thereto, and not to destroy the power of the Government to compel a citizen to render public service. *Butler* v. *Perry*, 240 U. S. 328, 332; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *Clyatt* v. *United States*, 197 U. S. 207, 216; *Edwards* v. *United States*, 103 U. S. 471; *People ex rel. German Ins. Co.* v. *Williams*, 145 Illinois, 573; *Wilson* v. *New*, 243 U. S. 332, 351; *In re Dassler*, 35 Kansas, 678; and other cases. The legislation affecting the Northwest Territory (the language of the Amendment is used in the Ordinance of 1787) shows that compulsory military service was not regarded as involuntary servitude. See Chase, Statutes of Ohio, vol. 1, pp. 92, 102, 113, 211, 245.

The law is not unconstitutional on the ground that state officials aid in its enforcement. The contention that it denies to the States a republican form of government is without merit and a question which the courts will not consider. *Luther* v. *Borden*, *supra; Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. As to the objection that it imposes duties on state officials, it is sufficient to say that plaintiffs in error, not being state officials, may not raise the objection. In executing the federal

law state officials are *pro hac vice* federal officials. In the absence of contrary statutory or constitutional provisions of the State, power may be conferred upon state officials as such to execute duties under an act of Congress, as was done during the Civil War in calling out militia.

The law does not delegate legislative authority. It is as specific as is reasonably practicable. Throughout our history the common method of providing for increase in the land forces has been simply to vest authority in the President to raise the necessary troops. [Citing many statutes.]

The act does not infringe the constitutional provisions concerning the judicial power. Art. I, § 8, cl. 9; Art. III, §§ 1, 2. The duties of the boards of exemption are administrative; they determine questions of fact necessary to be ascertained by the Executive in enforcing the law.

The act does not violate the due process clause. It is said that it confers upon the President discretionary and arbitrary powers in the selection of citizens for the draft army and that citizens may be selected upon the whim of a state official. But the act does not require an arbitrary selection. No complaint has been made that it has been arbitrarily or unfairly administered. On the contrary, it provides a fair and orderly method of selection. The individual citizen may incidentally or temporarily be restrained of his liberties in order to protect the liberties of the people as a whole. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29.

The law neither establishes a religion nor prohibits its free exercise. Section 4 contains nothing respecting the establishment of religion; on the contrary, it goes so far as to aid in the free exercise of those religions which forbid participation in war.

The law does not deprive of the equal protection of the laws. The Fourteenth Amendment is addressed to

the States; and, besides, the exemptions are based on sound classification. The law proceeds upon the equitable principle that each citizen should be subject to call for his particular service. Some are exempted from direct military service because they may help more effectively in other ways. Exemptions were allowed by every compulsory service law passed by the States. Quakers and conscientious objectors were frequently exempted in the Revolutionary War. [Citing many acts of the States.]

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

We are here concerned with some of the provisions of the Act of May 18, 1917, c. 15, 40 Stat. 76, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States." The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass upon and those which will throw light on their significance are briefly summarized:

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 3, 1916, c. 134, 39 Stat. 211) and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service; and fifth, by providing for

selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and, while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a non-combatant character to be defined by the President.

The proclamation of the President calling the persons designated within the ages described in the statute was made, and the plaintiffs in error, who were in the class and under the statute were obliged to present themselves for registration and subject themselves to the law, failed to do so and were prosecuted under the statute for the penalties for which it provided. They all defended by denying that there had been conferred by the Constitution upon Congress the power to compel military service by a selective draft, and asserted that even if such power had been given by the Constitution to Congress, the terms of the particular act for various reasons caused it to be beyond the power and repugnant to the Constitution. The cases are here for review because of the constitu-

tional questions thus raised, convictions having resulted from instructions of the courts that the legal defences were without merit and that the statute was constitutional.

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, § 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article VI. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and

cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force.[1] In England it is certain that before the

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[1] In the argument of the Government it is stated: "The Statesman's Year-book for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Colombia, p. 790; Chile, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1119; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353." See also

Norman Conquest the duty of the great militant body of the citizens was recognized and enforcible. Blackstone, Book I, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad. This is exemplified by the present English Service Act.[1]

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed

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the recent Canadian conscription act, entitled, "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899, Military Service and Commando Law, sections 10 and 28, Laws of Orange River Colony, 1901, p. 855; of the South African Republic, "De Locale Wetten en Volksraadsbesluiten der Zuid- Afr. Republiek," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59, Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur le recrutement de l'armée of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

[1] Military Service Act, January 27, 1916, 5 and 6 George V, c. 104, p. 367, amended by the Military Service Act of May 25, 1916, 2nd session, 6 and 7, George V, c. 15, p. 33.

the brief of the Government contains a list of Colonial acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called. But it is indisputable that the States in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the States, an illustration being afforded by the following provision of the Pennsylvania constitution of 1776. "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Art. 8, (Thorpe, American Charters, Constitutions and Organic Laws, vol. 5, pp. 3081, 3083.) [1] While it is true that the States were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the States to

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[1] See also Constitution of Vermont, 1777, c. 1, Art. 9 (Thorpe, vol. 6, pp. 4747, 3740); New York, 1777, Art. 40 (*id.*, vol. 5, p. 2637); Massachusetts Bill of Rights, 1780, Art. 10 (*id.*, vol. 3, p. 1891); New Hampshire, 1784, pt. 1, Bill of Rights, Art. 12 (*id.*, vol. 4, p. 2455); Delaware, 1776, Art. 9 (*id.*, vol. 1, pp. 562, 564); Maryland, 1776, Art. 33 (*id.*, vol. 3, pp. 1686, 1696); Virginia, 1776, Militia (*id.*, vol. 7, p. 3817); Georgia, 1777, Art. 33, 35 (*id.*, vol. 2, pp. 777, 782).

resort to drafts to fill their quotas [1]—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the States for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article I, § 10.

To argue that as the state authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army. Nor is this met by saying that it does not exclude the right of Congress to organize an army by voluntary enlistments, that is, by the consent of the citizens, for if the proposition be true, the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call because of state authority, the citizen had a right to obey the call and set aside state authority if he pleased to do so. And a like conclusion demonstrates the want of foundation for the contention that, although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited

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[1] Journals of Congress, Ford's ed., Library of Congress, vol. 7, pp. 262, 263; vol. 10, pp. 199, 200; vol. 13, p. 299. 7 Sparks, Writings of Washington, pp. 162, 167, 442, 444.

in some respects to services for which the militia it is assumed may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it and yet destroys the purpose for which the call is authorized—the raising of armies to be under the control of the United States.

The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

"The Congress shall have power . . . To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Article I, § 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right on the one hand of Congress under the Confederation to call on the States for forces and the duty on the other of the States to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the States on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting the power thus conferred in all its plenitude was not

made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the States. It further conduced to the same result by delegating to Congress the right to call on occasions which were specified for the militia force, thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed when called for such special purposes although subjecting the milita when so called to the paramount authority of the United States. *Tarble's Case*, 13 Wallace, 397, 408. But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public

interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the Government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every State (Act of May 8, 1792, c. 33, 1 Stat. 271) which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the States according to their quota to be trained as directed by Congress and to be called by the President as need might require.[1] When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border,[2]

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[1] Act of May 9, 1794, c. 27, 1 Stat. 367; Act of February 28, 1795, c. 36, 1 Stat. 424; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of March 3, 1803, c. 32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of March 30, 1808, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705.

[2] Upton, Military Policy of the United States, pp. 99 *et seq.*

the Government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War, (Mr. Madison being President) in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the Proclamation of the President calling a force into existence was issued it

was addressed to the body organized out of the militia and trained by the States in accordance with the previous acts of Congress. (Proclamation of April 15, 1861, 12 Stat. 1258.) That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. (Act of July 22, 1861, c. 9, 12 Stat. 268.) This was soon followed by another act increasing the force of the militia to be organized by the States for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863, c. 75, 12 Stat. 731, was adopted entitled "An Act for enrolling and calling out the National Forces and for other purposes." By that act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of twenty and forty-five was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July, 1863, of February and March, 1864, of July and Decem-

ber, 1864, producing a force of about a quarter of a million men.[1] It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the States as trained by the States under the direction of Congress became known as the National Guard (Act of January 21, 1903, c. 196, 32 Stat. 775; National Defense Act of June 3, 1916, c. 134, 39 Stat. 211). And to make further preparation from among the great body of the citizens, an additional number to be determined by the President was directed to be organized and trained by the States as the National Guard Reserve. (National Defense Act, *supra.*)

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the Government

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[1] Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866.

since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. (*Kneedler* v. *Lane*, 45 Pa. St. 238.) And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding States wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration, by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. *Burroughs* v. *Peyton*, 16 Gratt. 470; *Jeffers* v. *Fair*, 33 Georgia, 347; *Daly and Fitzgerald* v. *Harris*, 33 Ga. (Supp.) 38, 54; *Barber* v. *Irwin*, 34 Georgia, 27; *Parker* v. *Kaughman*, 34 Georgia, 136; *Ex parte Coupland*, 26 Texas, 386; *Ex parte Hill*, 38 Alabama, 429; *In re Emerson*, 39 Alabama, 437; *In re Pille*, 39 Alabama, 459; *Simmons* v. *Miller*, 40 Mississippi, 19; *Gatlin* v. *Walton*, 60 N. Car. 333, 408.

In reviewing the subject, we have hitherto considered

it as it has been argued, from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that Amendment for the purpose of pointing out, as has been frequently done in the past,[1] how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest.

It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features, is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Intermountain Rate Cases*, 234 U. S. 476; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. *Buttfield* v. *Stranahan*, 192 U. S. 470, 497; *West* v. *Hitchcock*, 205 U. S. 80; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 338–340; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275. And we pass without anything but statement

[1] *Slaughter House Cases*, 16 Wall. 36, 72–74, 94–95, 112–113; *United States* v. *Cruikshank*, 92 U. S. 542, 549; *Boyd* v. *Thayer*, 143 U. S. 135, 140; *McPherson* v. *Blacker*, 146 U. S. 1, 37.

the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

*Affirmed.*

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## JONES *v.* PERKINS, DEPUTY UNITED STATES MARSHAL, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 738. Argued December 13, 14, 1917.—Decided January 7, 1918.

Petitioner sought *habeas corpus* upon the ground that the Selective Draft Law, for disobedience of which he was arrested, was unconstitutional. The constitutional questions he raises having all been decided adversely to him in the *Selective Draft Law Cases*, *ante*, 366, the court affirms the trial court's order refusing the writ, without, however, departing from the general principle that *habeas corpus* should not anticipate trial in criminal cases, in the absence of exceptional circumstances, and without inquiring whether in this case such circumstances existed.

243 Fed. Rep. 997, affirmed.

THE case is stated in the opinion.

*Mr. J. Gordon Jones*, with whom *Mr. Thomas E. Watson* was on the brief, for appellant.

*The Solicitor General*, with whom *Mr. Robert Szold* was on the brief, for appellees. See *ante*, 368.

*Mr. Hannis Taylor* and *Mr. Joseph E. Black*, by leave of court, filed a brief as *amici curiæ*.

*Mr. Walter Nelles*, by leave of court, filed a brief as *amicus curiæ*.

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

Jones, the appellant, was arrested under a warrant charging him with a failure to register as required by the Act of Congress of May 18, 1917, known as the Selective Draft Law, (c. 15, 40 Stat. 76), and after a hearing by a United States Commissioner was committed to custody to await the ensuing term of the United States District Court. Alleging that he was illegally restrained because the statute under the assumed authority of which he was held was repugnant to the Constitution of the United States, he petitioned the court below for a writ of *habeas corpus*. Following a rule to show cause and a hearing on the return thereto, the petition was denied on the ground that the statute was constitutional (243 Fed. Rep. 997), and to reverse the order so adjudging this direct appeal was prosecuted.

It is well settled that in the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and *habeas corpus* should not be granted in advance of a trial. *Riggins* v. *United States*,

199 U. S. 547; *Glasgow* v. *Moyer*, 225 U. S. 420; *Johnson* v. *Hoy*, 227 U. S. 245. If that rule applied, therefore, our duty would be to affirm, unless this case could be treated as coming within the exceptional class. But we do not deem it necessary to enter into that consideration because, even if it were found to be embraced in such class, every constitutional question relied upon has been this day in *Arver* v. *United States*, [the *Selective Draft Law Cases*,] *ante*, 366, decided to be without merit. Because of this situation, therefore, without departing from the general principle, we think it suffices in this case to apply the ruling made in the *Arver Case* and, for the reasons stated in the opinion therein, to affirm.

*And it is so ordered.*

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## UNITED STATES *v.* MORENA.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 523. Argued December 13, 1917.—Decided January 7, 1918.

The second proviso in § 8 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, permitting naturalization of aliens who cannot speak English if before the passage of that act they have made declarations of intention in conformity with prior laws, has no bearing on the relation of the seven-year limitation prescribed by § 4, subdivision second, of the act, to declarations filed before its passage.

Giving effect to the purpose expressed in the title of the Naturalization Act of June 29, 1906, "to provide for a uniform rule for the naturalization of aliens throughout the United States," the requirement of subdivision second of § 4, that the petition for citizenship shall be filed not more than seven years after the alien has made his declaration of intention, is *held* applicable to declarations made

before the act was passed; the enactment does not invalidate such old declarations, but the time runs upon them from its date. So *held* where the declaration was made December 15, 1905, and the petition for citizenship was not filed until December 21, 1914.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Fitts* for the United States.

No appearance for Morena.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This certificate presents for construction certain sections of an Act of Congress, approved June 29, 1906, and entitled "An Act to establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States." C. 3592, 34 Stat. 596.

The pertinent parts of the act are as follows:

"Sec. 4. That an alien may be admitted to and become a citizen of the United States in the following manner and not otherwise:

"First. He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States . . .: *Provided, however,* That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

"Second. Not less than two years nor more than seven years after he has made such declaration of intention he

shall make and file, in duplicate, a petition" for citizenship.

The facts certified are these:

Morena, on December 15, 1905, declared his intention to become a citizen of the United States, and on December 21, 1914, filed in the District Court of the United States for the Western District of Pennsylvania a petition for citizenship. On April 6, 1915, the petition was granted and he was admitted to citizenship.

In July, 1915, the United States filed in the District Court a bill praying that the order admitting Morena to citizenship be vacated and his certificate be canceled, upon the ground, among others, that the certificate was void because it had been granted upon a petition filed more than seven years after he had made his declaration and more than seven years after the passage of the Act of Congress of June 29, 1906.

The District Court dismissed the bill and an appeal was taken to the Circuit Court of Appeals for the Third Circuit.

The Circuit Court of Appeals, reciting that there are conflicting decisions upon the construction of the act of Congress, has certified the following questions:

"1. Is a declaration of intention made before the naturalization act of 1906 saved by the proviso of the first paragraph from the seven-year limitation of the second paragraph of section 4 of the act?

"2. Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of such declaration of intention?

"3. Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of the act?"

The question in the case then, to state it succinctly,

is whether the Act of 1906 is applicable to declarations of intention made prior to its passage and to what extent applicable, if at all.

That the question is susceptible of different answers is indicated by the diversity of views [1] of the courts which have passed upon it.

The cases that have answered the question in the negative have invoked in support of their view the presumption that statutes have prospective operation unless controlled by contrary intention clearly expressed and certain provisions of the act which indicate, it was said, that it was not the intention of Congress to invalidate a declaration of intention made prior to the act "at any future time." And one case adduces the contemporaneous construction of an administrative board.

The words especially relied on are those of the proviso in the first paragraph of § 4 and those of § 8.[2] The latter

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[1] The cases deciding that the seven-year limitation is applicable to prior declarations are as follows:

*In re Goldstein* (D. C.), 211 Fed. Rep. 163; *Yunghauss* v. *United States* (C. C. A., 2nd Cir.), 218 Fed. Rep. 168, sustaining 210 Fed. Rep. 545; *Harmon* v. *United States* (C. C. A., 1st Cir.), 223 Fed. Rep. 425, affirming decree of District Court; and *In re Lee* (D. C.), 236 Fed. Rep. 987.

The cases *contra* are:

*Eichhorst* v. *Lindsey* (D. C.), 209 Fed. Rep. 708; *In re Anderson* (D. C.), 214 Fed. Rep. 662. And to like effect are: *United States* v. *Lengyell* (D. C.), 220 Fed. Rep. 720; *In re Valhoff* (D. C.), 238 Fed. Rep. 405; *Linger* v. *Balfour*, 149 S. W. Rep. 795.

[2] "Sec. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language: *Provided*, That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: *And provided further*, That the requirements of this section shall not apply to any alien who has prior to the passage of this Act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: *Provided further*, That the require-

may be disregarded. It prohibits the naturalization of aliens who cannot speak the English language, if physically able to do so, but preserves prior declarations if made in conformity with law in force at their date. The proviso of § 4 deserves more notice. It is that no alien whose declaration conformed to law when made "shall be required to renew such declaration." To this provision the cases we have summarized—and we refer to them because there is no brief on file for Morena—have ascribed the direct influence of excluding declarations theretofore made.

We cannot assent to that view or to the view that if a limitation be put upon the time to complete the declaration by the final application for citizenship it can be construed as invalidating the declaration. It is no destruction of a right or privilege to limit the time for its assertion, and the cited provision does no more. Section 4 prescribes a time for completing the declaration, a time so liberal, regarding the privilege granted and the reason for granting and seeking it, as not to be considered in any just appreciation of words as even a limitation of it. And there was appealing purpose. There were reasons for diligence and reasons for giving to all declarations the same duration.

It is to be remembered that the resolution of the alien to change his allegiance is expressed in his declaration. The interval of time between it and admission to citizenship is the precaution of the law to assure of qualification. In the old law this interval could not be less than two years, and so in the new law. Aside from this there was no other prescription in the old law of the time that should

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ments of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands."

elapse between the declaration and the final petition. The minimum of time was preserved in the new law, but there was a maximum time prescribed for the completion of the declaration, and unless this was made applicable to "old-law declarations" as well as to "new-law declarations," the Act of 1906 would not do what its title declares it was intended to do—"provide for a uniform rule for the naturalization of aliens throughout the United States."

A limitation of time even upon the assertion of a right theretofore having no limitation upon its assertion, or a different limitation, is not infrequent, and its legality is unquestionable if a time reasonable, in view of the subject-matter, be given. *Wilson* v. *Iseminger*, 185 U. S. 55; *Soper* v. *Lawrence Brothers Co.*, 201 U. S. 359; *Blinn* v. *Nelson*, 222 U. S. 1. See also *Sohn* v. *Waterson*, 17 Wall. 596; *Union Pacific R. R. Co.* v. *Laramie Stockyards Co.*, 231 U. S. 190. This being the power of Congress, there were, as we have seen, promptings to its exercise.

The act, therefore, does not invalidate old declarations. It only specifies a time for their realization, a time ample to consider and estimate the value of realization, the extent of its duty and responsibility, a time determined and applied, therefore, upon full consideration; and we are not impressed with the argument that would assign an eternity of duration to prior declarations.

The first question certified would seem to be addressed to the view that the Act of 1906 made nugatory declarations theretofore filed. This, however, is not urged by the Government and we consider it untenable for the reasons which we have already expressed. Such has been the ruling of the cases.

We therefore answer the first and second questions in the negative and the third in the affirmative.

*And it is so ordered.*

# WALLER ET AL., TRUSTEES (UNDER THE LAST WILL AND TESTAMENT) OF WALLER, *v.* TEXAS & PACIFIC RAILWAY COMPANY.

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

No. 92. Argued December 17, 1917.—Decided January 7, 1918.

Plaintiffs, as testamentary trustees, sought to hold the Texas & Pacific Railway Company, as by an express trust, for the satisfaction of certain bonds, part of an issue made under a deed of trust, in 1872, by the New Orleans, Baton Rouge & Vicksburg Railway Company. The deed purported to cover the right of way and aid lands, then unearned, which had been granted to that company by § 22 of the act creating the Texas & Pacific (Act of March 3, 1871, c. 122, 16 Stat. 573); and the contention, generally stated, was that the Texas & Pacific, by succession to the benefits of the grant through a quitclaim made by the grantee, in 1881, to an intervening company, by construction of the railroad by that company and by a practical merger with it in that year, had become directly and expressly liable—this in view of the terms of the deed of trust, of the act of Congress and the instrument of consolidation, and the circumstances attending the transactions. When the suit began, in 1913, the bonds were more than 10 years overdue, and interest had been in default since 1876, or longer; the railroad had been owned and operated by the Texas & Pacific since the merger; the aid lands had been held, mortgaged and otherwise dealt with as the property of the intervening company, subject to the merger agreement, and the validity of the deed of trust of 1872 had been challenged in 1890, and denied by a decree taken *pro confesso* against the trustee, which, however, the plaintiffs here claimed was collusive, and not binding, and not applicable to the right of way. The bonds in suit were owned by plaintiffs' decedent for seven or eight years before his death, but whether he was an original holder or purchaser did not appear, nor was there any evidence concerning his notice or knowledge. *Held*, without deciding the merits, that the suit, begun in 1913, was barred by laches. For even if it be assumed that under the deed of trust an action could not have been maintained for the interest until the bonds matured in 1902, yet no attempt was

made to avail of a provision for the taking of possession by the trustee, at request of any bondholder, for default of interest; and furthermore the court may neither suppose nor indulge an ignorance of the open activities of the companies and the long possession and operation of the railroad by the defendant. *Held*, further, that the fact that the defendant had itself paid off most of the bonds issued with plaintiffs' was immaterial in the absence of the reasons for so doing; and that, in view of the magnitude of the recovery sought (more than $100,000) and the long claim and operation of the property and expenditures upon it, the delay could not be excused upon the assumption that defendant's position had not changed since 1881, when its liability, if any, accrued.

229 Fed. Rep. 87, affirmed.

Suit to compel payment of thirty bonds issued by the New Orleans, Baton Rouge & Vicksburg Railroad Company under the circumstances hereinafter detailed. It was originally brought against appellee and the New Orleans Pacific Railroad Company and the Union Trust Company of New York. The latter company was dismissed from the suit. No process was issued against the New Orleans Pacific Railroad Company.

The bill presents the jurisdictional qualification of the parties and the following facts, which we state narratively:

The New Orleans, Baton Rouge & Vicksburg Railroad Company, which we shall refer to as the Baton Rouge Company, was incorporated December 30, 1869, by a special act of the Louisiana legislature and was given the usual powers to execute the purpose of its incorporation, to borrow money and issue bonds, etc., and secure their payment by a mortgage of its stock and franchises and property which it then owned or might thereafter acquire.

The Texas & Pacific Railway Company, herein referred to as the Texas & Pacific Company, was incorporated March 3, 1871, by an Act of Congress (16 Stat. 573, c. 122), and was granted certain lands to aid in the construction of its road; and by a section of the act (§ 22) a grant was made to the Baton Rouge Company of the

same kind, that is, alternate sections of public lands per mile, in the State of Louisiana, upon the condition that the company complete the whole of the road within five years of the passage of the act, the lands to be selected on each side of its road on a route to be selected by the company to connect with the Texas Pacific at the eastern terminus of the latter, through the public land from New Orleans to Baton Rouge and thence by the way of Alexandria. The company was empowered to mortgage the lands.

September 4, 1872, it exercised the power and executed a mortgage or deed of trust to the Union Trust Company of New York, transferring and conveying, among other things, all of its railroad and personal property and all the right, title and interest it then had or it or its successors might acquire to the granted lands. The trust company accepted of record its trusteeship.

The mortgage was intended to secure 12,000 bonds of $1000 each, payable September 1, 1902, with interest at 7%, payable semiannually; 1,250 of the bonds were issued and certified by the trustee.

Complainants, as executors and trustees of the estate under the will of David J. Waller, who died in 1893, are the owners and holders before maturity of 30 of the bonds with 52 coupons attached thereto.

It was covenanted in the mortgage by the trustee thereof that a sinking fund should be established and maintained and an amount equal to 1% of the company's gross earnings, after certain deductions, and the proceeds of the sales of the granted lands should be paid to the trustee for the fund for the benefit of the bondholders. The mortgage was duly recorded.

The railroad company accepted the grant and filed a map of its general route from Baton Rouge to Shreveport and a like map showing the general route from New Orleans to Baton Rouge. The lands were then withdrawn

from entry and sale by the order of the Secretary of the Interior. And under the terms of the grant the lands vested in the company, subject only to the construction of the road.

January 5, 1881, the Baton Rouge Company, by deed of quitclaim, conveyed the lands to the New Orleans Pacific Railroad Company, referred to herein as the New Orleans Company, and its successors and assigns, and thereafter the Baton Rouge Company no longer maintained its separate corporate existence and became merged and consolidated with the New Orleans Company.

The conveyance and acceptance were filed by the New Orleans Company in the Interior Department and the Secretary of the Interior, under an opinion of the Attorney General of the United States, recognized the New Orleans Company and that the Baton Rouge Company had title to the lands and could sell and assign the same.

On March 13, 1883, the Secretary of the Interior transmitted to the President a report of the examination of 260 miles of the road and recommended that they be accepted and that patents be issued for such lands as might have been earned by their construction by the New Orleans Company, as assignee of the Baton Rouge Company, the mortgagor thereof. The recommendation was approved and patents were issued to the New Orleans Company, but solely as the assignee of the Baton Rouge Company and as its grantee for 679,284.64 acres of lands in Louisiana. The foregoing state of facts in respect to the title of the lands was determined and adjudged in *New Orleans Pacific Ry. Co.* v. *United States*, 124 U. S. 124.

By an Act of Congress of February 8, 1887, c. 120, 24 Stat. 391, all lands which were not forfeited thereby were relinquished, granted, conveyed and confirmed to the New Orleans Company as assignee of Baton Rouge Company by the transfer above stated and title confirmed to

approximately 746,954 acres within the grant to the Baton Rouge Company. At this time the New Orleans Company was and now is consolidated with and merged into the Texas & Pacific Company.

Within six months after the conveyance to it by the Baton Rouge Company the New Orleans Company transferred all of its property to the Texas & Pacific Company, with the object and intention to merge the former with the latter under the latter's name. The land grant acquired by the former company was expressly reserved and its corporate organization was to be continued and maintained until further authorized corporate action. In addition to the lands patented to the amount of 679,284.64 acres to the New Orleans Company as assignee of the Baton Rouge Company, other lands have been patented to it amounting in 1917 to 1,001,000 acres, and the New Orleans Company has since procured further patents and filed applications for additional lands and still continues to do so. The records of the Secretary of the Interior show that there is a balance still due of more than 1,000,000 acres.

By the act incorporating the Texas & Pacific Company (1871) it was provided that the property and franchises acquired from each consolidated or purchased railroad company or companies should vest and become absolutely the property of the Texas & Pacific Company, subject, however, to all of the debts and obligations of the acquired company or companies, and that the consolidation should not impair any lien which might exist on any railroads so consolidated. It was provided that there should be no consolidation with any competing road and that the contracts and obligations of railroads consolidated should be liens upon the Texas & Pacific Company.

From about the time of the organization of the New Orleans Company, the Texas & Pacific Company con-

trolled it and still controls it, and by the recited acts and transfers became charged with the lien of the mortgage by the Baton Rouge Company to the Union Trust Company (September 4, 1872) and the other obligations of the New Orleans Company, particularly the performance of the covenants in the mortgage and the payment of the bonds secured thereby. The organization of the companies and merger in the Texas & Pacific Company and transfer of the lands granted were all a part of a scheme to secure from the United States the grant for the purpose of raising money thereon by mortgages, and bonds secured thereby, to construct and equip a transcontinental railway from New Orleans to the Pacific, as appears from the act incorporating the Texas & Pacific Company (Act of March 3, 1871).

The lands patented in the name of the New Orleans Company were appropriated by the Texas & Pacific Company, it continuing the other company in name for the sole purpose of receiving patents, and controlling its corporate books, accounts and records, the New Orleans Company maintaining no corporate existence and having no officers or directors (this on information and belief), and the Texas & Pacific, in violation of the terms of the covenants of the mortgage by the Baton Rouge Company to the Union Trust Company and the trust thereby created, has diverted the proceeds of the lands granted from the use and purpose of the mortgage and in fraud of complainants and the holders of bonds secured by the mortgage to its own use and to the use of the New Orleans Company and to other uses not authorized by the deed of trust. The persons to whom the sales of the lands have been made are so many that it is wholly impracticable to enforce the lien of the mortgage, and have by occupation under the color of title acquired an impregnable title thereto.

The Union Trust Company and certain bondholders

were made parties defendant in an action brought against the Baton Rouge Company by the trustees under deeds of trust of April 17, 1883, and January 5, 1884, executed by the New Orleans Company, to declare them first liens upon the lands described therein and to secure an issue of bonds authorized thereby, and asking for judgment that the deed of trust from the Baton Rouge Company to the Union Trust Company (September 4, 1872) did not affect or give any lien in or to the lands and that the same be canceled. A decree *pro confesso* was entered so declaring and adjudging.

The bondholders were dismissed from the case. The attorneys for the complainants were attorneys for the New Orleans Company and the Union Trust Company. There were false allegations in the bill and the Union Trust Company, though in duty bound as trustee to defend the action and the trust created by the mortgage, failed to do so, permitted the destruction of the lien and permitted the New Orleans Company and the Texas & Pacific Company to appropriate to themselves or to other purposes the proceeds of the sales of the lands which were at least worth $5.00 per acre.

The subject-matter of the suit exceeds $3,000 and the complainants are without remedy at law.

Discovery is prayed of the quantity of lands patented, the amount of sales and the proceeds thereof and that the Union Trust Company and the Texas & Pacific Company account to complainants and to all other bondholders similarly situated for all money and property received from the enjoyment and sales of the lands to the extent of their bonds and coupons and that they be adjudged to pay complainants the amounts found due them.

The answer of the Texas & Pacific Company qualified or denied certain of the averments of the bill and admitted others. It set up the various acts of Congress referred to in the bill and the transactions between the Texas &

Pacific Company and the New Orleans Company, but assigned a different cause and effect to them and to the acts of Congress and to what was done under them. Its defenses may be concentrated in four propositions stated by counsel:

"1. That the Baton Rouge Company never acquired title to the land grant lands, and that its alleged mortgage of September 4, 1872, never became operative as a lien thereon.

"2. That prosecution of the action is barred by the decree of the Circuit Court of the United States for the Eastern District of Louisiana in the suit of Dillon and Alexander against the New Orleans Pacific Railway Company and others.

"3. That the Texas and Pacific Railway Company is in no way connected with the land grant or the transactions referred to in the complaint.

"4. That the suit is barred by limitations and by the laches of the complainants."

Upon the issues thus formed, if it can be said there are issues upon anything else but the characterization and legal effect of the acts of Congress, the instruments referred to and the transactions detailed, the District Court expressed opinion that it was unable "to see how any express trust ever existed in plaintiff's favor or in favor of his decedent, except that created by the mortgage to the Union Trust Company as trustee, the bounds and limitations of which are set forth in the deed itself," which instrument, the court said, was "in effect nothing more or less than a mortgage, and to be treated as such." The mortgage and debt, therefore, the court said, might be enforced against the property at the *situs* of the latter, but by this suit, the court said further, it was sought to enforce the collection of the debt not from the property mortgaged but from another corporation now alleged to be personally liable for it. Such liability, the court

continued, could only result from some trust *ex delicto* to be implied from some state of fact shown, and not upon any direct undertaking by the New Orleans Company or the Texas & Pacific Company to pay the debt of another, to-wit, the Baton Rouge Company. Therefore, the court concluded that its decision must turn upon either one or both of the affirmative defenses made by the Texas & Pacific Company, that is, either the statute of limitations or laches, or both.

Reciting that the bonds matured September 4, 1902, and this suit was commenced May 7, 1913, the court finally applied the statute of limitations of ten years according to the law of New York and Louisiana. It, however, expressed the view that the defense of laches should be sustained and referred to *O'Brien* v. *Wheelock*, 184 U. S. 493, and dismissed the bill.

The Court of Appeals affirmed the District Court, but rested its decision upon the defense of laches, citing therefor *O'Brien* v. *Wheelock*, *supra*, and saying: "The proposition is somewhat startling that the holder of the obligations of one corporation secured by a mortgage on its property may maintain a suit forty years after the date of such obligation and based thereon against another corporation not a party thereto."

*Mr. Jesse C. Adkins*, with whom *Mr. David Bennett King*, *Mr. W. Russell Osborn*, *Mr. William A. Milliken*, *Mr. C. C. Calhoun* and *Mr. Daniel B. Henderson* were on the briefs, for appellants.

*Mr. Thomas J. Freeman* for appellee.

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

To establish a trust against the Texas & Pacific Company it is argued that the purpose of the Act of Congress

of 1871 was to provide for the construction of a transcontinental railroad from Texas to San Diego, California, and from thence to San Francisco by another company, and that the Baton Rouge Company, the New Orleans Company and principally the Texas & Pacific Company were instruments of that purpose; and the grant of the Baton Rouge Company, by its mortgage to the Union Trust Company, became charged with a lien for the payment of the bonds issued by the railroad company, which lien followed the conveyance of the lands to the New Orleans Company and to the Texas & Pacific Company; and that besides there was a personal trust first in the Union Trust Company and successively in the other companies. And the argument is attempted to be fortified by § 4 of the Act of Congress of 1871 which authorized the Texas & Pacific Company to acquire other railroad corporations, and § 6, by which it was to become responsible for the debts or obligations of any company so acquired.

To sustain this contention the provisions of the various instruments are adduced and their requirements, especially that the bonds were entitled to the benefit and security of a sinking fund to be set apart for their redemption whereby the proceeds of all lands granted to the railroad company (the Baton Rouge Company) were to be applied to the payment of interest on the bonds and to their redemption and also 1% of the gross earnings of the company. And that the railroad and its equipment were mortgaged for like purposes and all "the lands and sections of lands situate, lying and being on either side of the said railroad, as the same may be finally located and constructed, in accordance with and as granted by the act of Congress" of March 3, 1871.

The mortgage to the Union Trust Company was in trust for the purposes expressed above, and it was provided that, if default should be made in payment of inter-

est or of any payment to the sinking fund and continue for the period of six months, or in default of any requirement of the mortgage, all of the bonds outstanding, at the option of the holders of a majority in interest of such outstanding bonds, should forthwith become due and payable. And further, upon written request of the holders of at least 1000 bonds then outstanding, the trustee should foreclose the equity of redemption of the property embraced in the hypothecation; and at the request of a bondholder might take possession of the road.

Sales of the lands were provided for and the disposition of the proceeds, any balance remaining to be appropriated to the purpose of the sinking fund. There was a covenant by the company to pay on June 1, 1880, and on the first of June of each succeeding year, a sum which should equal one percentum of the gross earnings received by the road from its operation twelve months immediately preceding, which sum should be applied by the Trust Company or its successors to the redemption of the bonds, and that the Trust Company on the first days of January and July of each and every year should designate by lot for redemption a number of bonds sufficient to equal, as near as might be, the accumulations of the sinking fund and cause a notice to be printed of such purpose.

It is contended that by reason of these provisions and the facts detailed a trust was created that followed the lands to whosesoever hands they reached, and each possessor of them became a trustee and bound with respect to the property to the execution of the trust in the same manner as the original trustee, the Union Trust Company, was, citing for this result *Ketchum* v. *City of St. Louis*, 101 U. S. 306.

And by virtue of this principle the New Orleans Company is declared to have been a trustee and the lands granted to it subject to the execution of the trust and the Texas & Pacific Company has also become a trustee.

Another ground of liability is asserted against the latter company. It has been consolidated, the contention is, with the New Orleans Company and the latter has disappeared from sight and significance, leaving the Texas & Pacific in sole responsibility. And yet the instrument of consolidation expressly excepts "the lands and the land grants acquired or to be acquired" by the New Orleans Company from the United States, the State of Louisiana or the Baton Rouge Company, or from any other source, other than lands necessary or needful for railway purposes. There is an express exemption and exclusion of such from the provisions of the instrument of consolidation. And it was provided that the corporate existence of the New Orleans Company should be maintained and its power to carry out the existing contracts and to mortgage any land grant it had acquired or might acquire from the Baton Rouge Company or otherwise should remain unimpaired.

There is, therefore, some ground for the contention of the Texas & Pacific Company that there is a want of that privity of property which, according to the insistence of appellant, is necessary to make that company trustee of the Baton Rouge Company's mortgage of 1872, and that §§ 4 and 6 of the act incorporating the Texas & Pacific Company have not the meaning ascribed to them. And further that the Baton Rouge Company never acquired any lands to which a lien could attach and that the asserted trust had nothing upon which it could be exercised, neither lands to sell nor railroad to take possession of and operate, both of which—sale of lands and operation of road—were necessary to the execution of the trust; and that it was so determined in a suit against proper parties by the decree of the Circuit Court of the United States for the Eastern District of Louisiana.

To this contention complainants reply: (1) The decree was collusively obtained, (2) It did not cover the right

of way and roadbed which, it is said, is admitted to have come to the Texas and Pacific Company from the New Orleans Company, (3) Independently of the deed of trust and irrespective of it, the arrangement between those companies was an attempt to conserve the subordinate rights and interests of the stockholders of the Baton Rouge Company at the expense of its creditors; an attempt, it is insisted, always judicially condemned. Cases are cited, among others, *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482.

The argument to sustain or oppose the respective contentions we need not recite. They have indication in the pleadings and, it may be, in what we have already said. We rest our decision on the defense of laches which, we think, has been sustained.

In 1872 the Baton Rouge Company executed the instrument the particular trusts of which are now attempted to be enforced. Before that time it had filed a map of general route but no map of definite location; but after that time the record discloses nothing done by it until 1881, when it conveyed the lands to the New Orleans Company.

The activities of the New Orleans Company are shown, and through and by what struggles it was enabled to construct the road. The record shows assertion of rights by some of the bondholders, but also shows that the assertion was met by challenge of legality and judicially determined against. During all that time, during all of the notoriety of the transactions detailed, the owner or owners of the bonds in suit made no claim by word or act and now, over ten years after their maturity and forty years after their issue, a claim of personal liability is made against the Texas & Pacific Company. It is to be borne in mind that the interest on the bonds has always been in default, certainly since 1876, and there was remedy provided for such default. At the instance of

any holder of the bonds the trustee could have taken possession of the road and if of the Baton Rouge Road then of its successors in liability, the New Orleans and the Texas & Pacific companies, for if they were successors in liability they were successively subject to the remedy. If it be said that such remedy was extreme and inconvenient, it had potency as a threat in the hands of a diligent creditor, and, besides, if there was a successive personal liability it accrued against the New Orleans Company in 1881 and the Texas & Pacific Company in 1881.

The delay is attempted to be excused. It is said action for nonpayment of interest could only be taken by the holders of 1000 or a majority of bonds outstanding, and that it appears the Texas & Pacific Company had acquired 1183 of the 1275 bonds which were outstanding. It is hence contended that complainants' testate could not have been guilty of laches before his death and that the present complainants could not act until the maturity of the bonds in 1902. It is further said that complainants filed a bill in 1908 in the United States District Court in Louisiana to collect the bonds and that until the filing of the answer in that case complainants were ignorant of the merger of the New Orleans and the Texas & Pacific companies or of the suit filed in 1890 to remove the cloud of the asserted lien of the mortgage of the Baton Rouge Company to the Union Trust Company of 1872.

But what complainants' testate knew does not appear and whether he was an original holder or a purchaser, except that it was thought he owned the bonds for seven or eight years before his death. And the ignorance of complainants is extraordinary in view of their interest, if it was an attentive interest. If we may suppose ignorance of records we cannot suppose, certainly not indulge, an ignorance of the open activities of the companies and the possession and operation of the railroad by the Texas & Pacific Company.

It is again said in excuse that it does not appear that the Texas & Pacific Company has changed its position, which it is said is the same as it was in 1881, and that it has even realized the benefit of the trust and so far executed it as to pay before 1890 most of the bonds. Why those bonds were paid or acquired and upon what motive does not appear, and it cannot be said that a company which has been in possession of and operating a great property for many years, having spent large sums of money upon it, in the belief of having a clear and unincumbered right, is inequitably unaffected by a claim against it, asserted as a result of remote transactions with which it had no connection. And certainly it may be urged that it would surprise and strain any condition to be suddenly called upon to pay $107,700.00, that sum being the amount of principal and interest (7%) of complainants' demand.

*Decree affirmed.*

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## UNION TRUST COMPANY *v.* GROSMAN ET AL.

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

No. 106. Argued December 20, 21, 1917.—Decided January 7, 1918.

While a husband and wife, domiciled in Texas, were temporarily in Illinois, the former executed his note and the latter her continuing guaranty of payment. Assuming that the guaranty would have been enforced in Illinois, *held*, that comity did not call for its enforcement by the courts of Texas, against the wife's separate property there, if contrary to the public policy of Texas; for it is one thing for a court to decline to be an instrument for depriving citizens belonging to the jurisdiction of their property in ways not intended by the law that governs them, another to deny its

offices to enforce obligations good by the *lex domicilii* and the *lex loci contractus* against those whom the local laws have no duty to protect.

By the law of Texas—the common law modified by statute—a married woman's guaranty of her husband's note is not enforcible against her separate property. In this case note and guaranty were part of one transaction, but the guaranty was a separate instrument executed by the wife alone.

If a contract, made and valid in one State, is unenforcible in the courts of another on grounds of local public policy, it is unenforcible also, for the same reason, in the District Court, sitting in the latter State and having jurisdiction through diversity of citizenship.

228 Fed. Rep. 610, affirmed.

The case is stated in the opinion.

*Mr. William Hawley Atwell* for petitioner:

The Illinois statute allows a married woman to contract as a *feme sole.* Hurd's Rev. Stats., 1911, c. 68. The note and guaranty in this case were executed and delivered in Illinois, where each was payable, and where the makers were under no legal disability. The place of the contract is, generally speaking, a matter of mutual intention, but the intended place, as determined by legal presumption in some cases and evidentiary circumstances in others, settles all questions as to the legal test of validity and interpretation. The presumption, in the absence of evidence to the contrary, is that the place of making and performance in a physical sense is the place in a legal sense.

The policy of Texas is to extend comity in such a case. *Ryan & Co.* v. *M., K. & T. Ry. Co.*, 65 Texas, 13; *Merrielles* v. *State Bank of Keokuk,* 5 Tex. Civ. App. 483; *Southern Pacific* v. *Dusablon,* 106 S. W. Rep. 767; preamble and emergency clause of Texas Laws, 1913, pp. 61–62; Speer's Law of Marital Rights in Texas. That the contract cannot be regarded as inherently harmful, is evidenced by the fact that contracts of similar nature are permitted

by the written laws of a large portion of the States, and in most others legislation in that direction is progressive, and they are recognized as not inherently bad by substantially all the courts of this country. The Act of 1913 shows that there is no well-defined "public policy" in Texas against the right of its married women to contract, and, under it, it would seem the contract was valid not only in Illinois, but also in Texas. The fact that the wife is guarantor of the husband's note, in itself constitutes an essential joinder between husband and wife, equivalent to the wife becoming "joint maker of a note," which the act permits. [For a discussion of this act see the opinion of the court below, 228 Fed. Rep. 610.]

There is no exception to the general proposition that a contract valid where executed and where to be performed is valid and enforcible in any other nation, even as to nations separated by the seas, save that a contract would not be enforced if there were a well-defined and settled public policy against it. "Public policy," as here understood, means that the contract to be refused life must be vicious, or unjust, or immoral. *International Harvester Co.* v. *McAdam*, 142 Wisconsin, 114; *The Kensington*, 183 U. S. 263; *Insurance Co.* v. *Head*, 234 U. S. 161; *Northern Pacific Ry. Co.* v. *Babcock*, 154 U. S. 190. Manifestly no immorality or viciousness or injustice exists here. That the enforcement of a contract will result in the payment of an honest debt can never be said to be immoral or vicious or unjust. *Brodnax* v. *Insurance Co.*, 128 U. S. 244; *Sutton* v. *Aiken*, 62 Georgia, 741. There must be something inherently bad about it, shocking to one's sense of right—in the judgment of the courts, something pernicious and injurious to the public welfare. *Milliken* v. *Pratt*, 125 Massachusetts, 374; *Garrigue* v. *Kellar*, 164 Indiana, 676; Greenwood on Public Policy, 36. Otherwise the doctrine of comity gives effect to the contract, valid where made, *Hilton* v. *Guyot*, 159 U. S. 113, even as

between independent nations, and much the more readily as between the States of the Union. *Bank* v. *Earle,* 13 Pet. 519; *Bond* v. *Hume,* 243 U. S. 15.

*Mr. Joseph Manson McCormick,* with whom *Mr. Francis Marion Etheridge* was on the briefs, for respondent Minnie Kahn Grosman.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the petitioner in the District Court of the United States for the Northern District of Texas upon two promissory notes made in Chicago by Hiram Grosman and another, and a continuing guaranty executed in the same place by the respondent, Mrs. Grosman, the wife of Hiram Grosman, as part of the same transaction as the earlier note. A decree was rendered for the plaintiff in the District Court, but upon appeal by Mrs. Grosman was reversed as against her by the Circuit Court of Appeals, on the ground that it subjected her separate property to the payment of the demand, contrary to the public policy of the State in which the suit was brought. 228 Fed. Rep. 610. 143 C. C. A. 132. Mrs. Grosman and her husband were domiciled in Texas, as the plaintiff seems to have known, and made the contracts while temporarily in Chicago. We assume for the moment that if she had given the guaranty in Texas it would have been void, and on the other hand that if she had been domiciled in Illinois when she made her promise she would have been bound. The main question is which law is to prevail.

If this suit were brought in Illinois it would present broader issues. On the one side would be decisions that *locus regit actum,* and the consideration that when a woman goes through the form of contracting in an independent State, theoretically that State has the present

power to hold her to performance, whatever may be the law of her domicile. It might be urged that the contract should be given elsewhere the effect that the law of the place of making might have insured by physical force. See *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 353. On the other hand it is obvious that practically at least no State would take any steps, if it could, before a breach of an undertaking like this. The contract being a continuing one of uncertain duration the plaintiff had notice that in case of a breach it probably might have to resort to the defendant's domicile for a remedy, as it did in fact. In such a case very possibly an Illinois court might decide that a woman could not lay hold of a temporary absence from her domicile to create remedies against her in that domicile that the law there did not allow her to create, and therefore that the contract was void. This has been held concerning a contract made with a more definite view to the disregard of the laws of a neighboring State. *Graves* v. *Johnson*, 156 Massachusetts, 211, 212.

But when the suit is brought in a court of the domicile there is no room for doubt. It is extravagant to suppose that the courts of that place will help a married woman to make her property there liable in circumstances in which the local law says that it shall be free, simply by stepping across a state line long enough to contract. *The Kensington*, 183 U. S. 263, 269. *Armstrong* v. *Best*, 112 N. Car. 59. *Bank of Louisiana* v. *Williams*, 46 Mississippi, 618. *Baer* v. *Terry*, 105 Louisiana, 479, 480. *Palmer* v. *Palmer*, 26 Utah, 31, 40. See generally, *Seamans* v. *The Temple Co.*, 105 Michigan, 400. Dicey, Conflict of Laws, 2nd ed., 34, General Principle No. II (B), and as to torts, *id.* 645, Rule 177. There is nothing opposed to this view in those decisions in which the courts have enforced similar contracts of women domiciled where the law allowed such contracts to be made. It is one thing

for a court to decline to be an instrument for depriving citizens belonging to the jurisdiction of their property in ways not intended by the law that governs them, another to deny its offices to enforce obligations good by the *lex domicilii* and the *lex loci contractus* against women that the local laws have no duty to protect. *International Harvester Co.* v. *McAdam*, 142 Wisconsin, 114. *Merrielles* v. *State Bank of Keokuk*, 5 Tex. Civ. App. 483. The case of *Milliken* v. *Pratt*, 125 Massachusetts, 374, went to the verge of the law in holding a Massachusetts woman liable in Massachusetts on a contract that she could not have made there, because made by a letter in Maine, although her person remained always within the jurisdiction of Massachusetts. It is safe to conjecture that the decision would have been different if the law of Massachusetts had not been changed before the bringing of the suit so as to allow such contracts to be made. 125 Massachusetts, 377, 383.

Texas legislation is on the background of an adoption of the common law. If the statutes have not gone so far as to enable a woman to bind her separate property or herself in order to secure her husband's debts, they prohibit it, and no argument can make it clearer that the policy of that State is opposed to such an obligation. It does not help at all to point out the steps in emancipation that have been taken and to argue prophetically that the rest is to come. We have no concern with the future. It has not come yet. The only question remaining, then, is whether the court below was right in its interpretation of the Texas law. This was not denied with much confidence and we see no sufficient reason for departing from the opinion of the court below and the intimations of all the Texas decisions that we have seen. *Red River National Bank* v. *Ferguson*, 192 S. W. Rep. 1088. *Shaw* v. *Proctor*, 193 S. W. Rep. 1104. *Akin* v. *First National Bank of Bridgeport*, 194 S. W. Rep. 610,

612. *First State Bank of Tomball* v. *Tinkham*, 195 S. W. Rep. 880.

If the decree would have been right in a court of the State of Texas it was right in a District Court of the United States sitting in the same State. *Pritchard* v. *Norton*, 106 U. S. 124, 129.

*Decree affirmed.*

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## TOWNE *v.* EISNER, COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE THIRD DISTRICT OF THE STATE OF NEW YORK.

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

No. 563. Argued December 12, 1917.—Decided January 7, 1918.

In an action to recover back money collected and retained by the Government, over plaintiff's protest, as a tax on income under the Income Tax Law of 1913, plaintiff alleged that that upon which the tax was levied, a stock dividend based on accumulated profits, was not "income" within the true intent of the statute, and that if the statute so intended it was so far unconstitutional, because in the Sixteenth Amendment, upon which its validity depended, the term "income" could not be construed to embrace such dividends. *Held*, that there was thus presented, not merely a question whether the statute had been wrongly understood and applied, but also a question of the scope of the Amendment, which afforded jurisdiction to review both questions by direct writ of error to the District Court.

The value of new shares, issued as a stock dividend and representing merely surplus profits transferred to the capital account of the corporation, is not taxable to the share holders as income within the meaning of the Income Tax Law of 1913. So *held* where the profits were earned before January 1, 1913, and the transfer and dividend were voted December 17, 1913, and the distribution, ratably to shareholders of record on the 26th of that month, took place on January 2, 1914.

242 Fed. Rep. 702, reversed.

THE case is stated in the opinion.

*Mr. Charles E. Hughes*, with whom *Mr. George Welwood Murray*, *Mr. Charles P. Howland* and *Mr. Louis H. Porter* were on the briefs, for plaintiff in error:

The constitutionality of § II of the Act of 1913, construed to be applicable to the plaintiff's stock, is drawn in question. Before the Sixteenth Amendment there were two kinds of income, subject to different constitutional rules as to taxation, viz: (1) Gains and profits from "business, privileges, employments and vocations." These were subject to excise taxes. (2) Income from real or personal property, as such. Taxes on real or personal property, and on the income derived therefrom, because of its ownership, were held to be direct taxes, requiring apportionment among the States according to population. The tax in controversy is laid directly upon the property in question, as such, because of its ownership. Investments in stock are unquestionably within the rule of *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 637. The case at bar, therefore, concerns a direct tax which must be apportioned unless the stock in question constitutes income under the Sixteenth Amendment.

The stock in question is not income within the meaning of the Sixteenth Amendment. A "stock dividend" is not income to the stockholder receiving it, but is a mere readjustment of the evidence of the stockholder's interest already owned. The "stock dividend" takes nothing from the property of the corporation and adds nothing to the interests of the stockholders. The only change in substance is that, instead of the property represented thereby being distributed to stockholders, it is permanently fixed as capital so that it cannot be distributed. *Gibbons* v. *Mahon*, 136 U. S. 549; *Bailey* v. *Railroad Co.*, 22 Wall. 684, distinguished; *Gray* v. *Hemenway*, 212 Massachusetts, 239; *Spooner* v. *Phillips*, 62 Connecticut, 62; *Green*

v. *Bissell*, 79 Connecticut, 547; *DeKoven* v. *Alsop*, 205 Illinois, 309; *Kaufman* v. *Charlottesville Mills Co.*, 93 Virginia, 673; *Williams* v. *Western Union Telegraph Co.*, 93 N. Y. 162, 189. The stock in question was based on earnings which had been accumulated by the corporation prior to January 1, 1913, that is, prior to the adoption of the Sixteenth Amendment, and neither this stock nor the accumulated surplus which it represented was subject to taxation without apportionment as being income within the meaning of that Amendment. It is the decided weight of authority even in those jurisdictions which have established a doctrine of apportionment between the tenant for life and remainderman, that a "stock dividend" does not go to the life beneficiary of the income, in case the stock, where it is issued *after* the creation of the life tenancy, is based on surplus accumulated *before* the life tenancy began. *Matter of Osborne*, 209 N. Y. 450; *Lang* v. *Lang's Executor*, 57 N. J. Eq. 325; *Day* v. *Faulks*, 79 N. J. Eq. 66; 81 *id.* 173; *Will of Pabst*, 146 Wisconsin, 330. The courts upon whose decisions the Government has relied look through the "stock dividend" to the fund upon which it is based. This is a limitation inconsistent with the position that the "stock dividend" should be regarded as income *per se.* And when, in this case, we look through the stock dividend to the fund upon which it rests, we find a surplus invested in plant and property, all of which had been accumulated prior to January 1, 1913. The Sixteenth Amendment had no application to income or earnings accumulated prior to its adoption. It was not the purpose to endow the Congress with power to reach, without apportionment, accumulations of property already effected. *Shreveport* v. *Cole*, 129 U. S. 36, 43; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 20.

"Income" in an income tax law, unless it is otherwise specified, means cash or its equivalent. It does not mean choses in action or unrealized increments in the value of

property. *United States* v. *Schillinger*, 14 Blatchf. 71; *Gray* v. *Darlington*, 15 Wall. 63, 66; *Baldwin Locomotive Works* v. *McCoach*, 221 Fed. Rep. 59. The stock in question was not a "dividend" within the meaning of the word "dividends" used in the Act of 1913. If Congress had intended to embrace "stock dividends" based on surplus accumulations capitalized Congress would have said so. *Hyatt* v. *Allen*, 56 N. Y. 553, 556; *Gibbons* v. *Mahon*, 136 U. S. 549, 569; Income Tax Act of 1913, Section II, subd. 2-B, 38 Stat. 166. The tax for which the Act of 1913 provides is an annual tax upon the entire net income arising or accruing in the preceding calendar year. For the year 1913 the tax was to be computed on the net income accruing after March 1st. Section II, A, subd. 2, D; *Gray* v. *Darlington, supra; Merchants' Ins. Co.* v. *McCartney*, 1 Lowell, 447; *Bailey* v. *Railroad Co.*, 106 U. S. 109; *People* v. *Albany Ins. Co.*, 92 N. Y. 458, 462; *Gauley Mountain Coal Co.* v. *Hays*, 230 Fed. Rep. 110; *Doyle* v. *Mitchell*, 235 Fed. Rep. 686; *C. C. C. & St. L. Ry. Co.* v. *United States*, 242 Fed. Rep. 18; *Lynch* v. *Turrish*, 236 Fed. Rep. 653. When Congress undertook to tax "stock dividends" it provided for the tax in express terms and excluded "stock dividends" based on surplus accumulations existing prior to March 1, 1913. Act of September 8, 1916, 39 Stat. 756, § 2, (a), (c); *Sarlls* v. *United States*, 152 U. S. 570, 577; War Revenue Act of October 3, 1917, § 1211, 40 Stat. 336, adding to Income Tax Act, § 31.

*The Solicitor General*, with whom *Mr. William C. Herron* was on the brief, for defendant in error:

As the case does not involve the constitutionality but merely the construction of a law of the United States—the Income Tax section of the Act of October 3, 1913—, the writ of error should be dismissed. *American Sugar Refining Co.* v. *United States*, 211 U. S. 155, 161, 162; *Ar-*

*buckle* v. *Blackburn*, 191 U. S. 405, 415; *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460, 471, 472; *Lamar* v. *United States*, 240 U. S. 60, 65; *Shaw* v. *United States*, 212 U. S. 559; *Sloan* v. *United States*, 193 U. S. 614, 620. The question is whether the stock dividend was a mere readjustment of capital or whether it constituted income to the plaintiff. This is a question to be determined by a construction of the statute and does not involve the Constitution. The constitutionality of the act is settled by *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1.

The claim that the act is unconstitutional if construed to cover dividends, whether in stock or in cash, derived from earnings prior to the Sixteenth Amendment, is denied in *Brushaber* v. *Union Pacific R. R. Co., supra; Stanton* v. *Baltic Mining Co.*, 240 U. S. 103; *Edwards* v. *Keith*, 231 Fed. Rep. 110, certiorari denied, 243 U. S. 638. See also *Memphis &c. R. R. Co.* v. *United States*, 108 U. S. 228, 234.

"Stock dividends" are taxable under the provisions of the Act of 1913. The term "dividends" denotes merely a species falling within the genus "income," and the question is whether "stock dividends" are included within the term "income arising or accruing from all sources." "Capital" represents the wealth or property of a person at a given instant of time; "income" represents the advantage, service, or use actually rendered by capital to its owner during a period of time. Under the act, income need not be money, but may be any advantage or service capable of easy, accurate, monetary appraisement. State courts have held that the term "income" includes the passing of shares of stock. *Union &c. Trust Co.* v. *Taintor*, 85 Connecticut, 452; *Gray* v. *Hemenway*, 212 Massachusetts, 239; *Leland* v. *Hayden*, 102 Massachusetts, 542, 551.

There is a strong presumption that the distribution of this stock dividend was an advantage to the stockholders from the fact that they desired it and passed the resolutions directing it. These advantages were: (1) A transfer

of the surplus and undivided profits from the plenary control of the corporation to a control largely in the stockholder. (2) An assurance that a declaration of dividends would in the future specifically take account of this surplus and be declared upon it. (3) A muniment of title which enables the stockholder to deal easily with his interest in the surplus by a mere assignment of his new stock. The latter is a real advantage and of great value. *In re Evans* (1913), 1 Ch. Div. 23, 30, 31. These advantages constitute "income" to the stockholder because they flow to him from his property rights (i. e., "capital") in the corporation, and are capable of easy, accurate, monetary appraisement. They accrued to him because of his ownership of a portion of the original capital stock; that they were capable of easy, monetary appraisement is demonstrated by the fact that there was a regular market quotation upon them.

True, the surplus always belonged to the stockholder, but not in the strict sense and to the full extent of control obtaining in the case of original capital. The transfer gave him new rights. It cannot be said that the corporation lost nothing or that the stockholder gained nothing. The former lost its plenary control over the surplus; instead of being indebted to "surplus," with a consequent free use of such funds, it became indebted to "capital," with a limited use of the funds. The latter gained a direct right against the corporation instead of an indirect interest in the "surplus." Counsel contend that the surplus was put in a position where it could not be distributed as dividends or income. But it gained this position by distribution; by conversion into capital. It passed to the stockholder as income *en bloc*, and of course could not produce income again in that form until another complete change took place.

The rule as between life tenant and remainderman, involved in *Gibbons* v. *Mahon*, 136 U. S. 549, depends on

equitable considerations, but a statute levying a tax must be rigorously applied according to its correct construction, no matter what hardships may be caused thereby. In *Bailey* v. *Railroad Co.*, 22 Wall. 604, 106 U. S. 109, it was undoubtedly held in the first error proceedings that a stock dividend was, and could lawfully be, taxed under the Income Act Tax of 1864. *Gibbons* v. *Mahon* seems to recognize this, p. 560. Reviewing the decisions of this court in the first *Bailey Case*, in *Gibbons* v. *Mahon*, and in *Logan County* v. *United States*, 169 U. S. 255, comparing them, and considering carefully the due weight to be given to each as an authority in the case at bar, it is submitted that the question whether a stock dividend is "income" within the meaning of an act taxing "net income arising or accruing from all sources" is not foreclosed by authority.

*Mr. Gordon M. Buck*, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover the amount of a tax paid under duress in respect of a stock dividend alleged by the Government to be income. A demurrer to the declaration was sustained by the District Court and judgment was entered for the defendant. 242 Fed. Rep. 702. The facts alleged are that the corporation voted on December 17, 1913, to transfer $1,500,000 surplus, being profits earned before January 1, 1913, to its capital account, and to issue fifteen thousand shares of stock representing the same to its stockholders of record on December 26; that the distribution took place on January 2, 1914, and that the plaintiff received as his due proportion four thousand one hundred and seventy-four and a half shares. The defendant compelled the plaintiff to pay an income tax upon this stock as equivalent to $417,450 income in cash. The District Court held that the stock was income

within the meaning of the Income Tax of October 3, 1913, c. 16, Section II; A, subdivisions 1 and 2; and B. 38 Stat. 114, 166, 167. It also held that the act so construed was constitutional, whereas the declaration set up that so far as the act purported to confer power to make this levy it was unconstitutional and void.

The Government in the first place moves to dismiss the case for want of jurisdiction, on the ground that the only question here is the construction of the statute not its constitutionality. It argues that if such a stock dividend is not income within the meaning of the Constitution it is not income within the intent of the statute, and hence that the meaning of the Sixteenth Amendment is not an immediate issue, and is important only as throwing light on the construction of the act. But it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. *Lamar* v. *United States*, 240 U. S. 60, 65. Whatever the meaning of the Constitution, the Government had applied its force to the plaintiff, on the assertion that the statute authorized it to do so, before the suit was brought, and the court below has sanctioned its course. The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this court should think that the construction would make the act unconstitutional. While it keeps the money it opens the question whether the act construed as it has construed it can be maintained. The motion to dismiss is overruled. *Billings* v. *United States*, 232 U. S. 261, 276. *Altman & Co.* v. *United States*, 224 U. S. 583, 596, 597.

The case being properly here, however, the construction of the act is open, as well as its constitutionality if construed as the Government has construed it by its conduct. *Billings* v. *United States, ubi supra.* Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. . . . The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." *Gibbons* v. *Mahon,* 136 U. S. 549, 559, 560. In short, the corporation is no poorer and the stockholder is no richer than they were before. *Logan County* v. *United States,* 169 U. S. 255, 261. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. It is alleged and admitted that he receives no more in the way of dividends and that his old and new certificates together are worth only what the old ones were worth before. If the sum had been carried from surplus to capital account without a corresponding issue of stock certificates, which there was nothing in the nature of things to prevent, we do not suppose that any one would contend that the plaintiff had received an accession to his income. Presumably his certificate would have the same value as before. Again, if certificates for $1,000 par were split up into ten certificates each, for $100, we presume that no

one would call the new certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

*Judgment reversed.*

MR. JUSTICE MCKENNA concurs in the result.

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## STATE OF WISCONSIN *v.* LANE, SECRETARY OF THE INTERIOR.

IN EQUITY.

No. 7, Original. Argued December 11, 1917.—Decided January 7, 1918.

The grant of sections numbered 16, for school purposes, made by § 7 of the Enabling Act of August 6, 1846, c. 89, 9 Stat. 56, to the State of Wisconsin, was not an unconditional grant *in præsenti;* it was subject to the right of Congress to make other disposition of the land before the sections became identified by surveys finally approved, leaving the State the right to obtain other sections by way of indemnity.

By the treaty of October 18, 1848, 9 Stat. 952, the Menominee Indians ceded to the United States their land-holdings in Wisconsin in exchange for other lands farther west, and a sum of money; but, dissatisfied with the new lands and desiring to stay in Wisconsin, they remained upon the ceded lands during the period of two years allowed by the treaty, and extensions granted thereunder by the President, until, by action of the Indian Department and pursuant to an act of Congress appropriating money for the purpose, they were removed in 1852 to another tract in Wisconsin, selected for their reservation. This removal was at first referred to in the act as temporary, but the Wisconsin legislature, in 1853, assented to their remaining on the tract, and by the treaty of May 12, 1854, 10 Stat. 1064, for the purpose of acquiring the new lands as a permanent home, the Indians relinquished the lands assigned them by the treaty

of 1848, and the United States set apart for their home, to be held as Indian lands are held, a reservation including part of the reservation of 1852, with some additional townships. *Held*, that sections numbered 16, which were embraced by both reservations but were not identified by finally approved surveys until after the reservation of 1852 was made, were by that reservation and the reservation of 1854 "disposed of" within the meaning of the school section grant in the Wisconsin enabling act, and that other sections numbered 16, embraced by the later reservation only, but lacking such identification at its creation, were likewise disposed of; and, as all these sections remained in reservation and subject to the continuing occupancy and rights of the Indians, the State had acquired no title to them and could not restrain the cutting of timber on them by or in the interest of the Indians.

Decree for defendant.

The case is stated in the opinion.

*Mr. John C. Thompson* and *Mr. R. A. Hollister*, with whom *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, and *Mr. M. G. Eberlein* were on the briefs, for complainant.

*Mr. C. Edward Wright*, with whom *Mr. Charles D. Mahaffie*, Solicitor for the Department of the Interior, was on the brief, for defendant.

Mr. Justice Day delivered the opinion of the court.

This is an original suit brought by the State of Wisconsin claiming title under the school land grant to the State to sections 16 in certain townships in the Menominee Indian Reservation, which lands are alleged to belong to the State or its grantees. The bill seeks to enjoin the defendant, the Secretary of the Interior,[1] and through him the Indian occupants of the land, from cutting timber

[1] The jurisdiction in this case is founded upon the statute set forth in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387.

or committing waste thereon. The townships in controversy are numbers 29 and 30 in ranges 13, 14 and 15; township 29 in range 16; township 28 in ranges 15 and 16. These townships are all included in the treaty reservation of 1854, and those in ranges 15 and 16 also in the reservation of 1852; which treaty and reservations are hereinafter considered.

The question to be decided is whether the school land grant shall prevail over the rights of the Indian occupants.

The enabling act of Wisconsin was approved August 6, 1846, 9 Stat. 56. The State was admitted to the Union on May 29, 1848. The enabling act, § 7, provides: "That section numbered sixteen in every township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools."

As to the rights of the Indians, it appears that they had occupied a large territory in the State of Wisconsin, and by various treaties, not necessary now to be dwelt upon, had made cessions to the United States. In 1848 the Indians made a treaty [October 18, 1848, 9 Stat. 952] ceding the remainder of their lands in Wisconsin to the United States, for which they received lands farther west and the sum of $350,000. This treaty was ratified January 23, 1849. By its terms the Indians were permitted to remain on the ceded lands for two years from October 18, 1848, and until notified by the President that the same were wanted. The Indians did not remove to the West, and in August, 1850, petitioned the President for leave to remain on some of the ceded lands. In their petition the Indians set forth the unsatisfactory character of the lands granted to them in the West, and their desire to remain in Wisconsin. On September 5, 1850, the President gave the Indians permission to remain upon the ceded lands until June 1, 1851; this time was

subsequently extended by the President to October 1, 1852. On September 30, 1851, the local Superintendent of Indian Affairs reported to the Commissioner of Indian Affairs that in pursuance of instructions he had explored the country on the Wolf and Oconto Rivers in Wisconsin for a location for the Menominee Indians, and for that purpose recommended a rectangular tract of land; this tract of land was to commence at the southeast corner of township 28 on the range line between 19 and 20 and run west 30 miles, north 18 miles, and thence back east and south to the place of beginning. The tract embraced 15 townships, 6 of which on the west are included within the limits of the lands described in the treaty of 1854, hereinafter referred to.

On August 30, 1852, Congress appropriated money for the removal of the Indians to the lands designated by the Superintendent. 10 Stat. 41, 47. On November 30, 1852, the Commissioner of Indian Affairs reported to the Secretary of the Interior that the removal of the Menominee Indians, as contemplated by the act of Congress passed the preceding session, had been satisfactorily effected, and that the whole tribe had been concentrated on the designated territory between the Wolf and Oconto Rivers, a location with which they were well pleased, and on which they were anxious to be permitted to remain permanently.

On February 1, 1853, the State of Wisconsin by joint resolution of its legislature gave its assent to this removal, in the following terms:

"That the assent of the State of Wisconsin is hereby given to the Menominee Nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto Rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to wit:

"Commencing at the southeast corner of township 28

north, range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south 18 miles, to the place of beginning."

On November 26, 1853, the Commissioner of Indian Affairs made a report in which he said that by the treaty of 1848 the removal of the Menominee Indians to a place west of the Mississippi River was contemplated, but that it was thought preferable to concentrate them on the Upper Wolf and Oconto Rivers in the State of Wisconsin, and suggested, among other things, that the Indians could properly remain where they were for many years, without interference with the white population; suggesting, however, that, if such arrangement were to be of a permanent character, a new convention should be made with them, which would be necessary for their relinquishment of the country given to them by the treaty of 1848. This recommendation probably gave rise to the treaty of 1854 [May 12, 1854, 10 Stat. 1064], by which the Indians, for the recited purpose of acquiring the new lands for a permanent home, agreed to relinquish to the United States all lands assigned to them by the treaty of October 18, 1848; in consideration of which cession the United States agreed to give to the Indians for a home, to be held as Indian lands are held, "that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north, of range 16 east, of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence, east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being townships 28, 29 and 30, of ranges 13, 14, 15 and 16, according to the public surveys." This tract embraced six of the townships included in the Indian reservation of 1852, and six townships to the west thereof. The sixteenth sections in five of the former and four of the latter are here in controversy.

It appears that as to three of these townships the surveys were not approved until February 20, 1854, and as to the other townships the surveys of two were approved October 11, 1854, and of the others on dates ranging from February 6, 1855, to October 3, 1891.

It is evident from a consideration of the terms of the enabling act, section seven, that Congress did not make an unconditional grant *in praesenti* to the State of the school sections; the terms of the grant are that the sections "shall be" granted. Moreover, the grant contemplated that Congress might make other disposition of the lands. The State of Wisconsin's right to the lands in controversy was to be subordinate to such disposition; in which event the State should seek indemnity in other lands for the loss of school sections.

The Menominee Indians by the treaty of 1848 gave up their holdings in Wisconsin, but were not removed to the lands provided for them in the West. They had the privilege of remaining in Wisconsin for two years and until notified by the President that the lands were wanted, this permission was extended, ultimately until October, 1852, in the meantime the Indians were located by the action of the Superintendent of Indian Affairs, and by the act of Congress, with the approval of the President, upon the reservation created in 1852. True, the act of Congress appropriating money for the removal referred to the temporary character of the location, but they were thus located subject to the control of Congress, and, as we have seen, with the consent of the State, if that were needed.

We think this recited action was a disposition, prior to survey, of the school sections, which was clearly within the authority of Congress to make and sanctioned by the terms of section seven of the enabling act. This action being before survey took these lands out of the scope of the grant for school purposes, and made them subject

to ultimate disposition by Congress for the benefit of the Indians. This was accomplished by the treaty of 1854 which adds to the reserved lands six townships on the west and includes the six westerly townships of the reservation of 1852. That treaty is comprehensive in its terms, it recites the unwillingness of the Indians to remove to the lands provided for them to the west of the Mississippi River, and sets forth the purpose to exchange those lands for the lands desired by the Tribe for a permanent home. To that end the Menominee Indians agreed to cede, and did cede, to the United States all lands assigned to them under the treaty of October 18, 1848, and in consideration of this cession the United States gave to the Indians, for a home to be held as Indian lands are held, the lands described in the treaty, in the 12 townships to which we have referred. The occupancy and rights of the Indians so established have never been terminated, but still continue.

In view of these statements of fact, and the purposes of the Government and the Indians in the transactions referred to, we regard the case as controlled by the decision of this court in *United States* v. *Morrison,* 240 U. S. 192, which deals with a similar grant of lands for school purposes to the State of Oregon. In that case the previous decisions of this court were reviewed, and in concluding the discussion of the effect of such school land grants this court said: "The designation of these sections was a convenient method of devoting a fixed proportion of public lands to school uses, but Congress in making its compacts with the States did not undertake to warrant that the designated section would exist in every township, or that, if existing, the State should at all events take title to the particular lands found to be therein. Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; that is, that on the survey, defining the sec-

tions, the title to the lands should pass to the State provided sale or other disposition had not previously been made, and, if it had been made, that the State should be entitled to select equivalent lands for the described purpose." (240 U. S. 201.)

The principles, thus stated, are applicable here. In our view the lands were *otherwise disposed of* by the Indian reservation of 1852, and the treaty of 1854. As we have seen, these dispositions were made before final approval of the surveys identifying sections 16.

It is insisted that this conclusion is inconsistent with the decision of this court in *Beecher* v. *Wetherby*, 95 U. S. 517. The same contention as to the effect of that decision was made in the *Morrison Case*, *supra*, and of it this court said (p. 205):

"In opposition to this definition of the effect of the donation for school purposes, the appellees rely upon what was said in *Beecher* v. *Wetherby*, 95 U. S. 517. That was an action of replevin to recover logs cut on a section sixteen in Wisconsin which had been granted by the Enabling Act of August 6, 1846 (c. 89, 9 Stat. 56, 58). The exterior lines of the township in which the land was situated were run in October, 1852, and the section lines in May and June, 1854; and the defendant claimed under patents from the State issued in 1865 and 1870. The land had been occupied by the Menominee Indians, but their right was only that of occupancy. 'The fee was in the United States, subject to that right, and could be transferred by them whenever they chose.' By the treaty of 1848 (9 Stat. 952) these Indians agreed to cede to the United States all their lands in Wisconsin, it being stipulated that they should be entitled to remain on the lands for two years. In view of their unwillingness to withdraw, a further act was passed (10 Stat. 1064) by which a tract was assigned to them embracing the land in controversy. Subsequently, a portion of this reservation

was assigned by another treaty to the Stockbridge and Munsee tribes, and for the benefit of the latter Congress passed the Act of February 6, 1871 (16 Stat. 404, c. 38) providing for the sale of certain townships. The plaintiff asserted title under patents issued by the United States in 1872 pursuant to this act. It appeared, however, that the Indian occupation of the land had ceased before the logs were cut. The court held that the title had vested in the State and hence that the plaintiff had acquired no title by his patents from the United States. It was said in the opinion that by the compact with the State (the school grant) the lands were 'withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted'; and that after this compact 'no subsequent sale or other disposition . . . could defeat the appropriation.' But it was also stated that 'when the logs in suit were cut, those tribes (Stockbridge and Munsee) had removed from the land in controversy, and other sections had been set apart for their occupation.' That is, the lands had been surveyed in 1854; prior to that time, there had been no other disposition of the fee by the United States; the title had vested in the State subject at most to the Indian occupancy, and this had terminated. There was abundant reason for the decision that these lands were not embraced, and were not intended to be embraced, in the provisions for sale made by the Act of 1871. What was said in the opinion must be considered in the light of the facts. (*Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 394.) The *Heydenfeldt Case* was not cited and cannot be regarded as overruled. See *New York Indians* v. *United States*, 170 U. S. 1, 18; *Minnesota* v. *Hitchcock*, 185 U. S. 375, 399–401."

See *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634; *United States* v. *Thomas*, 151 U. S. 577;

*Minnesota* v. *Hitchcock*, 185 U. S. 373; *Wisconsin* v. *Hitchcock*, 201 U. S. 202.

We reach the conclusion that the lands in controversy did not pass under the school lands grant to the State of Wisconsin, and that there should be a decree for the defendant.

*It is so ordered.*

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

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## UNITED STATES *v.* J. S. STEARNS LUMBER COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 94. Argued December 18, 1917.—Decided January 7, 1918.

By the treaty of 1842, proclaimed in 1843, 7 Stat. 591, the Lake Superior Chippewas ceded lands in Wisconsin, reserving privileges of occupancy until removed by the President. Wisconsin was admitted in 1848. The treaty of 1854, proclaimed in 1855, 10 Stat. 1109, set apart from the ceded lands a reservation for the Indians, their occupancy not having been disturbed in the meantime, and provided for surveying this reserved land and for allotting it in severalty, at the discretion of the President. Allotment patents were issued accordingly in 1907, withholding all right of alienation without the President's consent; and under them the allottees resided on and claimed their several tracts. The lands in controversy, comprised by the original occupancy, the reservation and allotments, were surveyed as sections numbered 16, but not until 1864 and 1873. *Held,* that, as the treaty and reservation operated to withdraw the sections before survey and the allotments merely provided a home for the Indians as promised by the treaty, in furtherance of the purpose of

the reservation, the sections were disposed of within the meaning of the school section grant in the Wisconsin enabling act, and title did not pass to the State either before or after the allotments. *Wisconsin* v. *Lane, ante,* 427.

Reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Kearful* for the United States.

*Mr. Arthur Dyrenforth,* with whom *Mr. W. W. Gurley* was on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

The United States brought its bill to cancel patents from the State of Wisconsin held by the J. S. Stearns Lumber Company and covering certain lands in the Bad River or LaPointe Indian Reservation in the State of Wisconsin. The District Court dismissed the bill for want of equity. There is no controversy as to the facts, and it appears that the Lake Superior Chippewas by treaty of October 4, 1842, proclaimed March 23, 1843, 7 Stat. 591, ceded large tracts of land in Wisconsin and Michigan to the United States, reserving the right of hunting on the ceded territory, and other usual privileges of occupancy until removed by the President. Within the Wisconsin territory were included the sections 16 in question, lying in township 46 north, ranges 2 and 3 west, and township 47 north, in range 2 west.

Wisconsin was admitted to the Union in 1848. The enabling act contained the provision as to the school sections recited in *Wisconsin* v. *Lane,* just decided, *ante,* 427. The President did not remove the Indians, and on September 30, 1854, a treaty was made with them, proclaimed January 29, 1855, 10 Stat. 1109, whereby the

United States set apart the LaPointe Reservation in Wisconsin, and provided for surveys and allotments in severalty from time to time of such reserved lands in the discretion of the President.

This reservation embraces the land in controversy, nothing was said in the treaty about sections numbered sixteen. The sectional survey, identifying sections 16, as to one of the townships was made in 1864, as to the other two in 1873. From 1881 to 1887 the State of Wisconsin claiming to own these lands under its school land grant, patented them to various persons, under whom the Lumber Company claims title.

In 1907 allotment patents were issued by the President of the United States to the Indians in severalty under article 3 of the treaty of 1854, the allottees have since resided on the reservation, and claim the lands allotted and patented to them. The patents in each case contained a provision that the allottee and his heirs shall not sell, lease or in any manner alienate the lands except with the consent of the President. From 1909 to 1912 timber on the lands in dispute, which had been damaged by fire, was cut for sale by the Lumber Company under stipulation made with approval of the United States, and the value of the lumber so realized was deposited in banks for the benefit of the parties entitled thereto, the amount so deposited being $66,833.56.

This case does not need extended discussion as in our opinion it is controlled by the decision of this court just rendered in *Wisconsin* v. *Lane*, *ante*, 427. The treaty of 1854 authorized the ultimate allotment in severalty to the Indians of the lands reserved by it. Afterwards such allotment of the sections in question was made by the President of the United States in carrying out the purposes of the treaty. Considering the obligations of the United States in favor of its Indian wards imposed by this treaty, and the purpose for which these lands were

reserved, we are of opinion that the treaty with these provisions in favor of the Indians amounts to a disposition of the lands within the authority of Congress, and is not inconsistent with the enabling act under which the school lands were provided for the State.

Considering that the lands were reserved by the treaty long before they were surveyed and the sections identified, the fact that they were after survey allotted in severalty to the Indians does not in our view enable the State to claim the sixteenth sections under the school lands grant. What was ultimately done in the process of allotment was merely to provide a home for these Indians in furtherance of the purpose with which the reservation was made. (See *Missouri, Kansas & Texas Ry.* v. *United States*, 235 U. S. 37, 40.)

We are of opinion that the disposition of the lands by treaty in favor of the Indians, before the survey identifying the school sections, was but an exercise of the right of the United States to make other disposition of the lands, and the State of Wisconsin must seek indemnity elsewhere, as provided by law. It follows that the judgment of the United States District Court for the Western District of Wisconsin must be reversed, and the cause is remanded for further proceedings in conformity with this opinion.

*Reversed.*

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

# HOUSTON OIL COMPANY OF TEXAS ET AL. *v.* GOODRICH ET AL.

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

No. 76. Argued November 21, 22, 1917.—Decided January 7, 1918.

A writ of certiorari, if improvidently granted, will be dismissed. So *held* where the alleged errors consisted in refusing to submit certain questions to the jury in an action over the title to land, and where the rulings of the District Court depended essentially on an appreciation of the evidence and were concurred in by the Circuit Court of Appeals.

Writ of certiorari to review 226 Fed. Rep. 434, dismissed.

THE case is stated in the opinion.

*Mr. William L. Marbury* and *Mr. H. O. Head*, with whom *Mr. Oswald S. Parker* and *Mr. Thomas M. Kennerly* were on the briefs, for petitioners.

*Mr. William D. Gordon*, with whom *Mr. Harrison M. Whitaker*, *Mr. Eugene E. Easterling* and *Mr. Thomas J. Baten* were on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

After hearing arguments upon the issues involved in this cause it seems clear that the writ of certiorari was improvidently granted and must be dismissed. *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430.

The controversy (presented in an action at law) is over title to a tract of land in Texas. Both parties claim under one Felder—petitioners through a deed said to have been

executed June 10, 1839, and respondents through one dated June 18, 1839.

As grounds for granting the writ petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed (2) whether it was presented for record before execution of the later one (3) whether vendee in the junior deed was a *bona fide* purchaser for value (4) whether the junior deed was forged and (5) whether the action was barred by the three years statute of limitations. The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all the trial court concluded there was not enough in support of any one of petitioners' above stated claims to warrant a finding in their favor and the Circuit Court of Appeals reached the same result. 226 Fed. Rep. 434.

The record discloses no sufficient reason within the rule long observed why we should review the judgment below. *Forsyth* v. *Hammond*, 166 U. S. 506.

*Dismissed.*

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## BOLDT, ADMINISTRATRIX OF BOLDT, *v.* PENNSYLVANIA RAILROAD COMPANY.

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

No. 62. Argued November 16, 19, 1917.—Decided January 7, 1918.

Under the Federal Employers' Liability Act, except in the cases specified in § 4, the employee assumes extraordinary risks incident to his employment, and risks due to negligence of employer and fellow employees, when obvious or fully known and appreciated by him.

While between cars in a freight yard, helping to repair a faulty coupler, plaintiff's intestate was killed, due to the impact of a string of cars,

moving by gravity under control of a brakeman. It was contended that the brakeman negligently permitted the moving cars to strike with too great violence and that the company negligently failed to promulgate and enforce adequate rules to safeguard deceased while about his task; and some evidence tended to support both claims. But, *held*, that plaintiff was not entitled to have the jury instructed that "the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employees."

218 Fed. Rep. 367, affirmed.

THE case is stated in the opinion.

*Mr. Henry W. Brush* and *Mr. Rufus S. Day*, with whom *Mr. Frank Gibbons* and *Mr. C. W. Dille* were on the briefs, for plaintiff in error.

*Mr. Frederic D. McKenney*, with whom *Mr. John Spalding Flannery*, *Mr. Frank Rumsey* and *Mr. H. J. Adams* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

At Buffalo, New York, defendant has a yard where freight trains are made up. Cars under control of a brakeman descend by gravity to desired positions on connecting tracks which lie southward of the "hump" or high point. A rule forbade employees from going between cars without first taking precautions not observed in the present case. Some evidence tended to show that under long-continued practice, considered good railroading, cars (in "strings" or "cuts") were constantly sent down and purposely allowed to strike others with sufficient force to secure coupling, but not hard enough to injure the equipment, "regardless of the position the men are in, putting them under obligation to take care of themselves."

While between cars, contrary to instructions, and assisting in an effort to adjust a faulty coupler, Edward J. Boldt, an experienced yard conductor, was killed. The coupler was at the south end of a "string" standing on an inclined switch; another "string" moving down from the north, hit the standing one violently and drove it against deceased and across a space of twenty feet.

Suing under the Federal Employers' Liability Act plaintiff maintained that the brakeman in control negligently permitted the moving cars to strike with too great violence; also that the company negligently failed to promulgate and enforce adequate rules to safeguard deceased while occupied about his task; and some evidence tended to support both claims. The Circuit Court of Appeals affirmed a judgment upon verdict for defendant after the trial court had denied motion for new trial based solely upon its refusal to give the charge specially requested by plaintiff and copied below. 218 Fed. Rep. 367.

To the general charge plaintiff made no objection whatever. In the first paragrpah it declared: "The foundation for the action is the Employers' Liability Act, which was passed by Congress in the year 1908, and which substantially provides that if the employees of interstate railway carriers are injured while at work, on account of the negligence of the employer, or on account of the negligence of an officer or agent, or, indeed, even on account of the negligence of a fellow servant, that a recovery can be had." Continuing, it explained nature of the accident, relationship, responsibilities and obligations of parties, definition and effect of contributory negligence, etc.

Concerning assumption of risk the court said: "Evidence has been given by other witnesses that customarily cars are sent over this 'leader' into the yard of the defendant, and into the railroad yards of other railroad companies, *ad libitum*,—that is, they are sent freely, one after another, to classify them and to make up trains when

already classified; they are defined as 'live tracks,'—a dangerous place to work, gentlemen, and workmen who take upon themselves occupations of that character *assume the ordinary risks of the employment;* they assume the risks that are incident to the particular avocation." "The decedent, as I have already stated, was bound to take care, and exercise diligence, and avoid any accidents from the movements of the cars in the yards and while at work. A railroad company, gentlemen, does not guarantee or insure the safety of its employees; it is merely obliged to use ordinary care to prevent unusual risks by the decedent, which, under the circumstances, and the manner in which the work was ordinarily done, could not be reasonably anticipated." "You must be satisfied, gentlemen, in order to give her an award, that it is due to her because of the negligence of the defendant railroad company, and, if you also believe that it was due to the negligence of the decedent himself, who was engaged in a risky occupation, he, as I said before, assumed the ordinary risks of his employment, then you may apportion the damages."

At defendant's request and without objection, the jury were told "that the decedent assumed the obvious necessary risks of the employment in which he was engaged."

Plaintiff then asked a charge that "the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employees." Denying the request, the court said: "Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads, 'such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted

for the safety of employees contributed to the injury, or death of such employee.' I decline to charge as requested, because this is not an action of the kind specified in Section 4." This denial is the only error properly assigned here; and the circumstances afford no reason for departing from the general rule which limits our consideration to it.

Section 1, Employers' Liability Act, 35 Stat. 65, declares that carriers "shall be liable in damages to any person suffering injury while he is employed," etc., "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." In cases within the purview of the statute the carrier is no longer shielded by the fellow-servant rule, but must answer for an employee's negligence as well as for that of an officer or agent.

In *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503, we said: "It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, 235.

At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. Shearman & Redfield on Negligence (6th ed.), § 208; Bailey Personal Injuries (2d ed.), § 385. This general doctrine was clearly recognized in *Gila Valley &c. Ry. Co.* v. *Hall*, 232 U. S. 94, 101; *Jacobs* v. *Southern Ry. Co., supra; Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310, 313, and *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320, 324.

The request in question did not accurately state any applicable rule of law and was properly refused. Already the jury had been told that deceased assumed the ordinary risks of his employment—a statement more favorable than plaintiff could properly demand. The risk held to have been assumed in the *Horton Case* certainly arose from negligence of some officer, agent or employee; and if the negligence of all these should be excluded in actions under the Employers' Liability Act it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk.

The judgment below is

*Affirmed.*

MR. JUSTICE DAY took no part in the consideration or decision of this cause.

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## CITY OF CINCINNATI v. CINCINNATI & HAMILTON TRACTION COMPANY ET AL.

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

No. 10. Argued January 24, 25, 1916; restored to docket for reargument June 12, 1916; reargued October 26, 27, 1916; restored to docket for reargument May 7, 1917; reargued October 17, 18, 1917.—Decided January 7, 1918.

Corporations of Ohio claimed the right to operate a street railway in Cincinnati according to the terms of various grants, etc., under which it had been built in sections or links. A revocable ordinance of the city council, after reciting that as to portions of the streets so occupied, "alleged grants" had expired, and on others there never had been any grants and the companies had no longer any right to occupy the same, provided that the companies might continue

to operate, but only from day to day, and subject to new and material conditions, as to fares, transfers, etc.; that should it be adjudged that they were without continuing right in respect to portions only of the streets occupied, the ordinance should be construed to forbid further operation on such portions except on compliance with all of its terms and conditions; that continued operation "on said streets" should be deemed an acceptance by the companies of the ordinance and all its terms; that in case they refused or failed to comply with it on its effective date, the city solicitor should "take such legal proceedings as may be proper and necessary" to enforce its provisions, or to require them "to abandon the streets covered by this ordinance, and to remove their tracks from said streets." Averring that the ordinance impaired and attempted to impair the obligations of the several grants etc., that its enforcement would deprive them of their property without due process or compensation, and that, under it, the city threatened to, and unless restrained would, interfere with and prevent the maintenance and operation of the railway over the routes described in the grants aforesaid and under authority and in accordance with the terms thereof, thus causing irreparable injury, the companies, by their bill, filed in the District Court before the ordinance became effective, prayed that it be decreed void and that the city be perpetually enjoined from such interference, in any way, as to the whole and any part of the railway, and from enforcing, or taking any steps to enforce, the ordinance in whole or in part. The city's answer denied jurisdiction, that the bill stated a cause of action, that the companies had any right to operate as to certain portions of the line, that the city would interfere with or prevent the maintenance and operation by plaintiffs of the said railway, or cause any damage or injury to plaintiffs; and averred that enforcement of the ordinance was only authorized, and only would be sought, by due court proceedings. After full hearing the District Court upheld the grants, etc., involving complicated questions, under the laws of Ohio, and granted the injunction as prayed. *Held* (1) that the jurisdiction of the District Court was properly invoked, and that it had power to adjudicate the issues presented; but (2) that, as counsel for the city in this court had plainly conceded, what did not sufficiently appear by the answer, viz: that, except as it authorized proceedings in court the ordinance could have no effect prior to a judicial determination and that no other steps could be taken under it, or would be attempted, by the city's officers to enforce it, the decree should be modified so as to exclude any finding upon the validity of the franchises and rights claimed by plain-

tiffs, and so as to limit affirmative relief to an injunction restraining the city (a) from taking any steps, other than necessary court proceedings, to enforce the ordinance, prior to final adjudication of the controversies involved, and (b) from ever setting up claim that plaintiffs' continued operation of cars over streets now used, pending such final adjudication, does or will amount to an acceptance of the ordinance or in any way prejudice their rights.

Upon appeal, the cause is subject to review upon both law and facts, and that relief should be granted which is proper upon the case as it develops in this court.

Modified and affirmed.

The case is stated in the opinion.

*Mr. Charles A. Groom*, with whom *Mr. Constant Southworth* was on the briefs, for appellant.[1]

*Mr. Alfred C. Cassatt* and *Mr. Lawrence Maxwell*, with whom *Mr. George H. Warrington* and *Mr. Ellis G. Kinkead* were on the briefs, for appellees.

Mr. Justice McReynolds delivered the opinion of the court.

The Cincinnati and Hamilton Traction Company is owner and The Ohio Traction Company lessee and operator of an electric railway line extending from Vine Street,

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[1] At the first hearing *Mr. Constant Southworth* argued for the appellant. *Mr. Walter M. Schoenle* was with him on the brief.

The arguments went deeply into questions of local law touching the franchises claimed by plaintiffs, which are not passed on by the court. Upon the question of jurisdiction, in addition to the authorities mentioned in the dissenting opinion, the city cited, among others, the following cases: *Mindler* v. *Georgia*, 183 U. S. 559; *Barney* v. *New York*, 193 U. S. 430; *Louis. & Nash. R. R. Co.* v. *Garrett*, 231 U. S. 298; *Seattle Elec. Co.* v. *Seattle &c. Ry.*, 185 Fed. Rep. 365; *Louisville Tr. Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Seaboard Air Line* v. *Raleigh*, 219 Fed. Rep. 573; *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41.

Cincinnati, northward along Erkenbrecher Avenue, Carthage Pike, Wayne Avenue, Springfield Pike, etc., some five or six miles to the city limits. It was built in sections or links under grants, ordinances, permissions, contracts, etc., whose validity, effect, and continuation have given rise to conflicting contentions, based primarily upon different interpretations of statutes and laws of Ohio. April 21, 1914, the City Council passed the ordinance copied in the margin.[1]

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[1] AN ORDINANCE No. —.

Specifying the terms and conditions upon which The Cincinnati and Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the city, and authorizing the City Solicitor to take legal proceedings to enforce this ordinance.

Whereas, The Ohio Traction Company, as lessee of The Cincinnati and Hamilton Traction Company, is now operating street cars on certain streets of the City of Cincinnati; and

Whereas, on portions of the streets so occupied and used alleged grants have heretofore expired and on other portions, including that part of Carthage Pike formerly known as Springfield Pike there never have been any grants and said companies have no longer any right to occupy the same; now, therefore,

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That upon the terms and conditions in this ordinance specified, and upon no other, permission is hereby granted to said The Cincinnati and Hamilton Traction Company and to The Ohio Traction Company, as its lessee, to continue from day to day only from the date on which this ordinance becomes effective to operate street cars on the following streets, to wit:

Erkenbrecher Avenue from Vine Street and Erkenbrecher Avenue to Carthage Avenue; thence north on Carthage Avenue and Carthage Pike (formerly called Main Street) to Lockland Avenue, excepting the portions in the municipalities of St. Bernard and Elmwood Place; thence north on Lockland Avenue and Anthony Wayne Avenue to the northern boundary of the City through the district formerly known as Hartwell; and also from the intersection of Anthony Wayne and Woodbine (formerly called Rural) Avenues westwardly over Woodbine Avenue and over Decamp Avenue to Carthage (formerly called Springfield) Pike; thence north on said Carthage Pike to the northern

Shortly before the ordinance was to become effective, appellee companies—both Ohio corporations—filed a bill in the United States District Court, Southern District of Ohio, wherein they set out their interest in the railway, the various grants, ordinances, contracts, etc., under which it had been constructed, together with rights claimed. It then alleged: "Notwithstanding the contract rights of plaintiffs as hereinabove set forth, the defend-

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boundary of the City in the District formerly known as Hartwell; on the tracks now existing in said streets.

Section 2. On and after the taking effect of this ordinance the operation of street cars on said streets shall be subject to the same terms and conditions as existed under the prior alleged grants, if any, so far as not inconsistent with the provisions of this ordinance, and shall be subject to the following conditions:

A. That the necessary arrangements be made to operate cars from the aforesaid northern boundary of the City over said streets to Sixth and Walnut Streets in substantially the same manner and with substantially the same frequency as now, and as a continuous line; and that street cars shall be operated.

B. That for a continuous trip between any two points between the aforesaid northern boundary of the City and Sixth and Walnut streets the fare for each passenger shall not exceed five (5c) cents except that for children under ten years of age the fare shall not exceed three (3c) cents, and children in arms shall be carried free.

C. That the necessary arrangements be made so that without additional charge passengers on street cars operated on the streets mentioned in Section 1, and passengers on street cars operated by The Cincinnati Traction Company may transfer to and from either to the other; but transfers given hereunder shall be good only on the first street car available and on one not going in a substantially parallel and opposite direction.

D. That during the operation of this ordinance the Director of Public Service may make from time to time further and reasonable regulations as to the character, mode, manner and frequency of service and maintenance of the street cars and tracks.

Section 3. Should it be adjudged that on only a portion or portions of the said streets now occupied by the tracks of said The Cincinnati and Hamilton Traction Company the right to operate street cars has never been granted, or if granted has ceased to exist, then this ordi-

ant, The City of Cincinnati on or about the 21st day of April, 1914, passed . . . [the ordinance copied, *ante*]; in and by said ordinance said City repudiated the grants aforesaid and thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10, of the Constitution of the United States, and the enforcement of said ordinance will deprive plaintiffs of their property without due process of law and without compensation, in

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nance shall be construed to forbid the further operation of street cars on such portions except on the compliance by the said The Cincinnati and Hamilton Traction Company and The Ohio Traction Company and each of them with all of the terms and conditions specified in this ordinance.

Section 4. The continuing by said companies, or either of them, to operate street cars on said streets shall be deemed an acceptance of this ordinance and of all the terms hereof.

Section 5. In case The Cincinnati and Hamilton Traction Company and The Ohio Traction Company, or either of them, refuse or fail to comply with the terms of this ordinance upon the taking effect hereof, the City Solicitor shall be, and he is hereby authorized and directed to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance, or to require the said companies and each of them to abandon the streets covered by this ordinance, and to remove their tracks from said streets.

Section 6. Should The Cincinnati and Hamilton Traction Company and The Ohio Traction Company, or either of them, surrender or transfer all or any part of their rights, if any, to operate street cars over all or any part of the aforesaid streets, to The Cincinnati Street Railway Company, or to The Cincinnati Traction Company, either or both, this ordinance shall apply also to the two last named companies, either or both as the case may be.

Section 7. Should any part of this ordinance be adjudged invalid, such adjudication shall not affect the validity of the remainder of this ordinance.

Section 8. This ordinance and any rights granted or acquired hereunder are subject to repeal, amendment, or revocation in whole or in part at any time at the will of Council.

Section 9. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

violation of the Constitution of the United States and particularly Article XIV in amendment thereof." "The defendant, The City of Cincinnati, by its agents and employes, under the pretended authority of the ordinance of the City of Cincinnati aforesaid, threaten to and will, unless restrained by order of this Court, interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof, which will cause great and irreparable injury to these plaintiffs for which they have no adequate remedy at law." It prayed: "That the Court decree said ordinance passed April 21, 1914, to be null and void, and that the defendant, The City of Cincinnati, and its officers, agents and employes, be enjoined by a restraining order, preliminary injunction, and final decree, from interfering or attempting to interfere in any way with the maintenance and operation, or either, by the plaintiffs, or either of them, of said line of electric street railway or any part thereof; and from enforcing or attempting or taking any steps to enforce the pretended ordinance of The City of Cincinnati, aforesaid, or any part thereof, and from taking any action which would alter, impair, limit, or destroy, the right and title of plaintiffs under their said grants and contracts."

Answering, the City denied jurisdiction of the court; that the bill stated a cause of action; that complainant companies had any right to operate a railway on Erkenbrecher Avenue or over portions of Carthage Pike or over streets and roads formerly in the Village of Hartwell, etc. And further "the defendant denies that under the authority of said Ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage

or injury of any kind to the plaintiffs, or either of them, and defendant avers that the enforcement of said Ordinance is only authorized and will only be sought by and through an order of a Court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties."

Having finally heard the cause upon a record presenting many difficult problems arising under local laws, the trial court sustained its jurisdiction, adjudicated in favor of the companies in respect of the grants, ordinances, and contracts relied upon, and granted an injunction as prayed. The City has appealed and the questions presented below have again been elaborately discussed before us.

There is radical disagreement concerning interpretation and effect of the Ordinance of April 21st. Counsel for appellees maintain: "The City does not seek to eject plaintiffs from the occupancy of any particular part of the streets in question, but undertakes by the ordinance complained of to require plaintiff, in disregard of its rights under existing contracts, some of which the ordinance assumes may be good, either to abandon its line over the route in question, or to operate it on a day-to-day license and at a reduced fare." "The question, therefore, is not whether there is one bad link, but whether there is one good link, because, if there is a good link, the ordinance impairs its obligation."

"All parts of the ordinance go into operation at once at 'the earliest period allowed by law,' which is thirty days after it is filed with the mayor. The day the ordinance takes effect it gives to passengers the right to a reduced fare and transfers; and at the same time the companies, by operating on the said streets, are deemed to have accepted all the terms of the ordinance, which apply to all the links. This operation of the ordinance, and these results, do not await any litigation or any adjudication of any kind."

"While Section 5 authorizes and directs the city solicitor in the event of non-compliance to take the proper legal proceedings to enforce the ordinance, they might not be taken, and the operation of the ordinance does not await the beginning or outcome of such proceedings, nor is the city precluded by Section 5 from enforcing it in any other way, by tearing up the tracks or otherwise."

In the brief for appellant it is said: "These two provisions [§§ 3 and 5] clearly indicate that the rights of the City must be and will be established only after an orderly procedure through the courts, and it was contemplated and directed that this should be through legal proceedings brought by the Solicitor." "The fair reading of Section 4 is that the operation of the cars over the portion of the line where it is adjudged appellees have no franchise shall be an acceptance of the ordinance." During the oral argument here counsel for the City expressly affirmed, that properly construed and except as it authorized proceedings in court, the ordinance could have no effect prior to a judicial determination of the parties' rights; that until this was had no other steps could be taken, or would be attempted, to enforce the ordinance, and non-compliance therewith would in no wise injuriously affect the appellees. And, moreover, that the above quoted paragraph from the answer was intended to express that view.

We think the jurisdiction of the court below was properly invoked and that it had power to adjudicate the issues presented. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58.

As the cause is here upon appeal, it is subject to review upon both law and facts; we should grant the relief proper under circumstances now disclosed. *Wiscart* v. *D'Auchy*, 3 Dall. 321, 327; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 37; Daniell's Ch. Pl. & Pr. (5th ed.), *1484, *1489; *Elliott* v. *Toeppner*, 187 U. S. 327, 334.

The answer failed to set out with adequate precision, if at all, what counsel now claim were the powers of the City's officers under, and its purposes in respect of, the ordinance—otherwise a different result might have been reached in the trial court. Accepting, and for all purposes of the cause relying upon representations and admissions of counsel for the City as above detailed, we conclude that the decree below should be modified so as to exclude from it any finding concerning validity of franchises involved or rights claimed by appellees and to limit the affirmative relief granted to an injunction restraining the City (1) from taking any steps to enforce the ordinance (except institution of necessary court proceedings) prior to final adjudication of controversies involved, and (2) from ever setting up a claim that appellees' continued operation of cars over streets now used pending such final adjudication does or will amount to an acceptance of the ordinance by appellees, or in any way prejudice their rights.

As modified, the decree below is affirmed. Appellant will pay all costs.

*Modified and affirmed.*

Mr. Justice Clarke, dissenting.

The opinion and decree announced in this case seem to me so unsupported by the record and so unusual in character that I am impelled, reluctantly, to state my reasons for dissenting from both.

The court finds that the District Court had and that this court now has jurisdiction in the case such as to warrant permanently enjoining the City of Cincinnati in the two respects stated in the opinion, and with instructions to limit its decree to such an injunction the case is remanded to the District Court, leaving open for further litigation the validity and effect of the Ordinance of April 21, 1914 (copied in the margin of the court's opinion) and of prior grants claimed by the plaintiffs.

Assuming as we must that if the District Court had jurisdiction of the cause it had authority to go forward and completely dispose of the controversy, this action taken by the majority of the court seems to me to be anomalous if not unprecedented.

But my dissent goes also upon the more fundamental ground that the District Court did not have, and that this court does not now have, any jurisdiction over the case, for reasons which I shall state as briefly as I may.

The bill alleges that the plaintiffs and the defendant are all Ohio corporations, and after setting out in detail the grants which had been made to the plaintiffs over the various routes described in the Ordinance of April 21, 1914, it continues in paragraphs thirteen and fourteen, as follows:

"13. Notwithstanding the contract rights of plaintiffs as hereinabove set forth, the defendant, The City of Cincinnati, on or about the 21st day of April, 1914, passed a certain alleged ordinance entitled, 'An Ordinance No. ——. Specifying the terms and conditions upon which the Cincinnati and Hamilton Traction Company and The Ohio Traction Company, as its lessee, may operate street cars on certain streets of the City, *and authorizing the City Solicitor to take legal proceedings to enforce this ordinance*,' a copy of which is hereto attached, marked Exhibit A, and made a part hereof; *in and by said ordinance* said City repudiated the grants aforesaid and thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10, of the Constitution of the United States, and the enforcement of said ordinance will deprive plaintiffs of their property without due process of law and without compensation, in violation of the Constitution of the United States and particularly Article XIV in amendment thereof."

"14. The defendant, The City of Cincinnati, by its

agents and employees, under the pretended authority of the ordinance of the City of Cincinnati aforesaid, threatens to and will, unless restrained by the order of this Court, interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof, which will cause great and irreparable injury to these plaintiffs for which they have no adequate remedy at law."

Since there is no diversity of citizenship there must be found in these two paragraphs, if anywhere in the bill, the assertion of federal right sufficient to give jurisdiction to the district court.

Confining our attention to paragraph 13. It seems to me very clear that this paragraph simply alleges that the City passed the ordinance, copied in the margin of the court's opinion, and thereby authorized "the City Solicitor to take legal proceedings to enforce" it. This allegation is emphasized by making the ordinance, by reference, a part of the bill, which in § 5 specifically provides that if the plaintiffs shall fail or refuse to comply with the terms of the ordinance "*the City Solicitor shall be, and he is hereby authorized and directed to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance,*" or to require the companies to remove their tracks from the streets. The making of this declaration by ordinance, it is averred, impaired the obligation of the grants—the contract rights—which the plaintiffs claim they had when the ordinance was passed. No action other than the passing of the ordinance had been taken by the City when the bill for injunction was filed, in fact the ordinance did not become effective for thirty days after the bill was filed.

It has been decided by this court, within recent years, at least twice, that for a municipal corporation to thus

assert by resolution or by ordinance that a claim of contract right against it is not valid and to direct its legal representative to test in the courts the right so asserted, neither impairs the obligation of the contract assailed nor deprives the persons claiming under it of their property without due process of law.

In *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179, it was asserted as a ground of federal jurisdiction that a resolution of the Des Moines City Council was a law which impaired the obligation of the contract which the railway company claimed to have with the City, and that if given effect it would deprive the company of its property without due process of law. The Circuit Court overruled an objection to its jurisdiction and granted an injunction against the enforcement of the resolution. This resolution, in terms, ordered the railway companies to remove their tracks, poles and wires from the streets, and in case of failure to do so within a time stated, the City Solicitor was "instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the resolution." In a unanimous decision, this court reverses the lower court, saying:

"We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the City Solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the City Solicitor to take action to enforce the city's position. The only action to be expected from a City Solicitor is a suit in court. We cannot take it to have been within the meaning of the

direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

Since the court "lays on one side" the distinction between a resolution and an ordinance, this decision seems clearly to rule the case at bar.

Again, in *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, a claim to federal jurisdiction was based on a resolution of an Ohio city council, which it was claimed impaired the obligation of a contract which the water company had with the City. But this court, while finding that the record disclosed the City as claiming that the water company did not have a valid contract with the City and that a suit to test its validity had been instituted in a state court by the City Solicitor, nevertheless held that the action so taken was not obnoxious to the prohibition of the Federal Constitution, and the case was dismissed for want of jurisdiction.

The ordinance involved in this case, like the one in the *Des Moines Case,* having regard to all of its provisions, even including its title, seems very clearly to be no more than an assertion on the part of the City Council of what it considers the rights of the City to be, with authority and direction to the City Solicitor to resort to the courts to test the validity of the claims made, if they are denied by the traction companies, and the cases cited are authority sufficient, if indeed authority be needed, to justify the conclusion that such an expression of purpose to resort to the courts of the country and to abide by their decision, is not a law impairing the obligation of a contract, within the meaning of the Constitution.

A careful reading of this ordinance, especially of §§ 3 and 5, makes it convincingly clear that the writer of it must have had in mind the decisions which we have cited;

and that he has attempted, successfully it seems to me, to keep clearly within the law established by them.

The allegation in paragraph 14 of the bill, that the City, and its agents and employees, threaten to interfere with and prevent the operation of the street railways, states no invasion of a federal right, unless such action is threatened under warrant of an invalid ordinance. If the ordinance is valid it can add nothing to the other allegations of the bill and if invalid it is futile.

It is impossible for me, also, to share in the interpretation given to § 4 of the ordinance which makes it the subject of special injunctive relief. The section provides that the continuing to operate cars on the streets in controversy "shall be deemed an acceptance of this ordinance and of all of the terms hereof." Considering the ordinance as a whole, and not as if it were a group of independent provisions, if this section has any meaning at all, it cannot be more than an assertion on the part of the City, that if the companies, without formal acceptance, but without protest, should continue to operate the lines of railway, such action would be taken as implying an acceptance of the burdens as well as of the benefits of the ordinance. But such an implication of acceptance certainly could not prevail in any court against an assertion to the contrary by the companies.

If the companies really have contract rights in the streets, as they claim that they have, such rights cannot be impaired by the exercise of them, and if they do not have such rights, this declaration of the section cannot harm them, and therefore it cannot properly serve as a basis, either for jurisdiction or for an injunction.

Thus considering the question of jurisdiction as depending wholly upon the form of the allegations of the bill, it seems very clear that the federal courts are without jurisdiction in the case.

If, now, we consider the answer in the case we shall

find the strongest possible confirmation of the conclusion just arrived at.

The first paragraph of the answer denies the jurisdiction of the court and asserts that it is apparent on the face of the bill that it seeks to prevent the City of Cincinnati from resorting to the state courts for a decision of the controversy, and the answer to paragraph 13 of the bill, quoted above, is a special denial. Then follows this paragraph of the answer:

"13. The defendant denies that under the authority of said Ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage or injury of any kind to the plaintiffs, or either of them, *and defendant avers that the enforcement of said Ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties.*"

It is difficult to imagine how a clearer statement than this could be framed on the part of the City, that the enforcement of the ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction.

When to all this we add that not one word of evidence was offered on the trial tending to sustain the allegations of paragraph 14 of the bill, that the defendant threatened and intended to interfere with and unless enjoined would prevent the operation of the street railways, it becomes very clear that we have before us an utterly unsubstantial and purely paper attempt to carry into the federal courts a case which, because of its "many difficult problems arising under local laws," is peculiarly one for first decision in the state courts, with the right of revision in this court as provided for by law.

It has been for many years the constant effort, repeatedly declared, of Congress and of this court, to prevent the evasion of the Constitution and laws of the United States, by bringing into the federal courts controversies between citizens of the same State, *Bernards Township* v. *Stebbins*, 109 U. S. 341, 350, and it is because of my conviction that the integrity of the jurisdiction of the federal courts can best be preserved by refusing to extend it to doubtful cases that this dissent is written thus at length. My conclusion is that the plea of the defendant to the jurisdiction of the District Court should have been sustained on the face of the bill, but that if doubt were entertained as to this, then when the plaintiffs rested without attempting to prove their allegations of intended interference by the City with the operation of the roads, it became the duty of the District Court to proceed no further, but to dismiss the case, for the reason that it did not really and substantially involve a controversy properly within the jurisdiction of the court. Judicial Code, § 37.

There remains to be added only this: That, even if agreement were possible with the conclusion that the court has jurisdiction in the case, nevertheless I could not agree with the judgment rendered, for the reason that it seems to me very clear that the principal grant on which the plaintiffs rely, that from the County Commissioners dated March 23, 1889, expired on March 23, 1914, before the ordinance complained of was passed. My reason for this conclusion is that the Supreme Court of Ohio in 1905 held the Ohio Act of 1883 (80 Ohio Laws, 173) invalid because in violation of § 26 of Article II of the state constitution. *Railway Co.* v. *Railway Co.*, 5 Ohio C. C. (N. S.) 583, affirmed 73 Ohio St. 364. This is conclusive on all federal courts. If unconstitutional in 1905, the act was unconstitutional in 1889, when the grant by the Commissioners was made, and therefore

§§ 3439 and 2502 of the Revised Statutes of Ohio of 1880 were then in force and imposed the limitation of twenty-five years on all grants by County Commissioners. The doctrine that rights acquired before cannot be impaired by a change of judicial decision, has no application to this case, for the reason that there was no settled principle of decision in Ohio in cases such as we have here, where counties were concerned, prior to 1889, or at any other time, but, as the decisions abundantly prove, each case as it arose was disposed of on its own peculiar facts, e. g., *State* v. *Powers*, 38 Ohio St. 54 (1882), overruled in *State ex rel.* v. *Shearer*, 46 Ohio St. 275 (1889).

For the reasons here given and upon the authorities cited, my conclusion is that the decree of the District Court should be reversed, and the case remanded with instructions to dismiss the bill for want of jurisdiction.

MR. JUSTICE BRANDEIS concurs in this dissent.

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## LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 91. Submitted November 23, 1917.—Decided January 7, 1918.

The appellant applied to the Interstate Commerce Commission under § 4 of the Act to Regulate Commerce, as amended June 18, 1910, for relief from the long and short haul provision with reference to many hundred points on its line, including Nashville, Louisville and Bowling Green. After a full, separate hearing of the conditions affecting rates applicable to the three places named, the Commission made an order merely denying the appellant the authority to con-

tinue on certain traffic through Bowling Green to Louisville and to Nashville lower rates "than are contemporaneously in effect on like traffic to and from Bowling Green." *Held:* (1) That the Commission's findings of fact, based on ample evidence, were conclusive. (2) That the order was not objectionable as to form or as broader than the hearing, or because other phases of the application were not acted upon, or as otherwise beyond the Commission's power. (3) That, on the issues presented, the validity of the order depended on the evidence before the Commission, and the trial court in this suit to set it aside did not err in excluding other evidence.

225 Fed. Rep. 571, affirmed.

THE case is stated in the opinion.

*Mr. Henry L. Stone, Mr. Wm. A. Colston, Mr. Wm. A. Northcutt, Mr. Nelson W. Proctor* and *Mr. Wm. Burger* for appellant.

*Mr. Assistant Attorney General Frierson* and *Mr. Alex. Koplin* for the United States.

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

MR. JUSTICE BRANDEIS delivered the opinion of the court:

Bowling Green, Kentucky, is located on the main line of the Louisville and Nashville Railroad, 114 miles south of Louisville and 73 miles north of Nashville. Prior to the year 1910 the Railroad had established many rates to and from Bowling Green which were higher than those charged by it for longer distances over the same route in the same direction to and from Louisville and Nashville. The amendment to § 4 of the Act to Regulate Commerce, made June 18, 1910 (c. 309, 36 Stat. 539, 547), prohibits any such higher charges for shorter distances unless previously authorized by the Interstate Commerce

Commission; but it provided that carriers might, within six months thereafter, apply to the Commission for authority to continue in effect charges of that nature then lawfully existing. Within the period so fixed the Railroad filed such an application covering many hundred different places scattered over its extended system, and including both Louisville and Nashville. That part of the application which sought to continue in effect lower rates to and from Louisville and Nashville than those in effect to and from Bowling Green, was heard separately.[1] The Railroad sought to justify the lower charges for the longer distances by showing that it had to meet, particularly as to Nashville traffic, competition both by water and by rail. This contention was opposed by evidence to the effect that at Bowling Green, also, there was water competition, actual or potential, and that at Nashville there was no real rail competition. After full hearing an order was entered which (after several revisions) merely denied to the Railroad authority to continue on certain traffic through Bowling Green to Louisville and to Nashville lower rates "than are contemporaneously in effect on like traffic to and from Bowling Green." *Bowling Green Business Men's Association* v. *Louisville & Nashville R. R. Co.*, 24 I. C. C. 228.

The Railroad then brought this suit in the Commerce Court to set aside the order of the Commission and asked for a temporary injunction.[2] Upon the abolition of that

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[1] Rates to Clarksville, a city 64 miles southwest of Bowling Green on a branch line of the Railroad were considered at the same time, but the order here assailed did not deal with Clarksville rates.

[2] The Commerce Court dismissed the bill for want of jurisdiction on the ground that its jurisdiction to review orders of the Commission applied only to affirmative orders (207 Fed. Rep. 591). Pending an appeal of the case to this court, *Intermountain Rates Cases*, 234 U. S. 476, was decided, whereupon appellees herein confessed error, the decree was reversed and the case was remanded to the District Court for further proceedings.

court by Act of October 22, 1913, c. 32, 38 Stat. 208, 219, the case was heard in the District Court of the United States for the Western District of Kentucky before three judges. The Railroad assailed the validity of the order on many grounds; but its main contentions were, that the order complained of was not such a negative order as was contemplated by the fourth section of the Act to Regulate Commerce, was not responsive to the application and hence, was not such an order as the Commission had power to make; and also that its decision was "contrary to the indisputable nature of the evidence" and not supported by any evidence. The District Court refused to grant a temporary injunction and dismissed the bill. (225 Fed. Rep. 571.)

The case comes here by direct appeal; and thirty-eight errors are assigned. Eleven relate to the weight or sufficiency of the evidence before the Commission. The evidence was conflicting. And, as there was ample to sustain the findings, they are conclusive. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. Other assignments present, in substance, either criticism of the reasoning of the Commission or of the form of the order, or assert unsubstantial or unsubstantiated irregularities in practice before the Commission; such as that the order deprived plaintiff of its property without due process of law, because the order was "broader than the hearing held in connection therewith," or that it was invalid because the Commission failed to act on "other phases" of the application. *United States* v. *Merchants' and Manufacturers' Traffic Association*, 242 U. S. 178. Other errors assigned relate to the exclusion by the court of evidence which was clearly inadmissible, both because of the character of the evidence and because, on the issues presented, the validity of the order must be determined upon the evidence introduced before the Commission. Still other assignments allege, in varying language but without

statement of reasons, that the Commission was without power to enter the order or that the court erred in denying the relief prayed for. Many of the assignments of error are not now insisted upon. None deserves detailed discussion. All are unsound. The decree dismissing the bill is

*Affirmed.*

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## ROSEN ET AL. v. UNITED STATES.

## PAKAS v. UNITED STATES.

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

Nos. 365, 438. Argued December 12, 1917.—Decided January 7, 1918.

Under the modern rule, supported both by legislation and by the very great weight of judicial authority, all persons of competent understanding are permitted to testify to relevant facts within their knowledge, and the former common-law rule disqualifying witnesses convicted of crime will no longer be followed, but such conviction will be given due consideration in determining the credibility and weight of their testimony.

In a criminal trial in a United States District Court in New York, a witness, previously sentenced and imprisoned under the law of that State for the crime of forgery in the second degree, was competent to testify for the United States against his co-defendants, irrespective of whether he would have been disqualified by the rules of competency as they were in New York at the date of the Judiciary Act of 1789. *United States* v. *Reid*, 12 How. 361, is to this extent disapproved.

Under Rev. Stats., § 161, which authorizes the head of each Department "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the . . . property appertaining to it,"

and under and in supplement of § 194 of the Criminal Code, the Postmaster General by a general order may designate as letter boxes for the receipt or delivery of mail matter all letter boxes and other receptacles which are so used or intended on city delivery or other mail routes; a privately owned box coming within such designation is an "authorized depository for mail matter" within the meaning of the penal section, and a theft of letters from such a box is punishable as the section prescribes. So *held* where the letters were stolen from boxes placed by tenants for receipt of mail in the halls of buildings in which they had their places of business. The boxes bore the names of the owners and were not locked. Mail was deposited in them by the carriers, but not collected from them.

Mail matter which has not reached the manual possession of the addressee, but lies in a private letter box, designated as an authorized depository under the federal law, where it has been placed by the delivering carrier, is still subject to the protective power of the Government.

237 Fed. Rep. 810; 240 Fed. Rep. 350, affirmed.

THE cases are stated in the opinion.

*Mr. Terence J. McManus*, with whom *Mr. Meier Steinbrink* was on the briefs, for petitioners.

*Mr. Assistant Attorney General Fitts* for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases present precisely the same questions for decision. They were argued and will be decided together.

In No. 365 Rosen and Wagner were indicted in the District Court of the United States for the Eastern District of New York with one Broder for conspiring to buy and receive certain checks and letters which had been stolen from "duly authorized depositories for mail matter of the United States," and which were known to the accused to have been so stolen. Broder pleaded guilty, and when he was afterwards called as a witness for the

Government the objection was made that he was not competent to testify for the reason that, as was admitted by the Government, he had theretofore pleaded guilty to the crime of forgery in the second degree, in the Court of General Sessions, in the County and State of New York, had been sentenced to imprisonment, and had served his sentence. The objection was overruled and Broder was permitted to testify. This ruling was assigned as error in the Circuit Court of Appeals, where it was affirmed, and it is now assigned as error in this court.

The second claim of error is that the trial court erred in refusing the motion of the defendants to direct a verdict of acquittal on the ground that no crime had been committed, for the reason that the box from which the mail was taken was not "an authorized depository of the mail," and that it was taken therefrom after it had left the possession of the Government.

Broder testified, and it was not disputed, that the letters were stolen from boxes placed by tenants for the receipt of mail in the halls of buildings in which they had their places of business. The boxes bore the names of the owners and were not locked, and while mail was deposited in them by the carriers no mail was collected from them.

In No. 438 Pakas and Broder, the same Broder as in No. 365, were jointly indicted for buying and receiving three designated checks, knowing the same to have been stolen from letters which had been deposited in the United States mail for delivery by the Post Office establishment of the United States. The same questions are presented, raised in the same manner, as in No. 365.

For the validity of the claim that Broder was disqualified as a witness by his sentence for the crime of forgery, the plaintiffs in error rely upon *United States* v. *Reid*, 12 How. 361, decided in 1851. In that case it was

held that the competency of witnesses in criminal trials in United States courts must be determined by the rules of evidence which were in force in the respective States when the Judiciary Act of 1789 was passed, and the argument in this case is, that by the common law as it was administered in New York in 1789 a person found guilty of forgery and sentenced was thereby rendered incompetent as a witness until pardoned, and that, therefore, the objection to Broder should have been sustained.

While the decision in *United States* v. *Reid, supra,* has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in *Logan* v. *United States,* 144 U. S. 263–301, and in *Benson* v. *United States,* 146 U. S. 325.

The *Benson Case* differed from the *Reid Case* only in that in the former the witness whose competency was objected to was called by the Government while in the latter he was called by the defendant. The testimony of the witness was admitted in the one case but it was rejected in the other, and both judgments were affirmed by this court—however forty years had intervened between the two trials. In the *Benson Case,* decided in 1892, this court, after determining that the *Reid Case* was not decisive of it, proceeded to examine the question then before it "in the light of general authority and sound reason," and after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change which was "wrought partially by legislation and partially by judicial construction," and how "the merely technical barriers which excluded witnesses from the stand had been removed," proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

Accepting as we do the authority of the later, the *Benson Case,* rather than that of the earlier decision, we

shall dispose of the first question in this case, "in the light of general authority and sound reason."

In the almost twenty years which have elapsed since the decision of the *Benson Case*, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

Since the decision in the *Benson Case* we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury, Rev. Stats., § 5392, by the enactment of the Federal Criminal Code in 1909 with this provision omitted and § 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling

of the lower courts on this first claim of error should be approved.

There remains the claim that the boxes from which the letters were stolen were not "authorized depositories for mail matter," and that, therefore, the stealing of the letters from them did not violate § 194 of the Federal Criminal Code, of March 4, 1909, under which petitioners were indicted.

Section 194 provides that:

"Whoever shall steal, take, or abstract . . . from . . . any . . . *authorized depository for mail matter* . . . any letter . . . or shall abstract or remove from any such letter . . . any article," etc., shall be fined, etc.

Section 161 of the Revised Statutes of the United States provides:

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

A regulation promulgated as an order of the Post Office Department prior to the dates on which the defendants are charged with having committed the crime for which they were indicted was introduced in evidence and reads as follows:

"Any letter box or other receptacle intended or used for the receipt or delivery of mail matter on any city delivery route . . . or other mail route is hereby designated a letter box for the receipt or delivery of mail matter, within the meaning of the Act of March 4, 1909."

This regulation was obviously intended to supplement § 194 of the Criminal Code, under which the defendants were indicted, by supplying the detail which Congress contemplated should be so supplied when it left unde-

fined "or other authorized depository for mail matter." Such a regulation, if fairly within the scope of the authority given by Congress to make it, has the force and effect of law, and violations of it are punishable under the act which it supplements.

That § 194 contemplates that its general language shall be made definite by such order is plain, and that the order is well within the authority conferred upon the Postmaster General by Rev. Stats., § 161, cannot be doubted, prescribing, as it does, a rule for the conduct of carriers in the discharge of their duties in the delivery of mail and for safely preserving the property committed to the care of the Department until it shall reach the persons to whom it is addressed. This satisfies the law. *Searight* v. *Stokes*, 3 How. 151–169; *Ex parte Reed*, 100 U. S. 13, 22; *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389.

The suggestion that when the mail was deposited in a privately owned box it passed out of the custody of the Government and beyond the protection of the law does not deserve extended notice. The letters which were stolen did not reach the manual possession of the persons to whom they were addressed, but were taken from an authorized depository over which the act of Congress, by its express terms, extended its protection until its function had been served.

It results that the judgments of the Circuit Court of Appeals must be

*Affirmed.*

Mr. Justice Van Devanter and Mr. Justice McReynolds dissent from so much of the opinion as departs from the rule settled in *United States* v. *Reid* and *Logan* v. *United States*, which they think is in no way modified by what actually was decided in *Benson* v. *United States*.

# GOLDMAN ET AL. *v.* UNITED STATES.

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

No. 702. Argued December 13, 14, 1917.—Decided January 14, 1918.

The Selective Draft Law of May 18, 1917, *upheld* as constitutional, on the authority of the *Selective Draft Law Cases, ante*, 366, in a case of conspiracy to violate the act by dissuading persons from registering.

In reviewing directly a judgment of the District Court in a criminal case, when the constitutional questions upon which the jurisdiction of this court depends are not frivolous but are resolved against the plaintiff in error, other questions raised are to be considered and passed upon.

It is well settled that, under § 37 of the Criminal Code, a conspiracy to commit an offense, when followed by overt acts, is punishable as a substantive crime, whether the illegal end has been accomplished or not.

Upon a review of the whole record, the court finds that the objection that there was no evidence of guilt for the jury is absolutely devoid of merit, and based upon the false assumption that the power to review includes the right to invade the province of the jury by determining questions of credibility and weight of evidence.

Affirmed.

The case is stated in the opinion.

*Mr. Harry Weinberger* for plaintiffs in error.

*The Solicitor General*, with whom *Mr. Robert Szold* was on the brief, for the United States. See *ante*, 368.

*Mr. Hannis Taylor* and *Mr. Joseph E. Black*, by leave of court, filed a brief as *amici curiæ*.

*Mr. Walter Nelles*, by leave of court, filed a brief as *amicus curiæ*.

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

Because of the constitutional questions involved the plaintiffs in error prosecute this direct writ of error to reverse a crimimal conviction and resulting sentence imposed upon them. The indictment upon which the conviction was had charged them with having, in violation of §§ 37 and 332 of the Criminal Code, unlawfully conspired together and with others unknown to induce persons, who by the Selective Draft Law of May 18, 1917, c. 15, 40 Stat. 76, were under the duty to register, to disobey the law by failing to register. Five specified overt acts were in the indictment charged to have to have been committed in furtherance of the alleged illegal conspiracy.

Seven grounds of error were assigned at the time of the allowance of the writ: 1. The refusal of the court at the request of the defendants to dismiss the indictment on the ground that the formation of a conspiracy to induce persons not to register as they were required under the law to do, and the performance of overt acts to carry out the conspiracy, constituted no offense. 2. The action of the court in refusing to grant a motion in arrest of judgment on the same ground. 3. The refusal to set aside the verdict because the facts proved did not constitute an offense against the United States. 4. The denial of a motion to dismiss the prosecution at the request of the defendants on the ground that the Selective Draft Law, upon which the alleged duty to register depended, was repugnant to the Constitution and void, there being numerous specifications on this subject involving a challenge of all power in Congress to have enacted the law, and, moreover (upon the assumption of some power,) an assertion of the repugnancy of the statute to the Constitution, resulting from various provisions which the act contained. 5. The de-

nial by the court of a motion made at the close of the case to dismiss the indictment on the ground that it stated no offense, as previously insisted, and upon the further ground that, in any event, there was no proof of the alleged conspiracy or the averred overt acts, or of any act adequate to show guilt. 6 and 7. The refusal of a motion to set aside the verdict and in arrest of judgment because the verdict was contrary to law and unsupported by evidence, upon grounds which had been previously urged and overruled.

Putting aside the multiplication which results from urging the same ground several times because when once made it was adhered to and reiterated at different stages of the trial, it is clear that the assignments embrace only three propositions: 1. The failure to dismiss the prosecution because of the repugnancy of the Selective Draft Law to the Constitution, for the reasons relied upon. 2. The refusal to dismiss because the indictment stated no offense. 3. The refusal to dismiss because there was no proof of conspiracy or of any overt acts adequate to have justified the submission of the case to the jury. Indeed in the elaborate argument at bar all the assignments of error are treated as embraced under the propositions thus stated and we therefore come to dispose of the case from such point of view.

1. The grounds here made the basis of the charge that the Selective Draft Law is repugnant to the Constitution are, so far as they concern the question of registration provided for by that law, identical with those which were urged in *Arver* v. *United States* [*Selective Draft Law Cases*], *ante*, 366, and were there adversely disposed of. The ruling in that case therefore also adversely disposes of all the relevant constitutional questions in this. The duty nevertheless remains to consider the other questions. *Brolan* v. *United States*, 236 U. S. 216, 217-218.

2. The contention that the indictment stated no of-

fense proceeds upon the assumption, reiterated in various forms of statement, that no crime results from an unlawful conspiracy to bring about an illegal act, joined with the doing of overt acts in furtherance of the conspiracy, unless the conspiracy has accomplished its unlawful purpose by causing the illegal act to be committed. This, however, but disregards the settled doctrine that an unlawful conspiracy under § 37 of the Criminal Code to bring about an illegal act and the doing of overt acts in furtherance of such conspiracy is in and of itself inherently and substantively a crime punishable as such irrespective of whether the result of the conspiracy has been to accomplish its illegal end. *United States* v. *Rabinowich*, 238 U. S. 78, 85, 86, and authorities there cited.

3. Sifting out of the arguments advanced to support the proposition that there was no evidence whatever tending to show guilt, contentions based upon the misconception as to the law of conspiracy which we have just adversely disposed of, and, moreover, contentions concerning an asserted misuse of discretion by the court below in ruling on an application to postpone the trial, which, as we have seen, were not even remotely referred to in the assignments of error, we think all the arguments rest upon the assumption that the power to review embraces the right to invade the province of the jury by determining questions of credibility and weight of evidence and from the residuum of evidence, resulting from indulging in and applying the results of such erroneous assumption, drawing the conclusion as to no evidence relied upon. While this statement suffices to dispose of the case without going further, we nevertheless say without recapitulating the evidence that after a review of the whole record we think the proposition that there was no evidence whatever of guilt to go to the jury is absolutely devoid of merit.

It follows that the judgment below must be and it is

*Affirmed.*

# KRAMER ET AL. *v.* UNITED STATES.

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

No. 680. Argued December 13, 14, 1917.—Decided January 14, 1918.

After an examination of the entire record, the court finds no merit in the contention that the case should have been withheld from the jury for want of evidence tending to show the accused guilty of the crime charged—a conspiracy (with overt acts) to violate the Selective Draft Law, by dissuading persons from registering.

As to other questions, the case is indistinguishable from *Goldman* v. *United States*, *ante*, 474, and is decided on the authority of that case and the *Selective Draft Law Cases*, *ante*, 366.

Affirmed.

The case is stated in the opinion.

*Mr. Harry Weinberger* for plaintiffs in error.

*The Solicitor General*, with whom *Mr. Robert Szold* was on the brief, for the United States. See *ante*, 368.

*Mr. Hannis Taylor* and *Mr. Joseph E. Black*, by leave of court, filed a brief as *amici curiæ*.

*Mr. Walter Nelles*, by leave of court, filed a brief as *amicus curiæ*.

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

In this case, as in No. 702, just previously decided, *ante*, 474, because of constitutional questions the case was brought here by direct writ of error, with the object of re-

viewing and reversing a conviction and sentence under an indictment charging an unlawful conspiracy to induce persons, whose duty it was to register under the Selective Draft Law, not to perform that duty, and alleging overt acts done for the purpose of carrying out the illegal conspiracy. The defenses were substantially the same as those urged in the previous case and the assignments of error made at the time of the allowance of the writs were identical. In fact, at bar the propositions and arguments relied upon in the previous case were stated to be controlling in this. But, therefore, for the fact that there was different evidence in the two cases, the considerations which control the one control the other. No distinction, however, results from that difference, since we are of opinion in this case as we were in the other, after an examination of the entire record, that the contention that there was no evidence tending to show guilt, and hence the case should have been taken from the jury, is without merit.

As thus any conceivable distinction between the two cases is removed, it follows that for the reasons stated in the *Goldman Case, ante,* 474, just decided, and in the *Arver Case,* [*Selective Draft Law Cases*] *ante,* 366, as to the constitutional questions, the judgment below in this case must be and it is

*Affirmed.*

# RUTHENBERG ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 656. Argued December 13, 14, 1917.—Decided January 14, 1918.

As to the constitutionality of the Selective Draft Law, the case is ruled by the *Selective Draft Law Cases*, *ante*, 366.

No infraction of constitutional or statutory right is predicable of the fact that the indictment and conviction of a Socialist are returned by grand and petit juries composed exclusively of members of other political parties, and property owners.

Upon a criminal trial of defendants who are Socialists, it is not error for the District Court to refuse them permission to ask the jurors whether they distinguish between Socialists and Anarchists.

The Sixth Amendment, both by its plain text and as construed contemporaneously by the Judiciary Act of 1789, and continuously by legislative and judicial practice (Rev. Stats., § 802; Jud. Code, § 277), permits the drawing of a jury from a part of the district in criminal cases—in this case from a division.

A sworn charge previously made is not essential to the validity of an indictment.

By § 5 of the Selective Draft Law, all male persons between the ages of 21 and 30, both inclusive (with certain exceptions), must register. In an indictment under it for failure to register and for aiding, abetting, etc., such failure, it is sufficient, therefore, to allege that the delinquent was a male person between those ages, and not necessary to allege that he was a citizen of the United States, or a person, not an alien enemy, who had declared his intention to become such citizen, since these latter matters go only to the liability to military duty, under the act, and not to the duty to register.

An indictment charging one person with the direct commission of the criminal act, and others with aiding, abetting, counseling, commanding and inducing it, charges but one offense against all, since, by § 332 of the Criminal Code, all are principals.

By § 332 of the Criminal Code, charging a defendant as an aider and abettor of the direct criminal act states the offense against him as principal, though the offense be a misdemeanor, and though at common law there could be no accessory to a misdemeanor.

Affirmed.

THE case is stated in the opinion.

*Mr. Joseph W. Sharts*, with whom *Mr. Morris H. Wolf* was on the brief, for plaintiffs in error.

*The Solicitor General*, with whom *Mr. Robert Szold* was on the brief, for the United States. See *ante*, 368.

*Mr. Hannis Taylor* and *Mr. Joseph E. Black*, by leave of court, filed a brief as *amici curiæ*.

*Mr. Walter Nelles*, by leave of court, filed a brief as *amicus curiæ*.

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

Schue was indicted for having failed to register as required by the Act of Congress of May 18, 1917, c. 15, 40 Stat. 76, known as the Selective Draft Law, and in the same indictment it was charged that Ruthenberg, Wagenknecht and Baker, the plaintiffs in error, "did aid, abet, counsel, command and induce" Schue in failing to register "and procure him to commit the offense involved in his so doing." Schue pleaded guilty and the other three defendants were tried, found guilty and sentenced. Because of objections raised to the constitutionality of the act this direct writ of error was prosecuted.

As every contention made in this case concerning the unconstitutionality of the Selective Draft Law was urged in *Arver* v. *United States*, [*Selective Draft Law Cases*], *ante*, 366, and held to be without merit, that subject may be put out of view. The remaining assignments of error are to say the least highly technical, and require only the briefest notice.

The want of merit in the proposition that constitutional

or statutory rights were denied the plaintiffs in error, who were Socialists, because the grand and trial juries were composed exclusively of members of other political parties and of property owners, is demonstrated by previous adverse rulings upon similiar contentions urged by negro defendants indicted and tried by juries composed of white men. *Martin* v. *Texas*, 200 U. S. 316, 320, 321; *Thomas* v. *Texas*, 212 U. S. 278, 282.

A further objection that plaintiffs in error were prejudiced by the refusal of the court below to permit them in examining the jurors to inquire whether they distinguished between Socialists and Anarchists is likewise disposed of by previous decisions. *Spies* v. *Illinois*, 123 U. S. 131; *Thiede* v. *Utah Territory*, 159 U. S. 510; *Holt* v. *United States*, 218 U. S. 245, 248.

It is contended that plaintiffs in error were not tried by a jury of the State and district in which the crime was committed, in violation of the Sixth Amendment, because the jurors were drawn not from the entire district but only from one division thereof. The proposition disregards the plain text of the Sixth Amendment, the contemporary construction placed upon it by the Judiciary Act of 1789 (c. 20, 1 Stat. 73, 88, § 29), expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. Section 802, Rev. Stats.; § 277, Judicial Code. *Agnew* v. *United States*, 165 U. S. 36, 43; *United States* v. *Wan Lee*, 44 Fed. Rep. 707; *United States* v. *Ayres*, 46 Fed. Rep. 651; *United States* v. *Peuschel*, 116 Fed. Rep. 642, 646; *Clement* v. *United States*, 149 Fed. Rep. 305; *Spencer* v. *United States*, 169 Fed. Rep. 562, 565, 566; *United States* v. *Merchants' &c. Co.*, 187 Fed. Rep. 355, 359, 362.

It is argued that the court below erred in refusing to quash the indictment on the ground that it had been found "without a sworn charge previously made." It is settled

that such a charge is unnecessary. *Frisbie* v. *United States*, 157 U. S. 160, 163; *Hale* v. *Henkel*, 201 U. S. 43, 59, 60.

Further, it is said, the indictment was insufficient because it did not allege that Schue, who it was charged refused to register, was a citizen of the United States or was a person not an alien enemy who had declared his intention to become such citizen. But this overlooks the fact that although only the persons described were subject to military duty under the terms of the act, by § 5 "all male persons between the ages of twenty-one and thirty, both inclusive" (with certain exceptions not here material), were required to register. It was sufficient to charge, therefore, as the indictment did, that Schue was a male person between the designated ages.

The contention that more than one offense was charged in the same indictment is without merit. Section 332 of the Criminal Code provides that "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." The indictment, therefore, charged but one offense—the refusal of Schue to register—plaintiffs in error being charged as principals in procuring such refusal. And this also disposes of a further contention based upon the same misconception that, as at common law there could be no accessory to a misdemeanor, no offense was charged in the indictment.

Other errors are assigned but we do not expressly notice them, some because they are not urged in argument, others because they are so unsubstantial as not to require even statement, and we content ourselves with saying that after a careful examination of the whole record we find no error, and the judgment is

*Affirmed.*

# MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS ET AL. *v.* STATE OF TEXAS.

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

No. 113. Submitted January 2, 1918.—Decided January 14, 1918.

Where, in regular course, a passenger train is moved by one company from one State to a point in another and is there taken charge of and carried to destination by a second company, local to the second State, it is manifestly erroneous to hold that its interstate character is lost because the second company employs new crews and engines and cannot go beyond the state line.

An order of the Texas Railroad Commission requiring passenger trains in the State to leave stations on advertised schedule time, and allowing them no more than 30 minutes at origin or points of junction to make connection with trains of other lines, or 10 minutes more if at the end of the 30 minutes the connecting trains are in sight, is an unjustifiable interference with interstate commerce as applied to a local railroad company in respect of an interstate train which, under contract, the company receives at a point within the state line from a connecting company, and forwards (in sections) to its destinations within the State. The infliction of penalties upon the local corporation, under the local law, for failure to comply with the order, is beyond the power of the state courts in such a case. So *held* where, though the trial court found otherwise, the decisions of the intermediate and supreme courts of the State assumed that there was sufficient accommodation for local traffic independent of the through train in question—an assumption which this court adopts; and where the train was received too late to comply.

The suggestion that the order could have been complied with by running an extra train locally, if the interstate train was not on time, is impractical, and also inadequate in form, since, having exercised its right to advertise the latter train, the company could not escape liability for delay of that train by operating another.

The powers of a State over the local business of a local railroad company do not authorize the imposition of serious, unwarranted and unjust burdens in respect of its interstate trains.

167 S. W. Rep. 822, reversed.

The case is stated in the opinion.

*Mr. Alexander H. McKnight, Mr. C. S. Burg, Mr. Joseph M. Bryson, Mr. Alex. Britton* and *Mr. Charles C. Huff* for plaintiffs in error.

*Mr. B. F. Looney*, Attorney General of the State of Texas, and *Mr. Luther Nickels*, Assistant Attorney General of the State of Texas, for defendant in error:

The order is calculated merely to promote convenience of the traveling public in Texas. The trains affected are not used "exclusively for interstate traffic" as in *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514; the order does not interfere with their operation before they reach the state line. Even if it did affect their operation in other States, it would be to prevent delay—to aid commerce. Conformity to established and publicly advertised schedules substantially promotes the convenience of the traveling public. *Atlantic Coast Line* v. *North Carolina Corp. Comm.*, 206 U. S. 1, 22.

Admitting that the order incidentally affects interstate commerce, it is within the class of reasonable state police regulations, in the interest of the safety, good order, convenience and comfort of passengers and the public, which are not in themselves regulations of interstate commerce. *Gladson* v. *Minnesota*, 166 U. S. 427; *Atlantic Coast Line* v. *North Carolina Corp. Comm., supra.* Such regulations, being in "aid" of interstate commerce, are valid. *Lake Shore & Michigan So. Ry. Co.* v. *Ohio*, 173 U. S. 285; *Mobile County* v. *Kimball County*, 102 U. S. 691.

The running of substitute trains when the regular trains are late (not required by the order but merely an alternative method whereby the carrier may comply with it) would not result in discrimination against interstate passengers, for the regular train, when it arrived, would

necessarily continue its trip south. Nor would the cost of running such trains result in a burden on interstate commerce. The effect, if any, is remote, indirect and incidental. So with respect to the imposition of penalties for violations of the order. The penalties, like ordinary *ad valorem* tax levies upon the physical property located in the State, may *ultimately* result in an increased burdening of commerce, but this is not a regulation of it.

The order does not deprive the carrier of its property without due process of law. The evidence and the findings of the state courts show that the facilities available for intrastate traffic, other than trains Nos. 9 and 209, were wholly inadequate. Extra trains could be required under the state law. *Gulf, C. & S. F. Ry. Co.* v. *State*, 169 S. W. Rep. 385. Since the running of extra trains is due entirely to the voluntary acts of the carrier, no federal question arises under the Fourteenth Amendment. In this respect the case differs from *Atlantic Coast Line* v. *North Carolina Corporation Comm.*, 206 U. S. 1, where the running of an extra train was treated by the Corporation Commission and the state courts as the most direct and efficient means of complying with the order. Even if a federal question does arise, in this feature of the case, the invalidating facts are not proved. It was neither alleged nor proved that the running of the extra trains would entail a pecuniary loss either with respect to the particular facility or the general revenues of the company. The record negatives any idea of a loss. Notwithstanding the Corporation Commission and the state courts in *Atlantic Coast Line* v. *North Carolina Corp. Comm.*, *supra*, assumed that the operation of the train there in question would produce a loss, this court sustained the order. And that case is decisive against the plaintiff in error here. See also *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 277 *et seq.*

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the State of Texas to recover penalites for violation of an order of the State Railroad Commission. This order required passenger trains in Texas to start from their point of origin and from stations on the line in accordance with advertised schedule, allowing them not exceeding thirty minutes at origin or points of junction with other lines to make connection with trains on such other lines, and not exceeding ten minutes more if at the end of the thirty minutes the connecting trains were in sight. There were some other qualifications not necessary to be stated. The defendant's passenger trains concerned were numbers 9 and 209, and were parts of a train, also numbered 9, of the Missouri, Kansas & Texas Railway, a different corporation, taken charge of by the defendant at Denison, Texas, about five miles south of the Texas and Oklahoma state line, under a contract with the Missouri, Kansas & Texas. In pursuance of this contract they were forwarded via Dallas and Fort Worth to Hillsboro, thence as one train to Granger and there again divided, the two parts going respectively to Galveston and San Antonio. There were similar arrangements for trains to the north. The cars received by the defendant came from St. Louis and Kansas City, Missouri, uniting at Parsons, Kansas, and thence proceeding south to Denison. The Court of Civil Appeals at first held that the movement must be regarded as a continuous one from Kansas City and St. Louis, and that the order did not apply to the train; but on a rehearing decided that as the defendant took control at Denison with new crews and engines, and as the defendant could not go beyond the state line, the movement so far as the defendant was concerned was wholly within the State. Breaches of the order having been proved, it affirmed a judgment imposing

a fine. A writ of error was refused by the Supreme Court of the State.

The Supreme Court gave up the manifestly untenable ground taken by the Court of Civil Appeals and recognized that the defendant's trains were instruments of commerce among the States, but it construed the order as applying to them none the less and held it valid as so applied. The only question with which we have to deal is whether the State Commission could intermeddle in this way, especially when there was sufficient accommodation for local traffic independent of the through trains. The defendant in error attempts to open this last matter, because the opinion of the Court of Civil Appeals in which the fact was stated was reversed by it for a different reason, and that of the court of first instance was the other way. But we regard the decision of the intermediate and the Supreme Court as proceeding upon the assumption that we have stated and that we see no reason to disturb. Again, the question is not what the State Commission might require of a road deriving its powers from the State, with regard to local business, *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 283, but whether the order if applied to this case would not unlawfully interfere with commerce among the States.

On its face the order as applied was an interference with such commerce. It undertook to fix the time allowed for stops in the course of interstate transit. It was a serious interference, for it made the defendant liable for an interstate train not starting on schedule time, when the train did not come into the defendant's hands, from another company in another State, until too late. This, as we understand the facts, was the train to which the advertised schedule applied, and if so, the mere statement of the result is enough to show that the burden imposed not only was serious but was unwarranted as well as unjust. The suggestion that compliance with the order

could have been secured by having an extra train ready to run if the regular one was not on time hardly is practical, and is not an adequate answer, even in form. For the defendant advertised, or at least had the right to advertise, the interstate train, and, if it did so, would not free itself from liability for a delay on the part of that train by offering another. We think it plain that this order was applied in a way that was beyond the power of the Commission and courts of the State. *Seaboard Air Line Ry.* v. *Blackwell*, 244 U. S. 310. *Chicago, Burlington & Quincy R. R. Co.* v. *Railroad Commission of Wisconsin*, 237 U. S. 220, 226. *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U. S. 537, 548.

*Judgment reversed.*

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## GEORGE A. FULLER COMPANY *v.* OTIS ELEVATOR COMPANY.

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

No. 128. Argued January 3, 1918.—Decided January 14, 1918.

Petitioner, having paid the judgment affirmed in *George A. Fuller Co.* v. *McCloskey*, 228 U. S. 194, recovered indemnity from the respondent, upon the ground that the latter, at the time of the accident, retained its control over the negligent servant. *Held*, that, there being sufficient evidence upon that point to warrant the verdict, petitioner's judgment should be affirmed. *Held* further, that the adjudication in the former case did not estop the petitioner upon the issue of primary responsibility here presented, as it did not determine or involve that issue, and respondent had been dismissed from that case as co-defendant before petitioner's evidence therein was heard; and, further, that such adjudication, had it purported to include that issue, would not have the force of a precedent, since in the present case there was evidence, absent in the other, which makes it impossible

to say as a matter of law that respondent did not retain control of the servant.

The writ of certiorari, when issued to the Court of Appeals of the District of Columbia, is not limited to cases in which final judgment has been entered, but only to cases in which the judgment when entered is final. Jud. Code, § 251. So *held* where the judgment of the Court of Appeals reversed the judgment of the Supreme Court of the District.

44 App. D. C. 287, reversed.

THE case is stated in the opinion.

*Mr. Edward S. Duvall, Jr.*, for petitioner.

*Mr. John S. Flannery* and *Mr. Frederic D. McKenney* for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the petitioner to recover indemnity for a judgment that it had to pay in pursuance of the decision of this court in *George A. Fuller Co.* v. *McCloskey*, 228 U. S. 194. McCloskey, the plaintiff in the former suit, was injured upon an elevator through the negligence of Locke, the man in charge of it. He was at work for the Mackay Company, which was doing some painting under a subcontract with the defendant, the present petitioner, which, it was held, as between the parties then concerned, made the defendant answerable for Locke. The petitioner had constructed an office building under an agreement with the owner, Hibbs. The Otis Elevator Company had put in the elevators, also under an agreement with Hibbs, and furnished the man Locke upon a somewhat vague understanding with the petitioner, which, the latter contends, left Locke the servant of the Elevator Company as between the parties now before this court. If the petitioner is

right and the primary duty rested on the Elevator Company it may recover in the present suit, unless the former proceedings constitute a bar. *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 328.

There was evidence fully sufficient to show that the respondent retained its control at the time of the accident, and the jury found a verdict for the plaintiff, but the judgment was set aside by the Court of Appeals on the ground that although the former judgment did not make the matter *res judicata* it concluded the case: "In view of the adjudicated facts, which were not open to the consideration of a second jury, there was no such primary liability on the part of the Otis Company as will support an action for indemnity." But there were no facts, whether adjudicated in the former case or not, that were not open to the consideration of the jury in this. The Otis Company was joined as a party defendant, it is true, in the former action, and a verdict was directed in its favor. But even if the former verdict against the petitioner had gone on the same issue that was tried in the present case, which was not the fact, it could not have concluded the petitioner in favor of the Otis Company, for the reason, if for no other, that the Otis Company was dismissed from the suit before the petitioner's evidence was heard.

The former judgment did not decide that the evidence in the present case showed as matter of law that Locke, who was in the general service of the Otis Company, was transferred for the moment to the petitioner. It did decide as matter of law that as between the Mackay Company and the petitioner their agreement left the petitioner responsible. It had no occasion to decide and did not purport to decide more. Even if it had gone farther it would have been *res inter alios* as an adjudication and it would not have been a precedent because the evidence in the present case had additional details which, if meagre,

still made it impossible to say as matter of law that the Otis Company did not retain control.

It is objected to the writ of certiorari in this case that there was no final judgment; but the writ when issued to the Court of Appeals is not limited to cases in which final judgment has been entered, but only to cases in which the judgment when entered is final. Judicial Code, § 251. The words "with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court" express the character of the power, not its conditions, as the power is granted only when a writ of error or appeal does not lie. See Judicial Code, § 240. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133. The decision in *Bruce* v. *Tobin*, 245 U. S. 18, cited for the respondent, is concerned with the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726, which requires a final judgment in terms.

*Judgment reversed.*

*Judgment of Supreme Court affirmed.*

## ILLINOIS CENTRAL RAILROAD COMPANY *v.* STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ET AL.

## STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ET AL. *v.* UNITED STATES ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 416, 448. Argued October 8, 9, 1917.—Decided January 14, 1918.

Suits brought by carriers to restrain state officials from interfering with the establishment and maintenance of intrastate rates which the carriers have adopted in pursuance of an order of the Interstate Commerce Commission requiring the removal of discrimination against interstate commerce, are not suits to "enforce" the order in the sense of the jurisdictional provision of the Act of October 22, 1913, c. 32, 38 Stat. 219, and need not be brought in the district "wherein is the residence of the party or any of the parties upon whose petition the order was made." They come within the provision in § 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, repeated in Jud. Code, § 207, by which the general jurisdiction over cases not therein enumerated is preserved.

In such a suit neither the United States nor the Commission is a necessary party, either by statute or under the rules governing suits in equity.

As, by the jurisdictional provision of the Act of October 22, 1913, *supra,* a suit to set aside an order of the Commission, relating to transportation and made upon petition, may be brought only in the district of the petitioner's residence, and as the United States has not consented to be thus impleaded in any other district, and its immunity from suit recognizes no distinction between cross and original bills, or ancillary and original suits, it follows that the District Court of another district, in a suit by a carrier against state officials in aid of such an order, cannot entertain a cross bill seeking to have the order declared void and to enjoin the United States and the Commission from enforcing it and the carrier from complying with it.

Nor may such cross bill be entertained as against the Commission and the carrier only; under Jud. Code, §§ 208, 211, the United States is a necessary party, as the representative of the public.

When, in the exercise of the power constitutionally reposed in it by the Act to Regulate Commerce, the Commission finds that a disparity in interstate and intrastate rates is resulting in unjust discrimination against interstate commerce, and also determines what are reasonable rates for the interstate traffic and directs the removal of the discrimination, the carrier is not only entitled to put in force the interstate rates found reasonable but is free to remove the forbidden discrimination by bringing the intrastate rates (though fixed by state authority) to the same level. *The Shreveport Case*, 234 U. S. 342; *Adams Express Co.* v. *Caldwell*, 244 U. S. 617.

In such case, the Commission may make the order as broad as the wrongful discrimination, but the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the Commission; and, to be effective in respect of intrastate rates established and maintained under state authority, the order must have a definite field of operation and not leave uncertain the territory or points to which it applies. Such an order should not be given precedence over a state rate statute, otherwise valid, unless, and except in so far as, it conforms to a high standard of certainty.

Affirmed.

THESE cross appeals present a controversy over the validity, scope and effect of an order of the Interstate Commerce Commission dealing with discrimination found to result from a disparity in interstate and intrastate passenger rates. The facts and proceedings to be considered are these: The Mississippi River forms the boundary between the States of Missouri and Iowa on the west and the State of Illinois on the east. East St. Louis, in southwestern Illinois, is directly across the river from St. Louis, Missouri, and Hamilton, in western Illinois, is directly across the river from Keokuk, Iowa. At both places the river is spanned by railroad bridges whereby the lines of railroad on one side are connected with those on the other. For some years prior to December 1, 1914, interstate passenger rates between St. Louis and Keokuk on the one hand and points in Illinois on the other were on a sub-

stantial parity with intrastate rates between East St. Louis and Hamilton, respectively, and points in Illinois. All were on a basis of 2 cents per mile, save that the rates to and from St. Louis and Keokuk included a bridge toll over the river. All other rates between points in Illinois were also on the same basis, any intrastate rate in excess of 2 cents per mile being prohibited by a statute of that State. On December 1, 1914, the rates between St. Louis and Keokuk, respectively, and points in Illinois were increased by the carriers to 2½ cents per mile, plus bridge tolls, the parity theretofore existing being thereby broken. Following this increase the Business Men's League of St. Louis, a corporate body of that city engaged in fostering its interests, filed with the Interstate Commerce Commission a petition against the carriers charging that the rates between St. Louis and points in Illinois were unreasonable in themselves, and, in connection with the lower intrastate rates, worked an unreasonable discrimination against St. Louis and in favor of Illinois cities, particularly East St. Louis and Chicago, and a like discrimination against interstate passenger traffic to and from St. Louis and in favor of intrastate passenger traffic to and from East St. Louis and Chicago. An association representing interests in Keokuk, Iowa, intervened and urged that any relief granted with respect to St. Louis be extended to Keokuk, so the former would not have an undue advantage over the latter. The State of Illinois, the Public Utilities Commission of that State, an association representing interests in Chicago and another association representing interests in East St. Louis, also intervened and opposed any action contemplating or requiring an increase in intrastate rates. After a hearing, in which all the parties and intervenors participated, the Interstate Commerce Commission filed a report (41 I. C. C. 13) finding that the existing bridge tolls at St. Louis and Keokuk were unobjectionable, that rates between

either of those cities and points in Illinois were reasonable when not in excess of 2.4 cents per mile, plus bridge tolls, and that the service, equipment and accommodations provided for intrastate passengers to and from East St. Louis, Hamilton, and Chicago, were the same as those provided for interstate passengers to and from St. Louis and Keokuk. In that report the Commission also found that the contemporaneous maintenance between East St. Louis [1] and Hamilton,[2] respectively, and other points in Illinois, of rates on a lower basis than those maintained via the same routes between St. Louis and Keokuk, respectively, and the same points in Illinois, bridge tolls excepted, gave an undue preference to East St. Louis and Hamilton and to intrastate passenger traffic to and from the latter points, and subjected St. Louis and Keokuk and interstate passenger traffic to and from those cities to an unreasonable disadvantage; that the existing disparity in interstate and intrastate rates worked an unjust discrimination against St. Louis and in favor of Chicago in so far as the rates between St. Louis and points in Illinois approximately equidistant from those cities exceeded, by more than the bridge toll, the rates between Chicago and the same points; that the disparity worked a like discrimination against Keokuk and in favor of Chicago; and that the existence on the reasonably direct lines of the carriers in the territory between Chicago on the one hand and St. Louis and Keokuk on the other of intrastate rates on a lower basis per mile than the rates between that territory and St. Louis and Keokuk, bridge tolls excepted, operated to subject interstate traffic to an unreasonable disadvantage.

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[1] The report similarly speaks of other towns across the river from St. Louis, East St. Louis being here mentioned as representative of all.

[2] The report refers to a plurality of points opposite Keokuk, but it suffices here to mention Hamiliton.

The Commission then made an order intended to result in the installation of rates not exceeding 2.4 cents per mile between St. Louis and Keokuk, respectively, and points in Illinois and to remove the discrimination shown in the report; but shortly thereafter the Commission recalled that order and filed a supplemental report (41 I. C. C. 503) indicating that lawful interstate rates between St. Louis and Keokuk on the one hand and Illinois points on the other could be defeated by the use of two tickets, one purchased at the interstate rate for a part of the journey and the other at the lower intrastate rate for the remainder, and therefore that the order should be so framed as to cover the rates between the intermediate points. In this connection it was said that the discrimination against interstate traffic resulting from the lower intrastate rates "would not be removed merely by an increase in the intrastate fares to and from the east bank points," and that "any contemporaneous adjustments of fares between St. Louis or Keokuk and Illinois points, and generally within Illinois, which would permit the defeat of the St. Louis, Keokuk, East St. Louis, or any other east side city fares by methods such as described above, and which would thereby permit the continuance of the undue prejudice which we have found is suffered by St. Louis and Keokuk, and continue to burden interstate commerce," would not comply with the order about to be entered. An order was then made, which is copied in the margin.[1]

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[1] The order is dated October 17, 1916, and, omitting the caption, reads as follows:

"*It appearing*, That on July 12, 1916, the Commission entered its report and order in this proceeding, and on the date hereof a supplemental report, which reports are hereby referred to and made a part hereof:

"*It is ordered*, That the said order of July 12, 1916, be, and it is hereby, vacated, and that the following be substituted therefor:

"*It is further ordered*, That the above-named defendants, accord-

In obedience to that order the carriers—of whom there were 29—took the requisite steps to establish and put in force interstate rates on a basis of 2.4 cents per mile between St. Louis and Keokuk, respectively, and points in Illinois, and those rates became effective. Then,

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ing as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting passenger fares between St. Louis, Mo., and points in Illinois upon a basis higher than 2.4 cents per mile, bridge tolls excepted, which basis was found reasonable in said report, or higher than the fares contemporaneously exacted for the transportation of passengers between East St. Louis, Ill., and the same Illinois points, by more than a reasonable bridge toll; or fares constructed upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously maintained between Illinois points intermediate between St. Louis, Mo., and points in Illinois, as such fares have been found in said report to be unlawfully discriminatory.

"*It is further ordered,* That the above defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting fares for the transportation of passengers between St. Louis, Mo., and points in Illinois, the basis of which per mile, bridge tolls excepted, is higher than the basis per mile for fares contemporaneously maintained between Chicago and the same Illinois points, as such fares have been found in said report to be unlawfully discriminatory.

"*It is further 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 January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting passenger fares between Keokuk, Iowa, and points in Illinois upon a basis higher than 2.4 cents per mile, bridge tolls excepted, which basis was found reasonable in said report, or higher per mile than the fares contemporaneously exacted for the transportation of passengers between Illinois points directly opposite to Keokuk and the same Illinois points, by more than a reasonable bridge toll; or fares constructed upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously maintained between Illinois points

believing the order required all intrastate rates in Illinois to be on a level with those interstate rates, bridge tolls excepted, the carriers proceeded to establish and put in force new rates between all points in that State on a basis of 2.4 cents per mile. This met with opposi-

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intermediate between Keokuk, Iowa, and points in Illinois, as such fares have been found in said report to be unlawfully discriminatory.

"*It is further 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 January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting fares for the transportation of passengers between Keokuk, Iowa, and points in Illinois, the basis of which per mile, bridge tolls excepted, is higher than the basis per mile for fares contemporaneously maintained between Chicago and the same Illinois points, as such fares have been found in said report to be unlawfully discriminatory.

"*It is further ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the transportation of passengers between St. Louis and points in Illinois fares upon a basis not in excess of the fares between East St. Louis, Ill., and the same points by more than a reasonable bridge toll; nor upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously maintained between Illinois points intermediate between St. Louis and points in Illinois, as such fares have been found in said report to be unlawfully discriminatory.

"*It is further ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the transportation of passengers between St. Louis, Mo., and points in Illinois fares, the basis of which per mile, bridge tolls excepted, is not higher than the basis per mile for fares

tion on the part of the state authorities and the carriers severally brought suits against them, in the District Court for the Northern District of Illinois, to enjoin them from interfering, by civil or criminal proceedings, or otherwise, with the establishment and maintenance of such intrastate rates under the Commission's order.

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contemporaneously maintained between Chicago and those same Illinois points.

"*It is further ordered,* That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the transportation of passengers between Keokuk, Iowa, and points in Illinois fares upon a basis not in excess of 2.4 cents per mile, bridge tolls excepted, which basis has been found reasonable in the said report, nor in excess per mile of the fares between points in Illinois directly opposite to Keokuk and the same points by more than a reasonable bridge toll; nor upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously effective between Illinois points intermediate between Keokuk, Iowa, and points in Illinois.

"*It is further ordered,* That the above-named defendants, according as they participate in the transporation, be, and they are hereby, notified and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the transportation of passengers between Keokuk, Iowa, and points in Illinois fares, the basis of which per mile, bridge tolls excepted, is not higher than the basis per mile for fares contemporaneously maintained between Chicago and those same Illinois points.

"*It is further ordered,* That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from the undue preferences and the undue and unreasonable prejudices and disadvantages found in said report to result from the contemporaneous maintenance between Illinois points of

The suits were consolidated and the present appeals are from decrees dismissing the bills for want of equity and dismissing cross bills of the state authorities for want of jurisdiction.

*Mr. Silas H. Strawn*, with whom *Mr. Robert Bruce Scott* and *Mr. Andrew P. Humburg* were on the briefs, for the railroad companies.

*Mr. Robert Bruce Scott* for Illinois Central Railroad Co.

*Mr. Sydney R. Prince*, *Mr. Edward C. Kramer* and *Mr. Alexander Pope Humphrey* filed a brief for Southern Railway Co. and Mobile & Ohio Railroad Co.

*Mr. George T. Buckingham* and *Mr. James H. Wilkerson*, Assistant Attorneys General of the State of Illinois, with whom *Mr. Edward J. Brundage*, Attorney General of the State of Illinois, was on the briefs, for State Public Utilities Commission of Illinois *et al.*

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

*The Solicitor General*, for the United States, submitted upon a brief, contending that the court below had no jurisdiction over the United States and the Interstate Commerce Commission.

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passenger fares, which fares, in combination with other fares required or permitted by this order, would produce the discrimination against interstate commerce and the undue preferences in favor of intrastate commerce condemned in the report of the Commission.

"*And it is further ordered*, That this order shall continue in force for a period of not less than two years from the date when it shall take effect."

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

The questions to which attention is first invited relate to the power of the District Court in the Northern District of Illinois to entertain the suits and the cross bills, in view of the jurisdictional provision in the Act of October 22, 1913, c. 32, 38 Stat. 219, that a suit "to enforce, suspend, or set aside, in whole or in part," an order of the Commission relating to transportation and made upon petition may be brought only in the district "wherein is the residence of the party or any of the parties upon whose petition the order was made."

It was objected in the District Court that the suits were brought to enforce the Commission's order and therefore could be entertained only in the Eastern District of Missouri, which embraces the residence of the party upon whose petition the order was made. But the court sustained its jurisdiction, ruling that the suits were not of the nature indicated by the objection.

In common acceptation a suit to enforce an order of the Commission is one which seeks to compel the carrier to whom the order is directed to yield obedience to its command. Nothing in the jurisdictional provision suggests that this is not what is intended, and that it is is shown by the provision in § 16 of the Act to Regulate Commerce, c. 309, 36 Stat. 554, that, if an order respecting transportation be not obeyed by the carrier, the same may be enforced at the suit of the Commission, an injured party, or the United States, by an appropriate writ or process restraining the carrier from further disobedience and enjoing upon it due compliance with the order. A reading of both provisions leaves no room to doubt that the suit to enforce so clearly outlined in one is the suit intended by the other.

But these were not suits of that type. They were begun by the carriers, not against them, and proceeded upon the theory, not that the carriers were in default, but that they were proceeding to obey the order. What was alleged and sought to be enjoined was threatened action on the part of the defendants, the state authorities, whereby obedience on the part of the carriers would be obstructed and made the occasion for subjecting them to divers criminal proceedings, suits for penalities and the like. In other words, the suits were brought to prevent complete obedience by the carriers from being wrongfully obstructed and embarrassed, but not to enforce the order in the sense of the jurisdictional provision. Therefore that provision was not applicable to them. They properly came within the provision in § 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, repeated in Jud. Code, § 207, which preserves and continues the general jurisdiction of the District Courts over cases and proceedings not therein enumerated.

At this point it will be convenient to dispose of another objection relating to the principal suits, but not turning on the jurisdictional provision. Shortly after the carriers' bills were filed the court, acting upon a motion of the defendants, ruled that the United States and the Commission were necessary parties, ordered that they be made defendants, and directed the issue of process against them. After they were thus brought in, the matter was considered again and the bills were dismissed as to them for want of jurisdiction. The defendants now say that after this dismissal the court did not have before it the requisite parties to enable it to entertain the bills. But the point is not tenable. There was no statute making the United States or the Commission a necessary party to bills of that nature, nor was the relief sought such as to render the presence of either essential under the rules applicable to suits in equity.

It well may be that either or both, if desiring to intervene, would have been permitted to do so, but there is no warrant for thinking that without their presence the bills could not be entertained.

The cross bills assailed the validity of the Commission's order on various grounds and concluded with a prayer that it be set aside and annulled and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. Passing the fact that they were presented as *cross* bills, it is apparent that in subject-matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code, §§ 208, 211; c. 32, 38 Stat. 219–220, and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suable only by its consent, could not be sued in a district not within the consent given. See *Finn* v. *United States,* 123 U. S. 227, 232–233; *Schillinger* v. *United States,* 155 U. S. 163, 166. It therefore is certain that the cross bills could not be entertained in the Northern District of Illinois, unless in this regard there be, as is asserted, a valid distinction between a cross bill and an original bill. No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see *Denver* v. *New York Trust Co.,* 229 U. S. 123, 135, and cases cited); but it is otherwise where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross

bills and original bills, or between ancillary suits and original suits, but extends to suits of every class. *United States* v. *McLemore*, 4 How. 286; *Hill* v. *United States*, 9 How. 386; *Reeside* v. *Walker*, 11 How. 272, 290; *De-Groot* v. *United States*, 5 Wall. 419, 431–433; *Carr* v. *United States*, 98 U. S. 433, 437; *Belknap* v. *Schild*, 161 U. S. 10, 16. Thus the cross bills as such had no better standing than they would have had as original bills.

The claim is made that in any event the cross bills should have been retained as to the defendants therein other than the United States. But this is not an admissible view. As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature.

It follows that the District Court rightly disposed of the jurisdictional questions by entertaining the principal suits and declining to entertain the cross bills.

Whether the suits by the carriers were rightly dismissed on the merits is the principal question, and its solution turns on the power of the Commission to deal with discrimination arising out of a disparity in interstate and intrastate rates, and on the scope and effect of the order made.

In their answers the state authorities took the position that in so far as the order purports to authorize or require a removal of the discrimination found to exist by a change in intrastate rates it is in excess of any power that has been or can be conferred on the Commission, and therefore neither relieves the carriers from full compliance with the state rate law nor prevents that law from being fully enforced against them. If

the premise were sound the conclusion doubtless would follow, for where the Commission makes an order which it has no power to make the order is necessarily void, not merely voidable. But that the premise is not sound is settled by the *Shreveport Case* (*Houston, East & West Texas Ry. Co.* v. *United States*) 234 U. S. 342. Upon full consideration it there was held:

1. Under the commerce clause of the Constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate.

2. Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates this power may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier.

3. In correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such way as to remove the discrimination; for where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the other, it is Congress, and not the State, that is entitled to prescribe the dominant rule.

4. It is admissible for Congress to provide for the execution of this power through a subordinate body such as the Interstate Commerce Commission, and this it has done by the Act to Regulate Commerce.

5. Where in the exercise of its delegated authority the Commission not only finds that a disparity in the two classes of rates is resulting in unjust discrimination

against interstate commerce but also determines what are reasonable rates for the interstate traffic, and then directs the removal of the discrimination, the carrier not only is entitled to put in force the interstate rates found reasonable but is free to remove the forbidden discrimination by bringing the intrastate rates to the same level.

Upon further consideration that decision was approved and followed in *American Express Co.* v. *Caldwell,* 244 U. S. 617.

The parties differ widely about the scope of the order. The carriers assert that it covers every intrastate passenger rate in Illinois, is addressed to the removal of discrimination found to be state-wide, and gives ample authority for increasing all rates between points in Illinois from 2 cents to 2.4 cents per mile. On the other hand, the state authorities assert that it is not state-wide and that the extent to which it is intended to affect the state-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect as to them. Of course, the Commission could adjust the remedy to the evil and make the order as broad as the wrongful discrimination; and not improbably it would intend to go that far and no farther. But the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the Commission, for they constitute the only authoritative evidence of its action. The reports show that the only discrimination found relates to the passenger traffic between Illinois and two cities outside that State—St. Louis and Keokuk. There is no finding that this traffic extends in appreciable volume to all sections of Illinois. As to some sections its volume may be very large and as to others almost or quite negligible. At best the reports leave the matter uncertain. Obviously this traffic is only a small part of the interstate passenger traffic moving over

the railroads in Illinois, and yet the finding is merely that there was discrimination against this part. Had the Commission regarded the discrimination as state-wide it is but reasonable to believe that it would have said so in its findings. And had it intended to require or authorize a state-wide readjustment of the intrastate rates it doubtless would have given direct expression to that purpose, which easily could have been done in a few lines. But neither in any part nor as a whole does the order plainly manifest such a purpose. In harmony with the reports it deals with the intrastate rates in so far only as they result in discrimination against interstate traffic to and from St. Louis and Keokuk. Its most comprehensive paragraph—the next to the last—declares that the carriers must "abstain from the undue preferences and the undue and unreasonable prejudices and disadvantages found in said report to result from the contemporaneous maintenance between Illinois points of passenger fares, which fares, in combination with other fares required or permitted by this order, would produce the discrimination against interstate commerce and the undue preferences in favor of intrastate commerce condemned in the report of the Commission." But even here the general terms are so far restrained by the reference to the reports as to show that nothing more is intended than to command the removal of the discrimination to which the traffic to and from St. Louis and Keokuk is subjected. Besides, this paragraph evidently proceeds upon the theory that some of the intrastate rates are not affected by the other paragraphs, and ought not to be disturbed save where their use in connection with rates sanctioned by the order will be productive of the discrimination which it is intended to correct.

But while the order shows that it is not intended to require or authorize a readjustment of all the intrastate

rates, the description of those to which it applies is at best indefinite. There may be less uncertainty in some parts of the order than in others, but when each is read in the light of the rest and all in the light of the reports it is apparent that none has a certain or definite field of operation. The uncertainty arises out of a failure to designate with appropriate precision the territory or points to and from which the intrastate rates must or may be readjusted, and this omission accords with the absence from the reports of any finding showing definitely the territory or points where those rates operate prejudicially against the interstate traffic which the order is intended to protect.

To be effective in respect of intrastate rates established and maintained under state authority an order of the Commission of the kind now under consideration must have a definite field of operation and not leave the territory or points to which it applies uncertain. Upon this point we said in *American Express Co.* v. *Caldwell*, *supra*, p. 625:

"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."

In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Cummings* v. *Chicago*, 188 U. S. 410, 430; *Savage* v. *Jones*, 225 U. S. 501; *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, 419. This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.

We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates, established and maintained under a law of the State, and therefore that the suits by the carriers were rightly dismissed on the merits.

*Decrees affirmed.*

Mr. Justice Holmes took no part in the consideration or decision of this case.

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## KETCHAM *v.* BURR ET AL.

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

No. 114. Submitted January 2, 1918.—Decided January 14, 1918.

Appellant, having been for a time confined in an asylum as an insane person after due proceedings in a state probate court, took no appeal or other proceedings in the state courts, but long after his escape

filed this bill against the owner and officials of the asylum, the present and former judges and registers of the probate court, and others, to regain certain documents and set aside the inquisition. *Held*, that no construction or application of the Constitution was involved, and hence this court lacked jurisdiction of a direct appeal from the District Court.

Appeal dismissed.

THE case is stated in the opinion.

*Mr. William D. Williams*, *Mr. Renwick F. H. MacDonald* and *Mr. Dell H. Thompson* for appellant.

*Mr. John J. Carton* for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Having heard the cause upon bill, answer and replication, the District Court dismissed the bill. In support of this direct appeal it is said that the construction or application of the Federal Constitution is involved. Judicial Code, § 238.

The defendants are the corporation which owns and operates Oak Grove asylum in Genesee County, Michigan; the medical director and chief guard of that institution; the present and a former judge, and also the present and a former register of the Probate Court of Genesee County; two examining physicians who upon an inquest held before that court certified complainant's insanity; and the attorney who represented the petitioner therein.

The bill is a nebulous recital of grievances against defendants and many others—all alleged to have been wicked conspirators seeking to deprive appellant of his liberty and money. It appears that the appellant, a citizen of Indiana, having effected his escape from an

insane asylum in Wisconsin was taken by his family and friends to Oak Grove for medical care and treatment in May, 1906; and that directly thereafter a petition asking an inquisition concerning his sanity was duly presented to the Probate Court by the superintendent of that institution as provided by a state statute. After a hearing he was adjudged insane and committed for treatment; the right to appeal was not exercised. In October, 1906, he escaped, and this bill was filed May 11, 1912, without prior application for relief to any court of the State. It prays (1) that defendants be required to give an account of and restore to complainant all writings, letters, documents and papers placed in their hands in connection with the inquisition, and (2) that the judge and register of the Probate Court be required to set aside and hold for naught the pretended inquisition in insanity and make adequate entry accordingly on the record.

All equities of the bill are fully denied in the answer; and the claim that the cause really involves construction or application of the Federal Constitution is without foundation.

We have no jurisdiction to entertain the appeal and it must be

*Dismissed.*

# MARTIN, TRUSTEE IN BANKRUPTCY OF VIRGIN, v. COMMERCIAL NATIONAL BANK OF MACON, GEORGIA.

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

No. 100. Argued December 19, 20, 1917.—Decided January 14, 1918.

When the state law recognizes unrecorded chattel mortgages as valid between the parties, and merely postpones them to liens created and purchases made while they remain unrecorded (Georgia Code of 1910, § 3260,) delay of recordation until within four months before the initiation of bankruptcy proceedings against the mortgagor does not enable the trustee to assail such a mortgage as a preference, as of the date of its recordation, under § 60b of the Bankruptcy Act, as amended June 25, 1910, c. 412, 36 Stat. 838, 842, if he represents no lien on the property other than his lien under § 47a, arising subsequently.

Recordation is to be deemed "required" in the sense of the amendment when, through delay of it, a position superior to the challenged transfer has been gained, during the specified period, by some creditor whom the trustee represents or whose place he is entitled to take.

The mortgage in this case was given before the four months' period began, as security for money presently loaned in good faith, and was recorded the day before the petition was filed, when the mortgagee knew of the mortgagor's insolvency. Recordation was not fraudulently delayed and prior thereto no other liens were fixed upon the property.

228 Fed. Rep. 651, affirmed.

THE case is stated in the opinion.

*Mr. R. Douglas Feagin* and *Mr. Rudolph S. Wimberly*, with whom *Mr. Oliver C. Hancock* was on the brief, for petitioner, distinguished *Keeble* v. *John Deere Plow Co.*, 190 Fed. Rep. 1019; *In re Jacobson & Perrill*, 200 Fed. Rep. 812; and *Anderson* v. *Chenault*, 208 Fed. Rep. 400; and relied on *Carey* v. *Donohue*, 240 U. S. 430; *Covington* v.

*Brigman*, 32 A. B. Rep. 35; *Pacific State Bank* v. *Coats*, 205 Fed. Rep. 619; *Potter Mfg. Co.* v. *Arthur*, 220 Fed. Rep. 843; *Massachusetts Bonding Co.* v. *Kemper*, 220 Fed. Rep. 847; and *Millikin* v. *Second National Bank of Baltimore*, 206 Fed. Rep. 14. Section 60b, as amended, gives the trustee the right to show that the lien of the mortgage is invalid as to his junior lien under § 47a, because the older lien operates as a preference obtained when the bankrupt was insolvent and when the creditor had reasonable cause to believe that he was insolvent.

Under the Bankruptcy Act as it now stands, the transfer is to be deemed as made at the time of recording, where that is delayed, rather than at the time of execution; and at the time of recording the mortgage in this case the bank was a creditor. Distinguishing *Dean* v. *Davis*, 242 U. S. 438, and other cases, and citing *In re Bunch Commission Co.*, 225 Fed. Rep. 243-249; *Dulany* v. *Morse*, 39 App. D. C. 523; *Davis* v. *Hanover Savings Fund Society*, 210 Fed. Rep. 768; Remington on Bankruptcy, vol. 3, p. 406. The purpose of the amendment is very clearly pointed out by the Senate and House committees upon whose recommendation it was adopted. Senate Report No. 691, 61st Cong., 2nd sess.

*Mr. Orville A. Park*, with whom *Mr. George S. Jones* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

As security for money presently loaned to him in good faith by the Commercial National Bank, one Virgin executed and delivered a mortgage upon his stock of merchandise at Macon, Georgia, February 16, 1914. It was recorded August 20, 1914, when the bank knew of his insolvency. The next day involuntary bankruptcy pro-

ceedings were instituted and in due time he was adjudged bankrupt and a trustee appointed. Recordation of the mortgage was not fraudulently delayed and prior thereto no other liens were fixed upon the property. Both trustee and other creditors objected to the bank's claim as one entitled to priority "on the ground that the mortgage was recorded within the four months period preceding bankruptcy, at a time when the mortgagor was insolvent, and when the mortgagee knew that he was insolvent, and that the recording of the mortgage would effect a preference, and that the transfer arising from the recording of the instrument was non-operative, and that the instrument must be held as not recorded." Their contention here is thus stated: "The Trustee does not say in this case that his lien is older than the bank's and therefore he comes ahead of the bank, but he says that the bank's lien is invalid and inoperative, because recorded while the bankrupt was insolvent, etc., and that being a subsequent lien holder the Trustee is in the proper position to attack the bank's lien. The bank's lien is invalid only by the positive inhibition of the statute, Section 60b. It is for this reason invalid just as a transfer made (instead of recorded) within this four months' period is invalid by reason of the inhibition of the Bankruptcy law." "The record of an instrument is required as to any particular person if the instrument must be recorded to be good against him. If the subsequent lienor is entitled to priority unless the antecedent mortgage is recorded, such mortgage is required to be recorded as to him. The Trustee is a subsequent lienor. Unless the mortgage is recorded he, the Trustee, is entitled to priority. It is therefore 'required' to be recorded as to him."

The referee allowed the claim as preferred and the Circuit Court of Appeals approved his action. 228 Fed. Rep. 651.

It is provided by § 60b, Bankruptcy Act, as amended June 25, 1910, c. 412, 36 Stat. 838, 842:

"If a bankrupt shall . . . have made a transfer of any of his property, and if, at the time of the transfer, . . . or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Section 47a of the Bankruptcy Act provides:

"Trustees shall respectively . . . ; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; . . ."

Section 3260, Georgia Code of 1910, declares that "mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage. If, however,

the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage, or the purchaser has the like notice, then the lien of the older mortgage shall be held good against them." Construing this section, in *Hawes* v. *Glover*, 126 Georgia, 305, 317, the Supreme Court held: "A mortgage is perfectly valid as between the parties thereto, though never recorded. *Hardaway* v. *Semmes*, 24 Ga. 305; *Gardiner* v. *Moore*, 51 Ga. 268; *Myers* v. *Picquet*, 61 Ga. 260; Civil Code, § 2727 [Park's Ann. Code, § 3260]. If it is not recorded, or, as in this case, is illegally recorded, the only effect is to postpone it to purchases made, or liens procured by contract, without notice of its existence, or to liens obtained by operation of law."

Section 60b, Bankruptcy Act, has been specially considered by us in two recent cases—*Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, and *Carey* v. *Donohue*, 240 U. S. 430. In the first the company installed an ice machine for Grant Brothers at Horton, Kansas, during February, under a conditional sale contract of earlier date and recorded May 15th following when the purchasers were known to be insolvent; July 11th they became bankrupt. Such a contract is valid under the laws of Kansas as between the parties whether recorded or not, but void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment or like process prior to recording. The vendors demanded the machine. The trustee maintained § 47a, Bankruptcy Act, gave him the status of a lien holder prior to recordation and that the contract having been put to record within four months operated as a preference voidable under § 60b. We held the trustee occupied the status of a creditor with a lien fixed as of the date when the bankruptcy proceedings commenced and that he could not assail the contract under the state law. Further, that § 60b refers to an act whereby the bankrupt sur-

renders or encumbers his property for the benefit of a particular creditor thereby diminishing the estate which should be applied to all; the contract in question did not operate as a preferential transfer; the property was not the bankrupts' but the vendor's; the former were not to become owners until the condition was performed; and there was no diminution of the estate.

In *Carey* v. *Donohue* the trustee sought to set aside a real estate transfer executed more than four months before bankruptcy but recorded within that time. Under the Ohio statute conveyances of land until filed for record are deemed fraudulent as to subsequent *bona fide* purchasers without knowledge, but recording is not essential to their validity as against any creditor, whether general creditor, lien creditor, or judgment creditor with execution returned unsatisfied, that is, as against any class of persons represented by a trustee in bankruptcy or with whose rights, remedies and powers he is deemed to be vested. We denied the trustee's contention and, among other things, declared: "Required" has regard to persons in whose favor the requirement is imposed. "Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding." "It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording." "In dealing with a transfer, as defined, which though valid as between the parties was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision." "The intended meaning was to embrace

those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take."

The word "required" in § 60b refers directly to statutes in many States relating to recording which through various forms of expression seek to protect creditors by providing that their rights shall be superior to transfers while off the record. Recognizing the beneficial results of these enactments and intending that rights based thereon might be utilized for the advantage of bankrupt estates, Congress inserted (amendment of 1910) the clause "or of the recording or registering of the transfer if by law recording or registering thereof is required." In *Carey* v. *Donohue* we pointed out that purchasers are not of those in whose favor registration is "required," but that the reference is to persons concerned in the distribution of the estate, i. e., "creditors, including those whose position the trustee was entitled to take." And we think it properly follows that before a trustee may avoid a transfer because of the provision in question he must in fact represent or be entitled to take the place of some creditor whose claim actually stood in a superior position to the challenged transfer while unrecorded and within the specified period.

The Georgia statute imposes the requirement of registration only in favor of a creditor who fixes a lien on the property before recording takes place. Here there is no such person—the trustee occupies the status of one who acquired a lien after that event. No one concerned in the distribution of the estate actually held rights superior to the mortgage while off the record.

The judgment of the court below is correct and must be

*Affirmed.*

## BATES *v.* BODIE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 120. Argued January 4, 1918.—Decided January 21, 1918.

When a case is here upon the ground that the court below denied full faith and credit to a decree of a court of another State, a motion to dismiss the writ of error based on the proposition that the decree was accorded its due value under the statutes of the State of its rendition merely begs the question in issue and must be denied.

The principles of estoppel by judgment are reviewed in the opinion and *held* to apply (*semble* with peculiar reason) to decrees for divorce and alimony.

In a court of Arkansas, a wife, by her cross bill, sought absolute divorce, return of money lent her husband, and alimony "as the facts and law warrant, and all other proper and necessary relief" alleging that her husband owned certain real and personal property, including land in Nebraska. The decree granted the divorce as prayed, adjudged that the wife recover a stated sum "in full of alimony and all other demands set forth in cross bill," recited that such judgment was rendered by the husband's consent on condition that there be no appeal, made provisions for security, which the husband complied with, and awarded her certain personal property. After the husband had paid the judgment the wife sued him in Nebraska to obtain further alimony out of the Nebraska land, claiming that the Arkansas court had no jurisdiction to take it into consideration and did not do so. *Held*, that the face of the decree, with the cross bill, showed a plenary adjudication of the liability for alimony with consent of parties; that this was confirmed by the parties' conduct, and the weight of the testimony in this case, concerning the former proceedings; that in virtue of the consent, if not under the Arkansas statutes (Kirby's Digest, §§ 2681, 2684), the decree was within the jurisdiction of the Arkansas court, and that the action of the court below in sustaining the plaintiff's contentions and not accepting the decree as an estoppel was a denial of full faith and credit.

99 Nebraska, 253, reversed.

PLAINTIFF in error, Bates, filed a complaint in divorce against defendant in error in the chancery court of Ben-

ton County, State of Arkansas, alleging cruelty and praying for an absolute divorce.

Defendant in error filed an answer denying the charge against her and a cross complaint accusing him of cruelty.

In the cross complaint she alleged that Bates was the owner of real and personal property of the fair value of $75,000, consisting of 320 acres of land in York County, Nebraska, which she described, and lots in Oklahoma, and alleged further that she was the owner in her own right of $3,000, $2,500 of which she loaned to Bates, taking his notes therefor bearing interest at 8% per annum.

She prayed for an absolute divorce, for the restoration of the money borrowed from her and "that the court award her such alimony as the facts and law warrant, and all other proper or necessary relief." The court, after hearing, dismissed Bates' complaint for want of equity and granted her a divorce, and alimony was decreed her as follows:

"It is ordered, adjudged and decreed by the court that the defendant Lucie Bates have and recover of and from the defendant [plaintiff] Edward Bates the sum of $5,111.00 in full of alimony and all other demands set forth in cross bill which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree herein rendered."

Certain personal property, consisting of silverware and household furniture, was adjudged to her and a lien was declared on a lot in the City of Siloam Springs, State of Arkansas, and certain notes and mortgages amounting to the sum of $2,801.06 were required to be deposited with the clerk of the court as additional security. He, however, was given the power to sell the same but required to deposit the proceeds of the sale with the clerk until the sum awarded her be paid, for which no execution was to issue for six months. It was

also decreed "that she be restored to her maiden name . . . and that the bonds of matrimony entered into" between her and Bates "be dissolved, set aside and held for naught."

She subsequently brought this suit against him in a Nebraska state court repeating the charges of cruelty against him and the proceedings in Arkansas resulting in a decree for divorce and alimony as stated above, and "that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the State of Arkansas, and that in consequence of that fact in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into account the above mentioned property situated in York County, Nebraska. Said court was limited by the laws of Arkansas from taking into consideration said property lying in York County, Nebraska, in determining the amount of alimony that should be granted to defendant in that suit, who is plaintiff herein."

The laws of the State of Arkansas further provide, she alleged, that "where the divorce is granted to the wife each party is restored to all property not disposed of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration, or by reason thereof; and the wife so granted a divorce from the husband shall be entitled to one third of all lands of which her husband is seized of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form."

She further alleged that the land in Nebraska was worth the sum of $48,000, that the amount of alimony allowed her by the Arkansas decree was largely inadequate for her support and was not such a fair proportion of the property of Bates owned by him at the date of

the decree as she then was and is entitled to in view of the circumstances. She prayed that a reasonable sum be adjudged her out of the York County property in addition to the amount allowed her by the Arkansas decree. A copy of the decree was attached to the complaint.

Bates demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and, she declining to plead further, the cause was dismissed for want of equity. The judgment was reversed by the Supreme Court.

On the return of the case to the trial court Bates answered. He set up the proceedings in Arkansas and pleaded the decree and alleged that it was made upon full consideration of the evidence and the issues and that the court took into consideration the value of the land in York County, Nebraska, in determining the amount of alimony to be awarded to plaintiff. That the decree remained "in full force and effect, except that the amount of alimony awarded therein has been fully paid" by him. That the Arkansas court in awarding the alimony "took into consideration all of the property owned by" him, "which decree, so far as it relates to alimony, having been fully satisfied, has become a full and complete bar to further proceedings on the part of the plaintiff in this suit, defendant in that, to recover additional alimony under the laws of the State of Arkansas." And that, further, under the Constitution of the United States, the findings and decree are entitled to full faith and credit in the courts of Nebraska, and constitute a full and complete bar to plaintiff's right to recover additional alimony under the laws of the State of Nebraska.

It was adjudged and decreed that plaintiff (defendant in error here) have and recover from the defendant (plaintiff in error here) the "sum of ten thousand dol-

lars, being the amount found due her as alimony." The judgment was affirmed by the Supreme Court, to review which this writ of error was prosecuted.

*Mr. A. C. Ricketts* and *Mr. A. W. Field,* with whom *Mr. L. A. Ricketts* and *Mr. W. L. Kirkpatrick* were on the briefs, for plaintiff in error.

*Mr. Samuel P. Davidson* for defendant in error.

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

A motion is made to dismiss on the ground, as contended, that the decision of the Supreme Court of Nebraska was based upon a construction of the statutes of Arkansas and concluded therefrom that the District Court of Arkansas "had no jurisdiction to take the Nebraska lands of this plaintiff in error into consideration in fixing the amount of allowance to this defendant in error, and as a matter of fact did not do so." That this conclusion was reached "by reason of the peculiar statute of Arkansas which governs and controls the courts of that State in fixing the allowance of alimony to a wife, *in all cases* in which the divorce *is granted on her petition*" (italics counsel's) and the court "was limited and controlled by that statute." It is hence contended that the full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of another State was not denied to the Arkansas decree but that the Supreme Court of Nebraska, considering the statutes of Arkansas, gave to the decree the value those statutes gave to it.

But this is the question in controversy. The decision of the Supreme Court of Nebraska is challenged for not according to the decree the credit it is entitled

to and it is no answer to the challenge to say that the Supreme Court committed no error in responding to it and that, therefore, there is no federal question for review. *Andrews* v. *Andrews*, 188 U. S. 14. The motion to dismiss is denied.

The decision of the Supreme Court affirming the subsequent judgment of the district court on the merits was by a divided court and the opinion and dissenting opinion were well-reasoned and elaborate. The ultimate propositions decided were that the courts of Nebraska would entertain a suit for alimony out of real estate situated in that State after a decree for absolute divorce in another State, the latter State having no jurisdiction of the land, notwithstanding the decree awarding alimony, the decree not appearing to have been rendered by consent or not having taken such land into account; and that besides the Arkansas court had no jurisdiction to render a money judgment for alimony.

The propositions were supported and opposed by able discussion, some of which was occupied in reconciling a conflict of decision in Nebraska, a later decision made to give way to an earlier one. We are not called upon to trace or consider the reasoning of the opinion further than to determine the correctness of its elements, and this determination can be made by reference to the divorce proceedings in Arkansas and the decree of the court rendered therein.

The case is not in broad compass and depends upon the application of the quite familiar principle that determines the estoppel of judgments, and the principle would seem to have special application to a judgment for divorce and alimony. They are usually concomitants in the same suit—some cases say must be—or, rather, that as alimony is an incident of divorce, it must be awarded by the same decree that grants the separation. And it is the practice to unite them, as alimony

necessarily depends upon a variety of circumstances more adequately determined in the suit for divorce, not only the right to it but the measure of it, all circumstances upon which it depends being then naturally brought under the view and judgment of the court. Whether, however, the right to it should be litigated in the suit for divorce, or may be sought subsequently in another, the principle is applicable that what is once adjudged cannot be tried again. And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell* v. *County of Sac*, 94 U. S. 351, 353; *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252; *Troxell* v. *Delawere, Lackawanna & Western R. R. Co.*, 227 U. S. 434; *Radford* v. *Myers*, 231 U. S. 725; *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294.

But how find the matters in issue or the points controverted upon the determination of which the judgment was rendered? The obvious answer would seem to be that for the issues we must go to the pleadings; for the response to them and their determination, to the judgment; and each may furnish a definition of the other. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234. If there be generality and uncertainty, to what extent there may be specification and limitation by evidence *aliunde* there is some conflict in the cases. But we are not called upon to review or reconcile them. Our rule is that an estoppel by judgment is "not only as to every matter which was

offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac, supra,* p. 352. Is the rule applicable to the instant case?

We have set forth the proceedings in divorce in which, we have seen, there were charges of cruelty, and counter charges. There was display of property, prayers for divorce and a prayer in addition, on the part of defendant in error, that her husband, Bates, be required to restore a sum borrowed from her "and that the court award her such alimony as the facts and law warrant, and all other proper or necessary relief."

Responding to the issues thus made and the relief thus prayed, the court adjudged plaintiff in error guilty of cruelty, granted defendant in error a divorce and awarded her the sum of "$5,111.00 in full of alimony and all other demands set forth in cross bill."

There were then presented the issues of divorce and alimony; the first was made absolute, the second in a specified sum "in full," and the sum adjudged to her was made a lien on his property in the State (Arkansas). We may remark that she was awarded other property. It would seem, therefore, that there is no uncertainty upon the face of the record and that it is clear as to the issues submitted and clear as to the decision upon them.

But it is answered that—(1) The court had no jurisdiction of the Nebraska lands, and (2) that besides it did not take them into account in its judgment.

(1) Counsel make too much of this point. It may be that the Arkansas court had no jurisdiction of the Nebraska lands so as to deal with them specifically, but it had jurisdiction over plaintiff in error to require him to perform any order it might make. But even this power need not be urged. The court had jurisdiction of the controversy between the parties and all that

pertained to it, jurisdiction to determine the extent of the property resources of plaintiff in error and what part of them should be awarded to defendant in error. It was not limited to any particular sum if it had jurisdiction to render a money judgment at all.

But such jurisidiction does not exist, the Supreme Court of Nebraska decides and counsel urges. The argument to sustain this is that the Arkansas statute [1] (§ 2684, Kirby's Digest) provides that when a divorce is granted to the wife the only power the court possesses is to restore to the parties respectively the property one may have obtained from the other during the marriage and adjudge to the wife one-third of her husband's personal property absolutely and one-third of all the lands whereof he was seized of an estate of inheritance at any time during the marriage for her life unless she shall have relinquished the same in legal form. In other words, against a guilty husband the courts of Arkansas were without power to render a money judgment for alimony, but were confined to an allotment of his personal property and real estate in the proportions stated. But the court was confronted with the question of the relation of that section to § 2681 of the Digest, which provides that "when a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall

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[1] "And where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest, § 2684, [1904].

be reasonable." In answer to the question the court decided that the latter section is applicable only when a divorce is granted for the fault of the wife.

Plaintiff in error contests the conclusion and strong argument may be made against it to show that the sections are reconcilable and each applicable to particular conditions. And such was the view of the dissenting members of the court. However, we are not called upon for a definitive decision on account of the view we entertain of proposition 2 and the reason which, we think, induced the court to render a money judgment.

(2) This proposition is based on the record which, the Supreme Court said, "shows that the court [Arkansas court] did not in fact make any allowance on account of the Nebraska lands," and resort is had to parol testimony for the purpose of limiting the decree. But we cannot give the testimony such strength. It is conflicting. It consists of the impressions of opposing counsel and of the parties of the opinion of the court orally delivered in direction for the decree.

The Bodie version is supported by the clerk of the court, whose recollection was that the court did not take into consideration "the land outside of Benton County." But he further testified that there was testimony of the rental value of the Nebraska lands and that "the chancellor announced that while he did not have jurisdiction over the lands in Nebraska, he did have jurisdiction over the person of Bates, as he was personally present in court. The court required Bates to deposit security for the payment of the alimony awarded. . . . As I recollect it the decree rendered was on the consent of Bates on condition that Bodie would not appeal."

On the Bates side is the evidence of the chancellor, whose opinion was the subject of the testimony of the others. He was specific and direct and the following, in summary, is his testimony: Depositions were intro-

duced showing the value of and rental income from the Nebraska lands, which were supposed to be in the name of Bates' children or in his name as trustee for his children. The decree for alimony was a lump sum of $5,111.00 "in lieu of any interest that she might have or claim she might have for any sum." (It does not appear from what this is a quotation—probably from the witness' opinion.) He, the witness, intimated what he would do in the way of a property finding and the parties agreed upon a lump sum as a final settlement, from which no appeal was to be taken. His view was that the court had jurisdiction of the parties, and held it had not of the land in Nebraska, but it did have jurisdiction to consider its value in determining the amount of alimony. Knowing, as he testified, the law, he did not think he stated that there was no law justifying the court to take into consideration the Nebraska lands. It was not the first time the proposition had been raised before him.

He remembered that Bodie claimed $2,500 as borrowed money, but the money had merged in Bates' estate. He did not understand that it entered in the decree. It was a lump-sum agreement provided cash could be got to end the controversy both as to divorce and as to property rights. Counsel adjusted it on the outside, for he was quite sure that it was not the amount the court indicated it would allow. The court understood that counsel on both sides agreed to the amount; that the judgment was a complete and amicable settlement between the parties of all property rights involved.

We must ascribe to the representation of the decree the same judicial impartiality that induced its rendition and the representation was circumstantial, without material qualification, doubt or hesitation. It accords besides with the issues in the case and the decree. As we have seen, the amount it awarded was "in full of alimony and all other demands set forth in cross bill."

It also recited that it was "rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree." The amount was secured, as the chancellor declared he would secure it; it was paid as it was required to be paid.

The evidence, therefore, confirms the face of the decree and that it was rendered by consent of the parties. It is admitted that consent would give jurisdiction to the court to render a money judgment for alimony.

We think, therefore, that due faith and credit required by the Constitution of the United States was not given to the decree.

*The judgment of the Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.*

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## SOUTHERN PACIFIC COMPANY ET AL. *v.* DARNELL-TAENZER LUMBER COMPANY ET AL.

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

No. 132. Argued January 8, 9, 1918.—Decided January 21, 1918.

The fact that one who paid unreasonable freight charges has shifted the burden by collecting from purchasers of the goods, does not prevent him from recovering the overpayments from the carrier, under an order of reparation made by the Interstate Commerce Commission. He is the proximate loser; his cause of action accrues immediately, without waiting for later events; the purchaser, lacking privity, cannot recover the illegal profits from the carrier; and, practically, to follow each transaction to its ultimate result would be endless and futile. Cases like *Pennysylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, involving damages for discrimination, are distinguished.

An objection that error will not lie in this case, not decided, as the pending application for certiorari would be granted if the objection were held good.

*Semble*, that cases brought under § 16 of the Act to Regulate Commerce, to enforce reparation orders, stand on peculiar ground as respects review by certiorari.

229 Fed. Rep. 1022, affirmed.

The case is stated in the opinion.

*Mr. Charles N. Burch*, with whom *Mr. H. D. Minor*, *Mr. Fred H. Wood*, *Mr. Robert Dunlap*, *Mr. T. J. Norton*, *Mr. Blewett Lee*, *Mr. R. V. Fletcher* and *Mr. H. A. Scandrett* were on the briefs, for plaintiffs in error, in support of the proposition that a party seeking to recover an excessive rate must prove that he bore the burden of the excess, cited *Parsons* v. *Chicago & Northwestern Ry. Co.*, 167 U. S. 447; *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184; and *Atchison, T. & S. F. Ry. Co.* v. *Spiller*, 246 Fed. Rep. 1; and distinguished *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 429; and *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473.

*Mr. Francis B. James*, with whom *Mr. Allen Hughes* was on the briefs, for defendants in error, moved to dismiss because no one of the many separate claims and judgments involved exceeded the amount of $1,000, excluding costs, Jud. Code, § 241; and on the question of damages cited Sutherland on Damages, § 158; *Chicago &c. R. R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 86; *Regan* v. *Railway*, 60 Connecticut, 124; *Perrott* v. *Scherrer*, 17 Michigan, 48; *Nashville &c. Ry. Co.* v. *Miller*, 120 Georgia, 453; *Olds* v. *Construction Co.*, 177 Massachusetts, 41; *Illinois Central Ry. Co.* v. *Porter*, 117 Tennessee, 13, and particularly *New York, N. H. & H. R. Co.* v. *Ballou & Wright*, 242 Fed. Rep. 862.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the defendants in error to recover reparation from the railroads for charging a rate on hardwood lumber, alleged to be excessive. The Interstate Commerce Commission had found the rate to be excessive and had made an order for reduction from 85 to 75 cents, which was obeyed, and also one for reparation to the extent of the excess, which was not obeyed. 13 I. C. C. 668. A demurrer to the declaration was sustained by the Circuit Court on the ground that it was not alleged that the plaintiffs had paid the excessive rates or that they were damaged thereby. 190 Fed. Rep. 659. The declaration was amended, but at the trial the judge directed a verdict for the defendants, presumably on the ground argued here, that it did not appear that the plaintiffs were damaged. The judgment was reversed by the Circuit Court of Appeals. 221 Fed. Rep. 890. 137 C. C. A. 460. At a new trial the jury were instructed that if they found the rate charged unreasonable and that prescribed by the Interterstate Commerce Commission reasonable, they should find for the plaintiffs in accordance with the Commission's award. The jury found for the plaintiffs and this judgment was affirmed by the Circuit Court of Appeals. 229 Fed. Rep. 1022. 143 C. C. A. 663.

The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately

the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds* v. *Mapes-Reeve Construction Co.*, 177 Massachusetts, 41, 44. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios*, with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. *State* v. *Central Vermont Ry. Co.*, 81 Vermont, 459. See *Nicola, Stone & Myers Co.* v. *Louisville & Nashville R. R. Co.*, 14 I. C. C. 199, 207–209. *Baker Manufacturing Co.* v. *Chicago & North Western Ry. Co.*, 21 I. C. C. 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co.* v. *Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts.

The cases like *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them,

and there is no question as to the amount of the proximate loss. See *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 429. *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473.

An objection is taken to the jurisdiction of this court upon writ of error. An application is made for a certiorari in case the objection is held good, and as we should grant the latter writ in that event the question has no importance here except as a precedent. We are inclined to take the course followed *sub silentio* in *Mills* v. *Lehigh Valley R. R. Co.*, and to treat cases brought under § 16 of the Act to Regulate Commerce which authorizes the joinder of all plaintiffs and all defendants as standing on a peculiar ground.

*Judgment affirmed.*

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## UNION PACIFIC RAILROAD COMPANY *v.* HUXOLL, ADMINISTRATRIX OF HUXOLL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 104. Argued December 21, 1917.—Decided January 21, 1918.

The question whether any substantial evidence was introduced to justify submission of a case to the jury on the issue of proximate causal negligence is one of law, reviewable by this court, in an action under the Federal Employers' Liability Act, coming from a state court.

A railroad employee was run down and killed in a switching yard by a switching engine, backing on a track, between the rails of which he was walking in the opposite direction. He was passing through an extensive cloud of steam and smoke coming from a round-house and nearby engines, which had settled upon the tracks on a very cold and windy day. The cloud was dense but shifting, so that at times one might see through it considerable distances, and at others but

a very short distance. *Held,* that deceased was guilty of contributory negligence.

Under the Federal Employers' Liability and Safety Appliance Acts, contributory negligence avails the carrier neither as a defense nor in diminishing damages, if its failure to observe the latter act by having the power-brake of its locomotive in working order contributed in whole or in part to cause the death of the employee.

Upon the conflict of testimony introduced, considered in the aspect least favorable to the plaintiff in error, *held,* that it was not error to submit the case to the jury on the question whether the defective condition of the power-brake contributed, in whole or in part, to cause the fatal result.

99 Nebraska, 170, affirmed.

The case is stated in the opinion.

*Mr. N. H. Loomis* and *Mr. C. A. Magaw* for plaintiff in error.

*Mr. Halleck F. Rose,* with whom *Mr. Walter V. Hoagland, Mr. Wilmer B. Comstock, Mr. John F. Stout* and *Mr. Arthur R. Wells,* were on the brief, for defendant in error.

Mr. Justice Clarke delivered the opinion of the court.

Fred J. Huxoll, a locomotive engineer in the employ of the plaintiff in error, was run down by a switching engine, about 11 o'clock in the morning, in a switching yard of the company at a division point in Nebraska, and subsequently died of the injuries which he received.

The weather was very cold, with a high wind blowing and a cloud of steam and smoke, from engines standing nearby the scene of the accident and from a round-house farther away, had settled down upon the tracks, and it was while passing through this that the deceased was struck by the engine. This cloud of steam and smoke is described by one witness as extending 300 or 400 feet along

the tracks, and by another for about 100 to 200 feet. It varied in density and shifted with the wind, so that at times one could see considerable distances through it while at other times it was so dense that it was possible to see only a very short distance. Huxoll was walking eastward through this cloud of smoke and steam and was between the rails of one of the tracks when an engine backing toward the west struck him in such a manner that the tender passed over him, and when the engine was stopped he was opposite the main driving wheel, with his right wrist under the wheel on the rail.

Judgment was rendered by the trial court on a verdict in favor of the plaintiff, which was affirmed by the Supreme Court of Nebraska and, the case being one to which the Federal Employers' Liability Act is applicable, it is now here on writ of error.

There are many claims of negligence in the petition, but the court submitted only three of them to the jury, and of these we need consider but one instruction, viz:

Was the power brake on the engine in working order at the time of the accident, and if it was not, did this defect contribute "in whole or in part" to cause the death of Huxoll?

The oral argument of counsel for the plaintiff in error was practically confined to the proposition that the trial court committed reversible error in submitting these questions to the jury, for the reason that, even if it be assumed (as it must be for there is sharp conflict on the point) that the power brake was not in working order, there was no substantial evidence in the case that this failure contributed "in whole or in part" to cause the death of Huxoll.

The engineer did not see the deceased at the moment he was struck, and it is argued that there is no substantial evidence to show how much farther the engine ran after he was notified of the accident than it would have run if the power brake had been properly applied, or that

the running of the engine such distance, whatever it may have been, added anything to the injuries of the deceased and so contributed to cause his death.

It is necessary for us to examine the evidence in the record to determine the validity of this claim for the reason that it presents a federal question, not of fact but of law, (*Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673), and it relates to the only negligence claimed in the case which, if proved, would relieve the defendant in error, as the charge of the court in the instruction we are considering relieved her, from the necessity of having her recovery diminished by the jury in proportion to the amount of negligence attributable to her decedent, who was obviously guilty of contributory negligence in walking on the track under the conditions shown.

The Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, is confessedly applicable to the case and the rule of liability prescribed by this and the Safety Appliance Act of March 2, 1893, 27 Stat. 531, is, as the trial court charged, that if the failure to have the power brake in working order contributed "in whole or in part" to cause the death of deceased, the plaintiff in error would be liable in damages and neither contributory negligence nor assumption of risk could avail the company as a defense or in diminishing the damages.

There is conflict in the evidence; as to the speed at which the engine was moving when it entered the cloud of steam and smoke—the estimates vary from three miles to ten miles an hour; as to the distance within which the engine with the power brake properly working could have been stopped under the conditions which existed at the time of the accident,—the estimates vary from "almost instantly"—eight to ten feet,—to forty feet; as to when the engineer received notice that the deceased had been struck—the statements vary, from almost the instant the

man was struck, to considerably later; as to the distance which the engine ran after striking the deceased—the estimates vary from thirty to about one hundred and thirty-five feet; as to the distance which the engine ran after the engineer had notice of the accident—the engineer testified at one time that he thought it did not exceed forty feet, while other testimony tended to show that it must have been considerably more than a hundred feet; and as to the lookout which the engineer was keeping when the accident occurred.

The first wheel to actually strike the deceased was the "main" driving wheel—the middle one of three—and this was standing on his right wrist when the engine was stopped, so that the entire tender and quite one-half of the engine proper, including the fire-box, passed over his body which was found so wedged beneath the engine that it was necessary to remove the brakerods to release him.

The deceased was not instantly killed but was conscious and talked some during the forty-five minutes which elapsed before he was released from under the engine and also later in the day while on the way to the hospital at Cheyenne, and he did not die until two o'clock the next morning. The injuries which caused his death are not described beyond the bare statement that the driving wheel rested on the wrist of his right arm, that that arm was found afterwards to be torn from the shoulder and that his scalp was badly cut.

Considering this conflicting testimony in the aspect of it least favorable to the company, as we must on this review, it results that there is evidence tending to show, that, while the engineer did not see the man struck, he was notified almost instantly by a call to stop from the one witness who says he saw him struck, and that if the power-brake had been working the engineer could have stopped his engine, running three or four miles an hour, "almost instantly,"—"in eight to ten feet," but that in fact it

ran for approximately one hundred and thirty-five feet after striking the deceased, with his body under the tender or engine almost the entire time.

Demonstration is not required in such a case as we have here but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence, and it is impossible for us to conclude that the conflict which we have thus described does not present evidence sufficient to justify the submitting of the case to the jury for its determination as to whether the deceased, who survived the accident for fifteen hours, received injuries which contributed in part, at least, to the fatal result, during the time that the engine was being negligently run for a distance which there is evidence tending to show was at least one hundred feet, with his body all the time being dragged and crushed between the frozen ballast of the track, the low-hanging attachments of the tender and the rods of the driving wheel brakes with which his body was found so entangled that it required forty-five minutes to release him from his desperate situation. It is significant that the men who were there, with all of the conditions before their eyes, thought that further movement, even the slightest, of the engine, would result in further injury to the deceased and that, for this reason, they would not permit it to be moved at all, but thought it necessary to remove the brakerods in order to release him, even though this required that he be exposed to the cold in much below zero weather for forty-five minutes.

The judgment of the Supreme Court of Nebraska must be

*Affirmed.*

# JOHNSON *v.* LANKFORD ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 96. Submitted December 18, 1917.—Decided January 28, 1918.

An action against the Bank Commissioner of Oklahoma personally and his surety to recover damages for the loss of plaintiff's bank deposit, alleged to have been due to the Commissioner's failure to safeguard the business and assets of the bank, and his arbitrary, capricious and discriminating refusal to pay the claim or allow it as valid against the state Guaranty Fund, all in continuous, negligent or wilful disregard of his duties under the state law, *held,* not an action against the State, but within the jurisdiction of the District Court, there being diversity of citizenship. *Lankford* v. *Platte Iron Works Co.,* 235 U. S. 461, distinguished.

Allegations to the effect that the enforcement of the state laws in the matters complained of was solely through the Commissioner, and that he so arbitrarily and capriciously exercised his powers as to deprive plaintiff of the equal protection of the laws and deprive plaintiff of his property without due process, etc., *held,* not to change the complexion of the action, no relief being prayed against the Guaranty Fund.

Reversed.

Action for the sum of $5,235.60, with interest, for the failure of defendant in error Lankford to perform his duty as bank commissioner of Oklahoma, in consequence of which plaintiff in error sustained loss in the amount stated. Southwestern Surety Insurance Company, an Oklahoma corporation, was surety on the official bond of Lankford.

Defendants, defendants in error here, moved to dismiss the action on the ground of want of jurisdiction in the court, the action being "one against the State of Oklahoma without its consent, in violation of the Eleventh Amendment to the Constitution of the United States."

The court granted the motion, reciting that it was upon

the ground stated and that the question of jurisdiction was alone involved in its decision, and subsequently allowed a writ of error to review that question only.

Plaintiff in error (we shall refer to him as plaintiff) is a citizen of the State of Massachusetts. The defendants in error are citizens of the State of Oklahoma.

The petition of plaintiff is, in outline, as follows:

Lankford, in March, 1911, then being bank commissioner of Oklahoma, and again in March, 1915, entered into official bonds with the insurance company as surety in the sum of $25,000 for the faithful performance of his duties as required by law.

On October 11, 1913, the Farmers & Merchants Bank of Mountain View, Oklahoma, a domestic banking corporation under the control and supervision of Lankford as bank commissioner, for value received, executed and delivered to plaintiff a certificate of deposit for the sum of $5,066.66, with interest at 3%.

February 20, 1915, Lankford, as bank commissioner, took possession of the bank and of its assets because of its insolvency. Thereupon plaintiff endorsed the certificate to one Martin for collection, who presented the same to Lankford for payment. Payment being refused, Martin re-endorsed the same to plaintiff. Under the terms of the bonds given by Lankford it was his duty as commissioner to pay the certificate of deposit at the time it was presented to him. By refusal to so pay it, and his refusal afterward to pay upon the demand of plaintiff, he, Lankford, grossly and entirely failed to perform his duty, and being informed of the conditions of the bank and having means of knowledge he allowed the persons in charge of it to squander its assets so as to damage plaintiff in his right to compel payment from the bank. He, Lankford, also failed to exercise proper care and supervision in that before the making of the certificate of deposit and thence continuously up to the time he took possession of the bank,

with full knowledge of the situation, he permitted the persons in charge of it to conduct it while its reserve was less than that required by law, and failed to take possession of it for the purpose of enforcing the law, or to do anything else adequate and requisite in the premises. He also permitted it while insolvent to make excessive loans and allow overdrafts in violation of law. And, knowing that it was in the hands of incompetent and inefficient persons, he allowed it to be controlled and managed by them inefficiently and incompetently and without economy, to the great damage of its assets, and plaintiff thereby was deprived of all opportunity of recovering the amount of his certificate out of its property.

Lankford failed to make the visits to the bank which the law of the State required him to make or exact the reports which the law required him to exact. He permitted it to reduce the funds which the law required it to have and failed to notify it of the deficiencies or to require it to repair them.

It was his duty to have taken possession of the bank, but he delayed to do so until February, 1915, when its assets were so squandered and depleted as to be insufficient to pay plaintiff's claim. He knew of the violations of law by its officers and of its insolvency.

It was his duty after he took possession to pay plaintiff's claim but he arbitrarily and capriciously refused, in violation of law and his bonds, and there was no cause whatever for him to have questioned the certificate as a valid claim against the Guaranty Fund of the State, which was available under the law of the State for the payment of claims against the bank.

The laws of the State have been so interpreted and enforced by him as to deny plaintiff the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States and he has exercised this power so arbitrarily and capriciously that other depositors

of the same class and condition of plaintiff have been paid out of the available cash resources of the bank and the Guaranty Fund, and because the State is immune from suit plaintiff has no remedy by judicial review and Lankford, acting for the State as bank commissioner, has deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by illegally preferring other depositors to plaintiff, thereby breaching the obligation of his bonds.

By failure to perform the promises made for the benefit of plaintiff in the bonds, he has been damaged by defendants in the sum of $5,235.60, on February 20, 1915, together with 6% interest thereon, amounting, August 20, 1915, to the sum of $5,392.67.

Plaintiff was without knowledge of the delinquencies of Lankford and the condition of the bank and, without fault on his part, allowed the moneys represented by the certificate to remain in the bank after the same became due.

Judgment was prayed for the amounts above specified.

*Mr. Charles West* for plaintiff in error. See *Martin* v. *Lankford, infra,* 547, 548.

No brief filed for defendants in error.

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

Whether the District Court had jurisdiction was necessarily to be determined by reference to the case made by the petition. Hence we have given it at some length, omitting repetitions. It will be observed that the basis of the action is the neglect of duty of Lankford as bank commissioner, by which plaintiff has been damaged to the amount of his certificate of deposit. The insurance com-

pany has been made a party defendant because it has guaranteed the faithful performance of his duties, a statute of the State, it is contended, making it liable. Whether the contention is tenable or whether the petition or the case is defective in any particular we are not called upon to say. Upon neither question was the judgment of the District Court defensively invoked. The sole question for our consideration then is whether the cause of action stated is one against the State of which the District Court has no jurisdiction.

There is certainly no assertion of state action or liability upon the part of the State, and no relief is prayed against it. The charges are all against Lankford. The relief sought is against him because of his wilful or negligent disregard of the laws of the State, and it is because of this his surety is charged with liability, it having guaranteed his fidelity.

We think the question, therefore, should be answered in the negative; that is, that the action is not one against the State. To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment. Surely an officer of a State may be delinquent without involving the State in delinquency, indeed, may injure the State by delinquency as well as some resident of the State, and be amenable to both.

The case is not like *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461. There the effort was to compel the payment of a claim (certificates of deposit issued by a bank) out of the fund to which the State had a title and which it administered through its officers. Any demand upon it was a demand upon the State and a suit to enforce the demand was a suit against the State, necessarily precluded by the purpose of the law. The case at bar is not of such

character. Its basis is Lankford's dereliction of duty, a duty enjoined by the laws of the State, and the dereliction is charged to have been continuous, overlooking violations of the requirements of law by the bank officials by which it was brought to insolvency, knowing of the depletion of its assets, knowing of the reduction of its reserves, and not requiring their repair. A further dereliction is charged after Lankford took possession and such arbitrary conduct and preferences that plaintiff's claim was subordinated to other claims of like character.

The present case finds example in *Hopkins* v. *Clemson College*, 221 U. S. 636, where the college was held liable for acts of trespass upon private property, and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a "high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts." And it was further said, "The Eleventh Amendment was not intended to afford them [public agents] freedom from liability in any case where, under color of their office, they have injured one of the State's citizens." And a distinction was marked between such acts and such as affect the State's political or property rights.

One charge in the petition will justify special comment. It is that the enforcement of the laws of Oklahoma in the matters complained of was and is solely through and by Lankford as bank commissioner and that he so arbitrarily and capriciously exercised his powers as to deprive plaintiff of the equal protection of the laws and to give to "other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage." And also it is alleged that Lankford's conduct in that particular deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

The purpose of the allegations is not very clear. They

might be considered as intended for emphasis of the wrongful conduct of Lankford; but they seem to be made more of than this in the argument of counsel, and we are left in doubt whether they are pleaded as independent grounds of recovery or only as elements with other grounds. It is somewhat impossible to regard them as the former, for no special relief is asked on account of them. They represent completed acts the injury of which has been accomplished, the plaintiff losing by them access to the Guaranty Fund or its security, and hence Lankford is charged with personal liability. But no relief, as we have said, is prayed against the fund. If it were, *Lankford* v. *Platte Iron Works Co., supra,* might apply.

*Judgment reversed and cause remanded for further proceedings in accordance with this opinion.*

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## MARTIN v. LANKFORD ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 97. Submitted December 18, 1917.—Decided January 28, 1918.

This action was similar to *Johnson* v. *Lankford, ante,* 541. Here, however, plaintiff sought damages measured by the excess of his claims as depositor over his liability as a stockholder of the bank; and there was not diverse citizenship. *Held,* (1) that the action was not against the State but against the defendant Bank Commissioner personally (and his surety) because of his alleged tortious conduct in violating the state law, and (2) that allegations to the effect that by the Commissioner's wrongful administration of the state law plaintiff's privileges and immunities were abridged and his property taken without due process, in violation of the Constitution, were to be taken as in emphasis of the Commissioner's wrongdoing, not as an

independent ground of recovery; and, in the absence of diverse citizenship, the District Court lacked jurisdiction.
Affirmed.

The case is stated in the opinion.

*Mr. Charles West* for plaintiff in error, contended in this and the *Johnson Case, ante,* 541, (with which it was presented,) that the conduct of Lankford, besides constituting a breach of duty under the state law, was at the same time in violation of the Federal Constitution, and gave rise to a federal cause of action under Rev. Stats., § 1979, *Myers* v. *Anderson,* 238 U. S. 368. Further, that, done under color of the state law, the conduct amounted to unconstitutional state action, though the law itself was not subject to objection, and that the defendant, guilty of such conduct, became personally liable as a violator of the plaintiffs' privileges and immunities and their rights to due process and equal protection of law, citing *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278; *Virginia* v. *Rives,* 100 U. S. 313; *Ex parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20; *Ex parte Young,* 209 U. S. 123; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Nashville* v. *Taylor,* 86 Fed. Rep. 168, 184, 185; *Iron Mountain R. Co. of Memphis* v. *City of Memphis,* 96 Fed. Rep. 113; and other authorities. Upon this ground it was sought to sustain the District Court's jurisdiction in the absence of diverse citizenship.

No brief filed for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The action is in certain particulars similiar to No. 96, *ante,* 541, and was submitted with it. The citizenship of the parties, however, is not diverse as in the other action, they being all citizens of Oklahoma. There is a further

difference from the other action in that in the latter the plaintiff was a depositor in the bank while in this he is a stockholder as well as a depositor and seeks to have his stockholder's liability of $2,000 offset against any sums that may be owing to him by reason of the matters set forth in his petition, Lankford, as bank commissioner, having refused to do so. Wherein and wherefore Lankford should have done so and wherein and wherefore he violated his duty to plaintiff through wrongful and neglectful conduct is charged in three causes of action substantially the same as the petition in No. 96, varied only to suit the differences in demand. In other words, that plaintiff lost his deposit because of neglect of duty upon the part of Lankford in the following particulars: (1) Failure to exercise proper supervision over the bank as directed by the statute of the State. (2) Allowing the parties in charge of the bank to squander its assets. (3) Allowing it to continue business while and after its reserve was greatly less than required by law. (4) Allowing its managers continuously and repeatedly to make excessive loans and permit excessive overdrafts. (5) Allowing such managers to remain in charge of its affairs, knowing them to be incompetent and notwithstanding it was his duty to discover such incompetency and, upon discovery, to take possession of the bank for the protection of its depositors and stockholders.

Plaintiff hence prayed that his stockholder's liability of $2,000 be offset against the sums due him and for recovery of the overplus, which he alleged to be $6,669.25, and interest thereon.

The Attorney General of the State appeared specially and alleged that the State "is a necessary party in interest to a proper determination of the issues described in the plaintiff's petition," that it "does not consent to be sued in this cause, and objects to this action being maintained against it." The motion concluded as follows:—"Wherefore, the State of Oklahoma moves the court to dismiss this

action for want of jurisdiction over the party defendant."

Thereupon, by permission of the court, plaintiff inserted at the end of each cause of action an amendment in substance as follows: That the enforcement of the law of the State through Lankford, as bank commissioner, abridges plaintiff's privileges and immunities as a citizen of the United States in that Lankford allowed and paid out of the assets of the bank and out of the Guaranty Fund the deposits of other persons similarly situated with plaintiff and refused arbitrarily to pay his, plaintiff's, deposit. And by the imposition of the lien on the assets of the bank by the State for the sums advanced by it to the payment of such other depositors postpones and prevents the collection of plaintiff's deposit because the amount so advanced is greater than the assets, and that plaintiff was entitled to the same treatment as other depositors.

The court then passed upon the motion to dismiss and granted it, reciting that the question of jurisdiction was alone involved.

The petition charges delinquency on the part of Lankford whereby the bank's officers were enabled to so conduct its affairs as to bring it to insolvency, making it necessary for him to take possession of it with its assets depleted. The petition also charges such conduct after he took possession as to subordinate plaintiff's claim to that of other depositors in the same situation. His conduct in this last particular, it is said, was in violation of the equal protection and due process clauses of the Constitution of the United States.

We assume that the amendment to the petition which charges that the lien of the State upon the assets of the bank was so enforced as to give other depositors a preference was intended to be but another way of asserting violation of the Constitution, not by the law of the State, but by the wrongful administration of the law by Lank-

ford. Indeed the petition negatives state action. It is based, as we have seen, upon the tortious conduct of Lankford, not in exertion of the state law but in violation of it. The reasoning of No. 96 is therefore applicable and the conclusion must be the same, that is, the action is not one against the State, and the District Court erred in dismissing it for want of jurisdiction on that ground.

We say "on that ground," for we are brought to the consideration whether the judgment of dismissal can be sustained upon another ground. There is confusion in the petition and the argument used to support it. As we have seen, Lankford is charged with dereliction of duty whereby plaintiff in error has been injured; but there is an assignment of error based upon the due process and other clauses of the Constitution of the United States. They were violated, the assignment recites, by Lankford's conduct by which other depositors were preferred to plaintiff, and the decision was "without evidence, without notice, without a hearing provided by law, without an opportunity afforded by law for judicial review"; and that the District Court erred in deciding that "the consequent action based upon said facts against" Lankford and the insurance company as his surety "was in effect one against the State of Oklahoma."

In No. 96 we said of a like allegation that it was only possible to regard it as emphasis of Lankford's wrongdoing, not as an independent ground of recovery. To hold otherwise would be to disregard the whole scheme of plaintiff's petition which is, as we have seen, a cause of action against Lankford because of his derelictions. This being the nature of the action, the District Court erred in regarding it as one against the State and dismissing it on that ground. But, however, its judgment was right, plaintiff and Lankford being citizens of the same State, and the Surety Insurance Company being an Oklahoma corporation, and therefore the judgment must be affirmed. *Affirmed.*

# UNITED STATES ET AL. *v.* WOO JAN.

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

No. 586. Argued January 17, 1918.—Decided January 28, 1918.

Section 21 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, empowers the Secretary of Labor, when satisfied that an alien has been found in the United States in violation of that act, or is subject to deportation under the provisions of that act or of any law of the United States, to cause such alien within the period of three years, etc., to be taken into custody and returned to the country whence he came; § 43, however, provides that the act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. *Held*, that § 43 preserves the judicial proceedings prescribed by the Chinese Exclusion acts for the cases to which those acts apply, and that, where the ground was a violation of the Exclusion Acts and not a violation of the Immigration Act, the summary administrative method provided by § 21 cannot be used. *United States* v. *Wong You*, 223 U. S. 67, distinguished.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Fitts* for the United States *et al.*

*Mr. Francis R. Marvin* and *Mr. Proctor K. Malin* for Woo Jan, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Immigration Act of February 20, 1907, 34 Stat. 898, provides as follows:

"Sec. 21. That in case the Secretary of [Commerce

and] Labor shall be satisfied that an alien has been found in the United States in *violation* of this Act, or that an alien is subject to deportation under the provisions of this Act *or of any law of the United States* [italics ours], he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came. . . ."

It is provided, however (§ 43), "That this Act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. . . ."

The relation of these sections has given rise to diversity of decision, district courts of different districts and circuit courts of appeals for different circuits being in opposition. *Ex parte Woo Shing* (N. D. Ohio), 226 Fed. Rep. 141, sustains the power of the Secretary of Labor exercised under § 21, and the decision was approved by the Circuit Court of Appeals for the Eighth Circuit (*Lo Pong* v. *Dunn*, 235 Fed. Rep. 510; *Sibray* v. *United States*, 227 Fed. Rep. 1). The power of the Secretary was denied in the instant case by the District Court for the Eastern District of Kentucky (228 Fed. Rep. 927), and the decision has been followed by the Circuit Courts of Appeals for the Seventh and Fifth Circuits. *United States* v. *Lem Him*, 239 Fed. Rep. 1023; *Lee Wong Hin* v. *Mayo*, 240 Fed. Rep. 368.

The Circuit Court of Appeals, reciting this diversity, certifies to this court the following questions, "(*a* in the abstract, *b* concretely)":

"(*a*) Has the Secretary of Labor, acting within three years from the last entry, jurisdiction to arrest and deport a Chinese alien upon the sole ground that he is found in this country in violation of the Chinese exclusion act?

"(*b*) Are the facts stated in Woo Jan's petition and admitted by demurrer inconsistent with any jurisdiction in the Department of Labor to cause his arrest and deportation?"

The answer that is received to "(*a*)" determines the answer to "(*b*)." In other words, if the first be answered "No," the second will necessarily be answered "Yes," the second being, as indicated by the Circuit Court of Appeals, the concrete application of the abstraction of the first.

The facts are these: The Secretary of Labor, attempting to exercise the power supposed to be conferred upon him by § 21, caused the arrest of Woo Jan as a Chinese alien unlawfully within the United States with the view and purpose of deporting him. The warrant of arrest recited "that the said alien is unlawfully within the United States in that he is found therein in violation of the Chinese Exclusion laws, and is, therefore, subject to deportation under the provisions of section 21" of the Act of Congress of February 20, 1907, amended by the Act of March 26, 1910, 36 Stat. 263. It was directed to the "Inspector in Charge, Cleveland, Ohio, or to any immigrant inspector in the service of the United States."

Woo Jan petitioned the District Court in *habeas corpus* to be discharged from the arrest, asserting his right to be and remain in the United States and setting up as grounds of it, that he was a merchant and that his status as a resident had been investigated by the authorities of the United States and established, and that there was no authority of law for the issue of the warrant. To the petition the District Attorney demurred, and the court, holding that the warrant had been issued without authority of law, ordered the discharge of Woo Jan. The case, therefore, presents to us through the questions certified the validity of the judgment.

We are admonished at the outset by the diversity of opinion that there are grounds for opposing contentions. Indeed, §§ 21 and 43 seem to be, at first impression, in irreconcilable conflict. The declaration of § 21 is that the power of the Secretary of Labor shall extend to taking into custody and returning to the country from whence

he came whoever is subject to deportation under the provisions "*of any law of the United States.*" The universality of the declaration would seem to preclude exception and compel a single judgment. But, passing on to § 43, we find another law preserved and kept in function, a function so firm and exclusive that it is provided that the act, of which § 21 is but a part, shall not be construed to "repeal, alter, or amend" it. Let us repeat the language—"*Provided,* That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent." There is, therefore, an express qualification of the universality of § 21, indeed, from all of the provisions of the act the Chinese Exclusion laws are excepted. They, the latter, are to stand in their integrity and efficacy. But it is asserted that they are so left to stand and that § 21 only gives another remedy, and *United States* v. *Wong You,* 223 U. S. 67, is cited.

First as to the assertion, then as to the cited case. That we may estimate both we insert in the margin the provisions of the Exclusion laws.[1] The Government,

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[1] The Act of May 6, 1882, as amended by the Act of July 5, 1884 (22 Stat. 58; 23 Stat. 115), provides that:

"From and after the passage of this act, and until the expiration of ten years next after the passing of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States."

Section 13 of the Act of September 13, 1888, 25 Stat. 476, 479, entitled "An Act to prohibit the coming of Chinese laborers to the United States," provides:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United

confronted with those provisions, conceded at bar that the remedy of § 21 is not their equivalent. The difference is marked. It is the difference between administrative and judicial action; and the Government recognized that the difference—we might say contrast—is the step on which it "must fall down, or else o'erleap." And necessarily so. Manifestly the remedy of § 21 has not the safeguards of impartiality and providence that the remedy of the Exclusion laws has. Mere discretion prompts the first and last act of the former; the latter has the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions.

The remedies are too essentially different to be concurrent. And yet we are asked to decide that the law which permits the first, that is, permits the deportation of an

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States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

Section 3 of the Act of March 3, 1901, 31 Stat. 1093, provides:

"That no warrant of arrest for violations of the Chinese-exclusion laws shall be issued by United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

By the Act of April 29, 1902, as amended and re-enacted by § 5 of the Deficiency Act of April 27, 1904 (32 Stat., Pt. 1, 176; 33 Stat. 394, 428), "all laws . . . regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, . . . are . . . re-enacted, extended, and continued, without modification, limitation, or condition."

alien simply upon the warrant or determination of an executive officer, is not an amendment or alteration of a law which prohibits it. And there can be no doubt of the result if such decision be made. The summary and direct remedy of § 21 will always be used. No Chinese person will be given the formal procedure of the Exclusion laws with their safeguards. The cases demonstrate this and we cannot believe that Congress was insensible of it and left it possible. Nor can we ascribe to Congress a deliberately deceptive obscurity and an intention, by the use of words which can be given a double sense, to grant a right that can have no assertion. We must, indeed, assume that § 43 was intended to be sufficient of itself—fully exclusive and controlling.

We might terminate the discussion here and leave the case to the explicit language of § 43 that § 21 (to pass at once to the particular) "shall not be construed to repeal, alter, or amend existing laws relation to the immigration or exclusion of Chinese persons." The Government, however, contends, as we have seen, that this court has decided to the contrary in *United States* v. *Wong You*, *supra.*

The Government's understanding of the case is erroneous. It concerned Chinese persons, but not the Exclusion laws, and it was decided that such persons might offend against the Immigration Act and be subject to deportation by the Department of Labor if they should so offend. This was the extent of the decision and its language was addressed to the contention that the latter act was applicable to all persons except Chinese because of § 43. The contention was declared to be untenable, and it was untenable. The case, therefore, is different from that at bar and the opinion was considerate of the difference, that is, considerate of the difference between the Immigration Act and the Exclusion laws.

This difference must be kept in mind. The Chinese Exclusion laws have not the character or purpose of the Im-

migration Act. They are addressed under treaty stipulations [1] to laborers only. Other classes are not included in their limitation and it was provided by the treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion laws are adapted to them and their procedure is hence saved by § 43.

We, therefore, answer question "(*a*)" No, and question "(*b*)" Yes.

*And it is so ordered.*

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

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[1] Article I of the treaty [November 17, 1880, 22 Stat. 826] provides that whenever in the opinion of the United States the coming of Chinese laborers to the United States or their residence therein might affect the interests of the United States, it was agreed that the United States might regulate, limit or suspend such coming or residence, but not absolutely prohibit it, and that the limitation should be reasonable and apply only to laborers, other classes not being included in the limitation. Article II of the treaty is as follows:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come at their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

# GREER *v.* UNITED STATES.

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

No. 504. Argued January 18, 1918.—Decided January 28, 1918.

There is no presumption in a criminal case that the accused is of good character.

A presumption upon a matter of fact, when it is not merely a disguise for another principle, means that common experience shows the fact to be so generally true that courts may notice the truth.

The District Court in a criminal trial is not bound by the rules of evidence as they stood in 1789. *Rosen* v. *United States*, *ante*, 467.

240 Fed. Rep. 320, affirmed.

THE case is stated in the opinion.

*Mr. James C. Denton*, with whom *Mr. Frank Lee* was on the brief, for petitioner.

*Mr. Assistant Attorney General Warren*, for the United States, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

The petitioner was tried for introducing whiskey from without the State into that part of Oklahoma that formerly was within the Indian Territory. He was convicted and sentenced to fine and imprisonment. Material error at the trial is alleged because the court refused to instruct the jury that the defendant was presumed to be a person of good character, and that the supposed presumption should be considered as evidence in favor of the accused, with some further amplifications not necessary to be repeated. The court did instruct the jury that the de-

fendant was presumed to be innocent of the charge until his guilt was established beyond a reasonable doubt, and that the presumption followed him throughout the trial until so overcome. The Circuit Court of Appeals sustained the court below. 240 Fed. Rep. 320. 153 C. C. A. 246. This judgment was in accordance with a carefully reasoned earlier decision in the same circuit, *Price* v. *United States*, 218 Fed. Rep. 149; 132 C. C. A. 1, with an acute statement in *United States* v. *Smith*, 217 Fed. Rep. 839, and with numerous state cases and text books. But as other Circuit Courts of Appeal had taken a different view, *Mullen* v. *United States*, 106 Fed. Rep. 892, 46 C. C. A. 22; *Garst* v. *United States*, 180 Fed. Rep. 339, 344, 345, 103 C. C. A. 469, also taken by other cases and text books, it becomes necessary for this court to settle the doubt.

Obviously the character of the defendant was a matter of fact, which, if investigated, might turn out either way. It is not established as matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the Government would be entitled to put in evidence whether the prisoner did so or not. As the Government cannot put in evidence except to answer evidence introduced by the defence the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. The rule that if he prefers not to go into the matter the Government cannot argue from it would be meaningless if there were a presumption in his favor that could not be attacked. For the failure to put on witnesses, instead of suggesting unfavorable comment, would only show the astuteness of the prisoner's counsel. The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one; otherwise he would be foolish to open the

door to contradiction by going into evidence when without it good character would be incontrovertibly presumed. *Addison* v. *People*, 193 Illinois, 405, 419.

Our reasoning is confirmed by the fact that the right to introduce evidence of good character seems formerly to have been regarded as a favor to prisoners, MacNally, Evidence, 320, which sufficiently implies that good character was not presumed. In reason it should not be. A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth. Whatever the scope of the presumption that a man is innocent of the specific crime charged, it cannot be said that by common experience the character of most people indicted by a grand jury is good.

It is argued that the court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by *Rosen* v. *United States*, *ante*, 467. But it is safe to believe that the supposed presumption is of later date, of American origin, and comes from overlooking the distinction between this and the presumption of innocence and from other causes not necessary to detail.

*Judgment affirmed.*

Mr. Justice McKenna dissents.

# SOUTHERN PACIFIC COMPANY *v.* STEWART.

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

No. 348. Petition for rehearing. Granted and former dismissal vacated January 28, 1918.

The dismissal (*ante*, 359), having resulted from a misunderstanding, due to an incomplete printed record and to statements in the briefs, rehearing is granted, the dismissal set aside and the cause restored to the docket.

*Mr. Henley C. Booth, Mr. William F. Herrin, Mr. A. A. Hoehling, Jr., Mr. William R. Harr* and *Mr. Charles H. Bates* for plaintiff in error, in support of the petition.

Memorandum opinion by direction of the court, by MR. JUSTICE DAY.

The opinion in this case was handed down on December 17, 1917 (*ante*, 359). The cause was submitted on a motion to dismiss which was sustained. The printed record did not contain the proceedings upon the application to remove the cause from the state court. The briefs of counsel upon both sides, upon which the case was submitted, stated that the case was removed because of diversity of citizenship. Treating these statements as the equivalent of a stipulation the court decided the case and rendered judgment. It now appears by a certified copy of the record on removal, filed by the plaintiff in error, that the removal petition contained an allegation that the complaint alleged a cause of action arising under the Interstate Commerce Act, and this fact, as well as diversity of citizenship, was made a ground of removal.

In this view it follows that as our order of dismissal rested upon the assumption that the removal was because of diversity of citizenship only, the petition for rehearing must be granted, the order of dismissal set aside, and the cause restored to the docket.

*So ordered.*

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# UNITED STATES v. SWEET, ADMINISTRATOR OF SWEET.

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

No. 99. Argued December 19, 1917.—Decided January 28, 1918.

Section 6 of the Utah Enabling Act of July 16, 1894, c. 138, 28 Stat. 107, purports to grant to the State upon her admission sections 2, 16, 32 and 36 in every township, reserving lands embraced in permanent reservations, etc., but making no mention of mineral lands. Section 10 provides that land granted by the act for educational purposes "shall not be subject to preëmption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only." *Held*, that the school section grant was not intended to embrace land known to be valuable for coal.

It is the settled policy of Congress to dispose of mineral lands only under laws specially including them. This is evinced by very numerous enactments, beginning even with the Ordinance of May 20, 1785. It was expressed in its application to all grants, whether to a State or not, by the particular acts whence came the general and permanent provisions on the subject found in §§ 2318 and 2346 of the Revised Statutes, and was even more firmly established by the mining laws as a whole.

Taken collectively, the mining laws (including the coal land laws), constitute a special code upon the subject of mineral lands, intended not only to establish particular modes of disposing of such lands,

but also to except and reserve them from all other grants and modes of disposal where there is no express provision for their inclusion.

The school land indemnity act of February 28, 1891, c. 384, 26 Stat. 796, in providing for lieu selections where sections 16 and 36 are mineral, affords a plain implication that those sections are not to pass under the grant if known to be mineral when the grant takes effect.

The school land grant to Utah must be read in the light of the mining laws (which have always applied in Utah), the school land indemnity law, *supra*, and the settled policy of Congress respecting mineral lands, and not as if it constituted the sole evidence of the legislative will. As it contains no language certainly showing an intention to depart from such policy, or explicitly or clearly withdrawing from the operation of the mining laws the designated sections when known to be mineral, its general terms cannot be held to include them.

This conclusion is fortified by the fact that, although Utah was known to be rich in minerals as well as salines, the Enabling Act in its extensive grants is silent as to minerals but includes an express grant of salines; also by the committee reports in Congress, uniform construction by the Land Department, and the Act of May 3, 1902, c. 683, 32 Stat. 188, declaring that as to Utah the school land indemnity law of February 28, 1891, *supra*, shall apply to sections 2 and 32 as well as 16 and 36.

*Cooper* v. *Roberts*, 18 How. 173, distinguished and some of its observations disapproved.

228 Fed. Rep. 421, reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Kearful* for the United States.

*Mr. A. C. Ellis, Jr.*, with whom *Mr. W. H. Dickson* was on the brief, for appellee:

Section 6 of the Utah Enabling Act must be taken according to the plain meaning of its words. There is no exception or even mention in it of mineral lands; but other matters excepted are enumerated with particularity

which shows the more clearly that no exception of mineral land could have been intended. The same is true of the entire statute, which does not mention mines or minerals, much less except them. Section 10 furthermore declares that these school sections were under no circumstances to be subject to entry "under the land laws" of the United States—the mineral laws, necessarily, as well as the non-mineral.

The Utah Constitution, Art. X, undertook to provide for the sale of "minerals" from "school lands." This was a construction of § 4 of the Enabling Act as granting mineral lands, and this construction was acquiesced in by the general Government through the President when he accepted and proclaimed the constitution as in accordance with the act.

The grant being absolute on its face and perfectly clear and unequivocal, the courts cannot engraft upon it an exception. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 510; *Carey* v. *Donohue*, 240 U. S. 430; *United States* v. *Missouri Pacific Ry. Co.*, 213 Fed. Rep. 169, 173; *Hobbs* v. *McLean*, 117 U. S. 567, 579, 580; Sutherland, Stat. Constr., § 328.

The policy of the Government is to be found in its statutes, its court decisions and the constant practice of its officials. The policy from the beginning has been to deal bounteously with the common schools, definitely to grant the school sections. Exceptions should not be allowed unless the statute itself contains them. *Cooper* v. *Roberts*, 18 How. 173, 177; *s. c.*, 20 How. 467, 484, 485; *Beecher* v. *Wetherby*, 95 U. S. 517. There has been no uniform policy to except mineral land from such grants. Some enabling acts do and some do not. The Oklahoma Act expressly recognizes that minerals may pass to the State (34 Stat. 273), and this immediately preceded the Utah Act. Besides, the act being plain, the courts cannot vary it to suit their ideas of policy—the intention must

be gathered from the words. [Citing many cases.] Section 2318, Rev. Stats., applies only where the disposition of mineral land is not "otherwise directed by law," which is not this case. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391; *Hamilton* v. *Rathbone*, 175 U. S. 414, 421. Besides, the Enabling Act repeals all acts and parts of acts in conflict with it.

*Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167; *Deffeback* v. *Hawke*, 115 U. S. 392; and *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634, are readily distinguishable.

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

This is a suit by the United States to quiet the title to section 32 of a designated township in Carbon County, Utah, the suit being specially directed against a claim asserted by the defendant, as an assignee of the State, under the school land grant to the latter. Whether this tract passed to the State under that grant or was reserved to the United States as mineral land is the matter in controversy. In the District Court the United States prevailed as to all but 40 acres, but in the Circuit Court of Appeals that decree was reversed and one for the defendant was directed. 228 Fed. Rep. 421.

The evidence shows that the entire section, excepting 40 acres, is valuable for coal and has been known to be so since before Utah became a State. Land valuable for coal is mineral land within the meaning of the public land laws. Thus the ultimate question for decision is whether the school land grant to Utah embraces mineral land. The grant is found in § 6 of the Act of Congress of July 16, 1894, c. 138, 28 Stat. 107, and is copied in the margin [1]

[1] Sec. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every town-

with another closely related section of the same act. It neither expressly includes mineral lands nor expressly excludes them. If it did either, it would be conclusive of the will of Congress upon the point. But, as it makes no mention of such lands, it is permissible—indeed, is essential—to inquire whether the congressional will is otherwise made manifest, that is to say, whether the general words of the grant are to be read in the light of other statutes and a settled public policy in respect of mineral lands.

In the legislation concerning the public lands it has been the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specially including them. This practice began with the ordinance of May 20, 1785, 10 Journals of Congress, Folwell's ed., 118, and was observed

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ship of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

Sec. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to preëmption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

with such persistency in the early land laws [1] as to lead this court to say in *United States* v. *Gratiot*, 14 Pet. 526, "It has been the policy of the government, at all times in disposing of the public lands, to reserve the mines for the use of the United States," and also to hold in *United States* v. *Gear*, 3 How. 120, that an act making no mention of lead-mine lands and providing generally for the sale of "all the lands" in certain new land districts, "reserving only" designated tracts, "any law of Congress heretofore existing to the contrary notwithstanding," could not be regarded as disclosing a purpose on the part of Congress to depart from "the policy which had governed its legislation in respect to lead-mine lands," and so did not embrace them. A like practice prevailed in respect of saline lands, and in *Morton* v. *Nebraska*, 21 Wall. 660, where a disposal of such lands under an act providing generally for the sale of lands in certain Territories was drawn in question, this court said that it could not be supposed "without an express declaration to that effect" that Congress intended by such an act to permit the sale of saline lands and thus to depart from "a long-established policy by which it had been governed in similar cases."

While the early land laws occasionally and specially provided for the sale of mineral lands, they very generally evinced a purpose to reserve such lands for future disposal; and this purpose was given particular emphasis following the discovery of gold in California in 1848, as is shown in the Oregon donation act, the homestead act (which

[1] Acts May 18, 1796, c. 29, § 2, 1 Stat. 464; March 3, 1807, c. 46, § 2, 2 Stat. 445; March 3, 1807, c. 49, § 5, 2 Stat. 448; February 15, 1811, c. 14, § 10, 2 Stat. 617; March 3, 1811, c. 46, § 10, 2 Stat. 662; May 6, 1812, c. 77, § 1, 2 Stat. 728; February 17, 1815, c. 45, § 1, 3 Stat. 211; March 25, 1816, c. 35, § 1, 3 Stat. 260; April 29, 1816, c. 164, 3 Stat. 332; March 3, 1829, c. 55, 4 Stat. 364; September 4, 1841, c. 16, § 10, 5 Stat. 453; July 11, 1846, c. 36, 9 Stat. 37; March 1, 1847, c. 32, 9 Stat. 146; March 3, 1847, c. 54, 9 Stat. 179; September 26, 1850, c. 72, 9 Stat. 472; Public Domain (Donaldson), 306.

adopted the mineral land reservation of the preëmption act of 1841), the grant to the several States for the benefit of agricultural colleges, the railroad land grants and other land acts of that period.[1] Noticeable among those acts is one which, in dealing with grants to Nevada and surveys in that State, declared, "in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale," c. 166, 14 Stat. 85, and another declaring, "no act passed at the first session of the thirty-eighth congress, granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." 13 Stat. 567. Although applied in one instance to lands in Nevada and in the other to grants made at a particular session of Congress, these declarations were but expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them; and upon this theory both declarations were carried into the Revised Statutes as being general and per-

[1] Acts September 27, 1850, c. 76, §§ 5, 14, 9 Stat. 496; February 14, 1853, c. 69, § 7, 10 Stat. 158; July 22, 1854, c. 103, § 4, 10 Stat. 308; May 20, 1862, c. 75, § 1, 12 Stat. 392; May 30, 1862, c. 86, §§ 7, 10, 12 Stat. 409; July 1, 1862, c. 120, § 3, 12 Stat. 489; July 2, 1862, c. 129, § 3, 12 Stat. 503; July 2, 1862, c. 130, 12 Stat. 503; July 2, 1864, c. 216, §§ 4, 19, 13 Stat. 356; July 2, 1864, c. 217, § 3, 13 Stat. 365; June 21, 1866, c. 127, § 1, 14 Stat. 66; July 4, 1866, c. 166, § 5, 14 Stat. 85; July 23, 1866, c. 219, § 1, 14 Stat. 218; July 25, 1866, c. 242, §§ 2, 10, 14 Stat. 239; July 27, 1866, c. 278, § 3, 14 Stat. 292; July 28, 1866, c. 300, § 1, 14 Stat. 338; June 21, 1860, c. 167, § 6, 12 Stat. 71; July 4, 1866, c. 165, 14 Stat. 83; May 4, 1870, c. 69, 16 Stat. 94; March 3, 1871, c. 122, § 9, 16 Stat. 573; Lindley on Mines, 3d ed., § 47.

manent in their nature—the first in enlarged terms as § 2318,[1] and the other as § 2346.

By the Act of March 3, 1853, c. 145, 10 Stat. 244, Congress granted to the State of California sections 16 and 36 in each township for school purposes and large quantities of lands for other purposes. Mineral lands were neither expressly excepted from nor expressly included in the grant of the school sections, but were specially excepted from the other grants. This difference led to a controversy over the true meaning of the school grant, the state authorities taking the view that it did, and the land officers of the United States that it did not, include mineral lands. Ultimately the controversy came before this court in *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, and the position taken by the land officers of the United States was sustained, the court saying, p. 174:

"Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from preëmption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

"It follows from the finding of the court and the undisputed facts of the case, that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school-section grant."

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[1] Sec. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

That ruling was reaffirmed and followed in *Mullan* v. *United States,* 118 U. S. 271, where valuable coal lands, known to be such, were held not to be open to selection by the State as indemnity school lands.

The conditions ensuing from the discovery of gold and other minerals in the western States and Territories resulted in a general demand for a system of laws expressly opening the mineral lands to exploration, occupation and acquisition, and Congress, responding to this demand, adopted from 1864 to 1873 a series of acts dealing with practically every phase of the subject and covering all classes of mineral lands, including coal lands.[1] These acts, with some before noticed, were carried into a chapter of the Revised Statutes entitled "Minerals Lands and Mining Resources." Taken collectively they constitute a special code upon that subject and show that they are intended not only to establish a particular mode of disposing of mineral lands, but also to except and reserve them from all other grants and modes of disposal where there is no express provision for their inclusion. Thus the policy of disposing of mineral lands only under laws specially including them became even more firmly established than before, and this is recognized in our decisions. *Mining Co.* v. *Consolidated Mining Co., supra,* 174; *Deffeback* v. *Hawke,* 115 U. S. 392, 402; *Davis* v. *Weibbold,* 139 U. S. 507, 516. And while the mineral-land laws are not applicable to all the public land States, some being specially excepted,[2] there has been no time since their enactment when they were not applicable to Utah.

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[1] Acts July 1, 1864, c. 205, § 1, 13 Stat. 343; March 3, 1865, c. 107, § 1, 13 Stat. 529; July 26, 1866, c. 262, 14 Stat. 251; July 9, 1870, c. 235, 16 Stat. 217; May 10, 1872, c. 152, 17 Stat. 91; March 3, 1873, c. 279, 17 Stat. 607.

[2] Michigan, Wisconsin, Minnesota, Missouri, Kansas, Alabama and Oklahoma have been wholly or partly excepted. Acts February 18, 1873, c. 159, 17 Stat. 465; May 5, 1876, c. 91, 19 Stat. 52; March 3,

Another statute indicative of the policy of Congress and pertinent to the present inquiry is the Act of February 28, 1891, c. 384, 26 Stat. 796, which defines the indemnity to which a State or Territory is entitled in respect of its school grant. In addition to dealing with deficiencies occurring in other ways, it provides, "And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land." In this there is a plain implication that where those sections are mineral—known to be so when the grant takes effect—they do not pass under the grant. And it does not militate against this implication that under another provision the State may surrender those sections and take other lands in lieu of them where, although not known to be mineral when the grant takes effect, they are afterwards discovered to be so. See *California* v. *Deseret Water &c. Co.*, 243 U. S. 415.

What has been said demonstrates that the school grant to Utah must be read in the light of the mining laws, the school land indemnity law and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will. *United States* v. *Barnes*, 222 U. S. 513, 520. When it is so read it does not, in our opinion, disclose a purpose to include mineral lands. Although couched in general terms adequate to embrace such lands if there were no statute or settled policy to the contrary, it contains no language which explicitly or clearly withdraws the designated sections, where known to be mineral in character, from the operation of the mining laws, or which certainly shows that Congress intended to depart from its long prevailing policy of disposing of mineral lands only under laws specially including them.

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1883, c. 118, 22 Stat. 487; March 3, 1891, c. 543, 26 Stat. 1026; June 6, 1900, c. 813, 31 Stat. 680.

It therefore must be taken as neither curtailing those laws nor departing from that policy.

This conclusion is fortified by other considerations. When the grant was made Utah was known to be rich in minerals and salines. Besides this grant the act contains others aggregating 1,570,080 acres. In none is there any mention of mineral lands. As to 110,000 acres there is an express inclusion of saline lands. This silence as to mineral lands, when contrasted with the special inclusion of saline lands, indicates that the former are not included. See *Montello Salt Co.* v. *Utah,* 221 U. S. 452, 466. The committees of Congress, upon whose recommendation the act was passed, construed it as not embracing mineral lands, for in their reports [1] they stated that "All mineral lands are exempt from any grant made under the act." The Land Department has uniformly placed the same construction upon it.[2] And Congress acted upon that construction when, by the Act of May 3, 1902, c. 683, 32 Stat. 188, it declared that as to the State of Utah "all the provisions" of the school land indemnity law of February 28, 1891, before noticed, should apply to sections 2 and 32 as well as to sections 16 and 36,—the grant to that State covering all of these sections instead of the latter two as in other western States.

The case of *Cooper* v. *Roberts,* 18 How. 173, is relied upon as making for a different conclusion. Part of a school section in Michigan known to be mineral was there in controversy and was held to have passed to the State under its school grant. At the time the section was surveyed, which was the date when the grant was to take effect, there was a statute which in a single section provided for

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[1] House Report No. 162, 53d Cong., 1st sess., p. 18; Senate Report No. 414, 53d Cong., 2d sess., p. 19.

[2] *Utah* v. *Allen,* 27 L. D. 53; *Richter* v. *Utah,* 27 L. D. 95; *State of Utah,* 29 L. D. 69; *State of Utah,* 32 L. D. 117; *Mahoganey No. 2 Lode Claim,* 33 L. D. 37; *Charles L. Ostenfeldt,* 41 L. D. 265.

the sale of mineral lands, and also of other lands, and concluded with a reservation of the school sections "from such sales." The real question was whether those sections were reserved from both classes of sales, and this the court answered in the affirmative. Some observations in the opinion are not in accord with our present conclusion. These were relied upon in *Mining Co.* v. *Consolidated Mining Co., supra,* as our records show, and were in effect disapproved. Besides, when they were made the public policy respecting mineral lands had not been expressed in general and permanent laws, such as were afterwards enacted and carried into the Revised Statutes. See Lindley on Mines, 3d ed., § 136. The case, therefore, is neither controlling nor persuasive here.

It results that the decree of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

*It is so ordered.*

MR. JUSTICE MCREYNOLDS did not participate in the consideration or decision of this case.

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## NORTHERN OHIO TRACTION & LIGHT COMPANY ET AL. *v.* STATE OF OHIO ON THE RELATION OF PONTIUS, PROSECUTING ATTORNEY OF STARK COUNTY, OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 60. Argued October 18, 19, 1917.—Decided January 28, 1918.

Where there are no controlling provisions in state constitution or statutes and no prior adjudication by its courts to the contrary, a franchise for an interurban electric railway, granted by the proper state

authority without limit as to duration, and in the absence of circumstances showing an intention to give or accept a mere revocable right, is a contract not subject to annulment at the will of the granting authority.

Under the constitution and statutes of Ohio in 1892, county commissioners had power to grant franchises over public roads valid for twenty-five years, if not perpetually.

A resolution of county commissioners purporting to revoke an electric railway franchise, and treated by the state court as having that effect, amounts to state action, and, the franchise not being so revocable, such resolution impairs its obligation and is void.

Upon review of a judgment erroneously treating a franchise as revocable at the will of a board of county commissioners and upholding the board's resolution purporting to revoke it, the court is not called upon to determine whether the franchise term has since expired by limitation, or whether the state legislature (which has not acted) may have reserved power to revoke or repeal the franchise.

93 Ohio St. 466, reversed.

THE case is stated in the opinion.

*Mr. John C. Welty* and *Mr. Joseph S. Clark*, with whom *Mr. John C. Weadock* was on the briefs, for Northern Ohio Traction & Light Co.

*Mr. W. T. Holliday* filed a brief for Cleveland Trust Co., plaintiff in error.

*Mr. Frank N. Sweitzer* and *Mr. Hubert C. Pontius* for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Northern Ohio Traction & Light Company through successive assignments from William A. Lynch acquired the interurban electric railroad between Canton and Massillon, Ohio, October, 1906; The Cleveland Trust Company is trustee under a mortgage on the road intended to

secure an issue of bonds. The line was constructed under resolution by the Board of County Commissioners, Stark County, passed February 22, 1892, which granted to William A. Lynch, and such railroad corporation as he might cause to be incorporated for that purpose, the right to locate, construct, maintain and operate an electric railroad along the state highway without specifying any limit of time. This resolution is copied in the margin.[1]

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[1] *Resolution for Right of Way for Electric Railway.*

Resolved, that the right is hereby granted to William A. Lynch and to such railroad corporation as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon, said road to be constructed of ties and rails in the customary manner with the necessary poles and wires for an electric railroad. The ties shall not be laid nearer to the center line of said road than nine feet, except where switches are constructed, at which places the present traveled driveway may be slightly changed from its location to allow for the construction of such switches. Wherever cutting or filling may be necessary in order to establish a suitable grade for said railroad, and such cutting or filling encroaches upon the traveled portion of said road, or nearer than nine feet from the center of the road or wherever the cut or fill would interfere with the usefulness or safety of the road, at all such places the grade of the road shall be changed and its bed shall be re-graveled so as to restore it to its present state of usefulness, instead of locating said railroad on one side of the center line as above provided, the same may be located, along the center line of said road, along the whole or any portion thereof provided that in such case wherever so located said railroad company, or the property owners along the road shall cause a good and sufficient roadway to be graded on each side of said railroad, each of said roadways to be not less than sixteen feet wide in cuts and not less than eighteen feet wide on fills, and each roadway shall be graveled to a width of ten feet and eight inches in thickness and put in condition for public travel without unreasonable delay. In case the railroad is built upon the side of the road, crossings shall be constructed of plank or other suitable materials, at all public highway crossings or intersections and in front of all private driveways on the side of the road on which said railroad may be located. If the railroad be constructed in

A disagreement concerning rates having arisen, by resolution of March 27, 1912, the Commissioners declared the original grant to Lynch not a perpetual franchise but subject to termination by either party and that the passenger rate was excessive and should be reduced. It continued, "therefore, be it resolved, that unless said Northern Ohio Traction and Light Company comply with the above mentioned matters of reduction of amount of fare charged for transporting people between the cities of Canton and Massillon and from intermediate points, together with the transfer on the city lines of Canton and Massillon, on or before the twenty-seventh day of April, 1912, the said grant given to said William A. Lynch on February 22, 1892, to operate an electric railroad between the said cities of Canton and Massillon, is hereby declared terminated and the prosecuting attorney of this county is hereby instructed to take such legal proceedings as may be necessary to have said grant made null and void

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the center of the road, the track shall be laid so that the ties shall not be above the level of the highway on either side at the ends of the ties, materially, or so as to prevent the crossing of teams and vehicles over said railroad with reasonable convenience. All work that may be done under this resolution upon and along said state road shall be done under the supervision and subject to the control and to the approval and acceptance of the commissioners, they reserving the right to make such minor changes in location and the plans and methods of grading the highway as the public interests may require. It being understood and agreed that said Wm. A. Lynch or the railroad company, before commencing any part of said work shall enter into a bond in the sum of ten thousand dollars for the faithful performance of the conditions enjoined upon them by this resolution. This resolution to be of no binding effect until such bond is duly executed and accepted. It being further understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ($5,000) five thousand dollars conditional that said Wm. A. Lynch or said railroad company shall keep said county and said board perfectly harmless from any and all liability to abutting property owners growing out of the construction of said road.

and the said electric railway removed from said public highway between the said cities of Canton and Massillon."

April 26, 1912, the Commissioners returning to the matter resolved:

"In the event that said demands are not met by said company on or before the time mentioned in the said resolution of March 27th, 1912, the prosecuting attorney of this county be and he is hereby instructed to immediately proceed to have injunction proceedings filed against said Northern Ohio Traction & Light Company, restraining said company from operating said electric railway on the public highway between the cities of Canton and Massillon or running cars thereon and to further compel said Northern Ohio Traction & Light Company to remove said railway from said public highway, and be it further resolved, that this resolution be contingent upon and in accordance with the conditions of the said resolution passed by this board on March 27th, 1912, . . ."

Accordingly, August 13, 1912, Charles Krichbaum, Prosecuting Attorney, instituted *quo warranto* proceedings in the Circuit Court asking that plaintiff in error Traction & Light Company be ousted from exercising the franchise to operate a railroad along the Canton-Massillon highway, and be compelled to remove its tracks and switches. A demurrer was sustained because (1) the petition did not state facts sufficient to constitute a cause of action; (2) it did not state facts sufficient to justify relief prayed; (5) plaintiff had no legal power to try or bring the action. No appeal was taken from a final judgment entered June 3, 1913.

February 19, 1913, the Commissioners adopted another resolution which, after referring to the one of 1892 and the construction and operation of the railroad, stated that the grant continued from day to day so long as both parties consented and could be terminated at will, and then

declared "that said term of said grant and conveyance be terminated on this date." It is in the margin.[1]

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[1] Resolution of the County Commissioners of Stark County, Ohio.

Whereas, the county commissioners of Stark County, Ohio, on the 22nd day of February, 1892, passed a resolution appearing on pages 17, 18, and 19 of Volume 8, Commissioners' Journal, Stark county, Ohio, and said resolution is as follows: [Here follows a copy of the resolution granting a right of way to Lynch above set out] and,

Whereas, an electric interurban railway, some time after the passage of said resolution, was built and constructed from Canton, Ohio, to Massillon, Ohio, upon the state road between said cities, the course described in the aforesaid resolution, and

Whereas, cars are now being operated upon said interurban electric railway and have been so operated for some years, by persons or companies, claiming to derive their rights and title from the said William A. Lynch, and claiming that their said title, right and interest emanate from the aforesaid resolution, and

Whereas, The Northern Ohio Traction and Light Company, a corporation, is now and has been, for several years last past, operating the interurban electric cars over said railway and carrying passengers over said interurban electric railway between the cities of Canton and Massillon, Ohio, and

Whereas, the said The Northern Ohio Traction and Light Company claims its rights, interests and privileges for the conducting of said business as assignee, transferee and successors of the said William A. Lynch, and his assigns or successors, based and founded upon the aforesaid resolution passed by the county commissioners of Stark county, Ohio, on the 22nd day of February, 1892, and recorded on pages 17, 18 and 19 of Volume 8, Commissioners' Journal, Stark county, Ohio, and

Whereas, the commissioners of the county of Stark and state of Ohio contend,

First. That the said William A. Lynch, at the time of the enactment of said resolution of the commissioners of Stark county, was not an incorporated company and was not entitled to the privileges of which a company incorporated in Ohio for the purpose of owning and operating an interurban electric line, was not such an entity that he could accept the interests, rights and titles granted by the county commissioners of Stark county in the aforesaid resolution.

Second. That whatever right, title, interest and privilege, if any, were conveyed by the aforesaid resolution to the said William A. Lynch

Obeying this last resolution, Hubert C. Pontius, Prosecuting Attorney, instituted the proceeding under review in the Supreme Court of Ohio. The petition alleged control of the railway by the Traction & Light Company; set up resolutions of 1892 and 1913 authorizing its construction and directing removal; and declared the company continued operations "which said conduct plaintiff avers is without warrant or authority of law." It concluded, "wherefore, because of the premises and matters herein

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were conveyed and granted to the said William A. Lynch and to him alone, said grant and conveyance being a personal one.

Third. That the term of the grant included in the aforesaid resolution of the county commissioners, passed by the county commissioners on the 22nd day of February, 1892, as aforesaid is an indeterminate one, continuing from day to day and that said term extends and continues only so long as both parties to said grant and conveyance, to wit: Stark county, Ohio, through its board of county commissioners, the grantor, and William A. Lynch, or any company he might organize and incorporate, or any successor of the said William A. Lynch or the said company he might organize, the grantee, agree and consent, and that said grant and conveyance can be terminated at any time by either party to said grant and conveyance, or those claiming to hold or holding under said grant.

Now, therefore, be it resolved by the board of commissioners of Stark county, Ohio, assembled in session, that said term of said grant and conveyance be terminated on this date, to take effect on this date, and that the board of commissioners of Stark county, Ohio, refuse to extend to The Northern Ohio Traction and Light Company, which company claims to hold, title, right and interest as the successor, assignee and transferee of the aforesaid William A. Lynch and his successors and assignees, or either of them, the term for the operation of the aforesaid interurban electric railroad beyond this date.

Be it resolved that The Northern Ohio Traction and Light Company be notified that the commissioners of Stark county, Ohio, have on this date terminated the term of said grant and conveyance, under which said grant The Northern Ohio Traction and Light Company claim the right and privilege of operating said interurban electric railroad between Canton and Massillon, Ohio, and that the county of Stark and state of Ohio and the board of commissioners of Stark county, Ohio, will regard and do regard the operation of an interurban electric rail-

set forth, the plaintiff prays the advice of the court, and that the defendant, to wit, The Northern Ohio Traction and Light Company, be compelled to answer by what warrant it claims to have the use and to enjoy the rights, privileges and franchises aforesaid, in the operation of its said interurban electric railroad between the cities of Canton and Massillon, Ohio, in said county and state; and that it be ousted from exercising the same and be compelled to remove its tracks and switches from the said Canton-Massillon road between the corporate limits of the said cities of Canton and Massillon, and plaintiff further prays that such other and further relief be granted in the premises as to the court may seem just and proper."

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road between Canton and Massillon, Ohio, on said state road running between Canton and Massillon, Ohio, from this date forward a usurpation and infringement upon the rights of said Stark county, Ohio, and said board of commissioners of said Stark county, Ohio.

Be it resolved that the prosecuting attorney of Stark county, Ohio, be directed and is hereby directed to take whatever steps he may deem necessary and advisable to prohibit and prevent The Northern Ohio Traction and Light Company or any other person, individual, corporation or company from continuing to operate an interurban electric railroad between the cities of Massillon and Canton, Ohio, on the state road, running between said cities by virtue of any rights, title or interest the said The Northern Ohio Traction and Light Company or any other person, individual, corporation or company may claim as resulting from the aforesaid resolution, enacted by the county commissioners of Stark county, Ohio, on February 22, 1892.

Be it resolved that the said The Northern Ohio Traction and Light Company be directed and is hereby directed to remove all its property, equipment and belongings from the right of way described by the aforesaid resolution, herein referred to as having been passed by the county commissioners of Stark county, Ohio, on February 22, 1892, and now occupied by the said The Northern Ohio Traction and Light Company, at once.

Be it resolved that a copy of this resolution be sent or delivered, and the auditor of Stark county, Ohio, is hereby directed to send or deliver to The Northern Ohio Traction and Light Company a copy of this resolution.

The answer relied upon final judgment in proceedings instituted by Krichbaum as an adjudication of the grant's validity; also a resolution by the county commissioners May 3, 1909, providing for double tracking as recognition and continuation of original franchise. And further, "this defendant says that said resolution of February 22, 1892, and said amending resolution of May 3, 1909, by the acceptance thereof by this defendant and its predecessors in title, constitute a contract between the board of county commissioners of Stark county, Ohio, and this defendant, and that any ouster of this defendant from its use and operation of said electric railroad between Canton and Massillon would be an impairment of the obligation of this defendant's contract, and a taking of this defendant's property without due process of law, and would also be a denial to this defendant of the equal protection of the law, all in violation of the Constitutions of Ohio and of the United States."

Without opinion or other explanation the Supreme Court pronounced the following decree October 19, 1915: "This cause came on to be heard on the pleadings and the evidence and was argued by counsel. On consideration whereof, the court finds upon the issues joined in favor of the plaintiff on the authority of *Gas Company* v. *The City of Akron*, 81 Ohio St. 33. It is, therefore, ordered and adjudged that the said defendant be ousted from the exercise and use of the rights, privileges and franchise described in the petition of the plaintiff in the operation of the interurban electric railroad therein described, and it is hereby ordered to remove its tracks and switches from the said Canton and Massillon road between the corporate limits of the said Cities of Canton and Massillon within ninety days from this date. It is further ordered and adjudged that the plaintiff recover of the defendant its costs herein, taxed at $———."

Dissenting, three members declared: "The sole ques-

tion in this case as presented is whether the board of county commissioners can revoke and annul a franchise granted by the state without having the power so to do delegated to it by the sovereign authority." 93 Ohio St. 466.

Plaintiffs in error maintain that the Commissioners' resolution dated February 19, 1913, was an exercise of state authority repugnant to the Federal Constitution, because it impaired their contract, took their property without due process of law, and denied them equal protection of the laws.

In *East Ohio Gas Co.* v. *Akron*, (decided October, 1909) 81 Ohio St. 33, relied upon to support the judgment below, a city ordinance, without specifying anything as to duration, provided "that the East Ohio Gas Company, its successors and assigns, are hereby granted the right to enter upon the streets, alleys and public grounds of the city of Akron, Ohio, . . . to maintain, operate, repair and remove mains and pipes . . . together with the right to construct and maintain, repair and remove all necessary regulators," etc. And the court said (pp. 52, 53): "It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; . . . It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto."

The Supreme Court determined, in effect, that a valid franchise to construct and maintain the railroad granted to Lynch and his successors in 1892 was terminated by resolution of 1913. Accepting this ruling, is the latter resolution inoperative and void because in conflict with

Art. I, § 10, of the Federal Constitution? Manifestly it amounted to action by the State. *St. Paul Gas Light Co.* v. *St. Paul,* 181 U. S. 142, 148; *Ross* v. *Oregon,* 227 U. S. 150, 163.

It is suggested that in 1892 Ohio statutes only empowered county commissioners to grant franchises not exceeding twenty-five years in duration, and the present one accordingly expired in February, 1917. But by its final judgment (1915) the Supreme Court recognized a valid franchise existing in 1913 and declared it ended by the resolution of that year without discussing the subject of limitation. Consideration of the point is therefore unnecessary—our concern is with rights struck by the resolution. We express no opinion as to whether those have now expired. Neither are we concerned with the General Assembly's reserved power to revoke or repeal privileges; it has taken no action. Ohio Constitution (1851), Art. I, § 2, and Art. XIII, § 2.

Beyond serious doubt, under constitution and statutes of Ohio in 1892 county commissioners had power to grant franchises over public roads valid for twenty-five years, if not perpetually. Nothing said by the state courts prior to *East Ohio Gas Co.* v. *Akron* (1909) is cited which intimates that grants, without specified limit of time, were revocable at will. Evidently this was not the settled view in 1903 when the Circuit Court distinctly adjudged that accepted ordinances by a city between 1861 and 1873, authorizing construction and operation of street railways, silent as to time, created perpetual rights, subject however to revocation by the General Assembly. *State ex rel. Taylor* v. *Columbus Ry. Co.* (1903), 1 Ohio C. C. (N. S.), 145. This judgment was affirmed in 1905, 73 Ohio St. 363, "on the sole ground that the defendant had present right to occupy the streets at the time of the commencement of this action"—a result hardly intelligible upon the theory that the grants were revocable at will. Appar-

ently the doctrine announced in *East Ohio Gas Co.* v. *Akron*, was not suggested in either court.

The circumstances surrounding the grant of 1892 show no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 384.

Where there are no controlling provisions in state constitution or statutes and no prior adjudication by its courts to the contrary, we have distinctly held that franchises like the one under consideration are contracts not subject to annulment as here undertaken. *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 664; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544, 556; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 73; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 117.

As construed by the Supreme Court of Ohio the resolution of 1913 impaired a valid contract, upon which plaintiffs in error properly relied. It was accordingly invalid and without effect.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE DAY took no part in the consideration or decision of this cause.

MR. JUSTICE CLARKE, dissenting.

The parties to this suit are a Board of Commissioners of an Ohio county and two corporations organized under the law of the same State, and the jurisdiction of this court, if it exists at all, must be found in the claim that the resolution of the County Commissioners of February 19, 1913, is a law of the State of Ohio which impairs the ob-

ligation of the grant by the Commissioners of February 22, 1892, within the meaning of the Constitution of the United States. This resolution, printed in the margin of the court's opinion, declares that the Commissioners "contend" that the term of the grant of February 22, 1892, "is an indeterminate one, continuing from day to day, and that said term extends and continues only so long as both parties to said grant . . . agree and consent" and that it may be terminated at any time by either party to it. The resolution then declares the grant terminated as of the date of the resolution and that the prosecuting attorney of the county be, and he is, directed to take such steps as he may deem necessary to prevent further operation of the railroad on the highway, as provided for by the grant.

The effect of the decision by the Supreme Court of Ohio is that this "contention" of the County Commissioners that the grant is one determinable at the will of either party to it, is sound and that the Commissioners having elected to terminate it the rights of the railway company were at an end. This court reverses this decision of the state Supreme Court and holds that the grant of 1892 was not revocable at will by the County Commissioners, that the resolution of February 19, 1913, in terms revoking it, is invalid and void, and without deciding whether the power of the Commissioners was limited to the granting of such a franchise for twenty-five years and if so whether the grant has expired the court returns the case to the state courts for further proceedings not inconsistent with its opinion.

It is impossible for me to concur in the conclusion thus arrived at by the court and my reasons for dissenting will be briefly stated.

The resolution of February 19, 1913, is in terms simply an expression of the "contention" of the County Commissioners as to the legal effect of the grant of 1892, coupled

with notice of their election to terminate the same agreeably to their interpretation of it and with direction and authority given to the prosecuting attorney of the county to test in the courts the validity of the position asserted by the Board.

That such a resolution to apply to the courts of the country to establish an asserted legal right is not a law impairing the obligation of a contract is expressly decided, it seems to me, in *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179, and in principle in *Defiance Water Co.* v. *Defiance*, 191 U. S. 184. A resolution such as was passed here is the only form in which the Board of County Commissioners could assert, in advance of litigation, its contention as to its rights under the contract, and it is not different in effect from what it would have been if the same contention had been expressed in another form, such as by way of an answer filed in behalf of the Commissioners in a suit brought by the Companies to enforce what they considered to be their rights under the grant. The decision of this court that the obligation of the contract was thus impaired amounts to holding "that whenever it is asserted on the one hand that a municipality [county] is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court." This court in the language quoted has declared such a conclusion to be obvious error in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 149.

These three clear and well reasoned cases seem to me to correctly decide that the court is without jurisdiction to consider this case and that it should be dismissed.

But even if we should assume that this court has jurisdiction to decide the case, it, nevertheless, would be impossible for me to concur in the conclusion arrived at.

The resolution of the County Commissioners under discussion does not, in words, define the term for which the franchise to operate a railroad on the public highway is to continue. The Supreme Court of Ohio holds that it results from this failure to define "in express terms," "in plain terms," the duration of the grant that it should be considered an indeterminate one, but this court holds that this failure to clearly define the duration of the grant results in its being a perpetual one, unless it be otherwise limited by constitution or statute.

The rule for the construction of grants such as we have here will nowhere to be found more clearly or imperatively stated than in the decisions of this court.

In *Blair* v. *Chicago*, 201 U. S. 400, 463, a decision obviously rendered upon "great consideration," it is declared that a corporation which would successfully assert a private right in a public street must come prepared to show that it has been conferred "*in plain terms*," "*in express terms*," and that any ambiguity in the terms of the grant must be resolved in favor of the public and against the corporation, "*which can claim nothing which is not clearly given*." The sound reason given for this rule is that "grants of this character are usually prepared by those interested in them," and that "it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act." This is declared to be "sound doctrine which should be vigilantly observed and enforced."

The Supreme Court of Ohio is not less definite in adopting the same rule of construction, saying, in *Railroad Company* v. *Defiance*, 52 Ohio St. 262:

"Every grant in derogation of the right of the public in the free and unobstructed use of the streets . . .

will be construed strictly against the grantee, and liberally in favor of the public; *and never extended beyond its express terms* when not indispensable to give effect to the grant."

What results from the application of this rule to the grant we are considering?

The fact that two such courts as this one and the Supreme Court of Ohio differ so widely that the one holds the grant on its face to be perpetual, and the other holds it to be determinable at will, is, to me, convincing evidence that a perpetual grant is not conferred "in plain terms," "in express terms," that it is "something not apparent on the face of the grant," and that, therefore, to give such a construction to the resolution is to find in it a most vital and important provision which "those interested" in obtaining the grant would have been eager to incorporate into it had they thought it possible to obtain consent to it. It is impossible for me to doubt that a proposal to the County Commissioners to make the resolution read "Resolved, that the right is hereby granted . . . to construct, maintain and operate *perpetually* an electric railroad . . . on the State road between Canton and Massillon" would have been summarily rejected by the Commissioners. The public indignation which the making of such a grant would have excited was sufficient protection against its being made "in plain terms" and the rule we have quoted, in my judgment, should be the protection of the public against such a result being accomplished by construction.

The Supreme Court of Ohio may have been influenced in its decision of this case by the fact that from the time when the development of the State became such as to make of public importance the terms of grants of street railway rights in the streets and public roads of that State, the General Assembly of the State limited to twenty-five years the term for which such rights might be granted, either

by county commissioners or by municipal corporations. It is difficult for a man living in such a legal atmosphere with respect to such grants to think in terms of perpetual franchises. (An attempt to remove this restriction from grants by county commissioners was declared unconstitutional by the Supreme Court in *Railway Company* v. *Railway Company*, 5 Ohio C. C. (N. S.) 583, affirmed 73 Ohio St. 364.)

The decision of this case by the Supreme Court of Ohio is without written opinion, but it is rested by the court upon its previous decision in *East Ohio Gas Co.* v. *Akron*, 81 Ohio St. 33. In that case the City of Akron contended that the franchise granted to the Gas Company, in terms unrestricted as to time, was perpetual, and the Gas Company contended that it was determinable at the will of either party. After having the case under advisement for six months, and as the court says in its opinion "on account of its great importance to the public as well as to all public service corporations" having given unusual consideration to the case, the contention of the Gas Company was sustained and the grant was held "simply determinable, existing only as the parties mutually agree thereto." Paragraph three of the syllabus of the case, which in Ohio has the approval of the entire court, reads:

"While much regard will be given to the clear intention of the parties, yet where the *contract is entirely silent* as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be excluded."

This decision was rendered in 1909 by a unanimous court, and six years later it was made authority for the decision of this case. There is no Supreme Court authority in Ohio to the contrary. The judgment by an inferior court, cited in the majority opinion, that street railway grants made before the statutory limit of twenty-five years was imposed and silent as to duration were perpetual, was

promptly discountenanced when the case reached the Supreme Court. 73 Ohio St. 363.

A decision by a state Supreme Court, repeated after the lapse of six years, of a question involving the construction of local laws is, in my judgment, entitled to very great weight.

There was no question raised in the Ohio court but that a contract was created by the passing and accepting of the resolution of 1892, and the record shows that the sole question for decision, and which was decided, was, whether the grant was an indeterminate or a perpetual one. If the grant had contained an express provision that it was revocable at will, it would have been impossible, having any regard to the meaning of words, to have said that the resolution of 1913 impaired its obligation. It would have been simply and only a form of exercising a legal right the exercise of which was contemplated by the contract. The case is not different if the grant, without such expression, really means, as the Supreme Court of Ohio held that it means, the same thing as if such provision had been incorporated into it, and since the state court arrived at its result by the construction of the grant wholly unaffected by the subsequent resolution terminating it, it seems clear enough, upon repeated decisions of this court, that a decision should not be rendered here based on the theory that the grant was impaired by a resolution in form terminating it. While this court has held that in such cases it will for itself determine whether a contract exists and what its terms are, yet where the decision of the state court is so manifestly unaffected by the later "law" as it is in this case, it should be given weight and authority comparable at least to that which would have been given it if it had been directed to the validity of the granting "law" under the state constitution.

The power to declare laws of States unconstitutional and to reverse the judgments of the Supreme Courts of

States is so fateful and is so unprecedented in the history of governments other than ours that, as this court has repeatedly declared, it should be exercised only in cases which are clear, and it is impossible for me to think that this is such a case.

The only reason given by the court in its opinion for differing with the Supreme Court of Ohio in its construction of the granting resolution of 1892 is that "The circumstances surrounding the grant of 1892 show no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners."

There is no evidence whatever in this record that there were any special circumstances "surrounding the grant of 1892," and to undertake to infer what the unexpressed intention of the parties to this grant was twenty-five years ago is, it seems to me, an unusual and unpromising enterprise.

That it would be against common experience to conclude that rational men would wittingly invest their money in a railroad constructed under a grant determinable by the action of county commissioners is reasoning which it seems is more persuasive with courts than with investors or men of affairs. To reason upon what is reasonable is always uncertain and often misleading, but in this case we have ascertained facts to guide us.

Until recent years street railroad franchises (locations), and also electric light, gas, and other public utility franchises were revocable in Massachusetts, by aldermen in cities, and by selectmen in towns (counties), and they are still in the main so revocable, save that as to railroad grants revocation is now subject to approval by the State Railroad Commission, and as to some other "locations" revocation is subject to approval by the Board of Gas and

Electric Light Commissioners. Mass. Rev. Laws, 1902, vol. II, §§ 7, 32, pp. 1044, 1051. *Springfield* v. *Springfield Street Ry. Co.*, 182 Massachusetts, 41, 48; *Boston Electric Light Co.* v. *Boston Terminal Co.*, 184 Massachusetts, 566; *Metropolitan Home Telephone Co.* v. *Emerson*, 202 Massachusetts, 402. Yet hundreds of millions of dollars have been invested in that State in dependence upon these revocable ordinances.

In legislating for the District of Columbia, Congress has followed the Massachusetts example and has made street railroad grants indeterminate and revocable at the will of Congress. 12 Stat. 390, § 6; 27 Stat. 334, § 8.

Wisconsin, in 1907, adopted the principle of indeterminate franchises (Laws of Wisconsin, 1909, § 1797t), and the new constitution of Michigan recognizes it by providing that any franchise not revocable at will shall require the affirmative vote of sixty per cent. of the voters before it can become valid. Constitution, 1908, Art. 8, § 25. Wilcox Municipal Franchises, vol. I, pp. 36, 37, vol. II, pp. 46, 47, and c. 27.

This form of franchise has been called "a tenure during good behavior," it has resulted in superior service to the public and, to the surprise of those who reason *a priori* on the subject, such franchises have proved in effect perpetual. This type of franchise is undergoing modification in various parts of the country, which will, no doubt, improve it, but, of it even as it now is, Wilcox has this to say:

"Unquestionably, with the recognition of the unspeakable wrong that is inherent in the grant of perpetual franchises, and the great practical disadvantages that usually arise in connection with limited-term grants, public sentiment is rapidly crystallizing in favor of the indeterminate franchise as the most promising basis for public control of street railways." Municipal Franchises, vol. II, p. 240.

Perpetual franchises have proved to be such a burden in communities upon which they have been imposed (Wilcox, vol. II, c. 26) that, for the reasons so well stated in *Blair* v. *Chicago*, *supra*, it is impossible for me to agree that any grant is perpetual unless the language used in it is so express and clear that reasonable men cannot differ in giving to it that effect.

Thus for the reasons (1) That a perpetual grant is not "in plain terms" made by the resolution of 1892; (2) That appropriate consideration seems to me not to be given to the decision of the Supreme Court of Ohio, and (3) That the reasons stated for inferring that an irrevocable franchise was intended by the granting power in the case before us are not sound reasons, I should dissent from the opinion of the court even if convinced that it had jurisdiction to decide the case.

MR. JUSTICE BRANDEIS concurs in this dissent.

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## SUPREME LODGE KNIGHTS OF PYTHIAS *v.* SMYTH.

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

No. 107. Argued January 2, 1918.—Decided January 28, 1918.

The appellant had the right to increase the assessment upon the insurance certificate here concerned, and there was jurisdiction to entertain the appeal, the case involving a construction of a federal charter. The case is ruled on both points by *Supreme Lodge Knights of Pythias* v. *Mims*, 241 U. S. 574. See also *Texas & Pacific Ry. Co.* v. *Hill*, 237 U. S. 208.

220 Fed. Rep. 438, reversed.

THE case is stated in the opinion.

*Mr. John J. McCall*, with whom *Mr. James E. Watson*, *Mr. Ward H. Watson* and *Mr. Sol. H. Esarey* were on the brief, for appellant.

*Mr. Harry V. Borst*, with whom *Mr. W. W. Millard* was on the briefs, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

We shall designate the parties as they were in the trial court, the appellant as defendant and the appellee as plaintiff.

This is a suit to enjoin an increase of assessment upon a certificate,—we shall call it a policy—of insurance on the life of the plaintiff, issued by the defendant. The asserted claim, approved by the lower courts, is that the defendant is estopped to demand such increased payment, or to cancel the policy for failure to pay it, for the reason that at the time plaintiff's policy was delivered to him there was handed to him by the Secretary of the Local Section a pamphlet which purported to be a copy of the "Constitution and General Laws" of the Insurance Section or "Endowment Rank" of the defendant, which were then in force, in which copy Article IV, Section 1, reads:

"Each member . . . shall pay . . . a monthly assessment, as provided in the following table, *and shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank.*"

This provision, it is contended, became a part of the contract of insurance with the plaintiff, which could not be changed without his consent, and made unlawful any increase in his assessment. The defense is that power was given to the defendant by its charter to change its by-laws;

that by provisions in his policy and in his application for it, the plaintiff was notified and charged with knowledge of this fact; and that the increase of assessment complained of was duly authorized pursuant to the terms of this grant of power.

In the disposition which we make of the case the further claim of the defendant, that the by-law relied upon by the plaintiff had been amended before the policy was issued to him, becomes unimportant.

The facts of the case before us make it clear that it must be ruled by the decision of this court in *Supreme Lodge Knights of Pythias* v. *Mims*, 241 U. S. 574.

The defendant is the same fraternal insurance corporation which was plaintiff in error in that case, and its corporate history there detailed need not be repeated here.

The plaintiff in this case (as in the other) was a member of the 4th Class of the "Endowment Rank," and his policy for $3,000 was delivered to him on November 26, 1889, upon an application filed the 26th of the preceding month. He paid a monthly assessment of $3 until 1894 when it was increased to $3.15, which he paid until 1901 when it was increased to $4.80, which he paid until 1910 when he received a notice of an increase to $14.70, which he refused to pay and made the basis of his claim in this suit.

In the *Mims Case* the original policy was issued in 1879 but was surrendered for another in May, 1885, which contained, as the report shows, the same provisions, in almost the same words, as in the Smyth policy. When it was issued the by-law on which the plaintiff relies in this case was confessedly in full force, so that if it be admitted that this by-law was in the form which the plaintiff claims it was represented to him to be at the time his policy was issued, nevertheless his position would be precisely that of Mims.

Two increases of assessment made prior to the one ob-

jected to were paid by Mims "under protest" and by Smyth without objection. The cases are on all fours one with the other and the decision of the earlier one, which it should be noted was rendered since the decision in the Circuit Court of Appeals, must be accepted as ruling this case on the merits as it also rules against the motion by the appellee to dismiss. *Texas & Pacific Ry. Co.* v. *Hill*, 237 U. S. 208, and also 215.

It results that the decision of the Circuit Court of Appeals must be

*Reversed.*

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## WILLIAM FILENE'S SONS COMPANY *v.* WEED ET AL., RECEIVERS OF WILLIAM S. BUTLER & COMPANY, INC.

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

No. 93. Argued December 17, 18, 1917.—Decided February 4, 1918.

Rent issues from the land, is not due until the rent day, and is due in respect of the enjoyment of the premises let.

Where, however, a lessee corporation not only undertook to pay as rental all sums payable by its lessor under overleases of the same premises, but also, as the inducing consideration for the lease, covenanted to pay at all events a certain amount per annum, in monthly instalments throughout the term and, if the lease should be terminated sooner, to pay a sum measured at the same rate for the unexpired portion, less a discount, *held,* (1) that the covenant created a present indebtedness, independent of rent, for the whole amount so stipulated to be paid; and (2) that upon the appointment of receivers in a purely equitable proceeding to carry on the lessee's business and pay its debts, and upon their declining the lease, leaving rent in default, the lessor, by re-entry pursuant to the lease with the court's consent, might perfect its claim to the amount payable under the covenant for the unexpired term, and

that the claim thus perfected was provable within the time fixed by the court for proof of claims against the receivers.

*Held*, further, in such case, that the lessor might, in like manner, perfect and prove its claim under the lessee's covenant to pay as damages the difference between the rental value at the date of entry and the rent reserved, for the residue of the term; for such is not a covenant to pay or accelerate rent, but a personal covenant liquidating damages upon a footing that is familiar and fair.

When a court, without statute, takes possession of all the assets of a corporation to satisfy its debts, the rights and equities of the creditors are determined by their contracts with the debtor. It is error to give to the filing of the bill the effect of the filing of a petition in bankruptcy or to exclude a lawful claim made within the time fixed for proving claims and maturing within a reasonable time before distribution can be made.

A covenant for the payment of so much per annum in monthly payments throughout the term, and if the lease is terminated sooner, for anticipating the payments for the unexpired portion "less a discount at the rate of five per cent. per annum on payments so anticipated," *construed* as intending a simple discount on the payments as they would fall due, *i. e.*, monthly.

230 Fed. Rep. 31, reversed.

THE case is stated in the opinion.

*Mr. George R. Nutter*, with whom *Mr. Jacob J. Kaplan*, *Mr. Edward F. McClennen* and *Mr. Wm. H. Dunbar* were on the brief, for petitioner.

*Mr. Frederick H. Nash*, with whom *Mr. Charles F. Choate, Jr.*, was on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes to this court by writ of certiorari upon a bill for instructions filed by the receivers of William S. Butler & Company, incorporated. The receivers were appointed upon the prayer of a creditor, assented to by the corporation, in a bill brought for continuing the business until the assets could be applied in satisfaction of the com-

pany's debts. Instructions are asked as to the amount to be paid to the petitioner, Wm. Filene's Sons Company, under a lease of the premises that William S. Butler & Company occupied. The lease covered five parcels of land held by the petitioner, also as lessee, and ran for the terms, less one day, of the respective original leases, which expired at different dates, from December 30, 1917, to February 28, 1921. It provided for a reëntry in case of a failure to perform any covenant, of bankruptcy, &c., or of a receiver being appointed and not discharged within ninety days. These proceedings were begun on November 7, 1912. On December 5, 1912, the receiver elected not to assume the lease and left the rent due December 1, unpaid; on December 9 the petitioner reëntered in pursuance of leave granted by the court, and on December 17 made demand upon the receiver for the sum that it alleges to be due. The receiver filed this petition for instructions on April 7, 1913. On September 30, 1913, the petitioner filed a formal claim, the time for proving claims not yet having expired.

The lease is made in consideration of the lessee's covenant to pay twenty thousand dollars a year until February 27, 1921 (the day before the longest of the original leases expired,) and of the other covenants therein contained by the lessee to be performed. The reddendum requires the payment as rental of all sums payable by the lessor under the leases to it at the times specified in their leases, "together with a further sum of twenty thousand dollars yearly, payable in equal monthly instalments until February 27, 1921." The lessor agrees, at the joint request of the lessee and the overlessors in all the original leases in force at the time, to cancel the overleases and abate the rent in respect of them upon payment of a sum equal to $20,000 a year for the residue of the term plus one day, "less a discount at the rate of five per cent. per annum on payments so anticipated." There is a proviso

for an abatement of rent and other payments in case of fire, the taking of part of the premises, &c. "except said payment of twenty thousand dollars per year"; and there is a further stipulation that if the overlease of any part of the demised premises is terminated, the payment of twenty thousand dollars per year shall continue without any abatement. Finally it is agreed that upon a termination of the lease as provided for the lessee will pay to the lessor, upon demand, a sum equal to twenty thousand dollars per year and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one day added (less the five per cent. discount, as aforesaid), and will further make one of three several payments at the election of the lessor, of which it is only necessary to mention the second. This was to pay to the lessor as damages, the difference between the rental value and the rent and other payments named in the lease for the residue of the term, deducting, however, such sum as has been paid for the same period under the clause requiring the payment of twenty thousand dollars a year.

The substance of the petitioner's claim as argued before us is for a sum equal to twenty thousand dollars a year in monthly payments from December 9, 1912, to February 28, 1921, less a discount at the rate of five per centum per annum on the payments anticipated, and for whatever sum may represent its damages estimated in the manner that we have just stated as stipulated in the lease. The courts below were of opinion that the twenty thousand dollars were simply an addition to the rent, that the provisions for payment upon termination of the lease were an attempt to secure a preference by accelerating the instalments and also were in the nature of a penalty, that the analogy of bankruptcy applied, and that the claim for the above-mentioned items could not be allowed. The Circuit Court of Appeals seems to have considered also

that the filing of the bill had the same effect as a petition in bankruptcy in stopping claims that like this were not provable at that date. 230 Fed. Rep. 31. 144 C. C. A. 329.

We are driven to different conclusions. In the first place, whether a letter showing that the payment of $20,000 a year was a substitute for a bonus of $340,000 was admissible or not, *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 120, we are of opinion that on the face of the lease and the figures it was dealt with as a separate item and as the inducing consideration for the sublease, the right to the whole of which was earned when the sublease was made. The summary of the clauses referring to it that we have given shows that the whole amount was to be paid in any event, whether the overleases were cancelled, or a part of the rent was abated, or the leases were terminated, as well as if they ran their full course. It is true that in the reddendum the words "as rental" might be construed to embrace the later clause "together with a further sum of twenty thousand dollars," but the sentence does not compel that construction and the dominant intent and obvious fact seems to us to override any argument upon that ground. See *Cox* v. *Harper* [1910], 1 Ch. 480. Rent issues from the land, is not due until the rent day, and is due in respect of the enjoyment of the premises let. The twenty thousand dollars a year was to be paid whether the premises were enjoyed or not, upon a personal covenant that created a present debt, with no contingency except those possibly and lawfully accelerating the time in which it was to be paid.

We perceive no ground that would justify the rejection of the petitioner's proof for the whole sum subject to the discount agreed. Certainly the fact that the termination of the lease happened after the filing of the bill has no such effect, although the sum was not presently payable until then. When a statutory system is administered the only

question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741. Of course it does not matter that the claim was perfected by the petitioner's act, after a default in the rent. The receivers would not, and Butler & Company could not pay it, so that all agree that the petitioner's course was the prudent and only possible course to take, as it was the course that was contemplated by the covenant in the lease. *Wilder* v. *McDonald*, 63 Ohio St. 383, 397.

We agree with the petitioner that the discount on payments so anticipated should be a simple discount on the payments as they would fall due, that is, monthly, making the total according to the Master's report, $137,348.88.

The rest of the claim is for damages ultra the twenty thousand dollars a year—the difference between the rental value at the date of entry and the rent reserved, less the amount received under the twenty thousand dollar clause. This also was contracted for and we see no reason why it should not be paid. The contract was not that all the rent for the term should become presently due, it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair. Mass. Rev. Laws, c. 163, § 33. *Woodbury* v. *Sparrell*

*Print*, 187 Massachusetts, 426, 428. *International Trust Co.* v. *Weeks*, 203 U. S. 364. *People* v. *St. Nicholas Bank*, 151 N. Y. 592. *Woodland* v. *Wise*, 112 Maryland, 35. *Reading Iron Works—Sweatmen's Appeal*, 150 Pa. St. 369. *McGraw* v. *Union Trust Co.*, 135 Michigan, 609. *Smith* v. *Goodman*, 149 Illinois, 75, 85, 86. *Kalkhoff* v. *Nelson*, 60 Minnesota, 284, 288. *Ex parte Llynvi Coal & Iron Co. in re Hide*, L. R. 7 Ch. 28. The claim divides itself into two items: one from January 1, 1913, until April 1, 1913, when the whole premises were relet, put by the master at $39,829.80; the other from April 1, 1913, to the end of the term, put at $34,433.47. The other disputed item for expenses of reletting is disallowed.

*Decree reversed.*

Mr. Justice Brandeis having been of counsel took no part in the decision of this case.

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## GARDINER, TRUSTEE OF THE PERRY REAL ESTATE TRUST, v. WILLIAM S. BUTLER & COMPANY, INCORPORATED, ET AL.

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

No. 95. Argued December 18, 1917.—Decided February 4, 1918.

Following *Filene's Sons Co.* v. *Weed*, *ante*, 597, *held*, that, in a non-statutory receivership proceeding brought to preserve the good will and pay the debts of a company occupying premises as lessee, the lessor, which reëntered during the receivership, had a proper claim for rent up to reëntry, and for damages based on the lessee's covenant to pay the difference between the rental value at time of reentry and the rent and other payments reserved for the residue of the term.

In Massachusetts, in the absence of statute or express contract, a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee—hence none against the lessee's receivers in proceedings in equity to continue the lessee's business to pay its debts.

230 Fed. Rep. 1021, reversed in part and affirmed in part.

THE case is stated in the opinion.

*Mr. Alexander Whiteside,* with whom *Mr. Bentley W. Warren* and *Mr. Howard Stockton, Jr.*, were on the brief, for petitioner.

*Mr. Frederick H. Nash,* with whom *Mr. Charles F. Choate, Jr.*, was on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here upon the report of a master asking the court to decide whether two claims are provable. The first is upon a lease made by the petitioner to William S. Butler & Company. Receivers were appointed for the William S. Butler & Company corporation on November 7, 1912. At that time the winding up of the company was not contemplated by the bill or decree, but the object was to preserve the good will and pay the debts. On October 1, 1913, the petitioner entered, and on December 1, 1913, presented his proof of claims. The lease contained a clause similar to that in the lease of Wm. Filene's Sons Company, just considered, *ante*, 597, providing that in case of reëntry the lessee should pay to the lessor the difference between the rental value and the rent and other payments required for the residue of the term. The claim was for rent up to the time of reëntry and for damages for the later period. It was rejected by the courts below upon the same grounds as in the former case. 230 Fed. Rep. 1021; 144 C. C. A. 663. This decision, like the other, must be reversed.

The second claim is upon a lease by Russell to the same company of which Gardiner had purchased the reversion. In substance it is for damages similar to those held allowable under the former lease, but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his reëntry, the lease not containing any clause stipulating for such an allowance. Of course there are plausible analogies for the contention. But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition and we believe that it is the general understanding in that State that in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee. *Sutton* v. *Goodman,* 194 Massachusetts, 389, 395. *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581, 590. Upon this claim the decree below is affirmed.

*Decree reversed.*

MR. JUSTICE BRANDEIS took no part in the decision of this case.

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# STELLWAGEN, TRUSTEE FOR ZENGERLE, *v.* CLUM, TRUSTEE IN BANKRUPTCY OF GEORGIAN BAY COMPANY.

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

No. 89. Argued December 14, 1917.—Decided February 4, 1918.

The Bankruptcy Act as it was on the dates herein mentioned (February 2, 1910, November 9, 1910) did not operate to suspend § 6343 of the Revised Statutes of Ohio as it stood February 2, 1910, or the sections into which that section was divided and numbered by the General Code of Ohio, approved February 15, 1910, viz: §§ 11102-11105, as such sections existed May 5, 1910.

The Ohio law, *supra*, (part of a chapter concerning insolvent debtors), provides, among other things, that any transfer made by a debtor to prefer creditors, or with intent to hinder, delay or defraud them, shall, if the transferee knew of such fraudulent intent, be declared void at the suit of any creditor or creditors, and that a receiver may thereupon be appointed to take charge of all the debtor's assets, including the property so transferred, and administer them for the equal benefit of all creditors in proportion to their respective demands. *Held*, that such provisions are consistent with the Bankruptcy Law, and that, availing of them pursuant to § 70e of the latter, a trustee in bankruptcy proceedings, which followed within a few days of the debtor's general assignment, could administer for the creditors generally property which had been transferred by the debtor in trust for particular creditors more than four months previously.

Bankruptcy laws enacted by Congress pursuant to Article I, § 8, of the Constitution, operate to suspend the laws of States only in so far as the latter laws are in conflict with the system established by the former.

In determining whether a state law is in conflict with the Bankruptcy Act, much weight is to be given the consideration that a main purpose of the act, and a prime requisite of every true bankruptcy law, is to benefit the debtor by relieving his future acquired property from the obligations of existing debts.

Although different results may ensue therefrom in different States, it is not inconsistent with the requirement of uniformity for the federal bankruptcy law to permit trustees in bankruptcy to avail themselves of state statutes intended to avoid fraudulent conveyances and thus promote the equal distribution of insolvent estates.

Section 70-e of the Bankruptcy Act gives the trustee in bankruptcy a right to recover property transferred in violation of state law, without reference to the four months' limitation; if a creditor could have avoided the transfer under the state law, the trustee may do the same.

For opinion of the Circuit Court of Appeals *in re* the certification, see 218 Fed. Rep. 730.

The case is stated in the opinion.

*Mr. Bernard B. Selling*, *Mr. George E. Brand* and *Mr. J. Shurley Kennary* for Stellwagen, Trustee, submitted.

*Mr. Alfred Clum*, with whom *Mr. Geo. B. Marty* was on the brief, for Clum, Trustee.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon certificate from the United States Circuit Court of Appeals for the Sixth Circuit. From the statement accompanying the certificate it appears that Stellwagen, Trustee for Margaret Zengerle, filed a petition in the United States District Court to require the surrender and transfer to him of a quantity of white pine lumber and balance due upon a certain open account then in possession of Clum as trustee in bankruptcy of the Georgian Bay Company. The order was denied, the petition dismissed, and appeal taken to the Circuit Court of Appeals.

The questions are whether certain provisions of the statutes of Ohio are suspended by virtue of the Bankruptcy Act of 1898. The facts upon which the questions arise, and in view of which they are to be answered, are thus stated:

"The Georgian Bay Company, an Ohio corporation, was at the time of the transactions in dispute engaged in the wholesale and retail lumber business at Cleveland. Ohio. February 2, 1910, the company delivered to appellant's predecessor (A. L. McBean), as trustee for Margaret Zengerle and the Dime Savings Bank of Detroit, its bill of sale, describing 433,500 feet of white pine lumber then in the company's yards, and stating a total price of $14,013; crediting the trustee with certain promissory notes of the company for a like sum and payable in different amounts, to the order of Margaret Zengerle, C. M. Zengerle, agent, and the Dime Savings Bank, respectively. Neither the bill of sale nor a copy was filed with the recorder of Cuyahoga County, Ohio; but the lumber so in terms sold consisted of piles (stacked in the ordinary way) which were to be and at the time in fact were each dis-

tinctly marked: 'Sold to A. L. McB., Agt.' May 3, 1910, the company with consent of McBean sold this lumber and certain of its own lumber then in the yards, to Schuette & Co. of Pittsburgh. Payment was to be made by Schuette & Co., part in cash, part in notes maturing at fixed times between date of sale and the following September 10th, and the balance in cash on or before October 1st. Two days later, May 5th, the Georgian Bay Company transferred to appellant 'the balance, twenty-five per cent. of invoice value or what may show due on the first of October, A. D. 1910, of the purchase price of the lumber' (so sold to Schuette & Co.), to secure payment in full of all moneys that should be advanced by, and 'payment *pro rata* of all moneys' then owing to, the Dime Savings Bank, Mrs. Zengerle and C. M. Zengerle, agent; and any surplus remaining was to be returned to the company. Schuette & Co., while owing a balance of $7,500 on portions of the lumber it had received, rejected the rest; this can be identified and is worth about $4,000. It was the transfer of this balance and the surrender of this rejected lumber that appellant sought in the court below.

"October 31, 1910, the Georgian Bay Company made a general assignment for the benefit of its creditors, which was properly filed the following November 7th; and on the 9th of that month the company was adjudicated a bankrupt. At the time there remained due from the bankrupt to Mrs. Zengerle $7,100. C. M. Zengerle is the husband of Margaret Zengerle, and was the president of the Georgian Bay Company; the notes payable to his wife represented loans of money belonging to her; and in negotiating those loans and in the transaction had under the bill of sale, he acted as her agent and as president of the company. The theory of the court below was that the bill of sale (February 2, 1910) was intended merely as security and, not having been deposited in accordance with Sec. 4150 (2 Bates' Ann. Ohio Stat., p. 2302) concerning

chattel mortgages, was null and void; that the transfer (May 5th) of balance accruing October 1st from Schuette & Co. was made with intent to hinder and delay creditors, when, according to the laws and the rule of judicial decision of the State of Ohio, the Georgian Bay Company was insolvent, though not according to the Bankruptcy Act; that Margaret Zengerle was, through her agent, C. M. Zengerle, chargeable with knowledge of such intent and insolvency, and the Savings Bank was not; that as to Margaret Zengerle the transfer was null and void and so was set aside, but that the Savings Bank was entitled to be paid out of the balance of the Schuette account. No appeal was taken from the portion of the decree which allowed recovery by the Savings Bank."

The statutes of the State of Ohio in question are §§ 6343 and 6344 of the Revised Statutes of Ohio as amended April 30, 1908, 99 Ohio Laws, 241, 242. These sections were rearranged under the General Code of Ohio approved February 15, 1910, wherein they appear as §§ 11102 to 11107, inclusive. (These sections are given in the certificate, as they stood February 2, 1910, and are found in the margin.[1])

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[1] Sec. 6343. Every sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency, and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors, and in any suit brought by any creditor or creditors of such debtor or debtors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall adminster all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debt-

The claim is stated to be that § 6343 when considered in connection with the chapter concerning insolvent debtors is suspended by the Bankruptcy Act. Reliance is had for this contention upon the following portion of § 6343 which provides: "a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the

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ors in proportion to the amount of their respective demands, including those which are unmatured.

Provided, however, that the provisions of this section shall not apply unless the person, or persons to whom such sale, conveyance, transfer, mortgage or assignment be made, knew of such fraudulent intent on the part of such debtor or debtors, and provided, further, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if such mortgage be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where, upon foreclosure or taking possession of such property, the mortgagee fully accounts for the proceeds of such property.

Every sale or transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferrer's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay or defraud creditors within the meaning of this section, unless the seller or transferrer shall, not less than seven (7) days previous to the transfer of the stock of goods sold or intended to be sold, and the payment of the money thereof, cause to be recorded in the office of the county recorder of the county in which such seller or transferrer conducts his business, and in the office of the county recorder of the county or counties in which such goods are located, a notice of his intention to make such sale or transfer, which notice shall be in writing describing in general terms the property to be sold and all conditions of such sale and the parties thereto; excepting, however, that no such presumption shall arise because of the failure to record notice as above provided in the case of any sale or transfer made under the direction or order of a court of competent jurisdiction, or by an executor, administrator, guardian, receiver, assignee for the benefit of creditors or other officer or person acting in the regular and

assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

The questions propounded are:

"(a) Whether the Bankruptcy Act of the United States, in force on the dates herein mentioned, operated to suspend section 6343 of the Revised Statutes of Ohio, as such section stood February 2, 1910.

"(b) Whether the Bankruptcy Act operated to suspend the sections into which section 6343 was divided and numbered, February 15, 1910, by the General Code of Ohio, to-wit, sections 11102, 11103, 11104 and 11105, as such sections existed May 5, 1910.

"(c) If the Bankruptcy Act did not operate to suspend in their entirety the several sections of the Ohio statutes mentioned in the preceding questions, whether such suspension extended only to the portions thereof which in

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proper discharge of official duty or in the discharge of any trust imposed upon him by law, nor in the case of any sale or transfer of any property exempt from execution.

Sec. 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void. And such court shall appoint a trustee or receiver according to the provisions of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And any assignee as to whom any thing or act mentioned in the preceding section shall be void, shall likewise commence a suit in a court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors. (99 Ohio Laws, 241, 242.)

terms appropriated, for the benefit of all the creditors, the property of the debtor not specifically described in the bill of sale and transfer of account in dispute."

The Circuit Court of Appeals also sends an opinion *in re* the certification aforesaid, in which the court says that it is disposed to hold that if the provisions of the Ohio statutes were suspended, the appellant is entitled in behalf of Margaret Zengerle to recover, otherwise the trustee in bankruptcy is entitled to hold the balance due from Schuette & Company and the lumber rejected by them, and administer the same as part of the estate of the bankrupt for the benefit of its general creditors. The court states that as between Mrs. Zengerle and the general creditors of the Georgian Bay Company, there was sufficient delivery of possession of lumber covered by the bill of sale to dispense with the necessity of depositing the instrument with the county recorder. The sale subsequently made to Schuette & Company, upon the consent of Mrs. Zengerle's trustee, was a distinct recognition of the intent and effect of the bill of sale, and the marking of the piles of lumber, and the transfer of account made two days later was manifestly designed at once to execute the transaction involved under the bill, and transfer the rights thereunder of Mrs. Zengerle, as well as of the Savings Bank, to the sales' proceeds. The court further says, upon the hypothesis that the state statutes are suspended, that because more than four months elapsed between the delivery of the bill of sale, as also of the transfer of account, and the bankruptcy, the trustee cannot by virtue of the Bankruptcy Act alone question the validity of either of those instruments. The court adds that if the state statutes were not suspended, the general creditors acquired rights to have the instruments in dispute set aside because, under the facts shown, the company was not able to meet its debts as they fell due, and so, was insolvent; and, further, the instruments in terms were

made to a trustee. The rights so vested in the creditors being enforcible at any time within four years under the Ohio law.

The Federal Constitution, Article I, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213.

Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the States. *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 188, 189, 190. True it is that general assignments for the benefit of creditors are acts of bankruptcy, Act of 1898, § 3, clause 4, and since the amendment of 1903, 32 Stat. 797, a receivership of an insolvent debtor with a view to distribution of his property for the benefit of creditors will have the like effect. 1 Loveland on Bankruptcy, 4th ed., § 153. In such cases the bankruptcy proceedings, taken within four months, displace those in the state court and terminate the jurisdiction of the latter. *Randolph* v. *Scruggs*, 190 U. S. 533, 537; *In re Watts & Sachs*, 190 U. S.

1, 31. But it does not follow that state statutes intended to avoid conveyances actually or constructively fraudulent and thereby to promote the equal distribution of insolvent estates, may not be availed of by the trustee. Section 70e of the Bankruptcy Act provides:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

This section as construed by this court gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law. *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 425, 426; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 557.

And a right of action under this subdivision is not subject to the four months' limitation of other sections (60b, 67e) of the Bankruptcy Act. Under this subdivision if a creditor could have avoided a transfer under a state law, a trustee may do the same. *In re Mullen*, 101 Fed. Rep. 413 (opinion by Judge Lowell); 1 Loveland on Bankruptcy, 4th ed. 786, 787; Collier on Bankruptcy, 11th ed., p. 1178, and cases cited in note 439.

Turning now to the sections of the Ohio laws in question,—the right to proceed by course of law to recover particular property transferred as prohibited in § 6344, and to cause the same to be administered for the equal benefit of creditors, as in cases of assignment to trustees for the benefit of creditors, has long been part of the stat-

utory law of Ohio. The part in § 6343 which enables the court to appoint a receiver to take charge of all the assets of the debtor or debtors, including the property conveyed, and administer the same for the equal benefit of creditors, is the new feature of the law.

It is apparent that this section intends to permit the appointment of a receiver to take charge of all the assets of the debtor when the provisions of the statute apply as to the debtor and his transferee, and the latter is required to know of the fraudulent intent on the part of the debtor.

Creditors are not thereby deprived of rights, but in case of bankruptcy proceedings within four months of a general assignment for creditors as was the case here, the property may be brought into the bankruptcy court, or, as in this case, may be in its possession and be retained in that court to be administered for the benefit of general creditors. This state statute is not opposed to the policy of the bankruptcy law or in contravention of the rules and principles established by it with a view to the fair distribution of the assets of the insolvent. It is only state laws which conflict with the bankruptcy laws of Congress that are suspended; those which are in aid of the Bankruptcy Act can stand. *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496.

This view of the sections in question was taken by the Circuit Court of Appeals, 6th Circuit, in *In re Farrell*, 176 Fed. Rep. 505, 509, 510, wherein in the opinion it was said that the changes made by the new statutes were in harmony with the policy of the Bankruptcy Act and in aid of its purposes.

There is much discussion in the books as to what constitutes a bankruptcy act as distinguished from an insolvency law. It is settled that a State may not pass an insolvency law which provides for a discharge of the debtor from his obligations, which shall have the effect of a bankruptcy discharge as to creditors in other States, and this although no general federal bankruptcy act is in effect.

And while it is not necessary to decide that there may not be state insolvent laws which are suspended although not providing for a discharge of indebtedness, all the cases lay stress upon the fact that one of the principal requisites of a true bankruptcy law is for the benefit of the debtor in that it discharges his future acquired property from the obligation of existing debts.

In the case of *Mayer* v. *Hellman*, 91 U. S. 496, this court had before it, while the Bankruptcy Act of 1867 was in force, the question of the validity of the assignment of an insolvent, in Ohio, to trustees for the benefit of all his creditors executed six months before the proceedings in bankruptcy had been taken, and it was held that the assignment was good and the assignees in bankruptcy not entitled to the possession of the property. Mr. Justice Field, in delivering the opinion of the court, said:

"In the argument of the counsel of the defendant in error, the position is taken that the Bankrupt Act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments: it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment: it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions

for enforcing a trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankrupt Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application."

The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life. *Neal* v. *Clark*, 95 U. S. 704, 709; *Traer* v. *Clews*, 115 U. S. 528, 541; *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 192; *Wetmore* v. *Markoe*, 196 U. S. 68, 77; *Burlingham* v. *Crouse*, 228 U. S. 459, 473.

This feature of a bankruptcy law is wholly wanting in the Ohio statutes under consideration. Indeed, there is not now, any more than when *Mayer* v. *Hellman*, *supra*, was decided, any attempt in the Ohio laws to provide for the discharge of the debtor from his existing debts.

If the Ohio statutes in the feature now under consideration be suspended, it would follow that a person in Ohio might successfully claim a part of the estate which is being administered in bankruptcy, although the conveyance under which the property is claimed is voidable under the laws of the State where it was made and the alleged right

in the property secured. We think that Congress in the Bankruptcy Act did not intend any such result, but meant to permit the trustee in bankruptcy to have the benefit of state laws of this character which do not conflict with the aims and purposes of the federal law. . And certainly, in view of the provisions of § 70e of the Bankruptcy Act, Congress did not intend to permit a conveyance such as is here involved to stand which creditors might attack and avoid under the state law for the benefit of general creditors of the estate.

From what we have said it follows that Questions A and B should be answered in the negative, and it is unnecessary to answer Question C.

*So ordered.*

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## WEEKS, DOING BUSINESS UNDER THE NAME OF O. J. WEEKS & COMPANY, *v.* UNITED STATES.

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

No. 109. Submitted January 2, 1918.—Decided February 4, 1918.

The Food and Drugs Act of June 30, 1906, c. 3915, § 8, 34 Stat. 768, specifies and defines at least two kinds of "misbranding"—one where the article bears a false or misleading label, and the other where it is offered for sale under the distinctive name of another article.

In either case, it is not the misbranding that is made unlawful, but the shipment or delivery for shipment from one State to another, of the misbranded article.

That this is a legitimate exertion of the power of Congress to regulate interstate commerce is settled by previous decisions.

It is also settled that the negotiation of sales of goods which are in

another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

Upon a charge of misbranding by offering for sale under the distinctive name of another article, *held*, that the trial court properly received evidence that the shipment was made to fill an order obtained by the defendant's agent by so misrepresenting the article, and properly declined to confine the jury's attention to the label borne by the article when it was shipped.

Whether the court below was correct in viewing intent as not an element in such a case and so in holding that sanction by defendant of his agent's misrepresentations was immaterial, this court need not determine, since the trial court instructed the jury that such authority must appear beyond reasonable doubt, and, as the record neither shows that defendant objected to this mode of submitting the question nor purports to contain all the evidence, the verdict of guilty must be taken as determining conclusively that he sanctioned the representations.

224 Fed. Rep. 64, affirmed.

THE case is stated in the opinion.

*Mr. Walter Jeffreys Carlin* for petitioner.

*The Solicitor General* and *Mr. Assistant Attorney General Frierson* for the United States.

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

This was a prosecution under the Act of June 30, 1906, c. 3915, 34 Stat. 768, upon a charge of shipping an article of food in interstate commerce in circumstances making the shipment a violation of the act. The information contained two counts, both charging that the article was misbranded,—one because it bore a false and misleading label, and the other because it was offered for sale as lemon oil when in truth it was an imitation thereof containing alcohol and citral derived from lemon grass. In the District Court there was a conviction upon both counts, and the Circuit Court of Appeals reversed the conviction as

to the first count and affirmed it as to the second. 224 Fed. Rep. 64. The judgment upon the latter is all that is brought here for review.

The defendant was engaged in making and selling various articles of food used by bakers, confectioners and ice cream makers, including the article with which this prosecution is concerned. On the occasion in question he shipped from one State to another a quantity of this article labeled "Special Lemon. Lemon Terpene and Citral." The printed record, although not purporting to contain all the evidence, shows that there was testimony tending to prove the following facts, among others: The shipment was made to fill an order solicited and taken by a traveling salesman in the defendant's employ. The salesman had been supplied by the defendant with a sample bottle of the article which was labeled simply "Special Lemon." In offering the article for sale and soliciting the order the salesman exhibited the sample and represented that the article was pure lemon oil obtained by a second pressing and that this pressing produced a good, if not the best, oil. In truth the article was not lemon oil, but an imitation thereof containing alcohol and citral made from lemon grass. Some of the elements of lemon oil were present in other than the usual proportions and others were entirely wanting.

The testimony respecting the salesman's representations was admitted over the defendant's objection; and later the court denied a request on the part of the defendant that the jury be instructed that this testimony could not be considered, but only the statement appearing on the label when the article was shipped. In that connection the court told the jury that the defendant could not be held responsible criminally by reason of any representations made by the salesman unless it appeared beyond a reasonable doubt that the same were made by the defendant's authority.

The defendant, who is the petitioner here, complains of the admission and consideration of this testimony and insists that under the statute the question whether an article is misbranded turns entirely upon how it is labeled when it is shipped, regardless of any representations made by a salesman, or even the vendor, in offering it for sale.

The statute, in its second section, makes it unlawful to ship or deliver for shipment from one State to another "any article of food or drugs which is adulterated or misbranded within the meaning of this act." In its eighth section it declares:

"That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

"That for the purposes of this Act an article shall *also* be deemed to be misbranded:

"In the case of drugs:

* * * * * * * *

"In the case of food:

"First. If it be an imitation of or offered for sale under the distinctive name of another article."

This section contains other provisions relating to misbranding, but they are not material here and need not be set forth or specially noticed.

It is apparent that the statute specifies and defines at least two kinds of misbranding,—one where the article bears a false or misleading label, and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one, but not of the other. No

doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced. Evidently each is intended to cover a field of its own, for otherwise there would be no occasion for specifying and defining both. That one article of food may be offered for sale in the distinctive name of another, and the offer accomplish its purpose, without the aid of a false or misleading label hardly needs statement.

The statute does not attempt to make either kind of misbranding unlawful in itself, but does, as before indicated, make it unlawful to ship or deliver for shipment from one State to another an article of food which is misbranded in either way. That this is a legitimate exertion of the power of Congress to regulate interstate commerce is settled by our decisions. *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *McDermott* v. *Wisconsin*, 228 U. S. 115, 128; *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 514. It also is settled by our decisions that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Crenshaw* v. *Arkansas*, 227 U. S. 389, 396.

It follows that the testimony respecting the representations of the defendant's traveling salesman was rightly admitted in evidence and submitted to the jury. It tended to prove that the order, to fill which the shipment was made, was obtained by offering the article for sale in the distinctive name of another article, and therefore that the article was misbranded within the meaning of the statute. To have confined the jury's attention to the label borne by the article when it was shipped, as was requested by the defendant, would have been to disregard the nature of the charge in the second count and the distinction between the two kinds of misbranding.

In the Circuit Court of Appeals the view was expressed

that intent was not an element of the offense charged in the second count and therefore that it was immaterial whether the representations of the salesman had the sanction of the defendant. Complaint is now made of this. But the question is not in the case, the view expressed by the Circuit Court of Appeals not being essential to an affirmance of the judgment. The District Court had expressly instructed the jury that to hold the defendant responsible criminally by reason of such representations it must appear, and appear beyond a reasonable doubt, that they were made by his authority. The record before us does not show that the defendant objected to the submission of this question to the jury in this way; neither does it purport to contain all the evidence. The verdict therefore must be taken as conclusively determining that the representations were made with the defendant's sanction.

*Judgment affirmed.*

## DECISIONS PER CURIAM, FROM OCTOBER 1, 1917, TO MARCH 4, 1918, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 173. RICARDO ASCARATE, PLAINTIFF IN ERROR, *v.* STATE OF NEW MEXICO. In error to the Supreme Court of the State of New Mexico. Motion to dismiss submitted October 1, 1917. Decided October 8, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Twining* v. *New Jersey*, 211 U. S. 78; *Ensign* v. *Pennsylvania*, 227 U. S. 592, 597, 598; *Frank* v. *Mangum*, 237 U. S. 309, 342. *Mr. Edward C. Wade, Jr.*, for plaintiff in error. *Mr. Frank W. Clancy* for defendant in error.

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No. ——. Original. *Ex parte:* IN THE MATTER OF JOHN E. READE, PETITIONER. Submitted October 1, 1917. Decided October 8, 1917. Motion for leave to file petition for writ of *habeas corpus* denied. *Mr. O. T. Richey* for petitioner.

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No. 3. TREMONT LUMBER COMPANY, PLAINTIFF IN ERROR, *v.* MRS. NORA REAGAN. In error to the Supreme Court of the State of Louisiana. Submitted October 12, 1917. Decided October 15, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of (1) *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; (2) *Missouri, Kansas & Texas Ry. Co.* v. *Cade*, 233 U. S. 642; *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412. *Mr. John C. Theus* for plaintiff in error. *Mr. S. D. Pearce* and *Mr. H. Garland Dupre* for defendant in error.

No. 236. City of Chelsea, Plaintiff in Error, *v.* City of Boston. In error to the Supreme Judicial Court of the State of Massachusetts. Motion to dismiss submitted October 8, 1917. Decided October 15, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 314; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 137; *Easterling Lumber Co.* v. *Pierce,* 235 U. S. 380; (2) *Worcester* v. *Worcester Consolidated Street Ry.,* 196 U. S. 539; *Kies* v. *Lowrey,* 199 U. S. 233; *Stewart* v. *Kansas City,* 239 U. S. 14. *Mr. Wilton J. Lambert, Mr. Louis R. Kiernan* and *Mr. Samuel R. Cutler* for plaintiff in error. *Mr. John A. Sullivan* and *Mr. Joseph P. Lyons* for defendant in error.

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No. 485. Clara A. Wheeler et al., Appellants, *v.* City and County of Denver et al. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 1, 1917. Decided October 15, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285; *Fay* v. *Crozer,* 217 U. S. 455; *Hendricks* v. *United States,* 223 U. S. 178, 184. See *City and County of Denver* v. *New York Trust Co., City and County of Denver* v. *Denver Union Water Co.,* 229 U. S. 123; *Wheeler* v. *City and County of Denver,* 229 U. S. 342, 352; (2) *Robinson* v. *Caldwell,* 165 U. S. 359; *Loeb* v. *Columbia Township,* 179 U. S. 472; *Macfadden* v. *United States,* 213 U. S. 288; *Boise Water Co.* v. *Boise City,* 230 U. S. 98. *Mr. Clayton C. Dorsey, Mr. Edwin H. Park* and *Mr. Henry A. Lindsley* for appellants. *Mr. James A. Marsh* and *Mr. Norton Montgomery* for appellees.

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No. 619. J. M. Kellogg, Executor, Estate of Mrs. Mary H. Miles, Deceased, Plaintiff in Error, *v.*

Letitia King, Administratrix, Estate of Charles L. King, Deceased. In error to the Supreme Court of the State of Mississippi. Motion to dismiss or affirm submitted October 8, 1917. Decided October 15, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Telluride Power & Transmission Co.* v. *Rio Grande Western Ry. Co.*, 175 U. S. 639; *First National Bank* v. *Estherville,* 215 U. S. 341; (2) *Choteau* v. *Gibson,* 111 U. S. 200; *San Francisco* v. *Itsell,* 133 U. S. 65; *Wood* v. *Chesbrough,* 228 U. S. 672. *Mr. E. F. Noel* for plaintiff in error. *Mr. William H. Watkins* for defendant in error.

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No. 28. Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error, *v.* State of Kansas ex rel. S. M. Brewster, Attorney General, etc., et al. In error to the Supreme Court of the State of Kansas. Submitted October 18, 1917. Decided November 5, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350. *Mr. Paul E. Walker* for plaintiff in error. *Mr. James P. Coleman* and *Mr. F. P. Lindsay* for defendants in error.

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No. 280. B. V. Moore, Plaintiff in Error, *v.* S. A. Olsness, Commissioner of Insurance of the State of North Dakota, et al. In error to the Supreme Court of the State of North Dakota. Motion to dismiss or affirm submitted October 17, 1917. Decided November 5, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 314; *Consolidated Turnpike* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 137; (2) *Butler* v.

*Pennsylvania*, 10 How. 402, 415, 416; *Newton* v. *Commissioners*, 100 U. S. 548, 559; *Taylor* v. *Beckham*, 178 U. S. 548; *Wilson* v. *North Carolina*, 169 U. S. 586; (3) *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 676; *Kies* v. *Lowrey*, 199 U. S. 233; *Stewart* v. *Kansas City*, 239 U. S. 14; *Heim* v. *McCall*, 239 U. S. 175. *Mr. Aubrey Lawrence* for plaintiff in error. *Mr. William Langer* for defendants in error.

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No. 34. United States of America for the use of T. H. Kessler & Company, Plaintiff in Error, *v.* Title Guaranty & Surety Company. In error to the United States Circuit Court of Appeals for the Fifth Circuit. Argued November 8, 1917. Decided November 12, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, and cause remanded to the District Court of the United States for the Southern District of Texas. *Mr. James A. Baker, Mr. Samuel B. Dabney* and *Mr. Claudian B. Northrop* for plaintiff in error. *Mr. Lewis R. Bryan* for defendant in error, submitted.

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No. 35. E. O. Ellison, Plaintiff in Error, *v.* City of La Moure et al.; and

No. 36. David Lloyd, Plaintif in Error, *v.* City of La Moure et al. In error to the Supreme Court of the State of North Dakota. Argued November 8, 9, 1917. Decided November 12, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Kansas City Star* v. *Julian*, 215 U. S. 589; *McCorquodale* v. *Texas*, 211 U. S. 432, 437; *St. Louis & San Francisco Ry. Co.* v. *Shepherd*, 240 U. S. 240, 241. *Mr. S. E. Ellsworth* for plaintiffs in error. No brief filed for defendants in error.

No. 150. Eugene W. Moran, Plaintiff in Error, *v.* Central Railroad Company of New Jersey. In error to the Court of Errors and Appeals of the State of New Jersey. Submitted November 5, 1917. Decided November 12, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington,* 241 U. S. 177; *Lehigh Valley R. R. Co.* v. *Barlow,* 244 U. S. 183. *Mr. Frank M. Hardenbrook* for plaintiff in error. *Mr. Charles E. Miller* for defendant in error.

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No. 350. Helen Bell, as Administratrix of George Bell, Deceased, Plaintiff in Error, *v.* Chesapeake & Ohio Railway Company. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss or affirm or place on summary docket submitted November 5, 1917. Decided November 12, 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. Alan D. Cole* for plaintiff in error. *Mr. E. L. Worthington, Mr. W. D. Cochran* and *Mr. LeWright Browning* for defendant in error.

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No. 366. William A. Trogler et al., Appellants, *v.* United States et al. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Argued November 5, 1917. Decided November 12, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Whitney* v. *Dick,* 202 U. S. 132, 135; *McClellan* v. *Carland,* 217 U. S. 268, 278; (2) *Smith* v. *Indiana,* 191 U. S. 138, 148–150; *McCandless* v. *Pratt,* 211 U. S. 437, 440. *Mr. Edwin H. Park* for appellants.

*The Solicitor General* and *Mr. Archibald A. Lee* for appellees.

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No. 59. BELLOWS FALLS POWER COMPANY, PLAINTIFF IN ERROR, *v.* COMMONWEALTH OF MASSACHUSETTS. In error to the Supreme Judicial Court of the State of Massachusetts. Argued November 16, 1917. Decided November 19, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 137; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380. See *Hamilton Company* v. *Massachusetts*, 6 Wall. 632. *Mr. Richard Y. FitzGerald* for plaintiff in error. *Mr. Henry C. Attwill* and *Mr. William Harold Hitchcock* for defendant in error.

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No. 49. FRANCIS STEPHEN MEDCRAF, APPELLANT, *v.* ROBERT T. HODGE, AS SHERIFF OF KING COUNTY, WASHINGTON. Appeal from the District Court of the United States for the Western District of Washington. Argued November 14, 15, 1917. Decided November 19, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Ex parte Royall*, 117 U. S. 241, 251; *In re Frederich*, 149 U. S. 70, 77; *Markuson* v. *Boucher*, 175 U. S. 184; *Urquhart* v. *Brown*, 205 U. S. 179; *Frank* v. *Mangum*, 237 U. S. 309, 328, 329. *Mr. Cassius E. Gates* and *Mr. W. B. Stratton* for appellant. *Mr. Alfred C. Lundin* and *Mr. H. M. Caldwell* for appellee.

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No. 42. AMERICAN RADIATOR COMPANY, PLAINTIFF IN ERROR, *v.* JOHN F. ROGGE, ADMINISTRATOR OF THE ES-

TATE OF JOHN F. ROGGE, JR., DECEASED. In error to the Supreme Court of the State of New Jersey. Argued November 12, 13, 1917. Decided November 19, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Haire* v. *Rice*, 204 U. S. 291; *Thomas* v. *Iowa*, 209 U. S. 258; *Appleby* v. *Buffalo*, 221 U. S. 524, 529. *Mr. Franklin W. Fort, Mr. John Franklin Fort* and *Mr. J. G. Shipman* for plaintiff in error. *Mr. John K. English* for defendant in error.

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No. 69. ENTERPRISE RAILWAY EQUIPMENT COMPANY, APPELLANT, *v.* NORFOLK & WESTERN RAILWAY COMPANY. Appeal from the District Court of the United States for the Northern District of Illinois. Submitted November 16, 1917. Decided November 19, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.*, 236 U. S. 723. *Mr. H. N. Low* and *Mr. George I. Haight* for appellant. *Mr. Theodore W. Reath* and *Mr. Robert J. Fisher* for appellee.

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No. 47. CHICAGO CAR HEATING COMPANY, APPELLANT, *v.* GOLD CAR HEATING & LIGHTING COMPANY. Appeal from the District Court of the United States for the Northern District of Illinois. Submitted November 9, 1917. Decided November 19, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.*, 236 U. S. 723. *Mr. Otto Raymond Barnett* for appellant. *Mr. William A. Redding, Mr. Edward Rector* and *Mr. Arthur C. Frazer* for appellee.

No. 46. Germania Refining Company et al., Plaintiffs in Error, *v.* Oramel B. Fuller, Auditor General et al. In error to the Supreme Court of the State of Michigan. Argued November 14, 1917. Decided November 19, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149. *Mr. Charles D. Chamberlin* for plaintiffs in error. *Mr. Alexander J. Groesbeck* and *Mr. Samuel D. Pepper* for defendants in error, submitted.

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No. 57. Cincinnati, Hamilton & Dayton Railway Company, Plaintiff in Error, *v.* Joseph M. McCollum, Administrator of the Estate of Joseph William Roebuck. In error to the Supreme Court of the State of Indiana. Submitted November 13, 1917. Decided November 26, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 52, 53; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas*, 240 U. S. 518. *Mr. Morison R. Waite* and *Mr. Harvey J. Elam* for plaintiff in error. *Mr. Merrill Moores* for defendant in error.

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No. 163. John E. Roller, Plaintiff in Error, *v.* Charles Catlett, Trustee. In error to the Supreme Court of Appeals of the State of Virginia. Motion to dismiss submitted November 26, 1917. Decided December 10, 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; *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. John E. Roller pro se. Mr. Rudolph Bumgardner* for defendant in error.

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No. 507. Elina Skarderud, Plaintiff in Error, *v.* Tax Commission of the State of North Dakota. In error to the Supreme Court of the State of North Dakota. Submitted November 23, 1917. Decided December 10, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Duus* v. *Brown*, this day decided, *ante*, 176. *Mr. Edward Engerud* for plaintiff in error. *Mr. William Langer* for defendant in error.

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No. 83. Menasha Wooden Ware Company, Plaintiff in Error, *v.* Minneapolis, St. Paul & Sault Ste. Marie Railway. In error to the Circuit Court of Winnebago County, State of Wisconsin. Argued November 23, 1917. Decided December 10, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80 *et seq.*; *Louis. & Nash. R. R. Co.* v. *Mottley*, 219 U. S. 467; *Portland Railway &c. Co.* v. *Railroad Commission of Oregon*, 229 U. S. 397, 412, 413; *New York Central & Hudson River R. R. Co.* v. *Gray*, 239 U. S. 583. *Mr. A. E. Thompson* and *Mr. J. C. Thompson* for plaintiff in error, submitted. *Mr. William A. Hayes* and *Mr. Alfred H. Bright* for defendant in error.

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No. 601. Midland Valley Railroad Company, Plaintiff in Error, *v.* Mrs. Maude Griffith, Adminis-

TRATRIX, ETC. In error to the Supreme Court of the State of Kansas. Motion to dismiss or affirm and for damages submitted December 10, 1917. Decided December 17, 1917. *Per Curiam.* Dismissed for want of jurisdiction with five per cent. damages, upon the authority of § 237, Judicial Code, as amended by the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726; *Prairie Oil & Gas Co.* v. *Carter*, 244 U. S. 646. (Petition for a writ of certiorari denied October 15, 1917, *infra*, 653.) *Mr. L. T. Michener* for plaintiff in error. *Mr. W. L. Cunningham* and *Mr. C. T. Atkinson* for defendant in error.

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No. 697. SIDNEY J. BROOKS, RECEIVER, ETC., APPELLANT, *v.* EMPIRE TRUST COMPANY ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss submitted December 10, 1917. Decided December 17, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Rouse* v. *Letcher*, 156 U. S. 47; *Gregory* v. *Van Ee*, 160 U. S. 643; *St. Louis, K. C. & C. R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247, 250; *Shulthis* v. *McDougal*, 225 U. S. 561; (2) *Gumbel* v. *Pitkin*, 113 U. S. 545; *Rouse* v. *Letcher*, 156 U. S. 47, 60; *Carey* v. *Houston & Texas Central R. Co.*, 161 U. S. 115. *Mr. Joseph W. Bailey* and *Mr. Chester H. Terrell* for appellant. *Mr. Thomas H. Franklin* and *Mr. Stephen H. Olin* for appellees.

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No. 90. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, APPELLANT, *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DOUGLAS, STATE OF COLORADO, ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Argued December 14,

1917. Decided January 7, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Phillips* v. *Negley,* 117 U. S. 665, 671; *Covington* v. *First National Bank,* 185 U. S. 270; *MacFarland* v. *Byrnes,* 187 U. S. 246; *United States* v. *Beatty,* 232 U. S. 463. The petition for a writ of certiorari is denied. *Mr. S. T. Bledsoe, Mr. Gardiner Lathrop* and *Mr. Henry T. Rogers* for appellant. *Mr. A. L. Doud* and *Mr. B. C. Hilliard* for appellees.

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No. 112. Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error, *v.* W. E. Vasbinder. In error to the Court of Civil Appeals, Fourth Supreme Judicial District, State of Texas. Argued January 2, 1918. Decided January 7, 1918. *Per Curiam.* Judgment reversed with costs upon the authority of *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson,* 233 U. S. 173; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592; *American Express Co.* v. *United States Horse Shoe Co.,* 244 U. S. 58. *Mr. Alexander Britton, Mr. J. W. Terry, Mr. Gardiner Lathrop, Mr. A. H. Culwell, Mr. Evans Browne* and *Mr. F. W. Clements* for plaintiff in error. *Mr. R. H. Ward* for defendant in error, submitted.

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No. 607. State of Missouri on the relation of the American Manufacturing Company, Plaintiff in Error, *v.* George D. Reynolds, Albert D. Nortoni, and William H. Allen, Judges of the St. Louis Court of Appeals, and Louis Alt. In error to the Supreme Court of the State of Missouri. Submitted January 2, 1918. Decided January 7, 1918. *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; *Prairie Oil & Gas Co.* v. *Carter,* 244 U. S. 646; *Midland Valley R. R. Co.* v. *Griffith, ante,* 633. (Petition for a writ of certiorari denied October 15, 1917, *infra,* 650.) *Mr. Shepard Barclay* for plaintiff in error. *Mr. E. C. Slevin* for defendants in error.

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No. 644. Minnie Evvia Stadelman et al., Plaintiffs in Error, *v.* W. H. Miner et al. In error to the Supreme Court of the State of Oregon. Submitted January 2, 1918. Decided January 7, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Haire* v. *Rice,* 204 U. S. 291, 301; *Thomas* v. *Iowa,* 209 U. S. 258, 263; *Appleby* v. *Buffalo,* 221 U. S. 524, 529; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134. *Mr. John M. Gearin* for plaintiffs in error. *Mr. Guy C. H. Corliss* for defendants in error.

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No. 108. Harry Susman, Appellant, *v.* Board of Education of the School District of Pittsburgh. Appeal from the District Court of the United States for the Western District of Pennsylvania. Argued January 2, 1918. Decided January 14, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Witherspoon* v. *Duncan,* 4 Wall. 210, 217; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Soliah* v. *Heskin,* 222 U. S. 522; (2) *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis,* 233 U. S. 652, 658; *Stewart* v. *Kansas City,* 239 U. S. 14. *Mr. Andrew G. Smith, Mr. W. H. Dodds* and *Mr. James M. Beck* for appellant. *Mr. J. Roger McCreary* and *Mr. Samuel S. Mehard* for appellee.

No. 125. Archibald E. Brightman, Plaintiff in Error, *v.* Lake Erie & Western Railroad Company. In error to the District Court of the United States for the District of Indiana. Argued January 7, 1918. Decided January 14, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285; *Fay* v. *Crozer,* 217 U. S. 455; *Hendricks* v. *United States,* 223 U. S. 178, 184; (2) *St. Louis & San Francisco Ry. Co.* v. *James,* 161 U. S. 545; *Southern Ry. Co.* v. *Allison,* 190 U. S. 236; *Sun Printing & Publishing Association* v. *Edwards,* 194 U. S. 377, 381; *Missouri Pacific Ry. Co.* v. *Castle,* 224 U. S. 541, 546. *Mr. William V. Rooker* for plaintiff in error. *Mr. Samuel D. Miller, Mr. W. H. Thompson, Mr. John B. Cockrum* and *Mr. W. H. H. Miller* for defendant in error.

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No. 116. Police Jury of the Parish of Acadia, Plaintiff in Error, *v.* City of Crowley. In error to the Supreme Court of the State of Louisiana. Argued January 4, 1918. Decided January 21, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Braxton County Court* v. *West Virginia,* 208 U. S. 192; *McCandless* v. *Pratt,* 211 U. S. 437; *Marshall* v. *Dye,* 231 U. S. 250; *Stewart* v. *Kansas City,* 239 U. S. 14. *Mr. A. P. Holt* and *Mr. P. J. Chappuis* for plaintiff in error. *Mr. Philip S. Pugh* and *Mr. James E. Zunts* for defendant in error.

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No. 202. Atlantic Coast Line Railroad Company, Plaintiff in Error, *v.* Ella Dutton, as Administratrix of the Estate of Lee Dutton, Deceased. In error to the Supreme Court of the State of South Carolina. Argued January 18, 1918. Decided January 21,

1918. *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; *Great Northern Ry. Co.* v. *Knapp,* 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre,* 242 U. S. 169; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571, 574. *Mr. P. A. Willcox, Mr. Lucian W. McLemore, Mr. Frederic D. McKenney* and *Mr. J. S. Flannery* for plaintiff in error. *Mr. L. D. Jennings* and *Mr. A. S. Harby* for defendant in error.

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No. 391. Railroad Commission of the State of California, Plaintiff in Error, *v.* Atchison, Topeka & Santa Fe Railway Company. In error to the Supreme Court of the State of California. Argued January 18, 1918. Decided January 21, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 112, 116; *Leathe* v. *Thomas,* 207 U. S. 93; *Holden Land Co.* v. *Inter-State Trading Co.,* 233 U. S. 536, 541; *Mellon Co.* v. *McCafferty,* 239 U. S. 134; (2) § 237, Judicial Code, as amended by the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726; *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert,* 245 U. S. 162. *Mr. Douglas Brookman* and *Mr. Max Thelen* for plaintiff in error. *Mr. Robert Dunlap, Mr. E. W. Camp, Mr. E. S. Pillsbury* and *Mr. Gardiner Lathrop* for defendant in error.

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No. 525. Carey W. Stone, Guardian of Thomas S. Stone, Plaintiff in Error, *v.* Emmett P. Stone, Next Friend of Thomas S. Stone. In error to the Supreme Court of the State of North Carolina. Argued January 18, 1918. Decided January 21, 1918. *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; *Prairie Oil & Gas Co.* v. *Carter,* 244 U. S. 646; *Midland Valley R. R. Co.* v. *Griffith, ante,* 633. *Mr. Clyde A. Douglass, Mr. William C. Douglass,* and *Mr. Murray Allen* for plaintiff in error. *Mr. R. W. Winston* and *Mr. Moses N. Amis* for defendant in error.

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No. 534. People of Porto Rico et al., Appellants, *v.* Carlos Tapia. Appeal from the District Court of the United States for the District of Porto Rico. Argued January 17, 18, 1918. Decided January 21, 1918. *Per Curiam.* Judgment reversed upon the authority of *Downes* v. *Bidwell,* 182 U. S. 244; *Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States,* 195 U. S. 138; *Rassmussen* v. *United States,* 197 U. S. 516; *Kopel* v. *Bingham,* 211 U. S. 468; *Dowdell* v. *United States,* 221 U. S. 91; *Porto Rico* v. *Rosaly,* 227 U. S. 270, 274; *Ocampo* v. *United States,* 234 U. S. 91, 98. *Mr. Edward S. Bailey, Mr. Samuel T. Ansell, Mr. Assistant Attorney General Warren* and *Mr. Robert Szold* for appellants. *Mr. Willis Sweet* and *Mr. Francis H. Dexter* for appellee.

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No. 647. People of Porto Rico, et al., Plaintiffs in Error and Petitioners, *v.* Jose Muratti. In error to and on writ of certiorari to the Supreme Court of Porto Rico. Argued January 17, 18, 1918. Decided January 21, 1918. *Per Curiam.* Judgment reversed upon the authority of *People of Porto Rico* v. *Tapia,* just decided, *supra,* this page, and authorities therein cited. *Mr. Edward S. Bailey, Mr. Samuel T. Ansell, Mr. Assistant Attorney General Warren* and *Mr. Robert Szold* for plaintiffs in error and

petitioners. *Mr. Willis Sweet and Mr. Francis H. Dexter* for defendant in error and respondent.

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No. 678. KATE P. MCNAUGHTON, APPELLANT, *v.* W. D. STEPHENS, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL. Appeal from the District Court of the United States for the Southern District of California. Submitted January 16, 1918. Decided January 21, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of *McNaughton* v. *Johnson,* 242 U. S. 344. *Mr. Tom L. Johnston* and *Mr. James H. Longden* for appellant. *Mr. U. S. Webb, Mr. Robert M. Clarke, Mr. Thomas Lee Woolwine* and *Mr. Clifford P. Smith* for appellees.

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No. 679. L. E. NICKELL AND ROBERT J. BURKE, APPELLANTS, *v.* W. D. STEPHENS, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL. Appeal from the District Court of the United States for the Southern District of California. Submitted January 16, 1918. Decided January 21, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of *Crane* v. *Johnson,* 242 U. S. 339. *Mr. Tom L. Johnston* and *Mr. James H. Longden* for appellants. *Mr. U. S. Webb, Mr. Robert M. Clarke, Mr. Thomas Lee Woolwine, Mr. Clifford P. Smith* and *Mr. A. W. Eckman* for appellees.

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No. 195. IDORA HILL MINING COMPANY, PLAINTIFF IN ERROR, *v.* HARRY OLSON ET AL. In error to the Supreme Court of the State of Idaho. Motion to dismiss submitted January 14, 1918. Decided January 21, 1918. Dismissed with costs and five per cent. damages for failure to print

the record. *Mr. Burton L. French* for plaintiff in error. *Mr. John W. Keener* for defendants in error.

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No. 153. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* PAUL D. COLE. In error to the Supreme Court of the State of Kansas. Argued January 24, 1918. Decided January 28, 1918. *Per Curiam.* Judgment affirmed with costs and ten per cent. damages upon the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, 574. *Mr. Alfred A. Scott*, *Mr. Robert Dunlap* and *Mr. Gardiner Lathrop* for plaintiff in error. *Mr. Alfred M. Jackson* and *Mr. Charles T. Atkinson* for defendant in error, submitted.

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No. 156. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, PLAINTIFF IN ERROR, *v.* W. P. SCHNOUTZ and TEXAS MIDLAND RAILROAD COMPANY. In error to the County Court of Kauffman County, State of Texas. Submitted January 25, 1918. Decided January 28, 1918. *Per Curiam.* Judgment reversed upon the authority of *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242; *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 596–598; *Illinois Central R. R. Co.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 653. See *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94. *Mr. Alexander Britton*, *Mr. C. S. Burg*, *Mr. Joseph M. Bryson* and *Mr. A. H. McKnight* for plaintiff in error. No appearance for defendants in error.

No. 84. Stonebraker-Zea Company, Appellant, *v.* United States. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Submitted January 23, 1918. Decided January 28, 1918. *Per Curiam.* Judgment affirmed upon the authority of *McCaskill Co.* v. *United States,* 216 U. S. 504, 514; *Washington Securities Co.* v. *United States,* 234 U. S. 76, 78; *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, 402, 405; *Causey* v. *United States,* 240 U. S. 399, 401; and cause remanded to the District Court of the United States for the Western District of Oklahoma. *Mr. Henry B. Martin* for appellant. *Mr. Assistant Attorney General Kearful* for the United States.

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No. 167. John E. Roller, Plaintiff in Error, *v.* Lindsay M. Armentrout. In error to the Supreme Court of Appeals of the State of Virginia. Submitted January 25, 1918. Decided January 28, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.,* 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis,* 233 U. S. 652, 658; *Stewart* v. *Kansas City,* 239 U. S. 14; (2) *Eustis* v. *Bolles,* 150 U. S. 361; *Leathe* v. *Thomas,* 207 U. S. 93; *Holden Land Co.* v. *Inter-State Trading Co.,* 233 U. S. 536, 541; *Mellon Co.* v. *McCafferty,* 239 U. S. 134. *Mr. John E. Roller pro se. Mr. Everett Dulaney Ott* for defendant in error.

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No. 581. State of Ohio on the Relation of The Hartford Life Insurance Company, Plaintiff in Error, *v.* Alonzo J. Douds et al. In error to the Supreme Court of the State of Ohio. Motion to affirm or place on summary docket submitted January 21, 1918.

Decided January 28, 1918. *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; *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162. *Mr. James C. Jones* and *Mr. Harry B. Arnold* for plaintiff in error. *Mr. Smith W. Bennett* for defendants in error.

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No. 369. El Paso Sash and Door Company, Plaintiff in Error, *v.* E. M. Carraway. In error to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas. Motion to dismiss or affirm submitted January 28, 1918. Decided February 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *McCorquodale* v. *Texas*, 211 U. S. 432, 437; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 118; *Kansas City Star Co.* v. *Julian*, 215 U. S. 589; *St. Louis & San Francisco Ry. Co.* v. *Shepherd*, 240 U. S. 240, 241; (2) *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131, 134; *Harding* v. *Illinois*, 196 U. S. 78, 84 *et seq.*; *Bowe* v. *Scott*, 233 U. S. 658, 664, 665. *Mr. Charles B. Braun* for plaintiff in error. *Mr. Frank G. Morris* for defendant in error.

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## DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM OCTOBER 1, 1917, TO MARCH 4, 1918.

No. 557. Guerini Stone Company, Petitioner, *v.* P. J. Carlin Construction Company. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Ed-*

*ward S. Paine* for petitioner. *Mr. Charles Hartzell* for respondent.

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No. 568. International News Service, Petitioner, *v.* The Associated Press. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Samuel Untermyer, Mr. Henry A. Wise, Mr. Louis Marshall* and *Mr. William A. DeFord* for petitioner. *Mr. F. B. Jennings, Mr. Peter S. Grosscup* and *Mr. Winfred T. Denison* for respondent.

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No. 385. Mobile Towing & Wrecking Company, Petitioner, *v.* The Steamship San Cristobal, etc. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hannis Taylor* and *Mr. Palmer Pillans* for petitioner. *Mr. Gregory L. Smith* for respondent.

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No. 487. Bob Braziel, Petitioner, *v.* United States. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack* and *Mr. David B. Trammell, II,* for petitioner. No brief for the United States.

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No. 488. Northwestern Consolidated Milling Company, Petitioner, *v.* Chicago, Burlington & Quincy Railroad Company. October 8, 1917. Petition for a writ of certiorari to the Supreme Court of the State of

Minnesota denied. *Mr. William Furst* for petitioner. No appearance for respondent.

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No. 511. Bank of Inverness, Petitioner, *v.* William T. Hayden. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John W. Cutrer* and *Mr. O. G. Johnston* for petitioner. *Mr. Gerald FitzGerald* for respondent.

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No. 515. Tweedie Trading Company, Petitioner, *v.* United States. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Ferdinand E. M. Bullowa* and *Mr. R. J. M. Bullowa* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Thompson* for the United States.

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No. 528. John E. Roller, Petitioner, *v.* Mary H. Murray et al. October 8, 1917. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. E. Hilton Jackson* for petitioner. No appearance for respondents.

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No. 529. Northern Central Railway Company, Petitioner, *v.* United States. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis I. Gowen* and *Mr. Frederic D. McKenney* for petitioner. *Mr. Assistant to the Attorney General Todd* for the United States.

No. 530. Safety Car Heating & Lighting Company, Petitioner, *v.* Gould Coupler Company. October 8, 1917. Petition for a writ of certiorari to the District Court of the United States for the Western District of New York denied. *Mr. Thomas J. Johnston, Mr. R. S. Blair* and *Mr. D. G. Haynes* for petitioner. *Mr. William Houston Kenyon* for respondent.

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No. 531. Charles W. Anderson, as Collector of Internal Revenue, etc., Petitioner, *v.* La Rose Consolidated Mines Company. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Solicitor General* for petitioner. *Mr. Richard T. Greene* for respondent.

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No. 537. Noah Parnoski, by Thomas Tiger, Guardian, etc., Petitioner, *v.* Lucinda Lumkin, for the use and Benefit of Robert Fry et al. October 8, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. R. C. Allen* for petitioner. *Mr. A. J. Biddison* for respondent.

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No. 538. E. T. Thurston, Petitioner, *v.* United States. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George G. Clough* and *Mr. John Ridout* for petitioner. *The Solicitor General* for the United States.

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No. 548. William T. Abbott, Petitioner, *v.* Wauchula Manufacturing & Timber Company et al.

October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George H. Lamar* for petitioner. *Mr. James F. Glen* for respondents.

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No. 549. Thomas J. Scully, Claimant of the Barge I. F. Chapman, Petitioner, *v.* Jacob Kazarian. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. James J. Macklin* and *Mr. Frank V. Barns* for petitioner. *Mr. Alexander L. Churchill* and *Mr. Frank Healy* for respondent.

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No. 552. Fred B. Jones, Petitioner, *v.* Bouker Contracting Company, Claimant, etc. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Fayette B. Dow* for petitioner. *Mr. Francis Martin* for respondent.

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No. 553. Frederick Leyland & Company (Ltd.) et al., Petitioners, *v.* Board of Commissioners of the Port of New Orleans. October 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry P. Dart* and *Mr. Henry P. Dart, Jr.*, for petitioners. No appearance for respondent.

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No. 589. Ball Engineering Company, Petitioner, *v.* J. G. White & Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court

of Appeals for the Second Circuit granted. *Mr. Homer S. Cummings*, *Mr. S. L. Swartz*, *Mr. Charles D. Lockwood* and *Mr. Solicitor General Davis* for petitioner. *Mr. Louis Sperry* and *Mr. J. Kemp Bartlett* for respondent.

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No. 593. United States, Petitioner, *v.* Cleveland, Cincinnati, Chicago & St. Louis Railway Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *The Solicitor General* for the United States. No appearance for respondent.

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No. 594. United States, Petitioner, *v.* Biwabik Mining Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *The Solicitor General* for the United States. *Mr. A. C. Dustin* for respondent.

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No. 600. Capitol Transportation Company, Petitioner, *v.* Cambria Steel Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Frank S. Masten* and *Mr. George L. Canfield* for petitioner. *Mr. Francis S. Laws* and *Mr. William D. Cady* for respondent.

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No. 622. Donatto Fillippon, Petitioner, *v.* Albion Vein Slate Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Third Circuit granted. *Mr. J. Willard Paff* and *Mr. Calvin F. Smith* for petitioner. *Mr. Frank P. Prichard* for respondent.

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No. 632. Texas & Pacific Railway Company et al., Petitioners, *v.* B. Leatherwood. October 15, 1917. Petition for a writ of certiorari to the Court of Civil Appeals, Second Supreme Judicial District, of the State of Texas granted. *Mr. George Thompson* and *Mr. J. H. Barwise, Jr.*, for petitioners. *Mr. D. T. Bomar* for respondent.

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No. 555. Daisy M. Linkous, Administratrix of J. M. Linkous, Deceased, Petitioner, *v.* Virginian Railway Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. L. Welborn* for petitioner. No appearance for respondent.

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No. 556. Morris Herrmann, as Surviving Partner of Morris Herrmann & Company, Petitioner, *v.* Henry Bower Chemical Manufacturing Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Louis Marshall* for petitioner. *Mr. James Piper* and *Mr. George Wharton Pepper* for respondent.

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No. 559. El Monte de Piedad y Caha de Ahorros de Manila, Petitioner, *v.* Government of the Philip-

pine Islands, Represented by the Treasurer of the Philippine Islands. October 15, 1917. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Alexander Britton, Mr. Evans Browne* and *Mr. Thomas L. Hartigan* for petitioner. *Mr. Samuel T. Ansell* and *Mr. Edward S. Bailey* for respondent.

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No. 561. American Manufacturing Company, Petitioner, *v.* Hon. George D. Reynolds et al., Judges of the St. Louis Court of Appeals, and Louis Alt. October 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Shepard Barclay* for petitioner. No appearance for respondents. See *ante*, p. 635.

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No. 564. J. W. Chapman and P. R. Thompson, Copartners, doing Business under the Firm Name of Chapman & Thompson, Petitioners, *v.* Java Pacific Line, Stoomvart-maat-schappy Nederland et al. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Eustace Cullinan* and *Mr. Thomas W. Hickey* for petitioners. No appearance for respondents.

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No. 565. William E. Wallace, Petitioner, *v.* United States. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Roger L. Foote* and *Mr. William A. Morrow* for petitioner. *The Solicitor General* for the United States.

No. 572. Lewis H. Stanton et al., Petitioners, *v.* City of Pittsburgh. October 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Richard Townsend* and *Mr. James T. Lloyd* for petitioners. No appearance for respondent.

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No. 573. Alex. H. Sands, Jr., as Trustee, etc., Petitioner, *v.* Fred W. Estabrook. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Granville Meyers* for petitioner. *Mr. Percy D. Trafford* for respondent.

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No. 582. William R. Moore Dry Goods Company et al., Petitioners, *v.* Eli Brooks, Bankrupt, and J. M. Jarman, Trustee. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. C. Mullinix* for petitioners. No appearance for respondents.

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No. 584. Missouri District Telegraph Company, Petitioner, *v.* Morris & Company. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Rush Taggart* for petitioner. *Mr. Luther M. Walter* for respondent.

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No. 585. Parker-Washington Company et al., Petitioners, *v.* City of St. Louis to the Use of Carroll-

PORTER BOILER & TANK COMPANY. October 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Shepard Barclay* for petitioners. *Mr. Frederick N. Judson* and *Mr. John F. Green* for respondent.

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No. 562. CHICAGO & ALTON RAILWAY COMPANY ET AL., PETITIONERS, *v.* PRESSED STEEL CAR COMPANY. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Silas H. Strawn* and *Mr. John D. Black* for petitioners. *Mr. Louis H. Freedman, Mr. Andrew W. Sheriff* and *Mr. Alfred R. Kiddle* for respondent.

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No. 595. JACOB NELLEMENN ET AL., PETITIONERS, *v.* THE STEAMSHIP LONDON, CHRISTIAN LARSEN, MASTER. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. J. H. Brinton* for petitioners. No appearance for respondent.

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No. 596. SOCIETE NAPHTES TRANSPORTS, PETITIONER, *v.* BISSO TOWBOAT COMPANY ET AL. October 15, 1917. Petition for a writ of certiorari to the United States Circiut Court of Appeals for the Fifth Circuit denied. *Mr. Richard B. Montgomery* for petitioner. No appearance for respondents.

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No. 597. ROLLA DE BORD, PETITIONER, *v.* CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY. October 15,

1917. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Mr. C. B. Reeder* for petitioner. *Mr. Hiram Glass* and *Mr. N. H. Lassiter* for respondent.

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No. 599. Margaret C. Harrison et al., Petitioners, *v.* Florence A. Campbell et al. October 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. L. Frank Ottofy* for petitioners. *Mr. Morton Jourdan*, *Mr. Frederick N. Judson* and *Mr. B. Schnurmacher* for respondents.

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No. 601. Midland Valley Railroad Company, Plaintiff in Error, *v.* Mrs. Maude Griffith, Administratrix, etc. October 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. L. T. Michener* for plaintiff in error and petitioner. *Mr. W. L. Cunningham* and *Mr. C. T. Atkinson* for defendant in error and respondent. See *ante*, p. 633.

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No. 602. Midland Valley Railroad Company, Petitioner, *v.* Armor Bell, Administratrix, etc. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. L. T. Michener* and *Mr. Farrar L. McCain* for petitioner. No appearance for respondent.

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No. 604. New York, New Haven & Hartford Railroad Company, Petitioner, *v.* Lansing Steamship

COMPANY (INC.). October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. E. G. Buckland* for petitioner. *Mr. Edward E. Blodgett* for respondent.

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No. 605. MARK J. GRETSCH, PETITIONER, *v.* UNITED STATES. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Mark J. Gretsch, pro se.* No brief for the United States.

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No. 606. PERCIVAL WILDS, AS TRUSTEE IN BANKRUPTCY, ETC., PETITIONER, *v.* DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK. October 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving L. Ernst* for petitioner. *Mr. Terence Farley* for respondent.

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No. 608. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER, *v.* ELSIE WESTLING, ADMINISTRATRIX, ETC. October 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. Alfred A. Scott, Mr. Robert Dunlap* and *Mr. Gardiner Lathrop* for petitioner. *Mr. Alfred M. Jackson* and *Mr. Carroll L. Schwartz* for respondent.

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No. 620. ABRAM H. PREEMAN ET AL., PETITIONERS, *v.* UNITED STATES. October 15, 1917. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Benjamin C. Bachrach* for petitioners. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

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No. 640. Chicago & Alton Railroad Company, Petitioner, *v.* United States. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. William L. Patton* and *Mr. Silas H. Strawn* for petitioner. No brief for the United States.

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No. 646. New York Central Railroad Company, Petitioner, *v.* Samuel Goldberg. October 22, 1917. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Charles C. Paulding* for petitioner. No appearance for respondent.

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No. 657. Peter Chelentis, Petitioner, *v.* Luckenbach Steamship Company, etc. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Fayette B. Dow* for petitioner. *Mr. Peter S. Carter* for respondent.

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No. 698. P. D. Camp et al., Petitioners, *v.* Morgan V. Gress. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. T. D. Savage* for petitioners. *Mr. Alexander Akerman* for respondent.

No. 636. B. H. Drees, Petitioner, *v.* Sarah J. Armstrong et al. October 22, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied. *Mr. Frederick S. Tyler* for petitioner. No appearance for respondents.

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No. 637. Morse Dry Dock & Repair Company, Owner, etc., Petitioner, *v.* Conron Brothers Company et al. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Pierre M. Brown* for petitioner. *Mr. Mark Ash, Mr. Julius Offenbach, Mr. H. T. Newcomb, Mr. Charles Kelley* and *Mr. Peter S. Carter* for respondents.

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No. 638. Eugene L. Younge, Petitioner, *v.* United States. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James W. Vandervort* and *Mr. C. M. Hanna* for petitioner. No brief for the United States.

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No. 642. Steamship Queensmore (Ltd.), Claimant, etc., Petitioner, *v.* Henry Nanninga Company et al. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for petitioner. *Mr. William Garrard* for respondents.

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No. 659. Kansas City, Mexico & Orient Railway Company of Texas, Petitioner, *v.* C. A. Finke. Octo-

ber 22, 1917. Petition for a writ of certiorari to the Court of Civil Appeals, Eighth Judicial District, of the State of Texas denied. *Mr. Herbert S. Garrett* for petitioner. No appearance for respondent.

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No. 675. GULF, COLORADO & SANTA FE RAILWAY COMPANY ET AL., PETITIONERS, *v.* J. P. NELSON. October 22, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Mr. Evans Browne, Mr. Robert Dunlap, Mr. J. W. Terry* and *Mr. Gardiner Lathrop* for petitioners. *Mr. Thomas H. Franklin* and *Mr. Floyd McGown* for respondent.

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No. 682. BARBER & COMPANY (INC.), PETITIONER, *v.* SULZBERGER & SONS COMPANY. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin, Mr. John M. Woolsey* and *Mr. D. Roger Englar* for petitioner. *Mr. Paul D. Cravath* and *Mr. Stuart McNamara* for respondent.

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No. 687. FLORENCE MCDONALD ET AL., PETITIONERS, *v.* JOHN F. RALSTON ET AL. October 22, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. C. W. King* for petitioners. No appearance for respondents.

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No. 692. IOWA STATE TRAVELLING MEN'S ASSOCIATION *v.* ALMA M. RUGE. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Eighth Circuit denied. *Mr. Robert A. Holland, Jr.*, and *Mr. Thomas G. Rutledge* for petitioner. *Mr. Lambert E. Walther* for respondent.

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No. 718. City of New Orleans et al., Petitioners, *v.* Penn Bridge Company. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. I. D. Moore*, *Mr. H. Generes Dufour* and *Mr. Edgar H. Farrar* for petitioners. *Mr. R. C. Milling*, *Mr. William Grant* and *Mr. R. E. Milling* for respondent.

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No. 691. Richard Watson, Master, etc., et al., Petitioners, *v.* Mattie Kreszewski, Administratrix, etc., et al. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George Forbes* for petitioners. No appearance for respondents.

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No. 707. Barnes-Ames Company, Petitioner, *v.* W. & C. T. Jones Steamship Company (Ltd.). October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles S. Haight* and *Mr. John W. Griffin* for petitioner. No appearance for respondent.

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No. 723. Pocahontas Consolidated Collieries Company (Inc.), Petitioner, *v.* F. L. Johnson, Administra-

TOR, ETC. October 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. C. Graham* and *Mr. Hugh Robert Hawthorne* for petitioner. No appearance for respondent.

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No. 689. S. D. BARRETT, PETITIONER, *v.* VIRGINIAN RAILWAY COMPANY. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. W. L. Welborn* for petitioner. No appearance for respondent.

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No. 445. BOB TERRELL, PETITIONER, *v.* UNITED STATES. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Guy H. Sigler* and *Mr. James C. Denton* for petitioner. *The Solicitor General* for the United States.

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No. 516. CORRUGATED BAR COMPANY, PETITIONER, *v.* TRUSSED CONCRETE COMPANY. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James A. Carr* for petitioner. *Mr. Fred L. Chappell* for respondent.

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No. 560. EDWARD W. BLUM, PETITIONER, *v.* BUMILLER-REMELIN COMPANY. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George B. Parkinson* for petitioner. *Mr. Charles L. Sturtevant* for respondent.

No. 655. F. F. Doane, Petitioner, *v.* California Land Company. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William B. Ogden* and *Mr. E. C. Brandenburg* for petitioner. *Mr. Peyton Gordon* for respondent.

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No. 686. City of Chicago, Petitioner, *v.* White Transportation Company. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel A. Ettelson* and *Mr. Chester E. Cleveland* for petitioner. No appearance for respondent.

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No. 688. Woo Vey, Petitioner, *v.* United States. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas S. Dunlap* and *Mr. C. W. Savage* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

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No. 695. Theodore Dendinger, Petitioner, *v.* Arthur L. Bear, Tutor, etc. November 5, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. Henry Mooney* and *Mr. J. D. Dresner* for petitioner. No appearance for respondent.

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No. 699. Harry Miller et al., Petitioners, *v.* United States. November 5, 1917. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. George F. Deiser* for petitioners. *The Solicitor General* and *Mr. Assistant Attorney General Warren* for the United States.

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No. 706. THE PORT OF PORTLAND, PETITIONER, *v.* WILHELM WILHELMSEN. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph N. Teal* and *Mr. Wirt Minor* for petitioner. *Mr. William C. Bristol* for respondent.

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No. 708. JAMES HOWARD SANNER, PETITIONER, *v.* WESTERN MARYLAND RAILWAY COMPANY. November 5, 1917. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland denied. *Mr. William C. Sullivan* for petitioner. *Mr. George R. Gaither* for respondent.

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No. 710. SUNDH ELECTRIC COMPANY, PETITIONER, *v.* CUTLER MANUFACTURING COMPANY. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert C. Wall* and *Mr. Frederick S. Tyler* for petitioner. *Mr. W. Clyde Jones* for respondent.

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No. 711. SUNDH ELECTRIC COMPANY, PETITIONER, *v.* GENERAL ELECTRIC COMPANY. November 5, 1917. Petion for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr.*

*Albert C. Wall* and *Mr. Frederick S. Tyler* for petitioner. *Mr. Frederick P. Fish, Mr. Charles Neave* and *Mr. Albert G. Davis* for respondent.

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No. 716. George Orlov et al., Petitioners, *v.* Abraham Aronson et al., etc. November 5, 1917. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied. *Mr. Edward F. McClennen* and *Mr. Francis B. James* for petitioners. *Mr. Samuel Sigilman* for respondents.

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No. 719. Planters' Steamship Company, Petitioner, *v.* Rolf Seeberg Ship Chandlery Company et al. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* and *Mr. Frederick S. Tyler* for petitioner. No appearance for respondents.

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No. 720. Liberal Elevator Company, Petitioner, *v.* Wichita Mill & Elevator Company. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. M. Williams* and *Mr. E. F. Colladay* for petitioner. *Mr. Chester I. Long,* for respondent.

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No. 730. United Metals Selling Company, Petitioner, *v.* Edward B. Pryor et al. November 5, 1917. Petition for a writ of certiorari to the United States Cir-

cuit Court of Appeals for the Eighth Circuit denied. *Mr. John A. Garver* for petitioner. No appearance for respondents.

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No. 731. N. B. K. Pettingill, Petitioner, *v.* Walter McK. Jones. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. N. B. K. Pettingill, pro se. Mr. Francis E. Neagle* and *Mr. Woodward Emery* for respondent.

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No. 732. Ella Getkin, Petitioner, *v.* Pennsylvania Railroad Company. November 5, 1917. Petition for a writ of certiorari to the Court of Common Pleas of Dauphin County, State of Pennsylvania, denied. *Mr. William M. Hargest* and *Mr. William N. Hayne* for petitioner. No appearance for respondent.

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No. 736. Globe Steamship Company, Claimant, etc., Petitioner, *v.* Henry Moss. November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas H. Garry* for petitioner. No appearance for respondent.

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No. 737. William Baulch, Petitioner, *v.* Strathleven Steamship Company (Ltd.). November 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Talley* for petitioner. *Mr. Floyd Hughes* and *Mr. R. J. M. Bullowa* for respondent.

No. 742. Hartford Life Insurance Company, Petitioner, *v.* Nannie M. Johnson. November 12, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Mr. James C. Jones, Mr. James C. Jones, Jr.*, and *Mr. George F. Haid* for petitioner. *Mr. Charles W. German* for respondent.

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No. 542. Alberto Sandoval et al., Petitioners, *v.* Ida C. Pfeuffer et al. November 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Don A. Bliss* for petitioners. *Mr. S. J. Brooks* for respondents.

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No. 612. Charles M. Simpson, Petitioner, *v.* United States. November 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George H. Eichelberger* for petitioner. *The Solicitor General* for the United States.

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No. 721. Great Northern Railway Company, Petitioner, *v.* United States. November 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. E. C. Lindley, Mr. F. V. Brown* and *Mr. Charles S. Albert* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for the United States.

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No. 725. J. E. Baldwin, Petitioner, *v.* United States. November 12, 1917. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. S. Baskett* for petitioner. *The Solicitor General* for the United States.

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No. 726. People of Porto Rico, Petitioner, *v.* Eduardo Wys. November 12, 1917. Petition for a writ of certiorari to the Supreme Court of Porto Rico denied. *Mr. Samuel T. Ansell* and *Mr. Edward S. Bailey* for petitioner. No appearance for respondent.

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No. 727. People of Porto Rico, Petitioner, *v.* Aniceto Berrios. November 12, 1917. Petition for a writ of certiorari to the Supreme Court of Porto Rico denied. *Mr. Samuel T. Ansell* and *Mr. Edward S. Bailey* for petitioner. No appearance for respondent.

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No. 729. Clemente Ramirez, Petitioner, *v.* People of Porto Rico. November 12, 1917. Petition for a writ of certiorari to the Supreme Court of Porto Rico denied. *Mr. Carroll G. Walter* for petitioner. *Mr. Samuel T. Ansell* and *Mr. Edward S. Bailey* for respondent.

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No. 741. H. Bradley Davidson et al., Petitioners, *v.* E. F. Brooks Company. November 12, 1917. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John C. Gittings* for petitioners. *Mr. D. T. Wright* and *Mr. Henry F. Woodard* for respondent.

No. 743. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* THOMAS YOUNG. November 12, 1917. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. H. O'B. Cooper, Mr. L. E. Jeffries, Mr. Benjamin Lindsay Abney* and *Mr. J. E. McDonald* for petitioner. *Mr. J. Frazer Lyon* for respondent.

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No. 745. MORGAN O. LLEWELLYN ET AL., PETITIONERS, *v.* STATE OF NEW MEXICO. November 12, 1917. Petition for a writ of certiorari to the Supreme Court of the State of New Mexico denied. *Mr. Francis C. Wilson* and *Mr. S. P. Weisiger* for petitioners. No appearance for respondent.

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No. 712. NEW YORK SCAFFOLDING COMPANY, PETITIONER, *v.* LIEBEL-BINNEY CONSTRUCTION COMPANY. November 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Frank Chase Somes* for petitioner. *Mr. Robert H. Parkinson* and *Mr. Wallace R. Lane* for respondent.

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No. 713. NEW YORK SCAFFOLDING COMPANY, PETITIONER, *v.* CHAIN BELT COMPANY ET AL. November 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Frank Chase Somes* for petitioner. *Mr. Robert H. Parkinson* and *Mr. Wallace R. Lane* for respondents.

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No. 744. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PETITIONER, *v.* UNITED STATES. November 26,

1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. M. Miner* for petitioner. No brief for the United States.

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No. 755. Hargadine-McKittrick Dry Goods Company, Petitioner, *v.* Christian J. Zeitinger et al. November 26, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles A. Houts* for petitioner. *Mr. Matt. G. Reynolds* and *Mr. Julian Laughlin* for respondents.

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No. 753. John A. Jesson et al., Petitioners, *v.* F. G. Noyes, as Receiver of the Washington-Alaska Bank. December 10, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Metson* for petitioners. *Mr. Orion L. Rider* for respondent.

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No. 762. James B. Simpson, Indicted as James B. Miller, Petitioner, *v.* United States. December 10, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel Herrick* and *Mr. Thomas E. Hayden* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

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No. 661. John B. Turner, Petitioner, *v.* Board of Trade of the City of Chicago. December 17, 1917.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Joseph E. Johnson* for petitioner. *Mr. Henry S. Robbins* for respondent.

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No. 754. H. H. Riddell, Petitioner, *v.* United States. December 17, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. Y. Masters* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

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No. 757. A. W. Lohman, Petitioner, *v.* Stock Yards Loan Company. December 17, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. P. White* for petitioner. *Mr. B. F. Deatherage* and *Mr. Robert F. Blair* for respondent.

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No. 777. Central California Canneries Company et al., Petitioners, *v.* Dunkley Company. December 17, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William K. White* for petitioners. *Mr. Fred L. Chappell* for respondent.

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No. 773. Southern Pacific Company, Petitioner, *v.* Henry L. Bogart et al., Executors, etc., et al. January 7, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Louis H. Freedman* and *Mr. Arthur H.*

*Van Brunt* for petitioner. *Mr. H. Snowden Marshall, Mr. A. J. Dittenhoefer* and *Mr. David Gerber* for respondents.

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No. 781. Gulf Oil Corporation, Petitioner, *v.* C. G. Llewellyn, Collector of Internal Revenue, etc. January 7, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. James H. Beal* and *Mr. William A. Seifert* for petitioner. No brief for respondent.

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No. 90. Atchison, Topeka & Santa Fe Railway Company, Appellant, *v.* Board of County Commissioners of the County of Douglas, State of Colorado, et al. See *ante*, p. 634.

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No. 550. Henry W. Boerner, Petitioner, *v.* William Hale Thompson, Mayor, etc., et al. January 7, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. James R. Ward* and *Mr. Sanuel Herrick* for petitioner. *Mr. Samuel A. Ettelson* and *Mr. Chester E. Cleveland* for respondents.

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No. 771. Ng Choy Fong, Petitioner, *v.* United States. January 7, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward M. Cleary* and *Mr. Philip S. Ehrlich* for petitioner. *The Solicitor General* for the United States.

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No. 782. Edward W. Morrison, Petitioner, *v.* Charles S. Rieman. January 7, 1918. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Seventh Circuit denied. *Mr. James R. Ward* and *Mr. Samuel Herrick* for petitioner. *Mr. James Rosenthal* and *Mr. Colin C. H. Fyffe* for respondent.

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No. 432. American Steel Foundries, Petitioner, *v.* Tri-City Central Trades Council et al. January 14, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Max Pam* for petitioner. *Mr. Frank C. Smith* for respondents.

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No. 791. The Washington Post Company, Petitioner, *v.* John Armstrong Chaloner. January 14, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Wilton J. Lambert*, *Mr. Joseph W. Bailey* and *Mr. Rudolph H. Yeatman* for petitioner. *Mr. E. F. Colladay*, *Mr. John Ridout* and *Mr. H. S. Barger* for respondent.

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No. 785. Atlantic Coast Line Railroad Company, Petitioner, *v.* Leath E. Treadway, Administratrix, etc. January 14, 1918. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. William B. McIlwaine* for petitioner. No appearance for respondent.

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No. 787. Lee A. Whitehead et al., Petitioners, *v.* United States. January 14, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Fifth Circuit denied. *Mr. Benjamin C. Bachrach* for petitioners. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

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No. 790. PHILADELPHIA & READING RAILWAY COMPANY, PETITIONER, *v.* CATHERINE MARLAND, ADMINISTRATRIX, ETC. January 14, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. William Clarke Mason* and *Mr. Charles Heebner* for petitioner. No appearance for respondent.

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No. 792. PENNSYLVANIA RAILROAD COMPANY, PETITIONER, *v.* MARY PRICE, ADMINISTRATRIX, ETC. January 14, 1918. Petition for a writ of certiorari to the Court of Appeals of Cuyahoga County, State of Ohio, denied. *Mr. Andrew Squire* and *Mr. William L. Day* for petitioner. *Mr. Charles W. Savage* for respondent.

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No. 796. CHARLES H. MOYER, AS TRUSTEE, ETC., ET AL., PETITIONERS, *v.* BUTTE MINERS' UNION. January 14, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Horace N. Hawkins* for petitioners. *Mr. Peter Breen* for respondent.

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No. 800. PORT GRAHAM COAL COMPANY, PETITIONER, *v.* ORREN G. STAPLES. January 14, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Samuel Herrick, Mr. Joseph W.*

*Cox* and *Mr. Rufus S. Day* for petitioner. *Mr. Bynum E. Hinton* for respondent.

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No. 750. Aurelia P. Bernal, Petitioner, *v.* United States. January 21, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Carlos Bee* for petitioner. *The Solicitor General* for the United States.

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No. 803. Deschutes Railroad Company, Petitioner, *v.* Eastern Oregon Land Company. January 21, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. C. Spencer* and *Mr. James G. Wilson* for petitioner. No appearance for respondent.

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No. 815. Norfolk County Water Company, Petitioner, *v.* City of Norfolk, Virginia, et al. January 21, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Luther B. Way* for petitioner. *Mr. George Pilcher* for respondents.

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No. 807. Rigney & Company, Petitioner, *v.* Aunt Jemima Mills Company. February 4, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. T. K. Bryant* and *Mr. F. F. Crampton* for petitioner. *Mr. Frank F. Reed* and *Mr. Edward S. Rogers* for respondent.

No. 811. S. L. Heatherly, Administrator, etc., Petitioner, *v.* Louisville & Nashville Railroad Company. February 4, 1918. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky denied. *Mr. Conrad H. Syme* for petitioner. *Mr. Benjamin D. Warfield* for respondent.

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No. 812. Edward Stroecker, as Trustee, etc., Petitioner *v.* Mariam A. Patterson et al. February 4, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles J. Heggerty* for petitioner. No appearance for respondents.

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## CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 1, 1917, TO MARCH 4, 1918.

No. 717. Martiniano M. Veloso, Plaintiff in Error and Appellant, *v.* Vicente Francisco Ageo et al. Appeal from the Supreme Court of the Philippine Islands. October 1, 1917. Docketed and dismissed with costs, on motion of *Mr. Evans Browne* for defendants in error and appellees. No one opposing.

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No. 1. Detroit United Railway, Plaintiff in Error, *v.* City of Detroit. In error to the Supreme Court of the State of Michigan. October 1, 1917. Dismissed without costs to either party, per stipulation. *Mr. John C.*

*Donnelly* and *Mr. Henry L. Lyster* for plaintiff in error. *Mr. Richard I. Lawson* and *Mr. Harry J. Dingeman* for defendant in error.

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No. 21. Kansas City Stock Yards Company of Missouri, Plaintiff in Error, *v.* State of Kansas ex rel. John S. Dawson, Attorney General. In error to the Supreme Court of the State of Kansas. October 1, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. L. W. Keplinger* for plaintiff in error. No appearance for defendant in error.

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No. 135. Shill Rolling Chair Company, Plaintiff in Error, *v.* Atlantic City;

No. 136. Hannah M. Clowney, Trading as Smith's Rolling Chairs, Plaintiff in Error, *v.* Atlantic City; and

No. 137. Thomas E. Lassiter, Plaintiff in Error, *v.* Atlantic City. In error to the Court of Errors and Appeals of the State of New Jersey. October 1, 1917. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. George A. Bourgeois* and *Mr. Harry R. Coulomb* for plaintiffs in error. No appearance for defendant in error.

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No. 149. St. Louis, Iron Mountain & Southern Railway Company, Plaintiff in Error, *v.* State of Louisiana ex rel. City of Lake Charles. In error to the Supreme Court of the State of Louisiana. October 1, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Henry Bernstein* for plaintiff in error. No appearance for defendant in error.

No. 258. Midland Valley Railroad Company, Plaintiff in Error, *v.* Della Ogden, Administratrix, etc. In error to the Supreme Court of the State of Oklahoma. October 1, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Norman R. Haskell* for plaintiff in error. No appearance for defendant in error.

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No. 54. United States, Appellant, *v.* Great Lakes Towing Company et al. Appeal from the District Court of the United States for the Northern District of Ohio. October 2, 1917. Dismissed on motion of *Mr. Solicitor General Davis* for the United States. No appearance for appellees.

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No. 197. Delaware, Lackawanna and Western Railroad Co., Plaintiff in Error, *v.* George D. Fish. In error to the Supreme Court of the State of New York. October 9, 1917. Dismissed without costs to either party, per stipulation of counsel. *Mr. Austin J. McMahon* for plaintiff in error. *Mr. Walter A. Fullerton* for defendant in error.

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No. 547. Adah B. Walton, Administratrix, etc., Plaintiff in Error, *v.* Edward B. Pryor et al., Receivers, etc. In error to the Supreme Court of the State of Illinois. October 9, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Charles C. LeForgee* for plaintiff in error. No appearance for defendants in error.

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No. 159. Frank R. Williams, Appellant, *v.* Charles Potter et al. Appeal from the United States Circuit

Court of Appeals for the Second Circuit. October 12, 1917. Dismissed with costs, on motion of counsel for appellant. *Mr. Frank R. Williams, pro se.*

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No. 13. P. J. Hamill, Plaintiff in Error, *v.* Joseph Schlitz Brewing Company. In error to the Supreme Court of the State of Iowa. October 16, 1917. Dismissed with costs, pursuant to the tenth rule. *Mr. Frederick S. Tyler* and *Mr. Benjamin I. Salinger* for plaintiff in error. *Mr. G. P. Miller, Mr. Edwin S. Mack* and *Mr. Arthur W. Fairchild* for defendant in error.

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No. 15. The Keetoowah Society et al., Appellants, *v.* Franklin K. Lane, Secretary of the Interior. Appeal from the Court of Appeals of the District of Columbia. October 17, 1917. Dismissed with costs, pursuant to the tenth rule. *Mr. C. C. Calhoun* for appellants. *The Attorney General* for appellee.

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No. 4. C. J. Olson, Plaintiff in Error, *v.* State of North Dakota. In error to the Supreme Court of the State of North Dakota. October 17, 1917. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. William Langer* for defendant in error. *Mr. Edward Engerud* for plaintiff in error. *Mr. Andrew Miller* and *Mr. Harrison A. Bronson* for defendant in error.

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No. 55. Jose Sanchez y Armijo, Plaintiff in Error, *v.* State of New Mexico. In error to the Supreme Court

of the State of New Mexico. November 5, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. T. B. Catron* for plaintiff in error. *Mr. Frank W. Clancy* for defendant in error.

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No. 357. Wells, Fargo & Company et al., Appellants, *v.* Clarence C. Caldwell, Attorney General, etc., et al. Appeal from the District Court of the United States for the District of South Dakota. November 5, 1917. Dismissed, per stipulation. *Mr. C. O. Bailey* and *Mr. Branch P. Kerfoot* for appellants. *Mr. Clarence C. Caldwell* and *Mr. P. W. Dougherty* for appellees.

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No. 617. Liverpool & London & Globe Insurance Company (Ltd.), Appellant, *v.* James J. Bailey, Secretary of State of the State of Louisiana. Appeal from the District Court of the United States for the Eastern District of Louisiana. November 5, 1917. Dismissed with costs, on motion of counsel for appellant. *Mr. J. Zach Spearing* for appellant. No appearance for appellee.

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No. 45. Southern Railway Company, Plaintiff in Error, *v.* C. S. Cook, Administrator of W. M. Poteat, Deceased. In error to the United States Circuit Court of Appeals for the Fourth Circuit. November 9, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Robert B. Tunstall* and *Mr. L. E. Jeffries* for plaintiff in error. *Mr. Harry Wooding, Jr.*, for defendant in error.

No. 64. United States of America ex rel. David Bowlegs, a Minor, etc., Plaintiff in Error, *v.* Franklin K. Lane, Secretary of the Interior. In error to the Court of Appeals of the District of Columbia. November 15, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. James W. McNeill, Mr. John B. Meserve, Mr. U. L. Mott* and *Mr. W. L. Sturdevant* for plaintiff in error. *The Attorney General* for defendant in error.

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No. 65. Thomas D. Aitken et al., Plaintiffs in Error, *v.* United States of America, by its Trustee, The Government of the Philippine Islands. In error to the Supreme Court of the Philippine Islands. November 15, 1917. Dismissed, pursuant to the tenth rule. *Mr. C. L. Bouvé* for plaintiffs in error. *Mr. Samuel T. Ansell* for defendant in error.

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No. 79. John Johnstone, Plaintiff in Error, *v.* Andrew Schmidt et al. In error to the Supreme Court of the State of North Dakota. November 20, 1917. Dismissed with costs, pursuant to the tenth rule. *Mr. C. L. Young* and *Mr. F. C. Heffron* for plaintiff in error. *Mr. James E. Trask* for defendants in error.

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No. 86. James McDowall et al., Plaintiffs in Error, *v.* Edward I. Donovan et al. In error to the Supreme Court of the State of North Dakota. November 22, 1917. Dismissed with costs, pursuant to the tenth rule. *Mr. Edward Engerud* for plaintiffs in error. *Mr. Samuel Herrick* for defendants in error.

No. 87. George H. Munroe et al., Plaintiffs in Error, *v.* Edward I. Donovan et al. In error to the Supreme Court of the State of North Dakota. November 22, 1917. Dismissed with costs, pursuant to the tenth rule. *Mr. Edward Engerud* for plaintiffs in error. *Mr. Samuel Herrick* for defendants in error.

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No. 676. U. S. Fidelity & Guaranty Company, Plaintiff in Error, *v.* State of Mississippi et al. In error to the Supreme Court of the State of Mississippi. December 10, 1917. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. E. C. Brandenburg* for plaintiff in error. No appearance for defendants in error.

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Nos. 121 and 122. George M. Glenn, Plaintiff in Error, *v.* Southern Express Company. In error to the Supreme Court of the State of North Carolina. December 17, 1917. Dismissed with costs, per stipulation. *Mr. Murray Allen, Mr. Lawrence Maxwell* and *Mr. Joseph S. Graydon* for plaintiff in error. *Mr. Alexander B. Andrews, Jr.*, for defendant in error.

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No. 151. Beekman Winthrop et al., Appellants, *v.* Grant Fellows, as Attorney General of the State of Michigan, et al. Appeal from the District Court of the United States for the Eastern District of Michigan. December 19, 1917. Dismissed with costs, per stipulation. *Mr. Henry W. Taft* and *Mr. Edwin P. Grosvenor* for appellants. *Mr. Grant Fellows* for appellees.

No. 251. BATESVILLE SOUTHWESTERN RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* M. H. MIMS. In error to the Supreme Court of the State of Mississippi. January 4, 1918. Dismissed with costs, per stipulation. *Mr. Thomas A. Evans* and *Mr. Roger Montgomery* for plaintiffs in error. *Mr. W. R. Wood* for defendant in error.

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No. 123. NANNIE C. GIBSON, PLAINTIFF IN ERROR, *v.* JOHN J. LENTZ. In error to the Court of Appeals for the Second Judicial District of the State of Ohio. January 14, 1918. Dismissed with costs, per stipulation. *Mr. Smith W. Bennett* and *Mr. W. J. Geer* for plaintiff in error. *Mr. John D. Karns* for defendant in error.

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No. 181. BERT WILLIAMS ET AL., PLAINTIFFS IN ERROR, *v.* A. P. SANDLES ET AL. In error to the Supreme Court of the State of Ohio. January 31, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. F. S. Monnett* for plaintiffs in error. *Mr. Edward C. Turner* for defendants in error.

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No. 694. ROBERT F. STROUD, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the District Court of the United States for the District of Kansas. February 4, 1918. Judgment reversed upon confession of error; and cause remanded for further proceedings, on motion of *Mr. Solicitor General Davis* for the United States. *Mr. Isaac B. Kimbrell* and *Mr. Martin J. O'Donnell* for plaintiff in error.

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No. 423. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* W. E. HOLLIFIELD. In

error to the Supreme Court of the State of North Carolina. February 4, 1918. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. James H. Merrimon* and *Mr. Alfred S. Barnard* for plaintiff in error. No appearance for defendant in error.

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## CASES DISPOSED OF IN VACATION.

No. 139. Coal & Coke Ry. Co., Plaintiff in Error, *v.* David F. Deal. In error to the United States Circuit Court of Appeals for the Fourth Circuit. July 16, 1917. Dismissed with costs, pursuant to the twenty-eighth rule. *Mr. George E. Price* for plaintiff in error. *Mr. H. W. Houston* for defendant in error.

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No. 241. John A. Bell, Plaintiff in Error, *v.* Lizzie E. Fitzpatrick. In error to the Supreme Court of the State of Oklahoma. July 31, 1917. Dismissed with costs, pursuant to the twenty-eighth rule. *Mr. James A. Veazey* for plaintiff in error. *Mr. Joseph P. Rossiter* for defendant in error.

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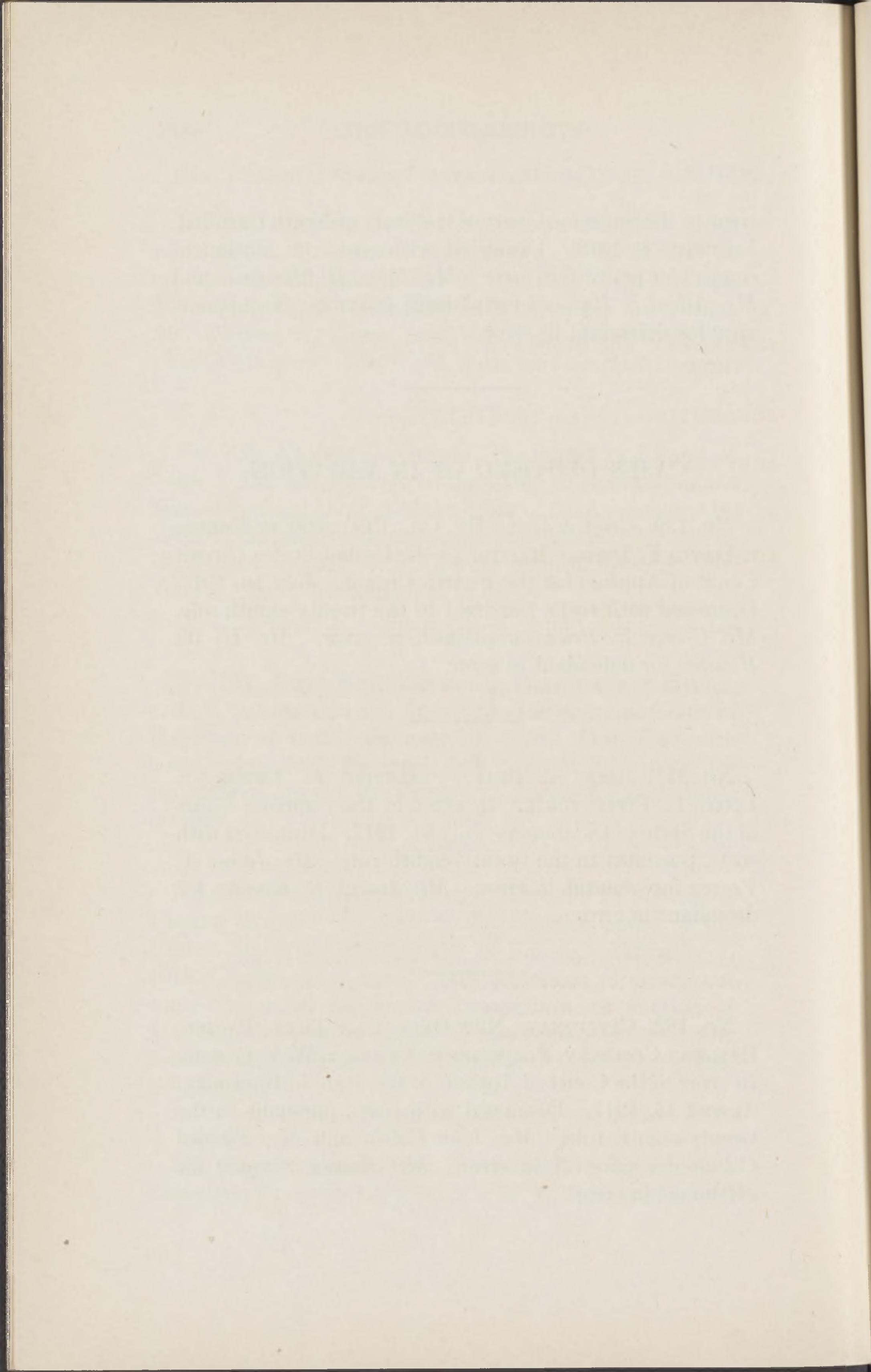
No. 182. Cincinnati, New Orleans & Texas Pacific Railway Company, Plaintiff in Error, *v.* W. E. Goode. In error to the Court of Appeals of the State of Kentucky. August 15, 1917. Dismissed with costs, pursuant to the twenty-eighth rule. *Mr. John Galvin* and *Mr. Edward Colston* for plaintiff in error. *Mr. Emmet Puryear* for defendant in error.



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2. If a contract, made and valid in one State, is unenforceable in the courts of another on grounds of local public policy, it is unenforceable also, for the same reason, in the District Court in the latter State having jurisdiction through diversity of citizenship. *Id.*

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tion, include power to compel military service, exercised by Selective Draft Act of 1917. *Selective Draft Law Cases* .... 366
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2. The militia power reserved to the States by Art. I, § 8, while separate and distinct in its field, is subject to be restricted in, or deprived of, its area of operation through the army power, according to the extent to which Congress, in its discretion, finds necessity for calling the latter into play. *Selective Draft Law Cases*.............................. 366

3. The army power, combining the powers vested in the Congress and the States under the Confederation, embraces the complete military power of government, as is manifested not only by the grant made but by the express limitation of Art. I, § 10, prohibiting the States, without the consent of Congress, from keeping troops in time of peace or engaging in war. *Id.*

4. The service which may be exacted of the citizen under the army power is not limited to the specific purposes for which Congress is expressly authorized, by the militia clause, to call the militia; the presence in the Constitution of such express regulations affords no basis for an inference that the army power, when exerted, is not complete and dominant to the extent of its exertion. *Id.*

5. Compelled military service is neither repugnant to a free government nor in conflict with the constitutional guarantees of individual liberty. It is the duty of the citizen to render military service in case of need and the right of the Government to compel it. *Id.*

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1. Negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which negotiation made, is interstate commerce. *Weeks* v. *United States*.......... 618

2. Making unlawful the shipment or delivery for shipment from one State to another of a misbranded article is legitimate exercise of power of Congress. *Id.*

3. Congress may prevent discriminating against localities by carriers whose lines do not reach them but which bill through traffic to them over other lines. *St. Louis S. W. Ry.* v. *United States*.......... 136

4. Franchise and permit taxes, based on capital stock, surplus and profits, levied by State on foreign corporations doing business in the State *held* direct burden on interstate commerce. *Looney* v. *Crane Co.*.......... 178

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8. Where, in regular course, a passenger train is moved by one company from one State to a point in another and is there taken charge of and carried to destination by a second company, local to the second State, its interstate character is not lost. *Id.*

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1. Contracts divesting State of power of eminent domain are not within protection of contract clause. *Pennsylvania Hospital* v. *Philadelphia*.......... 20

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2. A resolution of county commissioners purporting to revoke a franchise, and treated by state court as having that effect, amounts to state action, and, franchise not being so revocable, amounts to impairment of obligation of contract and is void. *Northern Ohio Tract. Co.* v. *Ohio* . . . . . . . . . . . . 574
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3. Where, at time of issuing county bonds, there existed a law providing a method for collecting taxes to pay the bonds whereby a single collector, under a single bond, was to be appointed to collect all county taxes, including those levied to pay the county's debts, a subsequent amendment, which authorized the appointment of more than one collector, under separate bonds, each charged with duty of collecting such part of taxes as should be designated in his appointment—an arrangement which made it possible to evade satisfaction of county's debt—*held* to impair obligation of contract under which bonds were issued. *Hendrickson* v. *Apperson.* 105
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1. A consent decree granting divorce as prayed and adjudging that wife recover a certain sum " in full of alimony and all other demands set forth in cross-bill " on which decree based, which bill recited husband's property rights in certain lands in another State, *held* within jurisdiction of the court granting it, and that action of court of State in which land situated, in suit by wife for alimony out of such lands, in not accepting such decree as an estoppel, was a denial of full faith and credit. *Bates* v. *Bodie*. . . . . . . . . . . . . . . . . . 520

2. Where an insurance company, by the decision of the court of the State of its domicile, was permitted, subject to a limitation as to amount, to keep up a mortuary fund through assessments, the decision of a court of another State, in a later action, holding such an assessment void on ground that it exceeded power of the company and the limit of amount, *held* to deny full faith and credit to former judgment. *Hartford Life Ins. Co.* v. *Barber* . . . . . . . . . . . 146

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The Selective Draft Law of 1917, by exempting ministers of religion and theological students under certain conditions and by relieving from strictly military service members of certain religious sects whose tenets deny the moral right to engage in war, is not repugnant to First Amendment. *Selective Draft Law Cases* ............................ 366

XI. **Fifth Amendment. Due Process. Liberty.**

1. Railroad companies, which, though chartered by different States, are all engaged in interstate commerce, and have established a through route between interstate points with a through rate consisting of the sum of the local rates, or of a combination of a local rate with a joint rate to an intermediate point, are not deprived of their rights under the Fifth Amendment when required, by order of Interstate Commerce Commission, to substitute a reasonable joint through rate for the existing through rate, and to maintain the same through route or, at their election, substitute a modification of it which the Commission has found preferable. *St. Louis S. W. Ry.* v. *United States* ............ 136

2. Error of District Court in admitting former judgments in evidence and in rendering judgment on such evidence against party who objects that they do not bind him, but who is fully heard, does not constitute denial of due process of law. *Jones* v. *Buffalo Creek Coal Co.* .................. 328

XII. **Sixth Amendment. Jury.**

1. The Amendment permits drawing of a jury from a part of the district in criminal cases. *Ruthenberg* v. *United States.* .......................................... 480

2. No infraction of constitutional or statutory right is predicable of the fact that the indictment and conviction of a Socialist are returned by grand and petit juries composed exclusively of members of other political parties, and property owners. *Id.*

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1. The Amendment broadened the national scope of the Government by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, thus operating generally upon the powers conferred by the Constitution. *Selective Draft Law Cases*. . .366

2. An ordinance forbidding colored persons to occupy houses in blocks where the greater number of houses are occupied by white persons, and vice versa, is beyond police power, invades civil right to acquire, enjoy and use property, and is unconstitutional under Fourteenth Amendment. *Buchanan* v. *Warley* . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 60

(2) *Hearing. Jury.*

3. In mandamus proceeding to test right of a State to levy charges on sand dredged from stream by a riparian owner under claim of title *ad filum aquæ*, latter has not a constitutional right to have question of navigability determined by jury. *Wear* v. *Kansas* . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 154

(3) *Regulation of Rates and Public Service.*

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5. Order of state public service commission requiring city gas company to extend mains and service pipes to meet reasonable needs of growing community within the city, *held* not contrary to the due process clause. *New York & Queens Gas Co.* v. *McCall*. . . . . . . . . . . . . . . . . . . . . . . . . . . 345

(4) *Taxation.*

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7. Establishing and maintaining public yard for sale of fuel, without financial profit, to inhabitants of municipality, *held* public purpose for which taxes may be levied. *Jones* v. *City of Portland*.... 217

8. Constitutionality of state tax determined by court's own judgment of actual operation and effect of tax, irrespective of its form and how characterized by state courts. *Crew Levick Co.* v. *Pennsylvania*.... 292

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Street railway franchises. See **Franchise.**

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1. State may not by contract divest itself of power of eminent domain; and such contracts are not within protection of contract clause of Constitution. *Pennsylvania Hospital* v. *Philadelphia*.......... 20

2. The same liberty which enables men to form labor unions, and through the unions to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. The parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. *Hitchman Coal & Coke Co.* v. *Mitchell*.......... 229

3. If a contract, made and valid in one State, is unenforceable in the courts of another on grounds of local public policy, it is unenforceable also, for the same reason, in the District Court in the latter State having jurisdiction through diversity of citizenship. *Union Trust Co.* v. *Grosman*.......... 412

4. In a suit for specific performance of contract for sale of a lot, where the vendee, a colored person, relies upon an ordinance forbidding colored persons to occupy houses in blocks where the greater number of houses are occupied by white persons, vendor may attack such prohibition under Fourteenth Amendment. *Buchanan* v. *Warley*.......... 60

5. Modern tendencies to depart from the strict letter in discovering intent do not alter the principle that, within the scope of his undertaking, a party contracting assumes the risks of intervening obstacles. *Day* v. *United States*.......... 159

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that the cost of protecting them from floods in the meantime was within the contractor's undertaking. *Id.*

7. Government's claim of liquidated damages, interposed in a suit on a construction contract, *held* inequitable and therefore disallowed. *United States* v. *California Bridge Co.* . 337

8. Under a contract with the United States to erect certain structures "at the United States navy yard, Mare Island," *held* the location selected before execution of contract was subject to be changed by Government for some other location within navy yard. *Id.*

9. Where, under supplemental agreements with new contractor to whom contract relet after default of original contractor, deviations were made involving a cost of about 6% of the total contract price and requiring estimates of the attendant expenses, the cost of the work being reduced notwithstanding the changes, *held*, because of the deviations, that the difference between the cost and the original contract price was not a proper measure of the original contractor's liability. *Id.*

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1. In the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and *habeas corpus* should not be granted in advance of a trial. *Jones* v. *Perkins* ........ 390

2. The statute of limitations is a defense and must be asserted on the trial by defendant in criminal cases; it cannot be heard on *habeas corpus* to test validity of arrest in extradition. *Biddinger* v. *Commissioner of Police* ........ 128

3. District Court not bound by rules of evidence as they stood in 1789. *Greer* v. *United States* ........ 559
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4. No presumption that accused is of good character. *Greer* v. *United States* ........ 559

5. A sworn charge previously made is not essential to validity of an indictment. *Ruthenberg* v. *United States* ........ 480

6. Charging one person with the direct commission of the criminal act, and others with aiding, abetting, etc., it, charges but one offense against all under § 332, Crim. Code; and all persons so charged are principals, though the offense be a misdemeanor. *Id.*

7. In an indictment under the Selective Draft Law for failure

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to register and for aiding, abetting, etc., such failure, it is sufficient to allege that delinquent was a male person between the ages specified and not necessary to allege that he was a citizen of the United States, or a person, not an alien enemy, who had declared his intention to become such citizen. *Id.*

8. Under § 37, Crim. Code, a conspiracy to commit an offense, when followed by overt acts, is punishable as a substantive crime, whether the illegal end has been accomplished or not. *Goldman* v. *United States* .............................. 474

9. Under Rev. Stats., § 161, and Crim. Code, § 194, a privately owned box coming within the designation of letter boxes as made by the Postmaster General, is "an authorized depository of mail matter" and a theft of letters therefrom is punishable as the latter section prescribes. *Rosen* v. *United States* .. 467

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11. Convictions under Selective Draft Law.
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1. Power cannot be divested through contracts made by State. *Pennsylvania Hospital* v. *Philadelphia* . . . . . . . . . . . 20[illegible]

2. A legislative contract prohibiting taking of land of charitable corporation for street extension without latter's consent cannot be opposed to power of condemnation. *Id.*

**EMPLOYER AND EMPLOYEE.** See **Employers' Liability Act; Labor Unions; Master and Servant; Safety Appliance Act.**

**EMPLOYERS' LIABILITY ACT:**

1. A railroad employee who was run down and killed in a switching yard in which he was walking between the rails amid a shifting cloud of steam and smoke coming from a roundhouse and nearby engines, *held* guilty of contributory negligence. *Union Pacific R. R.* v. *Huxoll* . . . . . . . . . . . . . 535

2. Contributory negligence avails carrier neither as defense nor in diminishing damages if failure to observe Safety Appliance Acts contributed, in whole or in part, to cause death of employee. *Id.*

3. Question whether defective condition of power-brake of locomotive contributed, in whole or in part, to injury to employee, *held* properly submitted to jury. *Id.*

4. Question whether any substantial evidence was introduced to justify submission of case to jury on issue of proximate causal negligence is one of law, reviewable in an action under Employers' Liability Act coming from the state court. *Id.*

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5. Except in cases specified in § 4, employee assumes extraordinary risks incident to employment, and risks due to negligence of employer and fellow employees when obvious or fully known and appreciated by him. *Boldt* v. *Pennsylvania R. R.* ........................................ 441

6. Employee was killed, while helping to repair faulty coupler, due to impact of cars moving by gravity under control of brakeman. Evidence tended to support contentions that brakeman negligently permitted cars to strike with too great violence and company neglected to provide rules to safeguard deceased while about his task. *Held,* plaintiff not entitled to instruction that risk employee assumes, since passage of Employers' Liability Act, is ordinary dangers incident to employment, which does not include assumption of risk incident to negligence of carrier's officers, agents or employees. *Id.*

**EMPLOYMENT CONTRACTS.** See **Labor Unions.**

**EQUAL PROTECTION OF LAWS.** See **Constitutional Law,** XIV (6).

**EQUITY.** See **Laches; Patents for Inventions; Procedure,** III, 7; IV, 3; **Receivers; Trusts and Trustees.**

*Bona fide* purchaser. See **Indians,** 8.

1. *Insolvency Proceedings. Provable Claims.* When court, without statute, takes possession of all assets of corporation to satisfy its debts, rights and equities of creditors are determined by their contracts with debtor; it is error to give to filing of the bill the effect of the filing of a petition in bankruptcy or to exclude lawful claims made within time fixed for proving claims and maturing within a reasonable time before distribution can be made. *Filene's Sons Co.* v. *Weed* 597

2. *Suit to Collect Stock Subscriptions. Order of Bankruptcy Court.* Order of bankruptcy court, calling for payment of shareholders' subscriptions to a bankrupt corporation which, before and independently of the order, were ascertained and payable, adds nothing to shareholders' liabilities or trustee's rights, and cannot justify a single suit by trustee against many of the shareholders to collect their subscriptions which, in the absence of the order, would not have

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been cognizable in equity; and neither can order of bankruptcy court directing trustee to institute a suit in equity to make such collections confer such equitable jurisdiction. *Kelley* v. *Gill* .................................... 116

3. *Id. Multiplicity of Actions.* Where liabilities to pay stock subscriptions are several, independent and unconditional, and no issue with corporation touching such liabilities is common to shareholders, remedy of the corporation, or its trustee in bankruptcy, is by action at law against each shareholder separately, and not in equity on ground of multiplicity of actions. *Id.*

4. *Ancillary Bill to Enjoin and Absorb Law Actions. Jurisdiction.* A bill filed in District Court by defendant in a number of actions at law pending therein, praying that the whole matter be tried in equity and the legal proceedings enjoined, *held* dependent and ancillary and that the jurisdiction to entertain it was referable to that invoked in the actions at law. *Eichel* v. *U. S. Fidelity & Guaranty Co.* ............. 102

5. *Injunction. Street Railway Franchises. City Ordinance.* City restrained in District Court pending determination of franchise rights in state court. *Cincinnati* v. *Cincinnati & H. Trac. Co* ........................................ 446

6. *Cross Bills; against United States.* United States no more impleadable by cross than original bill without its consent. *Illinois Cent. R. R.* v. *Public Utilities Comm.* ............ 493

7. *Enforcing and Annulling Orders of Interstate Commerce Commission.* As to what is such a suit; the venue and necessity of joining United States and Commission. See *Id.*

8. *Injunction. Absent Parties. Jurisdiction.* The District Court has no power to decree injunction against parties not served with process and who appeared only to object to jurisdiction over them. *Hitchman Coal & Coke Co.* v. *Mitchell.* .............................................. 229

9. *Id. Officials of Labor Union.* In a suit to restrain alleged concerted wrongful conduct upon the part of officials of a labor union, a temporary injunction should not be granted against those not served and not submitting themselves to jurisdiction. *Eagle Glass & Mfg. Co.* v. *Rowe* ............ 275

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10. *Id.* An injunction will lie to prevent officers and agents of a labor union from inducing employees of a plant run on a non-union basis to break their contract of employment by remaining in the employ of such non-union employer after joining the union, for the purpose of coercing such employer, through a strike or the threat of one, into recognition of the union. *Hitchman Coal & Coke Co.* v. *Mitchell* .......... 229
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11. *Id. Decree on Interlocutory Appeal.* Where application for temporary injunction submitted upon affidavits taken *ex parte* without opportunity for cross-examination and without consent that court proceed to final determination of merits, dismissal of bill, on interlocutory appeal, should not be directed, unless on its face there is no ground for equitable relief. *Eagle Glass & Mfg. Co.* v. *Rowe*..... 275

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**ESTOPPEL:**

1. Principles of estoppel by judgment reviewed and *held* to apply peculiarly to decrees for divorce and alimony. *Bates* v. *Bodie*........................................ 520

2. Consent decree granting divorce as prayed and adjudging that wife recover a certain sum "in full of alimony and all other demands set forth in cross-bill" on which decree based, which bill recited husband's property rights in certain lands in another State, *held* within jurisdiction of court granting it, and that action of court of State in which land situated, in suit by wife for alimony out of such lands, in not accepting such decree as an estoppel, was a denial of full faith and credit. *Id.*

3. In suit to set aside certificate of naturalization illegally granted United States is not estopped by the order of naturalization, although it entered its appearance in the naturalization proceedings and there unsuccessfully raised the same objection. *United States* v. *Ness*........................ 319

4. Acts of administrative officers of government *held* not to estop United States from asserting title to public land erroneously surveyed. *Lee Wilson & Co.* v. *United States*..... 24

5. Adjudication in former case *held* not to estop defendant

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on issue of primary responsibility of another in action whereby former, after paying judgment, sought indemnity from latter, the former adjudication not determining or involving such issue and party from whom indemnity sought having been dismissed from former case as co-defendant before defendant's evidence therein was heard. *Fuller Co.* v. *Otis Elevator Co* ........ 489

**EVIDENCE.** See **Judicial Notice; Presumptions.**

1. District Court in criminal trial not bound by rules of evidence as they stood in 1789. *Greer* v. *United States* ........ 559
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2. Power to review does not include the right to invade province of jury by determining questions of credibility and weight of evidence. *Goldman* v. *United States* ........ 474
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3. The common-law rule of disqualification of witnesses convicted of crime is no longer followed, but such conviction is considered in determining the credibility and weight of their testimony. *Rosen* v. *United States* ........ 467

4. In a criminal trial in District Court in New York, a witness, who had been convicted of crime under the law of that State, *held* competent to testify for the United States against his co-defendants, irrespective of whether he would have been disqualified under the rules of competency as they were in New York at date of Judiciary Act of 1789. *Id.*

5. In order that declarations and conduct of third parties may be admissible against persons sued with respect to acts done to carry out an alleged conspiracy, a combination between them and defendants must be shown, by independent evidence, but the criminal or otherwise unlawful character of the combination may be shown by the declarations themselves. *Hitchman Coal & Coke Co.* v. *Mitchell* ........ 229

6. Where validity of an order of Interstate Commerce Commission depended upon the evidence before it, trial court, in a suit to set aside order, properly excluded other evidence. *Louis. & Nash. R. R.* v. *United States* ........ 463

7. Question whether any substantial evidence was introduced to justify submission of case to jury on issue of proxi-

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mate causal negligence is one of law, reviewable in an action under Federal Employers' Liability Act coming from state court. *Union Pacific R. R.* v. *Huxoll*.................... 535

8. Upon charge of misbranding under Food and Drugs Act, by offering for sale under distinctive name of another article, trial court properly received evidence that shipment was made to fill order obtained by defendant's agent by so misrepresenting article, and properly declined to confine jury's attention to label borne by article when shipped. *Weeks* v. *United States*........................................ 618

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**EXPORTS.**

State tax on. See **Constitutional Law,** V, 5.

**EXTRADITION:**

1. A person indicted in due form for offense against laws of State, who was present therein when offense is alleged to have been committed, and subsequently leaves, becomes a fugitive from justice; and upon fulfillment of the requirements of § 5278, Rev. Stats., governor of State where accused found must cause his arrest and delivery for extradition to authorized agent of demanding State. *Biddinger* v. *Commissioner of Police*........................................ 128

2. Art. IV, § 2, of the Constitution intends, not to express the law as usually prevailing among independent nations, but to provide a summary executive proceeding whereby States may promptly aid one another in bringing accused persons to trial; and should be liberally construed to effectuate this purpose. *Id.*

3. Art. IV, § 2, subd. 2, of Constitution, places no limitation upon power of States to arrest in advance of extradition proceedings; with § 5278, Rev. Stats., it deals merely with conditions under which one State may demand rendition from another and under which alleged fugitive may resist com-

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pliance by State upon which demand is made. *Burton* v. *New York Cent. R. R.* .... 315

4. Matters of defense—in this case the bar of the statute of limitations—cannot be heard on *habeas corpus* to test the validity of arrest in extradition, but must be heard and determined at trial in demanding State. *Biddinger* v. *Commissioner of Police* .... 128

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**FIRST AMENDMENT.** See **Constitutional Law.**

**FOOD AND DRUGS ACT:**

1. Act specifies and defines at least two kinds of misbranding—where article bears false or misleading label and where offered for sale under distinctive name of another article. *Weeks* v. *United States* .... 618

2. It is not the misbranding that is made unlawful, but shipment or delivery for shipment from one State to another of misbranded article. *Id.*

3. Upon charge of misbranding, by offering for sale under distinctive name of another article, trial court properly received evidence that shipment was made to fill order obtained by defendant's agent by so misrepresenting article, and properly declined to confine jury's attention to label borne by article when shipped. *Id.*

4. Whether intent of principal and sanction of agent's misrepresentations are immaterial, not determined in a case where

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the jury found (presumptively with evidence) that principal authorized agent, under an instruction that such authority was essential. *Id.*

**FOREIGN COMMERCE:**

Tax on exports. See *Crew Levick Co.* v. *Pennsylvania* ...... 292

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**FRANCHISE.** See **Constitutional Law,** VI; **Procedure,** III, 1; **Taxation,** III.

1. In absence of state constitutional or statutory provision, and prior adjudication by state court to contrary, and of circumstances showing intention to give or accept mere revocable right, franchise granted by proper state authority without limit as to duration, is contract, not subject to annulment at will of grantor. *Northern Ohio Traction Co.* v. *Ohio* ........................................ 574
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2. Under constitution and statutes of Ohio in 1892, county commissioners had power to grant franchises over public roads valid for 25 years, if not perpetually. *Id.*

**FRATERNAL SOCIETIES.** See **Insurance,** 2.

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**FRAUDULENT CONVEYANCES.** See **Bankruptcy,** 5–8.

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**HABEAS CORPUS:**

1. In the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and *habeas corpus* should not be granted in advance of a trial. *Jones* v. *Perkins* .................................. 390

2. Matters of defense—in this case the bar of the statute of limitations—cannot be heard on *habeas corpus* to test validity of arrest in extradition, but must be heard and determined at trial in demanding State. *Biddinger* v. *Commissioner of Police* .................................. 128

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Section 43, Immigration Act of 1907, preserves judicial proceedings prescribed by Chinese Exclusion Acts for cases to which those acts apply, and summary administrative method provided by § 21 cannot be used in a case of violation of Exclusion Acts. *United States* v. *Woo Jan* ........ 552

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**INDIANS:**

1. Under treaties with Menominee Indians, acts of Congress and an act of the Wisconsin legislature, certain lands *held* disposed of within meaning of school section grant in Wisconsin Enabling Act; that they remained in reservation and subject to continuing occupancy and rights of Indians; and that State had no title to them and could not restrain cutting of timber on them by or in interest of Indians. *Wisconsin* v. *Lane* .................................. 427

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2. Treaty of 1854 with Lake Superior Chippewas and reservation for the Indians thereunder, *held* to withdraw certain lands and dispose of them within meaning of school section grant in Wisconsin Enabling Act, and that title did not pass to State. *United States* v. *Stearns Lumber Co*. . . . . . . . . . . . 436

3. Allotment certificate issued under Choctaw-Chickasaw agreement of 1902 passes equitable title only; until legal title conveyed by patent, duly recorded, as provided by § 5, Act of 1906, allotment may be set aside by Secretary of the Interior for fraudulent procurement. *Duncan Townsite Co.* v. *Lane*. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 308

4. The assignment of land provided for by Art. IV of treaty of 1865 with Omaha Indians, was merely an apportionment of tribal right of occupancy to members in severalty, leaving fee in United States and leaving United States and tribe free to take such measures for ultimate and permanent disposal of lands, including fee, as might become appropriate in view of changing conditions, welfare of the Indians and public interests. *United States* v. *Chase* . . . . . . . . . . . . . . . . . . . . . . 89

5. Possessory rights based on such assignments were terminated by Act of 1882, 22 Stat. 341. An assignee who failed to exercise his preferred right of selection waived it, and his assigned tract became allottable to any other qualified selector. *Id.*

6. The provision of § 4, Act of 1882, that " any right in severalty acquired by any Indian under existing treaties shall not be affected by this act " was not intended to qualify the plan of allotment defined in § 5, but only to prevent the sale under the earlier and separable portion of the act of tracts subject to Indian rights in severalty acquired under treaties. *Id.*

7. Patent for allotment under Act of 1882, in the name of an Indian who was dead at the time, inures to benefit of his heir under § 2448, Rev. Stats.; the fact that patentee had died before requisite proceedings had been taken upon his selection would not render patent void but at most voidable in an appropriate proceeding. Such a patent cannot be attacked by mere occupant of the allotment in an action brought by United States and patentee's heir to recover damages for wrongful use and occupation of the premises. *Id.*

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8. Doctrine of *bona fide* purchaser will not aid holder of an equity to overcome the holder of both the legal title and an equity. *Duncan Townsite Co.* v. *Lane* .................. 308

9. Mandamus will not lie to compel Secretary of Interior to execute and record a patent for land where relator, purchaser in good faith and without notice of a fraudulent Indian allotment, seeks to get legal title as against the United States. *Id.*

10. Under Acts of 1906, § 19, and 1908, § 4, land allotted to a Creek Freedwoman as a homestead under Act of 1902, lost its tax exemption when restrictions on alienation were removed by Secretary of Interior upon petition of allottee under townsite provision of Act of 1903. *Sweet* v. *Schock*.... 192

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1. A policy of insurance having a cash surrender value *held* an asset of bankrupt's estate to the extent of such value. *Cohen* v. *Samuels* .................................... 50

2. A fraternal insurance corporation *held* to have the right to increase assessment upon insurance certificate. *Knights of Pythias* v. *Smyth* .................................. 594

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1. Meanings and relations of the terms "through route," "through rate," "joint rate," "sum of the locals," "division of joint rate," "rate-breaking point" and "combination rate" explained and defined. *St. Louis S. W. Ry.* v. *United States* . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 136

II. **Powers and Proceedings of Commission.** See also III, 5, 6, *infra.*

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2. *Id.* Where the validity of an order of Commission depended upon the evidence before it, the trial court, in a suit to set aside the order, properly excluded other evidence. *Id.*

3. *Long and Short Haul Clause.* An order passed after a full hearing on an application for relief from the long and short haul provision of the Act to Regulate Commerce, *held* not objectionable as to form or as broader than the hearing, or because other phases of the application were not acted upon, or as otherwise beyond the Commission's power. *Id.*

4. *Discrimination against Locality.* The power to prevent discrimination against a particular locality applies to carriers whose lines do not reach it but which bill through traffic to it over connecting lines. *St. Louis S. W. Ry.* v. *United States*. . 136

5. *Joint Rates and Through Routes.* An order to substitute reasonable joint through rate for an existing through rate, and to maintain existing through route, or, at carrier's election, substitute a modification of it found preferable, is within the power of the Commission. *Id.*

6. *Id.* An order held consistent with provision of § 15 of Commerce Act forbidding Commission to embrace in a through route "less than the entire length" of a railroad "unless to do so would make such through route unreasonably long." *Id.*

7. *Id. Removing Discrimination.* An order requiring carriers to reduce existing through rates by establishing joint rates, or, in alternative, new through routes with joint rates, rests on § 15 of Commerce Act; it is not to be regarded as primarily an order to remove discrimination in violation of § 3, even

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though discrimination in rates as between two localities may have furnished the occasion for the complaint and afforded reason for the rate fixed. *Id.*

8. *Investigating Power.* An investigation directed by Senate resolution, relative to expenditures by certain railroad companies, held not to be regarded as directed to political activities, or to efforts to suppress competition, but as seeking to ascertain amounts of expenditures, their allocation, and the manner in which charged upon books. *Smith* v. *Interstate Com. Comm*....................................33, 47
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9. *Id.* Power of investigation not necessarily confined to cases in which evils and abuses are definitely charged and remedies proposed in words; nor, *semble,* is right of inquiry in a particular proceeding necessarily to be measured by scope of the proceeding as defined by the order instituting it. *Id.*

10. *Removing discriminating intrastate rates.* When Commission finds that disparity in interstate and intrastate rates is resulting in unjust discrimination against interstate commerce, and determines what are reasonable rates for interstate traffic and directs removal of discrimination carrier not only entitled to put in force such rates but free to remove the forbidden discrimination by bringing intrastate rates to same level. *Illinois Cent. R. R.* v. *Public Utilities Comm*.... 493

11. *Id. Scope and certainty of order.* In such case, Commission may make order as broad as wrongful discrimination, but extent of discrimination found and of remedy applied must be gathered from the reports and order of the Commission; and, to be effective in respect of intrastate rates established and maintained under state authority, order must have definite field of operation and not leave uncertain territory or points to which it applies. Such order should not be given precedence over a state rate statute, otherwise valid, unless, and except in so far as, it conforms to a high standard of certainty. *Id.*

III. **Duties, Rights and Liabilities of Carriers and Shippers.**

1. *Recovery of Excess Charges under Reparation Order.* That one who has paid unreasonable freight charges has shifted burden by collecting from purchasers of the goods, does not

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2. *Carmack Amendment. Bill of Lading Presumed.* In a case of interstate shipment governed by Amendment, issuance of a receipt or bill of lading will be presumed. *Southern Pacific Co.* v. *Stewart* .................................... 359

3. *State Liquor Laws; Exposure of Records.* A state law requiring carriers to keep records of shipments of intoxicating liquor open for inspection of any officer or citizen, is, under the Webb-Kenyon Law, valid, notwithstanding prohibition as to divulging information in § 15 of Commerce Act as amended. *Seaboard Air Line Ry.* v. *North Carolina* .................. 298

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5. *Suits to Restrain State Interference with Commission's Order—Venue.* Suits by carriers to restrain state officials from interfering with establishment and maintenance of intrastate rates which carriers have adopted in pursuance of order of Interstate Commerce Commission requiring removal of discrimination against interstate commerce, need not be brought in district of residence of party upon whose petition order was made, but come within provision of § 1, Act of June 18, 1910 (Jud. Code, § 207). *Illinois Central R. R.* v. *Public Utilities Comm* .................................... 493

6. *Id. Cross Bill to Set Order Aside.* The District Court of a district other than that of petitioner's residence, in a suit by a carrier in aid of an order of the Interstate Commerce Commission, cannot, under the Act of October 22, 1913, entertain a cross bill seeking to have the order declared void and to enjoin the United States and the Commission from enforcing it and the carrier from complying with it. *Id.*

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1. A State may prohibit and punish the possession of intoxicating liquor for personal use. *Crane* v. *Campbell*........ 304

2. Under Webb-Kenyon Law a State may prescribe conditions under which shipments of intoxicating liquors from other States may be allowed. *Seaboard Air Line Ry.* v. *North Carolina*........................................ 298

3. A state law requiring carriers to keep records of shipments of intoxicating liquor open for inspection of any officer or citizen, is, under the Webb-Kenyon Law, valid, notwithstanding prohibition as to divulging information in § 15 of Commerce Act as amended. *Id.*

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An attempt to impose on a circuit court or judge thereof the duty of levying and collecting taxes is void under the Constitution of Kentucky. *Hendrickson* v. *Apperson*......... 105

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2. Judgment of highest state court in action under Employers' Liability Act, final in sense of determining ultimate right and general principles by which it was to be measured, but which did not fix amount of recovery and directed new trial to accomplish that result, *held* not final for purposes of certiorari under Act of 1916. *Id.*

3. Finality of judgments of Court of Appeals of District of Columbia for purposes of certiorari from this court. See *Fuller Co.* v. *Otis Elevator Co.*......................... 489

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1. District Court has no power to decree an injunction against parties who were not served with process and who appeared only to object to the jurisdiction over them. *Hitchman Coal & Coke Co.* v. *Mitchell* .. ................ 229

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junction should not be granted against those not served and not submitting themselves to jurisdiction. *Eagle Glass & Mfg. Co.* v. *Rowe* .................................... 275

3. Where a bill to abate a nuisance on the Columbia River was filed in the Western District of Washington on the assumption that the *locus in quo* was within that State and District, a motion to dismiss without prejudice, because of an intervening decision of this court which fixed the *locus* in Oregon, should have been granted, the possibility of granting relief against the defendants *in personam* not justifying the retention of the case against plaintiff's will. *McGowan* v. *Columbia River Packers' Assn* ........................ 352

II. **Jurisdiction of this Court.**

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1. Without departing from settled rule that writ of error dismissed if its total want of merit shown conclusively by decisions extant at time of decision below, judgment affirmed. *Pennsylvania Hospital* v. *Philadelphia*. ................ 20

2. Power to review does not include the right to invade province of jury by determining questions of credibility and weight of evidence. *Goldman* v. *United States* .......... 474
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3. In reviewing judgment erroneously treating franchise as revocable at will of county commissioners and upholding purported revocation by them, court not called upon to determine whether franchise term has since expired or whether legislature may have reserved power to revoke or repeal franchise. *Northern Ohio Trac. Co.* v. *Ohio* ............... 574

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4. Writ will not issue to compel subordinate court to make a particular decision; and jurisdiction in this regard is no greater in a case in which lower court's decision is by law made final than those in which decisions are reviewable in the ordinary ways. *Ex parte Park & Tilford* .......... 82

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(4) *Over Circuit Court of Appeals.*

7. Though an action be removable as one arising under a federal law, if defendant remove it solely on ground of diverse citizenship a judgment of the Circuit Court of Appeals is not reviewable by writ of error. *Southern Pacific Co.* v. *Stewart* .......... 359

8. An ancillary, dependent bill to enjoin legal proceedings in District Court and adjudicate subject-matter is jurisdictionally referable to such actions, and decree therein is reviewable by appeal from Circuit Court of Appeals if original jurisdiction of action depended on federal question. *Eichel* v. *U. S. Fidelity & Guaranty Co.* .......... 102

9. Suit against fraternal insurance corporation *held* to involve construction of federal charter, and that court had jurisdiction to entertain appeal. *Knights of Pythias* v. *Smyth* .......... 594

(5) *Over District Courts.*

10. In reviewing directly judgment of District Court in criminal case, when constitutional questions upon which jurisdiction depends are not frivolous but are resolved against plaintiff in error, other questions raised are to be considered and passed upon. *Goldman* v. *United States* ... 474

11. A suit by one adjudged a lunatic, seeking to regain certain documents and to set aside the inquisition, *held* to involve no construction or application of the Constitution to support direct appeal from District Court. *Ketcham* v. *Burr* .......... 510

12. An action to recover back money paid under protest as tax on income under Law of 1913, *held* to present not merely question whether statute has been wrongly understood and applied, but also question as to scope of Sixteenth Amendment, and that court had jurisdiction to review both ques-

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tions by direct writ of error to District Court. *Towne* v. *Eisner* .......... 418

13. Upon appeal from decree of District Court granting an injunction against enforcement of a city ordinance, on ground that it impaired the obligations of grants under which a street railway has been built and that its enforcement would work a deprivation of property without due process or compensation and cause irreparable injury, the cause is subject to review upon both law and facts, relief depending upon the case as it develops in this court. *Cincinnati* v. *Cincinnati & H. Trac. Co.* .......... 446

14. A proceeding to set aside default judgment for want of service of process, *held* to amount to an independent action and that the question of jurisdiction, as it related to the power of the court in the original action, could not be made the basis of a direct writ of error, under § 238, Judicial Code, to determine correctness of order overruling application to set aside. *Stevirmac Oil & Gas Co.* v. *Dittman* .......... 210

(6) *Over Court of Appeals of the District of Columbia.*

15. Power of Court of Appeals to certify questions to this court is confined to cases where judgments or decrees are made final by § 250, Jud. Code, which does not embrace cases involving interpretation and effect of acts of Congress which are general in character, or the general duties or powers of officers under the law of the United States, as distinguished from merely local authority. *Arant* v. *Lane* .......... 166

16. When issued to the Court of Appeals, the writ of certiorari is not limited to cases in which final judgment has been entered, but only to those in which judgment when entered is final. *Fuller Co.* v. *Otis Elevator Co* .......... 489

(7) *Over Court of Customs Appeals.* See **Mandamus**, 3, 4.

(8) *Over Courts of the Philippine Islands.*

17. Judgment of Supreme Court of Philippine Islands modifying judgment of Court of Land Registration *held* properly reviewable by writ of error and that an appeal also taken must be dismissed. *Gauzon* v. *Compañia General &c.* .......... 86

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(9) *Over State Courts.*

18. Judgment of highest state court, in action under Employers' Liability Act, final in sense of determining ultimate right and general principles by which it was to be measured, but which did not fix amount of recovery and directed new trial to accomplish that result, *held* not final for purposes of certiorari under Act of 1916. *Bruce* v. *Tobin*.............. 18

19. A judgment rendered against corporation of one State in courts of another, on cause of action arising in the former, over objection that its consent to be sued in the latter could be implied only in respect of causes arising out of its business there and that the attempt to compel it to respond to the action was an invasion of its rights under Constitution, *held* not reviewable by writ of error, but by certiorari under that clause of § 237, Jud. Code, as amended, which deals with cases in which any title, right, privilege, or immunity is claimed under the Constitution. *Phila. & Reading C. & I. Co.* v. *Gilbert*.......................................... 162

20. Where, by the judgment of a court of domicile, an insurance company was permitted to levy certain assessments, subject to limitation of amount, and in a later action in court of another State such an assessment was held void on the ground that it exceeded the power of the company and the limit fixed by the former judgment, and that it was not made as required by the company's charter, *held*, that the second ground of decision could not be treated as an independent local basis of decision and thereby defeat the right of review and reversal of the decision on the first ground as one denying full faith and credit to the judgment with respect to the amount of assessment. *Hartford Life Ins. Co* v. *Barber*..... 146

21. Question whether any substantial evidence was introduced to justify submission of case to jury on issue of proximate causal negligence is one of law, reviewable in action under Federal Employers' Liability Act coming from state court. *Union Pacific R. R.* v. *Huxoll*.................... 535

III. **Jurisdiction of District Courts.** See II, (4) and (5), *supra.*

As to personal jurisdiction. See I, *supra.*

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(1) *Removal Proceedings.* See II, 7, *supra.*

1. Where complaint states cause of action against common carrier for loss or damage in transit to goods shipped in interstate commerce, case is removable from state to District Court if jurisdictional amount is involved. *Southern Pac. Co.* v. *Stewart* .......... 359

(2) *Enforcing Local Policy.*

2. If a contract, made and valid in one State, is unenforceable in the courts of another on grounds of local public policy, it is unenforceable also, for the same reason, in District Court in latter State having jurisdiction through diversity of citizenship. *Union Trust Co.* v. *Grosman* .......... 412

(3) *Under Contract Clause.*

3. Corporations claiming right to operate street railway according to terms of various grants, etc., under which it had been built, sought to restrain enforcement of a city ordinance on ground that it impaired and attempted to impair the obligations of the several grants, etc., and that its enforcement would deprive them of their property without due process or compensation and cause irreparable injury. *Held,* that jurisdiction of District Court was properly invoked and that it had power to adjudicate the issues presented, but that the decree for an injunction as prayed should be modified so as to limit affirmative relief to an injunction restraining city from taking any steps, other than necessary court proceedings, to enforce the ordinance prior to final adjudication of controversies involved and from setting up claim that plaintiff's continued operation of cars, pending such final adjudication, does or will amount to an acceptance of the ordinance or in any way prejudice their rights. *Cincinnati* v. *Cincinnati & H. Trac. Co.* .. 446

(4) *As to Orders of Interstate Commerce Commission.*

4. District Court, in a suit by a carrier in aid of an order of Commission, cannot, under Act of Oct. 22, 1913, entertain a cross bill seeking to have the order declared void and to enjoin United States and Commission from enforcing it and carrier from complying with it, in district where party who petitioned for the order does not reside. *Illinois Central R. R.* v. *Public Utilities Comm.* .......... 493

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5. Suits by carriers to restrain state officials from interfering with establishment and maintenance of intrastate rates which carriers have adopted in pursuance of order of Commission requiring removal of discrimination against interstate commerce, need not be brought in district of residence of party upon whose petition order was made, but come within provision of § 1, Act of June 18, 1910 (Jud. Code, § 207). *Id.*

6. In suit by carrier to restrain state officials from interfering with establishment and maintenance of intrastate rates adopted in pursuance of order of Commission requiring removal of discrimination against interstate commerce, neither the United States nor the Commission is a necessary party. *Id.*

7. A cross bill seeking to have an order of the Commission declared void and to enjoin United States and Commission from enforcing it and carrier from complying with it, cannot be entertained as against Commission and carrier only: United States is a necessary party. *Id.*

(5) *Suits Against State Officials or States.*

8. Action against Bank Commissioner of Oklahoma *held* to be against him personally and that, in absence of diverse citizenship, District Court without jurisdiction; allegations of abridgment of privileges and immunities and deprivation of property without due process being merely in emphasis of Commissioner's wrongdoing and not a statement of an independent ground of recovery. *Martin* v. *Lankford*.......... 547

9. Action against Bank Commissioner of Oklahoma personally and his surety to recover damages for loss of plaintiff's bank deposit, alleged to be due to his negligent or wilful disregard of his duties under state law, *held* not an action against State, but one within jurisdiction of District Court, there being diversity of citizenship. *Johnson* v. *Lankford*............... 541
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10. Allegations that Commissioner so arbitrarily and capriciously exercised his powers as to deprive plaintiff of the equal protection of the laws and of his property without due process, etc., *held* not to change complexion of action. *Johnson* v. *Lankford*.......................................... 541

11. Suit to enjoin state officials from enforcing unconstitutional tax not a suit against State. *Looney* v. *Crane Co*...... 178

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(6) *Suits against United States.*

12. The immunity of the United States recognizes no distinction between cross and original bills, or ancillary and original suits. *Illinois Central R. R.* v. *Public Utilities Comm* .......... 493

(7) *On Columbia River.* See I, 3, *supra.*

13. An alleged nuisance consisting of nets connected with buoys and heavily anchored to bottom of Columbia River between the line of extreme low tide and the channel, in Oregon, is not subject to abatement by District Court sitting in Western District of Washington; assuming that concurrent jurisdiction "on the Columbia" is enjoyed by State of Washington, it does not reach bed of stream in Oregon. *McGowan* v. *Columbia River Packers' Assn.* .......... 352

IV. **Jurisdiction of State Courts.** See II, (9) *supra;* VI, *infra.*
Removal. See II, 7; III, (1), *supra.*

V. **Jurisdiction of Court of Appeals of the District of Columbia.** See II, (6), *supra.*

VI. **Local Law. Following State Courts.** See II, 20, 21; III, (2), *supra.*

1. Conclusive effect of construction of state statutes by highest court of State. *Pennsylvania R. R.* v. *Towers* .... 6
*New York & Queens Gas Co.* v. *McCall* .......... 345
*Hendrickson* v. *Apperson* .......... 105

2. Where judgment sustaining *in toto* a street improvement tax laid upon abutting property partly according to frontage and partly according to area was reversed on sole ground that assessment based on area had produced results in conflict with Fourteenth Amendment and case sent back for further proceedings, questions as to whether the part of the tax based on frontage was severable, and whether, and by what agency, a new and just area assessment should be made, *held* questions of state law for determination by state court. *Schneider Granite Co.* v. *Gast Realty Co.* .......... 288

3. Whether a state court may take judicial notice that a

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stream is navigable is a question of local law. *Wear* v. *Kansas*. . . . . 154

4. Constitutionality of state tax determined by court's own judgment of actual operation and effect of tax, irrespective of its form and of how characterized by state courts. *Crew Levick Co.* v. *Pennsylvania*. . . . . 292

**JURY AND JURORS.** See **Constitutional Law,** XII; XIV, (2).

Instructions. See **Employers' Liability Act,** 3, 4, 6; **Food and Drugs Act,** 3, 4.

1. The Sixth Amendment and federal statutes permit the drawing of a jury from a part of the district in criminal cases. *Ruthenberg* v. *United States*. . . . . 480

2. No infraction of constitutional or statutory right is predicable of the fact that the indictment and conviction of a Socialist are returned by grand and petit juries composed exclusively of members of other political parties, and property owners. *Id.*

3. Upon a criminal trial of defendants who are Socialists it is not error for court to refuse them permission to ask jurors whether they distinguish between Socialists and Anarchists. *Id.*

**JURY TRIAL.** See **Constitutional Law,** XII; XIV, (2); **Jury and Jurors.**

**KANSAS:**

Riparian rights in. See **Waters.**

**KENTUCKY:**

Attempt to impose on a circuit court or judge thereof duty of levying and collecting taxes is void under Constitution of Kentucky. *Hendrickson* v. *Apperson*. . . . . 105

**LABELS.** See **Food and Drugs Act.**

**LABORERS:**

Contract Labor Law. See **Aliens.**

**LABOR UNIONS.** See **Evidence,** 5; **Master and Servant.** PAGE

1. The right of action for persuading an employee to leave his employment rests upon fundamental principles of general application. *Hitchman Coal & Coke Co.* v. *Mitchell* ...... 229
*Eagle Glass & Mfg. Co.* v. *Rowe* ........... 275

2. It is the right of workingmen to form unions and to enlarge their membership by inviting other workingmen to join, provided the objects of the union be proper and legitimate. The latter right must be exercised with reasonable regard for the conflicting rights of others and not by inducing or seeking to induce employees of an establishment to violate their contract of employment. *Hitchman Coal & Coke Co* v. *Mitchell* .............................. 229

3. The same liberty which enables men to form unions, and through the unions to enter into agreements with employers willing to agree, entitles other men to remain independent of the unions and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. The parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. *Id.*

4. An injunction will lie to prevent officers and agents of a labor union from inducing employees of a plant run on a non-union basis to break their contract of employment by remaining in the employ of such non-union employer after joining the union, for the purpose of coercing such employer, through a strike or the threat of one, into recognition of the union. *Id.*

5. In a suit to restrain alleged concerted wrongful conduct upon the part of officials of a labor union, a temporary injunction should not be granted against those not served and not submitting themselves to jurisdiction. *Eagle Glass & Mfg. Co.* v. *Rowe* .................................. 275

**LACHES:**

A suit, brought in 1913, by testamentary trustees, seeking to hold the Texas & Pacific Ry. Co., as by an express trust, for the satisfaction of certain bonds issued under a deed of trust in 1872 by another company, to whose interests and obligation defendant was alleged to have succeeded, the bonds at time of suit being more than 10 years overdue and

**LACHES**—*Continued.* PAGE

the interest in default 37 years or longer, *held* barred by laches. *Waller* v. *Texas & Pac. Ry.* .................... 398

**LAND DEPARTMENT.** See **Public Lands.**

**LAND GRANTS.** See **Public Lands.**

**LANDLORD AND TENANT:**

1. Rent issues from the land, is not due until the rent day, and is due in respect of the enjoyment of the premises let. *Filene's Sons Co.* v. *Weed.* ............................ 597

2. Where lessee corporation not only undertook to pay as rental all sums payable by its lessor under overleases of the same premises, but also, as the inducing consideration for the lease, covenanted to pay at all events a certain amount per annum, in monthly instalments throughout the term and, if the lease should be terminated sooner, to pay a sum measured at the same rate for the unexpired term, less a discount, *held*, that the covenant created a present indebtedness, independent of rent, for the whole amount so stipulated to be paid; that upon appointment of receivers in a purely equitable proceeding to carry on the lessee's business and pay its debts, and upon their declining the lease leaving rent in default, the lessor, by reëntry pursuant to the lease with the court's consent, might perfect its claim to the amount payable under the covenant for the unexpired term and that the claim thus perfected was provable within the time fixed for proof of claims against the receivers; that lessor might in like manner perfect and prove its claim under the covenant to pay as damages difference between rental value at date of entry and rent reserved, for residue of term. *Id.*

3. In Massachusetts, in absence of statute or express contract, lessor who has terminated lease and evicted tenant has no further claim against lessee or his receivers appointed to continue business and pay debts. *Gardiner* v. *Butler & Co.* ............................................ 603

4. In non-statutory receivership proceeding brought to preserve good will and pay debts of company occupying premises as lessee, lessor reëntering during receivership held to have proper claim for rent up to reëntry and for damages based

**LANDLORD AND TENANT**—*Continued.* PAGE

on lessee's covenant to pay difference between rental value at time of reëntry and the rent and other payments reserved for residue of term. *Id.*

5. Covenant for payment of so much per annum in monthly payments throughout term, and, if lease terminated sooner, for anticipating payments for unexpired portion, less a discount on payments so anticipated, *held* to intend a simple discount on monthly payments as they fell due. *Filene's Sons Co.* v. *Weed* .......... 597

**LANDS.** See **Indian ; Public Lands.**

**LARCENY.** See **Criminal Law,** 9, 10.

**LEASE.** See **Landlord and Tenant.**

**LEGACIES:**

Inheritance tax. See **Taxation,** V.

**LETTER-BOXES.** See **Criminal Law,** 9, 10; **Mails.**

**LIBERTY.** See **Constitutional Law; Contracts,** 2.

**LIMITATIONS.** See **Laches.**

1. Statute of limitations is a defense and must be asserted on trial by defendant in criminal cases; it cannot be heard on *habeas corpus* to test validity of arrest in extradition. *Biddinger* v. *Commissioner of Police* .......... 128

2. Limitations in Act of Mar. 3, 1891, inapplicable to suit by United States to quiet its title to land erroneously excluded from survey. *Lee Wilson & Co.* v. *United States* .... 24

3. Second proviso in § 8, Naturalization Act of 1906, has no bearing on relation of 7 year limitation prescribed by § 4, subd. 2, to declarations filed before passage of act. *United States* v. *Morena* .......... 392

4. Requirement of subd. 2, § 4, that petition shall be filed not more than 7 years after alien has made his declaration of intention, applies to declarations made before act was passed. The period runs on such declarations from date of act. *Id.*

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**LOCAL LAW.** See **Jurisdiction,** VI.

**LONG AND SHORT HAULS.** See **Interstate Commerce Acts,** II, 3.

**MAILS.** See **Criminal Law,** 10.

1. Executive powers of Postmaster General under § 161, Rev. Stats., include power to designate certain receptacles as letter boxes. *Rosen* v. *United States*.................. 467

2. Theft of letters from mail boxes placed by tenants for receipt of mail in halls of buildings in which they have place of business punishable under Crim. Code, § 194. *Id.*

**MANDAMUS:**

1. Discretionary remedy, largely controlled by equitable principles; will not be granted to promote wrong—to direct an act which will work public or private mischief, or which, while within letter, disregards spirit of law. *Duncan Townsite Co.* v. *Lane*.................................... 308

2. Will not lie to compel Secretary of Interior to execute and record patent for land where relator, purchaser in good faith and without notice of fraudulent Indian allotment, seeks to get in legal title as against the United States. *Id.*

3. Will not issue to compel subordinate court to make a particular decision; jurisdiction in this regard no greater in case in which lower court's decision is by law made final than where decision is reviewable in the ordinary ways. *Ex parte Park & Tilford*................................ 82

4. Where the Court of Customs Appeals had taken jurisdiction and decided case upon its merits, mandamus will not lie to compel it to inquire into and pass upon the refusal of Secretary of Treasury to direct action of Collector of Customs. *Id.*

5. In a mandamus to test right of a State to levy charges on sand dredged from a stream by riparian owner under claim of title *ad filum aquæ*, latter has not a constitutional right to have question of navigability determined by jury. *Wear* v. *Kansas*............................................ 154

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As to territorial status of American vessel. See *Scharrenberg* v. *Dollar S. S. Co.* . . . . . . . . . . 122

**MARRIAGE AND DIVORCE.** See **Estoppel,** 1; **Married Women.**

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**MARRIED WOMEN:**

1. Wife's continuing guaranty of payment of husband's note, enforceable in State where executed, *held* not enforceable, under the rule of comity, in courts of State of domicile against wife's separate property there if contrary to public policy of State. *Union Trust Co.* v. *Grosman* . . . . . . . . . . 412

2. By law of Texas, married woman's guaranty of husband's note not enforceable against her separate property. *Id.*

**MASSACHUSETTS:**

In absence of statute or express contract, lessor who has terminated lease and evicted tenant has no further claim against lessee or his receivers appointed to continue business and pay debts. *Gardiner* v. *Butler & Co.* . . . . . . . . . . 603

**MASTER AND SERVANT.** See **Employers' Liability Act; Labor Unions; Safety Appliance Act.**

1. An employer is entitled to the good will of his employees; to the benefit of the reasonable probability that by properly treating them he will be able to retain them in his employ and fill vacancies occurring from time to time by the employment of other men on the same terms; and it is unlawful for a third party, having notice of this relation, to interfere with it without just cause or excuse. *Hitchman Coal & Coke Co.* v. *Mitchell* . . . . . . . . . . 229

*Eagle Glass & Mfg. Co.* v. *Rowe* . . . . . . . . . . 275

2. The right of action for persuading an employee to leave his employment rests upon fundamental principles of general application. *Id.*

3. A bill setting up contract with plaintiff's employees whereby latter were not to join labor unions and remain in employ and charging defendants with formation and pursuit of scheme to unionize plaintiff's shop by interfering with its employees, *held* one stating an equitable cause of action, which appellate court should not dismiss on an interlocutory appeal. *Eagle Glass & Mfg. Co.* v. *Rowe* . . . . . . . . . . 275

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4. Party held liable for servant's negligence may have indemnity from another primarily responsible as master. *Fuller Co.* v. *Otis Elevator Co* ........................... 489

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**MILITIA.** See **Constitutional Law, III.**

**MINERAL LANDS.** See **Public Lands, III.**

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**MULTIPLICITY OF SUITS.** See **Equity, 3, 4.**

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**NATIONAL BANKS.** See **Payment.**

1. Comptroller of Currency has discretionary power to withdraw assessment on shareholders before it is paid, or when partly paid. *Korbly* v. *Springfield Inst. for Savings* ....... 330

2. Where sums paid by savings banks to receiver of national bank in which they held shares were intended to be applied against their liabilities under National Bank Act, to enforce which an assessment was then outstanding, second assessment, exceeding difference between their statutory liabilities and amounts so paid, is void. *Id.*

**NATURALIZATION:**

1. Filing of certificate of arrival an essential prerequisite. *United States* v. *Ness*.................................. 319

2. Certificate of naturalization, issued without certificate of arrival having been filed, may be set aside at suit of United States, as one illegally procured. *Id.*

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3. In suit to set aside certificate of naturalization illegally granted, United States not estopped by order of naturalization although it entered appearance in naturalization proceedings and there unsuccessfully raised same objection. *Id.*

4. Second proviso in § 8, Act of 1906, has no bearing on relation of 7 year limitation prescribed by § 4, subd. 2, to declarations filed before passage of act. *United States* v. *Morena* 392

5. Requirement of subd. 2, of § 4, Act of 1906, that petition shall be filed not more than 7 years after alien has made his declaration of intention, applies to declarations made before act was passed. The period runs on such declarations from date of act. *Id.*

**NAVIGABLE WATERS.** See **Waters.**

**NEGLIGENCE.** See **Employers' Liability Act; Master and Servant,** 4.

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**OHIO:**

Under constitution and statutes in 1892, county commissioners had power to grant franchises over public roads valid for 25 years, if not perpetually. *Northern Ohio Trac. Co.* v. *Ohio* ........................................ 574

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Race segregation ordinance *held* unconstitutional under Fourteenth Amendment. *Buchanan* v. *Warley* .......... 60

**OREGON:**

Sand Island, in the Columbia River, is part of the State of Oregon, the boundary between that State and Washington being the ship channel north of the Island. *McGowan* v. *Columbia River Packers' Assn.* ........................ 352

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Trustee in bankruptcy. See **Bankruptcy,** 6-8, 11-15.

1. In a suit by a carrier to restrain state officials from interfering with establishment and maintenance of intrastate rates adopted in pursuance of order of Interstate Commerce Commission requiring removal of discrimination against interstate commerce, neither United States nor Commission is necessary party. *Illinois Cent. R. R.* v. *Public Utilities Comm.* 493

2. A cross bill seeking to have order of Interstate Commerce Commission declared void and to enjoin United States and Commission from enforcing it and carrier from complying with it, cannot be entertained as against Commission and carrier only: United States is a necessary party. *Id.*

**PATENTS FOR INVENTIONS:**

1. One who entered the field when a patent was unquestioned and after the patentee by his efforts had created an extensive market, *held* to have acquired in equity no intervening rights against the patent as subsequently reissued. *Abercrombie & Fitch Co.* v. *Baldwin*.................................. 198

2. Baldwin patent for improvements in acetylene gas generating lamps *held* valid and infringed as to claim 4. *Id.*

3. The invention covered by such patent *held* meritorious and entitled to invoke the doctrine of equivalents. *Id.*

4. The reissue of such patent and amendment therein *held* not to enlarge original patent. *Id.*

**PATENTS FOR LAND.** See **Indians; Public Lands.**

**PAYMENT:**

In determining effect of certain payments made by trustees of savings banks, the court assumed that it was the purpose of trustees to act within their powers, and applied settled rule that when neither debtor nor creditor has applied payments before controversy has arisen courts will apply them in a manner to accomplish ends of justice. *Korbly* v. *Springfield Inst. for Savgs*........................................ 330

**PERSONAL INJURY.** See **Employers' Liability Act; Master and Servant,** 4; **Safety Appliance Act.**

**PHILIPPINE ISLANDS.** See **Jurisdiction,** II, (8); **Procedure,** III, 2, 3.

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Allegations of violation of constitutional rights *held* not to state independent ground of recovery to support jurisdiction of District Court. *Johnson* v. *Lankford* ............ 541
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**POST OFFICE.** See **Criminal Law,** 9, 10; **Mails.**

**PRESUMPTIONS:**

1. No presumption in criminal case that accused is of good character. *Greer* v. *United States* ............ 559

2. Presumption upon matter of fact, when not merely disguise for another principle, means that common experience shows fact to be so generally true that court may notice its truth. *Id.*

3. In a case of interstate shipment governed by Carmack Amendment, issuance of a receipt or bill of lading will be presumed. *Southern Pacific Co.* v. *Stewart* ............ 359

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**PRINCIPAL AND AGENT.** See **Food and Drugs Act,** 3, 4.

**PROCEDURE:**

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See **Jurisdiction; Extradition; Habeas Corpus.**

**I. Error, Appeal or Certiorari.**

1. Section 4, Act of 1916, does not abolish distinction between writs of error and appeals, but only requires that party seeking review shall have it in appropriate way notwithstand-

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ing a mistake in his choice of proceeding. *Gauzon* v. *Compañia General &c*. . . . . 86

2. Writ of certiorari improvidently granted will be dismissed. So *held* where alleged errors consisted in refusing to submit certain questions to jury in action over title to land, rulings of District Court depending essentially on appreciation of the evidence and being concurred in by Circuit Court of Appeals. *Houston Oil Co.* v. *Goodrich*. . . . . 440

3. An objection that error will not lie not decided where a pending application for certiorari would be granted if the objection were held good. *Southern Pacific Co.* v. *Darnell-Taenzer Co*. . . . . 531

II. **Motion to Affirm.**

On a motion to dismiss or affirm in a case presenting only questions of fact and well settled questions of general law, decree affirmed where the federal courts of two circuits had reached the same conclusions of fact independently and the appeal taken apparently for delay. *Eichel* v. *U. S. Fidelity & Guaranty Co*. . . . . 102

III. **Scope of Review.** See IV, *infra;* **Jurisdiction,** VI.

1. In reviewing judgment erroneously treating franchise as revocable at will of county commissioners and upholding purported revocation by them, court not called upon to determine whether franchise term has since expired or whether legislature may have reserved power to revoke or repeal franchise. *Northern Ohio Traction Co.* v. *Ohio*. . . . . 574

2. This court is not disposed to disturb judgment of Supreme Court of Philippine Islands construing local laws and announcing rule applicable in the islands. *Gauzon* v. *Compañia General &c* . . . . . 86

3. Upon writ of error to Supreme Court of Philippine Islands in case decided upon issues of fact, conclusions of lower court, which find support in the record, not considered. *Id.*

4. In prosecution under Food and Drugs Act upon charge of shipping misbranded article in interstate commerce, the question of whether court below was correct in viewing intent as not an element and in holding that sanction by defendant of

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his agent's misrepresentations was immaterial, not determined in view of instruction of trial court that such authority must appear beyond reasonable doubt and as record neither shows that defendant objected to this mode of submitting the question nor purports to contain all the evidence, the verdict of guilty must be taken as determining conclusively that he sanctioned the representations. *Weeks* v. *United States*.......... 618

5. In reviewing directly judgment of District Court in criminal case, when constitutional questions upon which jurisdiction of this court depends are not frivolous but are resolved against plaintiff in error, other questions raised will be considered and passed upon. *Goldman* v. *United States*.. 474

6. Power to review does not include right to invade province of jury by determining questions of credibility and weight of evidence. *Id.* *Kramer* v. *United States*............... 478

7. Upon appeal from decree of District Court granting injunction against enforcement of city ordinance, on ground that it impaired obligations of railway grants and enforcement will work deprivation of property without due process and cause irreparable injury, cause is subject to review upon both law and facts, relief depending upon case as it develops in this court. *Cincinnati* v. *Cincinnati & H. Trac. Co*........................................ 446

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1. Without departing from settled rule that writ of error dismissed if its total want of merit shown conclusively by decisions extant at time of decision below, judgment affirmed. *Pennsylvania Hospital* v. *Philadelphia*........................ 20

2. Where constitutional questions adversely disposed of by decision of this court, trial court's order refusing *habeas corpus* affirmed, without departing from rule that *habeas corpus* should not anticipate trial in criminal cases. *Jones* v. *Perkins*........................................ 390

3. When a decree dismissing a bill is meant to be without prejudice, the better practice is to express it so. *McGowan* v. *Columbia River Packers' Assn*.............................. 352

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examination and without consent that court proceed to final determination of merits, dismissal of bill, on interlocutory appeal, should not be directed, unless on its face there is no ground for equitable relief. *Eagle Glass & Mfg. Co.* v. *Rowe* . . 275

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1. *Erroneous Survey. Powers of Department.* If, in making a survey, an area is, through fraud or mistake, meandered as a body of water, which does not exist, riparian rights do not accrue; and Land Department has power to deal with the meandered area, to cause it to be surveyed, and lawfully to dispose of it. *Lee Wilson & Co.* v. *United States* . . . . . . . . . . 24

2. *Id. Riparian Rights. Estoppel of Government.* That administrative officers, before discovering the error, have treated such meandered tract as subjected to the riparian rights of abutting owners, under state laws, cannot estop United States from asserting title in controversy with abutting owner; and even as against such owner who acquired property before mistake discovered, United States may correct mistake and protect its title. Equities of abutting owner are not judicially cognizable, but should be addressed to legislative department of government. *Id.*

3. *Id. Swamp Land and Arkansas Compromise Acts.* Effect of erroneous meander in survey of township *held* to exclude the meandered area from the township; and that neither the

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selection of the township by State of Arkansas under Swamp Land Act of 1850, the confirmatory Act of 1857, nor patent issued, could be construed as embracing it; and that the State derived no title thereto through the Compromise Act of 1898. *Id.*

4. *Swamp Land Act of 1850.* Did not convey land of its own force, without survey, selection or patent. *Id.*

5. *Statute of Limitations Inapplicable.* Suit by United States to quiet its title to land erroneously excluded from survey, against abutting owner claiming riparian rights, is not a suit to vacate or annul defendant's patent, and limitations of Act of 1891 inapplicable. *Id.*

II. **School Section G ants.**

1. *Utah. Minerals Impliedly Excepted.* School Land Indemnity Act of 1891, in providing for lieu selections, affords plain implication that sections 16 and 36 are not to pass under grant if known to be mineral when grant takes effect. *United States* v. *Sweet* .......... 563

2. *Id.* School land grant to Utah must be read in light of mining laws, indemnity law of 1891 and settled policy of Congress; and does not include mineral lands. *Id.*

3. *Id. Exception Includes Coal.* School section grant in Utah Enabling Act not intended to embrace lands known to be valuable for coal. *Id.*

4. *Wisconsin. Indian Lands Excepted.* Under treaties with Menominee Indians, acts of Congress and an act of the Wisconsin legislature, certain lands *held* disposed of within meaning of school section grant in Wisconsin Enabling Act; that they remained in reservation and subject to the continuing occupancy and rights of the Indians; and that State had no title and could not restrain cutting of timber by or in interest of Indians. *Wisconsin* v. *Lane* .......... 427

5. *Id.* Treaty of 1854 with Lake Superior Chippewas and reservation for the Indians thereunder, *held* to withdraw certain lands and dispose of them within meaning of school section grant in Wisconsin Enabling Act and that title did not pass to State. *United States* v. *Stearns Lumber Co.* .... 436

6. *Id. Right of Congress before Survey.* The grant of sec-

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tions 16 in § 7 of Wisconsin Enabling Act *held* subject to right of Congress to make other disposition of the land before sections identified by surveys finally approved, leaving State right to obtain other sections by way of indemnity. *Wisconsin* v. *Lane*. . . . . . 427

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1. *Mining Laws Exclusive.* It is settled policy of Congress to dispose of mineral lands only under laws specially including them. *United States* v. *Sweet* . . . . . . 563

2. *Id.* Taken collectively, the mining laws (including coal land laws) constitute a special code, intended not only to establish particular modes of disposition, but exceptions and reservations. *Id.*

3. *Mineral Character. Department's Finding. Notice.* Where land embraced in conflicting placer and homestead entries is found, upon hearing in Land Department, to be non-mineral and therefore is patented to the homesteader, finding does not conclude claimant under placer entry who was not notified and given opportunity to be heard; a trust might be declared in his favor if he proved the land mineral; but not when evidence confirms Department's finding. *Kirk* v. *Olson*. . . . . . . 225

4. *Id. Department's Control before Patent.* A finding of mineral character made in allowing an entry under the placer mining law is subject to be reconsidered and reversed by the Land Department at any time before the patent issues, upon due notice to the parties interested. *Id.*

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1. When court, without statute, takes possession of all assets of corporation to satisfy its debts, rights and equities of creditors are determined by their contracts with debtor; it is error to give to filing of bill effect of filing of petition in bankruptcy or to exclude lawful claims made within time fixed for proving claims and maturing within reasonable time before distribution can be made. *Filene's Sons Co.* v. *Weed*.......................................... 597

2. In non-statutory receivership proceeding brought to preserve good will and pay debts of company occupying premises as lessee, lessor reëntering during receivership *held* to have proper claim for rent up to reëntry and for damages based on lessee's covenant to pay difference between rental value at time of reëntry and the rent and other payments reserved for residue of term. *Gardiner* v. *Butler & Co.*..... 603

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2. An adjudication in a former case *held* not to estop defendant on issue of primary responsibility of another in an action whereby the former, after paying judgment, sought to recover from the latter indemnity, the former adjudication not determining or involving such issue and the party from whom indemnity sought having been dismissed from former case as co-defendant before defendant's evidence therein was heard. *Fuller Co.* v. *Otis Elevator Co.* .............. 489

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tidal streams which are navigable in fact, is not predicable of a statute adopting the common law of England in general terms only; and such a statute of a State affords no basis for denying power of state court to apply test of navigability in fact, as part of the common law, in determining the ownership of a river bed as between the State and riparian owners deriving title under a federal patent issued before statehood. *Wear* v. *Kansas*.................................... 154

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