

T



\* 9 8 9 1 9 9 4 4 3 \*

ATES

TS

9

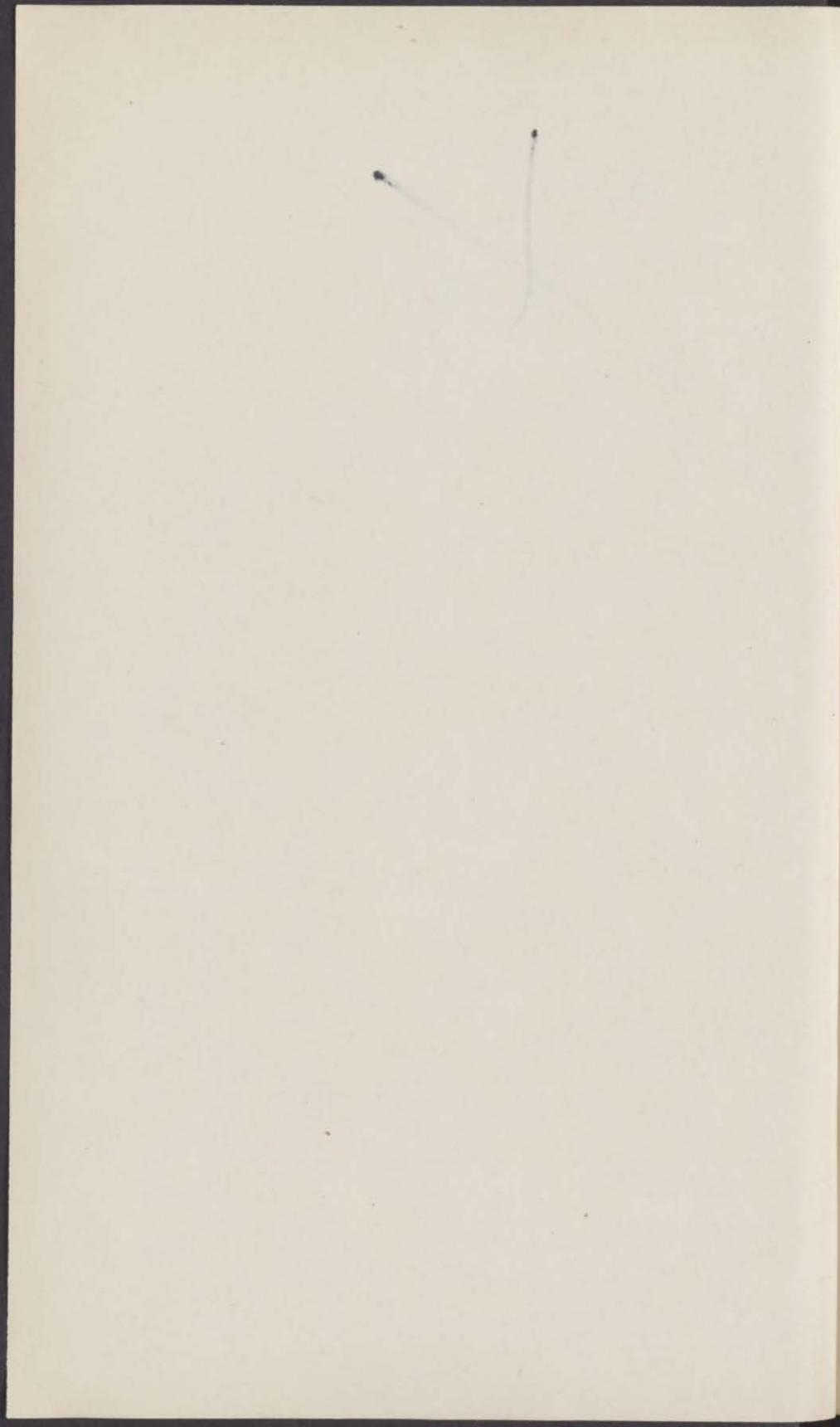
249

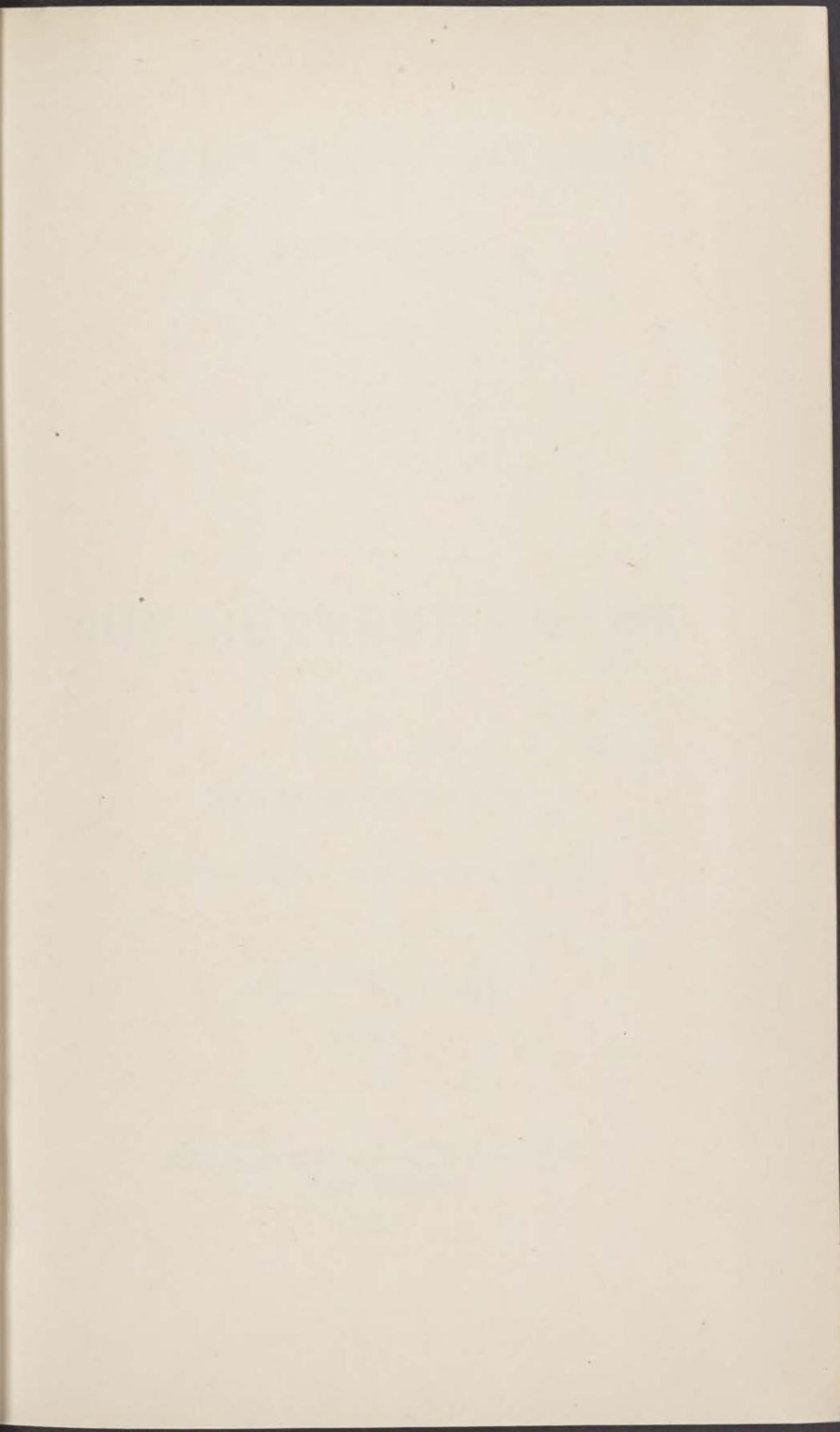
1918





PROPERTY  
OF THE  
U. S.









# UNITED STATES REPORTS

VOLUME 249

---

CASES ADJUDGED

IN

## THE SUPREME COURT

AT

OCTOBER TERM, 1918

FROM MARCH 3, 1919, TO MAY 19, 1919

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.  
NEW YORK

1919

UNITED STATES REPORTS  
VOLUME 140  
CARLOS A. BARRAGAN  
THE BANKS LAW PUBLISHING COMPANY

NOTICE

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



# J U S T I C E S

OF THE

## S U P R E M E C O U R T

DURING THE TIME OF THESE REPORTS.<sup>1</sup>

---

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.<sup>2</sup>  
A. MITCHELL PALMER, ATTORNEY GENERAL.<sup>3</sup>  
ALEXANDER C. KING, SOLICITOR GENERAL.  
JAMES D. MAHER, CLERK.  
FRANK KEY GREEN, MARSHAL.

<sup>1</sup> For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

<sup>2</sup> Resigned January 9, 1919, to take effect March 4, 1919.

<sup>3</sup> On March 5, 1919, A. Mitchell Palmer, of Pennsylvania, took the oath of office as Attorney General, under a recess appointment.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1916.<sup>1</sup>

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.

<sup>1</sup> For next previous allotment see 241 U. S., p. iv.

## TABLE OF CASES REPORTED

	PAGE
Abdu <i>v.</i> Steamship Nigretia, etc. . . . .	612
Adams, Collett, Trustee, <i>v.</i> . . . .	545
Alabama Power Co., Meharg <i>v.</i> . . . .	592
Alameda Mining Co. <i>v.</i> Success Mining Co. . . . .	622
Alaska, Territory of, Alaska Pacific Fisheries <i>v.</i> . . . .	53
Alaska, Territory of, Alaska Salmon Co. <i>v.</i> . . . .	62
Alaska Pacific Fisheries <i>v.</i> Territory of Alaska . . . . .	53
Alaska Salmon Co. <i>v.</i> Territory of Alaska . . . . .	62
Alhambra Cigar & Cigarette Mfg. Co., Compañia General de Tabacos de Filipinas <i>v.</i> . . . .	72
Allen, Railroad Comm. of the State of California <i>v.</i> . . . .	601
American R. R. Co. of Porto Rico <i>v.</i> People of Porto Rico . . . . .	600
American Schooner John Twohy, etc., Duche & Sons <i>v.</i> . . . .	596
American Steel Foundries, Smietanka, Collector of Internal Revenue, <i>v.</i> . . . .	617
American Trust & Savings Bank, Duncan, Trustee, <i>v.</i> . . . .	603
Anderson, Haney <i>v.</i> . . . .	606
Ann Arbor R. R. <i>v.</i> Manoloff . . . . .	583
Arant, United States <i>ex rel.</i> , <i>v.</i> Lane, Secy. of the In- terior . . . . .	367
Arizona, State of, Dominion Hotel, Inc., <i>v.</i> . . . .	265
Arizona, State of, Southern Pacific Co. <i>v.</i> . . . .	472
Arkadelphia Milling Co. <i>v.</i> St. Louis Southwestern Ry. . . . .	134
Arkansas, State of, State of Tennessee <i>v.</i> . . . .	588
Arkansas Central R. R. <i>v.</i> Goad . . . . .	609
Atchison, Topeka & Santa Fe Ry., United States <i>v.</i> . . . .	451
Atchison, Topeka & Santa Fe Ry., Weeks <i>v.</i> . . . .	602
Atlanta, City of, Hazelton <i>v.</i> . . . .	620



	PAGE
Atlanta National Bank <i>v.</i> Fuller, Trustee	599
Autopiano Co., Otto Higel Co., Inc., <i>v.</i>	609
Baars & Co., North British & Mercantile Ins. Co. <i>v.</i>	609
Baer <i>v.</i> United States	47
Baird, Denver & Rio Grande R. R. <i>v.</i>	587
Baltimore & Ohio R. R. <i>v.</i> Leach	217
Bank of Hartford, Gray <i>v.</i>	608
Barbour <i>v.</i> State of Georgia	454
Basham, Admr., Chicago Great Western R. R. <i>v.</i>	164
Beaumont <i>v.</i> Prieto <i>et al.</i> , Admr.	554
Berlin Mills Co. <i>v.</i> Procter & Gamble Co.	598
Bernstein <i>v.</i> United States	604
Billerman, United States <i>ex rel.</i> , <i>v.</i> Long, Criminal Sheriff	580
Bird, City of Richmond <i>v.</i>	174
Birmingham & Northwestern Ry., Chalker, Admr., <i>v.</i>	522
Bishop, Admr., <i>v.</i> Great Lakes Towing Co.	609
Bishop, Admr., <i>v.</i> Hungate, Executor	612
Bisight Co. <i>v.</i> Onepiece Bifocal Lens Co.	606
Blanton Mfg. Co., Brougham <i>v.</i>	495
Blunt <i>v.</i> United States	608
Board of County Commrs., Carter County, Oklahoma, Broadwell <i>v.</i>	594
Board of Directors, Garland Levee Dist., Dorsey Land & Lumber Co. <i>v.</i>	618
Board of Public Utility Commrs. <i>v.</i> Compania General de Tabacos de Filipinas	425
Board of Public Utility Commrs. <i>v.</i> Manila Electric R. R. & Light Co.	262
Bosse, Panama R. R. <i>v.</i>	41
Breen, Iowa Central Ry. <i>v.</i>	604
Brisco, Du Pont de Nemours & Co. <i>v.</i>	599
Broadwell <i>v.</i> Board of County Commrs., Carter County, Oklahoma	594
Brooklyn Eastern District Terminal, United States <i>v.</i>	296

## TABLE OF CASES REPORTED.

vii

	PAGE
Brougham <i>v.</i> Blanton Mfg. Co. . . . .	495
Burr <i>et al.</i> , Partners, <i>v.</i> City of Columbus . . . . .	415
Buskirk <i>et al.</i> , Partners, <i>v.</i> Caudill, Admr. . . . .	619
Butte & Superior Copper Co. <i>v.</i> Clark-Montana Realty Co. . . . .	12
Calhoun <i>v.</i> Massie . . . . .	596
California, State of, <i>v.</i> Mono County Irrigation Co. . . . .	581
California, State of, <i>v.</i> Pacific Power Co. . . . .	581
California R. R. Comm. <i>v.</i> Allen . . . . .	601
Cambria Steel Co., Capitol Transportation Co. <i>v.</i> . . . .	334
Cameron, State Public Utilities Comm. of Illinois <i>ex rel.</i> , Lake Erie & Western R. R. <i>v.</i> . . . .	422
Canadian Northern Ry. <i>v.</i> Eggen . . . . .	594
Capitol Transportation Co. <i>v.</i> Cambria Steel Co. . . . .	334
Carter County, Oklahoma, Broadwell <i>v.</i> . . . .	594
Caudill, Admr., Buskirk <i>et al.</i> , Partners, <i>v.</i> . . . .	619
C B Live Stock Co. <i>v.</i> Crosbyton Independent School Dist. . . . .	611
Central of Georgia Ry. <i>v.</i> Wright, Comptroller Gen- eral . . . . .	590
Central Trust Co. of New York <i>v.</i> Texas Co. . . . .	613
Chalker, Admr., <i>v.</i> Birmingham & Northwestern Ry. . . . .	522
Charlton, Admx., <i>v.</i> Chesapeake & Ohio Ry. . . . .	614
Chesapeake & Ohio Coal & Coke Co. <i>v.</i> Toledo & Ohio Central Ry. . . . .	585
Chesapeake & Ohio Ry., Charlton, Admx., <i>v.</i> . . . .	614
Chicago, City of, <i>v.</i> Dempcy, Chairman, etc. . . . .	582
Chicago & Eastern Illinois R. R. <i>v.</i> Collins Produce Co. . . . .	186
Chicago Great Western R. R. <i>v.</i> Basham, Admr. . . . .	164
Chicago, Milwaukee & St. Paul Ry. <i>v.</i> Des Moines Union Ry. . . . .	595
Chicago, Milwaukee & St. Paul Ry., Morrison, Admx., <i>v.</i> . . . .	611
Chicago & Northwestern Ry. <i>v.</i> First Trust Co. . . . .	615
Chicago & Northwestern Ry. <i>v.</i> Ochs . . . . .	416

	PAGE
Chicago, Rock Island & Pacific Ry. <i>v.</i> McBride	601
Chicago, Rock Island & Pacific Ry. <i>v.</i> Seay	598
Church <i>v.</i> Swetland	579
Cincinnati, New Orleans & Texas Pacific Ry. <i>v.</i> Sheridan	602
Citizens Bank of Michigan City, Indiana, <i>v.</i> Opperman	448
Clark-Montana Realty Co., Butte & Superior Copper Co. <i>v.</i>	12
Clarke <i>v.</i> United States	606
Cochnower <i>v.</i> United States	588
Coco, Attorney General, Oden, Sheriff, <i>v.</i>	587
Collett, Trustee, <i>v.</i> Adams	545
Collins, State of South Dakota <i>v.</i>	220
Collins Produce Co., Chicago & Eastern Illinois R. R. <i>v.</i>	186
Columbus, City of, Burr <i>et al.</i> , Partners, <i>v.</i>	415
Columbus, City of, Columbus Ry., Power & Light Co. <i>v.</i>	399
Columbus Ry., Power & Light Co. <i>v.</i> City of Columbus	399
Compañía General de Tabacos de Filipinas <i>v.</i> Alhambra Cigar & Cigarette Mfg. Co.	72
Compañía General de Tabacos de Filipinas, Board of Public Utility Commrs. <i>v.</i>	425
Cooley, Roller <i>v.</i>	619
Corn Products Refining Co. <i>v.</i> Eddy	427
Corn Products Refining Co. <i>v.</i> United States	621
Corson County, South Dakota, Zimmerman <i>v.</i>	593
County Commrs., Carter County, Oklahoma, Broadwell <i>v.</i>	594
Crescent Milling Co. <i>v.</i> Strait Mfg. Co.	584, 586
Crocker <i>et al.</i> , Trustees, <i>v.</i> Malley, Collector of Internal Revenue	223
Crosbyton Independent School Dist., C B Live Stock Co. <i>v.</i>	611
Crowley, City of, Louisiana Western R. R. <i>v.</i>	593



## TABLE OF CASES REPORTED.

ix

	PAGE
Cruzan, Admx., <i>v.</i> New York Central & Hudson River R. R.. . . . .	621
Cubadist, Steamship, Gordon <i>v.</i> . . . .	618
Daly-West Mining Co. <i>v.</i> Savage . . . . .	607
Darling <i>v.</i> City of Newport News . . . . .	540
Darlington <i>et al.</i> , Trustees, Lane, Secy. of the In- terior, <i>v.</i> . . . .	331
Da Vella, Royal Italian Consul, Admr., Denver & Rio Grande R. R. <i>v.</i> . . . .	584
Davis, nee Hutton, <i>v.</i> Thompson . . . . .	611
Deason <i>v.</i> United States . . . . .	607
Debs <i>v.</i> United States . . . . .	211
Deitz, <i>Ex parte</i> . . . . .	582
Delaware, Lackawanna & Western R. R. <i>v.</i> United States . . . . .	385
Dempey, Chairman, etc., City of Chicago <i>v.</i> . . . .	582
Denver & Rio Grande R. R. <i>v.</i> Baird . . . . .	587
Denver & Rio Grande R. R. <i>v.</i> Oresta Da Vella, Royal Italian Consul, Admr. . . . .	584
De Propper, <i>Ex parte</i> . . . . .	579
Des Moines Union Ry. <i>v.</i> Chicago, Milwaukee & St. Paul Ry. . . . .	595
Dispatch Printing Co., Westermann Co. <i>v.</i> . . . .	100
District of Columbia, Horning <i>v.</i> . . . .	596
Dominion Hotel, Inc., <i>v.</i> State of Arizona . . . . .	265
Doremus, United States <i>v.</i> . . . .	86
Dorsey <i>v.</i> United States . . . . .	616
Dorsey Land & Lumber Co. <i>v.</i> Board of Directors of Garland Levee Dist. . . . .	618
Douglas Park Jockey Club <i>v.</i> Talbott <i>et al.</i> , Kentucky State Racing Comm. . . . .	619
Duane <i>v.</i> Merchants Legal Stamp Co. . . . .	613
Dubois Electric Co., Fidelity Title & Trust Co., Ancillary Admr., <i>v.</i> . . . .	597, 606
Duche & Sons <i>v.</i> American Schooner John Twohy, etc. . . . .	596

	PAGE
Duncan, Trustee, <i>v.</i> American Trust & Savings Bank . . . . .	603
Du Pont de Nemours & Co. <i>v.</i> Brisco . . . . .	599
Eddy, Corn Products Refining Co. <i>v.</i> . . . .	427
Eggen, Canadian Northern Ry. <i>v.</i> . . . .	594
Elgin, Joliet & Eastern Ry. <i>v.</i> United States . . . . .	601
Elhardt, St. Charles Amusement & Transp. Co. <i>v.</i> . . . .	604
Elmore, Fentress Coal & Coke Co. <i>v.</i> . . . .	592
Enslen <i>v.</i> Mechanics & Metals National Bank . . . . .	617
<i>Ex parte</i> Deitz . . . . .	582
<i>Ex parte</i> De Propper . . . . .	579
<i>Ex parte</i> Hannevig . . . . .	587
<i>Ex parte</i> Hudgings . . . . .	378
<i>Ex parte</i> Meccano, Ltd. . . . .	594
<i>Ex parte</i> Thorburn . . . . .	588
<i>Ex parte</i> Tompkins . . . . .	584
<i>Ex parte</i> Tracy . . . . .	551, 588
<i>Ex parte</i> Wagner . . . . .	465
<i>Ex parte</i> Whitney Steamboat Corporation . . . . .	115
Farrell, State Supt. of Weights and Measures, Standard Computing Scale Co. <i>v.</i> . . . .	571
Fat, Kwock Jan, <i>v.</i> White, Commr. of Immigration . . . . .	596
Fentress Coal & Coke Co. <i>v.</i> Elmore . . . . .	592
Fidelity Title & Trust Co., Ancillary Admr., <i>v.</i> Du-bois Electric Co. . . . .	597, 606
First Trust Co., Chicago & Northwestern Ry. <i>v.</i> . . . .	615
First Trust Co., Illinois Central R. R. <i>v.</i> . . . .	615
First Trust Co., Northern Pacific Ry. <i>v.</i> . . . .	615
Foster <i>v.</i> Lancaster <i>et al.</i> , Receivers . . . . .	601
Fox Typewriter Co. <i>v.</i> Oehring . . . . .	598
Francis, Jastro <i>v.</i> . . . .	581
Frankenstein <i>v.</i> Jacobs, Trustee . . . . .	614
Freeman <i>v.</i> United States . . . . .	600
Freeport Texas Co., Union Sulphur Co. <i>v.</i> . . . .	618

## TABLE OF CASES REPORTED.

xi

	PAGE
Frohwerk <i>v.</i> United States . . . . .	204
Fuller, Trustee, Atlanta National Bank <i>v.</i> . . . .	599
Galloway, Whitehead <i>v.</i> . . . .	79
Garland Levee Dist., Dorsey Land & Lumber Co. <i>v.</i> . . . .	618
Garrett <i>v.</i> United States . . . . .	620
Georgia, State of, Barbour <i>v.</i> . . . .	454
Gilcrease <i>v.</i> McCullough . . . . .	178
Gillespie <i>v.</i> Scott, Trustee . . . . .	606
Gillis, Admx., <i>v.</i> New York, New Haven & Hartford R. R. . . . .	515
Glascock <i>v.</i> McDaniel <i>et al.</i> , Minors . . . . .	600
Goad, Arkansas Central R. R. <i>v.</i> . . . .	609
Gold <i>v.</i> Newton, Commr. of Patents . . . . .	608
Gordon <i>v.</i> Steamship Cubadist . . . . .	618
Gratiot County State Bank <i>v.</i> Johnson, Trustee . . . .	246
Graves, Standard Oil Co. <i>v.</i> . . . .	389
Gray <i>v.</i> Bank of Hartford . . . . .	608
Great Lakes Towing Co., Bishop, Admr., <i>v.</i> . . . .	609
Great Northern Ry. <i>v.</i> Minneapolis Civic & Com- merce Assn. . . . .	622
Green Bay Paper & Fibre Co., Pulp Wood Co. <i>v.</i> . . .	610
Greenwood District, Sebastian County, Missouri & Arkansas Lumber & Mining Co. <i>v.</i> . . . .	170
Gudger, United States <i>v.</i> . . . .	373
Hall, United States <i>ex rel.</i> , <i>v.</i> Lane, Secy. of the In- terior . . . . .	613
Hall Brothers Marine Ry. & Shipbuilding Co., North Pacific S. S. Co. <i>v.</i> . . . .	119
Hallowell <i>v.</i> United States . . . . .	615
Hamilton <i>v.</i> United States . . . . .	610
Haney <i>v.</i> Anderson . . . . .	606
Hannevig, <i>Ex parte</i> . . . . .	587
Hannevig <i>v.</i> Sutherland & Co. . . . .	612
Harriman National Bank <i>v.</i> Seldomridge, Receiver .	1

	PAGE
Hartford Life Ins. Co. <i>v.</i> Johnson . . . . .	490
Hasty <i>v.</i> St. Louis Southwestern Ry. . . . .	134
Hathaway & Co. <i>v.</i> United States . . . . .	460
Hayes <i>v.</i> Hocking Valley Ry. . . . .	591
Hazelton <i>v.</i> City of Atlanta . . . . .	620
Hewett <i>v.</i> State of Washington . . . . .	611
Higel Co., Inc., <i>v.</i> Autopiano Co. . . . .	609
Hocking Valley Ry., Hayes <i>v.</i> . . . .	591
Horning <i>v.</i> District of Columbia . . . . .	596
House <i>v.</i> Luellen . . . . .	608
Houston <i>v.</i> St. Louis Independent Packing Co. . . . .	479
Howard, Auditor, Shaffer <i>v.</i> . . . .	200
Hudgings, <i>Ex parte</i> . . . . .	378
Hughes, J. H., <i>v.</i> United States . . . . .	610
Hughes, U. S. G., <i>v.</i> United States . . . . .	610
Hume, Receiver, City of New York <i>v.</i> . . . .	603
Hungate, Executor, Bishop, Admr., <i>v.</i> . . . .	612
Hutton, Davis nee, <i>v.</i> Thompson . . . . .	611
Illinois Central R. R. <i>v.</i> First Trust Co. . . . .	615
Illinois Public Utilities Comm. <i>ex rel.</i> Cameron, Lake Erie & Western R. R. <i>v.</i> . . . .	422
Improved Order of Heptasophs, Supreme Conclave, <i>v.</i> Wilson . . . . .	583, 604
Iowa Central Ry. <i>v.</i> Breen . . . . .	604
Jacobs, Trustee, Frankenstein <i>v.</i> . . . .	614
Jan Fat, Kwock, <i>v.</i> White, Commr. of Immigra- tion . . . . .	596
Jastro <i>v.</i> Francis . . . . .	581
John Twohy, American Schooner, Duche & Sons <i>v.</i> . . . .	596
Johnson, Trustee, Gratiot County State Bank <i>v.</i> . . . .	246
Johnson, Hartford Life Ins. Co. <i>v.</i> . . . .	490
Kansas City, Missouri, <i>v.</i> Landon, Receiver . . . . .	236, 591
Kansas City Gas Co. <i>v.</i> Kansas Natural Gas Co. . . . .	236, 591

## TABLE OF CASES REPORTED.

xiii

	PAGE
Kansas Natural Gas Co., Kansas City Gas Co. <i>v.</i>	236, 591
Kansas Public Utilities Comm. <i>v.</i> Landon, Receiver	236, 590, 591
Keefe, Trustee, <i>v.</i> Worcester Trust Co.	602
Kelley <i>v.</i> United States	616
Kenney, Admr., <i>v.</i> Supreme Lodge of the World, Loyal Order of Moose	597
Kenney <i>v.</i> United States	600
Kentucky State Racing Comm., Douglas Park Jockey Club <i>v.</i>	619
Kentucky Traction & Terminal Co., Murray <i>v.</i>	623
King, Norfolk Southern R. R. <i>v.</i>	599
Kinney <i>v.</i> Oahu Sugar Co.	616
Kirby, Admr., Welch <i>v.</i>	612
Kirchner <i>v.</i> United States	595
Kittaning Iron & Steel Mfg. Co., Pennsylvania R. R. <i>v.</i>	595
Knauth <i>v.</i> Knight	608
Knight, Knauth <i>v.</i>	608
Kreuzer <i>v.</i> United States	603
Kwock Jan Fat <i>v.</i> White, Commr. of Immigration	596
La Grande, City of, Wagoner <i>v.</i>	622
Lake Erie & Western R. R. <i>v.</i> State Public Utilities Comm. of Illinois <i>ex rel.</i> Cameron	422
Lancaster <i>et al.</i> , Receivers, Foster <i>v.</i>	601
Landon, Receiver, Kansas City, Missouri, <i>v.</i>	236, 591
Landon, Receiver, Public Utilities Comm. for the State of Kansas <i>v.</i>	236, 590, 591
Lane, Secy. of the Interior, <i>v.</i> Darlington <i>et al.</i> , Trustees	331
Lane, Secy. of the Interior, <i>v.</i> Pueblo of Santa Rosa	110
Lane, Secy. of the Interior, United States <i>ex rel.</i> Arant <i>v.</i>	367
Lane, Secy. of the Interior, United States <i>ex rel.</i> Hall <i>v.</i>	613



	PAGE
Larson, Jr., Co. <i>v.</i> Mint Products Co. . . . .	603
Lasater <i>v.</i> Magnolia Petroleum Co. . . . .	599
Laughlin, United States <i>v.</i> . . . .	440
Laughter <i>v.</i> United States . . . . .	613
Leach, Baltimore & Ohio R. R. <i>v.</i> . . . .	217
Lehigh Valley R. R. <i>v.</i> New Jersey Fidelity & Plate Glass Ins. Co. . . . .	600
Liquid Carbonic Co., Commonwealth of Massachu- setts <i>v.</i> . . . .	603
Long, Criminal Sheriff, United States <i>ex rel.</i> Bill- man <i>v.</i> . . . .	580
Lott, Admx., Mississippi Central R. R. <i>v.</i> . . . .	616
Louisiana Western R. R. <i>v.</i> City of Crowley . . . . .	593
Louisville & Jeffersonville Bridge Co. <i>v.</i> United States . . . . .	534
Loyal Order of Moose, Supreme Lodge of the World, Kenney <i>v.</i> . . . .	597
Luck, Executrix, <i>v.</i> Staples, Trustee . . . . .	605
Luellen, House <i>v.</i> . . . .	608
McBride, Chicago, Rock Island & Pacific Ry. <i>v.</i> . . . .	601
McCabe, Pell <i>v.</i> . . . .	595
McClain, Miller <i>v.</i> . . . .	308
McCullough, Gilcrease <i>v.</i> . . . .	178
McDaniel <i>et al.</i> , Minors, Glascock <i>v.</i> . . . .	600
McKinley <i>v.</i> United States . . . . .	397
McKnight <i>v.</i> United States . . . . .	614
Macleod <i>et al.</i> , Public Service Comm. of Massachu- setts, <i>v.</i> New England Telephone & Telegraph Co. . . . .	597
Magnolia Petroleum Co., Lasater <i>v.</i> . . . .	599
Magon <i>v.</i> United States . . . . .	618
Malley, Collector of Internal Revenue, Crocker <i>et al.</i> , Trustees, <i>v.</i> . . . .	223
Manila Electric R. R. & Light Co., Board of Public Utility Commrs. <i>v.</i> . . . .	262
Manoloff, Ann Arbor R. R. <i>v.</i> . . . .	583



## TABLE OF CASES REPORTED.

xv

	PAGE
Manson v. Mesirov, Trustee	615
Massachusetts, Commonwealth of, v. Liquid Carbonic Co.	603
Massachusetts Public Service Comm., New England Telephone & Telegraph Co. v.	597
Massie, Calhoun v.	596
Matters v. Ryan	375
Meccano, Ltd., <i>Ex parte</i>	594
Mechanics & Metals National Bank, Enslen v.	617
Meharg v. Alabama Power Co.	592
Merchants Legal Stamp Co., Duane v.	613
Mesirov, Trustee, Manson v.	615
Middleton v. Texas Power & Light Co.	152
Miller v. McClain	308
Minneapolis Civic & Commerce Assn., Great Northern Ry. v.	622
Mint Products Co., Larson, Jr., Co. v.	603
Mississippi Central R. R. v. Lott, Admx.	616
Missouri & Arkansas Lumber & Mining Co. v. Greenwood District, Sebastian County	170
Mono County Irrigation Co., State of California v.	581
Moon Co., State of Wisconsin <i>ex rel.</i> , v. Wisconsin Tax Comm.	621
Moore v. United States	487
Morrison, Admx., v. Chicago, Milwaukee & St. Paul Ry.	611
Motley, Watson, Trustee, v.	579
Mullins, Admx., Yazoo & Mississippi Valley R. R. v.	531
Murray v. Kentucky Traction & Terminal Co.	623
New England Telephone & Telegraph Co., Macleod <i>et al.</i> , Public Service Comm. of Massachusetts, v.	597
New Jersey, State of, State of New York v.	202
New Jersey Fidelity & Plate Glass Ins. Co., Lehigh Valley R. R. v.	600

	PAGE
Newman, Southern Pacific Co. <i>v.</i>	580
New Orleans & Northeastern R. R. <i>v.</i> Scarlet	528
Newport News, City of, Darling <i>v.</i>	540
Newton, Commr. of Patents, Gold <i>v.</i>	608
New York, City of, <i>v.</i> Hume, Receiver	603
New York, State of, <i>v.</i> State of New Jersey	202
New York Central R. R. <i>v.</i> Porter	168
New York Central & Hudson River R. R., Cruzan, Admx., <i>v.</i>	621
New York Central & Hudson River R. R., Venner <i>v.</i>	617
New York, New Haven & Hartford R. R., Gillis, Admx., <i>v.</i>	515
New York, Philadelphia & Norfolk R. R. <i>v.</i> Wilkins, Admx.	605
Nicholas & Co. <i>v.</i> United States	34
Nigretia, Steamship, Abdu <i>v.</i>	612
Norfolk Southern R. R. <i>v.</i> King	599
North American Telegraph Co. <i>v.</i> Northern Pacific Ry.	607
North British & Mercantile Ins. Co. <i>v.</i> Baars & Co.	609
North Carolina, State of, Perley <i>v.</i>	510
Northern Pacific Ry. <i>v.</i> First Trust Co.	615
Northern Pacific Ry., North American Telegraph Co. <i>v.</i>	607
Northern Pacific Ry. <i>v.</i> Thompson, County Treasurer	619
Northern Pacific Ry., United States <i>v.</i>	597
North Pacific S. S. Co. <i>v.</i> Hall Brothers Marine Ry. & Shipbuilding Co.	119
Nulomoline Co. <i>v.</i> Stromeier	604
Oahu Sugar Co., Kinney <i>v.</i>	616
Occidental Construction Co. <i>v.</i> United States	623
Ochs, Chicago & Northwestern Ry. <i>v.</i>	416
Oden, Sheriff, <i>v.</i> Coco, Attorney General	587

## TABLE OF CASES REPORTED.

xvii

	PAGE
Oehring, Fox Typewriter Co. <i>v.</i>	598
O'Hare <i>v.</i> United States	598
Olentine, Renfro <i>v.</i>	614
Onepiece Bifocal Lens Co., Bisight Co. <i>v.</i>	606
Opperman, Citizens Bank of Michigan City, Indiana, <i>v.</i>	448
O'Pry <i>v.</i> United States	323
Oresta Da Vella, Royal Italian Consul, Admr., Den- ver & Rio Grande R. R. <i>v.</i>	584
Otto Higel Co., Inc., <i>v.</i> Autopiano Co.	609
Pacific Power Co., State of California <i>v.</i>	581
Paine, Trustee, Sanborn-Cutting Co. <i>v.</i>	622
Panama R. R. <i>v.</i> Bosse	41
Parker <i>et al.</i> , Copartners, Werk <i>et al.</i> , Copartners, <i>v.</i>	130
Pell <i>v.</i> McCabe	595
Pendleton, Admx., <i>v.</i> United States	623
Penn Mutual Life Ins. Co., Rawls <i>v.</i>	614
Pennsylvania R. R. <i>v.</i> Kittaning Iron & Steel Mfg. Co.	595
Perley <i>v.</i> State of North Carolina	510
Petit, Southern Ry. <i>v.</i>	607
Porter, New York Central R. R. <i>v.</i>	168
Porto Rico, People of, American R. R. Co. of Porto Rico <i>v.</i>	600
Postal Telegraph-Cable Co. <i>v.</i> City of Richmond	252
Powers, Trustee, <i>v.</i> Scott County Milling Co.	585
Prieto <i>et al.</i> , Admrs., Beaumont <i>v.</i>	554
Procter & Gamble Co., Berlin Mills Co. <i>v.</i>	598
Public Service Comm. of Massachusetts, New Eng- land Telephone & Telegraph Co. <i>v.</i>	597
Public Utilities Comm. of Illinois <i>ex rel.</i> Cameron, Lake Erie & Western R. R. <i>v.</i>	422
Public Utilities Comm. for the State of Kansas <i>v.</i> Landon, Receiver.	236, 590, 591
Public Utility Commrs. <i>v.</i> Compania General de Tabacos de Filipinas	425

	PAGE
Public Utility Commrs. <i>v.</i> Manila Electric R. R. & Light Co. . . . .	262
Pueblo of Santa Rosa, Lane, Secy. of the Interior, <i>v.</i> . . . .	110
Pulp Wood Co. <i>v.</i> Green Bay Paper & Fibre Co. . . . .	610
Purcell Envelope Co., United States <i>v.</i> . . . .	313
 Railroad Comm. of the State of California <i>v.</i> Allen . . . . .	 601
Rand <i>et al.</i> , Executors, <i>v.</i> United States . . . . .	503
Raton, City of, Raton Water Works Co. <i>v.</i> . . . .	552
Raton Water Works Co. <i>v.</i> City of Raton . . . . .	552
Rawls <i>v.</i> Penn Mutual Life Ins. Co. . . . .	614
Renfro <i>v.</i> Olentine . . . . .	614
Richmond, City of, <i>v.</i> Bird . . . . .	174
Richmond, City of, Postal Telegraph-Cable Co. <i>v.</i> . . . .	252
Roller <i>v.</i> Cooley . . . . .	619
Ross, Receiver, <i>v.</i> Schooley, Admx. . . . .	615
Rudolph <i>v.</i> United States . . . . .	602
Ruecking Construction Co., Withnell <i>v.</i> . . . .	63
Ryan, Matters <i>v.</i> . . . .	375
 St. Charles Amusement & Transp. Co. <i>v.</i> Elhardt . . . . .	 604
St. Louis, City of, St. Louis Poster Advertising Co. <i>v.</i> . . . .	269
St. Louis Independent Packing Co., Houston <i>v.</i> . . . .	479
St. Louis, Iron Mountain & Southern Ry. <i>v.</i> Southern Cotton Oil Co. . . . .	134
St. Louis, Iron Mountain & Southern Ry. <i>v.</i> True . . . . .	611
St. Louis Poster Advertising Co. <i>v.</i> City of St. Louis . . . . .	269
St. Louis Southwestern Ry., Arkadelphia Milling Co. <i>v.</i> . . . .	134
St. Louis Southwestern Ry., Hasty <i>v.</i> . . . .	134
St. Louis Southwestern Ry. of Texas <i>v.</i> Smith . . . . .	605
St. Louis Southwestern Ry. <i>v.</i> Southern Cotton Oil Co. . . . .	134

## TABLE OF CASES REPORTED.

xix

	PAGE
Sallie F. Moon Co., State of Wisconsin <i>ex rel.</i> , <i>v.</i> Wisconsin Tax Comm.	621
Sanborn-Cutting Co. <i>v.</i> Paine, Trustee	622
San Francisco, City and County of, United Railroads of San Francisco <i>v.</i>	517
Santa Rosa, Pueblo of, Lane, Secy. of the Interior, <i>v.</i>	110
Savage, Daly-West Mining Co. <i>v.</i>	607
Scarlet, New Orleans & Northeastern R. R. <i>v.</i>	528
Schenk <i>v.</i> United States	47
Schooley, Admx., Ross, Receiver, <i>v.</i>	615
Scott, Trustee, Gillespie <i>v.</i>	606
Scott County Milling Co., Powers, Trustee, <i>v.</i>	585
Seay, Chicago, Rock Island & Pacific Ry. <i>v.</i>	598
Seattle, City of, Seattle Electric Co. <i>v.</i>	621
Seattle Electric Co. <i>v.</i> City of Seattle	621
Sebastian County, Arkansas, Missouri & Arkansas Lumber & Mining Co. <i>v.</i>	170
Seldomridge, Receiver, Harriman National Bank <i>v.</i>	1
Seufert Brothers Co. <i>v.</i> United States, as Trustee, etc., Yakima Indians	194
Shaffer <i>v.</i> Howard, Auditor	200
Shaffer, Tyrrell <i>v.</i>	582
Shaw & Co. <i>v.</i> United States	34
Sheridan, Cincinnati, New Orleans & Texas Pacific Ry. <i>v.</i>	602
Sheridan-Kirk Contract Co. <i>v.</i> United States	620
Sims <i>v.</i> Stark	584
Skinner & Eddy Corporation <i>v.</i> United States	557
Smietanka, Collector of Internal Revenue, <i>v.</i> American Steel Foundries	617
Smith, St. Louis Southwestern Ry. of Texas <i>v.</i>	605
Smith, Union Oil Co. of California <i>v.</i>	337
South Dakota, State of, <i>v.</i> Collins	220
Southern Cotton Oil Co., St. Louis, Iron Mountain & Southern Ry. <i>v.</i>	134
Southern Cotton Oil Co., St. Louis Southwestern Ry. <i>v.</i>	134



	PAGE
Southern Oregon Co. <i>v.</i> United States . . . . .	589
Southern Pacific Co. <i>v.</i> State of Arizona . . . . .	472
Southern Pacific Co. <i>v.</i> Newman . . . . .	580
Southern Pacific Co. <i>v.</i> Terry . . . . .	592, 593
Southern Ry. <i>v.</i> Petit . . . . .	607
Standard Computing Scale Co. <i>v.</i> Farrell, State Supt. of Weights and Measures . . . . .	571
Standard Oil Co. <i>v.</i> Graves . . . . .	389
Staples, Trustee, Luck, Executrix, <i>v.</i> . . . .	605
Stark, Sims <i>v.</i> . . . .	584
State Public Utilities Comm. of Illinois <i>ex rel.</i> Came- ron, Lake Erie & Western R. R. <i>v.</i> . . . .	422
Steamship Cubadist, Gordon <i>v.</i> . . . .	618
Steamship Nigretia, etc., Abdu <i>v.</i> . . . .	612
Strait Mfg. Co., Crescent Milling Co. <i>v.</i> . . . .	584, 586
Stromberg Motor Devices Co., Zenith Carburetor Co. <i>v.</i> . . . .	605
Stromeyer, Nulomoline Co. <i>v.</i> . . . .	604
Success Mining Co., Alameda Mining Co. <i>v.</i> . . . .	622
Sugarman <i>v.</i> United States . . . . .	182
Supreme Conclave, Improved Order of Heptasophs, <i>v.</i> Wilson . . . . .	583, 604
Supreme Lodge of the World, Loyal Order of Moose, Kenney, Admr., <i>v.</i> . . . .	597
Sutherland & Co., Hannevig <i>v.</i> . . . .	612
Swetland, Church <i>v.</i> . . . .	579
Talbott <i>et al.</i> , Kentucky State Racing Comm., Doug- las Park Jockey Club <i>v.</i> . . . .	619
Tennessee, State of, <i>v.</i> State of Arkansas . . . . .	588
Terry, Southern Pacific Co. <i>v.</i> . . . .	592, 593
Texas Co., Central Trust Co. of New York <i>v.</i> . . . .	613
Texas Power & Light Co., Middleton <i>v.</i> . . . .	152
Thompson, Davis, nee Hutton, <i>v.</i> . . . .	611
Thompson, County Treasurer, Northern Pacific Ry. <i>v.</i> . . . .	619
Thompson <i>v.</i> United States . . . . .	617



## TABLE OF CASES REPORTED.

xxi

	PAGE
Thorburn, <i>Ex parte</i> . . . . .	588
Toledo & Ohio Central Ry., Chesapeake & Ohio Coal & Coke Co. <i>v.</i> . . . . .	585
Tompkins, <i>Ex parte</i> . . . . .	584
Tracy, <i>Ex parte</i> . . . . .	551, 588
True, St. Louis, Iron Mountain & Southern Ry. <i>v.</i> . . . . .	611
Tyrrell <i>v.</i> Shaffer . . . . .	582
Union Oil Co. of California <i>v.</i> Smith . . . . .	337
Union Pacific R. R., United States <i>v.</i> . . . . .	354
Union Sulphur Co. <i>v.</i> Freeport Texas Co. . . . .	618
Union Tank Line Co. <i>v.</i> Wright, Comptroller Gen- eral . . . . .	275
United Railroads of San Francisco <i>v.</i> City and County of San Francisco . . . . .	517
United States <i>v.</i> Atchison, Topeka & Santa Fe Ry. . . . .	451
United States, Baer <i>v.</i> . . . . .	47
United States, Bernstein <i>v.</i> . . . . .	604
United States, Blunt <i>v.</i> . . . . .	608
United States <i>v.</i> Brooklyn Eastern District Termi- nal . . . . .	296
United States, Clarke <i>v.</i> . . . . .	606
United States, Cochnower <i>v.</i> . . . . .	588
United States, Corn Products Refining Co. <i>v.</i> . . . . .	621
United States, Deason <i>v.</i> . . . . .	607
United States, Debs <i>v.</i> . . . . .	211
United States, Delaware, Lackawanna & Western R. R. <i>v.</i> . . . . .	385
United States <i>v.</i> Doremus . . . . .	86
United States, Dorsey <i>v.</i> . . . . .	616
United States, Elgin, Joliet & Eastern Ry. <i>v.</i> . . . . .	601
United States, Freeman <i>v.</i> . . . . .	600
United States, Frohwerk <i>v.</i> . . . . .	204
United States, Garrett <i>v.</i> . . . . .	620
United States <i>v.</i> Gudger . . . . .	373
United States, Hallowell <i>v.</i> . . . . .	615

	PAGE
United States, Hamilton <i>v.</i>	610
United States, Hathaway & Co. <i>v.</i>	460
United States, J. H. Hughes <i>v.</i>	610
United States, U. S. G. Hughes <i>v.</i>	610
United States, Kelley <i>v.</i>	616
United States, Kenney <i>v.</i>	600
United States, Kirchner <i>v.</i>	595
United States, Kreuzer <i>v.</i>	603
United States <i>ex rel.</i> Arant <i>v.</i> Lane, Secy. of the Interior	367
United States <i>ex rel.</i> Hall <i>v.</i> Lane, Secy. of the Interior	613
United States <i>v.</i> Laughlin	440
United States, Laughter <i>v.</i>	613
United States <i>ex rel.</i> Billerman <i>v.</i> Long, Criminal Sheriff	580
United States, Louisville & Jeffersonville Bridge Co. <i>v.</i>	534
United States, McKinley <i>v.</i>	397
United States, McKnight <i>v.</i>	614
United States, Magon <i>v.</i>	618
United States, Moore <i>v.</i>	487
United States, Nicholas & Co. <i>v.</i>	34
United States <i>v.</i> Northern Pacific Ry.	597
United States, Occidental Construction Co. <i>v.</i>	623
United States, O'Hare <i>v.</i>	598
United States, O'Pry <i>v.</i>	323
United States, Pendleton, Admx., <i>v.</i>	623
United States <i>v.</i> Purcell Envelope Co.	313
United States, Rand <i>et al.</i> , Executors, <i>v.</i>	503
United States, Rudolph <i>v.</i>	602
United States, Schenck <i>v.</i>	47
United States, as Trustee, etc., Yakima Indians, <i>v.</i> Seufert Brothers Co.	194
United States, Shaw & Co. <i>v.</i>	34
United States <i>v.</i> Sheridan-Kirk Contract Co.	620
United States, Skinner & Eddy Corporation <i>v.</i>	557

## TABLE OF CASES REPORTED.

xxiii

	PAGE
United States, Southern Oregon Co. <i>v.</i>	589
United States, Sugarman <i>v.</i>	182
United States, Thompson <i>v.</i>	617
United States <i>v.</i> Union Pacific R. R.	354
United States, Webb <i>v.</i>	96
United States, Wise, Trustee, <i>v.</i>	361
 Venner <i>v.</i> New York Central & Hudson River R. R.	 617
 Wagner, <i>Ex parte</i>	 465
Wagoner <i>v.</i> City of La Grande	622
Washington, State of, Hewett <i>v.</i>	611
Watson, Trustee, <i>v.</i> Motley	579
Webb <i>v.</i> United States	96
Weeks <i>v.</i> Atchison, Topeka & Santa Fe Ry.	602
Welch <i>v.</i> Kirby, Admr.	612
Werk <i>et al.</i> , Copartners; <i>v.</i> Parker <i>et al.</i> , Copart- ners	130
Westermann Co. <i>v.</i> Dispatch Printing Co.	100
White, Commr. of Immigration, Kwock Jan Fat <i>v.</i>	596
Whitehead <i>v.</i> Galloway	79
Whitney Steamboat Corporation, <i>Ex parte</i>	115
Wilkins, Admx., New York, Philadelphia & Norfolk R. R. <i>v.</i>	605
Wilson, Supreme Conclave, Improved Order of Heptasophs <i>v.</i>	583, 604
Wisconsin, State of, <i>ex rel.</i> Sallie F. Moon Co. <i>v.</i> Wis- consin Tax Comm.	621
Wisconsin Tax Comm., State of Wisconsin <i>ex rel.</i> Sallie F. Moon Co. <i>v.</i>	621
Wise, Trustee, <i>v.</i> United States	361
Withnell <i>v.</i> Ruecking Construction Co.	63
Worcester Trust Co., Keefe, Trustee, <i>v.</i>	602
Wright, Comptroller General, Central of Georgia Ry. <i>v.</i>	590
Wright, Comptroller General, Union Tank Line Co. <i>v.</i>	275

	PAGE
Yakima Indians, United States, as Trustee, etc., Seufert Brothers Co. <i>v.</i>	194
Yazoo & Mississippi Valley R. R. <i>v.</i> Mullins, Admx.	531
Zenith Carburetor Co. <i>v.</i> Stromberg Motor Devices Co.	605
Zimmerman <i>v.</i> Corson County, South Dakota	593

# TABLE OF CASES

## CITED IN OPINIONS.

	PAGE		PAGE
Acme Harvester Co. <i>v.</i> Beekman Lumber Co., 222 U. S.		American Refrigerator Transit Co. <i>v.</i> Hall, 174 U. S.	70
300	251	282, 288,	294
Adams <i>v.</i> New York, 192 U. S.	585	American Sugar Refg. Co. <i>v.</i> New Orleans, 181 U. S.	277
Adams Express Co. <i>v.</i> Croninger, 226 U. S.	491	61,	553
Adams Express Co. <i>v.</i> Ohio, 165 U. S.	194; 166 U. S.	Andrews <i>v.</i> Swartz, 156 U. S.	272
185	282, 286, 288,	248 U. S.	272
Aikens <i>v.</i> Wisconsin, 195 U. S.	194	167,	449
Alabama Great So. R. R. <i>v.</i> United States, 49 Ct. Clms.	522	Anonymous, Salk.	588
522	359, 360	Anvil Hydraulic Co. <i>v.</i> Code, 182 Fed. Rep.	205
Alaska Pacific Fisheries <i>v.</i> Alaska, 249 U. S.	53	Arant <i>v.</i> Lane, 47 App. D. C.	336
Alaska Pacific Fisheries <i>v.</i> Alaska, 236 Fed. Rep.	52; <i>id.</i> 70	336	368
Alaska Salmon Co. <i>v.</i> Alaska, 236 Fed. Rep.	62; 242 U. S.	Arkadelphia Milling Co. <i>v.</i> St. Louis S. W. Ry., 249 U. S.	134
648	62, 63	424,	477
Allen <i>v.</i> St. Louis, I. Mt. & So. Ry., 230 U. S.	553	Armour & Co. <i>v.</i> North Dakota, 240 U. S.	510
American Brewing Co., <i>In re</i> , 112 Fed. Rep.	752	268,	432
American Constr. Co. <i>v.</i> Jacksonville, T. & K. W. Ry.	148 U. S.	Aron <i>v.</i> Manhattan Ry., 132 U. S.	84
372	471	133	
American Dredging Co. <i>v.</i> United States, 49 Ct. Clms.	350	Aspen Min. Co. <i>v.</i> Billings, 150 U. S.	31
463		584,	592
American Express Co. <i>v.</i> Caldwell, 244 U. S.	617	Astor <i>v.</i> Wells, 4 Wheat.	466
American Express Co. <i>v.</i> Iowa, 196 U. S.	133	Atchison, T. & S. F. Ry. <i>v.</i> United States, 244 U. S.	336
American Express Co. <i>v.</i> Mullins, 212 U. S.	311	336	307
American Insulated Wire Co. <i>v.</i> Chicago & N. W. Ry., 26 I. C. C.	415	Atchison, T. & S. F. Ry. <i>v.</i> United States, 52 Ct. Clms.	338
570		451,	453
		Atlantic Coast Line R. R. <i>v.</i> Goldsboro, 232 U. S.	548
		141,	274,
		424	
		Atlantic Coast Line R. R. <i>v.</i> Interstate Com. Comm., 194 Fed. Rep.	449
		563	
		Atlantic Coast Line R. R. <i>v.</i> Mims, 242 U. S.	532
		493	
		Atlantic Coast Line R. R. <i>v.</i> North Carolina Corp. Comm., 206 U. S.	1
		421	



	PAGE		PAGE
Atlantic Coast Line R. R. <i>v.</i>		Benjamin Noble, The, 232	
Riverside Mills, 219 U. S.		Fed. Rep. 382; 244 <i>id.</i> 95	
186	191	334, 335	
Atlantic & Pacific Tel. Co. <i>v.</i>		Bennett <i>v.</i> United States,	
Philadelphia, 190 U. S. 160		227 U. S. 333	185
258-260		Berkson <i>v.</i> People, 154 Ill.	
Atlantic Works <i>v.</i> Brady, 107		81	382
U. S. 192	133	Bernardin <i>v.</i> Butterworth,	
Auten <i>v.</i> United States Natl.		169 U. S. 600	201
Bank, 174 U. S. 125	6	Berry <i>v.</i> Davis, 242 U. S. 468	427
Babbitt <i>v.</i> Dutcher, 216 U. S.		Bilby <i>v.</i> Stewart, 246 U. S.	
102	251	255	587, 593, 594
Bacon <i>v.</i> Illinois, 227 U. S.		Bird <i>v.</i> Richmond, 240 Fed.	
504	152, 396	Rep. 545	174, 175
Baker <i>v.</i> Butte City Water		Black <i>v.</i> Elkhorn Min. Co.,	
Co., 28 Mont. 222	25	163 U. S. 445	349
Balt. & Ohio R. R. <i>v.</i> Leach,		Blackstone <i>v.</i> Everybody's	
173 Ky. 452	217	Store, 207 Fed. Rep. 752	250
Balt. & Ohio R. R. <i>v.</i> Pitcairn		Blake <i>v.</i> McClung, 172 U. S.	
Coal Co., 215 U. S. 481	562	239	527
Balt. & Ohio R. R. <i>v.</i> Whit-		Board of Liquidation <i>v.</i>	
acre, 242 U. S. 169	517	Louisiana, 179 U. S. 622	593
Bank of Kentucky <i>v.</i> Adams		Board of Trade of Carrollton	
Express Co., 93 U. S. 174		<i>v.</i> Central of Georgia Ry.,	
192, 307		28 I. C. C. 154	565
Bank of United States <i>v.</i>		Bogart <i>v.</i> Amanda Consol.	
Bank of Washington, 6		Gold Min. Co., 32 Colo.	
Pet. 8	145	32	31
Barbour <i>v.</i> State, 146 Ga. 667		Boise Water Co. <i>v.</i> Boise	
454, 459		City, 230 U. S. 98	61
Bardes <i>v.</i> Hawarden Bank,		Booth <i>v.</i> United States, 49	
178 U. S. 524	251, 548	Ct. Clms. 699	509
Barnitz <i>v.</i> Beverly, 163 U. S.		Borgnis <i>v.</i> Falk Co., 147 Wis.	
118	173	327	159, 160
Bartels Northern Oil Co. <i>v.</i>		Boston & Maine R. R. <i>v.</i> Pi-	
Jackman, 29 N. Dak. 236	397	per, 246 U. S. 439	219
Bartemeyer <i>v.</i> Iowa, 18 Wall.		Bradford <i>v.</i> Morrison, 212	
129	459	U. S. 389	349
Basham <i>v.</i> Chicago G. W.		Brady <i>v.</i> Daly, 175 U. S. 148	107
R. R., 178 Ia. 998	164, 166	Brigham <i>v.</i> Fayerweather,	
Bates & Guild Co. <i>v.</i> Payne,		140 Mass. 411	249
194 U. S. 106	484, 500	Brolan <i>v.</i> United States, 236	
Bear <i>v.</i> Chase, 99 Fed. Rep.		U. S. 216 184, 580, 582,	
920	251	587, 592	
Beer Co. <i>v.</i> Massachusetts,		Brooklyn Eastern Dist. Ter-	
97 U. S. 25	459	minal <i>v.</i> United States, 239	
Belfast, The, 7 Wall. 624	126	Fed. Rep. 287	297, 300
Belk <i>v.</i> Meagher, 104 U. S. 279	349	Brougham <i>v.</i> Blanton Mfg.	
Belknap <i>v.</i> Stewart, 38 Neb.		Co., 243 Fed. Rep. 503	
304	249	495, 496	
Belt Ry. Co. of Chicago <i>v.</i>		Brown <i>v.</i> Alton Water Co.,	
United States, 168 Fed.		222 U. S. 325	584, 592
Rep. 542	306	Brown <i>v.</i> Piper, 91 U. S. 37	133

## TABLE OF CASES CITED.

xxvii

	PAGE		PAGE
Buckeye Powder Co. <i>v.</i> Du Pont Powder Co., 248 U. S.		Ches. & Ohio Ry. <i>v.</i> Public Service Comm., 242 U. S.	
55	209	603	421
Burfenning <i>v.</i> Chicago &c. Ry., 163 U. S. 321	484	Chew Hing Lung <i>v.</i> Wise, 176 U. S. 156	498
Burke <i>v.</i> Southern Pac. R. R., 234 U. S. 669	346	Chicago & Alton R. R. <i>v.</i> Suffern, 129 Ill. 274	424
Burlen <i>v.</i> Shannon, 3 Gray, 387	249	Chicago Dock & Canal Co. <i>v.</i> Garrity, 115 Ill. 155	424
Burrus, <i>In re</i> , 136 U. S. 586	377	Chicago & E. I. R. R. <i>v.</i> Collins Produce Co., 235 Fed. Rep. 857	186
Butler <i>v.</i> Boston & Savannah S. S. Co., 130 U. S. 527	336	Chicago G. W. R. R. <i>v.</i> Bas- ham, 249 U. S. 164	449
Butte City Water Co. <i>v.</i> Baker, 196 U. S. 119	25	Chicago, Mil. & St. P. Ry. <i>v.</i> Hoyt, 149 U. S. 1	411
Butte & Superior Copper Co. <i>v.</i> Clark-Montana Co., 248 Fed. Rep. 609	14, 20	Chicago, Mil. & St. P. Ry. <i>v.</i> Iowa, 233 U. S. 334	477
Buttfield <i>v.</i> Stranahan, 192 U. S. 470	399	Chicago, Mil. & St. P. Ry. <i>v.</i> Minnesota, 134 U. S. 418	148
Buttz <i>v.</i> Northern Pac. R. R., 119 U. S. 55	444	Chicago & N. W. Ry. <i>v.</i> Bower, 241 U. S. 470	533
Calder <i>v.</i> Michigan, 218 U. S. 591	460	Chicago & N. W. Ry. <i>v.</i> Ochs, 249 U. S. 416	425
Caledonian Ry. <i>v.</i> Walker's Trustees, 7 App. Cas. 259	544	Chicago, R. I. & Pac. Ry. <i>v.</i> Wright, 239 U. S. 548	533
Capitol Transp. Co. <i>v.</i> Cambria Steel Co., 245 U. S. 648	335	Choctaw, O. & G. R. R. <i>v.</i> Tennessee, 191 U. S. 326	533
Cardona <i>v.</i> Quinones, 240 U. S. 83	556	Chouteau <i>v.</i> Molony, 16 How. 203	113
Carfer <i>v.</i> Caldwell, 200 U. S. 293	377	Chrisman <i>v.</i> Miller, 197 U. S. 313	348
Carnegie Steel Co. <i>v.</i> United States, 240 U. S. 156	412	Cincinnati, N. O. & T. P. Ry. <i>v.</i> Interstate Com. Comm., 162 U. S. 184	564
Carney <i>v.</i> Emmons, 9 Wis. 114	250	Cincinnati, N. O. & Tex. Pac. Ry. <i>v.</i> Rankin, 241 U. S. 319	191
Carolina Glass Co. <i>v.</i> South Carolina, 240 U. S. 305	60, 553, 573	Citizens Bank <i>v.</i> Opperman, 115 N. E. Rep. 55	448
Castle <i>v.</i> Mason, 91 Oh. St. 296	397	Citizens' Tel. Co. <i>v.</i> Fuller, 229 U. S. 322	274
Chambers <i>v.</i> Harrington, 111 U. S. 350	351	Clark <i>v.</i> Chicago, 233 Ill. 113	372
Chandler <i>v.</i> Dix, 194 U. S. 590	201	Clark-Montana Co. <i>v.</i> Butte & Superior Copper Co., 233 Fed. Rep. 547	20
Chapman <i>v.</i> County of Douglas, 107 U. S. 348	371	Cleveland <i>v.</i> Cleveland City Ry., 194 U. S. 517	407, 408
Cherokee Nation <i>v.</i> Georgia, 5 Pet. 1	112	Cleveland &c. Ry. <i>v.</i> Backus, 154 U. S. 439	288
Cherokee Nation <i>v.</i> Hitchcock, 187 U. S. 294	113	Clipper Min. Co. <i>v.</i> Eli Min. Co., 194 U. S. 220	23
		Coe <i>v.</i> Errol, 116 U. S. 517	152, 477

	PAGE		PAGE
<i>Coggs v. Bernard</i> , 2 <i>Ld. Raymond</i> , 909	193	<i>Crossman v. Pendery</i> , 8 <i>Fed. Rep.</i> 693	347
<i>Cohens v. Virginia</i> , 6 <i>Wheat</i> . 264	286	<i>Crutcher v. Kentucky</i> , 141 <i>U. S.</i> 47	261
<i>Columbus Ry. &amp;c. Co. v. Columbus</i> , 249 <i>U. S.</i> 399	415	<i>Cubbins v. Mississippi River Comm.</i> , 241 <i>U. S.</i> 351	588
<i>Columbus Ry. &amp;c. Co. v. Columbus</i> , 253 <i>Fed. Rep.</i> 499	400	<i>Cudahy Packing Co. v. Minnesota</i> , 246 <i>U. S.</i> 450	283, 288, 295
<i>Commodity Rates to Pacific Coast Terminals</i> , 32 <i>I. C. C.</i> 611	560	<i>Cullinane v. Bank</i> , 123 <i>Ia.</i> 340	249
<i>Compañía General v. Alhambra Cigar Co.</i> , 249 <i>U. S.</i> 72	264	<i>Cusack Co. v. Chicago</i> , 242 <i>U. S.</i> 526	149, 268, 274
<i>Compañía General v. Alhambra Cigar Co.</i> , 33 <i>Phil. Rep.</i> 485	73, 75	<i>Cushing v. McWaters</i> , 175 <i>Pac. Rep.</i> 838	181
<i>Compañía General v. Board of Pub. Util. Commrs.</i> , 34 <i>Phil. Rep.</i> 136	425, 426	<i>Cutler v. Kouns</i> , 110 <i>U. S.</i> 720	326, 327, 329, 331
<i>Connolly v. Board of Education</i> , 99 <i>N. Y. Supp.</i> 737	372	<i>Darling v. Newport News</i> , 123 <i>Va.</i> 14	540, 541
<i>Consolidated Mutual Oil Co. v. United States</i> , 245 <i>Fed. Rep.</i> 521	347	<i>Darlington v. Lane</i> , 46 <i>App. D. C.</i> 465	331
<i>Consolidated Trac. Co. v. South Orange Trac. Co.</i> , 56 <i>N. J. Eq.</i> 569	522	<i>Darnell &amp; Son Co. v. Memphis</i> , 208 <i>U. S.</i> 113	527
<i>Consolidated Turnpike Co. v. Norfolk &amp;c. Ry.</i> , 228 <i>U. S.</i> 326; <i>id.</i> 596	587, 593	<i>Day v. United States</i> , 245 <i>U. S.</i> 159	412
<i>Cook v. Robinson</i> , 194 <i>Fed. Rep.</i> 785	251	<i>Decatur v. Paulding</i> , 14 <i>Pet.</i> 497	484
<i>Corn Products Refg. Co. v. Eddy</i> , 99 <i>Kans.</i> 63	428, 430	<i>Deibeikis v. Link-Belt Co.</i> , 261 <i>Ill.</i> 454	160
<i>Corry v. Lackey</i> , 105 <i>Mich.</i> 363	249	<i>Del., Lack. &amp; W. R. R. v. United States</i> , 51 <i>Ct. Clms.</i> 426	385
<i>Cotting v. Kansas City Stock Yards Co.</i> , 183 <i>U. S.</i> 79	148, 149	<i>Del., Lack. &amp; W. R. R. v. Yurkonis</i> , 238 <i>U. S.</i> 439	580, 585, 586
<i>Courtney v. Pradt</i> , 196 <i>U. S.</i> 89	550	<i>Del-Monte Min. Co. v. Last Chance Min. Co.</i> , 171 <i>U. S.</i> 55	349
<i>Cramp &amp; Sons Co. v. United States</i> , 239 <i>U. S.</i> 221	463	<i>Denver v. Denver Union Water Co.</i> , 246 <i>U. S.</i> 178	410
<i>Crane v. Campbell</i> , 245 <i>U. S.</i> 304	459	<i>Detroit United Ry. v. Detroit</i> , 248 <i>U. S.</i> 429	410
<i>Creede &amp; Cripple Creek Min. Co. v. Uinta Tunnel Min. Co.</i> , 196 <i>U. S.</i> 337	347	<i>Diamond Glue Co. v. United States Glue Co.</i> , 187 <i>U. S.</i> 611	460
<i>Crew Levick Co. v. Pennsylvania</i> , 245 <i>U. S.</i> 292	394, 432	<i>Dickens v. State</i> , 137 <i>Ga.</i> 523	460
<i>Crocker v. Malley</i> , 250 <i>Fed. Rep.</i> 817	224, 230	<i>Dinsmore v. Southern Express Co.</i> , 183 <i>U. S.</i> 115	427
<i>Crooks v. Tazewell Coal Co.</i> , 263 <i>Ill.</i> 343	160	<i>District of Columbia v. Camden Iron Works</i> , 181 <i>U. S.</i> 453	463
		<i>Dominion Hotel v. Arizona</i> , 249 <i>U. S.</i> 265	515

## TABLE OF CASES CITED.

xxix

	PAGE		PAGE
Dominion Hotel v. State, 18 Ariz. 345	265	Flint v. Stone Tracy Co., 220 U. S. 107	93
Downs v. United States, 187 U. S. 496	41	Footo & Co. v. Maryland, 232 U. S. 494	395, 396
Duer v. Corbin Cabinet Lock Co., 149 U. S. 216	133	Forbes v. Gracey, 94 U. S. 762	349
Duke v. Turner, 204 U. S. 623	371	French v. Barber Asphalt Co., 181 U. S. 324	69
Duncan Townsite Co. v. Lane, 245 U. S. 308	371	Frohwerk, <i>Ex parte</i> , 248 U. S. 540	206
Durant v. Abendroth, 97 N. Y. 132	248	Frohwerk v. United States, 249 U. S. 204	215
Eastern R. R. v. United States, 129 U. S. 391	388	Gaines v. Thompson, 7 Wall. 347	484
Eclipse, The, 135 U. S. 599	125	Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217	295
Edwards v. Elliott, 21 Wall. 532	127	Galveston, H. & S. A. Ry. v. Wallace, 223 U. S. 481	191
Elder v. Wood, 208 U. S. 226	349	Garfield v. United States, 93 U. S. 242	317, 320
Eliot v. Freeman, 220 U. S. 178	233	Gasquet v. Lapeyre, 242 U. S. 367	493
El Paso Brick Co. v. McKnight, 233 U. S. 250	350	Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55	67, 68, 70, 71
Embree v. Kansas City Road Dist., 240 U. S. 242	69	Gemmell v. Swain, 28 Mont. 331	347
Emert v. Missouri, 156 U. S. 296	257	General Oil Co. v. Crain, 209 U. S. 211	396
Empire State-Idaho Min. Co. v. Hanley, 205 U. S. 225		General Smith, The, 4 Wheat. 438	126
580, 582, 587, 591		Geneva Furn. Co. v. Karpen, 238 U. S. 254	550
Equitable Life Assurance Soc. v. Brown, 187 U. S. 308	184	Gilcrease v. McCullough, 243 U. S. 653; 249 U. S. 178	179, 582
Erie R. R. v. Welsh, 242 U. S. 303	158, 517	Gilcrease v. McCullough, 162 Pac. Rep. 178	178, 179
Erie R. R. v. Winfield, 244 U. S. 170	158, 169	Gill v. Read, 5 R. I. 343	249
Erwin v. Lowry, 7 How. 172	145	Gillis v. New York, N. H. & H. R. R., 224 Mass. 541	515
Etchen v. Cheney, 235 Fed. Rep. 104	181	Glasgow v. Moyer, 225 U. S. 420	380
Fargo v. Hart, 193 U. S. 490	283, 286, 295	Glide, The, 167 U. S. 606	126
Farrell v. Lockhart, 210 U. S. 142	349	Goldman v. United States, 245 U. S. 474	52, 184
Farrell v. O'Brien, 199 U. S. 89	580, 582, 587, 591	Gompers v. Bucks Stove & Range Co., 221 U. S. 418	52
Fertilizing Co. v. Hyde Park, 97 U. S. 659	500	Goodrich v. Ferris, 214 U. S. 71	184, 580, 582, 587
Fidelity & Deposit Co. v. Courtney, 186 U. S. 342	532	Goodyere v. Ince, Cro. Jac. 246	145
First Natl. Bank v. Keys, 229 U. S. 179	84	Gould v. Gould, 245 U. S. 151	233
Fitzpatrick v. Panama R. R., 2 Canal Zone, 111	45, 47		



	PAGE		PAGE
Grand Trunk W. Ry. <i>v.</i> R. R. Comm. of Indiana, 221 U. S. 400	424, 577	Hecox, <i>In re</i> , 164 Fed. Rep.	823 251
Gratiot County State Bank <i>v.</i> Johnson, 243 U. S. 645	248	Heffner <i>v.</i> Harmon, 159 Pac. Rep. 650	181
Great Northern Ry. <i>v.</i> Minnesota, 238 U. S. 340	577	Hendricks <i>v.</i> United States, 223 U. S. 178	184
Great Northern Ry. <i>v.</i> Otos, 239 U. S. 349	539	Henley <i>v.</i> Davis, 57 Okla. 45	182
Great Northern Ry. <i>v.</i> Wiles, 240 U. S. 444	516	Hickey <i>v.</i> Anaconda Min. Co., 33 Mont. 46	23, 25
Greene <i>v.</i> Caldwell, 170 Ky. 571	160	Hickox <i>v.</i> Eastman, 21 S. Dak. 591	250
Gregory <i>v.</i> Van Ee, 160 U. S. 643	142	Hinckley <i>v.</i> Pittsburgh Steel Co., 121 U. S. 264	320
Grimley, <i>In re</i> , 137 U. S. 147	359	Hollister <i>v.</i> Benedict Mfg. Co., 113 U. S. 59	133
Gulf, Colo. & S. F. R. R. <i>v.</i> Texas, 204 U. S. 403	477	Holt <i>v.</i> United States, 218 U. S. 245	50, 185
Guy <i>v.</i> Baltimore, 100 U. S. 434	527	Home Tel. Co. <i>v.</i> Los Angeles, 227 U. S. 278	424, 577
Hackney <i>v.</i> Hargreaves Bros., 68 Neb. 633	251	Homer <i>v.</i> Collector, 1 Wall. 486	498
Hairston <i>v.</i> Danville & W. Ry., 208 U. S. 598	420	Honolulu Rapid Transit Co. <i>v.</i> Wilder, 211 U. S. 137	45
Hampton <i>v.</i> Watson, 119 Va. 95	543	Houston <i>v.</i> St. Louis Packing Co., 249 U. S. 479	500
Hanson <i>v.</i> Craig, 161 Fed. Rep. 861; 170 Fed. Rep. 62	347	Houston, E. & W. Tex. Ry. <i>v.</i> United States, 234 U. S. 342	566
Harriman Natl. Bank <i>v.</i> Sel-donridge, 240 Fed. Rep. 111	2	Hubbard <i>v.</i> Taunton, 140 Mass. 467	274
Harris <i>v.</i> State, 120 Ga. 196	460	Hughes <i>v.</i> United States, 230 U. S. 24	588
Hartford Life Ins. Co. <i>v.</i> Barber, 245 U. S. 146	492	Huguley Mfg. Co. <i>v.</i> Galetton Cotton Mills, 184 U. S. 290	165, 553
Hartford Life Ins. Co. <i>v.</i> Ibs, 237 U. S. 662	492	Hull <i>v.</i> Burr, 234 U. S. 712	23, 580, 585, 586
Haskell <i>v.</i> Kansas Natural Gas Co., 224 U. S. 217	245	Hunter <i>v.</i> Colfax Coal Co., 175 Ia. 245	159, 160
Haskell <i>v.</i> New Bedford, 108 Mass. 208	543	Huntington, <i>Re</i> , 137 U. S. 63	380
Hathaway & Co. <i>v.</i> United States, 52 Ct. Clms. 267	461, 463	Hutchinson Ice Cream Co. <i>v.</i> Iowa, 242 U. S. 153	432
Hawkins <i>v.</i> Bleakly, 243 U. S. 210	161	Hutchison <i>v.</i> Brown, 167 Pac. Rep. 624	182
Heath & Milligan Co. <i>v.</i> Worst, 207 U. S. 338	432	Hyde <i>v.</i> Wrench, 3 Beav. 334	556
Hebe Co. <i>v.</i> Shaw, 243 U. S. 297	268, 432, 439	Illinois Cent. R. R. <i>v.</i> Behrens, 233 U. S. 473	158
Hebert <i>v.</i> Crawford, 228 U. S. 204	248	Illinois Cent. R. R. <i>v.</i> Illinois, 146 U. S. 387	543, 544
		Indiana Transp. Co., <i>Ex parte</i> , 244 U. S. 456	126



## TABLE OF CASES CITED.

xxxi

	PAGE		PAGE
Insurance Co. v. Dunham, 11 Wall. 1	125, 126	Johnson v. Hartford Ins. Co., 271 Mo. 562	490
Intermountain Rate Cases, 234 U. S. 476	559, 566	Johnson v. Hoy, 227 U. S. 245	380
International Harvester Co. v. Missouri, 234 U. S. 199	158	Johnson v. United States, 228 U. S. 457	50
International Trust Co. v. Weeks, 203 U. S. 364	7	Johnston v. Bowers, 69 N. J. L. 544	146
Interstate Com. Comm. v. Alabama Midland Ry., 168 U. S. 144	564	Jones v. Perkins, 245 U. S. 390	380
Interstate Com. Comm. v. Cincinnati, N. O. & T. P. Ry., 167 U. S. 479	564	Joplin Mercantile Co. v. United States, 236 U. S. 531	209
Interstate Com. Comm. v. Dittenbaugh, 222 U. S. 42	562	Jordan v. Jordan, 162 Pac. Rep. 758	181
Interstate Com. Comm. v. Humboldt S. S. Co., 224 U. S. 474	565	Joy v. St. Louis, 138 U. S. 1	33
Interstate Com. Comm. v. Louis. & Nash. R. R., 227 U. S. 88	563	Kalorama, The, 10 Wall. 204	126
Interstate Com. Comm. v. Union Pac. R. R., 222 U. S. 541	562	Kansas City Gunning Adv. Co. v. Kansas City, 240 Mo. 659	274
Interurban Ry. & Term. Co. v. Public Util. Comm., 98 Oh. St. 287	408	Kansas City &c. Ry. v. Kansas, 240 U. S. 227	432
Ireland v. Woods, 246 U. S. 323	165	Kansas City So. Ry. v. United States, 231 U. S. 423	562
Itow v. United States, 233 U. S. 581	61	Kansas Pac. R. R. v. Atchison, T. & S. F. Ry., 112 U. S. 414	112
Jackson v. Lair, 48 Okla. 269	182	Kehrer v. Stewart, 197 U. S. 60	257
Jackson v. Roby, 109 U. S. 440	351	Keokee Coke Co. v. Taylor, 234 U. S. 224	158
Jackson v. United States, 230 U. S. 1	588	Keppel v. Tiffin Savgs. Bank, 197 U. S. 356	251
Jackson v. Wauchula Mfg. Co., 230 Fed. Rep. 409	250	Kirwan v. Murphy, 189 U. S. 35	334
Jackson Coal Co. v. Phillips Line, 114 Va. 40	176	Kiser Co. v. Central of Georgia Ry., 236 Fed. Rep. 573	565
Jaquith v. Rowley, 188 U. S. 620	251	Knoxville Water Co. v. Knoxville, 200 U. S. 22	520
Jefferson, The Steamship, 215 U. S. 130	128	Kollock, <i>In re</i> , 165 U. S. 526	94
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571	149, 157, 159, 161	Kronprinzessin Cecilie, The, 244 U. S. 12	411, 413
Johanson v. White, 160 Fed. Rep. 901	347	Kung Ching Chong v. Wing Chong, 2 Canal Zone, 25	45
Johnson v. Drew, 171 U. S. 93	484	Lake Shore & Mich. So. Ry. v. Smith, 173 U. S. 684	148, 149
Johnson v. Gratiot County State Bank, 193 Mich. 452	247, 248	Lake Superior & Miss. R. R. v. United States, 93 U. S. 442	355

	PAGE		PAGE
Landon <i>v.</i> Public Util. Comm. of Kansas, 234 Fed. Rep. 152; 242 <i>id.</i> 658; 245 <i>id.</i> 950 237, 242, 244		Louis. & Nash. R. R. <i>v.</i> Par- ker, 242 U. S. 13	158
Lane <i>v.</i> United States <i>ex rel.</i> Mickadiet, 241 U. S. 201	334	Louis. & Nash. R. R. <i>v.</i> United States, 238 U. S. 1	565
Laughlin <i>v.</i> United States, 52 Ct. Clms. 292	441	Louis. & Nash. R. R. <i>v.</i> Woodford, 234 U. S. 46	460
Lawson <i>v.</i> United States Min. Co., 207 U. S. 1		Louisville Trust Co. <i>v.</i> Com- ingor, 184 U. S. 18	251
	24, 28, 30	Louisville Trust Co. <i>v.</i> Knott, 191 U. S. 225	550
Lazarus <i>v.</i> Eagen, 206 Fed. Rep. 518	251	Louisville Underwriters, <i>In</i> <i>re</i> , 134 U. S. 488	126
Lee <i>v.</i> School District, 149 Ia. 345	250	Luckenbach <i>v.</i> McCahan Sugar Refg. Co., 242 U. S. 638; 248 <i>id.</i> 139	335, 337
Lewis <i>v.</i> Frick, 233 U. S. 291	484	Luke <i>v.</i> Hill, 137 Ga. 159	249
Lewis <i>v.</i> Sloan, 68 N. Car. 557	248	McBurney <i>v.</i> Berry, 5 Mont. 300	25
License Tax Cases, 5 Wall. 462	93, 94	McCabe <i>v.</i> Police Board, 107 La. 162	372
Life & Fire Ins. Co. <i>v.</i> Wil- son, 8 Pet. 291	371	McClain <i>v.</i> Miller, 95 Kans. 794	308
Linam <i>v.</i> Beck, 51 Okla. 727	182	McClain <i>v.</i> Ortmyer, 141 U. S. 419	133
Litchfield <i>v.</i> The Register, 9 Wall. 575	333	McCluskey <i>v.</i> Marysville & Northern Ry., 243 U. S. 36	152
Loeb <i>v.</i> Columbia Township Trustees, 179 U. S. 472	61	McCormick Mach. Co. <i>v.</i> Aultman, 169 U. S. 606	286
Lone Wolf <i>v.</i> Hitchcock, 187 U. S. 553	113, 114	McCowan <i>v.</i> Maclay, 16 Mont. 234	25
Loomis <i>v.</i> Lehigh Valley R. R., 240 U. S. 43	562	McCray <i>v.</i> United States, 195 U. S. 27	93
Los Angeles Switching Case, 234 U. S. 294	562	McCrum, <i>In re</i> , 214 Fed. Rep. 207	249
Lottawanna, The, 21 Wall. 558	125, 126	McDaniel <i>v.</i> Holland, 230 Fed. Rep. 945	181, 182
Louisiana & Pac. Ry. <i>v.</i> United States, 209 Fed. Rep. 244	563	McDermott <i>v.</i> Wisconsin, 228 U. S. 115	439
Louisiana R. R. Comm. <i>v.</i> Texas & Pac. Ry., 229 U. S. 336	152	McKenzie <i>v.</i> McClintic- Marshall Constr. Co., 2 Canal Zone, 181	47
Louisville, <i>In re</i> , 231 U. S. 639	143	McLean <i>v.</i> United States, 226 U. S. 374	443
Louisville <i>v.</i> Cumberland Tel. Co., 231 U. S. 652	143	McLemore <i>v.</i> Express Oil Co., 158 Calif. 559	348, 350
Louis. & Nash. R. R. <i>v.</i> Bar- ber Asphalt Co., 197 U. S. 430	269	McNamara <i>v.</i> Washington Terminal Co., 37 App. D. C. 384	306
Louis. & Nash. R. R. <i>v.</i> Greene, 244 U. S. 522	295	Macfadden <i>v.</i> United States, 213 U. S. 288	61
Louis. & Nash. R. R. <i>v.</i> Ken- tucky, 183 U. S. 503	149	Madera Water Works <i>v.</i> Madera, 228 U. S. 454	521
Louis. & Nash. R. R. <i>v.</i> Mel- ton, 218 U. S. 36	494		

## TABLE OF CASES CITED.

xxxiii

	PAGE		PAGE
Mallinckrodt Works v. St. Louis, 238 U. S. 41	149	Miller v. Wilson, 236 U. S. 373	158
Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123	184	Minneapolis & St. Louis R. R. v. Gotschall, 244 U. S. 66	530
Manila Elec. R. R. Co. v. Board of Pub. Util. Commrs., 30 Phil. Rep. 387	262	Minneapolis & St. Louis R. R. v. Minnesota, 193 U. S. 53	421
Manro v. Almeida, 10 Wheat. 473	126	Minnesota v. Barber, 136 U. S. 313	394
Manson v. Williams, 213 U. S. 453	248	Minnesota v. Lane, 247 U. S. 243	333
Manufacturers Ry. v. United States, 246 U. S. 457	562	Minnesota Rate Cases, 230 U. S. 352	562
Marcus Sayre Co. v. Newark, 60 N. J. Eq. 361	543	Mirzan, <i>Re</i> , 119 U. S. 584	380
Market Street Ry. v. Central Ry., 51 Calif. 583	521	Mississippi R. R. Comm. v. Louis. & Nash. R. R., 225 U. S. 272	550
Market Street Cable Ry. v. Rowley, 155 U. S. 621	133	Missouri v. Chicago, Burl. & Q. R. R., 241 U. S. 533	147, 148
Marshall v. Gordon, 243 U. S. 521	383	Missouri v. Illinois, 200 U. S. 496	542
Marye v. Balt. & Ohio R. R., 127 U. S. 117	282, 289	Missouri Pac. Ry. v. Kansas, 216 U. S. 262	421
Mathison v. Minneapolis St. Ry., 126 Minn. 286	159, 160	Missouri Pac. Ry. v. Nebraska, 217 U. S. 196	421
Matters v. Ryan, 249 U. S. 375	551	Missouri, Kans. & Tex. Ry. v. Cade, 233 U. S. 642	158
Medbury v. United States, 173 U. S. 492	443	Monroe v. United States, 184 U. S. 524	463
Meier v. St. Louis, 180 Mo. 391	70	Montana Min. Co. v. St. Louis Min. Co., 204 U. S. 204	31
Merced Oil Min. Co. v. Patterson, 153 Calif. 624; 162 <i>id.</i> 358	348	Moore v. United States, 52 Ct. Clms. 532	487
Metropolitan Water Board v. Dick, Kerr & Co. [1918], A. C. 119	413	Morewood v. Enequist, 23 How. 491	126
Metropolitan Water Co. v. Kaw Valley Dist., 223 U. S. 519	592	Morley v. Lake Shore & Mich. So. Ry., 146 U. S. 162	172, 173
Michaels v. Post, 21 Wall. 398	248	Mountain Timber Co. v. Washington, 243 U. S. 219	163, 432
Michigan Cent. R. R. v. Michigan R. R. Comm., 236 U. S. 615	421	Municipal Securities Corp. v. Kansas City, 246 U. S. 63	587, 593
Middleton v. Texas Power Co., 108 Tex. 96; 178 S. W. Rep. 956	153, 154, 157	Murdock v. Memphis, 20 Wall. 590	533
Miller v. Chrisman, 140 Calif. 440	348	Murphy v. United States, 38 Ct. Clms. 511	360
Miller v. Connor, 250 Mo. 677	493	Nelson v. Northern Pac. Ry., 188 U. S. 108	445, 447

	PAGE		PAGE
Newark Natural Gas Co. v. Newark, 242 U. S. 405	246	O'Brien v. Miller, 168 U. S. 287	336
Newcomber v. United States, 51 Ct. Clms. 408	509	Ochs v. Chicago & N. W. Ry., 135 Minn. 323	416, 418
New England Oil Co. v. Congdon, 152 Calif. 211	347	O'Donnell v. Glenn, 8 Mont. 248	25
New Jersey v. Anderson, 203 U. S. 483	177	Ohio R. R. Comm. v. Worthington, 225 U. S. 101	152
New Jersey v. Lovell, 179 Fed. Rep. 321	177	Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229	245
New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344	126	Olin v. Timken, 155 U. S. 141	133
New Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656	248	Omaha Baum Iron Store Co. v. Moline Plow Co., 244 U. S. 650	584, 592
Newman, <i>Ex parte</i> , 14 Wall. 152	471	Opinion of Justices, 209 Mass. 607	159, 160
New Orleans v. Paine, 147 U. S. 261	334, 485	O'Pry v. United States, 51 Ct. Clms. 111	323
New Orleans Flour Inspectors v. Glover, 160 U. S. 170; 161 U. S. 101	427	Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S. 510	421, 577
New Orleans & N. E. R. R. v. Hanna, 78 So. Rep. 953	532	Panama R. R. Co. v. Bosse, 239 Fed. Rep. 303	42, 43
New Orleans & N. E. R. R. v. Harris, 247 U. S. 367	529, 532	Panama R. R. Co. v. Toppin, 250 Fed. Rep. 989	43
New Orleans & N. E. R. R. v. Scarlet, 115 Miss. 285	528, 529	Patson v. Pennsylvania, 232 U. S. 138	158
New York Cent. R. R. v. Carr, 238 U. S. 260	158	Patterson v. Colorado, 205 U. S. 454	52
New York Cent. R. R. v. White, 243 U. S. 188	159, 163	Pedersen v. Del., Lack. & W. R. R., 229 U. S. 146	158, 169
New York Cent. R. R. v. Winfield, 244 U. S. 147	158, 169	Pendleton v. Benner Line, 241 U. S. 677; 246 <i>id.</i> 353	335, 336
New York, Phila. & Norfolk R. R. v. Peninsula Exchange, 240 U. S. 34	533	Pennsylvania Co. v. Donat, 239 U. S. 50	158
Nicholas & Co. v. United States, 7 Cust. App. Rep. 97	34, 35	Pennsylvania Co. v. United States, 236 U. S. 351	562
Noble v. Union River Logging R. R., 147 U. S. 165	334	Pennsylvania R. R. v. Locomotive Truck Co., 110 U. S. 490	133
North Carolina R. R. v. Zachary, 232 U. S. 248	158	Pennsylvania R. R. v. Towers, 245 U. S. 6	149
Northern Pac. Ry. v. North Dakota, 236 U. S. 585	421	People's Ferry Co. v. Beers, 20 How. 393	125, 127
Northern Pac. R. R. v. Sanders, 166 U. S. 620	445	Peyroux v. Howard, 7 Pet. 324	126, 128
Northern Pac. Ry. v. United States, 227 U. S. 355	334	Phila. & Read. C. & I. Co. v. Gilbert, 245 U. S. 162	165
Northwestern Fuel Co. v. Brock, 139 U. S. 216	145, 146	Phila., W. & B. R. R. v. Philadelphia Towboat Co., 23 How. 209	125
		Phillips v. Brill, 17 Wyo. 26	347



## TABLE OF CASES CITED.

XXXV

	PAGE		PAGE
Pipe Line Cases, 234 U. S.		Rand v. United States, 52 Ct.	
548	245	Clms. 72; <i>id.</i> 285	503
Pittsburgh &c. Ry. v. Backus,		Range Sand-Lime Brick Co.	
154 U. S. 421	294	v. Great Northern Ry.,	
Planter, The, 7 Pet. 324	126, 128	137 Minn. 314	419
Plymouth Coal Co. v. Penn-		Rates on Iron & Steel Arti-	
sylvania, 232 U. S. 531		cles, 38 I. C. C. 237	559
149,	157	Read v. Mississippi County,	
Pope v. Louisville &c. Ry.,		69 Ark. 365	171
173 U. S. 573	142	Rearick v. Pennsylvania, 203	
Porter v. New York Cent.		U. S. 507	245
R. R., 172 App. Div. 918	168	Red Jacket, Jr., Coal Co. v.	
Postal Tel.-Cable Co. v. Bal-		United Thacker Coal Co.,	
timore, 156 U. S. 210	258, 260	248 U. S. 531	584
Postal Tel.-Cable Co. v.		Reopening Fourth Section	
Charleston, 153 U. S. 692	257	Applications, 40 I. C. C.	
Postal Tel.-Cable Co. v. New		35	561
Hope, 192 U. S. 55	258	Rice, <i>In re</i> , 155 U. S. 396	471
Postal Tel.-Cable Co. v. Nor-		Rice v. Anderson, 39 Okla.	
folk, 101 Va. 125; 118 Va.		279	182
455	257	Richardson v. Harmon, 222	
Postal Tel.-Cable Co. v. Tay-		U. S. 96	336
lor, 192 U. S. 64	258	Riggins v. United States, 199	
Procter & Gamble Co. v.		U. S. 547	380
United States, 225 U. S.		Riley v. Horne, 5 Bing. 217	193
282	562	Roach v. Chapman, 22 How.	
Public Util. Comm. v. Lake		129	127
Erie & W. R. R., 277 Ill.		Robert W. Parsons, The, 191	
574	423	U. S. 17	127, 128
Pueblo of Santa Rosa v. Lane,		Robertson v. Baldwin, 165	
46 App. D. C. 411	110, 111	U. S. 275	206
Pullman Co. v. Adams, 189		Robinson v. Balt. & Ohio	
U. S. 420	258	R. R., 222 U. S. 506	562
Pullman Co. v. Croom, 231		Robinson v. Caldwell, 165	
U. S. 571	201	U. S. 359	61
Pullman Co. v. Kansas, 216		Roehm v. Horst, 178 U. S. 1	320
U. S. 56	295	Rosenberg, <i>In re</i> , 90 Wis.	
Pullman's Palace Car Co.		581	382
v. Pennsylvania, 141 U. S.		Rosenthal v. New York, 226	
18 282, 283, 288, 290, 294,	295	U. S. 260	157, 158
Purcell Envelope Co. v.		Ross v. Oregon, 227 U. S.	
United States, 51 Ct. Clms.		150	424
211	313	Rouse v. Hornsby, 161 U. S.	
Pure Oil Co. v. Minnesota,		588	142
248 U. S. 158	396	Rouse v. Letcher, 156 U. S.	
Railroad Comm. of Nevada		47	142
v. Southern Pac. Co., 21		Royal, <i>Ex parte</i> , 117 U. S.	
I. C. C. 329	560	254	380
Railroad Comm. of Ohio v.		Ruecking Constr. Co. v.	
Worthington, 225 U. S.		Withnell, 269 Mo. 546	64, 67
101	477	Ruthenberg v. United States,	
Railroad Co. v. Lockwood, 17		245 U. S. 480	213
Wall. 357	192, 193	Sabine, The, 101 U. S. 384	126



	PAGE		PAGE
Sacramento Case, 242 U. S.		Schulman, <i>In re</i> , 177 Fed.	
178	559, 563, 570	Rep. 191	382
St. Anthony Church <i>v.</i> Penn-		Seaboard Air Line Ry. <i>v.</i> Hor-	
sylvania R. R., 237 U. S.		ton, 233 U. S. 492	533
575	580, 585, 586	Seaboard Air Line Ry. <i>v.</i>	
St. Joseph & G. I. Ry. <i>v.</i>		Moore, 228 U. S. 433	532
Moore, 243 U. S. 311	539	Selective Draft Law Cases,	
St. Louis <i>v.</i> Western Union		245 U. S. 366	183, 399
Tel. Co., 148 U. S. 92		Sexton <i>v.</i> Newark Dist. Tel.	
258, 259, 260		Co., 84 N. J. L. 85; 86 <i>id.</i>	
St. Louis <i>v.</i> Western Union		701	160
Tel. Co., 149 U. S. 465		Shade <i>v.</i> Cement Co., 93	
69, 259, 260		Kans. 257	159, 160
St. Louis Gunning Adv. Co.		Shaffer <i>v.</i> Howard, 250 Fed.	
<i>v.</i> St. Louis, 235 Mo. 99	274	Rep. 873	200
St. Louis, I. Mt. & So. Ry. <i>v.</i>		Shanks <i>v.</i> Del., Lack. & W.	
McKnight, 244 U. S. 368		R. R., 239 U. S. 556	158
143, 145		Shapiro <i>v.</i> United States, 235	
St. Louis, I. Mt. & So. Ry. <i>v.</i>		U. S. 412	592
Starbird, 243 U. S. 592	218	Shawhan <i>v.</i> Whertritt, 7 How.	
St. Louis, I. Mt. & So. Ry. <i>v.</i>		627	248, 251
Taylor, 210 U. S. 281	530, 539	Sheridan Chamber of Com-	
St. Louis Packing Co. <i>v.</i>		merce <i>v.</i> Chicago, Burl.	
Houston, 204 Fed. Rep.		& Q. R. R., 26 I. C. C.	
120; 215 <i>id.</i> 553; 242 <i>id.</i> 337		638	565
479, 481		Shreveport Case, 234 U. S.	
St. Louis Poster Adv. Co. <i>v.</i>		342	566
St. Louis, 195 S. W. Rep.		Silvey & Co. <i>v.</i> Tift, 123 Ga.	
717	270, 272	804	248
St. Louis & San Francisco Ry.		Simmons Creek Coal Co. <i>v.</i>	
<i>v.</i> Gill, 156 U. S. 649	148	Doran, 142 U. S. 417	27
St. Louis & San Francisco		Sligh <i>v.</i> Kirkwood, 237 U. S.	
R. R. <i>v.</i> Sheperd, 240 U. S.		52	439
240	594	Smelting Co. <i>v.</i> Kemp, 104	
St. Louis S. W. Ry. <i>v.</i> Ar-		U. S. 636	351
kansas, 235 U. S. 350	432	Smith <i>v.</i> Anderson, 15 Ch.	
San Jose-Los Gatos Ry. <i>v.</i>		Div. 247	233
San Jose Ry., 156 Fed.		Smith <i>v.</i> Hitchcock, 226 U. S.	
Rep. 455	520	53	484
Savage <i>v.</i> Jones, 225 U. S.		Smith <i>v.</i> Union Oil Co., 166	
501	432, 433, 436-439	Calif. 217	338, 343
Sayles <i>v.</i> Foley, 38 R. I. 484		Southern Ill. & Mo. Bridge	
159, 160		Co. <i>v.</i> Stone, 174 Mo. 1	493
Schenck <i>v.</i> United States, 249		Southern Pac. Co. <i>v.</i> Inter-	
U. S. 47	206, 207, 210, 215	state Com. Comm., 219	
Schick, <i>In re</i> , 2 Ben. 5	248	U. S. 433	563
Schmidinger <i>v.</i> Chicago, 226		Southern Pac. Co. <i>v.</i> State,	
U. S. 578	432	19 Ariz. 20	473
Schneider Granite Co. <i>v.</i> Gast		Southern Pac. Co. <i>v.</i> Stewart,	
Realty Co., 245 U. S. 288		248 U. S. 446	218
67, 68, 70		Southern Pac. Terminal <i>v.</i>	
School District <i>v.</i> Wood, 13		Interstate Com. Comm.,	
Mass. 193	112	219 U. S. 498	304

## TABLE OF CASES CITED.

xxxvii

	PAGE		PAGE
Southern Pine Co. <i>v.</i> Ward, 208 U. S. 126	555	Tang Tun <i>v.</i> Edsell, 223 U. S. 673	484
Southern Ry. <i>v.</i> King, 217 U. S. 524	157	Tap Line Cases, 234 U. S. 1	304
Southern Ry. <i>v.</i> Puckett, 244 U. S. 571	158, 169	Taylor <i>v.</i> Anderson, 234 U. S. 74	23
Standard Computing Scale Co. <i>v.</i> Farrell, 242 Fed. Rep. 87	571, 573	Terhune <i>v.</i> Phillips, 99 U. S. 592	133
Standard Oil Co. <i>v.</i> Graves, 94 Wash. 291	389, 391	Terminal Taxicab Co. <i>v.</i> Dis- trict of Columbia, 241 U. S. 252	304
Standard Stock Food Co. <i>v.</i> Wright, 225 U. S. 540	157, 432	Texas & N. O. R. R. <i>v.</i> Sabine Tram Co., 227 U. S. 111	152
State <i>v.</i> Chicago, Mil. & St. P. Ry., 115 Minn. 51	418	Texas & Pac. Ry. <i>v.</i> American Tie Co., 234 U. S. 138	562
State <i>v.</i> Creamer, 85 Oh. St. 349	159, 160	Thomas Jefferson, The, 10 Wheat. 428	126
State <i>v.</i> Johnson, 123 Mo. 43	250	Tiger <i>v.</i> Western Investment Co., 221 U. S. 286	113
State <i>v.</i> Perley, 173 N. Car. 783	511	Tilt <i>v.</i> Kelsey, 207 U. S. 43	249
State <i>v.</i> Schamber, 39 S. Dak. 492	223	Toledo Newspaper Co. <i>v.</i> United States, 247 U. S. 402	383
State <i>v.</i> Union Stock Yards Co., 81 Neb. 67	306	Transportation Co. <i>v.</i> Chi- cago, 99 U. S. 635	544
Steamboat Orleans <i>v.</i> Phoe- bus, 11 Pet. 175	126	Trimble <i>v.</i> Seattle, 231 U. S. 683	544
Stearns <i>v.</i> Minnesota, 179 U. S. 223	593	Truesdale <i>v.</i> Peoria Grape Sugar Co., 101 Ill. 561	424
Steiner, <i>In re</i> , 195 Fed. Rep. 299	382	Tucker <i>v.</i> Alexandroff, 183 U. S. 424	127
Stevenson <i>v.</i> Fain, 195 U. S. 165	580, 585, 586	Tyler <i>v.</i> Pomeroy, 8 Allen, 480	359
Stewart Min. Co. <i>v.</i> Ontario Min. Co., 237 U. S. 350	24	Tyrell <i>v.</i> Shaffer, 174 Pac. Rep. 1074	181
Stockham <i>v.</i> French, 1 Bing. 365	382	Ubeda <i>v.</i> Zialcita, 226 U. S. 452	77
Stone <i>v.</i> Board of Prison Commrs., 164 Ky. 640	372	Ulfelder Clothing Co., <i>In re</i> 98 Fed. Rep. 409	248
Stone <i>v.</i> United States, 164 U. S. 380	463	Ulmer, <i>In re</i> , 208 Fed. Rep. 461	382
Storti <i>v.</i> Massachusetts, 183 U. S. 138	377	Union Bridge Co. <i>v.</i> United States, 204 U. S. 364	399
Sun Prtg. & Pub. Assn. <i>v.</i> Moore, 183 U. S. 642	365	Union Lime Co. <i>v.</i> Chicago & N. W. Ry., 233 U. S. 211	420
Swift & Co. <i>v.</i> United States, 196 U. S. 375	152	Union Oil Co., 23 L. D. 222; 25 <i>id.</i> 351	345, 346
Sympson <i>v.</i> Juxon, Cro. Jac. 698	145	Union Pac. Ry. <i>v.</i> Chicago, R. I. & Pac. Ry., 163 U. S. 564	33
Taft <i>v.</i> Commonwealth, 158 Mass. 526	544	Union Pac. R. R. <i>v.</i> United States, 52 Ct. Clms. 226	354, 355
Talbert <i>v.</i> United States, 155 U. S. 45	463		

	PAGE		PAGE
Union & Planters' Bank <i>v.</i> Memphis, 189 U. S. 71	553	United States <i>v.</i> Gleason, 175 U. S. 588	412
Union Refrigerator Transit Co. <i>v.</i> Kentucky, 199 U. S.	194	United States <i>v.</i> Grimaud, 220 U. S. 506	399
Union Refrigerator Transit Co. <i>v.</i> Lynch, 177 U. S. 149	283, 288, 294	United States <i>v.</i> Hamburg- Amerikanische &c., 239 U. S. 466	427
Union Stockyards Co. <i>v.</i> United States, 169 Fed. Rep. 404	306	United States <i>v.</i> Hancock, 133 U. S. 193	332
Union Tank Line Co. <i>v.</i> Wright, 146 Ga. 489	276, 280, 288	United States <i>v.</i> Hvoslaf, 237 U. S. 1	443, 508
Union Trust Co. <i>v.</i> Westhus, 228 U. S. 519	592	United States <i>v.</i> Isham, 17 Wall. 496	233
United Railroads of San Francisco <i>v.</i> San Francisco, 239 Fed. Rep. 987	518, 519	United States <i>v.</i> Jin Fuey Moy, 241 U. S. 394	94
United States <i>v.</i> Anderson, 9 Wall. 56	330	United States <i>v.</i> Klein, 13 Wall. 128	331
United States <i>v.</i> Appel, 211 Fed. Rep. 495	382, 383	United States <i>ex rel.</i> Arant <i>v.</i> Lane, 47 App. D. C. 336	368
United States <i>v.</i> Balt. & Ohio R. R., 225 U. S. 306; 231 U. S. 274	304	United States <i>v.</i> Lawrence, 3 Dall. 42	371
United States <i>v.</i> Behan, 110 U. S. 338	320	United States <i>v.</i> Merchants &c. Traffic Assn., 242 U. S. 178	559, 563, 570
United States <i>v.</i> Berdan Fire- Arms Co., 156 U. S. 552	463	United States <i>v.</i> One Distil- lery, 174 U. S. 149	532
United States <i>v.</i> Bethlehem Steel Co., 205 U. S. 105	365	United States <i>v.</i> Padelford, 9 Wall. 531	331
United States <i>v.</i> Boutwell, 17 Wall. 604	201	United States <i>v.</i> Passavant, 169 U. S. 16	38, 40
United States <i>v.</i> Brooklyn Eastern Dist. Terminal, 243 U. S. 647	300	United States <i>v.</i> Pico, 5 Wall. 536	113
United States <i>ex rel.</i> Ber- nardin <i>v.</i> Butterworth, 169 U. S. 600	201	United States <i>v.</i> Ritchie, 17 How. 525	113
United States <i>v.</i> Chicago, Burl. & Q. R. R., 237 U. S. 410	539	United States <i>v.</i> Sandoval, 231 U. S. 28	113
United States <i>v.</i> Clark, 96 U. S. 37	463	United States <i>v.</i> Schooner Peggy, 1 Cranch, 103	427
United States <i>v.</i> Coca Cola Co., 241 U. S. 265	498	United States <i>v.</i> Seufert Bros. Co., 233 Fed. Rep. 579	194
United States <i>v.</i> Doremus, 249 U. S. 86	97, 99, 100	United States <i>v.</i> Sioux City Stock Yards Co., 162 Fed. Rep. 556	305, 306
United States <i>v.</i> Doremus, 246 Fed. Rep. 958	86, 89	United States <i>v.</i> Speed, 8 Wall. 77	320
United States <i>v.</i> Erie R. R., 237 U. S. 402	307, 539	United States <i>v.</i> Sugarman, 245 Fed. Rep. 604	182, 183
		United States <i>v.</i> Temple, 105 U. S. 97	489
		United States <i>v.</i> Tyler, 105 U. S. 244	360
		United States <i>v.</i> Union Stock Yard Co., 226 U. S. 286	304

## TABLE OF CASES CITED.

xxxix

	PAGE		PAGE
United States <i>v.</i> Wildcat, 244		Western Union Tel. Co. <i>v.</i>	
U. S. 111	181	Foster, 247 U. S. 105	250
United States <i>v.</i> Winans, 198		Western Union Tel. Co. <i>v.</i>	
U. S. 371	198	Kansas, 216 U. S. 1	261
United Surety Co. <i>v.</i> American Fruit Co., 238 U. S. 140	184	Western Union Tel. Co. <i>v.</i>	
Veazie Bank <i>v.</i> Fenno, 8 Wall.		Massachusetts, 125 U. S.	
533	93	530	282, 288
Vesey <i>v.</i> Harris, Cro. Car.		Western Union Tel. Co. <i>v.</i>	
328	145	New Hope, 187 U. S.	
Vicksburg <i>v.</i> Vicksburg		419	258
Waterworks Co., 202 U. S.		Western Union Tel. Co. <i>v.</i>	
453	553	Pennsylvania R. R., 195	
Vicksburg <i>v.</i> Vicksburg		U. S. 540	260
Waterworks Co., 206 U. S.		Western Union Tel. Co. <i>v.</i>	
496	407	Richmond, 224 U. S. 160	
Victor Chemical Works <i>v.</i>		257, 258, 260, 261	
Industrial Board, 274 Ill.		Western Union Tel. Co. <i>v.</i>	
11	160	Taggart, 163 U. S. 1	288, 294
Vilas <i>v.</i> Manila, 220 U. S. 345	76	Wheeling & Belmont Bridge	
Wadley Southern Ry. <i>v.</i>		Co. <i>v.</i> Wheeling Bridge Co.,	
Georgia, 235 U. S. 651	424	138 U. S. 287	520
Wagner <i>v.</i> Baltimore, 239		Whitehead <i>v.</i> Galloway, 153	
U. S. 207	69	Pac. Rep. 1101; 157 <i>id.</i>	
Wall <i>v.</i> Cox, 181 U. S. 244	251	xxiii	79, 82
Ward <i>v.</i> Maryland, 12 Wall.		Whiting <i>v.</i> Straup, 17 Wyo.	
418	527	1	347
Waring <i>v.</i> Clarke, 5 How. 441	125	Williams <i>v.</i> Bruffy, 96 U. S.	
Warner Valley Stock Co. <i>v.</i>		176	141
Smith, 165 U. S. 28	201	Williams <i>v.</i> Milton, 215 Mass.	
Waskey <i>v.</i> Hammer, 223 U. S.		1	233
85	346	Williams <i>v.</i> Talladega, 226	
Wear <i>v.</i> Kansas, 245 U. S.		U. S. 404	257, 258
154	45	Williams <i>v.</i> Wingo, 177 U. S.	
Weaver <i>v.</i> Ewers, 195 Fed.		601	520
Rep. 247	509	Williamson <i>v.</i> United States,	
Weber <i>v.</i> Mick, 131 Ill. 520	250	207 U. S. 425	184
Weed <i>v.</i> Snook, 144 Calif.		Wilson <i>v.</i> Mitchell, 48 Colo.	
439	347, 348	454	249
Weeks <i>v.</i> United States, 232		Wilson <i>v.</i> North Carolina,	
U. S. 383	50	169 U. S. 586	450
Werk <i>v.</i> Parker, 221 Fed.		Winnebago, The, 205 U. S.	
Rep. 644; 231 <i>id.</i> 121; 242		354	127
U. S. 645	130, 131	Wisconsin & Mich. Ry. <i>v.</i>	
West <i>v.</i> Camden, 135 U. S. 507	532	Powers, 191 U. S. 379	520
Westermann Co. <i>v.</i> Dispatch		Wisconsin, M. & P. R. R.	
Printing Co., 233 Fed. Rep.		<i>v.</i> Jacobson, 179 U. S.	
609	101, 102	287	421
Western Life Indemnity Co.		Wise <i>v.</i> United States, 249	
<i>v.</i> Rupp, 235 U. S. 261	495	U. S. 361	464
Western Union Tel. Co. <i>v.</i>		Wise <i>v.</i> United States, 52 Ct.	
Alabama State Board of		Clms., 400	361
Assessment, 132 U. S. 472	258	Wood <i>v.</i> Davis, 7 Cranch,	
		271	249



## TABLE OF CASES CITED.

	PAGE		PAGE
Workman <i>v.</i> New York City, 179 U. S. 552	126	Yazoo & M. V. R. R. <i>v.</i> Mul- lins, 115 Miss. 343	531, 532
Wortman <i>v.</i> Griffith, 3 Blatchf. 528	129	Yosemite Min. Co. <i>v.</i> Emer- son, 208 U. S. 25	26
Wright <i>v.</i> Jackson Constr. Co., 138 Tenn. 145	523, 526	Young, <i>Ex parte</i> , 209 U. S. 123	148
Wright <i>v.</i> Union Tank Line Co., 143 Ga. 765	276, 279, 288	Young <i>v.</i> Duncan, 218 Mass. 346	159, 160
Wright <i>v.</i> Yuengling, 155 U. S. 47	133	Zakonaite <i>v.</i> Wolf, 226 U. S. 272	484
Yazoo & M. V. R. R. <i>v.</i> Mul- lins, 249 U. S. 531	530	Zollars <i>v.</i> Evans, 5 Fed. Rep. 172	347



# TABLE OF STATUTES

## CITED IN OPINIONS.

### (A.) STATUTES OF THE UNITED STATES.

	PAGE		PAGE
1789, Sept. 24, c. 20, 1 Stat.		1866, July 24, c. 230, 14 Stat.	
73 (see Judiciary Act)		221	256
1822, March 30, c. 14, 3 Stat.		1866, July 27, c. 278, 14 Stat.	
659	357	292, § 11	355
1833, March 2, c. 87, 4 Stat.		1870, July 8, c. 230, 16 Stat.	
662	357	214, § 101	107
1847, March 2, c. 35, 9 Stat.		1872, May 10, c. 152, 17 Stat.	
149	357	92, § 5	350
1847, March 3, Resolution, 9		1874, June 22, c. 400, 18 Stat.	
Stat. 206	358	194	446
1850, Sept. 20, c. 61, 9 Stat.		1884, June 26, c. 121, 23 Stat.	
466, § 4	354	53, §§ 18, 30	336
1850, Sept. 28, c. 78, 9 Stat.		1886, Aug. 2, c. 840, 24 Stat.	
504, § 1	357	209, § 6	498
1854, Aug. 4, c. 245, 10 Stat.		1887, Feb. 4, c. 104, 24 Stat.	
575	112	379 (see Interstate Com-	
1856, Aug. 18, c. 169, 11 Stat.		merce Acts)	
138	107	1887, Feb. 8, c. 119, 24 Stat.	
1861, July 13, c. 3, 12 Stat.		388	308
255	327	§ 5	309
1861, Aug. 16, Proclamation,		1890, Sept. 29, c. 1040, 26	
12 Stat. 1262	327	Stat. 496	442
1863, Feb. 24, c. 56, 12 Stat.		1890, Oct. 1, c. 1224, 26 Stat.	
664	112	567	41
1863, March 12, c. 120, 12		1891, Feb. 28, c. 383, 26 Stat.	
Stat. 820	325	794	310
§§ 1, 2, 3	329	1891, March 3, c. 517, 26 Stat.	
1864, June 3, c. 106, 13 Stat.		826 (see Judiciary Act)	
102 (see National Bank		1892, July 16, c. 195, 27 Stat.	
Act)		174	355
1864, July 2, c. 217, 13 Stat.		1893, March 2, c. 196, 27	
365, §§ 3, 6	444	Stat. 531 (see Safety Ap-	
1864, July 2, c. 221, 13 Stat.		pliance Act)	
374	447	1893, Nov. 3, c. 12, 28 Stat. 6	350
1864, July 2, c. 225, 13 Stat.		1894, Aug. 13, c. 282, 28 Stat.	
375, § 8	325	279	319
1865, June 13, Proclamation,		1894, Aug. 15, c. 290, 28 Stat.	
13 Stat. 763	325	286	310
1865, June 24, Proclamation,		1895, March 2, c. 194, 28	
13 Stat. 769	328	Stat. 965	107

	PAGE		PAGE
1897, Feb. 11, c. 216, 29 Stat.		1906, June 30, c. 3913, 34	
526.....	346	Stat. 669 (Meat Inspection	
1897, June 7, c. 3, 30 Stat. 62	310	Act).....	480, 497
1898, June 13, c. 448, 30 Stat.		1906, June 30, c. 3915, 34	
448.....	504	Stat. 768 (Food &	
§ 29.....	504	Drugs Act).....	430, 498
§ 31.....	506	§ 8.....	434
1898, July 1, c. 541, 30 Stat.		1907, March 2, c. 2513, 34	
544 (see Bankruptcy Act)		Stat. 1205.....	387
1898, July 2, c. 563, 30 Stat.		1907, March 2, c. 2564, 34	
651.....	350	Stat. 1246 (see Criminal	
1899, March 3, c. 429, 30		Appeals Act)	
Stat. 1307.....	58	1907, March 4, c. 2907, 34	
1900, May 31, c. 598, 31 Stat.		Stat. 1260 (Meat Inspec-	
221.....	310	tion Act).....	499
1900, June 6, c. 786, 31 Stat.		1907, March 4, c. 2939, 34	
414.....	58	Stat. 1415 (see Hours of	
1901, Feb. 2, c. 192, 31 Stat.		Service Act)	
748, § 1.....	360	1908, March 26, c. 102, 35	
1901, March 1, c. 676, 31		Stat. 48, § 2.....	441
Stat. 861.....	178	§ 3.....	442
1902, June 27, c. 1160, 32		1908, April 22, c. 149, 35 Stat.	
Stat. 406.....	506	65 (see Employers' Liabil-	
§ 3.....	507	ity Act)	
1902, June 30, c. 1323, 32		1908, May 27, c. 199, 35 Stat.	
Stat. 500.....	178	312, § 3.....	179
1902, July 1, c. 1369, 32 Stat.		1909, March 4, c. 320, 35	
691.....	76, 426	Stat. 1075, §§ 1, 5, 25....	104
§ 10.....	76	1909, March 4, c. 321, 35	
1903, Feb. 5, c. 487, 32 Stat.		Stat. 1088 (see Criminal	
797 (see Bankruptcy		Code)	
Act)		1910, April 5, c. 143, 36 Stat.	
§ 6.....	249	291 (see Employers' Liabil-	
§§ 8, 13.....	251	ity Act)	
1903, Feb. 12, c. 548, 32 Stat.		1910, June 18, c. 309, 36 Stat.	
825.....	342	539 (see Interstate	
1903, Feb. 19, c. 707, 32 Stat.		Commerce Acts)	
841.....	82	§ 8.....	558
1903, March 2, c. 976, 32		1910, June 23, c. 373, 36 Stat.	
Stat. 943 (see Safety		604.....	128
Appliance Act)		1910, June 25, c. 412, 36	
§ 2.....	536	Stat. 838 (see Bankruptcy	
1904, April 28, c. 1758, 33		Act)	
Stat. 429, § 2.....	43	1910, June 25, c. 421, 36 Stat.	
1906, June 21, c. 3504, 34		847, § 2.....	347
Stat. 343.....	81	1910, June 25, c. 423, 36 Stat.	
1906, June 29, c. 3591, 34		851.....	488
Stat. 584 (see Inter-		1910, June 25, c. 431, 36 Stat.	
state Commerce Acts)		855.....	311
§ 7.....	191	1911, Feb. 17, c. 103, 36 Stat.	
1906, June 29, c. 3594, 34		913.....	529
Stat. 607 (see Twenty-		1911, March 2, c. 201, 36	
Eight Hour Law)		Stat. 1015.....	347

## TABLE OF STATUTES CITED.

xliii

	PAGE		PAGE
1911, March 3, c. 231, 36 Stat. 1087 (see Judicial Code)		1916, Sept. 6, § 6. . . . .	585, 586
1912, July 27, c. 25b, 37 Stat. 240. . . . .	506	§ 7. . . . .	166
§ 2. . . . .	507	1916, Sept. 7, c. 451, 39 Stat. 728. . . . .	116
1912, Aug. 23, c. 352, 37 Stat. 416. . . . .	438	1917, March 3, c. 162, 39 Stat. 1058, § 5. . . . .	373
1912, Aug. 24, c. 356, 37 Stat. 488. . . . .	104	1917, May 18, c. 15, 40 Stat. 76 (Selective Service Act) . . . . .	398
1912, Aug. 24, c. 389, 37 Stat. 557, § 8. . . . .	453	§ 13. . . . .	398
1912, Aug. 24, c. 390, 37 Stat. 560, §§ 2, 3. . . . .	44	1917, June 15, c. 29, 40 Stat. 182. . . . .	116
1913, March 2, c. 93, 37 Stat. 704. . . . .	355	1917, June 15, c. 30, 40 Stat. 217 (Espionage Act) . . . . .	
1913, March 3, c. 117, 37 Stat. 732. . . . .	438	48, 183, 205, 212	
1913, March 4, c. 143, 37 Stat. 791. . . . .	453	§ 3. . . . .	48, 183, 205, 212
1913, Oct. 3, c. 16, 38 Stat. 114. . . . .	35, 230	§ 4. . . . .	52, 209
Par. E, § 4. . . . .	35	Title XII, § 2. . . . .	49
§ II (Income Tax Act), Pars. G (a), D. . . . .	230	1917, Aug. 9, c. 50, 40 Stat. 270, § 4. . . . .	564
1913, Oct. 22, c. 32, 38 Stat. 219. . . . .	563	1917, Dec. 26, Proclamation, 40 Stat. 1733. . . . .	564
1914, April 25, c. 71, 38 Stat. 347, § 11. . . . .	360	1918, May 16, c. 75, 40 Stat. 553 (Espionage Act) . . . . .	
1914, April 27, c. 72, 38 Stat. 351. . . . .	358	53, 210, 212	
1914, Dec. 17, c. 1, 38 Stat. 785. . . . .	89, 97	§ 1. . . . .	212
§ 1. . . . .	90, 97	1919, Feb. 26. . . . .	589
§ 2. . . . .	89, 97	Constitution. See Index at end of volume.	
§ 8. . . . .	94	Revised Statutes.	
§ 9. . . . .	93	§ 13. . . . .	53
1915, Jan. 28, c. 22, 38 Stat. 804. . . . .	546	§ 563 (8). . . . .	125
1915, March 4, c. 143, 38 Stat. 1062. . . . .	358	§ 910. . . . .	349
1915, March 4, c. 169, 38 Stat. 1192. . . . .	529	§ 941. . . . .	118
1915, March 4, c. 176, 38 Stat. 1196. . . . .	220	§ 989. . . . .	235
1916, Aug. 29, c. 418, 39 Stat. 619. . . . .	564	§ 2259. . . . .	447
1916, Sept. 6, c. 448, 39 Stat. 726. . 75, 154, 165, 264, 343, 430, 449, 492, 529, 532, 579, 581, 583-586, 588, 592, 593		§ 2319. . . . .	344
§ 2. . . . .	165	§ 2320. . . . .	344
		§ 2322. . . . .	22, 344
		§ 2324. . . . .	22, 344
		§ 2325. . . . .	22, 345
		§ 2326. . . . .	345
		§ 2329. . . . .	345
		§ 2332. . . . .	22
		§ 2333. . . . .	345
		§ 2357. . . . .	447
		§ 2364. . . . .	447
		§ 3226. . . . .	507
		§ 3228. . . . .	508
		§ 3709. . . . .	317
		§ 4283. . . . .	336
		§ 4966. . . . .	107
		§ 5139. . . . .	449

	PAGE		PAGE
Bankruptcy Act . . .	175, 249, 548	Judicial Code . . . . .	56, 122, 324
§ 1 (8) . . . . .	549	§ 24 . . . . .	141
2 . . . . .	549	§ 24 (3) . . . . .	125
2 (20) . . . . .	549	§ 24 (14) . . . . .	573
18b . . . . .	249	§ 51 . . . . .	550
23b . . . . .	548	§ 54 . . . . .	550
59f . . . . .	249	§ 56 . . . . .	243
60b . . . . .	548	§ 128 . . 61, 141, 183, 553,	
64a . . . . .	175	580, 585, 586	
65b . . . . .	177	§ 134 . . . . .	56
67d . . . . .	175	§ 145 . . . . .	442
67e . . . . .	548	§ 162 . . . . .	324
70e . . . . .	548	§ 237 . . 154, 165, 343,	
Compiled Statutes, 1916.		430, 459, 492, 529, 532,	
vol. 4, § 3564 . . . . .	58	579-581, 583-585, 588,	
vol. 6, § 6287g . . . . .	89, 97	592, 593	
Criminal Appeals Act . . . . .	89	§ 238 . . 122, 141, 183,	
Criminal Code, § 37 . . . . .	97	406, 546, 553, 573	
Employers' Liability Act		§ 239 . . . . .	141
158, 165, 169, 516, 529, 532		§ 240 . . . . .	62, 141
Hours of Service Act . . . . .	299	§ 241 . . . . .	57, 141
§ 1 . . . . .	299	§ 247 . . . . .	57
§ 2 . . . . .	300	§ 248 . . . . .	75, 264
Immigration Laws . . . . .	376	Judiciary Act, 1789, § 9 . . .	125
Interstate Commerce Acts . .	558	Judiciary Act, 1891 . . . . .	60, 140
§ 4 . . . . .	558	§ 5 . . . . .	60, 140
§ 6 . . . . .	565	§ 6 . . . . .	61, 141
§ 13 . . . . .	562	National Bank Act . . . . .	6, 449
§ 15 . . . . .	562	§ 12 . . . . .	449
§ 20 . . . . .	191	Safety Appliance Act . . .	305, 535
		Twenty-eight Hour Law . . .	306

## (B.) STATUTES OF THE STATES AND TERRITORIES.

Alaska.		District of Columbia.	
Civil Code, §§ 504, 505 . . .	58	Code, c. 42 . . . . .	371
Crim. Code, § 202 . . . . .	58	§ 1265 . . . . .	372
Arizona.		Georgia.	
Penal Code, par. 717 . . .	268	Constitution . . . . .	279
Arkansas.		1915, Laws, ex. sess., Pt.	
Constitution, 1874, Art.		1, title 2, No. 4, §§ 16,	
XVI, § 1 . . . . .	170	30, p. 90 . . . . .	459
1893, Acts, p. 145 . . . . .	171	Civil Code, § 989 . . .	280, 287
1907, Act Feb. 9 . . . . .	137	§ 990 . . .	280, 287
Mansfield's Digest, 1884,		§ 1031 . . .	281, 287
c. 27, § 671 . . . . .	83	§§ 1045-1046 . . .	295
California.		§§ 1050-1054 . . .	295
Constitution, 1879, Art.		Illinois.	
I, § 14 . . . . .	521	Hurd's Stats., 1916, c.	
Constitution, (amdt.		111a, § 45 . . . . .	424
1911), Art. XI, § 19 . . .	520	Indiana.	
1911, Stats., c. 580 . . . . .	520	1907, Acts, c. 206 . . . . .	433
Civil Code, § 499 . . . . .	519	Burns' Anno. Stats.,	
		1914, § 7855 . . . . .	449



# TABLE OF STATUTES CITED.

xiv

	PAGE		PAGE
Iowa.		Ohio.	
Workmen's Compensation Law.....	161	Workmen's Compensation Law.....	160
Kansas.		Philippine Islands.	
1907, Laws, c. 266.....	429	Act No. 666.....	77
§ 3.....	437	§§ 9, 12.....	78
§ 8.....	436	§ 14.....	77
1909, Laws, c. 184.....	429	Act No. 744, § 4.....	78
Gen. Stats., 1909, c. 35.....	429	Act No. 2307, § 16 (e) ..	426
1915, c. 32.....	429	Act No. 2694.....	426
Minnesota.		Compiled Acts, §§ 63, 66	78
Gen. Stats., 1913,		§ 68.....	77
§§ 4231, 4284.....	418	South Dakota.	
Mississippi.		Constitution.....	221
1912, Laws, c. 215.....	529, 532	Rev. Pol. Code, 1903,	
Code, 1906, § 1985.....	529, 532	§ 333.....	221
Missouri.		Tennessee.	
Constitution, 1875, Art.		1909, Acts, c. 479, § 4 ..	525
9, §§ 20, 21.....	70	Texas.	
New Mexico.		1913, Laws, c. 179.....	154
1851-1852, Laws, pp.		§ 2, Pt. 1.....	156
176, 418.....	112	Vernon Sayles' Civ.	
New York.		Stats., 1914, Arts.	
1703 (Colonial Act),		6640-6652.....	159
June 19.....	576	Virginia.	
1804, Act Feb. 2.....	576	Constitution, 1902, § 58.	544
1851, Laws, c. 134, §§ 16,		1893-1894, Acts, c. 743.	542
17.....	576	1908, Acts, c. 349.....	542
1896, Laws, c. 376, § 11.	576	Code, §§ 604-623.....	176
1909, Laws, c. 25.....	572	§ 1042.....	257
1910, Laws, c. 187.....	572	§§ 2137, 2137a... ..	542
1914, Laws, c. 521.....	572	Washington.	
General Business Law,		1905, Laws, c. 161.....	391
§§ 11-15.....	572	1907, Laws, c. 192.....	391
Transportation Corpora-		1913, Laws, c. 60.....	392
tions Law, Art. III,		Rem. Code, § 3000-1... ..	392
§ 10.....	300	§§ 6051, 6052.....	391
Workmen's Compensation		§§ 6053, 6055.....	392
Law.....	159, 169		

## (C.) TREATIES.

Indian.		Mexico ( <i>Cont.</i> )	
1855, June 9, 12 Stat. 25,		1031.....	111
Art. III (Yakima)...	195	Art. VI.....	114
1855, June 25, 12 Stat. 37			
(Walla-Walla and		Spain.	
Wasco).....	196	1898, Dec. 10, 30 Stat.	
Mexico.		1754, Arts. VIII, XIII	75
1853, Dec. 30, 10 Stat.			



## (D.) FOREIGN LAWS.

	PAGE		PAGE
Great Britain.		Panama.	
1860, Act Aug. 28, 23 &		Civil Code.....	43
24 Vict., c. 129.....	36	Art. 2341.....	45
Defence of the Realm		Arts. 2347, 2349.....	46
Acts.....	413		

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1918.

---

HARRIMAN NATIONAL BANK OF NEW YORK *v.*  
SELDOMRIDGE, AS RECEIVER OF THE MER-  
CANTILE NATIONAL BANK OF PUEBLO, COLO-  
RADO.

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

No. 173. Argued January 31, 1919.—Decided March 3, 1919.

A, the cashier of the M. National Bank and in control of its affairs, acting in the name of B, its president, by correspondence induced the H. National Bank to agree to lend B a sum of money to be secured by the joint note of A and B and certain collateral. A then bought certain shares from T, with a check on the M. Bank signed with B's name, and forwarded by mail to the H. Bank a forged note and collaterals in apparent compliance with the loan agreement, upon receipt of which the H. Bank credited B with the amount agreed on; but in the meantime the check to T had been paid by the M. Bank, and A, to meet it, had made a slip falsely purporting to show a deposit there by B of a check on the H. Bank for the amount of the proposed loan. Having at first credited B with the amount of the loan, the H. Bank, under instructions sent by A in the names of the M. Bank and of B, respectively, made book-keeping entries transferring the credit to the M. Bank, and later, upon receiving notice from B to cancel A's authority to act for the M. Bank, made further entries withdrawing the credit from the

M. Bank's account; and still later, upon learning that the M. Bank had failed, made additional entries to cancel the loan. B repudiated A's action and denied liability. *Held*: (1) That, as against the M. Bank, the H. Bank had the right to rescind and cancel the loan agreement for failure to comply with its conditions and for the fraud; (2) that the payment of the check to T and the making of the fraudulent deposit to meet it, having occurred before the H. Bank received the note and collateral or made any entry on its books, could not subject it to liability in favor of the M. Bank; (3) that the bookkeeping entries made by the H. Bank could not create such liability, in the absence of any consideration moving to it from the M. Bank, and in the absence of any ground for estoppel. P. 10.

240 Fed. Rep. 111, reversed.

THE case is stated in the opinion.

*Mr. Charles E. Hughes*, with whom *Mr. Bertram L. Kraus* was on the brief, for plaintiff in error:

The credit was obtained by fraud, the collateral security being forged, and hence the defendant was entitled to rescind. The evidence clearly shows that the note itself and the powers of attorney for transfer of the certificates of stock were forged. In view of the forged collateral, it makes no difference whether W. B. Slaughter authorized his signature and thus became a party to the note or not. *Bradley v. Seaboard National Bank*, 167 N. Y. 427; *Flatow v. Jefferson Bank*, 135 App. Div. 24; *Mann v. Franklin Trust Co.*, 158 App. Div. 491.

On the transfer of the credit, the Mercantile Bank took subject to all equities. It had no standing superior to that of the Slaughters. There was no negotiable paper used; the transfer was merely a book entry of credit. The suggestion of an account stated between the Mercantile Bank and the defendant is unavailing. The former was simply the transferee of a chose in action created through fraud. An account stated may be opened on proof of fraud or mistake. *Lockwood v. Thorne*, 18 N. Y. 285, 292. See also *Greenhalgh Co. v. Farmers National Bank*, 226

## 1. Argument for Plaintiff in Error.

Pa. St. 184; *Shipman v. Bank of State of New York*, 126 N. Y. 318, 327; *Talcott v. First National Bank*, 53 Kansas, 480; *Curry v. Wisconsin National Bank*, 149 Wisconsin, 413; *First National Bank v. Whitman*, 94 U. S. 343, 346. Mere book entries do not create an obligation. *Rankin v. City National Bank*, 208 U. S. 541, 545, 546; *Cherry v. City National Bank*, 144 Fed. Rep. 587; *Kendrick State Bank v. First National Bank of Portland*, 213 Fed. Rep. 610; *Modern Woodmen of America v. Union National Bank*, 108 Fed. Rep. 753; *Talcott v. First National Bank*, *supra*.

The defendant is not estopped from showing the fraud and denying liability. Even if the payment had been made upon the faith of a representation by the defendant that it would make the loan or extend the credit, the representation being explicitly conditioned upon the receipt of described collateral, the defendant could not be held on the delivery of forged collateral. To base an estoppel, the representation must be taken as it is made. There was no payment which changed the position of the Mercantile Bank. The defendant is thus clearly entitled to rescind, both as against the Slaughters and the Mercantile Bank; and there is no basis for the finding of estoppel. *Selover v. First National Bank*, 77 Minnesota, 140. The receiver contends that if W. B. Slaughter had drawn a check against the amount credited to him and given the check to the Mercantile Bank which had been paid, the latter could have retained the avails of the check, citing *American National Bank v. Miller*, 185 Fed. Rep. 338; 229 U. S. 517; *National Bank v. Burkhardt*, 100 U. S. 686. But this introduces a question of negotiable paper.

C. C. Slaughter was acting for the bank; he had no interest adverse to the bank; it was a transaction in fraud of the defendant but not in fraud of the Mercantile Bank. If the bank is to take the benefit of the act of its agent it

must take the burden of what the agent knows at the time of the transaction. *The Distilled Spirits*, 11 Wall. 356, 366-368; *Ditty v. Dominion National Bank*, 75 Fed. Rep. 769; *Aldrich v. Chemical National Bank*, 176 U. S. 618, 633, 634; *Holden v. New York & Erie Bank*, 72 N. Y. 286.

The receiver stands in no better position than the bank. *Rankin v. City National Bank*, 208 U. S. 541.

*Mr. Stuart G. Gibboney*, with whom *Mr. William A. Barber* and *Mr. George M. Burditt* were on the brief, for defendant in error:

The Mercantile Bank, having to its credit \$53,000, was entitled to use the money as it saw fit unless it was guilty of fraud, and the defendant was bound to retain that amount and to pay it out only upon the order of the Mercantile Bank. Concededly the defendant withdrew \$30,000 without any such order. A bank cannot discharge its liability to a depositor except by payment to him or on his written order. *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26.

The statement sent to the Mercantile Bank showing the credit was binding upon the defendant unless there was some mutual mistake or fraud. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Daintry v. Evans*, 148 App. Div. 275. No mistake on the part of the Mercantile Bank has been shown. The evidence shows that it was the practice of C. C. Slaughter to draw checks against his father's account, to which the latter never objected. The Mercantile Bank had no knowledge of the loan agreement, nor did it rely upon any such agreement. The only knowledge it had was the deposit ticket and the subsequent information from the defendant that the \$30,000 had been placed to its credit. The transfer of the credit had the same effect as would the deposit of cash. The case is like *American National Bank v. Miller*, 229 U. S. 517, where it was held that the collection of a



## 1. Argument for Defendant in Error.

check and crediting by a bank on which the check is drawn, in the absence of fraud or mistake, constitutes payment. See also *National Bank v. Burkhardt*, 100 U. S. 686; *Oddie v. National City Bank*, 45 N. Y. 735. The fact that the Mercantile Bank did not forward a check signed by W. B. Slaughter is immaterial. It had his authority, his assignment, in the form of a deposit ticket; it paid out all of the funds for his benefit. The defendant accepted a telegram as sufficient authority for the transfer. Both banks acted in good faith. Care upon defendant's part would have saved the situation.

The knowledge of C. C. Slaughter cannot be imputed to the Mercantile Bank, because the Slaughters were acting in their individual capacities, in a transaction in which they were personally interested, and their interests were adverse to those of the bank. *American National Bank v. Miller*, *supra*; *American Surety Co. v. Pauly*, 170 U. S. 133, 156; *Levy & Cohn Co. v. Kaufman*, 114 Fed. Rep. 170; *Bank of Overton v. Thompson*, 118 Fed. Rep. 798; *Hilliard v. Lyons*, 180 Fed. Rep. 685; *In re United States Hair Co.*, 239 Fed. Rep. 703. The Mercantile Bank did not derive its right to the \$30,000 by any connection with the loan, but by paying out its money on the order of W. B. Slaughter's agent, on the assertion that the amount had been deposited to its credit in the defendant bank.

While the defendant was entitled to rescind as against the Slaughters because of the fraud, this is not true as to the Mercantile Bank, which had become the owner of those funds for value without notice. The book entries are only evidence of the happening of a specific event—the transfer from W. B. Slaughter's account to that of the Mercantile Bank of \$30,000. That is just as real as if the defendant had handed to the Mercantile Bank \$30,000 in cash.

The cases cited to the effect that mere book entries do

not create an obligation are inapplicable here. Those were cases where the original parties were still the ones in interest, and there were no third parties who had, without notice and for value, parted with a thing of value. The Mercantile Bank is not now seeking to retain a gain by reason of the transaction, as in *Selover v. First National Bank*, 77 Minnesota, 110, but to recoup its loss brought about by the extreme negligence of the defendant. In *The Distilled Spirits Case*, 11 Wall. 356, the agent had no interest adverse to that of the principal. In *Ditty v. Dominion National Bank*, 75 Fed. Rep. 769; *Aldrich v. Chemical National Bank*, 176 U. S. 618; and *Holden v. New York & Erie Bank*, 72 N. Y. 286, the bank had derived a specific benefit from the transaction which it was seeking to hold.

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

Following the failure in March, 1915, of the Mercantile National Bank of Pueblo, Colorado, the Receiver appointed by the Comptroller commenced this suit to recover from the Harriman National Bank of New York City \$30,000, alleged to be due to the Mercantile Bank. On issue joined before a jury, the court, after refusing a request of the Harriman National Bank for a peremptory instruction directing a verdict in its favor, granted a request of like character made by the Receiver, and a judgment on the resulting verdict for the amount claimed was entered.

The case is before us on error to the judgment of the court below affirming that of the trial court, our jurisdiction to review resulting because the case from its inception involved the enforcement of the National Banking Act, and therefore, was not dependent in the trial court solely upon diversity of citizenship. *Auten v.*

## 1. Opinion of the Court.

*United States National Bank*, 174 U. S. 125, 141; *International Trust Co. v. Weeks*, 203 U. S. 364, 366.

The case is this. W. B. Slaughter, through stock ownership, controlled the Mercantile National Bank of Pueblo, Colorado. He was president and his son, C. C. Slaughter, was cashier. Prior to 1915, Slaughter, the president, removed his residence from Pueblo to Texas, engaging there in the cattle business and leaving his son, the cashier in complete control of the Mercantile Bank and of all its affairs. W. B. Slaughter was also the president of the Silverton National Bank of Silverton, Colorado, and controlled the affairs of that bank by the ownership of a majority of its stock. At Silverton there was another national bank carrying on business, the First National, the majority of whose stock was owned by one Thatcher.

The correspondent of the Mercantile Bank in New York City was the Harriman National, with which it had a checking account. On January 28, 1915, C. C. Slaughter, the cashier of the Mercantile, dictated a letter to the Harriman which was dated at Pueblo and written on the letterhead of the Mercantile Bank, purporting to be from W. B. Slaughter, whose signature was affixed by a rubber stamp. By this letter its assumed writer, after referring to his ownership and control of the Silverton National, stated his purpose to buy out the interest of Thatcher in the First National Bank of Silverton and after doing so to consolidate the two banks, and requested a loan of \$30,000 to enable him to accomplish the purpose. It was stated that it was proposed to evidence the loan by a note at sixty days, to be signed by the writer, W. B. Slaughter, and by his son C. C. Slaughter, if the bank so desired, and to secure the note by the pledge of 500 shares of the Mercantile and 400 shares of the First National of Silverton. The Harriman Bank received this letter on the first of February and at once telegraphed W. B. Slaughter, president of the Mercantile Bank at Pueblo,

that, whenever desired, the Harriman would be willing to make the loan, as requested. On the same day the bank wrote a letter to W. B. Slaughter, president at Pueblo, but marked it personal, repeating and confirming the telegram, and inclosing a blank form of collateral note to be executed and sent to the bank with the collateral when the money was desired.

The telegram of the first of February announcing the willingness of the Harriman Bank to make the loan having come into the hands of C. C. Slaughter on the day it was sent, he ordered a seal to be made which he said was intended as the seal of the First National Bank of Silverton, and on the fifth of February bought from a printer blank forms of certificates of stock. On the next day, Saturday the 6th, purporting to act as agent of W. B. Slaughter, C. C. Slaughter bought from Thatcher his interest in the First National of Silverton, and gave a check in the name of W. B. Slaughter and as his representative, on the Mercantile National, for \$35,000 in part payment. On Sunday, February 7th, C. C. Slaughter caused a letter to be prepared falsely purporting to be written and signed by W. B. Slaughter, acknowledging the receipt of the telegram sent by the Harriman Bank on the first and asking that the loan be consummated. In this letter there was returned the collateral note which the bank had sent for execution, along with the promised collateral, that is, certificates for 400 shares of the First National of Silverton and 500 shares of the Mercantile at Pueblo. The signature of W. B. Slaughter to the note was forged and the collaterals were also forged, the first, the certificates of the Silverton Bank stock, because they were fabricated by the use of the printed certificates and seal which had been acquired a few days before and described shares which had no existence, and the second, the Mercantile Bank stock, because, although the certificates represented stock standing in the name of W. B. Slaughter on the



## 1. Opinion of the Court.

books of that bank, the powers of attorney purporting to have been given by W. B. Slaughter to enable them to be transferred to the Harriman Bank, were forged.

To meet the check for \$35,000 given on Saturday for the Thatcher purchase, on Monday morning, February 8th, C. C. Slaughter made out a deposit slip to show the deposit by W. B. Slaughter of a check on the Harriman National for \$30,000, although no such check was in fact deposited; and on that day the check in favor of Thatcher for \$35,000 was paid and debited by the Mercantile to W. B. Slaughter's account. The letter of the seventh sending the note to the Harriman reached that bank on the tenth and, complying with the request it contained, a credit in favor of W. B. Slaughter for \$30,000, the amount covered by the loan, was entered by the Harriman on its books.

On the seventeenth of February the Mercantile Bank overdrew its account in the Harriman to the extent of \$8,000, which that bank honored. It, however, telegraphed the Mercantile, calling attention to the overdraft and asked whether a remittance to cover it had been made. The telegram, moreover, referred to the \$30,000 credit in favor of W. B. Slaughter and asked whether possibly it was intended that the amount of the loan credit should be placed to the account of the bank. In reply, C. C. Slaughter dictated a telegram in the name of the Mercantile Bank instructing that the amount of the credit of W. B. Slaughter be transferred to the credit of the Mercantile. On the receipt of this telegram the Harriman made the necessary bookkeeping entries to transfer the credit of \$30,000 from the account of W. B. Slaughter to that of the Mercantile National Bank. On the next day, the eighteenth, however, the Harriman wrote W. B. Slaughter, Mercantile National Bank, Pueblo, informing him of the instructions they had received from C. C. Slaughter and what they had done under them, and ask-



ing the former's approval. This letter was replied to on February 22d by C. C. Slaughter confirming his previous telegram and saying that the original intention was that the money borrowed should go to the credit of the Mercantile Bank for the use of W. B. Slaughter.

Thus things stood until the twenty-third of March, when the Harriman received a telegram from W. B. Slaughter, president of the Mercantile Bank, telling them to cancel all authority of C. C. Slaughter to act as an officer of the Mercantile because he had resigned. The Harriman thereupon telegraphed and wrote W. B. Slaughter, informing him of what had transpired on the subject of the credit for the loan under the note and its transfer, and saying that as he had given no personal instructions on the subject, they had made bookkeeping entries taking the \$30,000 out of the account of the Mercantile so as to hold it for a full understanding of the situation; and when, a few days later, the Harriman learned of the failure of the Mercantile, such entries were made as to cancel the loan without diminishing or changing the credits which otherwise existed in favor of the Mercantile.

Subsequently W. B. Slaughter notified the Harriman that he had never applied for the loan in question, or signed the note which evidenced it, and denied all liability. The appointment of the Receiver and the bringing of the suit which we have stated at the outset followed in due season.

Passing the fact that both parties to the loan agreement, the Harriman Bank on the one side and W. B. Slaughter on the other, insist, although for different reasons, that the loan agreement has no existence, there nevertheless can be no room for dispute that such contract, by the failure to comply with its conditions and by the fraud and forgery committed concerning the collaterals as between the parties to it and those in privity, was rightly canceled and can be the source of no obligation against

1.

## Opinion of the Court.

the Harriman Bank. The right of the Mercantile Bank as here asserted, if it has any existence, must rest, therefore, not in the loan agreement, but on some condition or consideration extraneous to that contract creating as against the Harriman and in favor of the Mercantile the duty to pay the amount which both the courts below awarded.

No semblance of ground, however, supporting that view results from the undisputed facts which we have stated unless it can be sustained from two considerations: (1) the payment which was made by the Mercantile on February 8th of the check purporting to be drawn by W. B. Slaughter in favor of Thatcher and the making by C. C. Slaughter on the eighth of the fraudulent and false deposit slip purporting to show the deposit on that day by W. B. Slaughter of a check drawn by him on the Harriman for \$30,000; and (2) the bookkeeping entries which were made by the Harriman on the eighteenth transferring the credit for the amount of the agreed loan from the account of W. B. Slaughter to that of the Mercantile Bank. But a moment's thought demonstrates that the circumstances referred to cannot possibly sustain the conclusions stated. This is true as to the first because both the payment of the check by the Mercantile and the making of the false deposit slip took place before the Harriman had even received the collateral note or made any entry on its books concerning the same; and the second because the mere bookkeeping entry made by the Harriman of credit to the Mercantile, in the very nature of things, was incapable alone of conferring rights on the Mercantile to which it was not otherwise entitled, especially in the absence of all consideration moving from the Mercantile to the Harriman and the non-existence of any condition upon which to base even the pretext of estoppel in favor of the Mercantile as against the Harriman resulting from action taken by the former upon the faith of the book-

keeping credit. Indeed, when the reasoning upon which the relief below was awarded is considered, and the arguments pressed at bar sustaining that result are weighed, they all at last come to the assumption that by some undisclosed process the Mercantile Bank was entitled to enforce as against the Harriman the contract for the loan agreement made with W. B. Slaughter, without the duty to comply with the obligations of that contract, and therefore became possessed of the power to enforce the contract against the Harriman despite the fraud and forgery practiced upon the Harriman in the attempt which was made to procure the benefits of the loan agreement.

It follows that the judgment of the Circuit Court of Appeals and that of the District Court must be and they are reversed, and the case be remanded to the District Court with instructions, that after setting aside its judgment, it take such further proceedings as may be in conformity with this opinion.

*And it is so ordered.*

---

BUTTE & SUPERIOR COPPER COMPANY, LIMITED, *v.* CLARK-MONTANA REALTY COMPANY ET AL.

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

No. 598. Argued January 10, 13, 1919.—Decided March 3, 1919.

In a suit brought in the District Court to determine extralateral rights between patented mining claims, the complaint averred that the construction and application of §§ 2322-2332 of the Revised Statutes were involved, set up the discovery, location and patent of plaintiffs' claim, and, to meet a defect of the location notice under the state law, averred actual, open, exclusive and uninterrupted possession and working of the plaintiffs' claim for more than five

years from the date of discovery, the limitation period provided by § 2332. *Held*, that the latter allegations were part of plaintiffs' case, and involved a construction and application of § 2332, and hence the judgment of the Circuit Court of Appeals was reviewable in this court by appeal. Pp. 20-23.

In determining extralateral rights between adjoining patented mining claims, a failure of the earlier location notice to comply with the state law is immaterial if the junior locator, at the time of locating, knew that the earlier locator was in possession of and working his claim. The purpose of a location notice is but to give warning of the prior appropriation. P. 26.

The unequivocal possession of a mining claim gives constructive notice of the possessor's rights thereunder. *Id.*

As between two patented mining claims, priority of right to the vein of the one where it dips beneath, and unites with the vein of, the other is not determined by the dates of entries and patents but by priority of discovery and location. P. 27.

In the absence from the record of an adverse suit, there is no presumption that anything was considered and determined by the Land Department, in patenting a mining claim, except the question of the right to the surface. *Id.*

An application to patent a lode mining claim invites only such contests as affect the surface; and where no surface conflict involves the apex, a prior locator of an adjacent unpatented claim is not obliged to adverse in order to protect his right to follow his vein extralaterally on the dip. P. 28.

Findings of fact made by the District Court concerning the apexes, courses and dips of mineral veins in dispute, and affirmed by the Circuit Court of Appeals, must be accepted by this court unless clearly wrong. P. 30.

A release and quitclaim of an undivided interest in a designated mining claim, though with expressed intent to convey all the grantor's right, title and interest in the property, together with all earth, rock, ores, etc., found therein, *held*, to pass only rights and interests appertaining to that claim under its location and patent and not to affect the extralateral rights appertaining to an adjoining claim owned by the grantor. P. 30. *Montana Mining Co. v. St. Louis Mining Co.*, 204 U. S. 204, distinguished.

In a suit to establish extralateral rights and for an accounting for ores, where the plaintiffs were awarded relief as to their principal vein, the court also found that a branch or strand of it apexed in plaintiffs' claim and dipped beyond the side line into defendant's



territory, uniting there with the main vein again, but the place where the apex crossed the line could not be fixed. *Held* proper, while decreeing plaintiffs the owners of the strand vein and entitled to its possession throughout its depth as far as its apex extended within their claim, to reserve the question of such extent and the measurement of plaintiffs' rights thereunder for determination in future supplemental proceedings in the light of further mining development. P. 32.

248 Fed. Rep. 609, affirmed.

THE case is stated in the opinion.

*Mr. William Wallace, Jr.*, with whom *Mr. T. L. Chadbourne* and *Mr. K. R. Babbitt* were on the briefs, for appellant:

As between those asserting prior rights to vein areas and ore bodies situated such as are those here in controversy, the question of priority of location is one of naked fact—just as it would have been before the patent entry. *Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co.*, 196 U. S. 337; *Last Chance Mining Co. v. Tyler Mining Co.*, 61 Fed. Rep. 557; *Hickey v. Anaconda Mining Co.*, 33 Montana, 46. But a patent may not be used to create a false priority wherewith to destroy preëxisting rights of others. He who first completes a valid location gains the first segregation and first mining right. *Creede Case, supra*; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 649. A locator may not relate to his discovery, as against intervening rights to the same surface or rights appurtenant to adjoining free surface, location of which was first completed, unless he completed his own location within the time provided by law. *Creede Case, supra*; *Cedar Canyon Mining Co. v. Yarwood*, 27 Washington, 271.

As to the time when the marking of the Elm Orlu was completed, there can be no aid by presumption. There is no absolute finding of the trial court back of 1876. There is no affirmative evidence upon which this court could find an earlier date. A dominant presumption al-



ways obtains in favor of the owner of the surface against others seeking to take vein areas or ores therein beneath it. *Del Monte Mining Co. v. Last Chance Mining Co.*, 171 U. S. 55, 66; *Montana Mining Co. v. St. Louis Mining Co.*, 194 U. S. 235, 239; *Mammoth Mining Co. v. Grand Central Mining Co.*, 213 U. S. 72. Plaintiffs must prove a valid location anterior to the Black Rock patent and location, for they have admitted the latter to be valid.

The presumption could not apply in favor of the plaintiffs on their Elm Orlu claim because: (1) The finding with respect to discovery and marking replaced both presumption and evidence; (2) the Elm Orlu having affirmatively alleged the facts in that regard attempted to prove them; (3) a presumption cannot flow from a record not authorized by law; (4) when the only step proven—the record—appears on its face to have been taken contrary to law, it cannot form any basis for a presumption that either of the other two steps were taken in accordance with law; (5) the Elm Orlu as an extralateral claimant can have no aid by presumption to take ores from beneath the Black Rock or Jersey Blue surface. [Counsel here cited and analyzed *Hickey v. Anaconda Mining Co.*, *supra*; *Washoe Copper Co. v. Junila*, 43 Montana, 178; *Creede Case*, 196 U. S. 337; *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U. S. 499; *Baker v. Butte City Water Co.*, 196 U. S. 119; *Lawson v. United States Mining Co.*, 207 U. S. 1; *Hussman v. Durham*, 165 U. S. 144, 148; *Clason v. Matko*, 223 U. S. 646; *El Paso Brick Co. v. McKnight*, 233 U. S. 250.]

The actual notices of location were void and the Black Rock gained priority upon the constructively valid location born of its earlier patent. *Hickey v. Anaconda Mining Co.*, *supra*; *Baker v. Butte City Water Co.*, *supra*; *Van Buren v. McKinley*, 8 Idaho, 93; 2 Lindley on Mines, §§ 384, 385; *Cloninger v. Finlaison*, 230 Fed. Rep. 98; *Clason v. Matko*, *supra*.

Plaintiffs' "holding and working" allegation was wholly unproven, and if proven would have been immaterial: (1) Because not made the basis of the application for patent, such working may not now be relied on to create for the benefit of the patent an earlier priority, or for any purpose; (2) the segregation, if the statute provided therefor, would only be complete at the end of the period of holding.

Plaintiffs may not go back to any other pre-patent claim than the one they used as a basis for their application for patent. 3 Lindley on Mines, § 783, p. 1920; *Jacobs v. Lorenz*, 98 California, 332.

The evidence and findings do not warrant the claim that the Black Rock locators had actual knowledge of the facts concerning the Elm Orlu.

The Black Rock locators enjoyed the same right as any other citizen to locate any ground not theretofore segregated by a prior valid location. There could not be constructive segregation and private ownership of extralateral rights in the Elm Orlu on November 6, 1875, as to some citizen third persons, and no such rights as to others. If you could dispense with recording in Montana, equally could you dispense with marking of boundaries, so that a mere oral claim publicly asserted in connection with a discovery would be the equivalent of a complete valid location. Thus a quarter or possibly a half a century later, the question of priority of extralateral rights under patents, involving millions in ore values, might turn on mere oral assertions of claim and oral notice thereof. The act of Congress does not contemplate any such possibility.

If knowledge by a third party of some step in an incomplete or invalid location by another were sufficient to protect the latter, forever, without compliance with the law, the United States statute (Rev. Stats., § 2324) would be set at naught. That statute positively requires mark-

ing of the boundaries. It likewise specifies some matters that recorded notices must contain. Notice or knowledge cannot be said to dispense with these requirements, even as against third persons. *Yosemite Mining Co. v. Emerson*, 208 U. S. 25, is not at all in point. There the relocation was of the identical surface, so that there never could be two valid locations.

When the Black Rock owners included in their application for patent surface in conflict with the Elm Orlu, they set in motion a statutory proceeding under § 2336, Rev. Stats., that must necessarily result in a determination of right as between those two claims. Had the Elm Orlu people adversed, they must have claimed this conflict as a part of the Elm Orlu, and the resultant suit would necessarily have depended on and determined priority of location, at least in the absence of special dealings between the parties.

It is submitted that there can be but one single and uniform priority in one location as against another. If this be so, did not the surrender of the Elm Orlu with respect to the fraction necessarily operate to establish priority for all time for the Black Rock as a single entire claim against the Elm Orlu? *Bunker Hill Mining Co. v. Empire State-Idaho Mining Co.*, 109 Fed. Rep. 538; *Empire State-Idaho Mining Co. v. Bunker Hill Mining Co.*, 114 Fed. Rep. 417; *Round Mt. M. Co. v. Round Mt. S. M. Co.*, 36 Nevada, 543.

*Mr. W. H. Dickson*, with whom *Mr. J. Bruce Kremer*, *Mr. A. C. Ellis, Jr.*, and *Mr. William Scallon* were on the briefs, for appellant:

The location certificate of the Elm Orlu claim was defective, not being verified as required by Montana Laws, 1873, ex. sess., p. 83. Under the Montana decisions this defect made the location invalid. *Butte Northern Copper Co. v. Radmilovich*, 39 Montana, 157; *Ferris v. McNally*,

45 Montana, 20; and cases cited in note, *post*, p. 25. Compliance with the state regulation, not conflicting with any federal regulation, was essential, *Baker v. Butte City Water Co.*, 28 Montana, 222; *s. c.*, 196 U. S. 119; *Belk v. Meagher*, 3 Montana, 65; *s. c.*, 104 U. S. 279, 284; *Garfield Mining Co. v. Hammer*, 6 Montana, 53; *Clason v. Matko*, 223 U. S. 646; 1 Lindley on Mines, § 249, pp. 544-5; 2 *id.*, § 329; and the interpretation of the regulation by the state court should be accepted by the federal courts. *Clason v. Matko, supra*.

To authorize the courts to give effect to a mining patent as of a date anterior to the final entry, it must be made to appear that prior to that date there was a valid location upon which the patent issued; and in this connection it must be borne in mind that the owners of the Black Rock claim, having obtained their patent on an earlier application, and there being no surface conflict, were not called upon and had no standing to adverse the Elm Orlu application. *Last Chance Mining Co. v. Tyler Mining Co.*, 61 Fed. Rep. 557, 565, 566; *Hickey v. Anaconda Mining Co.*, 33 Montana, 46; *Uinta Tunnel Mining Co. v. Creede & Cripple Creek Mining Co.*, 119 Fed. Rep. 164; *s. c.*, 196 U. S. 337, 353, 354. The question whether or not the patent related back to the date of the location was not involved in *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U. S. 499. *Lawson v. United States Mining Co.*, 207 U. S. 1, and *El Paso Brick Co. v. McKnight*, 233 U. S. 250, distinguished. Sections 2292 and 2294, Montana Rev. Code, 1907, properly construed, do not validate the Elm Orlu location and could not so operate without impairing rights vested under the Black Rock claim.

Presumptively the owners of the Black Rock claim are the owners of all the veins and ore bodies found within the exterior limits of the claim extended downward vertically. *Leadville Mining Co. v. Fitzgerald*, 15 Fed. Cas.



No. 8158. That this presumption can only be overcome by clear and satisfactory evidence is well settled. Appellant denies that the apex or any portion of the apex of the "Pyle strand" is found anywhere within the Elm Orlu. Where its apex is found is altogether conjectural. For aught that appears from the evidence, it may have its apex in the Black Rock and, indeed, this is probably the case. *Heinze v. Boston & M. Mining Co.*, 30 Montana, 487; *Consolidated Wyoming Gold Mining Co. v. Champion Mining Co.*, 63 Fed. Rep. 540, 550. Indeed, in the case at bar, the District Court reached the conclusion that the evidence failed to support the plaintiffs' contention in this regard. Respecting that vein, therefore, a definite and conclusive decree in favor of the defendant should have been entered. It is well settled that a supplemental bill should not be allowed, or a rehearing granted, after final decree, upon new evidence which the plaintiff (as in this instance) with reasonable diligence could have discovered before beginning the suit. *Jenkins v. Eldredge*, 3 Story, 507, 509, 510; *Quaint v. McMullen*, 103 California, 381; and other cases. See also *Detroit v. Detroit Street Ry. Co.*, 55 Fed. Rep. 569, 572; *Callaghan v. Hicks*, 90 Fed. Rep. 539-542, 543; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602-604.

The deed of the plaintiff Realty Company granted the fractional interest in "all earth, rock and ores" found within the exterior limits of the Black Rock claim extended downward vertically. This is its plain language, and gauging the intent by the situation of the parties but one conclusion can be drawn from the testimony, *viz*, that the acquisition of the Rainbow vein, within the Black Rock claim, was the chief incentive for paying a large price for the conveyance, and the grantee must have understood that this was being conveyed, for it was the only thing of value within the latter claim, so far as the parties then knew.



*Mr. John P. Gray*, with whom *Mr. W. A. Clark, Jr.*, and *Mr. John L. Templeman* were on the briefs, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A contest between mining claims as to the right to the ores that may be not only inside the surface lines of the claims but outside their vertical side lines—dip or extra-lateral rights. It was commenced in the United States District Court for the District of Montana by a bill filed therein by the appellees Clark-Montana Realty Company and Elm Orlu Mining Company against appellant Butte & Superior Copper Company, Limited, under a statute of Montana authorizing an action to be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

The appellees (plaintiffs in the suit) obtained a decree in the District Court quieting their title and decreeing an accounting. 233 Fed. Rep. 547. The decree was affirmed by the Circuit Court of Appeals. 248 Fed. Rep. 609. To review the latter action this appeal is prosecuted.

We are confronted with a motion to dismiss on the ground that the decree of the Circuit Court of Appeals was final, the jurisdiction of the District Court having been, in legal effect, rested, it is asserted, upon diversity of citizenship. To judge of the motion requires a consideration of appellees' statement of their grounds of suit. An outline of them only is necessary.

At the outset we may say there is a diversity of citizenship, the parties being respectively corporations of Washington and Arizona, and it was so averred.

The predecessors of appellees (so run the allegations) on April 18, 1875, discovered a vein or lode of mineral-

bearing rock in the ground described as the Elm Orlu. Discovery was followed by location of the claim and other acts of its appropriation prescribed by the mining laws, proof of which was duly made; and such steps were taken that on December 30, 1882, application for patent was made and patent issued for the claim January 31, 1884. The locators and their successors in interest held, worked, possessed and actually occupied the claim continuously from the date of discovery for more than five years thereafter and during all that time were in the open, notorious, exclusive and uninterrupted possession of it.

The Clark-Montana Realty Company became the owner of the claim and entitled to its possession and of all veins, lodes or ledges having their tops or apices therein throughout their entire depth between the end lines of said claim extended northerly in their own direction. That company leased the claim to appellee Elm Orlu Mining Company, which is occupying it by virtue of the lease.

The appellant is the owner of the Black Rock, Jersey Blue, Admiral Dewey and Silver Lode Mining Claims which adjoin the Elm Orlu claim on its north side. Their locations progressed to patent.

In the Elm Orlu claim there is a vein or lode known as the Rainbow Lode, which crosses the west end line of the Elm Orlu claim and proceeds in an easterly direction through it. It was upon this lode that the discovery of the claim was made. Its downward course through the side line of the claim drawn vertically is northerly and it extends downward and passes below the surface of appellant's claims.

Appellant claims an estate or interest adverse to appellees' in the Rainbow Lode, the exact nature of which claim is unknown to appellees, but it is false and groundless.

The value of the Elm Orlu claim is given, and it is averred that appellant has by means of secret underground works in its possession wilfully penetrated the

Rainbow Lode and has extracted and is extracting large amounts of ore therefrom, the exact amount being unknown, but exceeding in value the sum of \$50,000.

It is prayed that appellant declare its title and, when declared, that it be adjudged without merit; that appellees' title be established and appellant enjoined from further assertion of rights adverse to appellees, and for an accounting.

There is an averment, however, that requires notice. It is as follows:

"That the jurisdiction of the United States District Court for the District of Montana over this suit is invoked and depends upon two grounds, to-wit:

"1. Upon the ground that the construction and application of Sections 2322, 2324, 2325, and 2332 of the Revised Statutes of the United States are involved, and the amount in controversy exceeds in value the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs, all of which will appear from the facts herein-after set forth.

"2. . . ."

The averment is explicit and, we may assume, had a purpose; but appellees do not wish to be taken at their word. The confidence they thought and expressed when invoking the powers of the court in the first instance—and providing, we may assume, for review in case of an adverse decision—they now recant and urge that it should not be used to question or disturb their success or become an avenue of relief to their antagonist. This is not unusual and counsel has cited prior examples and the action of the court therein.

The principle of decision which the court then announced is familiar. It is that the ground of jurisdiction in the District Court and ultimately in this court on appeal from the Circuit Court of Appeals is the statement of the suing party of his cause of suit. And there must

be substance in it, not mere verbal assertion or the anticipation of defenses. *Taylor v. Anderson*, 234 U. S. 74; *Hull v. Burr*, *id.* 712, 720.

Has appellees' statement these defects? As we have seen, there is a confident assertion that the construction and application of the designated sections of the Revised Statutes are involved, and, turning to them, we find that they are the foundation of the rights to mining claims and express the conditions of their acquisition and extent, and, it would seem, are often the basis of controversies as to them and the solution of the controversies. And realizing this, we may suppose, appellees were at pains to set out the conditions and steps they observed, and lest there might be omission, and in remedy of it if there should be, they availed themselves by appropriate allegations of § 2332, Rev. Stats.; that is, they alleged that they were in the actual, open, exclusive and uninterrupted possession of the Elm Orlu, working the same for more than five years, (the period of limitation under § 2332) continuously from the date of discovery. And counsel admitted upon a question from the bench at the oral argument, that the allegation had jurisdictional purpose and that resort was had to the federal court that appellees might avail themselves of the provisions of § 2332 and of *Clipper Mining Co. v. Eli Mining Co.*, 194 U. S. 220, 226, the Supreme Court of Montana having decided<sup>1</sup> that a notice of location which failed to comply, as appellees' did, with a statute of Montana was defective. The allegation, therefore, was part of appellees' case—fortified the other allegations as grounds of suit and recovery—and made the suit one involving the construction and application of that section. The motion to dismiss is, therefore, denied.

On the merits the case is not of novelty. It is the usual

---

<sup>1</sup> *Hickey v. Anaconda Mining Co.*, 33 Mont. 46.



one of priority of rights in a mineral-bearing vein. The averments of appellees we have given. They are met by appellant by denials, counter averments of location and rights, not only by grounds of defense but of affirmative relief; prayers for recompense for trespasses upon its rights and that its title be quieted against the assertion of appellees.

In summary description of the controversies in the case we may say they center in the Rainbow Lode, so-called—in regard to which the parties are in absolute antagonism both in averment and contention—and incidentally in other lodes.

Upon the issues thus joined the District Court made certain findings which were affirmed by the Circuit Court of Appeals. We take them up in their order as we shall thereby be able to separate the questions of law from the questions of fact.

(1) The court found that the Elm Orlu was located before the Black Rock. Of this finding there can be no doubt if the procedure of the law was observed in the location of the Elm Orlu. The steps in that procedure and their order are well established. The first of them is the discovery of mineral-bearing rock within the claim, and it must precede location. The subsequent steps—marking the boundaries, posting notice, recording—are the declaration of title; the patent is the final evidence of it. Such steps being observed, the right is acquired under the Revised Statutes to the vein on its course and dip to the extent that its top or apex is within the surface boundaries of the claim or within vertical planes drawn downward through them. *Lawson v. United States Mining Co.*, 207 U. S. 1; *Stewart Mining Co. v. Ontario Mining Co.*, 237 U. S. 350.

It is, however, provided by § 2322, Rev. Stats., that there must be not only compliance with the laws of the United States, but with “State, territorial and local



regulations" and appellant asserts that the location of appellees' predecessors did not comply with the territorial statute of Montana and that, therefore, though the location preceded that of appellant, it was destitute of legal sufficiency. And it is contended that the Supreme Court of Montana has decided in several cases <sup>1</sup> that the requirements of the state statute are imperative and that one of these cases (*Baker v. Butte City Water Co.*) was affirmed by this court. 196 U. S. 119.

It is further contended that "from the date when final entry of the Black Rock was made, certainly from the date when patent therefor issued, the patentee's title not only to the surface of the claim, but to every vein or lode the top or apex of which was found within the boundaries thereof, became unassailable."

The following is the relevant chronology: The location of the Elm Orlu, following discovery of mineral, was made April 18, 1875, the declaratory statement thereof recorded on the 22nd of that month; the location of the Black Rock was made November 6, 1875, the declaratory statement recorded the 13th of the same month. The entry for patent of the Black Rock was made November 24, 1880, and patent issued February 15, 1882; the Elm Orlu made final entry December 30, 1882, and patent issued January 31, 1884.

Such being the order of procedure of the parties, which acquired the title? Or, to express the issue in conformity to the contentions of appellant, was there defect in the location of appellees by reason of the Montana statute and did the prior issue of patent to appellant give impregnability to its title and right to the veins in controversy? The District Court, and the Circuit Court of Appeals affirming it, decided both issues against appellant on the

---

<sup>1</sup> *McBurney v. Berry*, 5 Mont. 300; *O'Donnell v. Glenn*, 8 Mont. 248; *McCowan v. Maclay*, 16 Mont. 234; *Hickey v. Anaconda Mining Co.*, 33 Mont. 46; *Baker v. Butte City Water Co.*, 28 Mont. 222.

grounds: (1) That the Montana cases did not furnish the rule of decision for the federal courts, the better reasoning being (for which cases were cited) that as the Montana statute did not impose a forfeiture hence none resulted from defects in the declaratory statement of the Elm Orlu. (2) That the Elm Orlu people were in possession of their claim, working the same—of which the Black Rock people had knowledge—and that hence the latter could not avail themselves of the defects in the location of the Elm Orlu. *Yosemite Mining Co. v. Emerson*, 208 U. S. 25, was adduced. In the latter ground we concur, and we need not express opinion of the other although it has impressive strength and was conceded to have in *Yosemite Mining Co. v. Emerson*. Indeed, there was a revulsion in the State against the ruling of the cases and a law was enacted making the issue of a patent for a mining claim conclusive evidence of compliance with the requirements of the laws of the State and making valid all locations under them theretofore made “that in any respect have failed to conform to the requirements of such laws,” “except as against one who has located the same ground . . . in good faith and without notice.”

*Yosemite Mining Co. v. Emerson* was concerned with a regulation of the State of California which prescribed the manner of the location of a claim. The regulation had not been conformed to and the validity of the location was attacked on that ground by a subsequent locator who had had notice of the claim, he contending that there was forfeiture of it. The contention was rejected and we said, that to yield to it would work great injustice and subvert the very purpose for which the posting of notices was required, which was, we further said, “to make known the purpose of the discoverer to claim title to the” claim “to the extent described and to warn others of the prior appropriation.” The comment is obviously applicable to the asserted defects in the declaratory statement of

appellees. It, like the California requirement, had no other purpose than "to warn others of the prior appropriation" of the claim, and such is the principle of constructive notice. It—constructive notice—is the law's substitute for actual notice, and to say that it and actual notice are equivalents would seem to carry the self-evidence of an axiom. Besides, in this case there was unequivocal possession of the Elm Orlu and it is elementary that such possession is notice to all the world of the possessor's rights thereunder. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417.

The other contention of appellant is, as we have said, that the title not only to the surface of its claim but to every vein whose top or apex was found within it became impregnable by the issue of patent to it. We need not follow the details of counsel's argument to sustain the contention—its reliance is on the dates on which entries for the patents were made, the Black Rock entry preceding that of the Elm Orlu. It is, however, admitted that by the issue of the patent to the Elm Orlu "it was thereby conclusively adjudicated or determined that at the time of final entry the applicants were entitled to a patent to that claim." But the admission is combined with the declaration that "to authorize the courts to give effect to a mining patent as of a date anterior to the final entry, it must be made to appear that prior to that date there was a *valid location* [italics counsel's] upon which the patent issued." And to establish that appellees' was not a valid location appellant relies upon the asserted defect in the declaratory statement. With that defect we have dealt and have decided that it had not the consequences ascribed to it. We may say, however, that priority of right is not determined by dates of entries or patents of the respective claims, but by priority of discovery and location, which may be shown by testimony other than the entries and patents. In the absence from the record of an adverse

suit there is no presumption that anything was considered or determined except the question of the right to the surface. *Lawson v. United States Mining Co., supra.*

The relevancy of that case is resisted. Appellant urges that by the application of the Black Rock for patent appellees were "confronted with the necessity of either adversing or suffering the consequences of a failure to do so," and the consequence is said to be that the Elm Orlu was made subordinate in time and right to the Black Rock. We can not assent. The application of the Black Rock for patent did not show a surface conflict and the doctrine of the *Lawson Case* is that on an application for a patent only surface rights are determined, and Lindley is quoted for the proposition that "'an application for patent invites only such contests as affect the surface area . . . Prospective underground conflicts . . . are not the subject of adverse claims.'"

It is true, as we have seen, there was some overlapping of the lines of the claims. If, however, a conflict was thus indicated the Black Rock secured the advantage. The ground within the overlapping lines was included within the Black Rock patent and expressly excepted from the application of the Elm Orlu for its patent. And no part of the decree was determined by it.

(2) The District Court found from the testimony that the Elm Orlu was of prior location and right and in this was confirmed by the Circuit Court of Appeals. The inevitable consequence is that appellees have title to the veins or lodes whose tops or apices are within the Elm Orlu. This consequence appellant admits at the very beginning of its argument, and says that one of the vital questions in the case is the priority of the claims and that if the Elm Orlu had priority over the Black Rock the appellees would be entitled to all the Rainbow Lode between the planes designated by the court and would be also entitled



"to all ores within the intersection spaces of that vein with the Jersey Blue vein and the Crenden vein."

We state the admission not in estoppel of appellant but only in concentration of attention upon the question for decision. In its solution there are in dispute many elements of importance. Among these necessarily is the question: In which of the claims do the veins apex, course and dip? In the question there is complexity and grounds for diversity of judgment, and the District Court felt and expressed them after hearing and estimating the testimony and the admission of the parties.

The court (Judge Bourquin) said that the chief contesting claims, the Elm Orlu and the Black Rock, "have a common side line for 850 feet of the Elm Orlu east end and of the Blackrock west end." And further said:

"It is now admitted that the Rainbow vein at the apex crosses the Elm Orlu west end line, courses easterly, crosses the common side line and branches in the Blackrock, one strand crossing the Blackrock north side line and one coursing easterly a disputed distance; that the Pyle strand of the Rainbow at some depth in the Elm Orlu diverges from the south side of the said vein and coursing easterly unites with the Rainbow at the Blackrock 1,100 level; that the Jersey Blue vein at the apex crosses the Blackrock west end line and courses easterly a disputed distance, it and the Rainbow converging on strike and dip to union or crossing; that the Crenden vein at some depth in the Elm Orlu near the Blackrock west end diverges from the north side of the Rainbow, courses northwesterly under both claims and unites with or is cut off by the Jersey Blue. Very large ore bodies are in the Rainbow under both claims, at places bisected on strike by the common side line, and both parties have mined them under both claims. From various names of the veins those herein are chosen to avoid confusion." And to all other elements of decision, presented in a trial



which occupied 16 days, the court gave a painstaking consideration and in estimate of them found the issues in favor of appellees, and carefully adjudged the rights of the contestants according to the lines of their respective properties and the relation of the mineral veins to them.

The Circuit Court of Appeals affirmed the findings, saying, by Circuit Judge Gilbert: "The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal." And we said in *Lawson v. United States Mining Co.*, *supra*, of the conclusion of the Circuit Court of Appeals in such case—and the concession is as great as appellant is entitled to—"That if the testimony does not show that it [the conclusion of the court] is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong." The findings accepted, the conclusions of law must be pronounced to be of necessary sequence.

One of the defenses of appellant is that on October 29, 1906, the Clark-Montana Realty Company, then being the owner of an undivided one-fourth interest in the Black Rock claim, executed and delivered to the predecessors in interest of appellant a deed of release and quit-claim of all its "right, title, interest, claim and demand . . . in and to that certain portion, claim and mining right, title and property on those certain ledges, veins, lodes or de-

posits of quartz and other rock in place, containing precious metals of gold, silver and other metals . . . ” And it was stated that it was “the intention of the party of the first part to convey to the party of the second part all of its right, title and interest in and to the above described property” (referring to the claim, which was described). “Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal bearing quartz, rock and earth therein, . . . ”

The deed is urged as an estoppel and appellant insists that it “operates to grant the fractional interest in ‘all earth, rock and ores’ found within the exterior limits of the Black Rock claim extended downward vertically,” citing therefor *Montana Mining Co. v. St. Louis Mining Co.*, 204 U. S. 204; *Bogart v. Amanda Consolidated Gold Mining Co.*, 32 Colorado, 32.

The cited cases are distinguishable from that at bar. In *Montana Mining Co. v. St. Louis Mining Co.*, the land was conveyed “together with all the mineral therein contained,” and the words were distinguished from those conveying extralateral rights and considered as a subject of the grant. In the other case the conveyance was of land in conflict between two claims which were in litigation, and in execution of the intention of the parties the deed was interpreted to convey “not merely the surface ground in conflict, as contradistinguished from the mineral beneath, but with this surface ground all underlying minerals” except one vein which had been excluded.

In the case at bar the conveyance was of an undivided one-fourth interest in and to the “mining claim known as the ‘Black Rock’ quartz lode mining claim.” It passed no rights or interest that did not belong to that claim or would not appertain to it. Or, to put it another way, the deed passed the rights and interests that were derived from the United States by the location of that claim and conveyed by the patent to the locators. It was not intended to con-

vey any of the rights of the Elm Orlu and denude it of the extralateral rights that the law conferred upon it. In other words, the contention of appellant would make the deed a conveyance of the Elm Orlu as well as of the Black Rock.

We do not stop to specialize either the contests of or the judgments on particular veins. Their relative locations and the rights in them are disposed of by what we have said. But an earnest and special contest is made on the finding of the court in regard to a vein designated as the Pyle strand. The District Court said, as we have seen, "that the Pyle strand of the Rainbow at some depth in the Elm Orlu diverges from the south side of the said vein and coursing easterly unites with the Rainbow at the Blackrock 1,100 level."<sup>1</sup> And the court decreed the appellees to be the owners of and entitled to the possession of it throughout its entire depth as far as its apex was within the Elm Orlu, but expressly reserved the question of the point where the apex passes out of the Elm Orlu. In other words, in the language of the Circuit Court of Appeals, "the court left to future development the question of how far the Pyle apex continued in the appellees' location, and to what extent beneath the Black Rock it united with the Rainbow in such position as to be controlled by the apex in the Elm Orlu." This action of the District Court is attacked by appellant. It admits, however, that the Pyle strand in its downward course unites with the Rainbow at or about a point which would be intersected by a vertical plane passed through the easterly end line of the Elm Orlu extended northerly in its own direction, but denies that the apex or any portion of the apex is within the Elm Orlu and asserts that where its apex is found is altogether conjectural and that "for aught that appears from the evidence, it may

---

<sup>1</sup> The formal finding of the District Court is as follows:

"That the Pyle strand of the Rainbow vein diverges from the south side of the latter vein in the Elm Orlu claim, and there and for some indefinite distance easterly has its apex in the Elm Orlu claim."

have its apex in the Black Rock and, indeed, this is probably the case." And it is urged that a situation is presented not of the weight of evidence, but of the absence of evidence, or, to quote counsel, the decision is "one which finds no support whatever in the testimony." But manifestly these are but assertions—attacks on the estimate of the testimony made by the District Court and Circuit Court of Appeals and the conclusion it justifies.

It is further said that issue was made upon the title to the Pyle strand and that it was the duty of the court to definitely pass upon it and to decide for appellant, but that "instead of entering such a decree, the court so framed, and intentionally so framed, its decree that it would not be a bar to a new suit which appellees might thereafter bring against this appellant to quiet title to all of the vein below the plane of union between it and the Pyle strand, if by further development they discovered additional evidence in support of their contention that the Pyle strand did apex in the Elm Orlu at the point of alleged forking and at its apex continued thence easterly to and across the east end line of the Elm Orlu."

It is true the apex of the Pyle strand was found to be within the Elm Orlu, but all else as to the vein was reserved and, in the circumstances, properly reserved. There was simply retention of the case for supplementary proceedings, as the Circuit Court of Appeals observed, to carry out the decree and make it effective under altered circumstances. *Joy v. St. Louis*, 138 U. S. 1, 47; *Union Pacific Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 163 U. S. 564, 603.

*Decree affirmed.*



G. S. NICHOLAS & COMPANY ET AL. *v.* UNITED STATES.

ALEX. D. SHAW & COMPANY ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

Nos. 62, 63. Argued January 14, 1919.—Decided March 3, 1919.

The allowance of three pence and five pence per gallon made under 23 & 24 Vict., c. 129, and later acts of Parliament, on exportation of certain British spirits, if not a "bounty," is a "grant" within the meaning of Paragraph E of § 4 of the Tariff Act of 1913, providing for a countervailing duty whenever any country shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise dutiable under the act. Notwithstanding the facts that such allowances may be intended merely as compensation to distillers and rectifiers for costs due to British excise regulations and are not confined to cases of exportation, they are, as applied to exports, governmental payments—"grants"—made only upon exportation, which, by lessening the burden of British taxation, enable the spirits to be sold more cheaply here than at home,—the situation against which Paragraph E was intended to provide. P. 37. *United States v. Passavant*, 169 U. S. 16, followed.

7 Cust. App. Rep. 97, affirmed.

THE case is stated in the opinion. For the decision of the Board of General Appraisers, see G. A. 7758, 29 T. D. 59.

*Mr. Albert H. Washburn* for petitioners in No. 62.

*Mr. W. P. Preble* for petitioners in No. 63.

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

34.

Opinion of the Court.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Writs of certiorari to review a judgment of the Court of Customs Appeals affirming a decision by the Board of General Appraisers which overruled the protests of petitioners against the action of collectors of customs at Boston and New York assessing additional or counter-vailing duties on whiskey and gin imported from Great Britain. 7 Cust. App. Rep. 97.

Paragraph E of § 4 of the Tariff Act of 1913 (38 Stat. 114) reads as follows:

"E. That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

The question in the case is the legality of the counter-

vailing duty. It was determined and declared to be necessary under Paragraph E by reason of the allowance under the British legislation of three pence upon plain British spirits and five pence upon British compounded spirits. 23 & 24 Vict., c. 129.

The case is not of broad compass. The act of Parliament referred to above levies a duty upon every gallon of spirits of a certain strength which after certain designated dates were or should be distilled within the United Kingdom or which, having been distilled therein, were on the designated dates in the stock or possession of any distiller or in any duty-free warehouse, and which after the named dates should be taken out for consumption within the United Kingdom.

It is provided that "In consideration of the Loss and Hindrance caused by Excise Regulation in the Distillation and Rectification of Spirits in the United Kingdom" there shall be paid "to any Distiller or Proprietor of such Spirits on the Exportation thereof from a Duty-free Warehouse, or on depositing the same in a Customs Warehouse . . . the Allowance of Twopence per Gallon . . . and to any licensed Rectifier who . . . has or shall have deposited in a Customs Warehouse Spirits distilled and rectified in the United Kingdom the following Allowances; . . . Threepence per Gallon, and on Spirits of the Nature of Spirits of Wine an Allowance of Twopence per Gallon . . ."

Subsequent acts of Parliament repeat the provisions for allowance upon exported spirits, adding some details, and are replete with the regulations and provisions which the legislators thought or experience had demonstrated were necessary. And there is quite an enumeration of warehouses and their purposes which, however necessary from the standpoint of the law, happily is not necessary to our consideration of the questions in the case, although counsel describe them and use them in display of the options which

34.

Opinion of the Court.

it is contended the law gives to a distiller—that is, to export, warehouse, or sell the spirits or use them under conditions which would or would not result in an allowance. We do not find it necessary to go into such confusing considerations. The question in the case is more direct, and is whether the three pence and five pence paid on account of export from the United Kingdom is the bestowal “directly or indirectly” of a “bounty or grant upon the exportation of any article or merchandise from such country,” to use the words of Paragraph E.

Looking only at the paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or five pence a gallon, as the case may be, and the instant conclusion is that the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market. And thus it would seem, if we regarded the substance of things, that the condition of the application of Paragraph E obtains.

Counsel, however, resist this view in somewhat lengthy and minute arguments, only the basic propositions of which we can give. They dwell especially upon the purpose of the British act and the differences, not only actual, as they contend, but recognized in the administrative and legislative parlance of this country, between the words allowance, bounty, drawback and grant. In support of the first contention—that is, the purpose of the British act—it is urged that the allowance provided for is not a “bounty” upon exportation, but “compensation” to the distiller and rectifier for costs due to excise restrictions. In other words, that the allowance is not a premium on exportation, but the remission or reimbursement of the expense of manufacture to accommodate the “pe-



culiar conditions and necessities" of the British fiscal policy. In confirmation of this view it is said that not all British spirits when exported get the allowance, but only those that are warehoused in a certain specified way, and that, besides, the allowance is also paid when certain spirits go into domestic consumption. And the British Ambassador is quoted as saying of the allowances that they "do not even compensate the loss they are intended to reimburse, as is abundantly proved."

It is hence asserted that the condition of the application of Paragraph E—that is, a premium bestowed on an exportation from another country—is absent and that, besides, the paragraph is of limited scope, the word bounty not being used in its most comprehensive sense, and that there is a wide difference between an "indirect bounty" and "indirectly paying a bounty," and that for an indirect bounty the paragraph does not provide. Counsel attempt to justify the distinction and illustrate it by the citation of the example of many acts of Congress by which "indirect" bounties were legislated and also by the comments of legislators in discussion of the purpose and effect of the use of the words "allowances," and "rebates," and "drawbacks." And *United States v. Passavant*, 169 U. S. 16, 23, is quoted for a distinction between "the word 'bounty' as differentiated from the word 'drawback' in tariff parlance" and the "shades of meaning which Congress must have had in mind in enacting Paragraph E and provisions *in pari materia*." In further support of their distinctions counsel cite the executive practice of this country, and adduce the decisions of this and other courts to show that such practice is a useful resolvent of the meaning of words and of legislative intention.

We appreciate the strength of the argument, but the circumstances are but aids to persuasion; they do not compel it. Every new statute is individual and presents its own problem. That before us does, and, as we have

34.

Opinion of the Court.

said, looking at its words alone, has no uncertainty of purpose. Whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise," there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one "equal to the net amount of such bounty or grant, however the same be paid or bestowed." The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required by Paragraph E.

There can be, therefore, but one inquiry: Was something—bounty or grant—paid or bestowed upon the exportation of spirits? Counsel's answer we have given; ours is different. They dwell upon the meaning of one word and the necessary adjustments of the British revenue legislation; we regard all of the words, the fact of payment and the event—the fact that the grant is made at the time of exportation and only upon exportation (of course, we mean of the spirits destined for the United States)—the event, that the spirits may be sold cheaper in the United States than in the United Kingdom, and necessarily there may be that aid to their competitive power. We do not think that it is a repelling answer to say that they are sold here at the same price that they would be sold for in the United Kingdom if the latter imposed no tax, that is, sold here as if they had not been taxed at all, and therefore sold not below their natural cost. This is mere speculation of the effects of a different situation. We have the

fact of spirits able to be sold cheaper in the United States than in the place of their production, and this the result of an act of government because of the destination of the spirits being a foreign market. For that situation Paragraph E was intended to provide. What legislation some other situation might require or receive we are not called upon to conjecture.

Our conclusion is supported, we think, by *United States v. Passavant*, *supra*, a case from which counsel have adduced some argument. An importation of goods from Germany was the subject of the decision. That country imposed a tax upon merchandise when sold by the manufacturer thereof for consumption or sale in the markets of Germany. Upon exportation of the merchandise the tax was remitted. The remission was called "bonification of tax" as distinguished from being refunded as a rebate. The merchandise could be purchased in bond for exportation in the principal markets of Germany at the net invoice price and without paying the so-called German duty. The merchandise with which the case was concerned was so purchased.

Upon importation of the merchandise it was determined by the collector and customs appraiser that its value was the net invoice value with the German duty added. This ruling was contested by the importer and the Board of General Appraisers reversed it. The Circuit Court, to which the case had been carried, affirmed the decision of the Board of General Appraisers. Upon appeal to the Circuit Court of Appeals that court asked of this court whether the German duty had been lawfully included by the collector and customs appraiser in their estimate of the dutiable value. We answered in the affirmative, and said, through Mr. Chief Justice Fuller, that "the laws of this country in the assessment of duties proceed upon the market value in the exporting country and not upon that market value less such remission or ameliora-

34.

Syllabus.

tion as that country chooses to allow in accordance with its own views of public policy." And this conclusion was reached upon the effect of the remitted tax and not upon the word used to designate it. In other words, the decision was not determined by a consideration of costs of manufacture or their reimbursement nor by the requirements of the policies of the exporting country. It regarded the fact and effect of the remitted excise.

*Downs v. United States*, 187 U. S. 496, is a like example, and direct and indirect bounties are illustrated. As an instance of the former the amount paid upon the production of sugar under the Act of Congress of 1890 is adduced, and also the "drawback" (the word of the statute is used) upon certain articles exported; as instances of the latter, that is, of indirect bounties, the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is given, and, as another example, the laws permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden.

We consider further discussion unnecessary and the judgment of the Court of Customs Appeals is

*Affirmed.*

---

PANAMA RAILROAD COMPANY *v.* BOSSE.

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

No. 203. Submitted January 31, 1919.—Decided March 3, 1919.

An order of the President continuing in force for the government of the Canal Zone "the laws of the land, with which the inhabitants are familiar," etc., was construed by the Government as including



the Civil Code of Panama, and was followed by an act of Congress ratifying the laws, orders, etc., promulgated by the President. *Held*, that the order merely embodied the rule that a change of sovereignty does not end existing private law, and that the act neither fastened upon the Zone a specific civil-law interpretation of the Code nor overthrew the principle of common-law construction adopted and applied by the Supreme Court of the Zone before the act was passed. P. 44.

The provisions of the Civil Code of the Canal Zone touching the relation of master and servant are not inconsistent with the common-law rule holding the former liable for personal injuries caused by the negligence of the latter while in the course of his employment; and it is not erroneous for the Supreme Court of the Zone to apply the common-law interpretation, at least in cases arising since the Zone was expropriated and became peopled only by the employees of the Canal, of the Panama Railroad and of licensee steamship lines and oil companies. P. 45.

Pain may be considered in fixing damages for personal injuries in the Canal Zone. P. 47.

239 Fed. Rep. 303, affirmed.

The case is stated in the opinion.

*Mr. Frank Feuille* for plaintiff in error. *Mr. Walter F. Van Dame* was also on the brief.

*Mr. Theodore C. Hinckley* and *Mr. Joseph W. Bailey* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries and consequent suffering alleged to have been caused, on July 3, 1916, by the Railroad Company's chauffeur's negligent driving of a motor omnibus at an excessive rate of speed in a crowded thoroughfare in the Canal Zone. The suit was brought in the District Court of the Canal Zone. The defendant, the plaintiff in error, demurred to the declaration generally, and also demurred specifically to that part that claimed damages for pain. The demurrer was overruled

41.

## Opinion of the Court.

and there was a trial, at which, after the evidence was in, the defendant requested the Court to direct a verdict in its favor and, failing that, to instruct the jury that the plaintiff could not recover for physical pain. The instructions were refused, the jury found a verdict for the plaintiff and the judgment was affirmed by the Circuit Court of Appeals. 239 Fed. Rep. 303. 152 C. C. A. 291. Followed in *Panama R. R. Co. v. Toppin*, 250 Fed. Rep. 989.

The main question in the case is whether the liability of master for servant familiar to the common law can be applied to this accident arising in the Canal Zone. Subordinate to that is the one already indicated, whether there can be a recovery for physical pain. There is some slight attempt also to argue that the defendant's negligence was not the immediate cause of the injury, but as that depended upon the view that the jury might take of the facts and as there was evidence justifying the verdict, we shall confine ourselves to the two above-mentioned questions of law.

By the Act of Congress of April 28, 1904, c. 1758, § 2, 33 Stat. 429, temporary powers of government over the Canal Zone were vested in such persons and were to be exercised in such manner as the President should direct. An executive order of the President addressed to the Secretary of War on May 9, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contained this passage, "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the canal zone . . . until altered or annulled by the said commission;" with power to the Commission to legislate, subject to approval by the Secretary. This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and pub-

lished by the Isthmian Canal Commission in 1905. By the Act of Congress of August 24, 1912, c. 390, § 2, 37 Stat. 560, 561, "All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide." On these facts it is argued that the defendant's liability is governed by the Civil Code alone as it would be construed in countries where the civil law prevails and that so construed the code does not sanction the application of the rule *respondeat superior* to the present case.

But there are other facts to be taken into account before a decision can be reached. On December 5, 1912, acting under the authority of the before-mentioned Act of August 24, 1912, § 3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction &c. of the Panama Canal and directed the Chairman of the Isthmian Commission to take possession of it, with provisions for the extinguishment of all adverse claims and titles. It is admitted by the plaintiff in error that the Canal Zone at the present time is peopled only by the employees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license. If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case if the Zone had remained within the jurisdiction of Colombia it does not follow that the liability is no greater as things stand now. The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the ratification of that order by the Act of August 24, 1912, no more fastened upon the Zone a specific interpretation of the former Civil

41.

## Opinion of the Court.

Code than does a statute adopting the common law fasten upon a territory a specific doctrine of the English Courts. *Wear v. Kansas*, 245 U. S. 154, 157. Probably the general ratification did no more than to supply any power that by accident might have been wanting. *Honolulu Rapid Transit & Land Co. v. Wilder*, 211 U. S. 137, 142. In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present "inhabitants are familiar," in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men. For whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated alike.

As early as 1910 the Supreme Court of the Canal Zone announced that it would look to the common law in the construction of the Colombia statutes, *Kung Ching Chong v. Wing Chong*, 2 Canal Zone Sup. Ct. Rep. 25, 30; and following that announcement, in January, 1913, held that "at least so far as the empresarios of railroads are concerned" the liability of master for servant would be maintained in the Zone to the same extent as recognized by the common law. *Fitzpatrick v. Panama R. R. Co.*, *id.*, 111, 121, 128. The principle certainly was not overthrown by the Act of 1912. It is not necessary to dwell upon the drift toward the common-law doctrine noticeable in some civil-law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common-law rule. By Art. 2341, in the before-mentioned translation, "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without



prejudice to the principal penalty which the law imposes" . . . By Art. 2347, "Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care," illustrating by the cases of father, tutor, husband, &c. By Art. 2349, "Masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and the competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants." The qualification in this last article may be taken to refer to acts outside the scope of the employment. It cannot refer to all torts, for that would empty the first part of meaning. A master must be taken to foresee that sooner or later a servant driving a motor will be likely to have a collision, which a jury may hold to have been due to his negligence, whatever care has been used in the employment of the man.

We are satisfied that it would be a sacrifice of substance to form if we should reverse a decision, the principle of which has been accepted by all the judges accustomed to deal with the locality, in deference to the possibility that a different interpretation might have been reached if the Civil Code had continued to regulate a native population and to be construed by native courts. It may be that they would not have distinguished between a negligent act done in the performance of the master's business and a malicious one in which the servant went outside of the scope of that for which he was employed. But we are by no means sure that they would not have decided as we decide. At all events we are of opinion that the ruling was correct. As we do not rely for our conclusion upon a

41.

Syllabus.

Colombia act specially concerning the empresarios of railroads, we do not discuss a suggestion, made only, it is said, to show that the act is inapplicable, to the effect that the charter of the Railroad Company did not grant the power to operate the omnibus line. The company was acting under the authority and direction of General Goethals and we do not understand that the defence of *ultra vires* is set up or could prevail.

In view of our conclusion upon the main point but little need be said with regard to allowing pain to be considered in fixing the damages. It cannot be said with certainty that the Supreme Court of the Zone was wrong in holding that under the Civil Code damages ought to be allowed for physical pain. *Fitzpatrick v. Panama R. R. Co.*, 2 Canal Zone Sup. Ct. Rep. 111, 129, 130; *McKenzie v. McClintic-Marshall Construction Co.*, *id.*, 181, 182. Physical pain being a substantial and appreciable part of the wrong done, allowed for in the customary compensation which the people of the Zone have been awarded in their native courts, it properly was allowed here.

*Judgment affirmed.*

---

SCHENCK v. UNITED STATES.

BAER v. UNITED STATES.

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

Nos. 437, 438. Argued January 9, 10, 1919.—Decided March 3, 1919.

Evidence held sufficient to connect the defendants with the mailing of printed circulars in pursuance of a conspiracy to obstruct the recruiting and enlistment service, contrary to the Espionage Act of June 15, 1917. P. 49.

Incriminating documents seized under a search warrant directed against a Socialist headquarters, *held* admissible in evidence, consistently with the Fourth and Fifth Amendments, in a criminal prosecution against the general secretary of a Socialist party, who had charge of the office. P. 50.

Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done. P. 51.

A conspiracy to circulate among men called and accepted for military service under the Selective Service Act of May 18, 1917, a circular tending to influence them to obstruct the draft, with the intent to effect that result, and followed by the sending of such circulars, is within the power of Congress to punish, and is punishable under the Espionage Act, § 4, although unsuccessful. P. 52.

The word "recruiting" as used in the Espionage Act, § 3, means the gaining of fresh supplies of men for the military forces, as well by draft as otherwise. P. 52.

The amendment of the Espionage Act by the Act of May 16, 1918, c. 75, 40 Stat. 553, did not affect the prosecution of offenses under the former. P. 53.

Affirmed.

THE case is stated in the opinion.

*Mr. Henry John Nelson* and *Mr. Henry J. Gibbons* for plaintiffs in error.

*Mr. John Lord O'Brian*, Special Assistant to the Attorney General, with whom *Mr. Alfred Bettman*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, by causing and attempt-

47.

Opinion of the Court.

ing to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On



August 20 the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c.; and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer there was evidence that she was a member of the Executive Board and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, 192 U. S. 585; *Weeks v. United States*, 232 U. S. 383, 395, 396. The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch Street and it would seem that the documents technically were not even in the defendants' possession. See *Johnson v. United States*, 228 U. S. 457. Notwithstanding some protest in argument the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*, 218 U. S. 245, 252, 253.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a

47.

Opinion of the Court.

convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the

main purpose, as intimated in *Patterson v. Colorado*, 205 U. S. 454, 462. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in § 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, 245 U. S. 474, 477. Indeed that case might be said to dispose of the present contention if the precedent covers all *media concludendi*. But as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The

words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment and would not, even if the former act had been repealed. Rev. Stats., § 13.

*Judgments affirmed.*

---

## ALASKA PACIFIC FISHERIES *v.* TERRITORY OF ALASKA.

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

Nos. 117, 118. Argued December 19, 20, 1918.—Decided March 3, 1919.

The provisions of the Judicial Code governing the review of cases coming from Alaska are to be construed in the light of their legislative history and of the Judiciary Act of 1891, as construed by this court. P. 58.

Under §§ 134, 247, and 241, of the Judicial Code, when a case involving constitutional as well as other issues is taken from the District Court for Alaska to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the latter court is not reviewable in this court by writ of error but only by certiorari. P. 61.

Writs of error to review 236 Fed. Rep. 52, 70, dismissed.

The cases are stated in the opinion.

*Mr. J. A. Hellenthal*, with whom *Mr. Harvey M. Friend* was on the briefs, for plaintiff in error:



Since this case involves the construction and application of the Constitution, by § 247, Jud. Code, a writ of error may be taken from the District Court for Alaska direct to the Supreme Court of the United States. If it had involved constitutional questions only, this court would have had exclusive jurisdiction to review the judgment of the District Court, and the Circuit Court of Appeals would have had none. But as the case involved a number of other questions along with the constitutional ones, under the authority of *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, it was reviewable alternatively by this court or the Circuit Court of Appeals.

Under § 134, Jud. Code, the judgment of the Circuit Court of Appeals is final in all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court, as provided in § 247. But since this is a case in which a writ of error would lie to the Supreme Court under the provisions of § 247, it is expressly excepted by the terms of the act from those cases in which the judgment of the Circuit Court of Appeals is made final. The language of the act is not that the judgments of the Circuit Court of Appeals for the Ninth Circuit shall be final in "all cases" but in "such cases." The use of the word "such" limits the class of cases in which the judgments of the Circuit Court of Appeals are made final to the cases previously in the same sentence dealt with; and since the cases of the character dealt with in § 247, to which the case at bar belongs, are expressly excepted from those in which the decision is made final, the decision in the case at bar is not final.

Owing to the peculiar fitness of this court to pass upon all matters relating to the construction and application of the Constitution, it has been the settled policy of Congress to leave such matters in all cases to the final judgment of this court. The decision of the Circuit Court of Appeals is not made final, and, the requisite amount

53.

Opinion of the Court.

being involved, it may be reviewed by this court under the provisions of § 241, Jud. Code. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397; *Christianson v. King County*, 239 U. S. 356; *Ohio R. R. Commission v. Worthington*, 225 U. S. 101, 104, 105.

The provisions of §§ 247 and 134, Jud. Code, governing appeals and writs of error from the District Court for Alaska, differ widely from the sections of the Judicial Code involved in *Macfadden v. United States*, 213 U. S. 288, and the *McClain Case*, *supra*, in that the finality of judgments of the Circuit Court of Appeals is not made to depend upon the sources of jurisdiction, but upon the character of the case. The District Court for Alaska is a court of general law and equity jurisdiction and its judgments are reviewable without regard to the question of how the case arose. *In re Cooper*, 143 U. S. 472. But in those other cases, arising in the District Courts of the United States, the judgments of the Circuit Court of Appeals were made final by the express provision of § 128, because of the sources of the initial jurisdiction, peculiar to District Courts of the United States, and without regard to the constitutional questions that became involved.

*Mr. George B. Grigsby*, Attorney General of the Territory of Alaska, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were argued and submitted together, and may be disposed of in a single opinion.

In case No. 117 the action was brought in the District Court for Alaska to recover monies alleged to be due under a statute imposing a tax upon prosecuting the business of fishing by means of fish traps in the waters of Alaska. The defendant, the Alaska Pacific Fisheries, filed an

answer in which it set up that the act of the Alaska legislature, under which the suit was brought, was void under the act of Congress creating the legislature of Alaska, and under the Constitution of the United States, and set up other defenses not involving the Constitution.

In case No. 118 the Territory brought an action to recover taxes claimed to be due under an act of the legislature of the Territory of Alaska for prosecuting the business of fishing for and canning salmon in Alaska. With other defenses the constitutionality of the law was contested by the defendant.

Judgment in each case was rendered in the District Court in sums in excess of \$500.00 against the Alaska Pacific Fisheries. Upon error to the Circuit Court of Appeals for the Ninth Circuit the judgments of the District Court were affirmed. 236 Fed. Rep. 52, 70.

Motions to dismiss the writs of error were filed by the Attorney General of the Territory upon the ground that the judgments of the Circuit Court of Appeals are final. Consideration of the motions was passed to the hearing upon the merits. A determination of the motions involves a construction of sections of the Judicial Code regulating appeals and writs of error in the District Court for Alaska and the Circuit Court of Appeals for the Ninth Circuit. Section 134 of the Judicial Code (36 Stat. 1134) provides:

“In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court

53.

Opinion of the Court.

of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals."

Section 247 (36 Stat. 1158) of the Code provides:

"Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court."

Section 241 (36 Stat. 1157) of the same Code provides:

"In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

It is the contention of the plaintiff in error that under § 241 the judgments of the Circuit Court of Appeals are not final and there is a right to a writ of error from this court, the matter in controversy exceeding one thousand dollars, besides costs.



The District Court of Alaska is a court with the jurisdiction of United States district courts and general jurisdiction in civil, criminal, equity, and admiralty causes. (4 U. S. Comp. Stats. § 3564.) In that court these suits were brought to recover the taxes in question. As already indicated, the answer in each of the cases raised an issue as to the constitutionality of the statute under which the taxes were levied, and the question which we are now to consider is: Are the judgments of the Circuit Court of Appeals final? In interpreting the sections of the statutes controlling this matter resort must be had to the language of the laws, to the history of the legislation, and the decisions of this court interpreting the Circuit Court of Appeals Act, now substantially carried into the Judicial Code, in so far as the same are applicable.

The sections of the Judicial Code pertaining to Alaska had their origin in prior federal legislation concerning the Territory. The Committee on revision of the laws in its report to Congress said of § 134:

"This section is drawn from section 202 of the Criminal Code for Alaska [Act of March 3, 1899, ch. 429, 30 Stat. L. 1307], and from sections 504 and 505 of the Civil Code [Act of June 6, 1900, ch. 786, 31 Stat. L. 414, 415] and states what was the existing law on the subject. Those portions of the sections which authorize the taking of writs of error and appeals direct to the Supreme Court are revised in section 247. Formerly capital cases went direct to the Supreme Court. Section 247 was so modified as to take from the Supreme Court its jurisdiction of capital cases, the effect being to vest the right to review on a writ of error in the Circuit Court of Appeals. This is accomplished, so far as this section is concerned, by the omission of the words 'other than capital' after the words 'and in all criminal cases.'" (Note by Committee on Revision, 5 Fed. Stats. Ann., p. 644, note to § 134.)

Sections 504 and 505 of the Alaska Civil Code as they

stood before the enactment of the Judicial Code are found in 31 Statutes at Large, pp. 414, 415. These sections are as follows:

"Sec. 504. Appeals and writs of error may be taken and prosecuted from the final judgments of the district court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court."

"Sec. 505. The judgments of the circuit court of appeals shall be final in all cases coming to it from the district court, but whenever the judges of the circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any case pending before the circuit court of appeals on writ of error to or appeal from the district court, judges may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the questions and propositions certified to it, and its instruction shall be binding upon the circuit court of appeals."

A reading of these sections shows that two classes of cases were provided for: (1) Prize cases, and cases involving the Constitution and treaties; (2) other cases wherein the amount involved exceeds five hundred dollars. In the first

class of cases appeal or writ of error was to this court direct. In the second class of cases the writ of error or appeal was to the United States Circuit Court of Appeals for the Ninth Circuit. Under § 505 the judgments of the Circuit Court of Appeals were made final in all cases coming to it from the district court, with the provision that the Circuit Court of Appeals might certify propositions of law to this court in any cases pending before it upon writs of error or appeals. The like provision as to the finality in the Circuit Court of Appeals was, we think, carried into the Judicial Code in § 134 thereof, and a writ of error or appeal to this court was allowed where the Federal Constitution was involved, under the provisions of § 247. In § 134, as in the Alaska Code from which we have quoted, the judgment of the Circuit Court of Appeals was made final "in all such cases," that is, in cases in which the section permitted appeals or writs of error to the Circuit Court of Appeals.

It is true that § 134 begins by reference to cases other than those which may come to this court, and might be construed to allow appeals to the Circuit Court of Appeals for the Ninth Circuit only in cases which could not be brought directly to this court. But, bearing in mind the sources of the legislation which was enacted into the Judicial Code and the interpretation which this court has placed upon the Circuit Court of Appeals Act of 1891, we are led to the conclusion that it was not the intention of Congress to give practically two appeals in the class of cases which we are now considering. Under § 5 of the Circuit Court of Appeals Act, 1891, c. 517, 26 Stat. 826, direct appeals might be taken from the district courts or circuit courts to this court in cases which involved the construction or application of the Constitution of the United States, and where such was the only matter involved, an appeal could not be taken to the Circuit Court of Appeals. *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318. But in cases wherein issues were involved affecting the

construction and application of the Constitution, as well as others upon which the case might go to the Circuit Court of Appeals under the Circuit Court of Appeals Act, two appeals were not allowed, and the judgment of the Circuit Court of Appeals was final if the case was taken there, and the jurisdiction originally invoked rested solely upon grounds which by § 6 of the Circuit Court of Appeals Act (§ 128, Judicial Code) made its judgment final. *Macfadden v. United States*, 213 U. S. 288; *Robinson v. Caldwell*, 165 U. S. 359; *Loeb v. Columbia Township Trustees*, 179 U. S. 472; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277; *Boise Water Co. v. Boise City*, (No. 2), 230 U. S. 98.

Under the original Alaska Act, cases involving the application of the Constitution were directly reviewable in this court, and those reviewable by the Circuit Court of Appeals for the Ninth Circuit were by the terms of the act made final in that court. The Judicial Code, which is primarily a codification of former statutes, carried the provisions of these sections into that code with the change which made all criminal cases, capital as well as others, final in the Circuit Court of Appeals. *Itow v. United States*, 233 U. S. 581.

We think Congress in enacting the Judicial Code contemplated no change as to the finality of the judgments of the Circuit Court of Appeals for the Ninth Circuit in cases taken to that court from the District Court of Alaska.

The plaintiff in error might have taken a writ of error from this court to the District Court. (§ 247.) It did not choose to do so, and as the cases involved issues other than those relating to the Constitution, sued out a writ of error from the Circuit Court of Appeals. By the terms of § 134 the judgment of that court is made final.

The contention that the effect of this construction is to make the Circuit Court of Appeals a court of final jurisdiction in cases involving questions of the construction and



application of the Constitution, is met by the suggestion that this court has ample power under the Judicial Code to review judgments of the Circuit Court of Appeals, made final in that court, by writs of certiorari. (§ 240.)

Reaching the conclusion that the judgments of the Circuit Court of Appeals were final in these cases, it follows that the writs of error must be

*Dismissed.*

---

ALASKA SALMON COMPANY *v.* TERRITORY OF  
ALASKA.

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

No. 151. Argued January 20, 1919.—Decided March 3, 1919.

Decided on the authority of *Alaska Pacific Fisheries v. Alaska*, ante, 53.  
Writ of error to review 236 Fed. Rep. 62, dismissed.

The case is stated in the opinion.

*Mr. Warren Gregory, Mr. E. S. McCord and Mr. W. H. Bogle*, for plaintiff in error, submitted.

*Mr. George B. Grigsby*, Attorney General of the Territory of Alaska, for defendant in error.

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

This action was brought in the District Court of Alaska by the Territory of Alaska to recover license taxes from the Alaska Salmon Company. Judgment was rendered

in the District Court in favor of the Territory. To review that judgment a writ of error was taken from the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals affirmed the judgment of the District Court. 236 Fed. Rep. 62. A petition for a rehearing was filed, and denied. Petition for writ of certiorari to the Circuit Court of Appeals was denied in this court. 242 U. S. 648.

The writ of error must be dismissed. The judgment of the Circuit Court of Appeals for the Ninth Circuit was final for the reasons set forth in Nos. 117 and 118, just decided, *ante*, 53.

*Dismissed.*

---

## WITHNELL v. RUECKING CONSTRUCTION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 142. Argued January 16, 1919.—Decided March 3, 1919.

When an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits. P. 68.

Within this principle, an assessment made in accordance with the rule prescribed by the charter of the City of St. Louis is legislative in character, since that charter, having been adopted by direct vote of the citizens under a special provision of the Missouri constitution, has, as respects local assessments, all the force of a legislative act. P. 69. *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465.

The method of assessing part of the cost of local improvements according to frontage, as provided in the St. Louis charter, is unassailable, under the previous decisions of this court. P. 70. *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55; *s. c.*, 245 U. S. 288.

Objections based on the manner of laying out an improvement district, and on alleged failure to conform with the city charter, raise only local questions. P. 70.

The system of area assessment provided by the St. Louis charter (*Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55) is not *per se* obnoxious to the Fourteenth Amendment, and becomes so in its application only when the results are palpably arbitrary or grossly unequal. P. 71.

269 Missouri, 546, affirmed.

The case is stated in the opinion.

*Mr. Edmund T. Allen and Mr. Clifford B. Allen*, for plaintiff in error, submitted:

An ordinance providing for the apportionment of the cost of an improvement must, in order to be valid, provide some rule capable of producing reasonable equality between the parties assessed, and a fair distribution of the taxes proportionately to the benefits received. *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55; *Myles Salt Co. v. Iberia Drainage District*, 239 U. S. 478; *Wagner v. Baltimore*, 239 U. S. 207; *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U. S. 419; *Houck v. Little River Drainage District*, 239 U. S. 254; *Martin v. District of Columbia*, 205 U. S. 135, 139; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20.

The ordinance in this case is invalid because the rule it applied to defendant's property did not produce reasonable equality between the parties assessed, and was not based upon the idea of benefits, equality and justice. The same tax was levied on property 297 feet away from the street to be improved as was levied upon property within a foot of it. *Gast Realty Co. v. Schneider Granite Co.*, *supra*; *Norfolk County Water Co. v. Norfolk*, 246 Fed. Rep. 652; *Norris v. Montezuma Valley Irrigation District*, 248 Fed. Rep. 369, 372; *Bush v. Branson*, 248 Fed. Rep. 377, 380; *Dietz v. Neenah*, 91 Wisconsin, 422; *White v. Gove*, 183 Massachusetts, 333.

The ordinance is void because it applied a vicious, arbitrary, and unjust rule to the defendant's property,

63.

Argument for Defendant in Error.

and its application thereto results in gross inequality and injustice, and practical confiscation.

The City of St. Louis is a political subdivision of the State of Missouri. *Northcut v. Eager*, 132 Missouri, 265; *Steffen v. St. Louis*, 135 Missouri, 44; *Straub v. St. Louis*, 175 Missouri, 413.

There was no opportunity afforded defendant to be heard upon the validity of the tax, and the amount of the assessment. *Collier Estate v. Western Paving Co.*, 180 Missouri, 375; *Meier v. St. Louis*, 180 Missouri, 391; *Houck v. Little River Drainage District*, 248 Missouri, 373.

The landowner must have an opportunity to be heard as to the validity and apportionment of a special assessment for local improvements, before it becomes a lien on his property. "The law itself must save the parties' rights, and not leave them to the discretion of the court as such" in a suit to enforce the lien. *Security Trust Co. v. Lexington*, 203 U. S. 323; *Coe v. Armour Fertilizer Works*, 237 U. S. 413; *Londoner v. Denver*, 210 U. S. 373; *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U. S. 419; *Embree v. Kansas City Road District*, 240 U. S. 242; *Roller v. Holly*, 176 U. S. 398; *Louisville & Nashville R.R. Co. v. Central Stock Yards Co.*, 212 U. S. 132; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; *State v. Colbert*, 273 Missouri, 198; *Sandersville v. Bell*, 146 Georgia, 737; *Bouslog v. Gulfport*, 112 Mississippi, 184; *Violet v. Alexander*, 92 Virginia, 561; *Stuart v. Palmer*, 74 N. Y. 183.

Mr. Frank B. Coleman, with whom Mr. George M. Block was on the brief, for defendant in error:

The charter of the City of St. Louis and the powers therein conferred upon the City with respect to municipal matters, including special assessments for local improvements, are an express grant by the constitution of Missouri, and these powers, when exercised by the City, are legislative powers as distinguished from delegated powers.



Where the amount of the benefit conferred and the proper adjustment of the taxes among the property owners and the assessment and classification of the property to be improved are fixed and designated by a legislative act, no notice or hearing is required, in order to constitute due process of law within the meaning of the Federal Constitution. *Gast Realty Co. v. Schneider Granite Co.*, 245 U. S. 288, s. c., 240 U. S. 55; *Embree v. Kansas City Road District*, 240 U. S. 242, 250, 251; *Houck v. Little River Drainage District*, 239 U. S. 254, 262; *Wagner v. Baltimore*, 239 U. S. 207, 216, 218, 219; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 341, 343; *Shumate v. Heman*, 181 U. S. 402, 403; *Meier v. St. Louis*, 180 Missouri, 391, 409; *Pryor v. Construction Co.*, 170 Missouri, 451.

The constitutionality and the legality of tax-bills issued pursuant to the provisions of § 14, Art. VI, of the charter of the City of St. Louis have been sustained both by the Supreme Court of the State of Missouri and by this court.

This court and the Missouri Supreme Court have both held, where tax-bills were issued for street improvements under the authority of Art. VI, § 14, of the charter of the City of St. Louis, that the one-fourth levied and assessed under the front-foot rule is valid and incontestable even where the three-fourths of such tax-bills assessed under the area rule are invalid because of gross inequalities in the assessment thereof.

In levying assessments for special improvements, there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. And the fact that there may be inequalities is not enough to invalidate the tax-bills. *Gast Realty Co. v. Schneider Granite Co.*, *supra*; *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U. S. 419, 430; *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 265; *Wagner v. Baltimore*, 239 U. S.

63.

Opinion of the Court.

207, 216; *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 433-435.

MR. JUSTICE DAY delivered the opinion of the court.

The construction company brought suit to enforce the lien of twelve tax-bills issued on account of the cost of paving a portion of Broadway in the City of St. Louis. Withnell, plaintiff in error, is the owner of property assessed, fronting on Broadway, being five lots in City Block No. 2069, five lots in City Block No. 2608, and unplatted property in City Blocks Nos. 2620 and 2621.

The validity of the tax-bills was affirmed by the Supreme Court of Missouri. 269 Missouri, 546. The case is here because of alleged violation of the Fourteenth Amendment to the Federal Constitution in assessing the lien of these tax-bills upon plaintiff in error's property. The assessment was levied in accordance with the charter of the City of St. Louis. An assessment for improving other portions of the street than are here involved, made under the terms of the St. Louis charter, was before this court in *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55. In that case the assessment was held invalid in part. After being remanded to the Supreme Court of Missouri, and a second judgment, the case was again before this court. 245 U. S. 288.

The method of making assessments under the charter of the City of St. Louis, as stated in *Gast Realty Co. v. Schneider Granite Co.*, *supra*, is as follows: One-fourth of the total cost is levied upon all the property fronting upon or adjoining the improvement according to frontage and three-fourths according to area ascertained as follows: "A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter pro-

vided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. . . . If there is no parallel or converging street on either side of the street improved, the district lines shall be drawn three hundred feet from that parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located."

In the *Gast Realty Co. Case* the area assessment was held invalid because it assessed a large and disproportionate part of the plaintiff in error's property. The memorandum appended to the opinion shows that the foot-front assessment was not disturbed. And see the subsequent consideration of the matter in *Schneider Granite Co. v. Gast Realty Co.*, 245 U. S. 288.

In support of the constitutional objection it is contended that the plaintiff in error was not allowed to be heard as to the validity and apportionment of the assessment, and was therefore denied due process of law. The charter provision for notice and hearing is inserted in the margin.<sup>1</sup> But whether a property-owner is entitled to be

---

<sup>1</sup> "No ordinance for the construction or reconstruction of any street, avenue, boulevard, alley or public highway of the city, shall be passed unless recommended by the board of public improvements, as hereinafter provided. The board shall designate a day on which they will hold a public meeting to consider the improvement of any designated streets, avenues, boulevards, alleys or public highways by grading or regrading, by constructing, or reconstructing, by paving or repaving the roadway, including cross-walks and intersections, and shall give two weeks' public notice, in the papers doing the city printing, of the time, place and matter to be considered, stating in such notice the kind of material and manner of construction proposed to be used for the wearing surface of such improvement, naming more than one kind

63.

## Opinion of the Court.

heard in advance upon the questions of benefit and apportionment depends upon the authority under which the assessment is made. When the assessment is made in accordance with a fixed rule adopted by a legislative act, a property-owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *Embree v. Kansas City Road District*, 240 U. S. 242; *Wagner v. Baltimore*, 239 U. S. 207, 217, 218, and cases cited. We are of opinion that the assessment made in accordance with the rule of the St. Louis charter was legislative in character and required no previous notice or preliminary hearing as to the nature and extent of benefits in order to maintain its constitutional validity. The charter of the City of St. Louis was adopted by a vote of the people under state constitutional authority. It was under consideration in *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465. This court said:

“As the legislative power of a State is vested in the legislature, generally that body has the supreme control,

---

of material or manner of construction, if the board deems it advisable so to do, and also the class of specification and plan for such work, which specification and plan shall be approved by said board, and filed in its office. If within fifteen days after such public meeting, the owners of the major part of the area of the land made taxable by this article for such improvement, shall file in the office of the board of public improvements their written remonstrance against the proposed improvement, or against the material or manner thereof, the board shall consider such remonstrance, and if said board shall, by a two-thirds vote, at a regular meeting, approve of the improvement, material or manner remonstrated against, they shall cause an ordinance for the same to be prepared and report the same with the reasons for their action and the remonstrance to the assembly. If such majority fail to remonstrate within fifteen days or shall petition the board for the improvement, said board may by a majority vote approve the same, and shall cause an ordinance to be prepared and reported to the assembly therefor.”



and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the State, given in the constitution. Sections 20 and 21 of Article 9 of the Constitution of 1875 of the State of Missouri authorized the election of thirteen freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to 'become the organic law of the city.' . . . In pursuance of these provisions of the constitution a charter was prepared and adopted, and is, therefore, the 'organic law' of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the constitution and laws of the State, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an organic act so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an '*imperium in imperio*.' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of the charter."

The same view has been repeatedly declared by the Supreme Court of Missouri. In *Meier v. St. Louis*, 180 Missouri, 391, 409, that court declared, citing its previous decisions, that the charter of St. Louis, adopted under the constitution, had as respects local assessments all the force of legislative acts.

We reach the conclusion that the attack upon the validity of the assessment for want of advance notice of hearing as to benefits must fail.

Regarding the front-foot method of assessment as being unassailable under the previous decisions of this court (240 U. S., 245 U. S., *supra*), we come to consider the area assessment. Objections based on the manner of laying

63.

Opinion of the Court.

out the district, and whether it conforms to the plan outlined in the city charter, are conclusively disposed of by the decisions of the state court. We have to deal only with the questions raised as to the alleged denial of the protection afforded by the Fourteenth Amendment. An examination of the plat made part of the record, and reproduced in the briefs of counsel, shows that owing to the curvatures in Broadway and the relation thereto of converging and parallel streets, the assessing district laid out in accordance with the charter is of irregular outline. The lots assessed are by no means uniform in size, nor is their relation to the improvement uniformly alike. Some blocks, including some of the plaintiff in error's, are not subdivided into lots, and are irregular in shape. But we are not prepared to hold that the assessment district was so laid out with reference to plaintiff in error's property as requires this court to declare the application of the area rule a denial of due process of law, or of the equal protection of the laws. That the assessment, owing to the difficulties of the situation, made inequalities inevitable, is apparent. The Supreme Court of the State finds, and we are not prepared to disturb its conclusion, that the property east and west of Broadway, in the subdivision of the same for the purposes of assessment, was treated with fairness and with as much equality as the situation permitted. The attack upon constitutional grounds because of the system which the charter authorized in making the assessment can only succeed if it has produced results as to plaintiff in error's property palpably arbitrary or grossly unequal. This system has been sustained in many decisions in the Supreme Court of Missouri, and has long been enforced in practice in that State. Its application in the instance passed upon in *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S., *supra*, was found to work so arbitrarily as to require an avoidance of the area assessment upon constitutional grounds. The

frontage rule of assessment, now generally in use, has been frequently sustained by the decisions of this court. It may and does in some instances work inequalities in benefits conferred upon property assessed. In the present case a calculation found in the brief of the defendant in error, the correctness of which does not seem to be challenged, shows that if the property had been assessed by the front-foot rule, that of the plaintiff in error would have had a larger assessment than the one which resulted from the method employed.

The Supreme Court of Missouri found that no evidence was offered to sustain the allegations of the cross-bill that the tax-bills were confiscatory or disproportionate to the benefits received in that the city escaped paying its just proportion of the cost of the improvement because of its ownership of property within the district.

We are not prepared to say that the plaintiff in error, because of arbitrary legislative action or the abuse of power, was denied due process of law or the equal protection of the laws in this assessment.

*Affirmed.*

---

COMPañIA GENERAL DE TABACOS DE FILIPINAS *v.* ALHAMBRA CIGAR & CIGARETTE MANUFACTURING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 180. Submitted January 22, 1919.—Decided March 3, 1919.

An appeal from the Supreme Court of the Philippine Islands perfected before the Act of September 6, 1916, is governed by § 248 of the Judicial Code, which gives this court jurisdiction in all cases in which any treaty of the United States is involved. P. 75.

72.

Opinion of the Court.

A decision of the Supreme Court of the Philippines that the name "Isabela" is a geographical and descriptive term not subject to registration as a trade-name under the law before or since the cession of the Islands, and that its use as a designation of cigars and cigarettes was not unfair competition, and that the suit was not for infringement of a trade-name, "La Flor de la Isabela," registered under the Spanish regime, *held* not to involve the provisions of the Treaty of Paris of 1898, Arts. VIII and XIII, providing that the cession shall not impair property rights previously acquired, and that rights of property secured by copyrights and patents acquired by Spaniards in the Islands shall be continued and respected. P. 75. *Ubeda v. Zialcita*, 226 U. S. 452, distinguished.

Appeal to review 33 Phil. Rep. 485, dismissed.

THE case is stated in the opinion.

*Mr. F. C. Fisher* for appellant.

*Mr. Harry W. Van Dyke* for appellee. *Mr. Edmund W. Van Dyke* was also on the brief.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought by the appellant, a corporation organized under the laws of Spain, in the Court of First Instance of Manila. The complainant set up that for more than twenty-seven years it had been engaged in the business of manufacturing cigars and cigarettes in the Philippine Islands. That its factory is known as "La Flor de la Isabela," which name is used upon the packages and containers of the products manufactured by complainant and on the advertising matter in its cigar and cigarette business. That on April 5, 1887, the Kingdom of Spain as the sovereign authority in the Philippine Islands issued to it, under laws then in force, a certificate of registration and ownership of certain trade-marks and trade-names and label designs therein described and enumerated, including the trade-name "La Flor de la



Isabela" conferring the right upon the complainant to all the benefits appurtenant thereto, including the right to prosecute for infringement. That the trade-name has been in continuous use solely by the complainant from the issuance of the Spanish certificate of registration and ownership to the time of bringing suit, except for the acts of the appellee. That by reason of the long-continued use of the phrase "La Flor de la Isabela" to designate its factory and its products the said phrase and sundry abbreviations thereof when applied to the manufactures of tobacco as a distinguishing brand or name had come to have a secondary meaning designating and denoting that they are the products of its factory. In common parlance the name "La Flor de la Isabela" is abbreviated to "Isabelas" when applied to cigars or cigarettes. That on or about the first of June, 1914, the defendant, now appellee, a corporation organized under the laws of the Philippine Islands, engaged in the manufacture and sale of cigars and cigarettes in Manila and elsewhere in the Philippine Islands, unlawfully misappropriated to its own use and benefit the word "Isabelas" in its secondary meaning as a distinguishing brand or name of its tobacco products. That the unlawful use of the name "Isabelas" as the distinguishing brand or name of the products of the defendant is calculated to deceive the public into the belief that the goods of the defendant so designated and branded are the goods manufactured by the complainant, and that the use thereof by the defendant will cause it irreparable injury. An injunction was prayed against the defendant, and an accounting sought.

The Court of First Instance found in favor of the complainant because of its exclusive ownership of the Spanish trade-mark, and in favor of the defendant on the question of unfair competition. Upon appeal to the Supreme Court of the Philippine Islands, that court found in favor of the defendant upon both issues, and directed a reversal of the

judgment below. 33 Phil. Rep. 485. Appeal to this court was sought and allowed upon the ground that the judgment of the Supreme Court was in an action which involved the Paris Treaty of 1898 between the United States and Spain, because it is therein provided that the property rights of private establishments or associations having legal capacity to acquire and possess property, and especially the rights of property secured by copyrights and patents acquired by Spaniards in the Philippine Islands at the time of the ratification of the treaty, shall not be impaired, but shall continue to be respected.

This appeal was perfected before the Act of September 6, 1916, 39 Stat. 726, and is controlled by § 248 of the Judicial Code, which provided that this court should have jurisdiction to review, revise, reverse, modify or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved.

The contention is that the provisions of this treaty were involved in the decision of the Supreme Court, thereby authorizing this appeal.

By the Treaty of Paris of 1898, Spain ceded to the United States the archipelago known as the Philippine Islands. In Article VIII of the treaty it is provided that the relinquishment or cession, as the case may be, "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." Article XIII provides that "The rights of property secured by copyrights and patents ac-

quired by Spaniards in the Island of Cuba and in Porto Rico, the Philippines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected." Treaties in Force, 1904, pp. 722, 725, 726. [30 Stat. 1754.]

It is the evident purpose of these provisions, in view of the cession of territory made by Spain to the United States, to preserve private rights of property, and to provide that the change of sovereignty should work no impairment of such rights.

The Philippine Act of 1902, carried into the section of the Judicial Code which we have quoted, intended to give this court jurisdiction in cases involving rights secured by the Treaty of 1898 and other treaties of the United States. A good illustration of a case of this character is found in *Vilas v. Manila*, 220 U. S. 345, where certain claims were made against the City of Manila, which it was contended survived, notwithstanding the cession to the United States. A writ of error was sued out to a judgment of the Supreme Court of the Philippine Islands denying relief because of its holding that the municipality of Manila after the treaty was a totally different corporate entity and in nowise liable for debts created under the Spanish sovereignty. Exception was taken to the jurisdiction, but this court held that the case involved the Treaty of 1898, as the question was made to turn in the court below upon the consequence of the change of sovereignty and the reincorporation of the city after the substituted sovereignty. Mr. Justice Lurton, who delivered the opinion of the court, said: "This disposes of the question of the jurisdiction of this court grounded upon the absence from the petition of the plaintiffs of any distinct claim under the treaty of Paris, since under § 10 of the Philippine Organic Act of July 1, 1902, this court is given jurisdiction to review any final decree or judgment of the Supreme Court of the Philippine Islands where any treaty of the

United States 'is involved.' That treaty was necessarily 'involved,' since neither the court below nor this court can determine the continuity of the municipality nor the liability of the city as it now exists for the obligation of the old city, without considering the effect of the change of sovereignty resulting from that treaty. See *Reavis v. Fianza*, 215 U. S. 16, 22."

In this case no such question is presented. The decision involved no consideration of treaty rights, nor were the same discussed in the judgment in the court below. The Philippine Supreme Court, in determining the issues, held that the name "Isabela," which appellee was charged with using, was a geographical and descriptive term and incapable of registration as a trade-mark either under the Philippine Act No. 666, or the law as it existed under the Spanish regime; that the Spanish trade-name as registered consisted of the words "La Flor de la Isabela" and the trade-mark of a shield with certain devices thereon. That the action was not for the infringement of the trade-name "La Flor de la Isabela," but was for the violation of the trade-name "Isabela." And that unfair competition was not shown.

Certainly the treaty, in providing that property rights of this class should be respected, did not intend to prevent the consideration by the courts of the nature and extent of the rights granted, or prohibit the application of laws for the enforcement and regulation of such property rights when not in derogation thereof. Philippine Act No. 666, § 14, Comp. of the Acts of the Philippine Comm., § 68, itself provides that certificates issued under the Spanish sovereignty, unannulled under the royal decree of 1888, shall be conclusive evidence of the exclusive right of ownership of such trade-marks or trade-names.

Reliance is had by appellant, to sustain the jurisdiction, on the decision of this court in *Ubeda v. Zialcita*, 226 U. S. 452. There suit was brought upon a trade-mark registered



under the Spanish regime. The record shows that the appeal was allowed upon two grounds: (1) that the amount involved exceeded \$25,000; (2) alleged violation of treaty rights in the decision that the trade-mark being itself an imitation of earlier trade-marks prevented an injunction in favor of its owner. As to the treaty claim this court said (p. 454): "In such a case [the wrongful appropriation of an earlier mark] the Philippine act denies the plaintiff's right to recover. Act No. 666, § 9. See § 12, and No. 744, § 4. Compiled Acts, §§ 63, 66. It is said that to apply the rule there laid down would be giving a retrospective effect to § 9 as against the alleged Spanish grant of December 16, 1898, to the plaintiff, contrary to the general principles of interpretation and to Article 13 of the Treaty of Paris, April 11, 1899, providing that the rights of property secured by copyrights and patents shall continue to be respected. But the treaty, if applicable, cannot be supposed to have been intended to contravene the principle of § 9, which only codifies common morality and fairness. The section is not retrospective in any sense, for it introduces no new rule."

Certainly, this was far from holding that a right of appeal existed because a right secured by the treaty was involved.

The present case was decided upon grounds entirely compatible with continued respect for the trade-mark and trade-name rights granted by the Spanish sovereignty. It results that in the sense of the statute, giving a right to review in this court, no treaty of the United States was involved in the decree which it is sought to reverse.

The appeal must be

*Dismissed.*

Argument for Plaintiff in Error.

## WHITEHEAD v. GALLOWAY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF  
OKLAHOMA.

No. 184. Submitted January 23, 1919.—Decided March 3, 1919.

Congress, having provided, through the Act of February 19, 1903, c. 707, 32 Stat. 841, and the provisions of Mansfield's Digest as thereby extended to the Indian Territory, that instruments affecting the title to land, to be valid against subsequent purchasers for value, should be recorded or filed in the office of the clerk or the deputy clerk of the United States Court for the Indian Territory, at the place of holding court in the recording district in which the land was located, afterwards, by the Act of June 21, 1906, c. 3504, 34 Stat. 343, created and defined a new recording district, naming a place for recording and for holding court therein, but an interval of some days occurred between the date of the act and the time when a deputy clerk was appointed and qualified for the new district and opened the office for reception of instruments. *Held*, that the law made no provision whereby during this interval a deed of land in the new district might be filed in an older district in which the land was previously located, and that a deed so filed was not constructive notice to subsequent purchasers who bought several months after the recording office in the new district was opened. P. 84.

The provision made by the Act of February 19, 1903, *supra*, for transfer of recorded instruments to the indices of new recording districts, applied only to instruments recorded before the date of the act. *Id.* 153 Pac. Rep. 1101, affirmed.

THE case is stated in the opinion.

*Mr. C. S. Arnold* for plaintiff in error, with whom *Mr. James E. Whitehead* was on the brief, insisted that Congress could not have intended the Act of June 21, 1906, to become immediately operative, before a deputy clerk and *ex officio* recorder could be legally appointed, could qualify, secure his quarters and records and open up his

office for the transaction of business. During such interval, the law as it previously existed remained in force, and with it plaintiff in error complied by filing in the older district. It was impossible to record at Duncan before the deputy clerk and *ex officio* recorder there had been appointed, because, under the laws, such deputy alone was qualified to act; and neither the clerk, marshal nor judge could do so. Act of February 19, 1903, 32 Stat. 841. Furthermore, there was provision for transfer of records. *Ib.* 842; *First National Bank v. Keys*, 229 U. S. 179. As to the peculiar functions of the deputy, counsel also cited Acts of May 2, 1890, 26 Stat. 81, §§ 30, 32, 38; March 1, 1895, 28 Stat. 693, §§ 3, 4.

Upon the right to record in the old district until the new is organized: *Lumpkin v. Muncey*, 66 Texas, 311; *O'Shea v. Twohig*, 9 Texas, 366; *Clark v. Goss*, 12 Texas, 395. Distinguishing: *Astor v. Wells*, 4 Wheat. 466; *Green v. Green*, 103 California, 108; *Garrison v. Haydon*, 1 Marsh. J. J. 222.

*Mr. H. A. Ledbetter* for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This is a contest between claimants to the ownership of a tract of land now part of Carter County, Oklahoma, and prior to June 21, 1906, a part of the 20th Recording District, Ryan, (Office of the Recording District) Indian Territory. Thereafter it was in the 29th Recording District, Duncan (Office of the Recording District) Indian Territory.

The facts so far as pertinent are:

On the 27th day of June, 1906, Wilburn Adams, who held title to the land, made and delivered a deed for the same to the plaintiff in error, Whitehead, which deed was filed for record in the office of the 20th Recording Dis-

79.

Opinion of the Court.

trict at Ryan, Indian Territory, on the 28th day of June, 1906, and was duly recorded. Afterwards Adams and wife made a warranty deed of the same property to James O. Galloway, dated November 16, 1906, and recorded November 22, 1906, in the office of the 29th Recording District of the Indian Territory at Duncan. Galloway on the 24th day of December, 1906, conveyed the same to Winfield S. Pressgrove and his wife, which deed was recorded at Duncan. Pressgrove and wife executed to the Travelers Insurance Company of Hartford, Connecticut, a mortgage on the land dated March 22, 1907, recorded April 5, 1907, in the office of the 29th Recording District at Duncan, Indian Territory. Pressgrove and wife executed a mortgage to the Atkinson, Warren & Henley Company, dated March 22, 1907, recorded April 24, 1907, in the office of the 29th Recording District at Duncan.

On June 21, 1906, Congress passed an act (34 Stat. 343):

“That in addition to the places now provided by law for holding courts in the southern judicial district of Indian Territory courts shall be held in the town of Duncan, and all laws regulating the holding of the courts in the Indian Territory shall be applicable to the said court hereby created in the said town of Duncan.

“That the territory next hereinafter described shall be known as recording district numbered twenty-nine, beginning at a point where township line between townships two and three north reaches the east boundary line of Oklahoma Territory; thence east on said township line twenty-four miles to where it intersects with range line three and four west; thence south on said range line twelve miles to where it intersects the base line between townships one north and one south; thence east along said base line six miles to the range line between ranges two and three west; thence south twelve miles along said range line to the township line between townships two



and three south; thence west thirty miles along said township line to where it intersects with the east line of Oklahoma Territory; thence north along said line twenty-four miles to the place of beginning; and the place of recording and holding court in said district shall be Duncan."

Prior to the passage of this act of Congress the lands involved in this case were located in the 20th Recording District of the Indian Territory, known as the "Ryan District." But this act made them a part of the 29th Recording District, known as the "Duncan Recording District." On June 30, 1906, C. M. Campbell, who was then Clerk of the United States Court for the Southern District of the Indian Territory, appointed C. N. Jackson deputy clerk and ex-officio recorder for the newly-created 29th Recording District, with headquarters at Duncan. C. N. Jackson took and subscribed the oath of office and filed his bond on June 30, 1906, and his appointment was duly approved by the United States Court at Ardmore on the same day. He arrived at Duncan and first opened his office on July 7, 1906, and the first entry made upon the books was upon that date. No recording office was opened at Duncan prior to July 7, 1906, when C. N. Jackson arrived and opened one.

From the time of the conveyance of the lands to Pressgrove (December 24, 1906) he has been in the actual possession thereof.

The lower court and the Supreme Court of Oklahoma decided in favor of Galloway and his successors, holding that the recording of the deed, made to Whitehead, at Ryan, was not constructive notice to the subsequent purchasers. (153 Pac. Rep. 1101; rehearing denied without opinion, 157 Pac. Rep. xxiii.)

At the time of the passage of the statute of June 21, 1906, another statute provided in effect (32 Stat. 841; 10 Fed. Stats., 1st ed., p. 130):

That chapter twenty-seven of the Digest of the Statutes

79.

Opinion of the Court.

of Arkansas, of 1884, be extended to the Indian Territory so far as the same is applicable and not inconsistent with any law of Congress; that the clerk or deputy clerk of the United States Court of each of the courts of the Territory should be ex-officio recorder for his district and perform the duties required of the recorder in the chapter of Mansfield's Digest, hereinafter referred to. The duty was placed on each clerk or deputy clerk to record in the books provided for the office all deeds, mortgages, etc. Instruments theretofore recorded with the clerk of the United States Court for the Indian Territory, were not required to be again recorded, but should be transferred to the indexes without further cost, and that such records theretofore made should be of full force and effect. That whenever in said chapter (Mansfield's Digest) the word "county" occurs there should be substituted the word "district," and wherever the words "State" or "State of Arkansas" occur there should be substituted therefor the words "Indian Territory," and wherever the words "clerk" or "recorder" occur there should be substituted the words "clerk or deputy clerk of the United States court." The statute further provides that all instruments of writing, the filing of which is provided by law, should be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located.

The provisions of Mansfield's Digest, which Congress extended to the Indian Territory so far as applicable, provide (Mansfield's Digest, 1884, c. 27, § 671):

"No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, ob-

taining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex officio* recorder of the county where such real estate may be situated."

Congress made no provision whereby deeds to lands in the new district were to be recorded at Ryan in the old district pending the opening of the office in the new district at Duncan. The provision as to transfer of recorded instruments to the new indexes, 32 Stat. 842, applied to instruments theretofore recorded. See *First National Bank v. Keys*, 229 U. S. 179.

Cases cited by plaintiff in error, where statutes provide for the organization of new counties, and holding that until such new counties are organized the place for recording is the old county where the lands are situated, are not apposite. Congress itself declared and defined the new Recording District, and the applicable provisions of Mansfield's Digest provided that no conveyance should be constructive notice against a subsequent purchaser unless such deed should be filed for record in the office of the clerk and *ex officio* recorder of the district where the real estate was situated. The statute is explicit, and when Whitehead bought from Adams the requirement of the law was plain that the deed should be filed for record at Duncan in the new district. See *Astor v. Wells*, 4 Wheat. 466. But, it is said, at the time of the conveyance to Whitehead, no office had been established at Duncan. This fact, however, did not continue Ryan as the place for recording deeds for lands in the new district.

The requirements of the legislation are positive, making Duncan the place for filing the deed in the new Recording District where the lands are situated. The plaintiff in error urges that until an office was opened at Duncan it was impossible to record a deed there. This

79.

## Opinion of the Court.

fact does present an anomalous situation, not to be remedied, however, by judicial construction in derogation of positive and controlling legislation.

Moreover, by the agreed statement of facts it appears that a deputy clerk, who became *ex officio* recorder, was appointed June 30, 1906, and opened his office for the transaction of business at Duncan on July 7, 1906. The conveyance from Adams to Galloway was made on November 16, 1906. Had Whitehead filed his deed for record at Duncan after the recording office was opened there and prior to November 16, 1906, Galloway and the subsequent purchasers would have had constructive notice by means of this record of the prior conveyance. But all that Whitehead did was to file his deed at Ryan after the land had become part of the Duncan district. After the opening of the Duncan office, it was his duty, if he would charge others with constructive notice, to file his deed in the office at Duncan. Had he done this he would have had a conveyance of record which would have been constructive notice to subsequent purchasers. Such constructive notice was not conveyed to Galloway and the subsequent purchasers by the filing of the deed for record at Ryan in the old district. It results that the judgment of the Supreme Court of Oklahoma must be

*Affirmed.*



UNITED STATES *v.* DOREMUS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF TEXAS.

No. 367. Submitted January 16, 1919.—Decided March 3, 1919.

While Congress may not exert authority which is wholly reserved to the States, the power conferred by the Constitution to levy excise taxes, uniform throughout the United States, is to be exercised at the discretion of Congress; and, where the provisions of the law enacted have some reasonable relation to this power, the fact that they may have been impelled by a motive, or may accomplish a purpose, other than the raising of revenue, cannot invalidate them; nor can the fact that they affect the conduct of a business which is subject to regulation by the state police power. P. 93.

The Narcotic Drug Act of December 17, 1914, c. 1, 38 Stat. 785, § 1, requires those who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, or their compounds, derivatives, etc., to register and pay a special tax. Section 2 makes sales, etc., of these drugs unlawful except to persons who give orders on forms issued by the Commissioner of Internal Revenue, which orders must be preserved for official inspection; forbids any person to obtain the drugs by means of such order forms for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business therein, or the legitimate practice of his profession; but declares that it does not apply (a) to the dispensing or distributing of the drugs to patients by physicians registered under the act, in the course of professional practice only, provided the physicians keep certain records for official inspection, or (b) to sales, etc., by dealers upon prescriptions issued by registered physicians, provided the dealers preserve the prescriptions for like inspection. *Held*, that the provisions of § 2 have a reasonable relation to the enforcement of the tax provided by § 1 (which is clearly unobjectionable), and do not exceed the power of Congress. P. 94. 246 Fed. Rep. 958, reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Porter and Mr. W. C. Herron* for the United States:

86.

## Argument for the United States.

A reading of the indictment shows that the first two counts and each succeeding two counts must be read together in order to make out the offense intended to be charged.

Looking at § 2 of the act, in connection with the title and all the other provisions thereof, it is clear that the key to its meaning is in the distinction made between producers of, and dealers in, these drugs, on the one hand, and consumers of them on the other. The former must register and pay the special tax; the latter not. The incidence of the tax is placed upon the former by the title of the act, and by its first section, while the latter are not directly dealt with by the act at all. This distinction is believed to be fundamental. Assuming it to be the practical object in the mind of Congress, the natural end to be accomplished by the act in this connection would be to see that the drugs in question, in so far as the incidence of the tax upon them was concerned, came really and honestly into the hands of consumers, and did not, through the passport of a druggist or doctor, come into the hands of a dealer who would not register, would not pay the special tax, and whose dealings would not be supervised by the Bureau of Internal Revenue. The facility with which they may be transferred, and the ease therefore with which the tax upon dealers may be evaded are evident, and therefore methods and means, which seem at first drastic, may nevertheless be properly deemed by Congress necessary to secure the assessment of all producers and dealers, while relieving genuine consumers.

Congress, consequently, provided for the producers and dealers in the provisions of §§ 1 and 2. It required the transferrer and the transferee both to register in the normal case, and to pay the tax, and to use official order forms in their dealings with each other, so as to secure that both should so register and pay the tax.

It recognized, however, consumers in paragraphs (a)

and (b) of § 2. It permitted the sale of the drugs to them either from a physician directly or from him indirectly through a prescription to a druggist. In order, however, to prevent frauds on the revenue by the obtaining of the drugs under the guise of *bona fide* consumers by persons who in truth intended to deal in them without registering and paying the special tax, it required that physicians dispensing the drugs directly should do so only to "patients" treated in the course of professional practice, and that druggists should dispense the drugs only on "prescriptions" issued by physicians, and that neither of them should procure the drugs on order forms for any purpose other than the distribution of them to *bona fide* consumers—that is, genuine patients of a physician. The act thus looked at hangs together. It is true, of course, that it also had the moral purpose of discouraging the use of the drugs except as a medicine, but its main purpose as a revenue measure was to see that dealers in the drugs do not escape the tax.

Counsel then instanced, as well-known examples of the use of the taxing power in connection with social or moral ends, the protective tariff system; the tax on foreign-built yachts, *Billings v. United States*, 232 U. S. 261; on dealers in liquors and lottery tickets, *License Tax Cases*, 5 Wall. 462; on notes of state banks, *Veazie Bank v. Fenno*, 8 Wall. 533; on importation of alien passengers, *Head Money Cases*, 112 U. S. 580; graduation of taxes, *Magoun v. Bank*, 170 U. S. 283; *Knowlton v. Moore*, 178 U. S. 41; *Brushaber v. United States*, 240 U. S. 1; on oleomargarine, *In re Kollock*, 165 U. S. 526; *McCray v. United States*, 195 U. S. 27; on sugar refiners, *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89. On the right to exempt certain classes of dealers, *United States v. Calhoun*, 39 Fed. Rep. 604; *Cook v. Marshall County*, 196 U. S. 261. And see *Mountain Timber Co. v. Washington*, 243 U. S. 219; *United States v. Jin Fuey Moy*, 241 U. S. 394.

86.

Opinion of the Court.

The same presumption prevails in favor of the constitutionality of the means adopted by Congress to effectuate its exercise of the taxing power as prevails regarding the exercise of the power itself. Where Congress has acted clearly in the exercise of its taxing power, the means employed to effectuate this legitimate functioning are in their nature practical, belonging to the field of experiment and experience, and outside of the field of judicial knowledge. Hence, if it once be determined that the main provision of the act levying the tax and defining its incidence is constitutional, the means devised by Congress for the collection of the tax and the prevention of frauds in connection with it will, except in the most extraordinary case, be held to be within the proper scope of the legislative power. *In re Kollock*, *supra*; *McCray v. United States*, *supra*; *Nicol v. Ames*, 173 U. S. 509; *Felsenheld v. United States*, 186 U. S. 126; *United States v. 132 Packages*, 76 Fed. Rep. 362; *United States v. Dewitt*, 9 Wall. 41; *United States v. Jin Fuey Moy*, *supra*. Counsel also cited *Blunt v. United States*, 255 Fed. Rep. 332; *Baldwin v. United States*, 238 Fed. Rep. 793; *United States v. Rosenberg*, 251 Fed. Rep. 963; *Foreman v. United States*, 255 Fed. Rep. 621; and *Hughes v. United States*, 253 Fed. Rep. 543, dealing with the act of Congress in question.

No appearance for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Doremus was indicted for violating § 2 of the so-called Harrison Narcotic Drug Act. 38 Stat. 785; 6 U. S. Comp. Stats. 1916, § 6287g. Upon demurrer to the indictment the District Court held the section unconstitutional for the reason that it was not a revenue measure, and was an invasion of the police power reserved to the States. 246 Fed. Rep. 958. The case is here under the Criminal Appeals Act, 34 Stat. 1246.



There are ten counts in the indictment. The first two were treated by the court below as sufficient to raise the constitutional question decided. The first count in substance charges that: Doremus, a physician, duly registered, and who had paid the tax required by the first section of the act, did unlawfully, fraudulently, and knowingly sell and give away and distribute to one Ameris a certain quantity of heroin, to wit, five hundred one-sixth grain tablets of heroin, a derivative of opium, the sale not being in pursuance of a written order on a form issued on the blank furnished for that purpose by the Commissioner of Internal Revenue.

The second count charges in substance that: Doremus did unlawfully and knowingly sell, dispense and distribute to one Ameris five hundred one-sixth grain tablets of heroin not in the course of the regular professional practice of Doremus, and not for the treatment of any disease from which Ameris was suffering, but as was well known by Doremus, Ameris was addicted to the use of the drug as a habit, being a person popularly known as a "dope fiend," and that Doremus did sell, dispense, and distribute the drug, heroin, to Ameris for the purpose of gratifying his appetite for the drug as an habitual user thereof.

Section 1 of the act requires persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, to register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on. At the time of such registry every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the said drugs, is required to pay to the collector a special tax of \$1.00 per annum. It is made unlawful for any person required to register

86.

Opinion of the Court.

under the terms of the act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the said drugs without having registered and paid the special tax provided in the act.

Section 2 provides in part:

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the

name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

“(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: *Provided, however,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.”

It is made unlawful for any person to obtain the drugs by means of the order forms for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.

It is apparent that the section makes sales of these drugs unlawful except to persons who have the order forms issued by the Commissioner of Internal Revenue, and the order is required to be preserved for two years in such way as to be readily accessible to official inspection. But it is not to apply (a) to physicians, etc., dispensing and distributing the drug to patients in the course of professional practice, the physician to keep a record thereof, except in the case of personal attendance upon a patient; and (b) to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription issued by a physician, etc.,

86.

Opinion of the Court.

registered under the act. Other exceptions follow which are unnecessary to the consideration of this case.

Section 9 inflicts a fine or imprisonment, or both, for violations of the act.

This statute purports to be passed under the authority of the Constitution, Article I, § 8, which gives the Congress power "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. *License Tax Cases*, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. *McCray v. United States*, 195 U. S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see *Flint v. Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156, and cases cited.

Nor is it sufficient to invalidate the taxing authority



given to the Congress by the Constitution that the same business may be regulated by the police power of the State. *License Tax Cases*, 5 Wall., *supra*.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. *In re Kollock*, 165 U. S. 526, 536.

The legislation under consideration was before us in a case concerning § 8 of the act, and in the course of the decision we said: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right." *United States v. Jin Fuey Moy*, 241 U. S. 394, 402. Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers, and others who are named in § 1 of the act, cannot be successfully disputed. The provisions of § 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This case well illustrates the possibility which may have induced Congress to insert

86.

Dissent.

the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

We cannot agree with the contention that the provisions of § 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes. It follows that the judgment of the District Court must be reversed.

*Reversed.*

THE CHIEF JUSTICE dissents because he is of opinion that the court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States.

MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS concur in this dissent.

WEBB ET AL. *v.* UNITED STATES.CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR  
THE SIXTH CIRCUIT.

No. 370. Argued January 16, 1919.—Decided March 3, 1919.

The first sentence of § 2 of the Narcotic Drug Act of December 17, 1914, c. 1, 38 Stat. 785, prohibits retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued under the act. P. 99.

This construction does not make unconstitutional the prohibition of such sale. *Id.* *United States v. Doremus*, ante, 86.

If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, such order is not a physician's prescription under exception (b) of § 2 of the act. *Id.*

THE case is stated in the opinion.

*Mr. Ralph Davis*, with whom *Mr. Ike W. Crabtree* was on the brief, for *Webb et al.*, defendants, contended that a druggist, who has paid the tax and registered under the act and obtained the drug by use of the required form, has a right to sell directly to the consumer, and that the part of the act making it unlawful to do so without a physician's prescription is beyond the power of Congress, and an invasion of the police power of the States, citing: *Beer Co. v. Massachusetts*, 97 U. S. 25; *Meffert v. Packer*, 195 U. S. 625; *United States v. Jin Fuey Moy*, 241 U. S. 394; *In re Kollock*, 165 U. S. 526; *Blunt v. United States*, 255 Fed. Rep. 332; *Mugler v. Kansas*, 123 U. S. 623, 661.

96.

Opinion of the Court.

Mr. Assistant Attorney General Porter, with whom Mr. W. C. Herron was on the brief, for the United States.

Mr. Frans E. Lindquist, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the provisions of the Harrison Narcotic Drug Act, considered in No. 367, just decided, *ante*, 86. The case comes here upon a certificate from the Circuit Court of Appeals for the Sixth Circuit. From the certificate it appears that Webb and Goldbaum were convicted and sentenced in the District Court of the United States for the Western District of Tennessee on a charge of conspiracy (§ 37, Penal Code) to violate the Harrison Narcotic Law. 38 Stat. 785; 6 U. S. Comp. Stats. 1916, § 6287g. While the certificate states that the indictment is inartificial, it is certified to be sufficient to support a prosecution upon the theory that Webb and Goldbaum intended to have the latter violate the law by using the order blanks (§ 1 of the act) for a prohibited purpose.

The certificate states: "If § 2, rightly construed, forbids sales to a non-registrable user, and if such prohibition is constitutional, we next meet the question whether such orders as Webb gave to applicants are 'prescriptions,' within the meaning of exception (b) in § 2.

"We conclude that the case cannot be disposed of without determining the construction and perhaps the constitutionality of the law in certain particulars, and for the purpose of certification, we state the facts as follows,—assuming, as for this purpose we must do, that whatever the evidence tended to show in aid of the prosecution, must be taken as a fact:

"Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular cus-



tom and practice to prescribe morphine for habitual users upon their application to him therefor. He furnished these 'prescriptions,' not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit or as might be necessary or helpful in an attempt to break the habit, but without such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by § 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by § 2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using such order forms, procure a stock of morphine, which morphine he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum and without any physician's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and he sold narcotic drugs in 6,500 instances; that Webb regularly charged fifty cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over 4,000 such prescriptions; and that one Rabens, a user of the

96.

Opinion of the Court.

drug, came from another state and applied to Webb for morphine and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Rabens' presentation, although each was made out in a separate and fictitious name."

Upon these facts the Circuit Court of Appeals propounds to this court three questions:

"1. Does the first sentence of § 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued?

"2. If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

"3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of § 2?

"If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two become immaterial."

What we have said of the construction and purpose of the act in No. 367 plainly requires that question one should be answered in the affirmative. Question two should be answered in the negative for the reasons stated in the opinion in No. 367. As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that

no discussion of the subject is required. That question should be answered in the negative.

*Answers directed accordingly.*

For the reasons which prevented him from assenting in No. 367, THE CHIEF JUSTICE also dissents in this case.

MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS concur in the dissent.

---

L. A. WESTERMANN COMPANY *v.* DISPATCH  
PRINTING COMPANY.

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

No. 50. Submitted November 15, 1918.—Decided March 3, 1919.

The liability imposed by § 25 of the Copyright Act attaches in respect of each copyright infringed, though by the same party. P. 105.

Several and distinct liabilities arise from several, distinct infringements of the same copyright by the same party. *Id.*

Where it is not shown that the infringer made profits, and it appears by the evidence that the damages, though actual, cannot be estimated in money, damages "in lieu of actual damages and profits" are assessable under § 25 of the Copyright Act. P. 106.

In such cases, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, etc., is made the measure of the damages to be paid, but with the express qualification that the assessment must be within the maximum and minimum limits prescribed by the section. *Id.*

The owner of separate copyrights for pictorial illustrations of styles for women's apparel made a business of granting exclusive licenses, restricted as to time and locality, for the use of the illustrations by dealers in such apparel in advertising their goods, receiving com-

100.

## Argument for Respondent.

pensation therefor. In a city covered by such a license, the owner of a newspaper issued daily in thousands of copies widely circulated, published, without the consent of the copyright owner or its licensee, in advertisements of business rivals of the latter, six of the copyrighted illustrations, separately, each in a distinct issue and in all the copies of the paper, five being so published but once, the other twice, in independent advertisements for different advertisers, separated by an interval of some days. *Held*, that there were seven distinct infringements, and that the damages "in lieu of actual damages and profits" under § 25 of the Copyright Act could not be less than \$250 for each case.

233 Fed. Rep. 609, reversed.

THE case is stated in the opinion.

*Mr. Curtis C. Williams* for petitioner. *Mr. Simeon Nash* was also on the brief.

*Mr. Smith W. Bennett* and *Mr. Luther Day* for respondent:

Section 25 of the Copyright Act was intended to provide (1) relief by injunction, and (2) relief by way of damages, declared not to be penal. In providing for a recovery of a sum within the prescribed limits, in lieu of actual damages, Congress did not mean to enact a penalty but, recognizing the character of the actual damage done, provides that when actual damages are proven which cannot be measured in dollars and cents, then the court may, in the exercise of its sound discretion, award a sum within the maximum and minimum limits. That is, this law obviated the strict necessity of proving the exact amount of the damage without negating the necessity for proof of some real damage done. To place any other construction on the section would be to make that which is recovered by it a penalty, pure and simple.

Before the adoption of this Copyright Act, the rule was that an award of nominal damages might be made when a right had been invaded or infringed and no damages



shown, but actual damages must be supported by competent testimony. *New York City v. Ransom*, 23 How. 487; *Dobson v. Hartford Carpet Co.*, 114 U. S. 439; *Coupe v. Royer*, 155 U. S. 565; *Birdsall v. Coolidge*, 93 U. S. 64; *Rude v. Westcott*, 130 U. S. 152. This rule is applicable as a rule of construction to the section now in question. *Woodman v. Lydiard-Peterson Co.*, 192 Fed. Rep. 67, 70; 204 Fed. Rep. 921; *Alfred Decker Cohn Co. v. Etchison Hat Co.*, 225 Fed. Rep. 135, 136; *Hendricks Co. v. Thomas Publishing Co.*, 242 Fed. Rep. 37.

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

This was a bill for an injunction against future infringement of certain copyrights and to recover damages for past infringement. The injunction was granted and in this both parties acquiesced. In addition, the District Court found that there were seven cases of infringement and awarded \$10 as nominal damages for each case—\$70 in all. The plaintiff appealed, insisting that for each case it was entitled under the copyright law to an award of not less than \$250. The Circuit Court of Appeals sustained that contention, but held that what the District Court regarded as seven cases was only one and directed that the decree be modified by awarding \$250, instead of \$70, as damages. 233 Fed. Rep. 609. A writ of certiorari granted on the plaintiff's petition brings the matter here.

Whether there were seven cases of infringement or only one, and whether the damages should have been assessed at not less than \$250 for each case, are the questions to be considered. The facts bearing on the solution of these questions are as follows:

The plaintiff designs and produces pictorial illustrations of styles in women's apparel and supplies the same to dealers in such apparel for use in advertising their

100.

Opinion of the Court.

goods. All the illustrations are separately copyrighted and all authorized copies carry the required copyright notice. The plaintiff grants exclusive licenses to use the illustrations for limited periods, each license being restricted to a particular locality. The dealer obtaining the license pays a fixed charge for it. Ordinarily the fact that the license is exclusive makes it attractive, serves as an incentive for paying the charge and is a helpful feature of the plaintiff's business. But when infringers use the illustrations the strength of that feature diminishes and the plaintiff's business suffers accordingly.

At the time of the infringing acts in question the Morehouse-Martens Company, a dealer at Columbus, Ohio, had an exclusive license from the plaintiff covering the use of the illustrations in that locality.

The defendant publishes at Columbus a daily newspaper, each issue comprising as many as 30,000 copies widely circulated. Without the consent or authority of the plaintiff or its licensee the defendant reproduced and published in its newspaper six of the plaintiff's copyrighted illustrations. They were published separately, each in a distinct issue and in all the copies. Five were published once and the other one twice, the illustrations being used in each instance as part of an advertisement by some competitor in trade of the plaintiff's licensee. The two advertisements having the same illustration were by different advertisers and were separated by an interval of twenty-six days.

The record, while showing that the plaintiff was damaged by the infringing publications, does not show the amount of the damages, a matter which is explained by undisputed testimony to the effect that the damages could not be estimated or stated "in dollars and cents, or in money." On this point the Circuit Court of Appeals aptly said: "The plaintiff's damages rested in the injury to his Morehouse contract, and in the discouragement of

and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible." Whether the defendant made any profit from the publications does not appear. In its bill the plaintiff asked for what are termed statutory damages in lieu of actual damages and profits.

The copyright statute, Act March 4, 1909, c. 320, 35 Stat. 1075, gives to one who copyrights a pictorial illustration the exclusive right to print, reprint, publish, copy and vend the same (§§ 1 and 5), and provides (§ 25<sup>1</sup>) that one who infringes "the copyright in any work" so protected shall be liable, among other things,—

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . , or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty:

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Second. In the case of any work enumerated in section five of this Act,<sup>2</sup> except a painting, statue, or sculp-

---

<sup>1</sup> For a subsequent amendment of this section see c. 356, 37 Stat. 488.

<sup>2</sup> "Prints and pictorial illustrations" are among the copyrightable works enumerated in § 5.

ture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

The statute says that the liability thus defined is imposed for infringing "the copyright in any" copyrighted "work." The words are in the singular, not the plural. Each copyright is treated as a distinct entity, and the infringement of it as a distinct wrong to be redressed through the enforcement of this liability. Infringement of several copyrights is not put on the same level with infringement of one. On the contrary, the plain import of the statute is that this liability attaches in respect of each copyright that is infringed. Here six were infringed, each covering a different illustration. Thus there were at least six cases of infringement in the sense of the statute. Was there also another? The illustration covered by one of the copyrights was published on two separate occasions, each time in a different advertisement. There was no connection between the two advertisements other than the inclusion of the same illustration in both. Each was by a different advertiser and was published at his instance and for his benefit. The advertisers were not joint, but independent, infringers, neither having any connection with what was done by the other. By publishing their advertisements, the defendant participated in their independent infringements. In these circumstances, we think the second publication of the illustration must be regarded as another and distinct case of infringement. Whether it would be otherwise if that publication had



been merely a continuation or repetition of the first, and what bearing the "third" and "fourth" subdivisions of § 25, before quoted, would have on the solution of that question, are matters which we have no occasion to consider now. They are mentioned only to show that no ruling thereon is intended.

We conclude, as did the District Court, that there were seven cases of infringement in the sense of the statute.

On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be "in lieu of actual damages" shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than \$5,000 nor less than \$250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than \$200 nor less than \$50. In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has

no discretion when proceeding under this provision to go outside of them.

Apart from the natural import of its words, the history of the provision makes strongly for this view. An early statute required the infringer of a copyright in a dramatic composition to pay such damages "as to the court shall appear to be just," but "not less than" a prescribed amount. Act August 18, 1856, c. 169, 11 Stat. 138; Act July 8, 1870, c. 230, § 101, 16 Stat. 214. This statute became § 4966 of the Revised Statutes. A later statute provided that the recovery for infringing a copyright in an engraving should not be less than \$250 nor more than \$10,000, and for infringing a copyright in a photograph of an object other than a work of art should not be less than \$100 nor more than \$5,000. Act March 2, 1895, c. 194, 28 Stat. 965. In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the "in lieu" provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained. The new provision, like one of the old, says the damages shall be such "as to the court shall appear to be just." Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.

In *Brady v. Daly*, 175 U. S. 148, which was an action to recover for the infringement of a copyright in a dramatic composition, the first of the earlier provisions—that in § 4966, Rev. Stats.—was much considered. The trial court was of opinion that, while the damages were to be such as appeared to it to be just, it could not go below the prescribed minimum; and it made the assessment accordingly. In this court it was contended that in this view

the provision was penal and the action was one to recover a penalty. But the contention was overruled and the judgment affirmed, the court saying, pp. 154, 157:

"It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damages in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor.' This means all the damages that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one."

\* \* \* \* \*

"Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum

100.

Opinion of the Court.

amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

It was after the minimum limitation was thus recognized as of controlling force in the assessment of the damages that the terms of the provision then under consideration were substantially repeated in the "in lieu" provision of the revised act. This hardly would have been done had it not been intended that the limitation should be as controlling there as in the earlier statute. That it was intended to be thus controlling is shown by the reports of the committees on whose recommendation the act was passed. House Report No. 2222, and Senate Report No. 1108, 60th Cong., 2d sess.

In our opinion the District Court erred in awarding less than \$250 damages in each of the seven cases and the Circuit Court of Appeals erred in holding there was only one case instead of seven.

*Decree reversed.*

MR. JUSTICE DAY did not participate in the consideration or decision of this case.



LANE, SECRETARY OF THE INTERIOR, ET AL. *v.*  
PUEBLO OF SANTA ROSA.

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

No. 197. Argued January 29, 1919.—Decided March 3, 1919.

The Pueblo of Santa Rosa is a legal entity, with capacity to maintain a suit to protect its rights in land claimed by it as a grantee under the laws of Spain and Mexico. P. 112. *Cherokee Nation v. Georgia*, 5 Pet. 1, distinguished.

This status of the Pueblo, if it did not previously exist, resulted from a law of the Territory of New Mexico, and from acts of Congress extending the laws of that Territory over the region acquired by the Gadsden Treaty, and over the Territory of Arizona, when the latter was organized; and it was not affected by the creation of the State of Arizona. *Id.*

Assuming that these Indians are wards of the Government, that fact would not affect the capacity of the Pueblo to sue in the District of Columbia, to restrain the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing, etc., under the public land laws, lands in Arizona to which the Pueblo alleges perfect title under the laws of Spain and Mexico. P. 113.

In such a suit, where the trial court dismissed the bill on defendants' motion, *held*, error for the Court of Appeals, finding the bill made a case for the relief sought, to award a permanent injunction; for defendants were entitled to answer to the merits as if their motion had been overruled originally. P. 114.

46 App. D. C. 411, reversed.

THE case is stated in the opinion.

*The Solicitor General*, with whom *Mr. Leslie C. Garnett* was on the brief, for appellants.

*Mr. Ralph S. Rounds*, with whom *Mr. Alton M. Cates* and *Mr. Henry P. Blair* were on the brief, for appellee.

110.

Opinion of the Court.

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

This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing or disposing of certain lands in southern Arizona as public lands of the United States. The lands include the site of the Pueblo of Santa Rosa and the surrounding territory, comprise some 460,000 acres, and are within the region acquired from Mexico under what is known as the Gadsden Treaty, 10 Stat. 1031. The suit is brought by the Pueblo of Santa Rosa and its right to the relief sought is based on two allegations, which are elaborated in the bill: one, that under the laws of Spain and Mexico it had, when that region was acquired by the United States, and under the provisions of the treaty it now has, a complete and perfect title to the lands in question; and the other, that in disregard of its title the defendants are threatening and proceeding to offer, list and dispose of these lands as public lands of the United States. In the court of first instance the bill was challenged by a motion to dismiss in the nature of a demurrer, and the motion was sustained. In the Court of Appeals the case made by the allegations in the bill was held to be one entitling the plaintiff to the relief sought, and the decree of dismissal was reversed with a direction that a permanent injunction be awarded. 46 App. D. C. 411. The latter decision is challenged here on two grounds: one, that the plaintiff is not a legal entity and has no capacity to maintain the suit; and the other, that, in any event, the defendants should not be subjected to a permanent injunction without according them an opportunity to answer the bill.

The plaintiff is an Indian town whose inhabitants are a simple and uninformed people, measurably civilized and industrious, living in substantial houses and engaged in agricultural and pastoral pursuits. Its existence, prac-

tically as it is today, can be traced back through the period of Mexican rule into that of the Spanish Kings. It was known then, as now, as the Pueblo of Santa Rosa, and its inhabitants were known then, as now, as Pueblo Indians. During the Spanish, as also the Mexican, dominion it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. With much reason this might be regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests. See *School District v. Wood*, 13 Massachusetts, 193, 198; Cooley's Const. Lim., 7th ed., p. 276; 1 Dillon Munic. Corp., 5th ed., §§ 50, 64, 65. But our decision need not be put on that ground, for there is another which arises out of our own laws and is in itself sufficient. After the Gadsden Treaty Congress made that region part of the Territory of New Mexico and subjected it to "all the laws" of that Territory. Act August 4, 1854, c. 245, 10 Stat. 575. One of those laws provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a body corporate and as such capable of suing or defending in respect of such lands. Laws New Mex. 1851-2, pp. 176 and 418. If the plaintiff was not a legal entity and juristic person before, it became such under that law; and it retained that status after Congress included it in the Territory of Arizona, for the act by which this was done extended to that Territory all legislative enactments of the Territory of New Mexico. Act February 24, 1863, c. 56, 12 Stat. 664. The fact that Arizona has since become a State does not affect the plaintiff's corporate status or its power to sue. See *Kansas Pacific R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 414.

The case of *Cherokee Nation v. Georgia*, 5 Pet. 1, on which the defendants place some reliance, is not in point.

The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution and therefore entitled to maintain an original suit in this court against the State of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense intended, and so could not maintain such a suit. This is all that was decided.

The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true,<sup>1</sup> we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court,

---

<sup>1</sup> See *Chouteau v. Molony*, 16 How. 203, 237; *United States v. Ritchie*, 17 How. 525, 540; *United States v. Pico*, 5 Wall. 536, 540; *United States v. Sandoval*, 231 U. S. 28; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 568; *Tiger v. Western Investment Co.*, 221 U. S. 286, 310, *et seq.*



of which *Lone Wolf v. Hitchcock*, 187 U. S. 553, is an illustration.

In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what has been said that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the sixth article of the Gadsden Treaty, but no decision on either point is intended. Both involve questions not covered by the briefs or the discussion at the bar and are left open to investigation and decision in the further progress of the cause.

Of course, the Court of Appeals ought not to have directed the entry of a final decree awarding a permanent injunction against the defendants. They were entitled to an opportunity to answer to the merits, just as if their motion to dismiss had been overruled in the court of first instance. By the direction given they were denied such an opportunity, and this was a plain and prejudicial error.

Our conclusion is that the decrees of both courts below should be reversed and the cause remanded to the court of first instance with directions to overrule the motion to dismiss, to afford the defendants an opportunity to answer the bill, to grant an order restraining them from in any wise offering, listing or disposing of any of the lands in question pending the final decree, and to take such further proceedings as may be appropriate and not inconsistent with this opinion.

*Decree reversed.*

## Argument for Petitioner.

## EX PARTE WHITNEY STEAMBOAT CORPORATION, PETITIONER.

## ON PETITION FOR WRIT OF PROHIBITION.

No. 25, Original. Argued December 9, 1918.—Decided March 3, 1919.

The jurisdiction acquired by the District Court through an attachment of a vessel on a libel *in rem*, and the power of the court to subject the same vessel to a second attachment in a second like action, are not ousted by a requisition of the use of the vessel, made by the United States Shipping Board under authority of the Act of June 15, 1917, c. 29, 40 Stat. 182, and an order of the President, for war purposes, but without displacing the custody and possession of the marshal. P. 118.

And an order of the District Court, made on application of the Shipping Board, with the consent of the libelants, permitting such vessel to be put at the service of the Government for war purposes while still remaining in the custody of the marshal, through the master as special deputy, for the purposes of the court's jurisdiction, is not subject to objection by an owner who had entered no appearance for the ship. *Id.*

Rule discharged; petition dismissed.

THE case is stated in the opinion.

Mr. Alexander S. Bacon, for petitioner, contended that no jurisdiction *in rem* could exist under the second attachment, mainly because the Government had through its executive branch taken over the physical possession. The vessel was clearly exempt from seizure. *The Siren*, 7 Wall. 152, 154; *Thomas A. Scott*, 10 L. T. Rep. H. M. 726; *Athol*, 1 W. Rob. 374; *Broad-Mayne* [1916], 1 P. D. 64; *The Pampa*, 245 Fed. Rep. 137; *The Davis*, 10 Wall. 15, 19.

The Shipping Board could not consent to a suit against the United States or affecting its authority. *Stanley v. Schwalby*, 162 U. S. 255, 270.

*Mr. Peter S. Carter*, with whom *Mr. George W. McKenzie* was on the brief, for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

Petitioner, a corporation of the State of New York, is the owner of the steamship *H. M. Whitney*, her engines, etc., which vessel, on April 18, 1918, while in petitioner's possession, was attached by the United States marshal for the Eastern District of New York in an action *in rem* brought by the Patent Vulcanite Roofing Company in the District Court of the United States for that district. On April 27, 1918, while the vessel was in the possession of the deputy marshal under the process in that action, the United States Shipping Board established by Act of September 7, 1916, c. 451, 39 Stat. 728, acting under authority of the Act of June 15, 1917, c. 29, 40 Stat. 182, and the President's Executive Order of July 11, 1917,<sup>1</sup> in-

---

<sup>1</sup> EXECUTIVE ORDER

By virtue of authority vested in me in the section entitled "Emergency Shipping Fund" of an Act of Congress entitled "An Act Making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management and disposition of such vessels, and of all other vessels hereto-

115.

Opinion of the Court.

structed one Smith as its agent to take possession of the steamer in behalf of the United States. This Smith did *pro forma* on April 29, but without dispossessing the marshal or his deputy. On May 16, Theodore A. Crane's Sons Company filed its libel *in rem* against the steamer in the same court, and under process in this suit the marshal, who already had her in custody, again attached the vessel. Afterwards, and on May 29, the Shipping Board, by its counsel, appeared before the court, stated that the use of the vessel was needed by the Government for war purposes, that the marshal was still in custody by virtue of the writs of attachment in the two suits referred to, and that the Board did not desire to raise an issue over the possession of the property as between two departments of the Government, and moved the court to direct the marshal to release her. No appearance having been entered in behalf of the ship, the court heard proctors for the libelants and counsel for the Shipping Board, and on motion of the latter, with consent of the former, made an order entitled in the two causes directing that the marshal be permitted to appoint the master of the ship as a special deputy United States marshal, that this deputy remain in possession of the vessel in behalf of the marshal, that the vessel, in his custody, be turned over to the Shipping Board for purposes connected with the war, the special deputy marshal or his substitutes to remain always in possession, and that the vessel be returned to the custody of the marshal upon being released from requisition by the Shipping Board.

---

fore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

WOODROW WILSON.

The White House,  
11 July, 1917.



Thereafter the present petitioner, claimant of the vessel, appeared specially by counsel and moved the District Court to quash the attachment in the Crane suit and dismiss the libel on the ground of want of jurisdiction. These motions, after argument, were overruled; and at a subsequent date motions for a rehearing and for a certificate of jurisdiction as the basis of a direct appeal to this court were denied upon the ground that the claimant had no standing to attack the validity of the attachment.

Thereafter this court granted leave for the filing of a petition for a writ of prohibition, and made an order upon the judges of the District Court to show cause why such writ should not issue. Return was made by the judge who had acted in the proceedings above mentioned, and, the matter having been argued here by counsel for the petitioner and by counsel for the Crane Company, the question for decision is whether the prohibition ought to be issued, or the order to show cause discharged.

The validity of the attachment in the suit of the Vulcanite Company and the continued possession of the marshal or his deputy under that process are not in controversy. No bond was given or deposit made for release of the vessel pursuant to § 941, Rev. Stats., or the admiralty rules of this court or of the District Court. Hence the vessel remained, for all purposes of the action, in the custody of the court. The requisition of the Shipping Board extended merely to the use of the ship for war purposes, and did not in fact take her out of the custody of the court. So far as any interest of the petitioner was concerned, there was nothing to prevent the vessel from being subjected to attachment under process in the Crane Company suit; and as she actually was subjected to that process by the action of the marshal, the jurisdiction of the court in that suit was complete, and the owner's only recourse was to enter appearance therein, with or without giving a bond or making a deposit.

If the custody of the ship by the officer of the court was inconsistent with the purposes of the Executive, acting through the Shipping Board, this was not a matter of which petitioner could take advantage. The application of the Board through its counsel for an order permitting the vessel to be put at the service of the Government for war purposes while still remaining in the custody of the marshal for the purposes of the court's jurisdiction, consented to by the only other parties who had a standing in court, was a sufficient warrant for the order made.

*Order to show cause discharged and petition dismissed.*

---

NORTH PACIFIC STEAMSHIP COMPANY v. HALL  
BROTHERS MARINE RAILWAY & SHIPBUILD-  
ING COMPANY.

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

No. 53. Argued November 18, 19, 1918.—Decided March 3, 1919.

A contract for maritime service is within the admiralty jurisdiction, although not to be executed upon navigable waters. P. 125.

The place of performance—i. e., whether upon navigable waters or elsewhere—is but an evidentiary circumstance, to be considered in determining whether the contract is by nature maritime. *Id.*

A materialman furnishing supplies or repairs may proceed against the ship *in rem*, or against the master or owner *in personam*. 12th Admiralty Rule. P. 126.

While a contract for building a ship or supplying materials for her construction is not maritime, a contract for services, materials, and use of facilities, for the repair of a vessel already launched and devoted to maritime use, is a maritime contract; and in this respect it is immaterial whether the repairs are made while she is afloat, in dry dock or hauled out upon the land. P. 126. *The Robert W. Parsons*, 191 U. S. 17, limited.

The fact that the repairs are made under superintendence of the shipowner does not destroy the maritime nature of such a contract. P. 129.

For the purpose of repairing a vessel for a voyage, the owner of a shipyard, marine railway and machine shops, agreed to furnish materials and men to work under supervision of the shipowner, and to tow the vessel in and haul her out upon the land next the shops, as required in the repairs, by means of the railway, stated prices being exacted for labor, use of tug and scow, hauling out, use of railway, materials, etc. *Held*, an entire marine contract, for the repair of the vessel, not involving a lease, or agreement in the nature of a lease, of the railway and machine shops, the use of these being but incidental. P. 128.

Affirmed.

THE case is stated in the opinion.

*Mr. Jackson H. Ralston*, with whom *Mr. Frank W. Aitken*, *Mr. H. W. Glensor* and *Mr. Ernest Clewe* were on the brief, for appellant:

The contract involved in this case did not call for the performance by libelant of any service on or for a ship, either on water or land, but merely for the supply of a marine railway shipyard and equipment. Appellant did not bargain for making repairs or for the results of the use of the equipment, labor and materials supplied by libelant, but for the use thereof by itself. The testimony of the parties forecloses any other construction. Such a contract does not relate to "navigation, business or commerce of the sea."

The subject-matter of a contract is the test for determining whether or not admiralty has jurisdiction. Subject-matter must not be confused with the object of a contract, *Leland v. Ship Medora*, 15 Fed. Cas. No. 8237; *The Paola R*, 32 Fed. Rep. 174; *De Lovio v. Boit*, 7 Fed. Cas. No. 3776; *Insurance Co. v. Dunham*, 11 Wall. 1, 26; *The Eclipse*, 135 U. S. 599, 608; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52; nor must the old single test of location be entirely disregarded, *The Robert W. Parsons*, 191 U. S. 17;

*Ransom v. Mayo*, Fed. Cas. Nos. 11571, 11571A; *Bradley v. Bolles*, Fed. Cas. No. 1773; *Pritchard v. Lady Horatia*, Fed. Cas. No. 11438; *Boon v. The Hornet*, Fed. Cas. No. 1640. *Wortman v. Griffith*, Fed. Cas. No. 18057, and *The Vidal Sala*, 12 Fed. Rep. 207, distinguished.

Under the subject-matter test as so limited, admiralty has no jurisdiction of the present case for two reasons, first, because the repairs to the vessel were made wholly upon land in a shipyard in no sense a part of the sea, and second, because the repairs were made solely by appellant, the libelant only furnishing the plant. In other words, the claim of libelant is merely for charges for the use and occupation of its marine railway and shipyard, a subject which under the decision in the *The Robert W. Parsons*, is not within the admiralty jurisdiction. See also *Berton v. Dry Dock Co.*, 219 Fed. Rep. 763, 769. For admiralty jurisdiction the contract must be maritime as a whole; and, even if this were not so, the contract here could not be severed, inasmuch as the libel was brought on the contract as an entirety. Furthermore, if there could be any such segregation of items, there would be no jurisdiction in admiralty inasmuch as the only items in dispute—for overtime rent—are not maritime at all. To give admiralty jurisdiction, the contract must be maritime in all its elements. *Plummer v. Webb*, Fed. Cas. No. 11233; *The Vidal Sala*, 12 Fed. Rep. 207, 208.

The Act of Congress of 1910 does not purport to give jurisdiction in this case. If such were its purpose the attempt would be nugatory. *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wall. 558, 575; *The Sinaloa*, 209 Fed. Rep. 287, 288.

An extension of admiralty jurisdiction to cases like this would constitute an unwarranted invasion of the field of ordinary contracts and result in a denial to litigants of the right of trial by jury and other incidents of common-law procedure which are jealously guarded by



the Federal Constitution and the constitutions of the several States.

*Mr. Warren Gregory and Mr. Allen L. Chickering*, for appellee, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a direct appeal under § 238, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157), involving only the question whether the cause was within the admiralty jurisdiction of a District Court of the United States.

Both parties are corporations of the State of California. Appellee, which for convenience may be referred to as the "Shipbuilding Company," filed its libel *in personam* against appellant, which we may call the "Steamship Company," to recover a balance claimed to be due for certain work and labor done, services rendered, and materials furnished in and about the repairing of the steamship *Yucatan*. The Steamship Company filed an answer denying material averments of the libel, and a cross-libel setting up a claim for damages for delay in the making of the repairs. The cause having been heard upon the pleadings and proofs, there was a decree for a recovery in favor of the Shipbuilding Company and a dismissal of the cross-libel. After this the Steamship Company filed a motion to arrest and vacate the decree and to dismiss the cause for want of jurisdiction. The motion was submitted to the court upon the pleadings, the proofs taken upon the hearings of the merits, and some slight additional proof. It was denied, and the present appeal followed.

The facts were these: In the month of May, 1911, the Steamship Company was the owner of the American steamer *Yucatan*, which then lay moored or tied up at

dock upon the waters of Puget Sound at Seattle, in the State of Washington. The vessel, which was of steel construction, was in need of extensive repairs. She had been wrecked, and had remained submerged for a long time; ice floes had torn away the upper decks, and some of her bottom plates also needed to be replaced. She was under charter for an Alaskan voyage, to be commenced as soon as the repairs could be completed. The Shipbuilding Company was the owner of a shipyard, marine railway, machine shops, and other equipment for building and repairing ships, situate upon and adjacent to the navigable waters of Puget Sound at Winslow, in the same State, and had in its employ numerous mechanics and laborers. Under these circumstances it was agreed between the parties that the Shipbuilding Company should tow the vessel from where she lay to the shipyard, haul her out as required upon the marine railway to a position on dry land adjacent to the machine shop—the place being known as the “dry dock,” and the hauling out being described as “docking”—and should furnish mechanics, laborers, and foremen as needed, who were to work with other men already in the employ of the Steamship Company, and under its superintendence; and the Shipbuilding Company was also to furnish plates and other materials needed in the repairs, and the use of air compressors, steam hammers, riveters, boring machines, lathes, blacksmith forge, and the usual and necessary tools for the use of such machines. At the time the contract was made, another vessel (the *Archer*) was upon the dry dock, and it was uncertain how soon she could be returned to the water. It was understood that the *Yucatan* should be hauled out as soon as the *Archer* came off, should remain upon the dry dock only during such part of the work as required her to be in that position, and at other times should lie in the water alongside the plant. For the services to be performed and the materials and equipment

to be furnished the Shipbuilding Company was to receive stated prices, thus: for labor of all classes, the actual rate of wages paid to the men plus 15 per cent.; for use of tug and scow, a stated sum per hour; for hauling out the vessel and the use of the marine railway, a stated sum for the first 24 hours, and a specified rate per day for 6 "lay days" immediately following the hauling out; for each working day thereafter, another rate; for vessel lying alongside the dock for repairs, no charge; for the running of air compressors, a certain charge per hour; for the use and operation of other machines, certain rates specified; and for materials supplied, invoice prices and cost of freight to plant, with 10 per cent. additional.

The vessel was docked and repaired in the manner contemplated by the agreement; she was brought to the shipyard on the 27th of May, and lay in the water alongside of the dock there until the 17th of June, during which time upper decks and beams were put in and other work of a character that could be done as well while she was afloat as in the dry dock. On June 17 she was hauled out and remained in dry dock for about two weeks while her bottom plates were renewed. During the same period the propeller was removed to permit of an examination of the tail shaft, and as the shaft showed deterioration a new one was ordered to be supplied by a concern in San Francisco. Upon completion of the work upon the bottom plates, and on the 5th of July, the vessel was returned to the water and lay there for about two weeks awaiting arrival of the new tail shaft. When this arrived the vessel was again hauled out, the tail shaft and propeller were fitted, and the remaining repairs completed. Libellant's claim was for work and labor performed, services rendered, and materials furnished under the circumstances mentioned, and was based upon the agreed scale of compensation.

The question in dispute is whether a claim thus grounded

is the subject of admiralty jurisdiction; appellant's contention being that the contract, or at least an essential part of it, was for the use by appellant of libellant's marine railway, shipyard, equipment, and laborers in such manner as appellant might choose to employ them, and that it called for the performance of no maritime service by libellant.

The Constitution, Art. III, § 2, extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction"; and the legislation enacted by Congress for carrying the power into execution has been equally extensive. Act of September 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Rev. Stats., § 563 (8); Judicial Code, § 24 (3), 36 Stat. 1087, 1091, c. 231. In defining the bounds of the civil jurisdiction, this court from an early day has rejected those trammels that arose from the restrictive statutes and judicial prohibitions of England. *Waring v. Clarke*, 5 How. 441, 457-459; *Insurance Co. v. Dunham*, 11 Wall. 1, 24; *The Lottawanna*, 21 Wall. 558, 576.

It must be taken to be the settled law of this court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed upon navigable waters—in matter of contract it depends upon the subject-matter—the nature and character of the contract; and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible, the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions. *People's Ferry Co. v. Beers*, 20 How. 393, 401; *Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia, &c. Steam Towboat Co.*, 23 How. 209, 215; *Insurance Co. v. Dunham*, 11 Wall. 1, 26; *The Eclipse*, 135 U. S. 599, 608.

In some of the earlier cases the influence of the English



rule may be discerned, in that the question whether a contract was to be performed upon the navigable waters was referred to as pertinent to the question whether the contract was of a maritime nature (*The Thomas Jefferson*, 10 Wheat. 428, 429; *The Planter* [*Peyroux v. Howard*], 7 Pet. 324, 341; *Steamboat Orleans v. Phæbus*, 11 Pet. 175, 183; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 392); but a careful examination of the opinions shows that the place of performance was dealt with as an evidential circumstance bearing with more or less weight upon the fundamental question of the nature of the contract. If they go beyond this, they must be deemed to be overruled by *Insurance Co. v. Dunham*, *supra*.

Neither in jurisdiction nor in the method of procedure are our admiralty courts dependent alone upon the theory of implied hypothecation; it being established that in a civil cause of maritime origin involving a personal responsibility the libellant may proceed *in personam* if the respondent is within reach of process. *The General Smith*, 4 Wheat. 438, 443; *Manro v. Almeida*, 10 Wheat. 473, 486; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 390; *Morewood v. Enequist*, 23 How. 491; *The Belfast*, 7 Wall. 624, 644; *The Kalorama*, 10 Wall. 204, 210; *The Sabine*, 101 U. S. 384, 386; *In re Louisville Underwriters*, 134 U. S. 488, 490; *Workman v. New York City*, 179 U. S. 552, 573; *Ex parte Indiana Transportation Co.*, 244 U. S. 456.

That a materialman furnishing supplies or repairs may proceed in admiralty either against the ship *in rem* or against the master or owner *in personam* is recognized by the 12th Rule in Admiralty, adopted in its present form in the year 1872 (13 Wall. xiv) after a long controversy that began with *The General Smith*, 4 Wheat. 438, and ended with *The Lottawanna*, 21 Wall. 558, 579, 581. See *The Glide*, 167 U. S. 606.

It is settled that a contract for building a ship or supply-

ing materials for her construction is not a maritime contract. *People's Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; *Edwards v. Elliott*, 21 Wall. 532, 553, 557; *The Winnebago*, 205 U. S. 354, 363. In the case in 20 Howard the court said (p. 402): "So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land." But the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is completed and launched. "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics' liens created by state law enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction." *Tucker v. Alexandroff*, 183 U. S. 424, 438.

In *The Robert W. Parsons*, 191 U. S. 17, 33, 34, it was held that the admiralty jurisdiction extended to an action for repairs put upon a vessel while in dry dock; but the question whether this would apply to a vessel hauled up on land for repairs was reserved, the language of the court, by Mr. Justice Brown, being: "Had the vessel been hauled up by ways upon the land and there repaired, a different question might have been presented, as to which we express no opinion; but as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs."

In *The Steamship Jefferson*, 215 U. S. 130, it was held that the admiralty jurisdiction extends to a claim for salvage service rendered to a vessel while undergoing repairs in a dry dock.

What we have said sufficiently indicates the decision that should be reached in the case at bar. The contract as made contemplated the performance of services and the furnishing of the necessary materials for the repairs of the steamship *Yucatan*. It was an entire contract, intended to take the ship as she was and to discharge her only when completely repaired and fit for the Alaskan voyage. It did not contemplate, as is contended by appellant, either a lease, or a contract for use in the nature of a lease, of the libellant's marine railway and machine shop. The use of these was but incidental; the vessel being hauled out, when consistent with the progress of other work of the Shipbuilding Company, for the purpose of exposing the ship's bottom to permit of the removal and replacement of the broken plates and the examination of the propeller and tail shaft. In *The Planter (Peyroux v. Howard)*, 7 Pet. 324, 327, 341, the vessel, requiring repairs below the water line as well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, 191 U. S. 17, 33, 34, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

This is recognized by the Act of Congress of June 23, 1910, c. 373, 36 Stat. 604, which declares that "Any per-

son furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic," upon the order of a proper person, shall have a maritime lien upon the vessel.

The principle was recognized long ago by Mr. Justice Nelson in a case decided at the circuit, *Wortman v. Grif-fith* (1856), 3 Blatchf. 528, 30 Fed. Cas. No. 18,057, which was a libel *in personam* to recover compensation for services rendered in repairing a steamboat. Libelant was the owner of a shipyard with apparatus consisting of a railway cradle and other fixtures and implements used for the purpose of hauling vessels out of the water and sustaining them while being repaired. Certain rates of compensation were charged for hauling the vessel upon the ways, and a per diem charge for the time occupied while she was under repair, in cases where the owner of the yard and apparatus was not employed to do the work but the repairs were made by other shipmasters, as was done in that case. The owner of the yard and apparatus, together with his employees, superintended and conducted the operation of raising and lowering the vessel and also of fixing her upon the ways preparatory to the repairs, a service requiring skill and experience and essential to the process of repair. Mr. Justice Nelson held there was no substantial distinction between such a case and the case where the shipmaster was employed to make the repairs; and that the admiralty jurisdiction must be sustained.

Nor is the present case to be distinguished upon the ground that the repairs in which libelant was to furnish work and materials and the use of a marine railway and other equipment were to be done under the superintendence of the Steamship Company. This affected the quantum of the services and the extent of the responsibility, but not the essential character of the services or the nature of the contract, which, in our opinion, were maritime.

*Decree affirmed.*



WERK ET AL., COPARTNERS UNDER THE NAME  
OF ROBERT F. WERK & COMPANY, *v.* PARKER  
ET AL., COPARTNERS UNDER THE NAME OF  
F. T. PARKER COMPANY.

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

No. 73. Argued November 21, 1918.—Decided March 3, 1919.

The use of horse-hair mats for extracting oil, as abundantly shown in standard and easily accessible books of reference, may be noticed judicially. P. 132.

The application in the extraction of cotton-seed oil of mats made of horse hair or other long animal hair, woven in a manner designated, but without improvement in the art of weaving, *held* not invention, but merely mechanical adaptation of familiar materials and methods. P. 133.

Divisional patents Nos. 758,574 and 758,575, to Robert F. Werk, relating to oil-press mats for use in extracting cotton-seed oil, *held* invalid as to certain claims.

231 Fed. Rep. 121, affirmed.

THE case is stated in the opinion.

*Mr. T. Hart Anderson* for petitioners.

*Mr. John Weaver* for respondents.

MR. JUSTICE PITNEY delivered the opinion of the court.

Petitioners sued respondents in the District Court of the United States for the Eastern District of Pennsylvania for infringement of two divisional patents, Nos. 758,574 and 758,575, granted April 26, 1904, to Robert F. Werk. Defendants answered denying patentable novelty, and also denying infringement. The patents relate to an oil-press mat or cloth for use in the extraction of cotton-seed oil. The claim in issue under the former patent was for:

"An oil-press mat or cloth made entirely of long animal hair and consisting of warp and weft threads, said weft-threads being composed exclusively of soft, pliable hair and the warp-threads greatly exceeding the weft-threads in number per square inch."

And in the second patent:

"An oil-press mat or cloth consisting of warp-threads and weft-threads, each composed exclusively of long hair derived from animals' tails and manes, which hair is soft and pliable; the warp-threads exceeding the weft-threads in number per square inch, and the weft-threads being thicker than the warp-threads."

The District Court dismissed the bill on the ground of non-infringement. 221 Fed. Rep. 644. The Circuit Court of Appeals, without discussing this question, affirmed the decree upon the ground that the patent disclosed no such novel information to the oil-pressing art as warranted a grant of the patent monopoly. 231 Fed. Rep. 121. At the conclusion of its opinion the court stated (p. 125) that in view of the fact that certain references quoted were not given in evidence, the sending down of the mandate would be deferred for a time to permit of an application for reargument or other form of relief to meet such references. Thereupon a petition for a rehearing was filed in behalf of appellants, which, while not disputing the accuracy of the results disclosed by the court's investigation, insisted that there was error in giving effect to the anticipatory matter thus disclosed, and in "failing to give controlling consideration to the fact that both of the two claims declared upon are laid not only to a particular woven structure of an oil-press mat, but also to an oil-press mat of such particular woven structure, when its threads are composed of animal hair." The rehearing was refused; after which the present writ of certiorari was allowed. 242 U. S. 645.

In the process of obtaining oil from cotton seed, the

seeds, having been cleaned and freed from lint, are hulled and chopped up, the meats being separated from the hulls; the meats are passed through a crusher, next cooked in water, and after this are spread upon an oil-press mat or cloth, the ends of which are folded over to cover the upper surface of the cooked meats. The mat with its inclosed mass of meats is then placed in a press and subjected to a pressure of about 4,000 pounds, which has the effect of expressing the oil through the mat as through a strainer.

One of the patents declares, and the evidence at the hearing indicated, that the highest grade of mat previously in general use was made of camel's hair, and that this was objectionable because of its tendency to pack and felt together when in use to such an extent as to hinder the free flow of the oil, and also because of its want of durability. The use of long animal hair, specifically horse hair, obviated this difficulty to such an extent as materially to reduce the percentage of oil wasted, as well as the cost of the mat in proportion to the product. Defendants accomplished like results with mats woven from human hair.

The Circuit Court of Appeals, while finding that the change from camel's hair to horse-hair mats was sufficient to constitute invention in the art, if this use of horse-hair mats was first disclosed by Werk, nevertheless found, from an examination of standard works, that the patentee's use was but a revival of an old and well-recognized use of such mats in the art of oil extraction. Reference was made to the *British Encyclopedia*, 9th ed., 1884, the *Standard Dictionary* of 1894, and a multitude of other publications long antedating the application for the patent.

It is not questioned that these references abundantly showed that the use of hair cloth, and especially horse-hair cloth, in the making of oil-press mats or cloths, was well known in the art long before the patents in suit.

Nor is it questioned—indeed, we deem it clear, beyond

130.

Opinion of the Court.

question—that the court was justified in taking judicial notice of facts that appeared so abundantly from standard works accessible in every considerable library. *Brown v. Piper*, 91 U. S. 37, 42; *Terhune v. Phillips*, 99 U. S. 592.

The burden of petitioner's argument in this court, as in the application for a rehearing in the Circuit Court of Appeals, is that there was nothing in these publications to show that the horse-hair cloth so familiar in the art embodied the "structural characteristics" of the oil-press mats of the patents in suit, referring to the peculiar mode of weaving described in the claims. But at the hearing it was clearly proved, and was conceded to be beyond controversy, that the patents involved no claim of an improvement in the art of weaving, but only the application of that art and a combination of threads of a certain type and character in order to produce a particular result. And this, in our opinion, goes no further than a mere mechanical adaptation of familiar materials and methods, not rising to the dignity of invention. *Atlantic Works v. Brady*, 107 U. S. 192, 200; *Pennsylvania R. R. Co. v. Locomotive Truck Co.*, 110 U. S. 490, 494; *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59, 71, 73; *Aron v. Manhattan Ry. Co.*, 132 U. S. 84, 90; *McClain v. Ortmyer*, 141 U. S. 419, 426, 429; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 222; *Wright v. Yuengling*, 155 U. S. 47, 54; *Olin v. Timken*, 155 U. S. 141, 155; *Market Street Cable Ry. Co. v. Rowley*, 155 U. S. 621, 629.

*Decree affirmed.*



ARKADELPHIA MILLING COMPANY *v.* ST. LOUIS  
SOUTHWESTERN RAILWAY COMPANY ET AL.

HASTY ET AL., COMPOSING THE PARTNERSHIP  
OF J. F. HASTY & SONS, *v.* ST. LOUIS SOUTH-  
WESTERN RAILWAY COMPANY ET AL.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAIL-  
WAY COMPANY ET AL. *v.* SOUTHERN COTTON  
OIL COMPANY.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY  
ET AL. *v.* SOUTHERN COTTON OIL COMPANY.

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

Nos. 92, 93, 94, 95. Submitted December 17, 1918.—Decided  
March 3, 1919.

Orders of a state commission fixing railroad rates under legislative authority are state laws within the meaning of the provision of the Judiciary Act of 1891, § 5, and Jud. Code, § 238, allowing direct appeals from the district court to this court in cases in which a law of a State is claimed to contravene the Federal Constitution. P. 141. When this court, having jurisdiction on constitutional grounds, under Jud. Code, § 238, reverses a final injunctive decree of the district court on direct appeal, with directions to dismiss the bill without prejudice, and the district court, acting under a reservation in its own decree, and within authority for further proceedings allowed by the mandate, assesses and decrees the damages caused by its injunctions, such supplementary decree is part of the main cause and appealable directly to this court. *Id.*

Upon reversal of final injunctive decrees of the district court with directions to dismiss the bills without prejudice, the mandates allowed further proceedings in the causes in conformity with the opinion and decree of this court, according to right and justice, etc. *Held*, that the district court was thus empowered to determine and

decree damages arising under the injunction bonds prior to the reversed decrees. *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368, explained. P. 143.

In awarding final injunctions restraining the enforcement of railway rates as fixed by state authority, the district court ordered that the preliminary injunction bonds be released and the sureties thereon discharged from further liability. *Held*, that a failure to appeal from and assign error to this action created no obstacle to the assessment of damages under the bonds, after reversal of the final decrees by this court, where the mandate allowed further proceedings and the district court had retained jurisdiction to make further orders if necessitated by changed conditions. *Id.*

In suits by railroads to determine the adequacy of rates fixed by a state commission, injunction orders restraining enforcement *pendente lite* were obtained on bonds conditioned for refund to shippers if it should eventually be decided that the orders should not have been made. *Held*: (1) That the conditions were broken by ultimate failure of plaintiffs to prove the inadequacy of the rates and ultimate denial of relief on that ground, although there was no specific adjudication that the preliminary injunctions were improper; (2) that the period of the obligation ended with final decrees of the district court awarding permanent injunctions, and that the sureties were not liable for claims arising thereafter and before reversal by this court. Pp. 144, 145.

A railroad company which, in virtue of an erroneous final decree of injunction, collects charges in excess of rates lawfully fixed by a State, is equitably liable to make refunds to the shippers when the decree is reversed on appeal. P. 145.

For the purpose of claiming such restitution in the injunction suit, shippers not named as parties and represented theretofore only by the state railroad commission, but who have been subjected to the injunction as a class and obliged to pay the overcharges, may intervene in a reference to a master, ordered by the district court. P. 146.

And although such reference be ordered under a rule of court relating only to damages recoverable on injunction bonds, it may still furnish foundation for a decree against the railroad on the theory of restitution also, if the merits are fully heard and the facts undisputed. *Id.*

In its relation to the rights of shippers to recover overcharges, whether under injunction bonds or on the theory of restitution, a decree reversing the final injunctive decree of the district court, with a direction to dismiss the bill, is none the less conclusive because

made without prejudice to the right of the carrier to bring future suits under changed conditions. P. 146.

Interest is recoverable upon such overcharges from the dates of payment. P. 147.

*Semble*, that a carrier which has failed in a suit to enjoin the enforcement of state rates as confiscatory is still free to contest the validity of particular schedules as applied to particular shippers, in supplemental proceedings for restitution. P. 148.

The objection that a state rate discriminates between shippers, in violation of the equal protection clause of the Fourteenth Amendment, is not available to a carrier. P. 149. *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, and *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, distinguished.

A movement of rough lumber from the woods to milling points in the same State, where it remains for some months in the process of manufacture before being sold and shipped as finished products to purchasers and destinations previously unidentified, is not a movement in interstate commerce, although the shipment of the rough material is actuated by a belief, which is justified by experience and market conditions, that 95% of the products will be marketed and shipped outside of the State. P. 150.

Nos. 92, 93, reversed.

Nos. 94, 95, modified and affirmed.

THE cases are stated in the opinion.

*Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. D. H. Cantrell and Mr. J. F. Loughborough* for appellants in Nos. 92 and 93, and appellee in Nos. 94 and 95.

*Mr. John M. Moore and Mr. George A. McConnell* for appellees in Nos. 92 and 93, and appellants in Nos. 94 and 95.

MR. JUSTICE PITNEY delivered the opinion of the court.

These four cases were consolidated for the purposes of the hearing in the District Court, and have been treated as consolidated for the purposes of the hearing on appeal. They are so closely related that they may be dealt with in a single opinion.

On July 18, 1908, the two railway companies concerned—the St. Louis, Iron Mountain & Southern, which for brevity may be called the Iron Mountain, and the St. Louis Southwestern, which may be called the Southwestern—brought separate suits in equity in the Circuit Court (now the District Court) of the United States for the Eastern District of Arkansas against the members of the State Railroad Commission in their official capacity, and against two citizens of that State named as frequent shippers of freight upon the railroad lines, for injunctions to restrain the enforcement of certain intrastate freight and passenger rates; setting up that the commission was duly organized under an act of the legislature, and was thereby authorized to fix rates to be charged by the railroads in the State of Arkansas for the transportation of freight and passengers in that State; that the commission had officially adopted a tariff of freight rates applying to all classes and commodities of freight on all railroads operated in the State, and had ordered it to take effect on June 15, 1908; that the rates were unreasonable, unjust, discriminatory, confiscatory, and void; that they did not yield an adequate return for the services rendered; and that the operation of said tariff would deprive complainants of their property without due process of law and deny to them the equal protection of the laws, in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States. It was further alleged that the rates for the transportation of passengers in the State fixed by an act of the legislature passed February 9, 1907, and promulgated by order of the railroad commissioners, were confiscatory and void in their effect upon the complainant railways and, therefore, violative of the Fourteenth Amendment; but the passenger rates are not involved in the present appeals, and need not be further mentioned.

The jurisdiction of the federal court depended solely



upon the ground that the cases arose under the Constitution of the United States, and that the matter in controversy in each case exceeded the jurisdictional amount.

Temporary injunctions were issued in September, 1908, and continued in force during the pendency of the suits. The circuit court upon granting them ordered in each case that the complainant should execute a bond in the penal sum of \$200,000, conditioned that complainant should keep a correct account respecting its carriage of passengers and freight, showing the difference between the tariff actually charged and that which would have been charged had the rate inhibited been applied, also showing the particulars of the carriage, and the names of the persons affected as far as practicable, the record to be kept subject to the further order of the court; and further conditioned that if it should eventually be decided that so much of the order as inhibited the enforcement of the rates ought not to have been made, the complainant should within a reasonable time to be fixed by the court refund in every instance to the party entitled the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages. Complainants entered into such bonds with sureties. Later an additional injunction bond was required to be and was furnished by each complainant, but without sureties, conditioned substantially as above.

Full answers having been filed by the railroad commission, and testimony having been taken, the cases were brought on to final hearing, and on May 11, 1911, final decrees were made, the same in both cases. They enjoined the commissioners and their successors, the individual shippers named as defendants, and all other patrons of the road in the shipment of freight between stations in the State of Arkansas, from enforcing or attempting to enforce any of the provisions of the freight tariff in question. In addition to this, and after disposing

of the question of costs, each decree ordered that the bond for injunction be released and the sureties thereon discharged from liability, and concluded as follows: "And the court reserves and retains unto itself jurisdiction of the subject matter of this suit and of all parties hereto, to the end that such other and further orders and decrees may be made herein as may become necessary by reason of any changed conditions as to the facts, equities or rights that may hereafter take place or arise."

The railroad commissioners appealed to this court (the defendant shippers having been severed), the cases were heard together, and the decrees of the circuit court were reversed June 16, 1913, with directions to dismiss the bills without prejudice. *Allen v. St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553. The causes were remanded to the district court, the mandate in each case reciting the reversal and the order remanding the cause with directions to dismiss the bill without prejudice, and concluding as follows. "You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Upon the going down of the mandates the district court on July 18, 1913, entered decrees in obedience thereto dismissing the bills without prejudice and dissolving the injunctions; and at the same time and as a part of the same decrees made a reference under a rule of the court to a special master for the purpose of determining the damages alleged to have been sustained by the railroad commissioners by reason of the granting of the temporary and permanent injunctions, declaring: "That in determining these damages, for the recovery of which the said commissioners are not acting for themselves but for the benefit of all persons, shippers, consignees and passengers, who

have sustained any damages by reason of the granting of said injunctions," the master was authorized to examine witnesses and to give notice by publication that all persons having claims against the complainants by reason of the granting of the injunctions should present them within a time specified for the purpose.

Under this reference the appellants in cases Nos. 92 and 93 and the appellee in Nos. 94 and 95 intervened and presented claims for a refund of the difference paid by them in freight rates between the rates prescribed by the commission and those put in force by the railway companies. The master reported favorably upon these claims, dividing the amounts allowed into three periods, the first and second of which included the time elapsed between September 3, 1908, when the interlocutory injunctions were issued, and May 11, 1911, the date of the final decrees, and the third period included the time elapsed between the latter date and July 18, 1913, the date of the decrees entered upon the mandates. The railway companies filed exceptions to the master's report, which were sustained by the district court as to the claims involved in cases Nos. 92 and 93 and overruled as to those involved in Nos. 94 and 95, and a combined decree was made accordingly.

The parties aggrieved desiring to appeal, and being in doubt whether the appeal lay to this court or to the circuit court of appeals, prayed for and were allowed appeals to both courts. Hence the first question that confronts us is whether the decree is the subject of a direct appeal to this court.

We are clear that this question must be answered in the affirmative. The appeals from the final decrees in the main causes were brought direct to this court, because of the constitutional question, under § 5 of the Circuit Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 827, which provided for such an appeal in the following

cases, among others: "In any case that involves the construction or application of the Constitution of the United States. . . . In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." This section, of course, was the predecessor of § 238, Judicial Code, under which the present appeals were taken. And it is plain that the orders of the railroad commission were state laws within the meaning of this provision. *Williams v. Bruffy*, 96 U. S. 176, 183; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 555.

The provisions of the Judicial Code which regulate the jurisdiction of the circuit court of appeals originated in § 6 of the Act of 1891. They must be construed together with those provisions of law that confer upon the district court (§ 24, Judicial Code), and formerly conferred upon the circuit court, original jurisdiction in suits of a civil nature arising under the Constitution or laws of the United States, and in suits between citizens of different States. By § 128 of the Code, the circuit courts of appeals are to exercise appellate jurisdiction over the final decisions of the district courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely" upon diversity of citizenship. Section 239 provides for the certification of questions by the circuit court of appeals to this court; § 240 permits this court to review by certiorari any case in which the judgment or decree of the circuit court of appeals is made final; and, by § 241, in any case in which the judgment or decree of that court is not made final, there may be an appeal or writ of error



to this court where the matter in controversy exceeds one thousand dollars besides costs.

The present appeals relate to a decree made in a subordinate action ancillary to the main causes, in which, as has been stated, the federal jurisdiction was invoked solely upon the ground that the cases arose under the Constitution of the United States. It has been held repeatedly that jurisdiction of subordinate actions is to be attributed to the jurisdiction upon which the main suit rested, and hence that where jurisdiction of the main cause is predicated solely on diversity of citizenship and the decree therein is for this reason made final in the circuit court of appeals, the judgments and decrees in the ancillary litigation also are final. *Rouse v. Letcher*, 156 U. S. 47; *Gregory v. Van Ee*, 160 U. S. 643; *Rouse v. Hornsby*, 161 U. S. 588; *Pope v. Louisville, &c., Ry. Co.*, 173 U. S. 573, 577.

The proceeding out of which the decree now in question arose was not merely ancillary but was in effect a part of the main causes, taken for the purpose of carrying into effect the decrees of this court reversing the final decrees in the main causes and, at the same time, for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in those final decrees. The supplementary decree that is now before us, since it simply brings to a conclusion those former suits pursuant to our decrees therein, must be treated as involving the construction and application of the Constitution of the United States and as being made in a case in which a state law was claimed to be in contravention of the Federal Constitution, within the meaning of § 238, Judicial Code.

Therefore the motions to dismiss must be denied.

Upon the merits, it will be convenient to take up first the case of the Southern Cotton Oil Company, appellee in Nos. 94 and 95, in whose favor claims were allowed by

the master as against each of the two railways and for each of the periods referred to. The railways excepted upon two grounds: (1) because the final decrees of May 11, 1911, discharging the injunction bonds and releasing the makers thereof from liability had the effect to relieve the railways and their sureties from all liability by reason of the granting of the injunctions; and (2) as to such claims for overcharges as accrued subsequent to the date of the final decrees, on the ground that upon the rendition of those decrees the injunction bonds ceased to be operative and created no further liability, and that the railways incurred no liability to the claimants under the final decrees. The district court overruled the exceptions and sustained the claims of the Oil Company as against the railway companies and the sureties with interest at 6 per cent. per annum from the respective dates that the overcharges were made.

We deal first with so much of the overcharges as accrued prior to the final decrees. In *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368, 373, doubt was expressed whether, in view of the form of the mandate, there was any power in the district court to determine the liability of the railway companies upon the bonds. But at that time our attention was not called to the fact that the mandates contained a provision authorizing further proceedings; a provision that removes all question of the power of the district court. In *re Louisville*, 231 U. S. 639, 645; *Louisville v. Cumberland Telephone Co.*, 231 U. S. 652.

In support of the contention that the final decrees had the effect of discharging the complainants and their sureties from liability upon the bonds by reason of previous overcharges, it is pointed out that this part of the decrees was not appealed from nor was error assigned to the court's action in vacating the bonds and releasing the sureties. Whether, under the circumstances, the

action of this court in reversing the decrees in respect of their main provisions granting permanent injunctions had the effect of reversing also that portion which discharged the liability upon the injunction bonds is a question upon which we need not pass. For, irrespective of this, those clauses of the final decrees by which the district court retained jurisdiction for the purpose of making such further orders and decrees as might become necessary, coupled with the subsequent mandates of this court permitting further proceedings to be taken in conformity with our opinion and decrees and according to right and justice, empowered the district court to set aside so much of its final decrees as released the railways and their sureties from liabilities theretofore incurred under the injunction bonds. This is what the district court in effect did when it ordered the reference and sustained the claims of the Oil Company so far as they accrued prior to the final decrees.

It is argued that the condition of the bonds—that if it should eventually be decided that the order inhibiting the enforcement of the commission rates should not have been made the complainant should refund, etc.—never was broken because it was not at any time adjudged that the allowance of the temporary injunctions was improper. But this is to construe the bonds according to the letter and not according to the substance. The state statute and the orders of the railroad commission entitled shippers to the benefit of the rates thereby established; and they were thus entitled at all times except as it became necessary to stay the operation of the rates by equitable process in order to permit of a judicial investigation into the question of their adequacy. The burden of proof to show them inadequate was upon the railway companies; and when they failed to sustain this burden they at the same time showed that the injunctions ought not to have been allowed.

As to that portion of the claims which accrued after the final decrees, this, as we already have held in the *McKnight Case*, 244 U. S. 368, 374, was not recoverable upon the injunction bonds, nor against the sureties therein. On a fair construction of the conditions of those instruments, their obligation expired by limitation when the suits were brought to a final conclusion. Hence, to the extent that the supplemental decree now under review awards a recovery against the sureties for claims accruing after the final decrees, it must be modified.

But, in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error "be restored to all things which he hath lost by occasion of the said judgment"; and thereupon, in a plain case, a writ of restitution issued at once; but if a question of fact was in doubt, a writ of *scire facias* was first issued. *Anonymous*, Salk. 588; citing *Goodyere v. Ince*, Cro. Jac. 246; *Sympton v. Juxon*, Cro. Jac. 698; *Vesey v. Harris*, Cro. Car. 328; see also Lil. Ent. 641, 650; Arch. Append. 195, 200. The doctrine has been most fully recognized in the decisions of this court. *Bank of the United States v. Bank of Washington*, 6 Pet. 8, 17; *Erwin v. Lowry*, 7 How. 172, 184; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216.

That a course of action so clearly consistent with the principles of equity is one proper to be adopted in an equitable proceeding goes without saying. It is one of the



equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219; *Johnston v. Bowers*, 69 N. J. L. 544, 547.

It is argued that the claimant is not in a position to invoke the principle of restitution in this proceeding because it was not a party to the original proceedings, but came in by intervening before the master. This point is unsubstantial. The railroad commission, in defending the rate schedules against the attack of the railway companies, represented all shippers; the permanent injunctions that were awarded by the final decrees restrained all shippers from taking advantage of the commission rates; and during the time that those decrees remained unreversed the railway companies obtained the benefit of the injunction by exacting from this claimant, among others, in addition to the commission rates, those excess charges that form the basis of the present claims. It is a typical case for the application of the principle of restitution; and the district court properly held the commission to be the representative of the shippers for this purpose.

The suggestion that the order of reference was made under a rule of court that related only to damages recoverable on injunction bonds, and furnished no foundation for a decree against the railways on the theory of restitution, is without weight. The companies were fully heard upon the merits, and there is no question about the facts.

In behalf of the railways, it is argued that the reversal of the decrees of May 11, 1911, "without prejudice," left the rights of the parties still in doubt, and thus rendered it improper for the district court to award damages against the railways, either on the basis of a breach of the injunction bonds or on the basis of restitution.

But it seems to us that the rights of the present shippers were so clear as to make an allowance of damages upon the injunction bonds and restitution upon the reversal of the decrees manifestly their due. That the reversal was "without prejudice" did not deprive the decrees of conclusiveness as to past transactions, but only prevented them from being a bar to future suits for injunction upon a showing of changed conditions. *Missouri v. Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 539.

The contention that there was error in allowing interest upon the amount of the overcharges is unsubstantial. The damage was complete when the overcharges were made, and as they were wrongfully made and without consent of the shippers, interest ran from that date on general principles.

For these reasons, the decree in favor of the Southern Cotton Oil Company, modified so as to relieve the sureties from that part of the claims which accrued after the final decrees of May 11, 1911, will be affirmed.

The claims of both the Arkadelphia Milling Company (No. 92) and Hasty & Sons (No. 93) were based upon the difference between rates charged on rough lumber from the forest to milling points and the rates provided in the commission tariff on such movements. The tariff contained certain maximum rates on lumber of this character applicable generally, and in addition certain "rough material rates" much lower than the others, conditioned upon a certain percentage of the manufactured product being shipped over the same line that brought in the rough material. The railway companies excepted to the allowance in favor of each of these appellants upon the ground that the "rough material rates" were discriminatory against shippers who did not reship the specified percentages of the finished product. As to the Hasty claim, there was an additional exception based upon the

ground that the movement of rough material to milling points in the State and the subsequent forwarding of the finished product to market points outside of the State constituted interstate commerce, so that the rough material rates prescribed by the state commission were not applicable. The court sustained the exceptions on both grounds.

To take up first the question of discrimination: The tariff gave the benefit of the rough material rates only where the shipper transported over the line of the carrier a certain percentage of the product manufactured from the rough material. The master found that the condition was complied with by these shippers and sustained the allowances accordingly.

The district court sustained the defense of discrimination upon the authority of *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, and *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79.

We assume, without deciding, that, notwithstanding the general result adverse to the railway companies in the main suits, they were still at liberty to dispute the validity of the rate schedule as it related to particular shippers. See *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 460, concurring opinion of Mr. Justice Miller; *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 659, 666; *Ex parte Young*, 209 U. S. 123; *Missouri v. Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 538.

In our opinion, however, the district court erred in its ruling. The rough material rates were but parts of a general schedule that covered a wide field. This schedule was established in the exercise of the legislative authority of the State, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

But there is nothing to show that the rough material rates wrought any discrimination against the railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railways could complain. It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *Mallinckrodt Works v. St. Louis*, 238 U. S. 41, 54; *Cusack Co. v. Chicago*, 242 U. S. 526, 530.

*Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended. *Louisville & Nashville R. R. Co. v. Kentucky*, 183 U. S. 503, 511; *Pennsylvania R. R. Co. v. Towers*, 245 U. S. 6.

*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, is not at all in point. While the opinion of Mr. Justice Brewer covers a wide range of discussion, a majority of the court (p. 114) placed the decision upon the ground that the statute of Kansas applied only to a single company, and not to others engaged in like business in the State, and thereby denied to that company the equal protection of the laws.

There remains the question whether the shipments by J. F. Hasty & Sons of rough material from the forest to the milling point, followed by the forwarding of the finished product to points outside of the State, constituted inter-



state commerce. If they did, it is obvious that the state tariff was not applicable to them.

The following statement, taken from the record, shows the admitted facts as to the course of business:

"When the rough material reached the mills, it was manufactured into finished staves, headings and hoops, and in this condition shipped to whoever purchased them. The purchaser uses them in making barrels, casks, etc. The wastings in the finishing of said articles from the rough material were either disposed of for firewood, or destroyed. When the rough material left the woods, a bill of lading was issued from the woods to the mill. When the rough material reached the mill, it was finished into some or all of the articles described, when it was stacked in the yards or placed in kilns to dry. The process of manufacturing and drying occupied several months, or on an average this process would be gone through with, the finished products sold and shipped to the purchaser, in about five months from the date the rough material was received at the mill. The claimants classified the different parts after they came from the mill completely finished, and made sales from such stock. The markets for the manufactured articles were almost altogether in other states than Arkansas, or in foreign countries, and about ninety-five per cent. of the sale of finished articles, that is, of the total outbound shipments, were made for delivery at points outside the State of Arkansas, the remaining five per cent. being sold and delivered, or shipped to points within the State of Arkansas. At the time the rough material was shipped to the mills, the mills did not know to whom they would sell the finished product, or to what points it would be shipped, but did know that there was little market for the finished articles in the State of Arkansas, and expected that they would sell ninety-five per cent. of said finished articles and ship them to points outside the State of Arkansas.

"It was the intention of all the claimants herein, at the time they shipped the rough material into the milling points, to mill said rough material with the object of selling the said finished product and shipping it out as soon as practicable, and all of them knew and intended at the time they brought the rough material into the mill, on account of previous course of dealings in the business, that ninety-five per cent. of the finished product would be by them shipped to points outside the State of Arkansas.

"The claimants paid the usual property tax to the State of Arkansas on their stock of materials on hand at the milling point, whether said stock was in the rough or finished, the amount of the tax being arrived at according to the methods in use in the State of Arkansas by the use of an average basis."

Upon the facts as stated, it is our opinion that the district court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce. It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent. of it must be marketed outside of the State, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by

previous decisions to require discussion. *Coe v. Errol*, 116 U. S. 517, 525; *Bacon v. Illinois*, 227 U. S. 504, 515-516; *McCluskey v. Marysville & Northern Ry. Co.*, 243 U. S. 36.

The distinction between these cases and those cited to sustain the decision of the district court (*Swift & Co. v. United States*, 196 U. S. 375, 398; *Ohio R. R. Commission v. Worthington*, 225 U. S. 101; *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Louisiana R. R. Commission v. Texas & Pacific Ry. Co.*, 229 U. S. 336) is so evident that particular analysis may be dispensed with.

The exceptions sustained by the district court to the claims of the Arkadelphia Milling Co. and Hasty & Sons having been found to be untenable, it results that these claims should be allowed as against the railway companies and their sureties, so far as they arose before the final decrees, and as against the railway companies only, so far as they arose after the final decrees.

*Nos. 92 and 93, decree reversed; Nos. 94 and 95, decree modified and affirmed; and the cause remanded for further proceedings in conformity with this opinion.*

---

## MIDDLETON v. TEXAS POWER & LIGHT COMPANY.

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

No. 102. Submitted December 18, 1918.—Decided March 3, 1919.

There is a strong presumption that discriminations in state legislation are based on adequate grounds, and the mere fact that a law regulating certain classes might properly have included others does not condemn it under the equal protection clause. P. 157.

The Texas Workmen's Compensation Act, regulating the rights and

liabilities of employers and employees respecting disabling and fatal injuries in the employment, is expressly inapplicable to domestic servants, farm laborers, common carrier railway employees, laborers in cotton gins and employees of employers employing not more than five. *Held*, that there are adequate grounds for each of these exceptions. *Id.*

The discrimination resulting between employees engaged in the same kind of work, where one employer exercises his option to come under the act and another does not, is likewise consistent with the equal protection clause. P. 159.

Construed as binding all employees who remain in the employment after notice that their employer has subscribed to compensation insurance under it, the act is not open to the objection of being optional to the employer while compulsory upon his employees when he accepts it, since the latter, by thus remaining, exercise their option also. P. 161.

As the status of employer and employee is voluntary, and in view of their different relations to the common undertaking, it is clearly within legislative discretion, and not a denial of equal protection, to leave the initiative to the former in adopting the new terms of employment, with the option to the latter of accepting them, too, after notice, or withdrawing from the service. *Id.*

A plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries, irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers, without depriving either of liberty in violation of the due process clause. P. 163.

108 Texas, 96, affirmed.

THE case is stated in the opinion.

*Mr. Chas. B. Braun* for plaintiff in error.

*Mr. Harry Preston Lawther* and *Mr. Alexander Pope* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Alleging that in the month of December, 1913, he was in the employ of the Texas Power and Light Company in the



State of Texas, and while so employed received serious personal injuries through the bursting of a steam pipe due to the negligence of his employer and its agents, Middleton sued the company in a district court of that State to recover his damages. The defendant interposed an answer in the nature of a plea in abatement setting up that at the time of the accident and at the commencement of the action defendant was the holder of a policy of liability and compensation insurance, issued in its favor by a company lawfully transacting such business in the State, conditioned to pay the compensation provided by the Texas Workmen's Compensation Act, which was approved April 16, 1913, and took effect on the first day of September in that year (c. 179, Acts of 33d Legislature), of which fact the plaintiff had proper and timely notice as provided by the act; and that no claim for the compensation provided in the act with respect to the alleged injury had been made by plaintiff, but on the contrary he had refused to receive such compensation; with other matters sufficient to bring defendant within the protection of the act. Plaintiff took a special exception in the nature of a demurrer, upon the ground (among others) that the act was in conflict with the Fourteenth Amendment to the Constitution of the United States. The exception was overruled, the plea in abatement sustained, and the action dismissed. On appeal to the court of civil appeals it was at first held that the judgment must be reversed (178 S. W. Rep. 956); but upon an application for a rehearing the constitutional questions were certified to the supreme court of the State. That court sustained the constitutionality of the law (108 Texas, 96); and in obedience to its opinion the court of civil appeals set aside its former judgment and affirmed the judgment of the district court. Thereupon the present writ of error was sued out under § 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726.

Thus we have presented, from the standpoint of an objecting employee, the question whether the Texas Employers' Liability Act is in conflict with the due process and equal protection provisions of the Fourteenth Amendment.

The act creates an Employers' Insurance Association, to which any employer of labor in the State, with exceptions to be mentioned, may become a subscriber; and out of the funds of this association, derived from premiums on policies of liability insurance issued by it to subscribing members and assessments authorized against them if necessary, the compensation provided by the act as due on account of personal injuries sustained by their employees, or on account of death resulting from such injuries, is to be paid. This is a stated compensation, fixed with relation to the employee's average weekly wages, and accrues to him absolutely when he suffers a personal injury in the course of his employment incapacitating him from earning wages for as long a period as one week, or to his representatives or beneficiaries in the event of his death from such injury, whether or not it be due to the negligence of the employer or his servants or agents. Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employee, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employee of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the willful act or omission or gross negligence of the employer. Employers who do not become subscribers are subject as before to suits for damages based on negligence for injuries to employees or for death resulting therefrom, and are deprived of the so-called "common law defenses" of fellow servant's negligence and assumed risk, and also of contributory

negligence as an absolute defense, it being provided that for contributory negligence damages shall be diminished except where the employer's violation of a statute enacted for the safety of employees contributes to the injury or death; but that where the injury is caused by the willful intention of the employee to bring it about the employer may defend on that ground. Every employer becoming a subscriber to the insurance association is required to give written or printed notice to all his employees that he has provided for the payment by the association of compensation for injuries received by them in the course of their employment. Under certain conditions an employer holding a liability policy issued by an insurance company lawfully transacting such business within the State is to be deemed a subscriber within the meaning of the act. There are administrative provisions, including procedure for the determination of disputed claims. By § 2 of Part 1 it is enacted as follows: "The provisions of this Act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employees of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employees of any person, firm or corporation having in his or their employ not more than five employees."

Following the order adopted in the argument of plaintiff in error, we deal first with the contention that the act amounts to a denial of the equal protection of the laws. This is based in part upon the classification resulting from the provisions of the section just quoted, it being said that employees of the excepted classes are left entitled to certain privileges which by the act are denied to employees of the non-excepted classes, without reasonable basis for the distinction.

Of course plaintiff in error, not being an employee in

any of the excepted classes, would not be heard to assert any grievance they might have by reason of being excluded from the operation of the act. *Southern Ry. Co. v. King*, 217 U. S. 524, 534; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550; *Rosenthal v. New York*, 226 U. S. 260, 271; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576. But plaintiff in error sets up a grievance as a member of a class to which the act is made to apply.

However, we are clear that the classification can not be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Texas, 110-111): "Employees of railroads, those of employers having less than five employees, domestic servants, farm laborers and gin laborers are excluded from the operation of the Act, but this was doubtless for reasons that the legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employees, known experience as to hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the legislature in exempting them from the operation of the Act. Distinctions in these and other respects between them and employees engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary."

There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not



amount to a constitutional objection. *Rosenthal v. New York*, 226 U. S. 260, 271; *Patsone v. Pennsylvania*, 232 U. S. 138, 144; *Missouri, Kansas & Texas Ry. Co. v. Cade*, 233 U. S. 642, 649-650; *International Harvester Co. v. Missouri*, 234 U. S. 199, 215; *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 227; *Miller v. Wilson*, 236 U. S. 373, 384.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. But in this case adequate grounds are easily discerned. As to the exclusion of railroad employees, the existence of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, applying exclusively as to employees of common carriers by rail injured while employed in interstate commerce, establishing liability for negligence and exempting from liability in the absence of negligence in all cases within its reach (*New York Central R. R. Co. v. Winfield*, 244 U. S. 147; *Erie R. R. Co. v. Winfield*, 244 U. S. 170), and the difficulty that so often arises in determining in particular instances whether the employee was employed in interstate commerce at the time of the injury (see *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 151-152; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 259-260; *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 478; *New York Central R. R. Co. v. Carr*, 238 U. S. 260, 263; *Pennsylvania Co. v. Donat*, 239 U. S. 50; *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 559; *Louisville & Nash. R. R. Co. v. Parker*, 242 U. S. 13; *Erie R. R. Co. v. Welsh*, 242 U. S. 303, 306; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, 573), reasonably may have led the legislature to the view that it would be unwise to attempt to apply the new system to railroad employees, in whatever kind of commerce employed, and that they might better be left to common-law actions with statu-

tory modifications already in force (Vernon's Sayles' Texas Civ. Stats. 1914, Arts. 6640-6652), and such others as experience might show to be called for.

The exclusion of farm laborers and domestic servants from the compulsory scheme of the New York Workmen's Compensation Act was sustained in *New York Central R. R. Co. v. White*, 243 U. S. 188, 208, upon the ground that the legislature reasonably might consider that the risks inherent in those occupations were exceptionally patent, simple, and familiar. The same result has been reached by the state courts generally. *Opinion of Justices*, 209 Massachusetts, 607, 610; *Young v. Duncan*, 218 Massachusetts, 346, 349; *Hunter v. Colfax Coal Co.*, 175 Iowa, 245, 287; *Sayles v. Foley*, 38 R. I. 484, 490-492. Similar reasoning may be applied to cotton gin laborers in Texas; indeed, it was applied to them by the supreme court of that State, as we have seen. And the exclusion of domestic servants, farm laborers, casual employees, and railroad employees engaged in interstate commerce was sustained in *Mathison v. Minneapolis Street Ry. Co.*, 126 Minnesota, 286, 293.

The exclusion of employees where not more than four or five are under a single employer is common in legislation of this character, and evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together; the legislature, of course, being the proper judges to determine precisely where the line should be drawn. Classification on this basis was upheld in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576-577, and has been sustained repeatedly by the state courts. *State v. Creamer*, 85 Ohio St. 349, 404-405; *Borgnis v. Falk Co.*, 147 Wisconsin, 327, 355; *Shade v. Cement Co.*, 93 Kansas, 257, 259; *Sayles v. Foley*, 38 R. I. 484, 491, 493.

The discrimination that results from the operation of the

act as between the employees of different employers engaged in the same kind of work, where one employer becomes a subscriber and another does not, furnishes no ground of constitutional attack upon the theory that there is a denial of the equal protection of the laws. That the acceptance of such a system may be made optional is too plain for question; and it necessarily follows that differences arising from the fact that all of those to whom the option is open do not accept it must be regarded as the natural and inevitable result of a free choice, and not as a legislative discrimination. They stand upon the same fundamental basis as other differences in the conditions of employment arising from the variant exercise by employers and employees of their right to agree upon the terms of employment. And see *Borgnis v. Falk Co.*, 147 Wisconsin, 327, 354; *Mathison v. Minneapolis Street Ry. Co.*, 126 Minnesota, 286, 294.

In recent years many of the States have passed elective workmen's compensation laws not differing<sup>e</sup> essentially from the one here in question, and they have been sustained by well-considered opinions of the state courts of last resort against attacks based upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer. *Sexton v. Newark District Telegraph Co.*, 84 N. J. L. 85; 86 N. J. L. 701; *Opinion of Justices*, 209 Massachusetts, 607; *Young v. Duncan*, 218 Massachusetts, 346; *Borgnis v. Falk Co.*, 147 Wisconsin, 327; *State v. Creamer*, 85 Ohio St. 349; *Deibeikis v. Link-Belt Co.*, 261 Illinois, 454; *Crooks v. Tazewell Coal Co.*, 263 Illinois, 343; *Victor Chemical Works v. Industrial Board*, 274 Illinois, 11; *Mathison v. Minneapolis Street Ry. Co.*, 126 Minnesota, 286; *Shade v. Cement Co.*, 93 Kansas, 257; *Sayles v. Foley*, 38 R. I. 484; *Greene v. Caldwell*, 170 Kentucky, 571; *Hunter v. Colfax Coal Co.*, 175 Iowa, 245. The Ohio law was sustained by this court against special

attacks in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, and the Iowa law in *Hawkins v. Bleakly*, 243 U. S. 210, 213, *et seq.*

Stress is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employee of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employees taking them out of the operation of the act; but probably such an agreement might be held by the courts of the State to be inconsistent with the general policy of the act; the supreme court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act.

But a moment's reflection will show the impossibility of giving an option both to the employer and to the employee and enabling them to exercise it in diverse ways. The provisions of the act show that the legislative purpose is that it shall take effect only upon acceptance by both employer and employee. The former accepts by becoming a subscriber; the latter by remaining in the service of the employer after notice of such acceptance. And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employee. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employee, who may go from place to place seeking



satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success, the legislature deemed it proper, if not essential, that the payment of compensation to the injured employees or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employees of a given employer should be treated alike. Still further, there are reasons affecting the contentment of the employees and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the State in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employee who with notice of the employer's acceptance dissented from the resulting arrangement should be required to exercise his option by withdrawing from the employment. The relation of employer and employee being a voluntary relation, it was well within the power of the State to permit employers to accept or reject the new plan of compensation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employees of the equal protection of the laws within the meaning of the Fourteenth Amendment.

This disposes of all contentions made under the equal protection clause.

It is argued further that there is a deprivation of liberty and property without due process of law in requiring employees, willingly or unwillingly, to accept the new system where their employer has adopted it. Of course there is no suggestion of a deprivation of vested property

in the present case, since the law was passed in April and took effect in September, while the plaintiff's injuries were received in the following December, after he had been notified of his employer's acceptance of the act. What plaintiff has lost, therefore, is only a part of his liberty to make such contract as he pleased with a particular employer and to pursue his employment under the rules of law that previously had obtained fixing responsibility upon the employer for any personal injuries the plaintiff might sustain through the negligence of the employer or his agents. But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of *respondeat superior*, the imposition of liability without fault, and the exemption from liability in spite of fault—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers. *New York Central R. R. Co. v. White*, 243 U. S. 188, 198–206; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 234.

All objections to the act on constitutional grounds being found untenable, the judgment under review is

*Affirmed.*

CHICAGO GREAT WESTERN RAILROAD COMPANY *v.* BASHAM, ADMINISTRATOR OF SPELLMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 111. Submitted December 19, 1918.—Decided March 3, 1919.

Under § 237 of the Judicial Code, as amended by the Act of September 6, 1916, § 2, c. 448, 39 Stat. 726, denial by a state court of rights and immunities claimed under the Federal Employers' Liability Act affords no ground for review of its judgment by writ of error, but only by certiorari. P. 165.

The words "or otherwise" in the Act of September 6, 1916 (*ubi supra*), where it grants the discretionary power to review "by writ of certiorari or otherwise," add nothing of substance to the power granted.

Under § 237 of the Judicial Code before and since the amendment of September 6, 1916, a judgment of a state court to be susceptible of review must be final. P. 166.

The Act of September 6, 1916, in providing (§ 7) that the right of review under existing laws in respect of judgments entered before it took effect (October 6, 1916) should remain unaffected for six months thereafter, contemplated final judgments ending the litigation in the state supreme court; and a judgment as to which a petition for rehearing has been presented to and entertained and considered by that court does not become final in that sense until the petition is disposed of. *Id.*

Writ of error to review 178 Iowa, 998, dismissed.

THE case is stated in the opinion.

*Mr. George H. Carr, Mr. Fred P. Carr and Mr. O. M. Brockett* for plaintiff in error. *Mr. Donald Evans* was also on the briefs.

*Mr. Thomas A. Cheshire and Mr. Howard H. Clark* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a writ of error directed to the court of last resort of a State since the taking effect of the Act of September 6, 1916, c. 448, 39 Stat. 726, by the second section of which § 237, Judicial Code, was so amended that the revisory jurisdiction of this court over the decisions of state courts, exercisable by writ of error, was confined to cases involving the validity of a treaty or statute of, or an authority exercised under the United States, the decision being against their validity, or involving the validity of a statute of, or an authority exercised under a State, on the ground of repugnancy to the Constitution, treaties, or laws of the United States, the decision being in favor of their validity; and by which the final judgment or decree of a state court of last resort based upon a decision adverse to a right or immunity claimed under the Constitution or a statute of the United States, previously reviewable by writ of error, was (with other kinds specified) made reviewable only in case this court, in the exercise of its discretionary authority, should require, "by writ of certiorari or otherwise," that the judgment be certified to it for review. See *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U. S. 162; *Ireland v. Woods*, 246 U. S. 323, 328. The words "or otherwise" add nothing of substance to the thought expressed by the new act. *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 295.

In the case before us the questions raised by the record and assignments of error relate wholly to the alleged denial by the Supreme Court of Iowa of certain rights and immunities asserted by plaintiff in error under the Act of Congress approved April 22, 1908, commonly known as the Employers' Liability Act (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291). Hence, under the new system established by the Act of 1916, the judgment is in the class



of those that are reviewable in this court not by writ of error but by writ of certiorari.

By § 7 of the latter act it was provided that the right of review under existing laws in respect of judgments entered before the act took effect (October 6, 1916) should remain unaffected for the period of six months thereafter, but at the end of that time should cease. The present writ of error was applied for within the six-months period—December 19, 1916—and the question whether our jurisdiction is properly invoked by this form of writ depends upon whether the judgment sought to be reviewed was “entered before this act takes effect” within the meaning of § 7.

The action was brought against the railway company in a district court to recover damages for the death of plaintiff's intestate, and a trial by jury resulted in a verdict and judgment for the plaintiff. Defendant appealed to the Supreme Court of Iowa, and that court on November 26, 1915, delivered an opinion for affirmance (178 Iowa, 998), and judgment was entered accordingly. A petition for a rehearing was filed, which, after consideration, was overruled April 7, 1916 (157 N. W. Rep. 192; 178 Iowa, 998), and a writ of procedendo was awarded. Thereafter a second petition for rehearing was filed, and, having been fully considered, was overruled on December 18, 1916, and judgment to that effect duly entered. The petition for allowance of a writ of error from this court, presented on the following day to the chief justice of the Supreme Court of Iowa, averred that the final order and judgment affirming the judgment of the district court was entered by the supreme court on the eighteenth day of December, 1916; and for review of this judgment a writ of error was prayed for and allowed.

We think this was a correct statement of the effective date of the judgment sought to be reviewed.

Section 237, Judicial Code, both before and since the

164.

Opinion of the Court.

amendment of September 6, 1916, permits of the review by this court only of the final judgment or decree of the highest state court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the State that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the State the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously rendered can not be regarded as a final judgment within the meaning of the act of Congress. We said recently in an analogous case: "If it were not so, a judgment of a state court susceptible of being reviewed by this court would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse." *Andrews v. Virginian Ry. Co.*, 248 U. S. 272. It results that in the present case the judgment of the Supreme Court of Iowa did not become a "final judgment" until December 18, 1916, and by reason of the nature of the only federal questions raised in the record it then was reviewable in this court only by writ of certiorari, because of the above-cited provisions of the Act of 1916.

*Writ of error dismissed.*

NEW YORK CENTRAL RAILROAD COMPANY,  
SUCCESSOR OF THE NEW YORK CENTRAL &  
HUDSON RIVER RAILROAD COMPANY, *v.* POR-  
TER, FOR HERSELF AND FOR HER FOUR  
MINOR CHILDREN, ETC., ET AL.

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

No. 134. Submitted January 10, 1919.—Decided March 3, 1919.

An employee of a railroad company killed by a train while removing snow on its premises from a space between a platform and a track used in interstate as well as intrastate commerce; *held* employed in interstate commerce; the resulting rights and liabilities were determinable by the Federal Employers' Liability Act and the State Workmen's Compensation Law was inapplicable.

172 App. Div. 918, reversed.

THE case is stated in the opinion.

*Mr. Robert E. Whalen* for plaintiff in error.

*Mr. Merton E. Lewis*, Attorney General of the State of New York, and *Mr. E. Clarence Aiken* for defendants in error. *Mr. Albert T. Wilkinson*, for defendants in error, in a separate brief.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Lewis M. Porter, a section-man, was struck and instantly killed by plaintiff in error's engine attached to a passenger train and moving along the main track. The Appellate Division affirmed an award in behalf of his

widow and children under the New York Workmen's Compensation Law.

If the deceased was employed in interstate commerce when the accident occurred, consequent rights and liabilities arose under the Federal Employers' Liability Act and the state statute did not apply. *New York Central R. R. Co. v. Winfield*, 244 U. S. 147; *Erie R. R. Co. v. Winfield*, 244 U. S. 170.

The evidence showed and the State Workmen's Compensation Commission found: "Lewis M. Porter resided at Camden, N. Y., and upon the date of the accident, December 17, 1914, was in the employ of The New York Central Railroad Company as a laborer. On said date, while engaged in shoveling snow upon the premises of The New York Central Railroad Company between the west bound track and a platform near the intersection of said tracks and Mexico Street in the Village of Camden, he was struck by the engine of a passenger train known as train No. 49, which was proceeding northerly on the west bound track, receiving injuries from which he died immediately. The tracks of The New York Central Railroad Company at the point where the deceased was working, were used for the purpose of transporting both interstate and intrastate cars and both interstate and intrastate commerce."

Considered in connection with our opinions in *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, and cases there cited, we think the circumstances here presented make it quite clear that when killed Porter was employed in interstate commerce. Accordingly, the judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE CLARKE dissents.



MISSOURI & ARKANSAS LUMBER & MINING  
COMPANY *v.* GREENWOOD DISTRICT OF SE-  
BASTIAN COUNTY, ARKANSAS, ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF ARKANSAS.

No. 149. Submitted January 17, 1919.—Decided March 3, 1919.

A revivor to escape the statute of limitations adds no new efficacy to a judgment in respect of the power of the legislature to stop the further running of interest. P. 172.

A judgment of the United States Circuit Court, based on non-interest-bearing county warrants, provided for interest at a specified rate on the amount of the judgment until paid. A later act of the legislature declared that thereafter judgments on such warrants should bear no interest. *Held*, consistent with the contract clause and due process. *Id.* *Morley v. Lake Shore & Michigan Southern Ry. Co.*, 146 U. S. 162.

Interest on judgments allowed by statute merely is not contractual but a penalty or liquidated damages. P. 173.

*Quære*: Is this true of a judgment based on a contract stipulating for interest? *Id.*

Affirmed.

THE case is stated in the opinion.

*Mr. John H. Vaughan* and *Mr. B. R. Davidson* for plaintiff in error.

*Mr. Thomas B. Pryor* for defendants in error.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Article XVI, § 1, Constitution of Arkansas (1874), declares: "Nor shall any county, city, town or other municipality ever issue any interest-bearing evidences of in-

debtedness." During 1889 (or about that time) Sebastian County, for the benefit of Greenwood District, issued certain *non-interest-bearing* warrants payable "out of any money in the Treasury appropriated for ordinary purposes" of which plaintiff in error became lawful holder and owner. It sued upon them in the United States Circuit Court, Western District of Arkansas, and obtained a judgment, January 26, 1891, for \$13,703.29, "with interest at the rate of six per cent. per annum from this date until paid together with all its costs in and about this case laid out and expended." So far as not satisfied, this was revived in 1900 and again in 1910; and at different dates from 1896 to 1914 the county made payments thereon aggregating its face value together with six per cent. interest reckoned to March 21, 1893, and all costs.

An act of the Arkansas legislature, approved March 21, 1893, [Acts Ark. 1893, p. 145] provides: "No judgment rendered or to be rendered against any county in the State on county warrants or other evidence of county indebtedness shall bear any interest after the passage of this act"; and relying upon this inhibition the county claimed that the above-mentioned payments fully discharged the judgment against it. Thereupon, May 23, 1916, plaintiff in error petitioned the court below for a mandamus to compel payment of alleged accrued interest. Answering, the county denied further liability and then asked for an order requiring that the judgment be satisfied of record. The trial court refused a mandamus and directed satisfaction as prayed. Whether plaintiff in error's rights under the Federal Constitution would be violated by giving effect to the statute is the only question presented for our consideration. The Supreme Court of the State sustained its validity in *Read v. Mississippi County*, 69 Arkansas, 365, where the precise points here involved were presented.

The two revivals in 1900 and 1910 kept the judgment

alive and permitted its enforcement beyond the periods fixed by statutes of limitation. Their entry gave it no greater efficacy than it possessed when first rendered.

Plaintiff in error maintains that the challenged act conflicts with § 10, Art. I, of the Constitution and also the Fourteenth Amendment forbidding a State from depriving any person of property without due process of law; but we think the contrary is settled by our opinion in *Morley v. Lake Shore & Michigan Southern Ry. Co.*, 146 U. S. 162, 168, 171. There the judgment directed that interest should accrue from its entry without mentioning any rate, the statutory one then being seven per centum; later another act fixed six per centum for the future and the debtor claimed benefit of it while the creditor maintained that to permit this would violate both the contract clause and Fourteenth Amendment. Through Mr. Justice Shiras we said (p. 168): "After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the State shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for non-payment of a judgment be determined by a State, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judg-

ment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the State chooses to prescribe. . . (p. 171). The discretion exercised by the legislature in prescribing what, if any, damages shall be paid by way of compensation for delay in the payment of judgments is based on reasons of public policy, and is altogether outside the sphere of private contracts. . . . The further contention of the plaintiff in error, that he has been deprived of his property without due process of law, can be more readily disposed of. If, as we have seen, the plaintiff has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property." See *Barnitz v. Beverly*, 163 U. S. 118, 129.

It is insisted that as the judgment now under consideration specified a definite interest rate while the one in *Morley v. Lake Shore & Michigan Southern Ry. Co.*, *supra*, did not, the doctrine there approved is inapplicable. To this we cannot assent; mere recital of a particular rate does not change the nature of the charge as a penalty or liquidated damages.

It should be noted that the county warrants, upon which plaintiff in error sued, bore no interest; if the parties had lawfully stipulated therefor, a different question would have been presented.

The judgment of the court below is

*Affirmed.*



CITY OF RICHMOND *v.* BIRD ET AL.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
FOURTH CIRCUIT.

No. 195. Argued January 28, 29, 1919.—Decided March 3, 1919.

Under the law of Virginia and the charter of the City of Richmond, the city's claim for delinquent taxes on personal property, unsupported by distraint, is no better than the claim of a general creditor and is inferior to a landlord's lien secured by levy of a distress warrant. P. 177.

Section 64a of the Bankruptcy Act, in directing payment of taxes before dividends to creditors, means general creditors; when by the local law a lien for a private debt is superior to a claim for taxes, its status is preserved by § 67d (as it was before 1910), if the lien was given or accepted in good faith and not in fraud of the act, for a present consideration. *Id.*

240 Fed. Rep. 545, affirmed.

THE case is stated in the opinion.

*Mr. George Wayne Anderson* for petitioner.

*Mr. James E. Cannon*, with whom *Mr. Samuel A. Anderson* was on the brief, for respondents.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

November 4, 1909, the Chancery Court at Richmond upon petition filed the preceding day appointed a receiver for the Ainslie Carriage Company; February 3, 1910, the company was adjudged bankrupt in involuntary proceedings instituted November 6, 1909. At time of receiver's appointment taxes assessed upon the bankrupt's personal property for the years 1907, 1908 and 1909 were due the

174.

Opinion of the Court.

City of Richmond for which it had not distrained, although having authority so to do. Respondents, landlords of the bankrupt, under express statutory authority, levied a distress warrant November 1, 1909, upon its goods and chattels on account of rent due for the period since April 1, 1908. The question is whether their claim is entitled to priority of payment over the taxes. The Circuit Court of Appeals answered in the affirmative. 240 Fed. Rep. 545.

The city, while not disputing that levy of the distress warrant gave respondents a valid lien, claims priority under § 64a, Bankruptcy Act—"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

Respondents maintain (1) that their lien, perfected through distraint, was fully protected by § 67d (as it read prior to 1910), Bankruptcy Act—"Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act." And (2) that under Virginia law such a lien is superior to the inchoate one which the city had for unpaid taxes but neglected to perfect by exercising its summary power to distrain therefor after September first in year for which levied.

It is not denied that respondents obtained a present, valid lien upon the bankrupt's goods and chattels distrained November 1, 1909; nor is it now claimed this was annulled by adjudication of bankruptcy. That the

City of Richmond had no lien for past due taxes upon these goods and chattels when the Chancery Court receiver took possession, we think must be regarded as settled by *Jackson Coal Co. v. Phillips Line*, 114 Virginia, 40 (1912), and this notwithstanding differences between its charter and that of Petersburg. The Supreme Court of Virginia there said (pp. 49, 50):

“With respect to that part of the decree appealed from, which directed the payment of taxes due from the Phillips Line, and its predecessor in title, to the State of Virginia and the city of Petersburg, out of the fund under the control of the court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the Auditor of the State or by the city of Petersburg, to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the Phillips Line ordered. The State had a right under sections 604–623 of the Code, for one year from the date on which the taxes in her favor were assessed, to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the city of Petersburg had a right of distress against the property assessed with taxes in its favor, which the city might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised.

“Under these circumstances, neither the State nor the city had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and, therefore, the position of the State and city was no better than that of the general

174.

Dissent.

creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them (the State and the city), respectively, for the year 1910, assessed against and due from the receivers."

Respondents therefore must prevail unless priority over their lien is given by § 64a to claim for taxes which, under state law, occupied no better position than one held by a general creditor. Section 67d, Bankruptcy Act, quoted *supra*, declares that liens given or accepted in good faith and not in contemplation of or in fraud upon this act, shall not be affected by it. Other provisions must, of course, be construed in view of this positive one. Section 64a directs that taxes be paid in advance of dividends to creditors; and "dividend" as commonly used throughout the act means partial payment to general creditors. In § 65b, for example, the word occurs in contrast to payment of debts which have priority. And as the local laws gave no superior right to the city's unsecured claim for taxes we are unable to conclude that Congress intended by § 64a to place it ahead of valid lien holders.

*New Jersey v. Anderson*, 203 U. S. 483, is not decisive of any point here contested; it only adjudged that New Jersey's claim was for a tax within the meaning of § 64a and entitled to be treated accordingly. See *New Jersey v. Lovell*, 179 Fed. Rep. 321.

The judgment below must be

*Affirmed.*

MR. JUSTICE DAY and MR. JUSTICE CLARKE dissent.



GILCREASE *v.* McCULLOUGH ET AL.CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
OKLAHOMA.

No. 167. Argued January 21, 1919.—Decided March 3, 1919.

In declaring the enrollment records of the Commission to the Five Civilized Tribes conclusive evidence of age, the Act of May 27, 1908, c. 199, § 3, 35 Stat. 312, 313, does not exclude other evidence on the subject consistent with the records and enrollment. P. 180.

Hence, where the enrollment record purported to show the age of an Indian, at time of application for enrollment, in years only, evidence that he was several months older was admissible. *Id.*

162 Pac. Rep. 178, affirmed.

THE case is stated in the opinion.

*Mr. A. J. Biddison* for petitioner.

*Mr. James B. Diggs*, with whom *Mr. Frederick deC. Faust*, *Mr. F. C. Proctor*, *Mr. D. Edward Greer*, *Mr. Rush Greenslade* and *Mr. W. C. Liedtke* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Thomas Gilcrease, a Creek Indian of one-eighth blood, received, under date of December 15, 1902, an allotment of surplus land under Act of Congress, March 1, 1901, c. 676, 31 Stat. 861, as amended by Act of June 30, 1902, c. 1323, 32 Stat. 500. On February 8, 1911, his twenty-first birthday, he executed to McCullough and Martin an oil and gas lease thereof. Later he brought suit in a state court of Oklahoma to set it aside, insisting that, under the applicable enrollment record of Creek citizenship, he must be assumed to have been under age at the time the lease was executed, although he had in fact

178.

Opinion of the Court.

attained his majority. The trial court entered judgment for the defendants which was affirmed by the Supreme Court of the State; and a rehearing was denied, January 9, 1917. 162 Pac. Rep. 178. The case comes here on writ of certiorari. 243 U. S. 653.

The only substantial question submitted is this: Did the entry concerning Gilcrease's age made in the enrollment record of Creek citizenship preclude defendant from showing that he was actually of age when the lease was executed? The decision of that question depends wholly upon the construction to be given § 3 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 313, as applied to the record.

Section 3 provides:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

The enrollment record introduced in evidence, so far as material, is as follows:

Residence: Leonard.

Creek Nation.

Creek Roll.

Post Office: Mounds, Ind. Ter.

Dawes' Roll No.	Name	Relationship to person first named	Age	Sex	Blood
1504	1 Gilcrease, Lizzie		25	F.	$\frac{1}{4}$
1505	2 " , Thomas	Son	9	M.	$\frac{1}{8}$
1506	3 " , Eddie	"	7	"	$\frac{1}{8}$
1507	4 " , Ben	"	5	"	$\frac{1}{8}$
1508	5 " , Lena	Daughter	3	F.	$\frac{1}{8}$
1509	6 " , Florence	"	1	"	$\frac{1}{8}$
Citizenship certificate issued— June 9th, 1899.			June 9/99.		

Gilcrease insists that the entry "June 9/99," near the lower right-hand corner of the enrollment card, signifies that the application for his enrollment was made on June 9, 1899; that in giving his age as "9," the roll declared him to be exactly nine years old on June 9, 1899; and that, consequently, in the absence of other evidence to the contrary in the enrollment record, he must be deemed to have been under age on February 8, 1911.

But there was no declaration or finding of fact by the Commission that Gilcrease was exactly 9 years old on June 9, 1899. The declaration that a person is 9 years of age signifies, in the absence of conditions requiring exact specification, merely that he has reached or passed the ninth anniversary of his birth and is still less than ten years old. There was neither a statute nor a regulation of the Commission which required an exact specification of age. Nor did the printed blank used for the enrollment provide a space either for entering the date of applicant's birthday or for entering the number of months and days by which his age exceeded a full year. Furthermore, the enrollment card itself bears positive evidence that it did not purport to represent the applicant as being exactly 9 years old on the day of application. For this same card records, in like manner, on the assumed date of application, also the ages of his mother, of three brothers, and a sister. Is the court expected to believe that the Commission found, that the six members of the family were all born on the ninth day of June?

Gilcrease insists, however, that the act makes the enrollment record not merely "conclusive," but the exclusive "evidence as to the age" of the citizen; or, in other words, that Congress has provided, not a rule of evidence, but the following rule of substantive law: Whenever a member of the Five Civilized Tribes is stated in the enrollment record to be a certain number of years old and the day of his enrollment is stated therein, he shall be unable

178.

Opinion of the Court.

to convey his lands so long as the rolls do not show affirmatively that he is 21 years old. For this contention there is no support in the words of the statute; nor is there any in reason. As well might it be contended that where the record states the number of the applicant's years, but gives only the year and not the day or the month of the application of enrollment, evidence could not be introduced to show that the application was made before December 31st of the year given; or that, if no age whatever appeared in the enrollment record, the citizen must for 21 years after the date of enrollment be conclusively presumed to be a minor. The enrollment record is, of course, conclusive as to that which it in terms recites or which is necessarily implied from the words and figures used. But there is no indication of an intention on the part of Congress that facts not inconsistent with the recitals of the record shall not be proved, whenever relevant. The roll had already been held to be practically conclusive as to facts, the determination of which was a condition precedent to enrollment. Compare *United States v. Wildcat*, 244 U. S. 111. The purpose of § 3 of the Act of May 27, 1908, seems to have been simply to make the record conclusive as to age in so far as it purports to state age. The cases in the lower federal courts, the recent decisions in the Supreme Court of Oklahoma, and the great weight of all the authorities support the proposition that, when the age is stated simply in years or whenever the age is not stated definitely by the addition of the months or days, other evidence may be introduced to supplement the record by proving these and thus establish the exact date of birth.<sup>1</sup>

*Affirmed.*

---

<sup>1</sup> *Etchen v. Cheney*, 235 Fed. Rep. 104 (C. C. A.); *McDaniel v. Holland*, 230 Fed. Rep. 945 (C. C. A.); *Cushing v. McWaters*, 175 Pac. Rep. 838; *Tyrell v. Shaffer*, 174 Pac. Rep. 1074; *Jordan v. Jordan*, 162 Pac. Rep. 758; *Heffner v. Harmon*, 159 Pac. Rep. 650. Compare also



SUGARMAN *v.* UNITED STATES.ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MINNESOTA.

No. 345. Argued January 9, 1919.—Decided March 3, 1919.

To empower this court to review a judgment of a District Court as involving the Constitution, under Jud. Code, § 238, the writ of error must present a substantial constitutional question, properly raised below. P. 183.

A substantial constitutional question cannot be based upon a refusal to give requested instructions the substance of which was clearly embodied in the charge to the jury. P. 184.

A judge is not obliged to adopt the exact language of instructions requested, or to repeat instructions already given in substance. P. 185.

Writ of error to review 245 Fed. Rep. 604, dismissed.

THE case is stated in the opinion.

---

*Hutchison v. Brown*, 167 Pac. Rep. 624, 626; *Jackson v. Lair*, 48 Okla. 269. For earlier case, *contra*, see *Rice v. Anderson*, 39 Okla. 279. Compare also *Linam v. Beck*, 51 Okla. 727; *Henley v. Davis*, 57 Oklahoma, 45.

The petitioner in his brief sets out a number of letters from the Land Department on the question of whether, under § 3, the date of application is to be considered the date of birth, when date of birth not given. In all the communications where the question is considered it is stated in effect, as in that of August 24, 1908, from Mr. Leupp, Commissioner of Indian Affairs, to the Secretary of the Interior (Land 56330—1908 E. B. H.), that the "application for enrollment shall be construed, for the purposes of the Government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise." It is always stated that the act shall be so construed "*for the purposes of the Government.*" This does not purport to be a result reached on a careful interpretation of the act; but was apparently adopted simply as a practical working rule of the Department. *McDaniel v. Holland*, 230 Fed. Rep. 945, 948-950.

182.

Opinion of the Court.

*Mr. Seymour Stedman and Mr. T. E. Lattimer*, for plaintiff in error, submitted.

*Mr. John Lord O'Brian*, Special Assistant to the Attorney General, with whom *Mr. Alfred Bettman*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Espionage Act (June 15, 1917, c. 30, Title I, § 3, 40 Stat. 217, 219) provides that: "Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States . . . shall be punished." Sugarman was charged with having violated this section on July 24, 1917, by words spoken in an address made at a Socialist meeting which was attended by many registrants under the Selective Service Act, sustained in *Selective Draft Law Cases*, 245 U. S. 366. He was tried in the District Court of the United States for the District of Minnesota, found guilty by the jury, and sentenced. See 245 Fed. Rep. 604. Thirty-one exceptions were taken to rulings of the trial judge. Instead of seeking review by the Circuit Court of Appeals under § 128 of the Judicial Code, the case is brought here under § 238.

Review by this court on direct writ of error is invoked on the ground that the construction or application of the Federal Constitution was drawn in question. Thirty of the rulings excepted to below are assigned as errors here. If any one of them involves a constitutional question which is substantial, or was such when the defendant sued out his writ of error, we have jurisdiction to review all the questions raised and it is our duty to determine

them, so far as necessary to afford redress, even if we should conclude that the constitutional question was correctly decided below. *Williamson v. United States*, 207 U. S. 425, 432, 434; *Goldman v. United States*, 245 U. S. 474, 476. But mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311; *Goodrich v. Ferris*, 214 U. S. 71, 79; *Hendricks v. United States*, 223 U. S. 178, 184; *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123; *Brolan v. United States*, 236 U. S. 216, 218; *United Surety Co. v. American Fruit Co.*, 238 U. S. 140, 142.

Of the thirty-one exceptions taken below only two refer in any way to the Federal Constitution. These two are for refusal to give the following instructions:

(a) "The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances. This right has been deemed so essential and necessary to free institutions and a free people that it has been incorporated in substance in the constitutions of all the states of the Union. These constitutional provisions referred to are not abrogated, they are not less in force now because of war, and they are as vital during war as during times of peace, and as binding upon you now as though we were at peace."

(b) "This provision of our Constitution will not justify or warrant advocating a violation of law. A man may freely speak and write and petition, but he is responsible for the consequences of what he may say, write or publish; and if what he says and publishes has a natural tendency to produce a violation of law, that is to impel the persons

182.

Opinion of the Court.

addressed to violate the law, and the person using the language intends that it should produce a violation of law, then the person using such language is subject to punishment and this is not inconsistent with the right and protection guaranteed by the Constitution of the United States and of this state."

While the trial judge refused to give these specific instructions, his charge to the jury included the following passage:

"Now, considerable has also been said in this case about freedom of speech. The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech. This provision of the Constitution is of course in force in times of war as well as in times of peace. But 'freedom of speech' does not mean that a man may say whatever he pleases without the possibility of being called to account for it. A man has a right to honestly discuss a measure or a law, and to honestly criticize it. But no man may advise another to disobey the law, or to obstruct its execution, without making himself liable to be called to account therefor."

This passage in the charge clearly embodied the substance of the two requests made by the defendant. The judge was not obliged to adopt the exact language of the instructions requested, *Holt v. United States*, 218 U. S. 245, 253; nor was he obliged to repeat the instructions already given in substance. Compare *Bennett v. United States*, 227 U. S. 333, 339. As no substantial constitutional question was presented by the defendant, this court is without jurisdiction to review the other errors assigned.

*Dismissed for want of jurisdiction.*



CHICAGO & EASTERN ILLINOIS RAILROAD COM-  
PANY *v.* COLLINS PRODUCE COMPANY.

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

No. 138. Submitted January 16, 1919.—Decided March 3, 1919.

In an action against an initial carrier to recover for goods lost on the line of a connecting carrier, the Carmack Amendment does not lay upon the shipper the burden of proving that the loss was "caused by" the connecting carrier. P. 191.

Where a shipper took depositions as to telephone and postal communications tending to prove liability of a connecting carrier for a loss of goods, and the defendant initial carrier introduced the depositions in evidence, *held*, that it could not be heard to object that the senders of the messages were not identified as officers or agents of the connecting carrier. P. 192.

A shipment of poultry, delayed by floods, was appropriated by state military authorities, at the solicitation of the carrier and upon its false or not justified representation that the fowls were abandoned by their caretaker and dying. *Held*, that the carrier was liable to the shipper, as the loss was not attributable to "the act of God" or "the authority of law" excepted in the bill of lading. *Id.*

235 Fed. Rep. 857, affirmed.

THE case is stated in the opinion.

*Mr. Homer T. Dick* and *Mr. Lindorf O. Whitnel* for plaintiff in error:

It is fundamental that the carrier is relieved from the duty to carry when prevented by an act of God. *Railroad Co. v. Reeves*, 10 Wall. 176.

It is admitted that the Governor of Ohio had proclaimed martial law and that military authority had superseded civil in Dayton and Montgomery County, and the uncontradicted evidence is that militia took possession of rail-

roads and all property in transit; placed cards on all cars, directed movement and disposition thereof; ousted the officers and agents of carriers from possession and control; and even the superintendent of the carrier had to get a military pass before he was permitted to go upon property of that railroad. Under these circumstances, even if such superintendent recommended confiscation of shipment, his action could not be in law the act of the carrier, when the carrier was not in possession or control of shipment, it being in possession of militia at time. Martial law is of necessity arbitrary. It is administered by the commander whose will is the law. Such law is the offspring of necessity and transcends the ordinary course of law. *United States v. Dieckelman*, 92 U. S. 520; *In re Egan*, 8 Fed. Cas. 367; *Griffin v. Wilcox*, 21 Indiana, 370.

Before a carrier can be held liable for the acts and declarations of an individual, the authority of such individual to act as an agent of the carrier must be established.

The fact that the defendant read the depositions of certain witnesses taken by and on behalf of the plaintiff does not add to or extend the probative force of such testimony. It proves no more if read by one party than it would if read by the other. If the plaintiff had read them without objection on the part of the defendant, the statements therein would have been no evidence of the existence of the relation of principal and agent, between the persons writing the postal card and communicating by telephone with the military authorities and the connecting carrier; this for the reason that, with the depositions in evidence, there is still no evidence in the record tending to establish the agency; and the state of the case was such that, without agency proven, a verdict should have been directed in favor of plaintiff in error. It cannot be the law that, if the depositions had been read by the plaintiff, without objection, a verdict should have been directed for want

of evidence establishing an essential element, yet, when read by the defendant these same depositions furnish evidence establishing such essential element.

The testimony of the witnesses in the depositions, given its most extended weight, can be said to do no more than set forth the statements of a supposed agent, and the law is that before such statements could be evidence there must be added to them proof of the existence of such agency. *United States v. Boyd*, 5 How. 29.

The testimony shows that the caretaker in charge of the shipment requested the military commander to take the carload of chickens off his hands.

The bill of lading routed the shipment over connecting lines, clearly showing that the initial carrier would not handle it to destination, and limited the initial carrier's liability to loss on its own line, except where otherwise provided by law. The cause of action then depended on the Carmack Amendment, making the initial carrier liable for losses "caused by" any connecting carrier. Therefore, it was not enough for plaintiff to prove shipment by initial carrier and non-delivery to consignee. *Adams Express Co. v. Croninger*, 226 U. S. 491; *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Rankin*, 241 U. S. 319.

*Mr. Charles Wham* and *Mr. Fred L. Wham* for defendant in error. *Mr. G. Gale Gilbert* and *Mr. Harman Gilbert* were also on the brief:

The determination of the facts was peculiarly the province of the jury and their verdict ought not to be disturbed.

A party placing in proof the depositions of the opposite party cannot be heard to complain that the jury gave credit to such testimony. *Fountain v. Ware*, 56 Alabama, 558; *Jewell v. Center & Co.*, 25 Alabama, 504; *Adams v. Russell*, 85 Illinois, 287; *Forward v. Harris*, 30 Barb. 338; *Harry v. Goldin*, 37 How. Pr. 310.

As to the admissibility of telephone conversations, see *Godair v. Ham National Bank*, 225 Illinois, 575.

The burden of proof was on the defendant and the bill of lading a through contract. *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U. S. 491, 492.

Military control, or so-called martial law, does not relieve a carrier from the performance of its duty. *Illinois Central R. R. Co. v. McClellan*, 54 Illinois, 71; *Griffin v. Wilcox*, 21 Indiana, 370.

An act of God to be a defense must be the sole cause of the loss. *Wald v. C., C., C. & St. L. R. R. Co.*, 162 Illinois, 545; *Bell v. Union Pacific R. R. Co.*, 177 Ill. App. 377; *Wolf v. American Express Co.*, 43 Missouri, 421; *Mueller Grain Co. v. Chicago &c. Ry. Co.*, 200 Ill. App. 347; *Sherman & Redfield, Negligence*, 4th ed., § 39.

As soon as the flood could reasonably be overcome the carrier must complete the transportation without delay. *Railroad Co. v. Reeves*, 10 Wall. 176, 191; *Baltimore & Ohio R. R. Co. v. O'Donnell*, 49 Ohio St. 502.

In addition to being bound by the bill of lading and the fair intendment of the provisions, plaintiff in error was bound by the Carmack Amendment. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 194-208; *Fry v. Southern Pacific Co.*, 247 Illinois, 576; *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Rankin*, 241 U. S. 319.

Damages for delay on the connecting railroad may be recovered from the initial carrier. *New York, Philadelphia & Norfolk R. R. Co. v. Peninsula Produce Exchange*, 240 U. S. 34.

The basis of value is the *bona fide* invoice price to the consignee.

MR. JUSTICE CLARKE delivered the opinion of the court.

On March 21, 1913, the plaintiff in error, the initial carrier, accepted a carload of live poultry from the de-



fendant in error, the shipper, for transportation from Cypress, Illinois, to Newark, New Jersey, and issued the customary bill of lading, containing the provision that the carrier should not be liable for any loss or damage to the property "caused by the act of God . . . or the authority of law."

In the progress of transportation the car arrived at Dayton, Ohio, on the morning of March 25th, and was there delayed by a flood caused by rains so unprecedented that on that date martial law was declared applicable to Dayton and the territory in which the car was held. The flood waters overflowed the rails on which the car stood, but did not reach the body of the car so as to affect the health of the poultry and access to and from it was readily maintained by the caretaker.

On March 31st the state military authorities took possession of the car and distributed its contents to persons rendered destitute by the flood.

Suit against the carrier, based on the bill of lading, commenced in a state court, was removed to the appropriate District Court of the United States.

On the trial of the case the shipper introduced evidence tending to prove that the confiscation was due to the solicitation of representatives of the carrier and to their false representation that the fowls were dying from lack of food and attention and had been or were about to be abandoned by the caretaker, but the Railroad Company denied this and introduced evidence tending to prove that there was no such solicitation or false representation and that the confiscation was rendered necessary by the exigencies of the situation and by the necessity for supplying food to the people rendered homeless by the flood.

The trial court charged the jury:

That it was the duty of the carrier to transport the property to destination, if it could do so; that it could not overcome the flood or the action of the military authori-

ties and that if the latter acted of their own volition the shipper could not recover; but that if the military authorities seized the consignment solely upon and by reason of the invitation of the Railroad Company, and if, but for this confiscation, the property or any part of it, in the exercise of ordinary care, could have been transported to its destination, then the defendant, the carrier, would be liable for the value of such part of it as the jury might find from the evidence could have reached its destination, to be determined by the invoice price at the point of shipment, less any deterioration caused by the delay solely incident to the flood.

The verdict was for the shipper and we are asked to review the judgment of the Circuit Court of Appeals affirming the judgment of the District Court entered upon that verdict.

The carrier argues that three errors, each requiring reversal of the judgment, appear in the record.

The first claim is that the court refused to rule, that by its terms, the Carmack Amendment (34 Stat. 595, c. 3591, § 7) casts upon the shipper the burden of proving affirmatively that the loss which occurred on a connecting line was "caused by" the connecting carrier. But, assuming that the question is presented by the record, which is doubtful, *Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace*, 223 U. S. 481, 491, rules that, under the act as construed in *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 205, 206, in such a case as we have here the liability of the initial carrier is as if the shipment had been between stations in different States, but both upon its own line, and this renders the contention untenable. *Adams Express Co. v. Croninger*, 226 U. S. 491, does not conflict with this conclusion. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin*, 241 U. S. 319, 326.

The second claim is that error was committed in the ad-

mission of testimony of military officers that the confiscation of the property resulted from communications received by them by postal card and telephone from the agents and officials of the Railroad Company respecting the condition of the poultry and that the caretaker had abandoned it, without evidence being required to identify the senders of such messages as officers or agents of the Company. But this evidence, while taken in the form of depositions by the shipper, was introduced by the carrier. One who asks a court and jury to believe evidence which he introduces will not be heard to claim that, for technical reasons, it was not admissible.

There remains only the contention that substantial error was committed by the Circuit Court of Appeals in approving as sound law the charge to the jury that if the military authorities seized the consignment of poultry solely upon and by reason of the invitation of the Railroad Company, and that if but for this confiscation the property, or any part of it, in the exercise of ordinary care, could have been transported to its destination, then the carrier would be liable, etc.

The shipment was not lost by the "act of God," and the defense of the carrier on the facts was narrowed to the claim that it was prevented from performing its contract "by the authority of law,"—by the appropriation by the military authorities.

The verdict approved by two courts will be accepted by this court as a conclusive finding in favor of the shipper upon the questions of fact involved.

The duties and liabilities of a common carrier have been so fully discussed by this court, notably in *Railroad Co. v. Lockwood*, 17 Wall. 357, and in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, that they need not be re-stated here.

The common-law principle making the common carrier an insurer is justified by the purpose to prevent negli-

gence or collusion between dishonest carriers or their servants and thieves or others, to the prejudice of the shipper, who is, of necessity, so remote from his property, when in transit, that proof of such collusion or negligence when existing, would be difficult if not impossible. *Coggs v. Bernard*, 2 Lord Raymond, 909; *Riley v. Horne*, 5 Bing. 217. The obligation to transport and to deliver is so exceptional and absolute in character that the relation of the carrier to the shipper was characterized in *Railroad Co. v. Lockwood*, *supra*, as so partaking of a fiduciary character as to require the utmost fairness and good faith on its part in dealing with the shipper and in the discharge of its duties to him, and so lately as *American Express Co. v. Mullins*, 212 U. S. 311, this court declared that if a carrier, by connivance or fraud, permitted a judgment to be rendered against it for property in its charge, such judgment could not be invoked as a bar to a suit by a shipper.

These decisions, a few from many, illustrate the character of the relation of trust and confidence which must be sustained between a common carrier and a shipper. It rests at bottom upon a commercial necessity and public policy which would be largely defeated if the carrier were permitted by false representations, or by representations, which, though not intentionally false, were not known to be true, to procure the appropriation by military or other authority of property in its custody, as the jury found was done in this case, and thereby defeat its obligation to carry and deliver.

These principles of law governing the relations between the carrier and the shipper, amply justified the charge of the trial court to the jury, and the judgment of the Circuit Court of Appeals must be

*Affirmed.*



SEUFERT BROTHERS COMPANY *v.* UNITED STATES, AS TRUSTEE AND GUARDIAN OF THE CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIANS AND NATIONS, ET AL.

UNITED STATES, AS TRUSTEE AND GUARDIAN OF THE CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIANS AND NATIONS, ET AL. *v.* SEUFERT BROTHERS COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON.

Nos. 187, 188. Argued January 29, 30, 1919.—Decided March 3, 1919.

The right secured to the Yakima Indians, through their treaty of June 9, 1855, Art. III, 12 Stat. 25, of taking fish at all usual and accustomed places, in common with citizens of the United States, and of erecting temporary buildings for curing them, extends to places in Oregon on the south side of the Columbia River, where these Indians habitually fished before and since the treaty, even though beyond the limits of the Yakima cession and within the region covered by the similar provision in favor of the Walla-Walla and Wasco tribes. (12 Stat. 37.) P. 196.

This provision is not to be construed technically and strictly as an exception from the general cession made by the Yakimas of lands north of the river, but must be given effect in accordance with the broad terms used, as understood by the Indians. P. 198.

233 Fed. Rep. 579, affirmed.

The case is stated in the opinion.

*Mr. H. S. Wilson*, with whom *Mr. A. S. Bennett* was on the briefs, for Seufert Brothers Co.

*Mr. Assistant Attorney General Brown*, with whom *Mr. Leonard Zeisler* was on the brief, for the United States, as trustee, etc., *et al.*

MR. JUSTICE CLARKE delivered the opinion of the court.

As trustee and guardian of the Yakima Indians, the Government of the United States instituted this suit in the Federal District Court for the District of Oregon to restrain defendant, a corporation, its officers, agents and employees, from interfering with the fishing rights in a described locality on the south side and bank of the Columbia River, which it was alleged were secured to the Indians by Article III of the treaty between them and the United States, concluded June 9, 1855, and ratified by the Senate on March 8, 1859 (12 Stat. 25).

The District Court granted in part the relief prayed for and found as follows: That the "following described portion of the south bank of the Columbia river in the county of Wasco, state and district of Oregon, was at the time of the treaty, always has been, and now is, one of the usual and accustomed fishing places belonging to and possessed by the Confederated Tribes and Bands of Indians known as the Yakima Nation." And the court further decreed that the rights and privileges to fish in common with citizens of the United States reserved by said Yakima Nation and guaranteed by the United States to it in the treaty of June 9, 1855, applied to all the usual and accustomed fishing places on the south bank or shore of the Columbia River, in the decree described.

An appeal from the decree granting an injunction brings the case here for review.

As stated by counsel for the appellant the most important question in the case is this, "Did the treaty with the Yakima tribes of Indians, ceding to the United States the lands occupied by them, on the north side of the Columbia River in the Territory of Washington," and reserving to the Indians "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" give them the right to fish in the country of another

tribe on the south or Oregon side of the river? The appeal requires the construction of the language quoted in this question, and the circumstances incident to the making of the treaty are important.

Fourteen tribes or bands of confederated Indians, which, for the purposes of the treaty were considered as one nation under the name of Yakima Nation, at the time of the making of the treaty occupied an extensive area in the Territory, now State, of Washington, which is described in the treaty, and was bounded on the south by the Columbia River. By this treaty the Government secured the relinquishment by the Indians of all their rights in an extensive region, and in consideration therefor a described part of the lands claimed by them was set apart for their exclusive use and benefit as an Indian reservation, and in addition fishing privileges were reserved to them by the following provision in Article III:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, *as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them.*"

This treaty was one of a group of eleven treaties negotiated with the Indian tribes of the northwest between December 26, 1854, and July 16, 1855, inclusive. Six of these were concluded between June 9th and July 16th, inclusive, and one of these last, dated June 25th, was with the Walla-Walla and Wasco tribes, "residing in Middle Oregon," and occupying a large area, bounded on the north by that part of the Columbia River in which the fishing places in controversy are located (12 Stat. 37). This treaty contains a provision for an Indian reservation and one saving fishing rights very similar in its terms to that of the Yakima treaty, viz: "That the exclusive right of taking fish in the streams running through and

bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same."

These treaties were negotiated in a group for the purpose of freeing a great territory from Indian claims, preparatory to opening it to settlers, and it is obvious that with the treaty with the tribes inhabiting Middle Oregon in effect, the United States was in a position to fulfill any agreement which it might make to secure fishing rights in, or on either bank of, the Columbia River in the part of it now under consideration,—and the treaty was with the Government, not with Indians, former occupants of relinquished lands.

The District Court found, on what was sufficient evidence, that the Indians living on each side of the river, ever since the treaty was negotiated, had been accustomed to cross to the other side to fish, that the members of the tribes associated freely and intermarried, and that neither claimed exclusive control of the fishing places on either side of the river or the necessary use of the river banks, but used both in common. One Indian witness, says the court, "likened the river to a great table where all the Indians came to partake."

The record also shows with sufficient certainty, having regard to the character of evidence which must necessarily be relied upon in such a case, that the members of the tribes designated in the treaty as Yakima Indians, and also Indians from the south side of the river, were accustomed to resort habitually to the locations described in the decree for the purposes of fishing at the time the treaty was entered into, and that they continued to do so to the time of the taking of the evidence in the case, and also that Indians from both sides of the river built houses upon the south bank in which to dry and cure their fish during the fishing season.



This recital of the facts and circumstances of the case renders it unnecessary to add much to what was said by this court in *United States v. Winans*, 198 U. S. 371, in which this same provision of this treaty was considered and construed. The right claimed by the Indians in that case was to fishing privileges on the north part and bank of the Columbia River—in this case similar rights are claimed on the south part and bank of the river.

The difference upon which the appellant relies to distinguish this from the former case is that the lands of the Yakima Indians were all to the north of the river and therefore it is said that their rights could not extend beyond the middle of that stream, and also that since the proviso we are considering is in the nature of an exception from the general grant of the treaty, whatever rights it saves must be reserved out of the thing granted, and as all of the lands of the Yakima tribes lay to the north of the river it cannot give any rights on the south bank.

But in the former case (*United States v. Winans, supra*), the principle to be applied in the construction of this treaty was given this statement:

“We will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,’ and counterpoise the inequality ‘by the superior justice which looks only to the substance of the right without regard to technical rules.’ 119 U. S. 1; 175 U. S. 1.”

How the Indians understood this proviso we are considering is not doubtful. During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the lower court applies, and they have shared such places with Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right

to resort to these fishing grounds and make use of them in common with other citizens of the United States,—and this is the extent of the right that is secured to them by the decree we are asked to revise.

To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty, which gives them the right “of taking fish at all usual and accustomed places, . . . and of erecting temporary buildings for curing them,” and would substitute for the natural meaning of the expression used,—for the meaning which it is proved the Indians, for more than fifty years derived from it,—the artificial meaning which might be given to it by the law and by lawyers.

The suggestion, so impressively urged, that this construction “imposes a servitude upon the Oregon soil” is not alarming from the point of view of the public, and private owners not only had notice of these Indian customary rights by the reservation of them in the treaty, but the “servitude” is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.

The only other questions argued by the appellant relate to the claims which counsel anticipated would be made on the cross-appeal by the Government, which, however, was abandoned before oral argument and must be dismissed. It results that the decree of the District Court must be

*Affirmed.*

SHAFFER *v.* HOWARD, AUDITOR OF THE STATE  
OF OKLAHOMA, ET AL.

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

No. 375. Argued December 13, 1918.—Decided March 10, 1919.

A suit against state officials to enjoin the enforcement of a tax becomes moot and must be dismissed on appeal where it appears that defendants' term of office has expired and that their successors have qualified, when there is no law authorizing a revival or continuance against the latter.

250 Fed. Rep. 873, reversed.

THE case is stated in the opinion.

*Mr. Malcolm E. Rosser*, with whom *Mr. George S. Ramsey*, *Mr. Edgar A. de Meules*, *Mr. Villard Martin* and *Mr. J. Berry King* were on the brief, for appellant.

*Mr. S. P. Freeling*, Attorney General of the State of Oklahoma, with whom *Mr. C. W. King*, Assistant Attorney General of the State of Oklahoma, was on the brief, for appellees.

Memorandum opinion by MR. CHIEF JUSTICE WHITE.

This suit was commenced against E. B. Howard, auditor of the State of Oklahoma, and John S. Woofter, sheriff of Creek County in that State, to enjoin such officials from enforcing a tax levied under the law of Oklahoma on the ground of the repugnancy of such tax to the Constitution of the United States. The court refused an injunction and dismissed the bill for want of equity, and the case was brought here.

200.

## Opinion of the Court.

Counsel for both parties having stated in answer to an inquiry on the subject submitted to them by the court while the cause was pending after argument under submission that the term of office of the defendant officials had expired and their successors had qualified, and that there was no law of the State of Oklahoma authorizing a revival or continuance of the cause of action against such successors, it follows that the controversy has become merely moot and that we have no authority to further consider or dispose of it. *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 34; *Chandler v. Dix*, 194 U. S. 590, 592; *Pullman Co. v. Croom*, 231 U. S. 571, 575.

True it is that counsel, in agreeing as to the statement above referred to, suggest that, although the successors in office of the former defendants intend in the discharge of their official duties to enforce the tax complained of unless enjoined from doing so, nevertheless, in view of the importance to the people of the State that the subject-matter of the controversy be here determined, a decision should be made of the pending cause irrespective of the disappearance of the parties defendant. But the absence of power which results from such disappearance cannot be supplied by the request referred to since after all it amounts to but a suggestion that that be done which there is no authority to do; in other words that the cause be decided in the absence of the parties whose presence is essential to its decision. *United States v. Boutwell*, 17 Wall. 604, 609; *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 609; *Pullman Co. v. Croom*, 231 U. S. 571, 576.

It follows therefore that the decree below must be reversed, and the cause be remanded with directions to dismiss the bill for want of proper parties,

*And it is so ordered.*



Order.

249 U. S.

PEOPLE OF THE STATE OF NEW YORK *v.*  
STATE OF NEW JERSEY AND PASSAIC VALLEY  
SEWERAGE COMMISSIONERS.

IN EQUITY.

No. 3, Original. Argued November 8, 11, 12, 1918.—Order entered  
March 10, 1919.

Order opening case for additional and supplemental proofs, and appointing commissioner.

THIS cause came on to be heard at this Term and was argued by counsel; and it appearing that the suit was begun by bill filed October 17, 1908, that answer was filed January 4, 1909, and that the cause was put at issue by replication filed November 8, 1909; that the taking of testimony was begun on June 26, 1911, and closed on June 27, 1913, more than five years before the final argument of the cause in this court; and the court deeming it proper that additional and supplemental proofs should be taken for the following purposes:

It is ordered that the defendants may proceed with all convenient dispatch to take the testimony of not exceeding three sanitary or engineering experts, deemed by them best qualified, concerning the following subject-matters:

(1) Any practicable modification of the proposed system of sewage disposal of the Passaic Valley Sewerage Commissioners, either as to construction, arrangement, or operation, and the nature and character of sanitary or engineering appliances that may be added thereto or introduced therein, in order to lessen the alleged polluting effect of the effluent upon the waters of New York Harbor.

(2) Any practicable plan of sewage disposal or treatment capable of being applied to the sewage of the City of New York and the several Boroughs thereof in order

202.

Order.

to lessen the alleged polluting effect of said sewage upon the waters of New York Harbor.

(3) Additional testimony (to the extent reasonably practicable within the time herein limited) as to the present degree of pollution of the waters of New York Harbor, including those parts affected or to be affected by the proposed Passaic Valley Sewerage system and by the sewage of the City of New York; and the change, if any, in the degree of such pollution since the time to which the testimony heretofore taken relates.

The taking of the above testimony by the defendants as stated in paragraphs 1 and 2, including also any testimony which said defendants may choose to offer on the subject-matter specified in paragraph 3, shall be concluded on or before the fifteenth day of June next.

The complainant shall thereupon be authorized to take the testimony of not exceeding three sanitary or engineering experts as specified in paragraphs 1 and 2, including such proof as they may elect to offer on the subject-matter covered by paragraph 3, the testimony relating to these subjects to be concluded on or before the fifteenth day of August next.

The defendants may thereupon, if they are so advised, recall in rebuttal the sanitary or engineering experts who may have been examined by them in accordance with paragraphs 1 and 2, and may also introduce rebuttal evidence relating to the subject-matter of paragraph 3, all such testimony in rebuttal to be concluded on or before the fifteenth day of September next.

James D. Maher, Esq., of the District of Columbia, is hereby appointed a commissioner to take and return the above-mentioned testimony, with the powers of a master in chancery as provided in the rules of this court.

This cause is hereby restored to the docket for further argument on a day to be fixed upon the coming in of the said testimony.

FROHWERK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF MISSOURI.

No. 685. Argued January 27, 1919.—Decided March 10, 1919.

The First Amendment, while prohibiting legislation against free speech as such, was not intended to give immunity to every possible use of language. P. 206.

A conspiracy to obstruct recruiting by words of persuasion merely, viz, by circulating newspaper publications—with overt acts, is within the Espionage Act of June 15, 1917, and within the power of Congress to punish. Pp. 206, 208. *Schenck v. United States*, ante, 47.

After conviction under an indictment charging such a conspiracy and, as overt acts, the circulation of newspapers containing articles which might well tend to effect its object if circulated in certain places, the court must assume, in the absence of a bill of exceptions, that the evidence as to the quarters reached by the newspapers and the scienter and expectation of the defendant, was sufficient to sustain the conviction. P. 208.

A conspiracy to obstruct recruiting in violation of the Espionage Act is criminal even when no means have been specifically agreed on to carry out the intent; and hence it is not an objection to an indictment that means are not alleged. P. 209.

Neither, in such an indictment, is it necessary to allege that false reports were made or intended to be made. *Id.*

An allegation that defendants conspired to accomplish an object necessarily alleges their intent to do so. *Id.*

Under § 4 of the Espionage Act of 1917, the overt acts are sufficiently alleged as done to effect the object of the conspiracy. *Id.*

An indictment is not bad for duplicity in setting up in a single count a conspiracy to commit two offenses; the conspiracy is a unit, however diverse its objects. *Id.*

There is no merit in the suggestion that acts which are not treasonable cannot be punished under the Espionage Act of 1917, upon the theory that other acts included in the statute amount to treason and can only be punished as such. P. 210.

The amendment of 1918 did not affect indictments found under the Espionage Act of 1917. *Id.*

204.

## Opinion of the Court.

Abuse of discretion is not established by the facts that, upon overruling a demurrer to an indictment, the District Court on the next day ordered a plea of not guilty to be entered, refused a continuance, empanelled a jury, out of those previously called to meet on that day for the term, and set the trial to begin on the day following. *Id.* Affirmed.

THE case is stated in the opinion.

*Mr. Frans E. Lindquist* and *Mr. Joseph D. Shewalter* for plaintiff in error.

*Mr. John Lord O'Brian*, Special Assistant to the Attorney General, with whom *Mr. Alfred Bettman*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in thirteen counts. The first alleges a conspiracy between the plaintiff in error and one Carl Gleeser, they then being engaged in the preparation and publication of a newspaper, the Missouri Staats Zeitung, to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219. It alleges as overt acts the preparation and circulation of twelve articles, &c. in the said newspaper at different dates from July 6, 1917, to December 7 of the same year. The other counts allege attempts to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, by the same publications, each count being confined to the publication of a single date. Motion to dismiss and a demurrer on constitutional and other grounds, especially that of the First Amendment as to free speech, were overruled, subject to exception, and the defendant refusing to plead the Court ordered a plea of not guilty to be filed. There was a trial and Frohwerk was found guilty on all



the counts except the seventh, which needs no further mention. He was sentenced to a fine and to ten years imprisonment on each count, the imprisonment on the later counts to run concurrently with that on the first.

Owing to unfortunate differences no bill of exceptions is before us. Frohwerk applied to this Court for leave to file a petition for a writ of mandamus requiring the judge to sign a proper bill of exceptions, but a case was not stated that would warrant the issuing of the writ and leave was denied. *Ex parte Frohwerk*, 248 U. S. 540. The absence of a bill of exceptions and the suggestions in the application for mandamus have caused us to consider the case with more anxiety than if it presented only the constitutional question which was the theme of the principal argument here. With regard to that argument we think it necessary to add to what has been said in *Schenck v. United States*, ante, 47, only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson v. Baldwin*, 165 U. S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

Whatever might be thought of the other counts on the evidence, if it were before us, we have decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion. The Government argues that on the record the question is narrowed simply to the power of Congress to punish such a conspiracy to obstruct, but we shall take it in favor of the defendant that the publications set forth as overt acts were the only means and, when coupled with the joint activity in producing them, the only evidence of

204.

Opinion of the Court.

the conspiracy alleged. Taking it that way, however, so far as the language of the articles goes there is not much to choose between expressions to be found in them and those before us in *Schenck v. United States*.

The first begins by declaring it a monumental and inexcusable mistake to send our soldiers to France, says that it comes no doubt from the great trusts, and later that it appears to be outright murder without serving anything practical; speaks of the unconquerable spirit and undiminished strength of the German nation, and characterizes its own discourse as words of warning to the American people. Then comes a letter from one of the counsel who argued here, stating that the present force is a part of the regular army raised illegally; a matter discussed at length in his voluminous brief, on the ground that before its decision to the contrary the Solicitor General misled this Court as to the law. Later, on August 3, came discussion of the causes of the war, laying it to the administration and saying "that a few men and corporations might amass unprecedented fortunes we sold our honor, our very soul," with the usual repetition that we went to war to protect the loans of Wall Street. Later, after more similar discourse, comes "We say therefore, cease firing."

Next, on August 10, after deploring "the draft riots in Oklahoma and elsewhere" in language that might be taken to convey an innuendo of a different sort, it is said that the previous talk about legal remedies is all very well for those who are past the draft age and have no boys to be drafted, and the paper goes on to give a picture, made as moving as the writer was able to make it, of the sufferings of a drafted man, of his then recognizing that his country is not in danger and that he is being sent to a foreign land to fight in a cause that neither he nor any one else knows anything of, and reaching the conviction that this is but a war to protect some rich men's money.

Who then, it is asked, will pronounce a verdict of guilty upon him if he stops reasoning and follows the first impulse of nature: self-preservation; and further, whether, while technically he is wrong in his resistance, he is not more sinned against than sinning; and yet again whether the guilt of those who voted the unnatural sacrifice is not greater than the wrong of those who now seek to escape by ill-advised resistance. On August 17 there is quoted and applied to our own situation a remark to the effect that when rulers scheme to use it for their own aggrandizement loyalty serves to perpetuate wrong. On August 31, with more of the usual discourse, it is said that the sooner the public wakes up to the fact that we are led and ruled by England, the better; that our sons, our taxes and our sacrifices are only in the interest of England. On September 28 there is a sneering contrast between Lord Northcliffe and other Englishmen spending many hundreds of thousands of dollars here to drag us into the war and Count Bernstorff spending a few thousand to maintain peace between his own country and us. Later follow some compliments to Germany and a statement that the Central Powers are carrying on a defensive war.

There is much more to the general effect that we are in the wrong and are giving false and hypocritical reasons for our course, but the foregoing is enough to indicate the kind of matter with which we have to deal.

It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the Country is at war. It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural in-

204.

Opinion of the Court.

clination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed. But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out. Small compensation would not exonerate the defendant if it were found that he expected the result, even if pay were his chief desire. When we consider that we do not know how strong the Government's evidence may have been we find ourselves unable to say that the articles could not furnish a basis for a conviction upon the first count at least. We pass therefore to the other points that are raised.

It is said that the first count is bad because it does not allege the means by which the conspiracy was to be carried out. But a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose. That purpose could be accomplished or aided by persuasion as well as by false statements, and there was no need to allege that false reports were intended to be made or made. It is argued that there is no sufficient allegation of intent, but intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it. The overt acts are alleged to have been done to effect the object of the conspiracy and that is sufficient under § 4 of the Act of 1917. Countenance we believe has been given by some Courts to the notion that a single count in an indictment for conspiring to commit two offences is bad for duplicity. This Court has given it none. *Buckeye Powder Co. v. DuPont Powder Co.*, 248 U. S. 55, 60, 61; *Joplin Mercantile Co. v. United*



*States*, 236 U. S. 531, 548. The conspiracy is the crime, and that is one, however diverse its objects. Some reference was made in the proceedings and in argument to the provision in the Constitution concerning treason, and it was suggested on the one hand that some of the matters dealt with in the Act of 1917 were treasonable and punishable as treason or not at all, and on the other that the acts complained of not being treason could not be punished. These suggestions seem to us to need no more than to be stated. The amendment of the Act of 1917 in 1918 did not affect the present indictment. *Schenck v. United States*, *supra*. Without pursuing the matter further we are of opinion that the indictment must stand.

Before the demurrer was disposed of the Court had ordered jurymen to be summoned to serve for the April term of the Court and to report for service on June 25, 1918, as of course it might. The demurrer was overruled on June 24, and on the following day the plea of not guilty was ordered to be entered, a continuance was refused, a jury was empanelled and the trial set to begin the next morning. There is nothing before us that makes it possible to say that the judge's discretion was wrongly exercised. Upon the whole case we are driven to the conclusion that the record shows no ground upon which the judgment can be reversed.

*Judgment affirmed.*

Counsel for Plaintiff in Error.

## DEBS v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF OHIO.

No. 714. Argued January 27, 28, 1919.—Decided March 10, 1919.

The delivery of a speech in such words and such circumstances that the probable effect will be to prevent recruiting, and with that intent, is punishable under the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, as amended by the Act of May 16, 1918, c. 75, § 1, 40 Stat. 553. P. 212.

Such a speech is not protected because of the fact that the purpose to oppose the War and obstruct recruiting, and the expressions used in that regard, were but incidental—parts of a general propaganda of socialism and expressions of a general and conscientious belief. P. 215.

In a prosecution for obstructing and attempting to obstruct recruiting, by a speech in which defendant expressed sympathy with others, imprisoned for similar offenses, the grounds for whose convictions he purported to understand, *held*, that the records in the other cases were admissible as tending to explain the subject and true import of defendant's remarks, and his intent. *Id.*

In such prosecution, *held*, that a document,—a so-called "Anti-War Proclamation and Program,"—expressing and advocating opposition to the War, was admissible against the defendant as evidence of his intent, in connection with other evidence that, an hour before his speech, he expressed his approval of such platform. *Id.*

*Seem*, that persons designated by the Draft Act of May 18, 1917, registered and enrolled under it and thus subject to be called into active service, are part of the military forces of the United States within the meaning of § 3 of the Espionage Act. P. 216.

Affirmed.

THE case is stated in the opinion.

*Mr. Seymour Stedman*, with whom *Mr. William A. Cunnea*, *Mr. Joseph W. Sharts*, *Mr. Morris H. Wolf* and *Mr. Isaac Edward Ferguson* were on the brief, for plaintiff in error.

*Mr. John Lord O'Brian*, Special Assistant to the Attorney General, with whom *Mr. Alfred Bettman*, Special Assistant to the Attorney General, was on the briefs, for the United States.

*Mr. Gilbert E. Roe*, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment under the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, as amended by the Act of May 16, 1918, c. 75, § 1, 40 Stat. 553. It has been cut down to two counts, originally the third and fourth. The former of these alleges that on or about June 16, 1918, at Canton, Ohio, the defendant caused and incited and attempted to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and with intent so to do delivered, to an assembly of people, a public speech, set forth. The fourth count alleges that he obstructed and attempted to obstruct the recruiting and enlistment service of the United States and to that end and with that intent delivered the same speech, again set forth. There was a demurrer to the indictment on the ground that the statute is unconstitutional as interfering with free speech, contrary to the First Amendment, and to the several counts as insufficiently stating the supposed offence. This was overruled, subject to exception. There were other exceptions to the admission of evidence with which we shall deal. The defendant was found guilty and was sentenced to ten years' imprisonment on each of the two counts, the punishment to run concurrently on both.

The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the

211.

Opinion of the Court.

more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech. The speaker began by saying that he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class—these being Wagenknecht, Baker and Ruthenberg, who had been convicted of aiding and abetting another in failing to register for the draft. *Ruthenberg v. United States*, 245 U. S. 480. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States.

After considerable discourse that it is unnecessary to follow, he took up the case of Kate Richards O'Hare, convicted of obstructing the enlistment service, praised her for her loyalty to socialism and otherwise, and said that she was convicted on false testimony, under a ruling that would seem incredible to him if he had not had some experience with a Federal Court. We mention this passage simply for its connection with evidence put in at the trial. The defendant spoke of other cases, and then, after dealing with Russia, said that the master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and have never yet had a voice in declar-



ing peace. "You have your lives to lose; you certainly ought to have the right to declare war if you consider a war necessary." The defendant next mentioned Rose Pastor Stokes, convicted of attempting to cause insubordination and refusal of duty in the military forces of the United States and obstructing the recruiting service. He said that she went out to render her service to the cause in this day of crises, and they sent her to the penitentiary for ten years; that she had said no more than the speaker had said that afternoon; that if she was guilty so was he, and that he would not be cowardly enough to plead his innocence; but that her message that opened the eyes of the people must be suppressed, and so, after a mock trial before a packed jury and a corporation tool on the bench, she was sent to the penitentiary for ten years.

There followed personal experiences and illustrations of the growth of socialism, a glorification of minorities, and a prophecy of the success of the international socialist crusade, with the interjection that "you need to know that you are fit for something better than slavery and cannon fodder." The rest of the discourse had only the indirect though not necessarily ineffective bearing on the offences alleged that is to be found in the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens, attribution to plutocrats of the high price of coal, &c., with the implication running through it all that the working men are not concerned in the war, and a final exhortation "Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves." The defendant addressed the jury himself, and while contending that his speech did not warrant the charges said "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone." The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental

211.

Opinion of the Court.

or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

The chief defences upon which the defendant seemed willing to rely were the denial that we have dealt with and that based upon the First Amendment to the Constitution, disposed of in *Schenck v. United States*, ante, 47. His counsel questioned the sufficiency of the indictment. It is sufficient in form. *Frohwerk v. United States*, ante, 204. The most important question that remains is raised by the admission in evidence of the record of the conviction of Ruthenberg, Wagenknecht and Baker, Rose Paster Stokes, and Kate Richards O'Hare. The defendant purported to understand the grounds on which these persons were imprisoned and it was proper to show what those grounds were in order to show what he was talking about, to explain the true import of his expression of sympathy and to throw light on the intent of the address, so far as the present matter is concerned.

There was introduced also an "Anti-war Proclamation and Program" adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance. The defendant referred to it in his address to the jury, seemingly with satisfaction and willingness that it should be considered in evidence. But his counsel objected and has argued against its admissibility, at some length. This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it "was instigated by the predatory capitalists in the United States." It alleged that the war

of the United States against Germany could not "be justified even on the plea that it is a war in defence of American rights or American 'honor.'" It said "We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage." Its first recommendation was, "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power." Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind.

Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained. Therefore it is less important to consider whether that upon the third count, for causing and attempting to cause insubordination, &c., in the military and naval forces, is equally impregnable. The jury were instructed that for the purposes of the statute the persons designated by the Act of May 18, 1917, registered and enrolled under it, and thus subject to be called into the active service, were a part of the military forces of the United States. The Government presents a strong argument from the history of the statutes that the instruction

211.

Opinion of the Court.

was correct and in accordance with established legislative usage. We see no sufficient reason for differing from the conclusion but think it unnecessary to discuss the question in detail.

*Judgment affirmed.*

---

BALTIMORE & OHIO RAILROAD COMPANY ET  
AL. v. LEACH.

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

No. 132. Argued January 15, 16, 1919.—Decided March 10, 1919.

A stipulation in an interstate bill of lading conditioning the shipper's right to recover for loss or damage to live stock upon delivery of a verified claim in writing to a designated agent of the carrier within five days from the removal of the stock from the cars, *held* valid; and not waived; and not substituted by oral notice of the facts to the connecting carrier's agent. *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U. S. 592.

173 Kentucky, 452, reversed.

THE case is stated in the opinion.

Mr. William W. Crawford, with whom Mr. Alex. P. Humphrey, Mr. Edward P. Humphrey, Mr. Charles G. Middleton and Mr. Churchill Humphrey were on the briefs, for petitioners.

Mr. Frank W. Hackett, with whom Mr. B. M. Lee and Mr. John S. Blair were on the brief, for respondent.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Respondent Leach sued the petitioners for damages sustained en route by cattle delivered at East St. Louis,



CLARKE, J., dissenting.

249 U. S.

Illinois, October 1, 1914, for shipment to Georgetown, Kentucky. In defense the carriers set up non-compliance with the following provision contained in bill of lading issued as required by act of Congress: "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for loss or damages shall be made in writing verified by the affidavit of the shipper or his agent, and delivered to the General Freight Agent of said carrier at his office in Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." This averment was not denied; but the shipper replied that he promptly advised the railroad's agent at Georgetown of all essential facts and maintained that requirement in respect of written notice to general freight agent had been waived.

The point involved has been discussed in our recent opinions and we can find nothing which takes this case out of the rule requiring compliance with a provision in a bill of lading like the one above quoted. *St. Louis, Iron Mt. & Southern Ry. Co. v. Starbird*, 243 U. S. 592; *Southern Pacific Co. v. Stewart*, 248 U. S. 446.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

MR. JUSTICE CLARKE dissenting.

In this case the shipper sued two connecting interstate

217.

CLARKE, J., dissenting.

carriers for damages to a carload of cattle, caused by delay in transit. Three died in the car and four more within three or four days of arrival at destination and the defense sustained by the court is failure to notify the carrier of claim for damages within five days of unloading.

The carrier pleaded that one of the terms of the bill of lading was the five-day limitation, quoted in the opinion of the court. This was immediately preceded, in the same paragraph, by the following:

"That in the event of any unusual delay or detention of said live stock caused by the negligence of said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept, as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said live stock while so detained."

In *Boston & Maine Railroad v. Piper*, 246 U. S. 439, a provision in exactly these terms was held "illegal and consequently void," as an attempt by the carrier to exonerate itself from loss negligently caused by it. This is the only provision in the bill of lading, as pleaded, which is applicable to a claim for delay, such as the shipper made in this case, and since it is void there is nothing in the contract for carriage on which the five-day limitation could operate, for it applied in terms only to claims "for damages which may accrue to the said shipper *under this contract*."

The suit of the shipper was based on the common-law liability of the carrier,—not at all on the bill of lading; the five-day limitation is in terms applicable only to claims under the bill of lading; the only provision in the bill of lading applicable to claims for delay was void, and therefore it seems very clear that the five-day limitation was not available as a defense.

Permit me to add that the many cases coming into this

and other courts show that this five-day limitation is unreasonably short and in my judgment, for this reason, it should be declared void upon its face. Certainly it should not be made a favorite of the law and extended beyond its strict terms, in presence of the Act of Congress, approved March 4, 1915, c. 176, 38 Stat. 1196, declaring that where in such suit the "damage or injury complained of was due to delay . . . or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." While the case before us arose prior to the passing of this act, it is an important declaration of public policy by Congress, which should not be overlooked.

For the reasons thus briefly stated, I cannot concur in the opinion of the court.

MR. JUSTICE MCKENNA also dissents.

---

## STATE OF SOUTH DAKOTA *v.* COLLINS.

### IN EQUITY.

No. 10, Original. Submitted March 4, 1919.—Decided March 17, 1919.

Under the constitution and laws of South Dakota, interest received by the state treasurer on state funds deposited by him in bank belongs to the State, and the treasurer must account therefor. Judgment for plaintiff.

THE case is stated in the opinion.

*Mr. Clarence C. Caldwell* and *Mr. Edward W. Wagner* for plaintiff.

No appearance for defendant.

220.

Opinion of the Court.

MR. JUSTICE McKENNA delivered the opinion of the court.

Suit by the State of South Dakota for an accounting and to recover from defendant interest received by him as treasurer of the State upon moneys of the State deposited by him in various banks.

There is no dispute about the facts, which are detailed at very great length in the bill of complaint.

Collins was treasurer for four years, beginning January, 1903. As such he was entitled to a salary of \$1800 a year, and it is provided by the constitution of the State that neither the treasurer nor any other officer of the State shall receive any "fees or perquisites whatever for the performance of any duties connected with their offices." And there are statutory provisions supplementing the constitution, one of which is that "all moneys belonging to the state, deposited in banks by the state treasurer shall be deposited not to his credit as an individual, but in his name as state treasurer, and not otherwise." § 333, Revised Political Code of 1903.

It is alleged that defendant received the sum of \$10,000 and more, and it is prayed that he be required to make a full and correct accounting of the moneys received by him and wrongfully withheld from the State.

Defendant answered as follows: "I hereby deny the allegation as set forth in the complaint and plead not guilty to the charge of misappropriating, withholding or converting to my personal use any moneys belonging to the State of South Dakota during my term of office."

On motion of plaintiff a referee was appointed to take the testimony on its part and that of defendant and make findings and recommendations.

On May 9, 1918, the referee made return of his proceedings, with the evidence adduced, from which he concluded as follows:



"That between January 1st, 1903, and January 10th, 1907, there was paid to the defendant as interest upon the moneys of the State of South Dakota, which was received by him as Treasurer of said State, and paid to him on deposits in the several banks above named, interest amounting to \$32,094.27; that said sum was received by the defendant as interest upon the public moneys of the State of South Dakota deposited by him as such State Treasurer in said banks in excess of his salary and all other sums due him from said State as State Treasurer, and that the same was received and retained by him and he rendered no account thereof to the plaintiff nor any of its officers, and paid no part of the same to the plaintiff or any of its officers, and that the said defendant appropriated the said sum to his own use." And the referee recommended that judgment be entered in favor of plaintiff and against defendant in the sum of \$32,094.27, with interest thereon at the rate of 7% per annum from January 1, 1907, and for plaintiff's costs and disbursements of the suit.

The case was put down for argument and subsequently submitted on brief, the defendant filing none.

Counsel for the State submits quite a long argument to sustain the report, with citation of authorities to establish the liability of defendant. It is not necessary to review them. There is no doubt of defendant's liability. He has not appeared to contend to the contrary, and at the taking of the testimony his defense or extenuation was that he acted upon his faith in a decision of the Supreme Court of Colorado, and, to evade or to withhold aid from any possible criminal prosecution, he declined to answer in regard to transactions concerning the receipt of interest on the public moneys he had deposited in various banks.

Further discussion is unnecessary. The Supreme Court of the State has decided (December 4, 1917), construing

220.

Syllabus.

§ 333, *supra*, and other statutory provisions, that in cases like that at bar it is state funds that are deposited and that earn the interest and not the money of the treasurer, and that, therefore, the interest becomes a mere increment of the principal fund and when it is paid to the treasurer it is in effect paid into the state treasury and the treasurer becomes liable for it. *State v. Schamber*, 39 S. Dak. 492.

The report of the referee is approved and judgment directed to be entered against defendant in the sum of \$32,094.27, with interest thereon at the rate of 7% per annum from January 1, 1907, and for costs and disbursements of the suit.

---

CROCKER ET AL., TRUSTEES, v. MALLEY, COL-  
LECTOR OF INTERNAL REVENUE.

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

No. 649. Argued March 6, 1919.—Decided March 17, 1919.

A law should not be construed to tax the same income twice, unless the intent to do so be clearly expressed. P. 233.

The shareholders of a milling company, preliminary to winding it up, caused its active property to be conveyed and its other realty to be leased to a new corporation, the shares of which were left with persons who also were granted the fee of the leased property, upon a trust, designated by a name, in which the equitable interests were divided ratably among the original shareholders, and evidenced by separable and transferable certificates. The trustees were to hold the trust property upon trust to convert it into money and distribute the proceeds at a time left to their discretion, within 20 years after death of specified living persons, and in the meantime were to have the powers of an owner, distributing what they determined to be fairly distributable net income among the beneficiaries, and applying

funds to repairs or development of the property or the acquisition of new, pending conversion and distribution. Their compensation, beyond a stated percentage, was not to be increased, nor were vacancies to be filled or the trust terms modified, without the consent of a majority in interest of the beneficiaries acting separately, who, in other respects, had no control, and were declared to be "trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*." *Held*, that neither the trustees nor the beneficiaries, nor all together, could be regarded as a joint stock association, within the meaning of § II, G. (a), of the Income Tax Law of October 3, 1913; and that dividends upon the stock left with the trustees were not subject to the extra tax imposed by that section. P. 232.

*Seem*, that the purpose of the act in taxing corporations and joint stock companies, etc., upon dividends of corporations that themselves pay the tax, was to discourage concentration of corporate power through holding companies and share ownership. P. 234.

Where a tax is sustained by the Commissioner of Internal Revenue and its invalidity under the statute is not clear, there is probable cause for its exaction by the collector, and under Rev. Stats., § 989, in an action against him, recovery will be from the United States. P. 235.

Where a collector, with probable cause, collects an excessive tax, the amount due the United States should be deducted from the recovery, in an action against him, and such deduction will conclude the United States. *Id*.

250 Fed. Rep. 817, reversed.

THE case is stated in the opinion.

*Mr. Felix Rackemann*, with whom *Mr. Harrison M. Davis* was on the brief, for petitioners:

The act of Congress clearly recognizes the distinction between the fiduciary and the association or quasi-corporation; and from the language of sub-section G. (a), ("not including partnerships") it would even seem doubtful if Congress intended that any body should be excluded from this class except the ordinary commercial partnerships.

In Massachusetts there is no statute provision in respect

of any such association as the collector claims to exist in the case at bar, and the contention of the defendant must, therefore, rest either upon the quasi-partnership theory or some other entirely vague and general construction of the words "joint-stock company or association."

The beneficiaries have their common interests and perhaps equitable titles (or perhaps only rights to an account and share of proceeds realized by their trustee), but no immediate right or title to the property and no voice in its management or disposition, the entire legal title and authority being vested in the trustees.

Whether *cestui que trusts* are also partners does not depend—(a) upon the manner of the trust creation; (b) the pre-existing relations between the settler, or testator, or trust declarant, and the beneficiaries; (c) the number of beneficiaries; (d) the nature of the trust assets, or the use made of them; (e) the fact that the beneficial interests are evidenced by receipts, certificates, or so-called shares; (f) nor upon any transferability given, or attempted to be given, to such receipts or shares. *Mayo v. Moritz*, 151 Massachusetts, 481; *Williams v. Milton*, 215 Massachusetts, 1, 8. Some additional element is necessary, and this is provided when *cestui que trusts* are found with some control and authority, directly or indirectly, in the management, and with liability for debts. See *Meehan v. Valentine*, 145 U. S. 611; *Bartlett v. Slater*, 211 Massachusetts, 334. In each of the numerous Massachusetts cases, where partnerships or quasi-partnerships were found to exist, such control, in some form, existed. The distinction is clearly pointed out and definitely established in *Williams v. Milton*, *supra*; and *Foster v. Boston*, 215 Massachusetts, 31.

There are no facts whatever in the case at bar which bring it within the rules laid down in the Massachusetts partnership cases, referred to above. There is no associa-



tion in fact of any kind; there is no basis for the claim of such association. There are no shareholders' meetings; no beneficiary has any voice in the management, nor any control whatever over the trustees. There is no delegated authority or management on any theory of agency. There is no reserved power of control. We have simply a case in which certain shares of stock and certain real estate under lease are held by strict trustees under a written instrument. The beneficiaries have no relations whatever *inter sese*; they are in no sense partners nor "associates" for any purpose. Whatever might have been, the plaintiffs in fact simply held an invested property. They collected the dividends and the rentals and disbursed the whole net income.

If we turn to the English authorities we find only confirmation of the principles and distinctions hereinabove set forth. *Smith v. Anderson*, 50 L. J. Ch. 39; *Crowther v. Thorley*, 50 L. T. 43; *In re Siddall*, 54 L. J. Ch. 682; *In re Thomas, ex parte Poppleton*, 54 L. J. Q. B. 336. In this court the law is the same, and the case of *Taylor v. Davis*, 110 U. S. 330, is helpful, and perhaps conclusive. See also *In re Associated Trust*, 222 Fed. Rep. 1012; *Crocker v. Crocker*, U. S. Dist. Court, Massachusetts, May 23, 1914 (not reported).

It is, perhaps, significant that for two years the Treasury Department assessed taxes to the plaintiffs on the fiduciary theory here contended for. It is certainly very significant that the contention of the collector in the case at bar means double taxation.

The provision in the declaration of trust that the beneficiaries shall be trust beneficiaries only without partnership, associate or any other relation whatever *inter sese*, is important as bearing on the deciding element of intent. *Williams v. Milton, supra*; *Taylor v. Davis, supra*; *Ward v. Brigham*, 127 Massachusetts, 24, 27.

Neither the trustees, nor their *cestui que trusts*, nor

223.

Argument for Respondent.

both, can be held to form an association, within the terms of the act, on any other theory than that of partnership. The words "joint stock" govern the word "association" just as much as the word "company," and the intent of sub-section G. (a) was to group only corporations and joint-stock companies similarly organized. The law knows the corporation, the partnership, the trust, and, more recently, the joint-stock company, which is a large partnership organized for profit with transferable shares and often some statute attributes. The law does not know any other classification.

Under the act, the association must be "organized." Cf. *Eliot v. Freeman*, 220 U. S. 186, 187. Where, in this case, shall we find any organization whatever, particularly in view of the agreement not to be associates of any kind?

It was certainly not intended to put fiduciaries in the same class with corporations, because, by section D, special provision is made for returns by all fiduciaries.

Counsel then criticised the theory of the court below, and contended for a strict construction. *Gould v. Gould*, 245 U. S. 151, 153.

*Mr. Assistant Attorney General Frierson* for respondent:

Counsel have argued that this trust is not a partnership. Thus far, there is no quarrel. The Government has taxed this income under a section of the act which excludes partnerships from its operation. But counsel have cited Massachusetts cases holding that similar trusts are not partnerships and urge them as authority for the contention that the trustees are mere fiduciaries. *Williams v. Milton*, 215 Massachusetts, 1, and other cases. An examination of these cases, however, will show that the court was only called on to determine whether a particular trust was a partnership or merely some form of trust not amounting to a partnership. If not a partnership, the question as to just what it was did not arise.

In *In re Associated Trust*, 222 Fed. Rep. 1012, the court, referring to the Massachusetts cases, held a trust very similar to this one not a partnership but an unincorporated company, which is only another name for an association, within the meaning of the Bankruptcy Act.

To be within the income-tax law an association is not required to be one organized under statutory authority. 36 Stat. 11, 112, c. 6, *Eliot v. Freeman*, 220 U. S. 179; 38 Stat. 166, c. 16; Bouvier's Law Dictionary, vol. 1, p. 269; 4 Cyc., p. 301; Words and Phrases, vol. 1, p. 584.

It will doubtless be conceded that any form of an unincorporated company is an association within the meaning of this act. Clearly, that is the very kind of organization which it was intended to tax, and probably no better description of an unincorporated company can be given than the one found in the case of *In re Associated Trust*, *supra*.

The court in that case found that the trust before it had the following features which were similar to those usually found in corporations, namely: (1) a capital contributed by the certificate holders; (2) future managers were to be chosen by the certificate holders; (3) the character, scope, and size of the enterprise might be changed or terminated by the certificate holders; (4) these rights were given to the certificate holders in the instrument by which the trust was constituted.

The present trust has all of these features, with one slight modification. The certificate holders may not, independently of the trustees, choose future managers or change the scope of the enterprise or terminate it. They are not, however, entirely divested of control in this respect. The trustees can do these things only with the written assent of a majority in interest of certificate holders. As in a corporation it is not essential that all stockholders shall have the same power of control, or even

that all shall have a voice in the management, so, in this organization, the original voting power was vested in the five stockholders who were named as trustees. The organization would not have been dissimilar to that of a corporation if this power had been unlimited. As to certain matters it was unlimited; but as to matters involving a change of the original scheme the certificate holders were given a right of veto.

Other points of similarity between this trust and a corporation are that both do business under a distinct name; that the managers of both are not personally liable for misconduct, errors, or omissions of their agents, if employed and retained with reasonable care, but only for the results of their own gross negligence or bad faith; and that, in those matters as to which the shareholders are empowered to act, the action of a majority, not in numbers but in interest, binds all. Each party in interest received a certificate showing what his interest was. The certificates were transferable. We have here a body of persons united without a charter, but upon methods and forms similar in many respects to incorporated bodies for the prosecution of a business enterprise. The organization is not bound by the acts of the individuals interested in it, but only by the trustees to whom the management is committed. Shares in it are transferable; it is not dissolved by the retirement, death, or bankruptcy of any of the individuals composing it, and these, it is respectfully submitted, include all the essentials of a business association within the meaning of the income tax law.

A person or corporation making the return required of a fiduciary reports income which has not accrued to it, but which has accrued to another who is liable for the tax. In the case of a mere trust, the rights of the beneficiary must be fixed so that he is entitled to the income collected and so that his right to it does not depend upon the will of a corporation or other organization as to



whether it shall be distributed or shall be retained as the property of the organization collecting it. In this case, the declaration of trust does not require the distribution of any particular part of the income. The trustees are empowered to withhold all of the income and use it for the development of the trust property itself. They have the same power that a corporation has to determine whether profits realized shall be distributed among stockholders or added to the surplus of the corporation. In either case, no income accrues to the certificate holder or stockholder until the organization having control of the business determines whether there shall be a distribution. It follows, therefore, when the Wachusett Trust collected income from the trust property, that income accrued to the business organization operating under that name and remained its income until it saw fit to distribute it. While in its hands it was its income and not income of the individual certificate holders.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover taxes paid under protest to the Collector of Internal Revenue by the petitioners, the plaintiffs. The taxes were assessed to the plaintiffs as a joint-stock association within the meaning of the Income Tax Act of October 3, 1913, c. 16, Section II, G. (a), 38 Stat. 114, 166, 172, and were levied in respect of dividends received from a corporation that itself was taxable upon its net income. The plaintiffs say that they were not an association but simply trustees, and subject only to the duties imposed upon fiduciaries by Section II, D. The Circuit Court of Appeals decided that the plaintiffs, together, it would seem, with those for whose benefit they held the property, were an association, and ordered judgment for the defendant, reversing the judgment of the District Court. 250 Fed. Rep. 817.

223.

Opinion of the Court.

The facts are these. A Maine paper manufacturing corporation with eight shareholders had its mills on the Nashua River in Massachusetts and owned outlying land to protect the river from pollution. In 1912 a corporation was formed in Massachusetts. The Maine corporation conveyed to it seven mills and let to it an eighth that was in process of construction, together with the outlying lands and tenements, on a long lease, receiving the stock of the Massachusetts corporation in return. The Maine corporation then transferred to the plaintiffs as trustees the fee of the property subject to lease, left the Massachusetts stock in their hands, and was dissolved. By the declaration of trust the plaintiffs declared that they held the real estate and all other property at any time received by them thereunder, subject to the provisions thereof, "for the benefit of the *cestui que trusts* (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*)" upon trust to convert the same into money and distribute the net proceeds to the persons then holding the trustees' receipt certificates—the time of distribution being left to the discretion of the trustees, but not to be postponed beyond the end of twenty years after the death of specified persons then living. In the meantime the trustees were to have the powers of owners. They were to distribute what they determined to be fairly distributable net income according to the interests of the *cestui que trusts* but could apply any funds in their hands for the repair or development of the property held by them, or the acquisition of other property, pending conversion and distribution. The trust was explained to be because of the determination of the Maine corporation to dissolve without waiting for the final cash sale of its real estate and was declared to be for the benefit of the eight shareholders of the Maine Company who were to receive certificates subject to transfer and sub-

division. Then followed a more detailed statement of the power of the trustees and provision for their compensation, not exceeding one per cent. of the gross income unless with the written consent of a majority in interest of the *cestui que trusts*. A similar consent was required for the filling of a vacancy among the trustees, and for a modification of the terms of the trust. In no other matter had the beneficiaries any control. The title of the trust was fixed for convenience as The Wachusett Realty Trust.

The declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts, unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash "and meantime to income." The only property expressly mentioned is the real estate not transferred to the Massachusetts corporation. Although the trustees in fact have held the stock of that corporation and have collected dividends upon it, their doing so is not contemplated in terms by the instrument. It does not appear very clearly that the eight Maine shareholders might not have demanded it had they been so minded. The function of the trustees is not to manage the mills but simply to collect the rents and income of such property as may be in their hands, with a large discretion in the application of it, but with a recognition that the receipt holders are entitled to it subject to the exercise of the powers confided to the trustees. In fact, the whole income, less taxes and similar expenses, has been paid over in due proportion to the holders of the receipts.

There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. "The certificate holders . . . are in no way associated together, nor is there any provision in the

223.

Opinion of the Court.

[instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust) they can do is to consent to an alteration . . . of the trust" and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it "is not to be had in a meeting, but is to be given by them individually." "The sole right of the *cestuis que trust* is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end." *Williams v. Milton*, 215 Massachusetts, 1, 10, 11; *ibid.* 8. The question is whether a different view is required by the terms of the present act. As by D. above referred to trustees and associations acting in a fiduciary capacity have the exemption that individual stockholders have from taxation upon dividends of a corporation that itself pays an income tax, and as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability the language of the statute must make the intention clear. *Gould v. Gould*, 245 U. S. 151, 153. *United States v. Isham*, 17 Wall. 496, 504.

The requirement of G. (a) is that the normal tax therebefore imposed upon individuals shall be paid upon the entire net income accruing from all sources during the preceding year "to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships." The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not. *Smith v. Anderson*, 15 Ch. Div. 247, 273, 274, 277, 282. *Eliot v. Freeman*, 220 U. S. 178, 186. If we assume that the words "no matter how created or organized" apply to "association" and not only to "insurance company," still it would be a wide departure



from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law.

We do not see either that the result is affected by any technical analysis of the individual receipt holder's rights in the income received by the trustees. The description most in accord with what has been the practice would be that, as the receipts declare, the holders, until distribution of the capital, were entitled to the income of the fund subject to an unexercised power in the trustees in their reasonable discretion to divert it to the improvement of the capital. But even if it were said that the receipt holders were not entitled to the income as such until they got it, we do not discern how that would turn them into a joint-stock company. Moreover, the receipt holders did get it and the question is what portion it was the duty of the trustees to withhold.

We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the

223.

Opinion of the Court.

whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G. (a).

Our view upon the main question opens a second one upon which the Circuit Court of Appeals did not have to pass. The District Court while it found for the plaintiffs, ruled that the defendant was entitled to retain out of the sum received by him the amount of the tax that they should have paid as trustees. To this the plaintiffs took a cross writ of error to the Circuit Court of Appeals. There can be no question that although the plaintiffs escape the larger liability, there was probable cause for the defendant's act. The Commissioner of Internal Revenue rejected the plaintiffs' claim, and the statute does not leave the matter clear. The recovery therefore will be from the United States. Rev. Stats., § 989. The plaintiffs, as they themselves alleged in their claim, were the persons taxed, whether they were called an association or trustees. They were taxed too much. If the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit.

*Judgment of the Circuit Court of Appeals reversed.*

*Judgment of the District Court affirmed.*

PUBLIC UTILITIES COMMISSION FOR THE  
STATE OF KANSAS ET AL. *v.* LANDON, RE-  
CEIVER OF THE KANSAS NATURAL GAS COM-  
PANY, ET AL.

KANSAS CITY, MISSOURI, ET AL. *v.* LANDON,  
RECEIVER OF THE KANSAS NATURAL GAS  
COMPANY, ET AL.

KANSAS CITY GAS COMPANY ET AL. *v.* KANSAS  
NATURAL GAS COMPANY ET AL.

PUBLIC UTILITIES COMMISSION FOR THE  
STATE OF KANSAS ET AL. *v.* LANDON, RE-  
CEIVER OF THE KANSAS NATURAL GAS COM-  
PANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS.

Nos. 277, 329, 330, 353. Argued November 6, 1918.—Decided  
March 17, 1919.

The District Court, having extended its receivership under Jud. Code, § 56, over the entire business and property of a company engaged in interstate transportation and sale of gas in several States of the circuit, has jurisdiction of a dependent bill brought by the receivers to enjoin officials of those States from imposing rates alleged to be confiscatory, and burdensome to the interstate business. P. 244. See 234 Fed. Rep. 152, 155.

Interstate commerce is a practical conception, and what falls within it must be determined upon considerations of established facts and known commercial methods. P. 245.

While the piping of natural gas from State to State, and its sale and delivery to independent local gas companies, is interstate commerce, the retailing of the gas by the local companies to their consumers is intrastate commerce and is not a continuation of such interstate commerce, even though their mains are connected per-

236.

Argument for Landon et al.

manently with those of their vendor and their vendor's agreed compensation is a definite proportion of their gross receipts. *Id.*

In such case, regulation of the rates chargeable by the local companies has but an indirect effect upon the interstate business of the transporting and selling company; at least when the latter is in the hands of receivers who have not accepted or become bound by the contracts with the former; and such receivers, not being obliged to accept unremunerative prices, have no ground to complain that rates fixed for the local companies are confiscatory, or are burdensome to the interstate business, even though that business consists exclusively in selling the gas to such local companies. P. 246.

234 Fed. Rep. 152; 242 Fed. Rep. 658; 245 Fed. Rep. 950, reversed.

THE case is stated in the opinion. (See also, *post*, 591.)

*Mr. F. S. Jackson* for Public Utilities Commission for the State of Kansas *et al.*

*Mr. Robert Stone* and *Mr. Chester I. Long*, with whom *Mr. John H. Atwood*, *Mr. George T. McDermott*, *Mr. Austin M. Cowan*, *Mr. R. A. Brown*, *Mr. T. S. Salathiel* and *Mr. John J. Jones* were on the briefs, for Landon, Receiver; Kansas Natural Gas Co.; and Sharitt, Receiver: <sup>1</sup>

That the court below had jurisdiction over the Kansas and Missouri defendants because of the ancillary and dependent character of the suit, see 234 Fed. Rep. 154; *Phoenix Ry. Co. v. Geary*, 239 U. S. 277; *Krippendorf v. Hyde*, 110 U. S. 276; *White v. Ewing*, 159 U. S. 36.

---

<sup>1</sup>For the cases involving this controversy in various phases, see: *McKinney v. Kansas Natural Gas Co.*, 206 Fed. Rep. 772; *McKinney v. Landon*, 209 Fed. Rep. 300; *Kansas City Pipe Line Co. v. Fidelity Title & Trust Co.*, 217 Fed. Rep. 187; *Fidelity Title & Trust Co. v. Kansas Natural Gas Co.*, 219 Fed. Rep. 614; *State v. Flannelly*, 96 Kansas, 372; s. c., 96 Kansas, 833; *Landon v. Public Utilities Commission*, 234 Fed. Rep. 152; *State v. Litchfield*, 97 Kansas, 592; *State v. Kansas Natural Gas Co.*, 100 Kansas, 593; *State v. Gas Company*, 102 Kansas, 712; *Landon v. Public Utilities Commission*, 242 Fed. Rep. 658; *Landon v. Public Utilities Commission*, 245 Fed. Rep. 950; *St. Joseph Gas Co. v. Barker*, 243 Fed. Rep. 206.



There is no misjoinder of causes. The property is a unit, to be protected as such.

The protection of the commerce clause extends not only to the transportation of the article, but also to the sale of the article when it arrives at its destination. *Heyman v. Hays*, 236 U. S. 178; *Pipe Line Cases*, 234 U. S. 548; *Brown v. Maryland*, 12 Wheat. 419; *American Express Co. v. Iowa*, 196 U. S. 133; *Minnesota v. Barber*, 136 U. S. 313; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 24. The transportation and sale of natural gas in interstate commerce is national in character. *Haskell v. Cowham*, 187 Fed. Rep. 403; 234 Fed. Rep., at p. 164; *West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; this case, 242 Fed. Rep. 687, 689; *South Covington Ry. Co. v. Covington*, 235 U. S. 537; *Pipe Line Cases*, 234 U. S. 548; *Wabash &c. Ry. Co. v. Illinois*, 118 U. S. 557.

With one or two exceptions, the distributing companies do no business except to transport and distribute the natural gas transported in interstate commerce by the plaintiff receivers. Employment of these local agencies in itself would not authorize the State to regulate the interstate commerce conducted by the plaintiff receiver. *West v. Kansas Natural Gas Co.*, *supra*; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105. Local incidental service at the beginning or end of the journey does not affect the interstate character. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, 465-468; *Southern Ry. Co. v. Prescott*, 240 U. S. 632; *Pennsylvania R. R. Co. v. Sonman Coal Co.*, 242 U. S. 120. The Supreme Court of Kansas, in *State v. Flannelly*, 96 Kansas, 372, and *State v. Litchfield*, 97 Kansas, 592, took the position that the distributing companies were but the agents of the receiver of the Kansas Natural Gas Company. If so, this case comes within *Crenshaw v.*

*Arkansas*, 227 U. S. 389; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304; *Davis v. Virginia*, 236 U. S. 697; and *Stewart v. Michigan*, 232 U. S. 665; for the order for the gas is given by the consumer to the distributing company long before the gas is started in the course of transportation. When the consumer connects with the distributing company's system, he thereby asks for a supply to be furnished him at all times in the future. It is with the knowledge of the demands of these consumers, and for the purpose of supplying them, that the receiver starts his natural gas in the course of transportation from Oklahoma to Kansas.

The use of the distributing companies' systems in the distribution and sale of natural gas does not change the interstate character of the commerce. As the court below found (242 Fed. Rep. 681), the transportation does not cease until the gas is consumed. The contention that the gas is at rest, that the whole pipe line system constitutes one huge reservoir from which the gas is taken off as needed by the consumers, is not supported by the evidence and is contrary to the court's finding.

Plurality of carriers does not affect the question. *South Covington Ry. Co. v. Covington*, 235 U. S. 537.

There may be a change of ownership in transit without affecting the character of the shipment. *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403. It is the purpose and intent with which a shipment is commenced that determines. *Kelley v. Rhoads*, 188 U. S. 1, 23; *Swift & Co. v. United States*, 196 U. S. 375.

The present case is much stronger than the *Swift Case*, for here the gas moves without interruption or change in ownership from the gas fields in Oklahoma to consumers in Kansas and Missouri. It is more than a recurring course of dealing. It is constant and continuous. When it is started in its course it is with the intent and purpose that it shall be delivered to consumers without interruption

in transportation. See also *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336; *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456; *Pennsylvania R. R. Co. v. Sonman Coal Co.*, 242 U. S. 120; *Atchison, Topeka & Santa Fe Ry. Co. v. Harold*, 241 U. S. 371; *Railroad Commission v. Worthington*, 225 U. S. 101. The distributing companies occupy the same position as connecting carriers, and the gas moves in a like manner as if a carload of coal was shipped from Oklahoma over a railroad, delivered to a terminal company at the outskirts of the city, and by the terminal company delivered to the consignee. *United States v. Terminal Association of St. Louis*, 224 U. S. 383; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498.

Incidental storage in the pipe lines and holders does not destroy the interstate character of the movement; nor does the drawing out of the gas for consumption as the movement progresses. *Western Transit Co. v. Leslie & Co.*, 242 U. S. 448; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105. The original package doctrine is applicable only to goods which have come to rest after their interstate journey and are intended to be transported no further in interstate commerce.

The mixing of intra- and interstate natural gas in the same pipe lines does not give the State authority over the mass. *State v. Stock Yards Co.*, 94 Kansas, 96, 99; *Minnesota Rate Cases*, 230 U. S. 352.

The gas in both main and service pipes belongs to the receivers and is paid for by the consumer at his meter. The receiver must bear all the loss from leakage, and gets nothing for the gas delivered if the consumer does not pay. The theory that the interstate transportation ends with a sale and delivery to the distributing company where the

latter's pipe connects with the trunk line, is fallacious, for there is no such delivery—the gas passes in freely and continuously; nor any sale—the distributor never owns the gas, and merely collects from the consumers and accounts to the receiver for his proportion (upon which the latter depends for all his expenses and profit), acting for him in a representative capacity, whether as agent or connecting carrier is immaterial.

The fixing of the price at which the gas may be sold is therefore the fixing of the rate for transportation and a direct interference with interstate commerce.

The supply contracts do not bind the receiver, because he has never adopted them; because they are void under the Federal, Kansas and Missouri Anti-Trust Acts; because of changed conditions; and because the bases of these contracts—rate provisions of the franchise ordinances—are void for want of power in the cities and have been violated and disregarded by them.

The rates fixed by the Kansas Commission are confiscatory and violate due process.

*Mr. James D. Lindsay*, with whom *Mr. Frank W. McAllister*, Attorney General of the State of Missouri, *Mr. W. G. Busby* and *Mr. A. Z. Patterson* were on the brief, for Public Service Commission of Missouri.

*Mr. A. F. Smith*, with whom *Mr. E. M. Harber*, *Mr. Benj. M. Powers*, *Mr. Ray Bond* and *Mr. Chas. L. Faust* were on the briefs, for Kansas City, Joplin and St. Joseph, Missouri.

*Mr. Charles Blood Smith* for Fidelity Title & Trust Co.

*Mr. J. W. Dana* for Kansas City Gas Co. *et al.*

*Mr. Leonard S. Ferry*, *Mr. Thomas F. Doran*, *Mr. M. F. Cosgrove*, *Mr. J. M. Challis* and *Mr. Floyd Harper* filed a brief on behalf of various distributing companies.



MR. JUSTICE McREYNOLDS delivered the opinion of the court.

These are appeals by different groups of defendants below from decrees prohibiting public commissions and officers of Kansas and Missouri, certain municipalities and many local gas distributing companies from interfering with establishment and maintenance of selling rates for gas to consumers sufficiently high to compensate receivers of the Kansas Natural Gas Company. 234 Fed. Rep. 152; 242 Fed. Rep. 658; 245 Fed. Rep. 950.

The Kansas Natural Gas Company—hereinafter, The Gas Company—a Delaware corporation, owned a system of pipe lines extending from Oklahoma and Kansas points to some forty terminal towns and cities in Kansas and Missouri and produced, purchased, transported, distributed and sold natural gas prior to October 9, 1912. During the years 1904-1908 by separate agreements it undertook to supply many local companies with gas for ultimate sale to their customers and to accept therefor a definite proportion—generally two-thirds—of the gross amounts paid by such customers. Permanent physical connections permitted gas to pass from The Gas Company's pipe lines into the several local companies' mains. The latter operated under special ordinances usually specifying the rates which customers should pay; and, except in four relatively unimportant places, the former had no local franchise permitting either distribution or sale of gas, nor did it own any interest in a defendant distributing company.

The Gas Company procured gas by drilling, purchase or otherwise in Southern Kansas and Oklahoma—six per cent. in the former—forced it through pipe lines and delivered it in the local mains at the connection points. None was obtained in Missouri. Having received gas at the connection points the several local companies dis-

tributed and sold it, collected established rates and settled with The Gas Company as agreed. Approximately forty-four per cent. of the total was thus sold to customers in Kansas and fifty-six per cent. in Missouri.

October 9, 1912, the United States District Court for Kansas appointed receivers for The Gas Company and shortly thereafter, acting under § 56, Judicial Code, extended the receivership to Missouri and Oklahoma. It is unnecessary to detail subsequent changes in respect of this receivership. The receivers took over the company's property, affairs and business and operated them under orders of the court; without specifically adopting or disavowing the supply contracts of 1904-1908 they continued to deliver gas to local distributing companies and to accept payments as originally agreed.

Available gas diminished; pipe lines to new wells became necessary; operating costs increased; and the sums received from local distributing companies were inadequate for the receivers' demands. In 1915 they petitioned the Kansas Public Utilities Commission to permit higher charges to customers by local companies. Responding the Commission authorized, December 10, 1915, what is known as the "28 Cent Schedule"—much below the rates requested.

Claiming jurisdiction over distribution and sale of gas in that State and power to fix the rates which local companies should both pay and charge therefor, the Missouri Public Service Commission suspended some proposed advanced rates to consumers and threatened to enforce further appropriate orders if found necessary. Certain local companies, notably the Kansas City Gas Company, insist that the receivers should comply with the original supply contracts between them and The Gas Company.

In December, 1915, the receivers began this proceeding against Kansas Public Utilities Commission, Missouri Public Service Commission, thirty-two local distributing

companies and forty-seven cities and towns in those States. After setting out the history of The Gas Company the bill alleged that the above-described actions by state commissions resulted in imposing upon the receivers inadequate and confiscatory rates and unduly burdened the interstate commerce which they were carrying on by transporting and selling gas; that the original supply contracts with distributing companies, although never adopted by them, were improvident, wasteful, a fraud upon creditors and no longer obligatory; that the city ordinances fixing prices to customers were unreasonable, non-compensatory and confiscatory of estate and property in the receivers' hands. They asked an appropriate injunction restraining the commissions, municipalities and distributing companies from interfering with establishment of reasonable and compensatory rates for selling gas to consumers.

The court below held the business carried on by the receivers—transportation of natural gas and its disposition and sale to consumers through the distributing companies—was interstate commerce of a national character; that the commissions' actions interfered with establishment and maintenance of reasonable sale rates and thereby burdened interstate commerce and took the receivers' property without due process of law; that the original supply contracts were not binding upon the receivers. And it accordingly enjoined the commissions, their members, the attorneys general of both States, the various municipalities and the distributing companies from interfering with establishment of such reasonable and compensatory rates as the court might approve.

We think the trial court properly overruled the objections offered to its jurisdiction and nothing need be added to the reasons which it gave. 234 Fed. Rep. 152, 155. But we cannot agree with its conclusions that local companies in distributing and selling gas to their customers

acted as mere agents, immediate representatives or instrumentalities of the receivers and as such carried on without interruption interstate commerce set in motion by them.

That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State. *American Express Co. v. Iowa*, 196 U. S. 133, 143; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217.

But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *The Pipe Line Cases*, 234 U. S. 548, 560. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains. The court below erroneously



adopted the contrary view and upon it rested the conclusion that the Public Commissions were interfering with establishment of compensatory rates by the receivers in violation of their rights under the Fourteenth Amendment.

The challenged orders related directly to prices for gas at burner-tips and only indirectly to the receivers' business. They were under no compulsion to accept unremunerative prices; even the original supply contracts had not been adopted and were subject to rejection. See *Newark Natural Gas & Fuel Co. v. Newark*, 242 U. S. 405. Our conclusion concerning relationship between the receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter. The receivers were in no position to complain of them.

The decrees below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

*Reversed and remanded.*

---

GRATIOT COUNTY STATE BANK *v.* JOHNSON, AS  
TRUSTEE OF THE ST. LOUIS CHEMICAL COM-  
PANY, BANKRUPT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
MICHIGAN.

No. 148. Submitted January 20, 1919.—Decided March 17, 1919.

Although an adjudication of bankruptcy concludes all the world as to the status of the debtor *qua* bankrupt, it does not bind strangers as to the facts or subsidiary questions of law upon which it is based.  
P. 248.

In a suit by the trustee to recover, as illegal preferences, payments made by the bankrupt, within four months before the filing of the

246.

## Opinion of the Court.

involuntary petition, to a creditor who did not appear in the bankruptcy proceedings, the adjudication of bankruptcy is not conclusive evidence of the bankrupt's insolvency when such payments were made, even if based upon allegations and findings that the bankrupt was insolvent throughout the four months and that, during that period, he gave illegal preferences to such creditor, among others. *Id.*

Sections 18*b* and 59*f* of the Bankruptcy Act, allowing creditors to intervene, are permissive only; and, unless a creditor exercises the right, he remains a stranger to the proceedings. P. 249.

The purpose of Congress in expressly authorizing such interventions in involuntary bankruptcy proceedings was to guard against improvident adjudications and protect those creditors whose peculiar interests might be prejudiced by establishing the status of bankruptcy. P. 250.

193 Michigan, 452, reversed.

THE case is stated in the opinion.

*Mr. Elliott G. Stevenson* and *Mr. William L. Carpenter* for petitioner.

*Mr. Edward J. Moinet* and *Mr. William A. Bahlke* for respondent. *Mr. Edwin H. Lyon* was on the briefs.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The trustee in bankruptcy of the St. Louis Chemical Company brought suit in a state court of Michigan against the Gratiot County State Bank to recover, as illegal preferences, payments made to it within four months before the filing of the involuntary petition. The Bank denied the allegation that the Chemical Company was insolvent when the payments were made. To establish that fact, the Trustee offered in evidence the adjudication together with the petition on which it was based and the special master's report which it confirmed. The latter found

that the debtor had been insolvent for four months or more before the filing of the petition and had made, while so insolvent, certain preferences. The Bank was not actually a party to the bankruptcy proceedings and had taken no part therein. The trial court held that this evidence was not only admissible but established conclusively that the debtor was insolvent throughout the four months; and it entered judgment for the Trustee which was affirmed by the Supreme Court of Michigan (193 Michigan, 452). The case comes here on writ of certiorari (243 U. S. 645). The only question presented is whether the state courts erred in holding that the record of the adjudication made the fact of insolvency at the time of the payments *res judicata* as against the Bank.

*First.* The Trustee contends that adjudication in bankruptcy, being in the nature of a judgment *in rem*, establishes not only the status of the debtor as a bankrupt, but also the essential findings of fact on which that judgment was based. The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare *Shawhan v. Wherritt*, 7 How. 627, 643. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. *Michaels v. Post*, 21 Wall. 398, 428; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 661-662. Compare *Hebert v. Crawford*, 228 U. S. 204, 208-209. But an adjudication in bankruptcy, like other judgments *in rem*, is not *res judicata* as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto. *Manson v. Williams*, 213 U. S. 453, 455.<sup>1</sup> This court applied the

<sup>1</sup> See also *In re Henry Ulfelder Clothing Co.*, 98 Fed. Rep. 409, 413-414; *In re Schick*, 2 Ben. 5, Fed. Cas. No. 12,455; *Silvey & Co. v. Tift*, 123 Ga. 804; *Durant v. Abendroth*, 97 N. Y. 132; *Lewis v. Sloan*, 68 N. C. 557, 562-563.

246.

Opinion of the Court.

principle in *Wood v. Davis*, 7 Cranch, 271, where a judgment that a mulatto woman was born free was held, as between strangers, not conclusive that her children were free. The rule finds abundant illustration in cases dealing with decedents' estates, *Till v. Kelsey*, 207 U. S. 43, 52; *Brigham v. Fayerweather*, 140 Massachusetts, 411; and in cases involving the marriage status, *Luke v. Hill*, 137 Georgia, 159; *Burlen v. Shannon*, 3 Gray, 387; *Wilson v. Mitchell*, 48 Colorado, 454, 469; *Corry v. Lackey*, 105 Michigan, 363; *Belknap v. Stewart*, 38 Nebraska, 304; *Gill v. Read*, 5 R. I. 343.

*Second.* The Trustee contends, however, that since by §§ 18b and 59f<sup>1</sup> of the Bankruptcy Act, any creditor is entitled to intervene in the bankruptcy proceedings, the Bank should be considered a party thereto. These sections are permissive, not mandatory. They give to a creditor, who fears that he will be prejudiced by an adjudication of bankruptcy, the right to contest the petition. Whether he does so or not, he will be bound, like the rest of the world, by the judgment, so far as it is strictly an adjudication of bankruptcy. But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidiary issues. *In re McCrum*, 214 Fed. Rep. 207, 213; *Cullinane v. Bank*, 123 Iowa, 340, 342. The rule is general that persons who might have

---

<sup>1</sup> Act of July 1, 1898, c. 541, 30 Stat. 544.

Section 18b provides: "The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow." (As amended by the Act of February 5, 1903, c. 487, § 6, 32 Stat. 797, 798.)

Section 59f provides: "Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."



made themselves parties to a litigation between strangers, but did not, are not bound by the judgment.<sup>1</sup> Compare *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 115. No good reason exists for making an exception in the case of bankruptcy proceedings.

The purpose of Congress in expressly authorizing creditors, as well as the debtor, to answer an involuntary petition in bankruptcy was to guard against an improvident adjudication and to protect those whose peculiar interests might be prejudiced by establishing the status of bankruptcy. See *Blackstone v. Everybody's Store*, 207 Fed. Rep. 752, 756; *Jackson v. Wauchula Mfg. & Timber Co.*, 230 Fed. Rep. 409, 411. The grant of this right of intervention was harmonized with the general purpose of Congress to secure a prompt adjudication, by requiring that the appearance and answers of creditors be made within five days after the return day on the petition. Had the adjudication been made determinative also of claims of the several creditors against the estate or of claims of the estate against individual creditors, such expedition in proceedings would be impossible, if each of the many widely scattered creditors is to be afforded a fair opportunity to be heard. Furthermore, to require every creditor to acquaint himself with the issues raised in every proceeding in bankruptcy against his debtors, in order to determine whether a decision on any such issue might conceivably affect his interests; and, if so, either to participate in the litigation, or, at his peril, suffer the decision of every question therein litigated to become *res judicata* as against him, would be an intolerable hardship upon creditors. And the resulting volume of litigation would often so delay the adjudication as to defeat the purposes of the Bankruptcy Act.

---

<sup>1</sup> *Lee v. School District*, 149 Iowa, 345, 354; *Weber v. Mick*, 131 Ill. 520, 529; *State v. Johnson*, 123 Mo. 43, 55; *Hickox v. Eastman*, 21 S. D. 591, 595; *Carney v. Emmons*, 9 Wis. 114, 117.

246.

Opinion of the Court.

The unreasonableness of the rule contended for by the Trustee is well illustrated in cases of alleged fraudulent preference. The claim may be made in respect to any creditor paid off within four months of the filing of an involuntary petition, that he received a fraudulent preference. Is every such former creditor to be deemed an existing creditor within the meaning of §§ 18*b* and 59*f* and a party to the bankruptcy proceeding? Compare *Keppel v. Tiffin Savings Bank*, 197 U. S. 356. And shall the decision of the bankruptcy court be binding on all these former creditors in respect to individual claims, although that court could not (without consent) obtain jurisdiction of any creditor who is not a resident of the district in which it sits, *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 311; and would not (prior to the Act of February 5, 1903, c. 487, §§ 8 & 13, 32 Stat. 797, 798, 800) have had jurisdiction, even as against a resident creditor, of a claim to recover a fraudulent preference; such claim being enforceable (without consent) only in courts of general jurisdiction; *Bardes v. Hawarden Bank*, 178 U. S. 524; *Wall v. Cox*, 181 U. S. 244; *Jaquith v. Rowley*, 188 U. S. 620; and, even now, only by plenary suit, *Louisville Trust Co. v. Comingor*, 184 U. S. 18; *Babbitt v. Dutcher*, 216 U. S. 102, 113.

The decisions of the lower federal courts upon which the state court relied <sup>1</sup> in holding that §§ 18*b* and 59*f* made all creditors parties to the proceeding so as to render

---

<sup>1</sup> *Cook v. Robinson*, 194 Fed. Rep. 785; *In re American Brewing Co.*, 112 Fed. Rep. 752; *Bear v. Chase*, 99 Fed. Rep. 920. See also *Lazarus v. Eagen*, 206 Fed. Rep. 518. *In re Hecox*, 164 Fed. Rep. 823, also relied upon, is a case of a different character. There, as in *Shawhan v. Wherritt*, 7 How, 627, 643, one not actually a party to the proceeding sought to attack the legislative effect of the adjudication—and it was properly held to be conclusive. *Hackney v. Hargreaves Bros.* (*Hackney v. Raymond Bros. Clarke Co.*), 68 Neb. 633, 639, involved only the admissibility of the schedule of liabilities as evidence tending to prove insolvency.

the adjudication binding on them as to all essential issues, clearly misconceived the intention of Congress. The allegation in the involuntary petition that the Bank was among those who had received preferences, did not impose upon it the duty to appear and answer; and since it did not do so, even a finding to that effect by the bankruptcy court would not have bound it. The Supreme Court of Michigan erred in holding that the adjudication in bankruptcy established conclusively as against the Bank that the debtor was insolvent at the time the payments were made. We have no occasion to consider whether the record introduced was admissible merely as evidence of insolvency.

*Reversed.*

---

POSTAL TELEGRAPH-CABLE COMPANY *v.* CITY  
OF RICHMOND.

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

No. 169. Argued January 22, 1919.—Decided March 17, 1919.

The City of Richmond is authorized by its charter and the statutes of Virginia to impose an occupation or license tax on the business of a telegraph company done within the city. P. 257.

Under its police power, a State may impose a license tax upon a telegraph company, which has accepted the Act of Congress of July 24, 1866, and is doing both an interstate and a local business, provided the tax is restricted in terms to the local business and does not in effect burden or discriminate against the interstate business. *Id.*

Where a State requires a telegraph company to engage in intrastate business, and taxes that business more than the amount of the net receipts therefrom, so that payment, if compelled, must come in part from receipts from interstate business, *semble*, that the tax must

252.

Argument for Appellant.

be declared invalid; but only if the incidence on interstate commerce is shown by clear and convincing evidence. P. 258.

A telegraph company although it has accepted the Act of 1866, and is engaged in interstate commerce, may be charged by a city a reasonable amount upon each pole maintained and used in the city streets, both as compensation for such use, in the nature of rental, and to cover the expense entailed on the city by the presence of the poles and wires and the liabilities and duties arising therefrom. *Id.* Such a tax, if reasonable in amount, is not necessarily objectionable because it exceeds the net returns from local business and must be paid from interstate earnings. P. 259.

Affirmed.

THE case is stated in the opinion.

*Mr. John N. Sebrell, Jr.*, for appellant:

The license tax while, in terms, restricted to business done within the State, is, in fact, a tax upon the company's interstate business. This becomes so because the *intrastate* business at Richmond is so small, that the net receipts therefrom are insufficient to pay the tax, and the payment if compelled, must come from the other business of the company, namely, its interstate business, since the laws of Virginia require it to accept such intrastate business. This fact was established by the allegations and proofs and stood unchallenged. In the case of the telegraph business (unlike the railroad business, where conditions as to different classes of freight and service are so diverse,) the most equitable method of determining the proper proportion of the expenses incurred in and properly chargeable to intrastate business and interstate business, is to divide the expense according to the ratio which exists between the interstate and intrastate receipts. Distinguishing *Wood v. Vandalia R. R. Co.*, 231 U. S. 1, and *Simpson v. Shepard*, 230 U. S. 352.

As to the license tax, therefore, the case falls clearly within *Pullman Company v. Adams*, 189 U. S. 420, since there is no doubt that the company was required to do



local business by the laws of Virginia. *Umstadter v. Postal Telegraph-Cable Co.*, 103 Virginia, 742; *Western Union Telegraph Co. v. Reynolds*, 100 Virginia, 459. See also, *Postal Telegraph-Cable Co. v. Cordele*, 141 Georgia, 658; *Postal Telegraph-Cable Co. v. Norfolk*, 118 Virginia, 455; *Postal Telegraph-Cable Co. v. Charleston*, 153 U. S. 692; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, *Lyng v. Michigan*, 135 U. S. 161, 166; *Norfolk &c., R. R. Co. v. Pennsylvania*, 136 U. S. 114, 118; *Leloup v. Mobile*, 127 U. S. 641.

The tax on poles also is unjust, excessive, unreasonable and void—far in excess of any expense to which the city is put for inspection and superintendence.

This court has held in a line of decisions that, where a municipality has no ownership in the streets which authorizes a rental, the only power for license fee exactions upon the instrumentalities of interstate commerce is derived from the police power. *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64; *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160.

The City of Richmond has no property right of any kind in the streets, the easement of passage therein being in the State and the fee in the abutting owners. Code of Virginia, 1887, § 1038, 1287; *Essex v. New England Telegraph Co.*, 239 U. S. 313; *Richmond v. Smith*, 101 Virginia, 161.

It results, therefore, that the city, being without property rights in the streets, can impose only such tax as is authorized by its police power, and, therefore, this case falls under the influence of *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, and not under *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92.

It appears from the record that there is no special inspection or supervision of the poles except by the regularly employed officers of the city with little or no ad-

ditional expense, and that the license fees exacted from the company are greatly in excess of any amount necessary for police inspection or supervision. In fact, this does not seem to be seriously controverted in the case.

That such taxes are invalid, see Dillon, *Municipal Corporations*, 5th ed., vol. II, pp. 599, 665; *Kitanning Borough v. American Natural Gas Co.*, 239 Pa. St. 210; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 164, 167; *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, 72; *Philadelphia v. Western Union Telegraph Co.*, 40 Fed. Rep. 615; *Sunset Telephone Co. v. Medford*, 115 Fed. Rep. 202; *Saginaw v. Swift*, 113 Michigan, 660; *Atlantic Postal v. Savannah*, 133 Georgia, 66, 71; *Foote & Co. v. Maryland*, 232 U. S. 494.

The right to use the streets for the erection of poles was granted directly by the State by § 1287 of the Code, supplemented by the ordinance of the city, and the grants there made when accepted and performed by the company constituted a contract, the obligation of which was impaired by the pole-tax ordinance. *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58; *Boise Water Co. v. Boise City*, 230 U. S. 84; *Louisville v. Cumberland Telephone Co.*, 224 U. S. 663. The power reserved "to put other and additional restrictions and regulations upon the erection or use of said poles and wires by said company, and to require at any time by ordinance or resolution, that the use or erection of said poles and wires shall cease," is no more than a reservation of the police control of the streets, *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 60, 72; and could not affect the nature of the grant coming direct from the State. *Grand Trunk Western Ry. Co. v. South Bend*, 227 U. S. 544.

Counsel also discussed certain questions of *stare decisis*, acquiescence and *res judicata*.

*Mr. H. R. Pollard* for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, the Telegraph Company, in its bill filed in the District Court of the United States for the Eastern District of Virginia, sought to enjoin the City of Richmond and its officers from collecting an annual license tax of \$300 imposed upon the company by ordinance "for the privilege of doing business within the City of Richmond, but not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents," and also from attempting to collect an annual fee of \$2, imposed by another ordinance, for each telegraph pole which the company maintained or used in the streets of the city.

The allegations of the voluminous bill essential to be considered are: That the company accepted the Act of Congress of July 24, 1866, entitled, "An Act to aid in the Construction of Telegraph Lines," etc., [c. 230, 14 Stat. 221], and is engaged in transmitting messages by telegraph, intrastate and interstate,—this is admitted; and the following which are denied, viz., that the cost of doing the intrastate business transacted by the company at Richmond is greater than the receipts from it and that since both taxes must be paid, if at all, from receipts from interstate commerce they constitute such a burden upon that commerce of the company as to render them unconstitutional and void.

The evidence introduced on the trial was largely in the form of affidavits, together with a transcript of the evidence taken in a former case, which was stipulated into the record.

The District Court held the taxes valid and dismissed the bill. On the constitutional questions involved a direct appeal brings the case into this court for review.

Except for the contention that this record shows affirmatively and clearly that the taxes complained of are necessarily unreasonable and a burden upon interstate commerce, the case could well be disposed of, without discussion, on the authority of decided cases.

That the City of Richmond has authority, under the statutes of Virginia and its charter, to impose an occupation or license tax on the business of the telegraph company done within the city is clear enough. Virginia Code, § 1042; Charter of the City of Richmond, § 67; *Postal Telegraph-Cable Co. v. Norfolk*, 101 Virginia, 125; *Postal Telegraph-Cable Co. v. Norfolk*, 118 Virginia, 455. Assuming the existence of this power in the city, since interstate and government service are expressly excluded from liability for the license charge, the following cases sustain the validity of the tax. *Postal Telegraph-Cable Co. v. Charleston*, 153 U. S. 692; *Emert v. Missouri*, 156 U. S. 296; *Kehrer v. Stewart*, 197 U. S. 60; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160; *Williams v. Talladega*, 226 U. S. 404, 416.

The principle of these cases, and of many others cited in the opinions, is that, as against federal constitutional limitations of power, a State may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against, interstate business and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. Such a tax is not, as is argued, an inspection measure, limited in amount to the cost of issuing the license or supervising the business, but is an exercise of the police power of the State for revenue purposes, restricted to internal commerce, and therefore within the taxing power of the State. *Postal Telegraph-Cable Co. v. Charleston*; *Williams v. Talladega*, *supra*; and



*Western Union Telegraph Co. v. Alabama State Board of Assessment*, 132 U. S. 472, 473.

A statute of Virginia requires all telegraph companies doing business in the State to transmit all messages, state or interstate, which are tendered by other companies or by individuals, upon payment of the usual charges. This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax, results, it is argued, in imposing a burden upon its interstate business for the reason that the net receipts from its intrastate business are insufficient to pay the tax and therefore payment, if compelled, must be made from interstate receipts. If the facts were as thus asserted it well might be that this tax would be invalid, *Pullman Co. v. Adams*, 189 U. S. 420; *Williams v. Talladega*, 226 U. S. 404, 416, 417; but a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void.

There remains to be considered the fee, as it is called in the ordinance imposing it, of \$2 for each pole maintained or used in the streets of the City of Richmond. This character of tax has also been the subject of definite decision by this court and has been sustained where not clearly shown to be a direct burden upon interstate commerce or unreasonable in amount, having regard to the purpose for which it may lawfully be imposed. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419; *Postal Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160. These decisions do not conflict with *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, or *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64. In the former of these

cases the decision of this court rests upon its conclusion that the jury found the tax unreasonable in amount, and in the latter the ordinance involved was disposed of on exception to the affidavit of defense, admitting the allegations of the bill that no inspection of the poles or wires or supervision of the business of the company had been, or was intended to be, made by the Borough and that if made the cost could not reasonably be one-twentieth of the tax imposed. This showing, taken with other facts in the case, it was held, rendered the charge unreasonable and void.

The decisions cited sustaining this character of tax proceed upon the principle that, although the occupation of its streets by a telegraph company engaged in interstate commerce, which has accepted the Act of Congress of 1866, cannot be denied by a city, yet, since the use of its streets for its poles by such a company is necessarily, in a measure, permanent and exclusive in character, and different in kind and extent from that of the general public, and since such use imposes contingent liabilities upon a city, it is competent for it, in the exercise of its police power, to exact reasonable compensation "in the nature of rental" for the use of its streets, having regard to the duties and responsibilities which such use imposes on the municipality. Even if the net returns from the intrastate business should not equal such tax and it must be paid from interstate earnings, this alone would not be conclusive against its validity. If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business must pay its way,—in this case for its right of way and the expense to others incident to the use of it. *St. Louis v. Western Union Telegraph Co.*, 148 U. S., *supra*, pp. 98, *et seq.*; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465. Such compensation should

also include the expense of inspection of the poles and wires used, and of such supervision of the business of the company conducted in the streets, as may be reasonably necessary to secure the safety of life and property of the inhabitants and of the users of the streets; but with the authority in the courts, on proper application, to determine whether, under the conditions prevailing in a given case, the charge made is reasonably proportionate to the service to be rendered and the liabilities involved, or whether it is a disguised attempt to impose a burden on interstate commerce. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465; *Postal Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163; *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 566; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 169.

These decisions and principles dispose of the "pole tax" before us.

The total amount of this tax was, in 1911, \$344, in 1914, \$384, and in 1915, owing to the extension of the city limits, it became \$666. There is evidence which must be credited, that poles and wires in the streets of a city require official inspection and supervision to secure their being kept in proper position and repair, so that they will not interfere with street traffic and may not, especially in time of storm, become crossed with wires carrying high tension currents and thus cause fires and loss of life and property. There is conflict in the evidence as to the cost to the city of such inspection and regulation, but the amount stated does not seem excessive for the service which should be rendered, and which witnesses for the city testified was rendered, in looking after the many poles of the appellant, part of which, at least, carried many wires. As great or greater charges were sustained in *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *Postal*

252.

Opinion of the Court.

*Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 172.

The contention cannot be allowed that the ordinance is shown to be void by a formula, devised by an officer of the appellant and pressed upon our attention, for determining the division of costs and expenses between interstate and intrastate business, which it is claimed shows that the pole tax must be paid wholly from receipts from interstate business.

Regardless of obvious criticisms which might be advanced to this formula and to the inadequacy of the data furnished by the record for testing its validity, the charge imposed upon the company, as we have seen, was so moderate in amount, having regard to the necessary burdens which the poles and wires in the streets must impose upon the city, and is so well within the prior holdings of this court, which we have cited, that it cannot be accepted as a sufficient basis for declaring the ordinance invalid.

There is no disposition on the part of this court to modify in the least the law as it has been stated in many cases, that "neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void." *Crutcher v. Kentucky*, 141 U. S. 47, 62; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. But municipal ordinances, which for constitutional inquiry are deemed state laws, will be declared void only where clearly shown to be unconstitutional and this very certainly cannot be said of the ordinances in this case, assailed as they are, upon inadequate evidence and upon purely empirical calculations which we are asked to adopt.

It results that the decree of the District Court must be  
*Affirmed.*



BOARD OF PUBLIC UTILITY COMMISSIONERS *v.*  
MANILA ELECTRIC RAILROAD & LIGHT COM-  
PANY.

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

No. 230. Argued March 14, 1919.—Decided March 24, 1919.

A judgment of the Supreme Court of the Philippine Islands, which denied the right of the Board of Public Utility Commissioners to require a Manila street car company to give free transportation to detectives wearing their badges concealed, and was based wholly upon a construction of the company's franchise ordinance, *held* not subject to review under Jud. Code, § 248, before the amendment of September 6, 1916, (1) as clearly not involving the Constitution or any statute, treaty, title or privilege of the United States, and (2) because the value in controversy was not shown to exceed \$25,000.

Writ of error and appeal to review 30 Phil. Rep. 387, dismissed.

THE case is stated in the opinion.

*Mr. Edward S. Bailey* for appellant and plaintiff in error.

*Mr. Robert H. Neilson*, with whom *Mr. Paul D. Cravath* and *Mr. Sherman Woodward* were on the brief, for appellee and defendant in error.

Memorandum opinion by MR. CHIEF JUSTICE WHITE.

The Manila Electric Railroad & Light Company, the appellee, operated in the City of Manila a street railway and an electric light and power plant by virtue of a franchise conferred by an ordinance adopted in 1902 by the City in the exercise of a power given it by the local legislative authority.

From the beginning, in giving effect to the provision of the franchise ordinance requiring that "members of the Police and Fire Departments of the City of Manila wearing official badges shall be entitled to ride free upon the cars of the grantee," that requirement was treated by the grantee as not embracing members of the detective branch of the Police Department who did not publicly wear official badges, although having such badges concealed upon their persons in such manner that they could be exposed or inspected when desired.

In 1914 the Board of Public Utility Commissioners, deeming that members of the detective force not publicly wearing their badges were entitled to ride free under the provisions of the ordinance, after notice and hearing to the Railroad on the subject, entered an order directing that members of the detective force be allowed to ride free under the circumstances stated. The Railroad, challenging the validity of the order, refused to obey it and, availing of the remedy provided by the local law, invoked the jurisdiction of the Supreme Court. In that court it disputed not only the correctness of the interpretation which had been given the ordinance by the Utility Commissioners but charged that if such interpretation were enforced a violation would result of the rights of the company in particulars stated guaranteed to it by the Bill of Rights provided by Congress for the Philippine Islands. The court, passing as unnecessary to be considered all the contentions made by the Railroad but the single one concerning the duty of the company under the franchise ordinance to furnish the free transportation ordered, decided that under the text of that ordinance the duty to furnish such transportation did not exist, and therefore set aside the order of the Commissioners. That body, both by error and appeal, brought the subject here for consideration.

As the action of the court complained of was taken

before the Act of September 6, 1916, and the appellate jurisdiction of this court was invoked before that act went into effect, our power to review is governed by § 248 of the Judicial Code. By that section the authority to review under the situation here disclosed can depend only upon one or both of two considerations, (a) whether the Constitution or any statute, treaty, title or privilege of the United States is involved, or (b) whether the value in controversy exceeds \$25,000. *Compañia General v. Alhambra Cigar Co.*, ante, 72.

We are of opinion that the mere construction by the court of the franchise ordinance, and its consequent ruling that the duty did not rest on the Railroad Company to give the free transportation which the orders of the Commissioners had directed to be given affords no ground for bringing the case within the first consideration, and indeed, that the contention that it does is too unsubstantial, not to say frivolous, to afford any basis for jurisdiction; and that the same conclusion is inevitably required as to the second consideration as the record discloses no ground whatever for concluding that the Utility Commissioners had any such pecuniary interest as to bring the case within the statute.

*Dismissed for want of jurisdiction.*

Argument for Plaintiff in Error.

DOMINION HOTEL, INCORPORATED, v. STATE  
OF ARIZONA.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 178. Submitted March 11, 1919.—Decided March 24, 1919.

Under the equal protection clause, a State may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule were made mathematically exact. P. 268.

A law of Arizona (Penal Code, par. 717), placing restrictions upon the hours of labor of women in hotels, with penalties upon hotel-keepers for infractions, excepts in part railroad restaurants or eating-houses upon railroad rights of way and operated by or under contract with any railroad company. *Held*, that the court cannot say, upon its judicial knowledge, that the legislature had no adequate ground for the distinction; possibly one might be found in the need of adjusting the service in the excepted restaurants to the hours of trains. *Id.*

18 Arizona, 345, affirmed.

THE case is stated in the opinion.

*Mr. Harvey M. Friend* for plaintiff in error. *Mr. S. H. Morris* and *Mr. James R. Malott* were on the brief:

The classification bears no relation to the purpose of the law. The undeniable effect of the statute, as it was construed by the Arizona courts, is to impose upon some employers of female labor a restriction on their right to contract with their employees that is not imposed upon all employers of the same class. The plaintiff in error was held to be and now is guilty of a misdemeanor if it permits its waitresses to serve meals from 7 a. m. to 10 a. m., from 12 m. to 2 p. m., and from 6 p. m. to 8:30 p. m., since those hours of work cover a greater period than twelve hours; but a railroad eating-house, which may be a competitor, catering to the same class of trade and located



just across the street, can permit its waitresses to work the same hours without fear of prosecution, since it comes within the class favored by the law. To avoid prosecution the plaintiff in error is compelled either to hire an extra shift of waitresses to serve one meal, to employ less efficient and more expensive male employees, or to close its plant for a part of the few customary meal hours during which it is operated.

It has been repeatedly determined that one of the essential elements of classification as distinguished from discrimination in legislation is that the classification shall be based upon a distinction having reference to the subject-matter of the legislation. *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150; *Atchison, Topeka & Santa Fe Ry. Co. v. Matthews*, 174 U. S. 96, 105; *Yick Wo v. Hopkins*, 118 U. S. 356; *Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg*, 238 U. S. 56, 59. An application of the rule to a set of facts somewhat similar to those existing in the present case was recently made in the case of *State v. Le Barron*, 24 Wyoming, 519. The nature of the employment of waitresses in railroad restaurants is not different from that in other restaurants. And under the facts of the present case, the plaintiff in error might be said to operate a railroad restaurant except for the single question of ownership. A railroad restaurant caters to the same class of persons and at the same hours as the plaintiff in error. The plaintiff in error served transients arriving on an evening train and departing on a morning train. Moreover, as plaintiff in error offered to show, it operated its restaurant at the hours complained of by the State, for the convenience of these transients. We further offered to show that the restaurant in question was located near the railroad station. On the question of whether ownership alone constitutes a sufficient ground for the classification of restaurants, see *Vandalia R. R. Co. v. Stillwell*, 181 Indiana, 267, in which the Supreme Court

265.

Opinion of the Court.

of Indiana declared that "the character of the employment, and not the character of the employer, must be the true test." That case was affirmed without opinion by this court. 239 U. S. 637.

The law does not apply to all members of the same class. As we have already shown, the law divides restaurants into two divisions—railroad restaurants and all others. But that such a sub-classification cannot be legally made has been repeatedly decided by the courts. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Powell v. Pennsylvania*, 127 U. S. 678; *State v. Julow*, 129 Missouri, 163; *State v. Miksicek*, 225 Missouri, 561; *Schmalz v. Wooley*, 56 N. J. Eq. 655; *Block v. Schwartz*, 27 Utah, 387; *Randolph v. Wood*, 49 N. J. L. 85; *Bedford Quarries Co. v. Bough*, 168 Indiana, 671; *Johnson v. St. Paul &c. R. R. Co.*, 43 Minnesota, 222.

*Mr. Wiley E. Jones*, Attorney General of the State of Arizona, and *Mr. Samuel Herrick* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an information alleging that the defendant, the plaintiff in error, was engaged in the hotel business and permitted a woman to work in the hotel for eight hours and that the "said eight hours of work was not then and there performed within a period of twelve hours," with a denial that the defendant was within the exceptions made by the statute governing the case. The statute provides as follows: "Provided further, that the said eight hour period of work shall be performed within a period of twelve hours, the period of twelve hours during which such labor must be performed not to be applicable to railroad restaurants or eating houses located upon railroad rights of way and operated by or under contract

with any railroad company." Penal Code of Arizona, Paragraph 717. The defendant by demurrer and otherwise set up that the exceptions in the statute made it void under the Fourteenth Amendment of the Constitution of the United States as depriving the defendant of the equal protection of the laws. There was a trial and judgment against the defendant which was sustained by the Supreme Court of the State, Arizona.

The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State "may be determined by degrees of evil or exercised in cases where detriment is specially experienced." *Armour & Co. v. North Dakota*, 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co. v. Shaw*, 248 U. S. 297, 303. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know. *Cusack Co. v. Chicago*, 242 U. S. 526, 530, 531.

Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from the passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important

distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines. "Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things." *Louisville & Nashville R. R. Co. v. Barber Asphalt Co.*, 197 U. S. 430, 434. We cannot pronounce the statute void.

*Judgment affirmed.*

---

ST. LOUIS POSTER ADVERTISING COMPANY v.  
CITY OF ST. LOUIS ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

ST. LOUIS POSTER ADVERTISING COMPANY v.  
CITY OF ST. LOUIS ET AL.

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

Nos. 220 and 2. Argued March 12, 13, 1919.—Decided March 24, 1919.

A city ordinance allowing no billboard of 25 square feet or more to be put up without a permit, and none to extend more than 14 feet high above ground; requiring an open space of 4 feet between the lower edge and the ground; forbidding an approach of nearer than 6 feet to any building or to the side of any lot than 2 feet to any other



billboard or 15 feet to the street; requiring conformity to the building line; limiting billboards in area to 500 square feet; and exacting a permit-fee of one dollar for every 5 lineal feet; *held* within the police power. P. 274. *Cusack Co. v. Chicago*, 242 U. S. 526.

Making billboards safe against wind and fire may not exempt them from the power of restriction or prohibition. *Id.*

Such regulations may not improperly include incidental and relatively trifling requirements founded in part at least on æsthetic reasons, such as a requirement of conformity to a building line. *Id.*

A high tax imposed by a city on billboards for the purpose of discouraging them is not objectionable under the Constitution. *Id.*

It is not an answer to an ordinance regulating the size, etc., of billboards, that they are on land leased or belonging to their owner, or that their owner has contracted ahead to maintain advertisements upon them, or that the size of board allowed is too small for standard posters and that these cannot be changed without affecting the business disastrously. *Id.*

195 S. W. Rep. 717, affirmed.

THE cases are stated in the opinion.

*Mr. Marion C. Early*, for plaintiff in error and appellant, contended that this case differed, *toto cælo*, from the *Gunning Case*, 235 Missouri, 99, upon which great reliance was placed by the city. In that case, though involving the same ordinances, the cornerstone of the decision was the finding that the billboards there under consideration were dangerous to public safety and injurious to public health and morals, and, because of that finding, the regulations were upheld as proper exercise of the police power. In this case, *per contra*, the allegations of the bill, framed with elaboration for the very purpose of avoiding that decision, and confessed by the demurrer, did away with the possibility of any such finding, showing conclusively that the billboards here in question are not dangerous to health, safety or morals, on any theory. Also, the case of *Cusack Co. v. Chicago*, 242 U. S. 526, while laying stress upon the presumptions in favor of local action, concedes expressly the duty of this court to interfere when

that action, plainly and palpably, "has no real or substantial relation to the public health, safety, morals, or to the general welfare." *Mugler v. Kansas*, 123 U. S. 661; *Minnesota v. Barber*, 136 U. S. 313; *People v. Weiner*, 271 Illinois, 74; *Lawton v. Steele*, 152 U. S. 133. Surely the presumption cannot be made conclusive without destroying all protection under the Fourteenth Amendment against local legislation asserting itself to be an exercise of the police power. This court has declared itself in duty bound to investigate whether the facts justifying such exercise actually exist.

There is nothing to justify the requirement that boards shall be 15 feet from the street line. This could only have relation to the danger of their being blown down, which is absent in this case. So of the regulation as to height; it has no possible relation to health or morals, but only to safety, and that danger is here eliminated. The fact that such boards in some cases may be carelessly constructed will not warrant their absolute prohibition, but only regulations to insure their safety. *Passaic v. Patterson Bill Posting Co.*, 72 N. J. L. 285; *State v. Lamb*, 98 Atl. Rep. 459; *State v. Whitlock*, 149 N. Car. 542; *Crawford v. Topeka*, 51 Kansas, 756; *People v. Weiner*, 271 Illinois, 74; *Chicago v. Gunning System*, 214 Illinois, 628.

The restrictions as to nearness of approach to buildings and the space between billboards can only be referred to danger from fire—not present here; and, as regards the public health and morality, these boards are so constructed and maintained as not to constitute a nuisance in law or in fact.

The regulations requiring conformity to the building line can rest only on æsthetic considerations, and they do not warrant exercise of the police power. *St. Louis Gunning Co. v. St. Louis*, 235 Missouri, 99; *Lawton v. Steele*, 152 U. S. 133; *Fisher v. Woods*, 187 N. Y. 90; *Austin v. Murray*, 16 Pick. 126; *People v. Murphy*, 195 N. Y. 126.

The cost of building-permits, in the case of billboards, is several hundred times what is required for other structures. This discrimination, apparent on the face of the ordinance, must be condemned as unconstitutional. The whole ordinance, so far as it deals with billboards, is based on no public policy, but on hostility to a legitimate business. *St. Louis Gunning Co. v. St. Louis*, 235 Missouri, (dissent) 208; *State v. Layton*, 160 Missouri, 474.

Counsel cited and analyzed the following cases, in which billboard regulations were held void. *Haller Sign Works v. Training School*, 249 Illinois, 436; *Commonwealth v. Boston Advertising Co.*, 188 Massachusetts, 438; *People v. Green*, 85 App. Div. 400; *Varney v. Williams*, 155 California, 318; *Bryant v. Chester*, 212 Pa. St. 259; *Chicago v. Gunning System*, 214 Illinois, 628; *Curran Bill Posting Co. v. Denver*, 47 Colorado, 221; *Crawford v. Topeka*, 51 Kansas, 756; *Passaic v. Patterson Bill Posting Co.*, 72 N. J. L. 285; *State v. Whitlock*, 149 N. Car. 542.

*Mr. Everett Paul Griffin*, with whom *Mr. Charles H. Daues* was on the brief, for defendants in error and appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

The first mentioned of these cases was brought by the plaintiff in error in a State Court of Missouri to prevent the City of St. Louis and its officials from enforcing an ordinance regulating the erection of billboards, on the ground that the ordinance is contrary to the Fourteenth Amendment in various respects. The suit was begun on March 21, 1914, and on May 22, 1917, a judgment of that Court dismissing it upon demurrer was affirmed by the Supreme Court of the State. 195 S. W. Rep. 717.

The other case was begun a little earlier, on January 30, 1914, in the District Court of the United States, by a bill in equity substantially to the same effect as in the state case. The bill was dismissed upon motion on February 19, 1914. The two cases appear to have proceeded to a conclusion without any reference to each other, but as they involve the same parties and the same questions they have been argued as one case here.

The ordinance complained of is number 22,022, passed on April 7, 1905. It allows no billboard of twenty-five square feet or more to be put up without a permit and none to extend more than fourteen feet high above the ground. It requires an open space of four feet to be left between the lower edge and the ground, forbids an approach of nearer than six feet to any building or to the side of the lot, or nearer than two feet to any other billboard, or than fifteen feet to the street line, and with qualifications requires conformity to the building line. No billboard is to exceed five hundred square feet in area. The fee for a permit is one dollar for every five lineal feet. The bill states that the size of posters has been standardized and cannot be changed without great expense and that the limits in size fixed for the boards are too small for such posters and will affect the plaintiff's business disastrously. The billboards are all upon private ground owned by or let to the plaintiff. They are built to withstand a windstorm of eighty-three miles an hour, a greater velocity than any known in St. Louis, and the frames and facing are of galvanized iron so as to exclude all danger of fire. The plaintiff has contracts running from six months to three years binding it to maintain advertisements upon its boards. The defendants are proposing to tear down these boards unless the plaintiff complies with the ordinance. This is a greatly abbreviated statement of the case but is sufficient, we believe, to present the questions that we have to decide.



Of course, the several restrictions that have been mentioned are said to be unreasonable and unconstitutional limitations of the liberty of the individual and of rights of property in land. But the argument comes too late. This Court has recognized the correctness of the decision in *St. Louis Gunning Advertising Co. v. St. Louis*, 235 Missouri, 99, followed in this case, that billboards properly may be put in a class by themselves and prohibited "in residence districts of a city in the interest of the safety, morality, health and decency of the community." *Cusack Co. v. Chicago*, 242 U. S. 526, 529, 530. It is true that according to the bill the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient to justify the general rule, they are or may be the least of the objections adverted to in the cases. 235 Missouri, 99. *Kansas City Gunning Advertising Co. v. Kansas City*, 240 Missouri, 659, 671. Possibly one or two details, especially the requirement of conformity to the building line, have æsthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary. *Hubbard v. Taunton*, 140 Massachusetts, 467, 468.

If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in the *Cusack Co. Case*. *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 329. As to the plaintiff's contracts, so far as appears they were made after the ordinance was passed, but if made before it they were subject to legislation not invalid otherwise than for its incidental effect upon them. *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558. The same thing may be said, apart from other an-

269.

Syllabus.

swers, with regard to the alleged standardizing of the size of posters. In view of our recent decision we think further argument unnecessary to show that the ordinance must be upheld.

*Judgment in No. 220 and decree in No. 2 affirmed.*

---

UNION TANK LINE COMPANY v. WRIGHT, COMPTROLLER GENERAL OF GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 170. Argued January 22, 1919.—Decided March 24, 1919.

A State may tax the movables of a foreign corporation, which are regularly and habitually employed therein, although devoted to interstate commerce. P. 282.

While the valuation must be just, it need not be limited to the mere worth of the articles taken separately, but may include as well the intangible value due to the organic relation of the property in the State to the whole system of which it is part. *Id.*

To meet the difficulties of appraisal where the tangibles constitute part of a going concern operating in many States, and where absolute accuracy is generally impossible, the court has sustained methods producing results approximately correct, for example, the mileage basis in the case of a telegraph company and the average amount of property habitually brought in and carried out by a car company. *Id.* *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70.

But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause, or the Fourteenth Amendment, or both. *Id.*

A New Jersey company owning many tank cars, rented by shippers, was assessed for those running in and out of Georgia, without regard to and much in excess of their real value, upon a track-mileage basis, *i. e.*, in an amount bearing the same ratio to the value of all its cars and other personal property as the ratio of the miles of railroad

over which the cars were run in Georgia to the total miles over which all were run, there and elsewhere. *Held*, that the rule adopted had no necessary relation to the real value in Georgia, and that the tax was void. P. 283. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, distinguished and limited.

What is said in an opinion upon a point not raised or properly involved cannot control in a subsequent case where the very point is presented for decision. P. 286.

143 Georgia, 765; 146 *id.*, 489, reversed.

THE case is stated in the opinion.

*Mr. Douglas Campbell* for plaintiff in error.

*Mr. Clifford Walker*, Attorney General of the State of Georgia, for defendant in error, submitted. *Mr. Warren Grice* and *Mr. Mark Bolding* were on the brief.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

This cause requires us to consider the power of a State to lay and collect taxes upon instrumentalities of interstate commerce which move both within and without its jurisdiction.

Union Tank Line—plaintiff in error—an equipment company incorporated in New Jersey which has never carried on business or had an office in Georgia, owns twelve thousand tank cars suitable for transporting oil over railroads and rents them to shippers at agreed rates, based on size and capacity. The roads over which they move also pay therefor stipulated compensation. Under definite contract certain of these cars were furnished to the Standard Oil Company of Kentucky and all of those which came into Georgia were being operated by the Oil Company under such agreement. They were not permanently within that State but passed “in and out.”

275.

Opinion of the Court.

March 16, 1914, the Tank Line made the following tax return to the Comptroller General for 1913—

Name of company.....	Union Tank Line
Value of real estate owned by company in or out of Georgia.....	None
Number of miles of R. R. lines in Georgia over which . . cars are run.....	6976.5
Total value of . . cars and . . other personal property [in Ga. & elsewhere].....	\$10,518,333.16
Value franchise [in Georgia].....	No franchise
Total number of miles R. R. lines over which . . cars are run [in Ga. & elsewhere].....	251,999
Total value of property taxable in Georgia.....	\$47,310.00
Union Tank Line Company had an average of 57 tank cars in Georgia during 1913 which at a value of \$830 per car equals.....	\$47,310.00

Defendant in error expressly admitted that the average number of cars in Georgia during 1913 was fifty-seven, the value of each being \$830—total \$47,310; that the owner had paid into the state treasury as taxes the full amount required on such valuation and during that year had no other property in the State. Acting upon information contained in return above quoted, the Comptroller General assessed the Tank Line's property for 1913 at \$291,196, its franchise at \$27,685; and demanded payment. In explanation of this action he wrote to it as follows:

"As to the return filed, you have furnished the data desired, but have made an error in the application of same. After giving the mileage for the Company everywhere



and for Georgia, you then go ahead and assign 57 tank cars for this State and value them at \$830 each, making the total for Georgia \$47,310. This is an incorrect method. If you were to be allowed to merely assign so many cars to the State for taxation there would be no need for the mileage figures to be furnished. The valuation to be assigned to Georgia must be in the same proportion to the valuation for the entire company, as the mileage in Georgia bears to the entire mileage everywhere. . . . Or to work it out by percentage instead of proportion: 6,976.5 the Georgia mileage, is 2.76846 per cent. of 251,999, the entire mileage. Georgia is therefore entitled to 2.76846 per cent. of the entire valuation. This per cent. of \$10,518,333 is \$291,195.84, or the same sum arrived at by proportion, if we call the 84 cents an even dollar. . . . A franchise value should also be returned. And whatever the valuation you place on the franchise for the entire country, 2.76846 per cent. of same must be assigned to Georgia. Thus, if you should value your franchise at \$1,000,000, the franchise value to be assigned to Georgia would be \$27,685."

"The valuation for Georgia was determined by taking 2.76846 per cent. of the valuation you gave for the entire company, exclusive of franchise. The 2.76846 per cent. is the ratio the Georgia mileage bears to the entire mileage, as explained in a previous letter. The franchise value was obtained by placing your franchise for the entire country at an even million dollars and giving Georgia 2.76846 per cent. thereof."

Thereupon, plaintiff in error instituted this proceeding in Fulton County Superior Court alleging invalidity of the assessment, that to enforce the tax would violate the Fourteenth Amendment, and asked appropriate relief. The cause was tried upon pleadings and agreed statement of facts. Among other things, the parties stipulated:

"On April 7, 1914, when the defendant entered an as-

275.

## Opinion of the Court.

assessment in his office of property and franchise of the plaintiff as shown hereinbefore, he had no other information for any of the years 1907 to 1914 inclusive than was contained in the said return filed by the plaintiff on March 16, 1914, and embraced in this statement and which was refused by the defendant, and did not know what cars defendant had had in Georgia during any of said named years nor did he ascertain the value of such cars, but his action was taken on such information hereinbefore shown; and that the assessment so entered by the defendant in his office against the plaintiff's property during said period for each of said years embraces the valuation of about three hundred cars in excess of what the plaintiff actually had in the State of Georgia, during said years of the approximate value of \$250,000.00 each year; and that the true value of a tank car is about eight hundred and thirty (\$830.00) dollars per car.

"That for the year 1914 the assessment entered against plaintiff by defendant covered the value of at least three hundred and fifty cars in excess of the number of cars plaintiff actually had in the State of Georgia for the time said tax was assessed.

"That defendant in entering said assessment never undertook to ascertain the actual property of plaintiff's located in the State of Georgia during the said years or to assess its property at its real value for taxation, otherwise than by simply ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia and the railroad mileage traversed by its equipment everywhere as shown by its said return filed on March 16, 1914."

The trial court adjudged the assessment good as to both franchise and physical property. The Supreme Court held no taxable franchise existed, but that the physical property had been assessed as required by statutes not in conflict with either state or Federal Constitution. 143

Georgia, 765, 769, 771, 773; 146 Georgia, 489. It said: "The case relates to two matters, namely: a tax assessment against tangible property of the company; and second, a claim of right to assess a franchise tax. . . . The effort was to tax property in this State, and in doing so to apply the statute designed as a rule to ascertain the property so coming into the State and its proper valuation." After quoting §§ 989, 990 and 1031, Civil Code of Georgia, copied in the margin,<sup>1</sup> the opinion con-

---

<sup>1</sup> Civil Code of Georgia.

Sec. 989. "Each non-resident person or company whose sleeping-cars are run in this State shall be taxed as follows: Ascertain the whole number of miles of railroad over which such sleeping-cars are run, and ascertain the entire value of all sleeping-cars of such person or company, then tax such sleeping-cars at the regular tax rate imposed upon the property of this State in the same proportion to the entire value of such sleeping-cars that the length of lines in this State over which such cars are run bears to the length of lines of all railroads over which such sleeping-cars are run. The returns shall be made to the comptroller-general by the president, general agent, or person in control of such cars in this State. The comptroller-general shall frame such questions as will elicit the information sought, and answers thereto shall be made under oath. If the officers above referred to in the control of said sleeping-cars shall fail or refuse to answer, under oath, the questions so propounded, the comptroller-general shall obtain the information from such sources as he may, and he shall assess a double tax on such sleeping-cars. If the taxes herein provided for are not paid, the comptroller-general shall issue executions against the owners of such cars, which may be levied by the sheriff of any county of this State upon the sleeping-car or cars of the owner who has failed to pay the taxes."

Sec. 990. "Any person or persons, copartnership, company or corporation wherever organized or incorporated, whose principal business is furnishing or leasing any kind of railroad cars except dining, buffet, chair, parlor, palace, or sleeping-cars, or in whom the legal title in any such cars is vested, but which are operated, or leased, or hired to be operated on any railroads in this State, shall be deemed an equipment company. Every such company shall be required to make returns to the comptroller-general under the same laws of force in reference to the rolling stock owned by the railroads making returns in this State, and the assessment of taxes thereon shall be levied and the taxes col-

275.

Opinion of the Court.

tinues—"The several code sections embody the statutory scheme for taxing cars of equipment companies whose cars are handled over the railroads in this State. Owing to the nature of the business, it is difficult to ascertain the number of cars of equipment companies that come into this State and designate the identity of each car or its value. The purpose of the statute is to provide a reasonable method for determining the fact that cars come into this State and the values thereof, to the end that the equipment companies allowing their cars to come into this State may bear their just proportion of taxes leviable in this State. The scheme of the statute is what is sometimes called the track-mileage basis of apportionment, or what in a more general way is termed the unit rule. The comptroller-general followed the statute. The unit rule has been upheld by the Supreme Court of the United States, in regard to railroads, telegraph companies, and sleeping-car companies. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18. And this principle of average has been approved in regard to refrigerator-cars. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149. It has even been held that the unit rule of valuation could properly be applied to the valuation of property of express companies within a certain State, though there was no

lected in the same manner as provided in the case of sleeping-cars in section 989."

Sec. 1031. "Railroad companies operating railroads lying partly in this State and partly in other States shall be taxed as to the rolling stock thereof and other personal property appurtenant thereto, and which is not permanently located in any of the States through which said railroads pass, on so much of the whole value of rolling stock and personal property as is proportional to the length of the railroad in this State, without regard to the location of the head office of such railroad companies."



physical connection with property beyond the State. . . . It seems to us, therefore, that the case falls within the rule laid down by the Supreme Court of the United States, as above mentioned, and that there are no such circumstances as to bring it within the ruling made in *Fargo v. Hart*, 193 U. S. 490."

A State may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the State according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well "the intangible value due to what we have called the organic relation of the property in the State to the whole system." How to appraise them fairly when the tangibles constitute part of a going concern operating in many States often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisal producing results approximately correct—for example, the mileage basis in case of a telegraph company (*Western Union Telegraph Co. v. Massachusetts*), and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both. *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26; *Adams Express Co. v. Ohio*, 165 U. S. 194; *s. c.*, 166 U. S. 185; *American Re-*

275.

## Opinion of the Court.

*frigerator Transit Co. v. Hall*, 174 U. S. 70; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149; *Fargo v. Hart*, 193 U. S. 490; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453.

In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all States. Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one State while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a “true” value of \$830. Thus the total there subject to taxation amounted to \$47,310—the challenged assessment specified \$291,196.

We think plaintiff in error’s property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce.

*Pullman’s Palace Car Co. v. Pennsylvania*, *supra*, relied on by defendant in error, contains the following passage which seems to uphold the Georgia rule—“The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company’s property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if

it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, it must be regarded as *obiter dictum*, and we cannot now approve or follow it.

Reference to the original record upon which that case came here will aid in understanding the exact issues presented. Pennsylvania demanded taxes of the Pullman Company, an Illinois corporation, for the years 1870 to 1880, upon such portion of its capital stock as total miles of railroad in Pennsylvania over which its cars moved bore to like total in all States. No statute prescribed the method of valuation; it had been adopted by executive officers. The Court of Common Pleas declared: "On the facts defendant claims that no part of its capital stock is invested in this State. The argument is that its cars are personal property, and, as they are not permanently located in this State, but pass into, through, and out of it, this personal property has no taxable situs in Pennsylvania, and could not be taxed specifically in any given locality; and therefore, it is contended, as the tax on capital stock is a tax on the property in which the capital is invested, the latter cannot be taxed. . . . We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used; . . . The defendant is liable to tax on the proportion of its capital stock invested in this State,

275.

Opinion of the Court.

as represented by the coaches and cars owned and used by it here. . . . Determining the amount of the tax on the principle above stated, it is as follows: Tax for years 1870 to 1880, inclusive, \$16,321.89." The Supreme Court affirmed this view, saying: "While the tax on the capital stock of the company 'is a tax on its property and assets,' yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other States cannot wholly exempt them from taxation here. It reduces the value of property in this State justly subject to taxation here. This was recognized in the court below, and we think the [proportion] preference was fixed according to a just and equitable rule."

In 1870 the Pullman Company's capital stock amounted to three million dollars, in 1880 it had grown to six million; all cars actually owned by the company (leased ones not included) during 1871, numbered 241, and in 1880, 472, their total value being \$4,334,000, and \$8,588,000 respectively; one hundred cars were operated within Pennsylvania during each of the eleven years; total miles of track everywhere passed over by the company cars during 1880 amounted to 57,099, within Pennsylvania 5,127, and these figures adequately represent the proportion for other years: total tax held due for the eleven years amounted to \$16,321.89. While the record does not disclose the precise valuations upon which taxes were computed, enough does appear to show that they were far below (perhaps not one-third) the actual worth of a hundred cars.

The company demanded complete exemption upon the ground that its cars were moving in interstate commerce



and had no taxable situs in Pennsylvania. The appraisal was not challenged as excessive; if the property was taxable in Pennsylvania the rule adopted may have been decidedly favorable to the owner and the assessment a moderate one. Having failed to challenge amount of the assessment, the company could not well complain of the rule under which this was fixed. In such circumstances reasonableness of the rule was not really in question and what was said of it cannot control here where the very point is presented for decision. *Cohens v. Virginia*, 6 Wheat. 264, 399; *McCormick Machine Co. v. Aultman*, 169 U. S. 606, 611. See also *Adams Express Co. v. Ohio*, *supra*.

In other opinions of this court cited below to support the conclusion there reached we upheld the power of a State to tax property actually within its jurisdiction upon a fair valuation considered as part of a going concern—they give no sanction to arbitrary and inflated valuations. Taxes must follow realities, not mere deductions from inadequate or irrelevant data.

In *Fargo v. Hart*, *supra*, we condemned an assessment ostensibly proportioned to mileage where property without the State and unnecessary to the Express Company's actual business had been included; and we pointed out that under no formula can a State tax things wholly beyond its jurisdiction.

The same considerations which establish invalidity of the assessment of plaintiff in error's property for 1913 apply to like ones made by the Comptroller General for all other years in question.

Judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE DAY, in view of the undisputed facts of this case, concurs in the result.

275. PITNEY, BRANDEIS, and CLARKE, JJ., dissenting.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE, dissenting.

During the period in controversy the Union Tank Line, plaintiff in error, a New Jersey corporation, was the owner of many tank cars, aggregating in value more than \$10,000,000, and was engaged in the business of renting them out to be employed in transporting oil and similar fluids over railroads throughout the United States extending to more than 250,000 miles. In the course of its business it made a contract with the Standard Oil Company of Kentucky to furnish to that corporation cars for use in the transportation of oils and like fluids from depots at Savannah, Georgia, and Jacksonville, Florida. The oils were brought to those depots chiefly in vessels by sea, and were shipped thence in the Tank Line cars to various destinations within and without the State of Georgia; plaintiff in error being compensated in part by rentals paid by the Standard Oil Company, based on size and capacity of cars, and in part by payments received from the railroad companies over whose lines the cars were run; those companies, in lieu of providing their own tank cars, paying to plaintiff in error three-fourths of a cent per mile per car for the car movements.

Under the provisions of the Georgia statutes (Civil Code, §§ 989, 990, 1031), property taxes were imposed upon plaintiff in error by reason of the habitual use and employment of its rolling stock within that State, based upon a valuation not limited to the value of the tank cars as separate chattels, but considering their value as a part of the entire system of cars owned and operated by plaintiff in error, and regarding these as a part of the equipment of the railroads over which they ran. Thus, it appearing from a return made by the Tank Line to the Comptroller General for the year 1913 that the number of miles of railroad lines in Georgia over which its cars

PITNEY, BRANDEIS, and CLARKE, JJ., dissenting. 249 U. S.

were run was 6,976.5, and the total number of miles of railroad lines over which its cars were run in Georgia and elsewhere was 251,999, and that the total value of its cars and other personal property in Georgia and elsewhere was \$10,518,333.16, the Comptroller General assigned to the State of Georgia for taxation the same proportion of the property value of the system of cars that the Georgia rail mileage bore to the total mileage. This gave a valuation of \$291,195.84, whereas plaintiff in error had returned that during the same year it had an average of only 57 tank cars in Georgia, amounting, at a valuation of \$830 per car, to \$47,310.

The Supreme Court of Georgia sustained the tax on the authority of numerous decisions of this court, cited for the purpose. 143 Georgia, 765; 146 Georgia, 489. This court reverses the judgment, and holds the taxing law unconstitutional, upon reasoning to which I am unable to yield assent.

In my opinion the Georgia system of taxing movable property of this character when habitually employed in the State, and the decision of the state Supreme Court sustaining the particular taxes in question, are based upon a correct view of the powers of the State under the Federal Constitution, and are in entire harmony with principles laid down in authoritative decisions of this court which have remained unchallenged for more than a quarter of a century. *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 552; *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117, 123; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 26, *et seq.*; *Cleveland &c., Ry. Co. v. Backus*, 154 U. S. 439, 445; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 14; *Adams Express Co. v. Ohio*, 165 U. S. 194, 221; *s. c.* 166 U. S. 185; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 75, *et seq.*; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 152; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453.

275. PITNEY, BRANDEIS, and CLARKE, JJ., dissenting.

The case presents no question of taxing a foreign corporation with respect to personal property that never has come within the borders of the State. According to the agreed state of facts and the petition of the Union Tank Line which is to be read with it, any and all cars of the company were liable to be used indiscriminately, as occasion required, in the transportation of oil within the State of Georgia, and there is nothing to show how many were so used during either of the taxing years in question. Fifty-seven cars simply represents the average number within the State at one and the same time within the year, and is not representative of the number of cars used in the State during the year. This court has declared that a State may lay hold of the average habitual use of movable railroad equipment as a basis of taxation (*Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117, 123); but there is nothing in the Constitution of the United States to confine the State to that particular method. It is but a method of approximation. Nor is the State obliged to ignore the special value that rolling stock has because of its organic relation to, and its customary use in connection with, the railroad tracks upon which it runs. Although the equipment be held in separate ownership, it may be regarded in fact as an appurtenance of the railroad and valued in that relation. It is admitted that the revenue derived by plaintiff in error from the use of its cars is in part paid by the railroad companies and proportioned to the mileage covered by the run of the cars.

The opinion of this court recognizes that plaintiff in error, because its tank cars are regularly and habitually used and employed in the State of Georgia, is taxable according to their fair value along with other property subject to the jurisdiction of the State, although they are devoted to interstate commerce; that while the valuation must be just it need not be limited to the mere value of the cars considered separately, but may include also the



PITNEY, BRANDEIS, and CLARKE, JJ., dissenting. 249 U. S.

special value attributable to their organic relation to the entire system; that fair appraisal, in a case like this, where the cars constitute part of a system operating in many States, is a matter of serious difficulty, but that absolute accuracy usually is impossible and therefore is not required by the Constitution; and it seems to be intimated that a valuation based upon the aggregate car mileage within the State during the taxable year would be permissible. But, even assuming that such a basis could be adopted without in effect regulating interstate commerce by varying the burden of taxation in direct proportion to the volume of such commerce, it still is obvious that a valuation according to aggregate car mileage would virtually ignore the particular value due to the relation of the cars to the rail system, would in effect be equivalent to a valuation according to average use, and would be open to the same objection, viz., that its ascertainment would lie wholly within the breast of the taxpayer. For, if the state authorities were required to keep a check either upon the average use or the aggregate mileage covered by the movements of rolling stock within the State, and to supplement this with observations in other States in order to arrive at the due proportion, the cost of administration easily might consume the tax.

It is because of difficulties such as these that so many of the States have resorted to track mileage—readily ascertained and little subject to change—as an equitable method of ascertaining the proportionate value taxable by a single State, out of the aggregate value of the movables of an equipment company that does business in several States.

This method was very clearly sustained by this court in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26, a case decided in the year 1891, followed repeatedly, and never questioned in the least until now. The tax laws of the State of Georgia, and doubtless of many other

275. PITNEY, BRANDEIS, and CLARKE, JJ., dissenting.

States, have been based upon that decision, and I regard it as most unfortunate that at this late date its authority should be overthrown.

The Pullman Company was a corporation of the State of Illinois, having its principal office in Chicago, and its business was to furnish sleeping coaches and parlor and dining cars to various railroad companies for use as a part of the equipment of passenger trains running in interstate commerce; the railroad companies collecting the usual passenger fares and the Pullman Company separate charges for seats and berths. The company was subjected by the State of Pennsylvania to a tax upon a part of its capital stock bearing the same proportion to the whole as the number of miles of railroad over which its cars were run in Pennsylvania bore to the whole number of miles in that and other States over which they were run. The Pullman Company objected to the taxation of any part of its capital stock by the State of Pennsylvania by reason of its running its cars through that State in the course of their employment in interstate transportation of passengers; and it is obvious that unless the tax was sustainable as being in substance and effect a tax upon property of the company no greater than that which the State had a right to impose it was invalid because amounting in its effect to a burden upon interstate commerce. It was from this point of view that the court tested and sustained the tax, as the following excerpts from the opinion will show. After declaring that the legislative power of every State extends to all property within its borders; that for purposes of taxation personal property may be separated from its owner and the owner taxed on account of it at the place where it is located, although he is not a citizen or resident of the State which imposes it; and that there is nothing in the Constitution or laws of the United States to prevent a State from taxing personal property employed in interstate or foreign commerce

PITNEY, BRANDEIS, and CLARKE, JJ., dissenting. 249 U. S.

like other personal property within its jurisdiction; the court, speaking by Mr. Justice Gray, proceeded to say (p. 25): "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. . . . The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. . . . The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property. . . . The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. . . . [p. 26] The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. . . . The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods

275.

PITNEY, BRANDEIS, and CLARKE, JJ., dissenting.

for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

*"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. [Italics mine.] The validity of this mode of apportioning such a tax is sustained by several decisions of this court," etc.*

It was upon this decision, among others, that the Supreme Court of Georgia relied as authority for its judgment. I cannot agree that any part of what I have quoted—least of all the italicized clause which relates to the apportionment of the tax according to track mileage—was *obiter dictum* or unnecessary for the decision. It was necessary—certainly so this court deemed it—that the disputed tax be vindicated as a property tax in order to relieve it from the criticism that it was an unwarranted interference with interstate commerce; and it could not be sustained as a property tax unless the method of apportionment was fair and equitable. The authority of the case cannot properly be overthrown by showing, even if it could be shown, that the court might have reached the same result upon some other ground than that which in truth it adopted as the basis of its decision. And it seems to me that a considered judgment of this court upon a constitutional question affecting the taxing powers of the States, long acted upon as a guide to state legislation upon this important and difficult matter, ought not to be



PITNEY, BRANDEIS, and CLARKE, JJ., dissenting. 249 U. S.

set aside without more cogent reasons than any that are here adduced. Certainly the fact that the established rule of taxation may operate with hardship or even with apparent injustice in a particular case is not sufficient to condemn it.

The decision referred to, *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, has always been regarded as a leading case, and cited with uniform approval in repeated decisions of this court: not only upon the point that property employed in interstate commerce, and in the ordinary use of it situate sometimes within and sometimes without a State, is subject to state taxation without regard to the place of the owner's domicile; but also and especially in support of the proposition that the mileage basis of apportionment as between the different States may be resorted to in order to determine what tax each State shall lay upon rolling stock used upon interstate railroads, just as it often is resorted to in apportioning the tax upon a railroad as between different taxing districts in the same State.

The reasoning of the case upon the point now in controversy has never heretofore been regarded as *obiter dictum*. On the contrary, it was cited in support of the mileage basis of apportionment for the taxation of a railroad in *Pittsburgh, &c. Ry. Co. v. Backus*, 154 U. S. 421, 431; and, in *Adams Express Co. v. Ohio*, 165 U. S. 194, 221, to sustain a mileage apportionment with respect to interstate express companies, notwithstanding the absence of physical unity, *s. c.*, 166 U. S. 185. It was quoted from extensively in *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 75-76, as authority for the apportionment of taxes upon rolling stock according to the track mileage within and without the State; the very part of the opinion now held to be *dictum* being included in the quotation. See also *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 14, 21; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 152; *Union Refrigerator Transit Co. v. Kentucky*,

275. PITNEY, BRANDEIS, and CLARKE, JJ., dissenting.

199 U. S. 194, 206; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 225; *Pullman Co. v. Kansas*, 216 U. S. 56, 63-64; *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. 522, 548; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453. In *Fargo v. Hart*, 193 U. S. 490, 499, the court recognized the authority of *Pullman's Palace Car Co. v. Pennsylvania* as supporting the acknowledged doctrine of organic unity and the reasonableness and constitutionality of the mileage proportion, but found in the particular case an exception to the rule.

I can see nothing arbitrary or unreasonable in the general rule of mileage apportionment adopted by the State of Georgia, upon the authority of these repeated decisions of this court, for the taxation of railroad cars and other equipment habitually operated on lines extending within and without the State, and hence am convinced that the statute is not repugnant to the Federal Constitution. If, for any reason that does not appear, the rule operated unfairly in this particular case, and imposed an unjust and inequitable burden of taxation upon plaintiff in error, it was incumbent upon plaintiff in error to show this by calling for an arbitration upon the question of true value, as permitted by the Georgia statutes (Civil Code, §§ 1045-1046, 1050-1054), or by some appropriate proceeding for relief against the excessive part of the taxes. Having failed to do this although properly notified, it cannot in justice be heard to say that the valuation of its property, made according to a statutory rule that in its general application is just and reasonable, is in the particular case so excessive as to amount to a deprivation of property without due process of law, or an undue burden upon interstate commerce.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this dissent.

UNITED STATES *v.* BROOKLYN EASTERN  
DISTRICT TERMINAL.

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

No. 155. Argued January 20, 1919.—Decided March 24, 1919.

Whether a carrier is a common carrier within the meaning of the Hours of Service Act, does not depend upon whether its charter declares it to be such, nor upon whether the State of incorporation so considers it, but upon what it does. P. 304.

The fact that a carrier acts only as agent for other carriers may affect its contractual obligations to shippers, but cannot change its obligations, under the Hours of Service Act, concerning the physical operation of its railroad, and the safety of its employees and the public which the act aims to secure. P. 306.

The act must be liberally construed. P. 307.

A navigation company, owner of a terminal consisting of docks, float bridges, warehouses, etc., with delivery and other tracks which crossed a public street and varied individually from a few yards to a mile in length and aggregated 8 miles, was engaged, under separate contracts with interstate railroads, in the reception and delivery there of freight, in carload lots and less (the terminal being named as a reception and delivery station in the tariffs filed by the railroads with the Interstate Commerce Commission), and in transporting the freight on floats between the terminal and the railroad termini, in cars furnished by the railroads, which it hauled between its floats and its reception and delivery tracks, etc., by means of its engines and crews. As agent of the respective railroads, it accepted all freight offered for their lines, issued bills of lading to destination for outgoing freight and receipts for freight delivered to consignees, collected the railroads' tariff charges, where they did not extend credit, adding nothing on its own account, and accounted to them in full. Its compensation, paid by the respective railroads, was determined by weight and origin or destination of goods handled. It owned no cars, and moved none save those mentioned, paid nothing for their use, and did not hold itself out as a common carrier or file tariffs with the Interstate Com-

merce Commission. *Held*, a common carrier within the meaning of the Hours of Service Act, c. 2939, 34 Stat. 1415. P. 304.

Crews engaged in moving at one time a locomotive and seven or eight cars between the docks and the warehouses and team tracks of a terminal company, *held* engaged in the movement of a "train," within the meaning of the Hours of Service Act, § 1. P. 307.  
239 Fed. Rep. 287, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson, with whom Mr. Neal L. Thompson was on the brief, for the United States.

Mr. Henry B. Closson, for respondent, in support of the contention that the Terminal is not a common carrier,—because it is not organized and does not hold itself out as such, and because its relations are not with shippers or consignees, but only with the carriers with which it chooses to contract, and its obligations are wholly to the latter and not at all to the former—cited the following: *United States v. Ramsey*, 197 Fed. Rep. 144; *Jackson Iron Works v. Hurlbut*, 158 N. Y. 34, 38; *United States v. Union Pacific R. R. Co.*, 213 Fed. Rep. 332; *Texas & Pacific Ry. Co. v. Henson*, 56 Tex. Civ. App. 468; *Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. R. Co.*, 37 Fed. Rep. 567, 615, 617; 6 Cyc. 366.

It is immaterial that the Terminal may be subject to the Interstate Commerce Act. It was because of the broad definitions of "railroad" (including terminal facilities), and "transportation," in that act, and because of provisions in the acts of their incorporation, and their control by railroads, that the terminals involved in the following cases were held subject to the Interstate Commerce Act or the Employers' Liability Act. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*,



219 U. S. 498; *United States v. Union Stock Yard*, 192 Fed. Rep. 330; 226 U. S. 286; *McNamara v. Washington Terminal Co.*, 37 App. D. C. 384. *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, arose under a statute subjecting every "public utility" or "common carrier" to the orders of a commission, and declaring that the phrase "common carrier" should be held to include "every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire." This court held that the Taxicab Company was an agency for public use for the conveyance of persons within the District. The decision throws no light upon the question here whether the Brooklyn Eastern District Terminal is a common carrier "in the usual and ordinary acceptation of the term." *United States v. Ramsey*, *supra*.

For similar reasons, decisions sustaining prosecutions against transportation corporations for violation of the provisions of the Safety Appliance Act requiring the use of automatic couplers, grab-irons and draw-bars cannot properly be cited as decisions that the corporations in question were "common carriers," for these provisions relating to cars apply to all cars "used on any railroad engaged in interstate commerce." Amendment of March 2, 1903; *Belt Ry. Co. v. United States*, 168 Fed. Rep. 542; *United States v. Union Stockyard & Transit Co.*, 192 Fed. Rep. 330, 336; *United States v. Union Stockyards Co. of Omaha*, 161 Fed. Rep. 919; 169 Fed. Rep. 404; *Hines v. Stanley G. I. Co.*, 199 Massachusetts, 522.

The Terminal is not "engaged in the transportation of property by railroad"; and for that reason also is not subject to the Hours of Service Act. Merchandise in a car being shunted back and forth over its tracks is not being "transported by railroad." It is being made ready for transportation by water to the railroad or is being

delivered after such transportation. *Taggart v. Republic Iron & Steel Co.*, 141 Fed. Rep. 910.

The car floats in their daily movement between its station and the different railroad termini do not constitute "ferries used or operated in connection with any railroad," which the act declares the term "railroad" shall include. *St. Clair County v. Interstate Transfer Co.*, 192 U. S. 454, 467, 468.

The employees were not "actually engaged in or connected with the movement of any train." Aggregations of cars, however many, while in process of being switched in switching yards by switching locomotives, are not "trains"; to be such they must be proceeding on a journey from one point to another on the main line of the railroad. This distinction is made in the following: *United States v. Erie R. R. Co.*, 237 U. S. 402; *United States v. Chicago, Burlington & Quincy R. R. Co.*, 237 U. S. 410; *La Mere v. Railway Transfer Co.*, 125 Minnesota, 159; *United States v. Grand Trunk Ry. Co.*, 203 Fed. Rep. 775; *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 198 Fed. Rep. 637; *United States v. Pere Marquette R. R. Co.*, 211 Fed. Rep. 220; *Clary v. Chicago, Milwaukee & St. Paul Ry. Co.*, 141 Wisconsin, 411; *Lynch v. Great Northern Ry. Co.*, 112 Minnesota, 382.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415) <sup>1</sup> prohibits any common carrier by railroad en-

---

<sup>1</sup> Act of March 4, 1907, c. 2939, 34 Stat. 1415.

"That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad . . . from one State . . . to any other State. . . . The term 'railroad' as used in this Act shall include all bridges and ferries used or operated

gaged in interstate commerce from requiring or permitting an employee to remain on duty for a longer period than sixteen consecutive hours. For alleged violation of this provision, proceedings were brought against the Brooklyn Eastern District Terminal in the District Court of the United States for the Eastern District of New York. The defendant contended that it was not a common carrier; that it was not engaged in interstate commerce by railroad; and that its employees were not "connected with the movement of any train." Upon facts which were agreed the trial court entered judgment for the Government. The Circuit Court of Appeals reversed the judgment on the ground that, while the Terminal was engaged in interstate commerce and the employment in question was connected with the movement of trains, it was not a common carrier. 239 Fed. Rep. 287. The case comes here on writ of certiorari (243 U. S. 647); and the substantial question before us is whether the Terminal is within the scope of the Hours of Service Act, as being a common carrier. The essential facts are these:

1. The Terminal is a navigation corporation with an authorized capital stock of one hundred thousand dollars (\$100,000), incorporated under § 10 of Article III of the transportation corporations law of the State of New York, which reads as follows:

"Seven or more persons may become a corporation, for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating or

in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employees' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours . . ."

owning steam, sail or other boats, ships, vessels or other property to be used in any lawful business, trade, commerce or navigation upon the ocean, or any seas, sounds, lakes, rivers, canals or other waterways, and for the carriage, transportation or storing of lading, freight, mails, property or passengers thereon."

In its certificate of incorporation, the corporate powers and purposes of the defendant are stated as follows:

"The purposes for which it is formed are to build for its own use, equip, furnish, fit, purchase, charter, navigate, and own steam, sail, and other boats, ships, vessels, and other property, to be used in the business of carrying, transporting, storing, and lading merchandise in New York Harbor and the waters adjacent thereto and connected therewith and the territory bordering thereon."

2. The Terminal operates a union freight station at Brooklyn under individual contracts with ten interstate railroads and several steamship companies. From the railroads it receives both carload and less-than-carload freight and transports the same from their termini to its Brooklyn docks. There, the cars containing such freight are hauled from the car floats by its locomotives and placed for unloading either on its team tracks or at its freight houses. The Terminal receives likewise from shippers both carload and less-than-carload outgoing freight originating at Brooklyn and consigned to points upon the various railroads with which it has contracts. The cars carrying this outgoing freight are then switched and loaded by its locomotives upon its floats and transported by its tugs to the docks of the several railroads.

3. For its services in handling freight as above set forth the Terminal is paid not by the shipper or consignee, but by the railroad or steamship company upon whose account the transportation service is performed, at the rate of 3 cents per 100 pounds of freight moving to or from points east of the western termini of said railroads, and 4 1-5 cents



per 100 pounds on freight moving to or from points beyond such termini. Upon prepaid shipments from shippers not on the credit lists of the railroads it collects from the shipper at Brooklyn the money and charges for the transportation of such freight from that point to its final destination; and also collects from the consignee at Brooklyn the charges for the transportation of such freight from its point of origin to that place, when such charges have not been prepaid. The freight moneys and charges so received by the defendant from shippers or consignees are accounted for and paid over by it without deduction to the railroads or steamship lines upon whose account they are collected.

4. The Terminal does not hold itself out as a common carrier; nor does it file with the Interstate Commerce Commission any tariffs or concurrences with tariffs, or copies of the contracts with the common carriers by whom it is paid for the transportation of freight, as heretofore set forth. The terminal at Brooklyn is designated by such railroads and rail and water lines, in the tariffs filed by them with the Interstate Commerce Commission, as one of their receiving and delivering stations for freight in the Port of New York; and through bills of lading to such terminal as such station are issued by them on freight to be delivered there. For all freight originating at Brooklyn bills of lading of the railroad or steamship line to which the freight is to be delivered are there issued to the shipper by one of the defendant's employees, who is duly authorized to issue such bills of lading by the railroad or steamship line by which the freight is to be transported to its final destination or destinations after the same is delivered to such railroad or steamship line by defendant.

5. The tracks of the Terminal which extend from its float bridges to several warehouses, coal pockets, platforms, and team tracks have an aggregate length of 8-1/3 miles. One track connecting its several dock and delivery

tracks which is kept clear for operating its switching engines is about one mile in length. The length of haul effected by its locomotives in moving cars between its float bridges and warehouses, platforms, pockets, and team tracks varies from a few yards to nearly a mile. The number of cars so hauled as part of a movement varies from a single car to eight cars. As an incident to such movement its locomotives hauling cars cross a public street in Brooklyn.

6. Defendant owns or hires no cars itself, and no cars, except the ones heretofore mentioned, are ever moved over its tracks. For the use of such cars defendant pays no charges; and except by the switching service heretofore described, it transports freight only by water. It handles interstate and intrastate freight indiscriminately, the larger part being interstate. It transports no passengers.

7. In connection with the movement of one or more cars between the floats and the loading tracks, warehouses, and team or delivery tracks, defendant employs four to eight switching crews during the day and two at night, each crew consisting of a conductor, engineer and two or more brakemen.

The Hours of Service Act declares (in the first section) that, "The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease." Hence, neither the character of the Terminal's railroad nor its independent ownership excludes it from the scope of the act. But the Terminal contends that it is not subject to the provisions of the statute, since it is not incorporated as a common carrier and does not hold itself out as such; does not file tariffs; and does not undertake to transport property for all who may apply to have their goods transported; but merely transports as agent such freight as is delivered to

it by or for those carriers, and those only, with whom it has elected to make special contracts; and that, under these contracts it performs for the railroads, and not for the public, a part of the whole carriage which they, as common carriers, have undertaken with the shipper to perform.

We need not undertake a definition of the term "common carrier" for all purposes. Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers. We have merely to determine whether Congress, in declaring the Hours of Service Act applicable "to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad," made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the State of incorporation considers it such; but upon what it does. *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 254.

The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *United States v. Baltimore & Ohio R. R. Co.*, 225 U. S. 306; 231 U. S. 274, 288. The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in *United States v. Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25. The services rendered by the Terminal are public in their

nature; and of a kind ordinarily performed by a common carrier. If these terminal operations were conducted directly by any, or jointly by all, of the ten railroad companies with which the Terminal has contracts, the operations would clearly be within the scope of the Hours of Service Law. The evils sought to be remedied exist equally, whether the terminal operations are conducted by the railroad companies themselves or by the Terminal as their agent; and whether the Terminal acts only as such agent for railroads or undertakes in addition to transport on its own account goods for shippers. The precise question presented is, therefore, whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer and exempts the Terminal, because it is not a common carrier; thus making inapplicable a provision regarding the physical operation of the property devised for the protection of employees and the public.

One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character;—that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier, *United States v. Sioux City Stock Yards Co.*, 162 Fed. Rep. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts,



*Union Stockyards Co. of Omaha v. United States*, 169 Fed. Rep. 404; *Belt Railway Co. of Chicago v. United States*, 168 Fed. Rep. 542; and under the Twenty-Eight Hour Law, *United States v. Sioux City Stock Yards Co.*, *supra*.<sup>1</sup>

What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their other stations. The incidental services performed by the Terminal in respect to these goods are also the same as those performed by the railroad companies at their other stations. For all freight originating at Brooklyn, it issues through bills of lading to destination. Upon prepaid shipments originating there, it collects from the shippers the charges for transportation from Brooklyn to final destination; except where shippers are on the credit lists of the railroad companies. Upon goods arriving over its line at Brooklyn, it collects from the consignees the charges from point of origin, unless these were prepaid. As the Terminal receives both from railroad companies and from shippers also less-than-carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respect, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them and not on its own account. But a common carrier does not cease to be

---

<sup>1</sup> Compare also *McNamara v. Washington Terminal Co.*, 37 App. D. C. 384, 394, *et seq.*; *State v. Union Stock Yards Co.*, 81 Nebraska, 67.

such merely because the services which it renders to the public are performed as agent for another. The relation of connecting carriers with the initial carrier is frequently that of agent. See *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174. The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operation of the railroad under the Hours of Service Act, which as this court has said, must be liberally construed to secure the safety of employees and the public. *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U. S. 336.

It is now admitted that the Terminal is engaged in interstate commerce; and it is clear that at least "switching crews" engaged in moving at one time a locomotive with seven or eight cars between the docks and the warehouses or team tracks, a distance of nearly a mile, are engaged in the movement of a "train." The decisions under the Safety Appliance Acts depend upon the particular context in which the word "train" there occurs, and are not here applicable. Compare *United States v. Erie R. R. Co.*, 237 U. S. 402, 407-408.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

*Reversed.*

MILLER ET AL. *v.* McCLAIN.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 19. Submitted November 13, 1918.—Decided March 31, 1919.

An Indian holding a trust patent under the General Allotment Act of 1887, who leases his allotment with permission granted under the Act of June 25, 1910, and the supplementary regulations of the Interior Department, may make a valid sale of his share of the crop reserved in the lease as rental. P. 311.

Whether, apart from authority to lease, sale of the growing crop by the allottee would be void under the Act of 1887, in a State where such crops are personalty—not passed upon. P. 309.

The concession that the allottee had written permission from the Government to lease his allotment is taken as implying permission to lease for himself, based on a finding of capacity under the Act of 1910 and regulations, and not as referring to authority of the Government to lease for the allottee in case of age, disability, etc., under the Act of May 31, 1900, 31 Stat. 221, 229. P. 312.

95 Kansas, 794, affirmed.

THE case is stated in the opinion.

*Mr. A. E. Crane* and *Mr. E. D. Woodburn* for plaintiffs in error.

*Mr. Robert Stone*, *Mr. Geo. T. McDermott* and *Mr. H. O. Caster* for defendant in error. *Mr. M. A. Bender* and *Mr. Floyd W. Hobbs* were on the brief.

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

Under the Act of February 8, 1887, c. 119, 24 Stat. 388, 389, Mish-no, a member of the Prairie Band of the Potawatomes, was allotted land in Kansas, which was to be

308.

Opinion of the Court.

held in trust by the United States and subject to the restrictions on the power of the allottee to deal with the land, provided by that act.

Mish-no leased the land for the year 1912 for a rental of one-half the corn and stalks to be produced. In May of that year he sold his right to his share of the prospective crop to McClain, and in the autumn when the crop was made again sold his share to Cooney, who sold and delivered it to Miller.

The writ of error before us is prosecuted by Miller and Cooney to reverse the judgment of the court below, sustaining the purchase by McClain, with a resulting liability in Miller and Cooney to McClain for the corn or its value. The case as made by the argument turns exclusively upon the correctness of the interpretation affixed by the court below to § 5 of the Act of 1887, to the effect that as by the law of Kansas a growing crop is a chattel, the sale to McClain was valid and not in conflict with the following provision of § 5:

“And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned [the trust period], such conveyance or contract shall be absolutely null and void.”

But we are of opinion that the solution of the case does not require a consideration of this question since it only exacts that we ascertain whether the particular contract in question was by law excepted from the operation of the prohibition of the Act of 1887, thus rendering an analysis and application of that prohibition negligible.

As we have seen, what was sold to McClain was not an undivided share of a growing crop of the allottee but was that portion of the total crop of the tenant fixed by the lease as due for rent. The lease, therefore, and the power to make it was the criterion by which to determine the application of the prohibition of the Act of 1887. If it



be that the lease was inconsistent with that act it would follow that the stipulation as to the rent which it contained would perish with the contract. If on the contrary it be that the lease was valid, the authority to make it would include the right to stipulate for the rental. As it cannot be questioned that a contract leasing land is one touching the land, it is indisputable that the lease was void under the Act of 1887 unless its validity may be excepted by some other statutory provision.

By a course of legislation beginning in 1891 and extending to 1900, authority was conferred upon the Secretary of the Interior to sanction, when enumerated and exceptional conditions existed, leases of land allotted under the Act of 1887, and the power was given to the Secretary to adopt rules and regulations governing the exercise of the right (Acts of February 28, 1891, c. 383, 26 Stat. 794, 795; August 15, 1894, c. 290, 28 Stat. 286, 305; June 7, 1897, c. 3, 30 Stat. 62, 85; May 31, 1900, c. 598, 31 Stat. 221, 229). The general scope of the legislation is shown by the following provision of the Act of 1900, which does not materially differ from the prior acts.

"That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, disability, or inability, any allottee of Indian lands can not personally, and with benefit to himself, occupy or improve his allotment or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary for a term not exceeding five years, for farming purposes only."

The regulations for the purpose of carrying out the power given prescribed a general form of lease to be used under the exceptional circumstances which the statute contemplated and subjected its execution and the subjects connected with it to the scrutiny of the Indian Bureau and to the express or implied approval of the Secretary. (See "Amended rules and regulations to be

308.

Opinion of the Court.

observed in the execution of leases of Indian Allotments," approved by the Secretary of the Interior March 16, 1905.)

The foregoing provisions were enlarged by the Act of June 25, 1910, c. 431, 36 Stat. 855, 856, as follows:

"That any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior."

And the regulations of the Secretary which were adopted under this grant of power in express terms modified the previous regulations on the subject "so far as to permit Indian allottees of land held under a trust patent, or the heirs of such allottees who may be deemed by the superintendent in charge or any competency commission to have the requisite knowledge, experience, and business capacity to negotiate lease contracts, to make their own contracts for leasing their lands." The scope of such regulations is further made clear by the following provision dealing with the rental to result from the lease by the Indian of his allotted land under the power given: "The question of consideration, whether a cash rental or share of the crops grown on the land, shall be left to the determination of the lessor." (Regulations, approved September 19, 1910.)

The right of an allottee under stated conditions to lease and to stipulate for such rental as he deemed adequate, whether in money or crop, having been thus undoubtedly provided for by the statute and the regulations, the only question is, had the capacity of the allottee in this case been recognized conformably to the statute and regulations so as to justify his exercise of the right? That question would seem to be free from difficulty for the following

reasons: (a) because in the narrative statement of the testimony on behalf of the plaintiff it is said that "Written permission had been given by the Government to Mish-no to lease his own allotment and [he] had leased the same for the year 1912;" (b) because there is no denial or controversy as to the correctness of this statement; (c) because the court below in its opinion treated the matter as indisputable by stating, "Written permission was given him [Mish-no] by the Government to lease his allotment;" and (d) because the fact thus stated clearly refers to the authority and capacity provided for by the Act of 1910 and the regulations thereunder, that is, not to the authority of the Government to lease for the allottee, but to the right to give the allottee permission to lease his allotted land for himself as the result of a conclusion that he had capacity to do so.

As it results that Mish-no, the allottee, had by virtue of the statute of 1910 and resulting regulations the power to make the lease and to stipulate for the rental for which it provided, it follows, as the greater power includes the lesser, that the contract for the sale of the growing crop made with McClain was also within the statute and regulations and excluded from the prohibition of the Act of 1887.

For the reasons which we have stated we affirm the judgment of the court below which sustained a like conclusion, although we have not found it necessary to express any opinion as to the correctness of the reasoning by which the court below was controlled in its action.

*Judgment affirmed.*

Argument for the United States.

UNITED STATES *v.* PURCELL ENVELOPE  
COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 168. Argued March 10, 1919.—Decided March 31, 1919.

In answer to an advertisement under Rev. Stats., § 3709, claimant made the lowest bid for furnishing envelopes and wrappers to the Post Office Department, which was duly accepted. *Held*, that a contract was completed with the same force and effect as if a formal writing had been executed, and bond approved, by the Department, and that the Postmaster General or his successor had no discretion to revoke it. P. 317.

Charges embodied in requests for findings that such a contract was procured by one without financial standing, by imposing on the Postmaster General, *held* concluded by the judgment of the Court of Claims, sustaining the contract. P. 320.

Upon the Government's repudiation of such a contract before the time for performance has arrived, the measure of claimant's damages is the difference between the contract price and what would have been the cost of performance. *Id.*

This court will assume that evidence touching the amount of damages, including the expense necessary to make the contractor ready (as it was found to be) for performance of its contract, was duly considered by the Court of Claims. P. 321.

A contract to furnish and deliver promptly in quantities as ordered the envelopes and newspaper wrappers that the contractor may be called upon by the Post Office Department to furnish during four years, *construed* as entitling the contractor to supply all needed by the Department in that period. P. 322.

Motion to remand to the Court of Claims, for additional findings, denied. P. 323.

51 Ct. Clms. 211, affirmed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Frierson*, with whom



*Mr. Huston Thompson* and *Mr. J. Robt. Anderson* were on the briefs, for the United States:

The proposal by its terms contemplated only an agreement to enter into a contract. The contract itself, which was never executed on behalf of the Government, contained material matter not found in the proposal and acceptance, and was drawn to be executed by the Postmaster General, or, with his authority, by his Third Assistant, as required by law (19 Stat. 319, 355); and the bond required to be approved. Thus the case is clearly one of those where the agreement at most was upon the preliminaries to a contract which was never made. *Steamship Co. v. Swift*, 86 Maine, 248, 259, 261; *Ambler v. Whipple*, 20 Wall. 546, 556; *Commercial Telegram Co. v. Smith*, 47 Hun, 494, 501, 502. All contracts of a similar nature, since 1882, had been signed by the Postmaster General. In *Garfield v. United States*, 93 U. S. 242, the acceptance made the contract because under the law relating to the class of contracts there involved (to carry the mail) all the conditions were statutory, and these having been complied with, the action of the Postmaster General was merely ministerial.

The contract was for the supply of such envelopes and wrappers as the Department might call for. Nowhere is there expressed any obligation of the United States to order in any particular quantity. The obligation is simply to pay for the articles accepted and delivered under the contract, at the rates specified, with the additional obligation to accept and pay for stock on hand at the expiration of the term, not exceeding the Department's average requirements for fifteen days. *Merriam v. United States*, 107 U. S. 437, 439, 444; *Lobenstein v. United States*, 91 U. S. 324, 325.

*Mr. Arthur Black*, with whom *Mr. Stanton C. Peelle* and *Mr. C. F. R. Ogilby* were on the briefs, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action brought by appellee, the Purcell Envelope Company, which we shall designate as the Envelope Company, against the United States for damages for breach of an express contract. The Court of Claims rendered judgment for the Envelope Company for the sum of \$185,331.76. The United States appeals.

The findings of the court are quite voluminous, but it is only necessary to quote from them to the following effect: The Post Office Department, through the Postmaster General, James A. Gary, invited by advertisement bids "for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years, beginning on the first day of October, 1898." In pursuance of the invitation the Envelope Company submitted a bid in the manner and time specified in the advertisements of the Department.

The bid of the Envelope Company was accepted, and the following order entered: " . . . 2nd. That the contract for furnishing the envelopes called for by the advertisement and specifications referred to be awarded to the Purcell Envelope Co., of Holyoke, Mass., as the lowest bidder for the Government standard of paper, at the following prices a thousand, namely: . . ." The Department, before issuing the order, investigated the financial responsibility of the Envelope Company and considered it satisfactory.

April 21, 1898, the Department sent to the Envelope Company a "contract in quadruplicate," to be executed "at once" and returned to the Department. It was promptly returned as requested, signed by the president of the Envelope Company, with the Fidelity & Deposit Company of Maryland as surety in the sum of \$200,000.

April 27, 1898, the Department, by the Third Assistant Postmaster General, wrote to the Envelope Company as follows: "Your telegram of to-day is before me. As the Postmaster General has not yet signed the contract awarded by the Department to your company for furnishing stamped envelopes during the coming four years, but is holding the matter in abeyance, I have to request that you suspend all action under my letter of the 21st instant until further orders." The Envelope Company had, however, already made arrangements and contracts for the supplying to it of the necessary materials to fulfill the terms of the contract and was ready and willing at all times to fully perform it according to its terms. But neither the Postmaster General, nor any department or officer of the Government made any call or request upon the Envelope Company to furnish or deliver the envelopes or wrappers which were the subject-matter of the contract and the company's plant was kept intact ready for the performance of the contract, remaining idle.

July 22, 1898, the Department, through Postmaster General Smith, the immediate successor of Postmaster General Gary, the latter having gone out of office, revoked and canceled the contract and declared it to be null and void. Prior to doing so the Postmaster General instituted an investigation through one of his proper officers into the business and financial standing of the Envelope Company and the report thereunder was unfavorable to the company.

On or about July 22, 1898, the Envelope Company, having received information that the Postmaster General designed readvertising for proposals, sought by a bill filed in the Supreme Court of the District of Columbia to enjoin his action. The bill was dismissed August 15, 1898. The court, however, was of opinion that a contract had been executed but that the Envelope Company had an efficient remedy at law.

An offer was subsequently made by two other companies to supply the Post Office Department, upon an emergency contract, stamped envelopes and wrappers of the kinds and qualities the Government should need. The Department declared that an emergency existed under § 3709, Rev. Stats., accepted the offer and entered into a contract in accordance therewith.

The total cost to the Envelope Company for materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract would have been \$2,275,224.46. Deducting that sum from the contract price leaves a difference of \$185,331.76, which represents the profit the company would have made if it had been allowed to perform its contract. For that sum judgment was entered.

It will be observed from the recitation of the above facts that the case presents the propositions—First, was there a completed contract between the Envelope Company and the United States through its Postmaster General, and, second, if there was such contract, what is the measure of damages?

For an affirmative answer to the first proposition the Envelope Company relies on *Garfield v. United States*, 93 U. S. 242, and on that case the Court of Claims rested its decision and considered that the case was supported by other cases which were cited.

The case may be considered as the anticipation of this—its prototype. It passed upon a transaction of the Post Office Department and decided that a proposal in accordance with an advertisement by that department and the acceptance by it of the proposal “created a contract of the same force and effect as if a formal contract had been written out and signed by the parties.” And for this, it was said, many authorities were cited but it was considered so sound as to make unnecessary review of or comment upon them.



In resistance to the case as conclusive the Government urges the qualification that "the court did not say, or assume to say, that the acceptance of the proposal in *all* [italics counsel's] cases constituted a contract, but held that it did in the present [that] case," and that "there was a reason for the conclusion . . . which does not obtain in the case at bar." We cannot agree, and in answer to the first qualification it is only necessary to say that the court expressed a principle, not, of course, applicable to all cases, but applicable to like cases; and the present is a like case, identical in all that makes the principle applicable. And in so determining we answer the other objection of the Government that there were features in the law in the *Garfield Case* which do not obtain in the pending case, which constituted, if we understand counsel, the determination of the law against the act of the Postmaster General, his duty being merely ministerial. In the present case it is insisted his action is not so subordinate, that he has discretion, and when exercised it is paramount, his action being "quasi judicial," the contract not having been consummated, and that, therefore, it was within his power to review and set aside the decision of his predecessor. We are unable to concede the fact or the power asserted to be dependent upon it. There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (§ 3709, Rev. Stats.). By it the Government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own.

And, we repeat, there must be some point at which discretion ceases and obligation takes its place. That point is defined in the *Garfield Case*, and that the definition is applicable to the case at bar is illustrated by the findings of the Court of Claims. Upon the invitation, in accordance with law, of Postmaster General Gary, the Envelope Company and eleven others submitted bids. The Envelope Company was the lowest bidder and after the Company had been found upon investigation to be financially responsible its bid was accepted by entry of a formal order. The Company was then directed by the Department to execute the necessary contract in quadruplicate, which it did, and returned the contract to the Department with a surety whose responsibility was not questioned at any time nor was other security demanded, as it might have been. Postmaster General Gary went out of office, and his successor, either by inducement or upon his own resolution, revoked the contract and entered into a contract with other companies.

The record furnishes no justification of such action. There is no charge of default against the Envelope Company, no charge of inability to perform its contract, except in a particular which we shall hereafter mention. There is, it is true, a finding that Postmaster General Smith caused an investigation to be made of the financial standing of the Envelope Company and that the report thereunder was unfavorable to it. This is made a great deal of, and the fact that the contract was not signed nor the bond of the Envelope Company approved.

It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the Government contends they should have been, both by the terms of the contract and by a statute of the United States (28 Stat. 279). Their formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as was decided in the

*Garfield Case*, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it. Therefore, we do not follow with minute attention the argument of the Government in asserting the power of Postmaster General Smith to review and annul his predecessor's decision and that directed against the financial standing of the Envelope Company or the deception the Government asserts was practiced on Postmaster General Gary, which are made the subject of a request for findings. We may assume that the Court of Claims considered such charges and all other elements before concluding that the Envelope Company was entitled to recover. And we pass to the question of damages.

The Court of Claims decided that the measure of damages was the difference between the cost to the Envelope Company of materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract and what it would have made if it had been allowed to perform the contract. For this the court cited and relied upon *Roehm v. Horst*, 178 U. S. 1. It is there decided that the positive refusal to perform a contract is a breach of it, though the time for performance has not arrived, and that liability for the breach at once occurs. And it is further decided that the measure of damages is the difference between the contract price and the cost of performance. The case was replete in its review of prior cases. We may refer, however, to *United States v. Speed*, 8 Wall. 77, 85; *United States v. Behan*, 110 U. S. 338; *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264.

The Government does not attack the ruling but contends that it was not properly applied by the Court of Claims. The contention is rested on the following finding: "Claimant, contemplating making the envelopes under its said contract on the Wickham envelope machines, entered into negotiations with Horace J. Wickham whereby he prom-

ised to furnish claimant with a sufficient number of said machines on which to perform said (envelope) contract, and to have some of them ready before the beginning of the contract term, October 1, 1898."

The Government says of the Wickham machine that it made the envelope in one operation and that there is nothing to show that the Court of Claims, "as an incident to the cost of performance of the contract, considered the cost of the Wickham machines to appellee, although evidence of the same was submitted to it." And further, "if the court did find this item, and did consider it in arriving at the judgment, appellant is entitled to know this." Again, the Government contends that "so far as the findings are concerned it does not appear that the court allowed a reasonable deduction from the amount of the judgment by reason of appellee's release from care, trouble, risk, and responsibility attending the performance of the contract."

To the contentions there may be offset the decision of the Court of Claims. The court in its opinion expressly declares that the findings showed that the Envelope Company had fulfilled all the requirements of the Postmaster General and was ready and willing to furnish the envelopes and wrappers and recognized, we may assume, as grounds to be considered the elements the Government urges, so far as the court deemed them relevant or as having any probative strength, and its appreciation of them was obtained after protracted litigation involving two complete trials. We are not, therefore, disposed, on assertions so elusive or disputable of estimation as those of the Government, to reverse or modify the judgment.

There are other contentions of the Government which we may pass without comment except one which it submits upon a supplemental brief. It is addressed to the rule of damages adopted by the Court of Claims and urges that it was erroneous, based on the theory, as it is as-



serted, that the Envelope Company "had a contract which entitled it to furnish all the stamped envelopes and wrappers, of the sizes mentioned in the specification, which the Post Office Department *should need* [italics counsel's] during the four years' contract." This is denied, and it is said, quoting the contract, that the Envelope Company was only to "furnish and deliver promptly and in quantities as ordered," the envelopes and wrappers "that it may be called upon by the Post Office Department to furnish during the four years." It is difficult to treat the contention seriously. There is something surprising in the declaration that a contract to supply a great department of the Government with envelopes and newspaper wrappers which it might need for a period of four years at a cost of nearly two and one-half million dollars bore but scant obligation upon the part of the Government, or, to be precise and in the language of counsel, that the Envelope Company "could not have forced the giving of orders [by the Government] in excess of fifteen days' supply," and that this was the extent of the Government's obligation. And the further contention is, that the obligation being thus limited the damages the Envelope Company was entitled to were, at most, "the expenses, incurred in getting ready to perform the contract, and the profits it would have derived from the manufacture and sale" of such fifteen days' supply—that all else was expectation and cannot be capitalized by the Envelope Company and made the basis of profits and the responsibility of the Government. If the contention be more than dialectical we may express wonder that it was not given prominence in the Court of Claims and that in this court it was reserved for the afterthought of a supplemental brief. The further answer may be made that the contract of the Envelope Company was not so dependent as urged, and that its expectation was substantial is evidenced by the haste of the Department, after the revocation of the contract

313.

Syllabus.

with the Company, to declare an emergency in its need and enter into a contract with other companies.

On January 13th the Government made a motion to remand the case to the Court of Claims for additional findings. It was denied, but the right reserved to make such order if we should be so advised. Our attention is directed to the motion, which it is submitted should be considered on the merits. Again considering the motion and the case as it has been developed by argument of counsel, we think the motion should not be granted. The judgment of the Court of Claims is

*Affirmed.*

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

---

O'PRY, SOLE SURVIVING DESCENDANT AND  
SOLE HEIR OF KOUNS, ETC., ET AL. v. UNITED  
STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 216. Argued March 12, 1919.—Decided March 31, 1919.

The Act of July 2, 1864, c. 225, 13 Stat. 375, § 8, providing for the purchase for the United States at designated places of the products of States declared in insurrection, at not exceeding three-fourths their New York market value, was strictly in addition, as its title declared, to the Abandoned Property Act of 1863, and not an amendment of that act in the sense of § 162 of the Judicial Code, which gives jurisdiction to the Court of Claims over claims for property taken under the latter act and amendments and sold. P. 328.

The words "addition" and "amendment," as applied to statutes, may or may not have the same meaning, according to the purpose. P. 330.

51 Ct. Clms. 111, affirmed.

THE case is stated in the opinion.

*Mr. George A. King*, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for appellants.

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

MR. JUSTICE MCKENNA delivered the opinion of the court.

Section 162 of the Judicial Code, enacted March 3, 1911, provides as follows:

"The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June 1, 1865, under the provisions of the Act of Congress approved March 12, 1863, entitled 'An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

To avail herself of that section Isabel Kouns O'Pry alleged herself to be the sole surviving descendant and sole heir of John Kouns and brought this suit in the Court of Claims and for grounds thereof set forth the following facts: June 6, 1865, George L. Kouns and John Kouns were owners of 900 bales of cotton in two lots, of which 350 bales had been raised in Texas and 550 bales raised in Louisiana, and which after the cessation of

323.

Opinion of the Court.

hostilities were brought to New Orleans, June 6, 1865. The cotton was worth the sum of \$123,110.

On that date—June 6, 1865—the Act of Congress of July 2, 1864, c. 225, 13 Stat. 375, was in force, § 8 of which made it lawful for the Secretary of the Treasury with the approval of the President to authorize agents to purchase for the United States products of States declared in insurrection at designated places at such prices as might be agreed on with the seller, not exceeding three-fourths of the market value at the latest quotation in the city of New York. [The other provisions of the statute are not necessary to quote.]

The Act of July 2, 1864, was an amendment of the Act of March 12, 1863, entitled "An Act to provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States." (12 Stat. 820.)

In pursuance of the authority thus conferred the Secretary of the Treasury designated, among other cities, the city of New Orleans as a place of purchase and by a subsequent regulation directed that the agents appointed should receive all the cotton brought to the places designated as places of purchase and forthwith return to the seller three-fourths of the cotton or sell the same and retain out of the price thereof the difference between three-fourths of the market price and the full price thereof in the city of New York.

The agent appointed at New Orleans was Otis N. Cutler, and, on the arrival of the Kouns cotton, Cutler, as such agent, took possession of it and refused to release the same or to allow the owners to have any custody of it until they paid him one-fourth of its market value, being the sum of \$30,777.50. They paid the same under protest and it was placed in the Treasury of the United States, where it remains.

June 13, 1865, the President removed by proclamation



all restrictions upon intercourse and trade in products of States theretofore in insurrection and theretofore imposed in the territory *east* [italics ours] of the Mississippi River.

Thereafter the Kouns brought suit in a New York court against Cutler, which was removed to the Circuit Court of the United States for the Southern District of New York. The ground of Cutler's liability was alleged to be that his retention of the cotton and the exaction of money from them was unwarranted in law. They recovered judgment, but it was reversed by the Supreme Court of the United States (*Cutler v. Kouns*, 110 U. S. 720), and a new trial ordered. The suit was then dismissed.

The loyalty of the appellants is alleged. The Court of Claims dismissed the suit upon the demurrer of the Government. The court expressed the opinion that the claim did not come either "within the letter or the spirit of section 162 and the correlative statutes" and said: "At the time of this transaction the Kouns firm could not have made any disposal of the cotton in question had it not been for the provisions of said § 8, it being insurrectionary territory. That section prescribed the method and the conditions upon which it might be sold to the Government. The firm complied with those conditions and were doubtless glad to do so. We do not think where one only complies with the law in his transaction with the Government in the sale of cotton and receives all that the law allows him he has any valid claim under § 162 of the Judicial Code."

To fulfill the conditions of necessary parties on account of a doubt expressed by the court, there was an intervening petition by Charles Schneidau, assignee in bankruptcy of George L. Kouns. He adopted the petition of Isabel Kouns O'Pry "and jointly with her claims as therein prayed."

By order of the court the petition was amended and

323.

## Opinion of the Court.

Schneidau made a party claimant. The Government's demurrer to the petition as amended was sustained.

The case is not in broad compass, involving as it does only the relation and construction of statutes, but it is not easy to state it briefly. The petition recites, as we have seen, that the Kounsens in their lifetime brought suit against the agent of the Government, Cutler, who had seized the cotton in New Orleans and exacted payment from them of one-fourth of its value, granting them, however, the indulgence of paying it in three installments, respectively, June 12, June 15, and June 20, 1865. They charged Cutler with an unlawful seizure of the cotton and an unlawful exaction of the money. They obtained judgment in the Circuit Court, but the judgment was reversed by this court, 110 U. S. 720, and the following is, so far as material, a summary of the decision in the case:

In consequence of the Act of July 13, 1861, c. 3, 12 Stat. 255, it was lawful for the President to declare that the inhabitants of all States in rebellion against the United States were in a state of insurrection and that all commercial intercourse between them should cease and be unlawful so long as such condition of hostilities should continue. And August 16, 1861 (12 Stat. 1262) the States of Texas and Louisiana were declared to be in like condition and intercourse was forbidden between them and other States and parts of the United States. On April 26, 1862, the city of New Orleans, however, was occupied by the National forces and from that date was excepted from the operation of the Non-intercourse Act.

In this state of affairs Congress passed the Act of July 2, 1864, referred to in the petition, § 8 of which authorized the purchase of products of States declared in insurrection, which included the cotton in suit, and it was seized by virtue of such authority and the payments mentioned

exacted. It was contended that the cotton was exempt from such action by proclamation of the President of June 13, 1865. The contention was rejected, the cotton not being, as it was said, the product of territory *east* of the Mississippi River. It was, however, further urged that the President's proclamation of June 24, 1865, removed all restrictions as well from products of territory *west* of the Mississippi River. To this it was replied that upon the arrival of the cotton in New Orleans the rights of the Government to it became fixed and that at such time "one-fourth its value was as much the property of the government as the other three-fourths were the property of the defendants in error [the Kounsens]. No proclamation of the President could transfer the property of the government to them." It was hence decided that Cutler "had authority under the law and regulations of the Treasury Department to exact the money" which the suit was brought to recover. The defense of the statute of limitations was also sustained.

It is now asserted that notwithstanding such decision a claim has accrued to appellants by virtue of § 162 of the Judicial Code upon which they are entitled to recover. It will be observed by reference to that section that the Court of Claims is given jurisdiction of claims of those whose property was taken subsequent to June 1, 1865, under the provisions of the Act of March 12, 1863, "and Acts amendatory thereof," where the property was sold and its net proceeds were placed in the Treasury of the United States, and they are directed to be returned upon judgment rendered for the claimant. Appellants invoke the relief of these provisions by the contention that the cotton was taken under the provisions of the Act of March 12, 1863, because the Act of July 2, 1864, was an amendment to it, and that therefore the provision of § 162 of the Judicial Code is completely satisfied; in other words, that the money exacted was taken under the

323.

Opinion of the Court.

Act of March 12, 1863, "and Acts amendatory thereof." It is further contended that the conditions of § 162 being thus satisfied it is no answer to say that the seizure of the cotton was legal, it being the intention of Congress to declare that even in such case "the proceeds should be returned to the owners." And this contention counsel offers as an answer to *Cutler v. Kouns*, *supra*, and that Congress having by § 162 opened the doors of the Court of Claims "to claimants whose property had been seized after June 1, 1865, they can no longer be met with the defense that because the seizure was lawful when made, there can be no recovery on account of it. To sustain such a defense would be to 'keep the word of promise to the ear and break it to the hope.'" The Government opposes the contentions.

The Act of March 12, 1863, 12 Stat. 820, is entitled "An act to provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States." Its first section empowers the Secretary of the Treasury to appoint a special agent or special agents to collect and receive all abandoned or captured property in any State or Territory in insurrection, with an exception not material. Section 2 provides that the property so received or collected may be put to public use or sold at public auction and the proceeds thereof put into the Treasury of the United States. By § 3 a bond may be required of the agent or agents, who may be required to keep a book or books of accounts showing those from whom the property was received, the cost of transportation and proceeds of sale. It is further provided that the owner of the property may at any time within two years prefer a claim for the proceeds thereof and upon proof of loyalty receive the residue of the proceeds.

It will be observed that the act had a special purpose and was directed to the receipt and collection of property



in a particular condition, either abandoned or captured, recognizing, however, that there might be a just claim to it, but limiting the assertion of the claim to two years after the suppression of the rebellion.

The Act of July 2, 1864, 13 Stat. 375, describes itself to be "An Act in addition to the several Acts concerning Commercial Intercourse between loyal and insurrectionary States, and to provide for the Collection of captured and abandoned Property, and the Prevention of Frauds in States declared in Insurrection." The act, therefore, is declared to be an "addition" to preceding legislation, not an amendment to it. Is an addition the same as amendment? We are informed by the dictionaries that in addition the added parts remain independent and by amendment there is change and, it may be, improvement. The words and the processes they respectively describe may, however, be regarded as roughly or even accurately interchangeable and in investigating the meaning of legislation we must regard that possibility and resolve a doubt in the words by the purpose of the legislation. In other words, whatever the relation of the statutes, their purpose must be looked to to determine the application to them of § 162. So looked to, we agree with the Government that the purpose of the Act of July 2, 1864, demonstrates the contrary of the contention of appellants, and that the act was strictly in addition to prior acts and not an amendment of the Act of March 12, 1863, in the sense asserted. The latter act applied to a different situation. The cotton collected under it and to which its provisions applied might be the property of those innocent of disloyalty but victims of the disorder and violence of the times, and the Government constituted itself a trustee for them and gave them the opportunity, at any time within two years after the suppression of the rebellion, to establish their right to the proceeds, requiring of them nothing but proof of loyalty and ownership. *United States*

323.

Syllabus.

v. *Anderson*, 9 Wall. 56, 65; *United States v. Padelford*, 9 Wall. 531; *United States v. Klein*, 13 Wall. 128.

The cotton in the present case, unlike that to which the Act of March 12, 1863, applied, was the subject of a business enterprise and taken to a market opened by the United States forces upon the conditions expressed in the Act of July 2, 1864—that is, that its owners should turn over to the Government one-fourth of the cotton, or its money equivalent, which would immediately become the property of the United States. *Cutler v. Kouns*, *supra*. The conditions in the two situations, therefore, are in broad contrast and it could not have been the intention of § 162 to confound the conditions. The section did no more than remove the bar of limitation of time to sue that was given by the Act of March 12, 1863. It did not intend to transfer property that had become that of the United States.

*Judgment affirmed.*

---

LANE, SECRETARY OF THE INTERIOR, v. DAR-  
LINGTON ET AL., TRUSTEES, ESTATE OF  
CLAPP.

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

No. 219. Argued March 12, 1919.—Decided March 31, 1919.

An official resurvey of the boundary of a patented Mexican grant, for the purpose of defining contiguous public land, does not operate as an adjudication against the grant owner or otherwise so affect his rights as to afford him ground for an injunction suit against the Secretary of the Interior.

46 App. D. C. 465, reversed.

THE case is stated in the opinion.

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

*Mr. F. W. Clements*, with whom *Mr. Alex. Britton* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellees to restrain the Secretary of the Interior from carrying out a resurvey of a part of the boundary of a Mexican grant. The plaintiffs hold the legal title to the grant and the adjoining land belongs to the United States. The boundary was surveyed by one Hancock and on June 22, 1872, the grant was patented. A bill to set aside the patent was dismissed in *United States v. Hancock*, 133 U. S. 193, (1890.) Doubts having arisen as to where a portion of the Hancock line on the northern boundary ran, the Land Department employed one Perrin to make a resurvey. It found and reestablished the original monuments except between Hancock's stations 20 and 25, and attempted to fix the line between these also. In 1901 the resurvey was approved by the Commissioner of the General Land Office, but in 1902 on an appeal, the Secretary of the Interior reversed the approval and ordered a new survey of the line between stations 20 and 25. This was made by one Sickler and was approved by the Secretary of the Interior on February 28, 1907. On September 5, 1913, the Secretary vacated the Sickler survey and ordered the reestablishment of the Perrin line. The present bill to restrain the carrying out of this order was dismissed on motion by the Supreme Court of the District of Columbia but the decree was reversed and an injunction ordered by the Court of Appeals.

The bill, of course, is not a bill against the United States brought on the ground that it is claiming land

331.

Opinion of the Court.

belonging to the plaintiffs. The bill does not seek to try the title. It is brought on the ground that the power of the Secretary is exhausted, and it may be doubted whether that is a matter with which the plaintiffs have anything to do. But however that may be, the whole proceeding on behalf of the United States is simply an effort to fix the boundaries of its own land. It is recognized, it was recognized when the Perrin survey was set aside, that the United States has no authority to change the Hancock line; but it has a right for its own purposes to try to find out where that line runs and the fact that its conclusions may differ from that of the owners of the Hancock grant does not diminish that right. So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reestablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court." *Litchfield v. The Register*, 9 Wall. 575, 578. *Minnesota v. Lane*, 247 U. S. 243, 250.

We know of no warrant for the notion that the power is exhausted by a single exercise of it. Repeated retracement of lines, although, of course, exceptions, are well known, we believe, to the Land Department, as, with the limitation that we have expressed, there is no reason why they should not be. The case is different when the act of the Secretary is directed to a third person, as for instance, the approval of a map of the location of a railroad over public lands, where the approval operates as a



grant. *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165. See *New Orleans v. Paine*, 147 U. S. 261, 267. But this retracing of the Hancock line is not directed to the plaintiffs, but, as we have said, is an investigation by the United States on its own account. The plaintiffs gained no rights by the approval of the Sickler line; they lose none by the substitution of the Perrin line. These acts were neither adjudications nor agreements. The plaintiffs' rights were fixed before. Even after land had been sold with reference to a survey and plat that had been approved, this Court refused to restrain the Secretary from making a new survey in *Kirwan v. Murphy*, 189 U. S. 35. See *Lane v. United States ex rel. Mickadiet*, 241 U. S. 201, 208. *Northern Pacific Ry. Co. v. United States*, 227 U. S. 355.

We are of opinion that the decision of the Court of Appeals was wrong.

*Decree of the Court of Appeals reversed, with directions to affirm the decree of the Supreme Court dismissing the bill.*

---

CAPITOL TRANSPORTATION COMPANY v.  
CAMBRIA STEEL COMPANY.

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

No. 231. Argued March 14, 17, 1919.—Decided March 31, 1919.

An owner who by personal contract has warranted the seaworthiness of a vessel, and is also privy to and has knowledge of her unseaworthiness, to which is due a loss of cargo, is not within the Limited Liability Act of June 26, 1884.

Concurrent findings of two lower courts accepted.

244 Fed. Rep. 95, affirmed.

THE case is stated in the opinion.

*Mr. J. Parker Kirlin*, with whom *Mr. George L. Canfield* was on the briefs, for petitioner.

*Mr. Francis S. Laws*, with whom *Mr. Sherwin A. Hill* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition to limit liability for the loss of cargo on *The Benjamin Noble*, brought by the present petitioner after libels *in personam* had been filed in different districts by the cargo owners, the Cambria Steel Company. The right was denied by the District Court on the ground that the vessel was unseaworthy with the privity and knowledge of the owner when she sailed and that the owner had made a personal contract by which it warranted seaworthiness. 232 Fed. Rep. 382. The findings, rulings and decree of the District Court were affirmed by the Circuit Court of Appeals. 244 Fed. Rep. 95. 156 C. C. A. 523. Sub nom. *The Benjamin Noble*. A writ of certiorari was granted before *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, and *Pendleton v. Benner Line*, 246 U. S. 353, were decided but when they were before this Court. 245 U. S. 648. See 242 U. S. 638. 241 U. S. 677. The findings of fact are contested here, and because of some expressions it is suggested that the Circuit Court of Appeals is to be taken not to have made findings of its own upon the facts. On the contrary it appears to us to have reconsidered the evidence, giving to the findings below only the weight usually accorded to those of the tribunal that sees the witnesses and we see no sufficient reason for departing from the general rule where the two lower courts have concurred. 248 U. S. 139, 145.

We are urged to reconsider the question whether the limitation of liability is not made independent of the "privity or knowledge" of the owner by the omission of those words from the Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57, coupled with the repeal, in § 30, of all laws and parts of laws in conflict with the provisions of that act. It is argued that the effect of the omission and the repealing section is to do away with the former qualification in Rev. Stats., § 4283, and the argument is fortified by a reference to the history of the act, which shows that some of the Senators thought it important to make the limitation absolute. On the other hand in *Butler v. Boston & Savannah S. S. Co.*, 130 U. S. 527, 553, 554, it was said by Mr. Justice Bradley that possibly the later act was intended to remove all doubt as to the application of the law to all cases of loss "caused without the privity or knowledge of the owner." We find no different expression in *O'Brien v. Miller*, 168 U. S. 287, 303. Mr. Justice Bradley's opinion was adopted after considerable discussion in *Richardson v. Harmon*, 222 U. S. 96, 106, and *Richardson v. Harmon* was accepted as establishing that the statute does not limit liability for the personal acts of the owners done with knowledge, in the late case of *Pendleton v. Benner Line*, 246 U. S. 353, 356. In that case the argument that the limitation of the exoneration to acts &c. done or incurred without the privity or knowledge of the owner was repealed by the Act of 1884, was presented in the fullest way.

We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. But in this case in addition to the finding of the owner's privity to the unseaworthiness was the further finding that the

334.

Syllabus.

contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided. *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 149. Upon the whole case we cannot escape from the conclusion that the decree must be affirmed.

*Decree affirmed.*

---

## UNION OIL COMPANY OF CALIFORNIA v. SMITH.

### ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 8. Submitted November 13, 1918.—Decided March 31, 1919.

In order to create valid rights or initiate a title as against the United States under the mining laws, a discovery of mineral within the location is essential. P. 346.

For the purpose of exploring for mineral, a qualified person who has entered peaceably upon vacant public land is treated as a licensee or tenant at will of the United States and allowed, as of necessity, a right of possession, the extent of which, *i. e.*, whether confined to *pedis possessio* or coterminous with the boundaries of his inchoate location,—is not here decided. *Id.*

The right of possession before discovery may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral. P. 348.

Discovery may follow the marking and recording of a mining claim, and perfect the location as of the time of discovery, provided no rights of third parties have intervened. P. 347.

The terms “assessments,” “annual assessment labor,” and “assessment work,” in acts of Congress as in the practice of miners, have nothing to do with the locating or holding of a claim before discovery, but refer to the annual labor required by Rev. Stats., § 2324,



as a condition subsequent, to preserve the exclusive right of possession of a perfected location, based upon prior discovery. P. 350.

The Act of February 12, 1903, c. 548, 32 Stat. 825, providing that the annual assessment labor may be done upon any one of a group of contiguous oil-land locations not exceeding five, in the same ownership, provided it will tend to their development or to determine their oil-bearing character, refers to locations based each on a discovery of oil within its limits, and evinces no purpose to break down in any way the distinction between the mere *pedis possessio* of the prospector before discovery and the rights resulting from discovery and perfected location. P. 351.

Where two contiguous tracts are claimed by the same party under oil-land locations without discovery of mineral, drilling a well on one of them, for the purpose of discovering oil, even though it tends to determine the oil-bearing character of the other also, will not avail to hold the other against an intervening qualified claimant who enters upon it peaceably and diligently prosecutes discovery work on his own account. *Id.*

166 California, 217, affirmed.

THE case is stated in the opinion.

*Mr. Lewis W. Andrews* and *Mr. Thomas O. Toland* for plaintiff in error. *Mr. A. V. Andrews* was on the brief:

The Act of February 12, 1903, is remedial and should be liberally construed.

It was passed to relax the stringent rule of interpretation respecting discovery (*Miller v. Chrisman*, 140 California, 440), and not permitting claims to be held by annual labor, which was so burdensome and expensive as applied to oil lands. Its purpose was to encourage the oil miner to go out upon lands recognized as oil lands, locate his five or less claims by posting his notices, setting his monuments and recording his notices, and thereby become entitled to sink a well upon one of those claims without starting in upon the others, and to be allowed to apply the \$500.00 worth of work upon that one claim for the benefit of the five, provided, that there is but one

337.

Argument for Plaintiff in Error.

ownership of the five and that they are so situated that the sinking of the well upon one will tend to develop, or to prove the oil-bearing character of the remaining claims of his group. There was no need of remedial legislation in cases where discovery had been made on the claims, because such a discovery itself establishes their oil-bearing character. The mining law requires assessment work as an evidence of good faith. *Chambers v. Harrington*, 111 U. S. 350, 353; *McCulloch v. Murphy*, 125 Fed. Rep. 147, 149. Work done for discovering minerals or in prospecting or developing the claim may be included in the expenditure required as a condition to acquiring patent. It is doubtful if there was any authority in the statute for extending the requirement of annual work to placer claims. *Morrison's Mining Rights*, 14th ed., 134. For placer locations, such work need not be done within the boundaries of the claim. *Lindley on Mines*, 2nd ed., p. 1174; *Gordon Gulch Bar Placer*, 38 L. D. 28, 32.

Oil, except in rare cases, lies in stratified formations, often at great depth, requiring vast effort and expenditure and much hazard to reach the deposit and determine its nature and permanency. *McLemore v. Express Oil Co.*, 158 California, 561. In this respect it is like blind lodes, which gave occasion to the tunnel site laws, and oil locations should be treated as leniently as tunnel locations—hence this act. The term “mining claim” is used here in the abstract, synonymously with location. “Annual assessment labor” done upon one of five or fewer contiguous locations, where it would tend to the development or to determine the oil-bearing character of such contiguous locations, applies to work upon unperfected as well as perfected oil locations.

The great purpose was to eliminate the expense of separate discovery work simultaneously upon five or less contiguous locations, by centralizing the work upon one,

when by that the oil-bearing character of the other claims could be effectively determined. The unit of the group contemplated is "oil land . . . located as placer mining claims." Such a unit would not necessarily be a perfected claim and, in view of the subsequent language of the act, to imply that it must be such, with discovery thereon, before the act could be applicable, would be to import something into the act which is not contained in its terms.

We submit that the full import of this language is, that the lands shall be oil lands only in the sense in which they are pleaded in the respondent's complaint and in the appellant's amended answer in this action, to be oil lands; that is, lands adjacent to lands which are demonstrated to be oil lands; recognized to be oil lands; in the vicinity of which are outcroppings and evidence of those geological formations which are oil-bearing in their character, and so situated that those who are familiar with that department of geology are able to say, as business men, that probably, if wells shall be sunk in such lands, oil may, as a good business venture, be produced therefrom.

The word "located" means simply delimited by having the boundaries ascertained and monumented on the ground, identified by having a notice of the location posted upon the land, and further proclaimed to the public by having such notice of location recorded in the manner customary under the rules for recording mining claims.

It has been long recognized, particularly under the decisions in California, commencing with *Miller v. Chrisman*, that a claim so located, whether discovery shall have been made thereon or not, is property and the subject of conveyance and the passing of rights therein from one owner to another.

Two or more claims may be actually developed by one

337.

Argument for Plaintiff in Error.

well. And, owing to geological conditions, a well on one may determine the oil character of the other; under the recent decisions of the Land Department it may even amount to a discovery of oil in the other.

Plaintiff in error was not only in possession of the Rawley claim by its possession and sinking of well on the contiguous Sampson claim, but at the time of the pretended location of the alleged Schley claim by Smith and others, and for more than two months prior thereto, was in the actual possession and occupancy of the Rawley and actively engaged in its development through lessees and their assigns, by the work they had begun in November or December, 1909; by their continuation thereof; by their expending money in good faith in shipping tools and machinery by rail and wagon road to the claim, and by their every act, all of which were indicative of possession and development in good faith. A party may be in legal possession, though not personally on the land at the time of a stranger's entry. *Davis v. Dennis*, 43 Washington, 54. And see *Weed v. Snook*, 144 California, 439, 445; *Phillips v. Brill*, 17 Wyoming, 26.

Roadways are necessities, and when such have been constructed on the claim, for the manifest purpose of assisting in the development of the mine, such as transporting material and machinery to the mine, it is a legitimate expenditure. *Doherty v. Morris*, 17 Colorado, 105; *Sexton v. Washington Co.*, 55 Washington, 380; *Emily Lode*, 6 L. D. 220, 222.

Counsel further claimed that in the years 1909 and 1910 more than \$2400.00 worth of actual improvement was done by defendant through its lessees and sub-lessees upon the Rawley claim and that the earliest work claimed by the plaintiff was not only later, but, for several reasons assigned, could not enure to his benefit.

No appearance for defendant in error.



MR. JUSTICE PITNEY delivered the opinion of the court.

This case presents, for the first time in this court, the question of the meaning and effect of an Act of Congress approved February 12, 1903, c. 548, 32 Stat. 825, which reads as follows:

"An Act Defining what shall constitute and providing for assessments on oil mining claims.

"*Be it Enacted, etc.*, That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: *Provided*, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims."

Smith, now defendant in error, being in possession of a placer mining claim known as the "Schley claim," comprising a tract of 160 acres of land in the State of California, part of the public domain of the United States, under a location notice posted and recorded by himself and seven other qualified persons who afterwards conveyed their interests to him, and being engaged in the diligent prosecution of work for the purpose of finding oil upon the claim, brought an action in a California state court to determine adverse claims, making the Union Oil Company of California defendant.

Defendant asserted a superior right of possession under a mineral land location of the same ground under the name of the "Rawley claim," made by eight qualified associates in the year 1883, many years before plaintiff's location. No discovery of oil or other minerals had ever been made upon the ground by either of the claimants or by any other person. But at the time plaintiff and his associates located it defendant, although not then

337.

Opinion of the Court.

actually occupying this ground, was in actual occupation of a contiguous claim of 160 acres known as the "Sampson claim" upon which it then was drilling and afterwards continued to drill a well for the discovery of oil, the well being 1,000 feet distant from the boundary line of the disputed claim. Defendant claimed the right of possession of five contiguous claims, including the "Rawley-Schley" and the "Sampson," under locations regularly made in all respects save discovery. Defendant pleaded and proved these facts, and also introduced evidence warranting a finding that its boring work on the "Sampson claim" tended to determine the oil-bearing character of the "Rawley-Schley claim."

It was and is defendant's contention that by virtue of the Act of 1903 one who has acquired the possessory rights of locators before discovery in five contiguous claims taken up as oil-bearing lands may preserve and maintain an inchoate right to all of them by means of a continuous actual occupation of one, coupled with diligent prosecution in good faith of a sufficient amount of discovery work thereon, provided such work tends also to determine the oil-bearing character of the other claims.

The superior court of the county and, on appeal, the Supreme Court of the State overruled this contention and gave judgment in favor of the plaintiff (166 California 217), and the case was brought here by writ of error under § 237, Judicial Code, prior to the amendment of September 6, 1916, c. 448, 39 Stat. 726.

It will be observed that both parties are in the position of prospectors or explorers upon the public domain—locators without discovery; and, in order to appreciate correctly what effect, if any, the Act of 1903 has upon their rights, it is important to have in mind what is meant by "annual assessment labor," and the part it plays in the operations of miners under the mining laws of the United States.

By § 2319, Rev. Stats., all valuable mineral deposits in lands belonging to the United States are declared to be "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States." By § 2320 it is declared: "No location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located." By § 2322 locators of mining locations on the public domain "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins," etc. By § 2324: "The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. . . . On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year

337.

Opinion of the Court.

thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." Section 2325 and sections following permit a patent to be obtained for a mineral claim, and regulate the procedure. By § 2325 the applicant for patent is required (among other things) to file "a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors"; and, upon his compliance with this and other requirements, if after publication of notice for sixty days no adverse claim is filed, or (§ 2326) such claim, having been filed, has proceeded to adjudication in a court of competent jurisdiction with result favorable to the applicant, upon a payment of five dollars per acre and proper fees a patent is issued for the claim or such portion thereof as has been decided to be in the rightful possession of the applicant. By § 2329 placer claims are made subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims; the purchase price of placer claims being fixed, by § 2333, at two dollars and fifty cents per acre.

Under this legislation petroleum for many years was regarded as a mineral, although not specially mentioned as such, and claims to oil lands were disposed of by the Land Department under the provisions of law relating to placer claims, with a single exception afterwards overruled. *Union Oil Co.*, 23 L. D. 222, decided August 27,



1896; *Union Oil Co.*, (*On Review*), 25 L. D. 351, decided November 6, 1897. It was in order to obviate the effect of the former of these two decisions that Congress passed the Act of February 11, 1897, c. 216, 29 Stat. 526, which declared: "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims"; with a proviso saving petroleum land theretofore filed upon, claimed or improved as mineral but not yet patented. See House Rep. No. 2655, 54th Cong., 2d sess.; 29 Cong. Rec., Pt. 2, p. 1409; *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 678.

Aside from the suggested effect of the Act of 1903, it is clear that in order to create valid rights or initiate a title as against the United States a discovery of mineral is essential. Section 2320, Rev. Stats.; *Waskey v. Hammer*, 223 U. S. 85, 90. Nevertheless, § 2319 extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discov-

337.

Opinion of the Court.

ery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent, and clandestine intrusions upon his possession. *Zollars v. Evans*, 5 Fed. Rep. 172, 173; *Crossman v. Pendery*, 8 Fed. Rep. 693, 694; *Johanson v. White*, 160 Fed. Rep. 901; *Hanson v. Craig*, 161 Fed. Rep. 861, 863; 170 Fed. Rep. 62, 65; *Gemmell v. Swain*, 28 Montana, 331, 335; *New England &c. Oil Co. v. Congdon*, 152 California, 211; *Whiting v. Straup*, 17 Wyoming, 1, 19, 23; *Phillips v. Brill*, 17 Wyoming, 26, 38.<sup>1</sup>

And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential in the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened. *Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co.*, 196 U. S. 337, 345, 348-352; *Weed v. Snook*, 144 California 439, 443.

In the California courts the right of a locator before discovery while in possession of his claim and prosecuting exploration work is recognized as a substantial interest, extending not only as far as the *pedis possessio* but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against

---

<sup>1</sup> Two recent acts of Congress contain recognition of the status of a *bona fide* occupant of oil-bearing lands in the public domain prior to discovery. Act of June 25, 1910 (36 Stat. 847, c. 421, § 2, first proviso); Act of March 2, 1911 (36 Stat. 1015, c. 201). See *Consolidated Mutual Oil Co. v. United States*, 245 Fed. Rep. 521, 524, 527, 529.

violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others and diligently and in good faith prosecutes the work of endeavoring to discover mineral thereon. *Miller v. Chrisman*, 140 California, 440, 447 (case affirmed 197 U. S. 313); *Weed v. Snook*, *ubi supra*; *Merced Oil Mining Co. v. Patterson*, 153 California, 624, 625; 162 California, 358, 361; *McLemore v. Express Oil Co.*, 158 California, 559, 562.

To what extent the possessory right of an explorer before discovery is to be deduced from the invitation extended in § 2319, to what extent it is to be regarded as a local regulation of the kind recognized by that section and the following ones, and to what extent it derives force from the authority of the mining States to regulate the possession of the public lands in the interest of peace and good order, are questions with which we are not now concerned. Nor need we stop to inquire whether the right is limited to the ground actually occupied in the process of exploration, or extends to the limits of the claim. These questions and others that suggest themselves are not raised by the present record, which concerns itself solely with the rights asserted by the defendant under the Act of 1903. Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral.

But, by the provisions of the Revised Statutes above cited, a discovery of mineral by a qualified locator upon unappropriated public land initiates rights much more substantial as against the United States and all the world. If he locates, marks, and records his claim in accordance with § 2324 and the pertinent local laws and regulations, he has, by the terms of § 2322, an exclusive right of pos-

337.

Opinion of the Court.

session to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent or seeking to obtain title to the fee; subject, however, to the performance of the annual labor specified in § 2324, for upon his failure to do this the claim is open to relocation by others at any time before resumption of work upon it by the original locator.

If not content to rest upon the right conferred by § 2322, the qualified locator may obtain a patent for his claim by complying with the conditions prescribed by §§ 2325 and 2326.

But, even without patent, the possessory right of a qualified locator after discovery of minerals upon the claim is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States (Rev. Stats., § 910), and it is capable of transfer by conveyance, inheritance, or devise. *Forbes v. Gracey*, 94 U. S. 762, 763, 767; *Belk v. Meagher*, 104 U. S. 279, 283, 285; *Del Monte Mining Co. v. Last Chance Mining Co.*, 171 U. S. 55, 78; *Elder v. Wood*, 208 U. S. 226, 232.

Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by non-performance of the annual labor required by § 2324. *Belk v. Meagher*, 104 U. S. 279, 283, 284; *Black v. Elkhorn Mining Co.*, 163 U. S. 445, 450; *Farrell v. Lockhart*, 210 U. S. 142, 147; *Bradford v. Morrison*, 212 U. S. 389, 394.

After this brief review of the mining laws there is little danger of mistaking the true intent and meaning of the Act of Congress of February 12, 1903. Title thirty-two, chapter six, Revised Statutes, therein referred to, embraces the sections we have cited. And



it is not to be doubted that the terms "assessments" and "annual assessment labor" refer to the annual labor required by § 2324, that being commonly called by miners the "annual assessment" or the "assessment work," and so described in many judicial opinions and in at least two acts of Congress, passed respectively November 3, 1893, c. 12, 28 Stat. 6, and July 2, 1898, c. 563, 30 Stat. 651. See *El Paso Brick Co. v. McKnight*, 233 U. S. 250, 255, 256, 258.

And it is important to observe that in these acts of Congress, as in the practice of miners, "assessment work" had nothing to do with locating or holding a claim before discovery. On the contrary it was the condition subsequent prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a valid mineral land location upon which discovery had been made. *McLemore v. Express Oil Co.*, 158 California, 559, 563. Hence the declaration in the Act of 1903 that where oil lands are located as placer mining claims "the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person," indicates simply the legislative purpose that the necessary assessment work if done upon one of the group should have the same effect as if properly distributed among the several claims; that is to say, the effect of preserving the exclusive right of possession and enjoyment conferred by § 2322 with respect to unpatented claims based upon a previous discovery of oil.

"Group assessment work" did not originate with the Act of 1903. From an early period the economy of operating contiguous mines or claims by a single system was recognized. In § 5 of the Act of May 10, 1872, c. 152, 17 Stat. 92, now § 2324, Rev. Stats., it was provided with respect to the annual labor that "where such claims are held in common such expenditure may be made upon any one claim." Questions as to the precise meaning of

337.

Opinion of the Court.

this naturally arose, and it was determined that it applied only to contiguous claims, and that the work must be done for the common benefit or for the purpose of developing all the claims. *Smelting Co. v. Kemp*, 104 U. S. 636, 655; *Jackson v. Roby*, 109 U. S. 440, 444; *Chambers v. Harrington*, 111 U. S. 350, 353; *Anvil Hydraulic Co. v. Code*, 182 Fed. Rep. 205, 206.

It is plain that the draftsman of the Act of 1903 had this settled rule in mind, for the bill as introduced, with enacting clause in the same form as finally passed, had this proviso: "*Provided*, That said labor will benefit or tend to the development of such contiguous claims." By committee amendment in the House the words "benefit or" were struck out, and after the word "development" the following were inserted: "or to determine the oil-bearing character," presumably regarded as peculiarly appropriate to oil lands. House Rep. No. 2657, 57th Cong., 1st sess.; Senate Rep. No. 2756, 57th Cong., 2d sess.; 36 Cong. Rec., Pt. 1, p. 83; Pt. 2, pp. 1561, 1682. The committee report contains this explanation of the object of the bill: "The law now requires that upon each mining claim there shall be performed each and every year at least \$100 worth of work. The courts have held with reference to lode-mining claims that this annual labor may be done upon any one of a group of mining claims, provided the said work tends to benefit the entire group, but the Land Department of the Government seems to be of opinion that the annual labor upon placer-mining claims must be done upon each of said claims. There is good reason for this holding when applied to the ordinary placer claim containing deposits of gold, because in such case the gold lies upon the surface or near the surface, and general development work being upon and near the surface does not tend to benefit other claims than the one upon which the work is actually done, but in the case of oil-mining claims the situation is different. It is neces-

sary to bore wells for great depths in order to determine whether or not oil exists in paying quantities. These wells are expensive, and it is the opinion of the committee that the industry itself will be more benefited by permitting the owner to spend his means in sinking a single well in order to demonstrate the possibilities of the property than it would to require him to distribute his means among several claims. In other words, it is better that \$500 should be spent in one place until the character of the oil deposit has been demonstrated than it is to require the same amount of money to be spent in five different places."

The argument for plaintiff in error, while conceding the general rule to have been established that assessment work could avail nothing except when performed upon or for the benefit of a claim in which a discovery of mineral already had been made, insists that the difficulty and great expense attendant upon the sinking of wells to make discovery of oil made it evident that the application of the doctrine was a great burden upon the oil miner; and that this, having been brought to the attention of Congress, was the moving cause of the enactment of the Act of February 12, 1903. This contention finds no support in the enacting clause, and but little in the proviso. It gives to the somewhat indefinite language of the proviso an effect that would greatly enlarge instead of confining the meaning of what precedes, and would render the statute a radical departure from the previous policy of the mining laws. The legislative history of the act, as well as its phraseology, fails to support the contention.

Nor is there great force in the suggestion that with respect to oil claims upon which discovery already had been made there was no need to encourage the doing of work tending to determine their oil-bearing character, because this would already have been established by the antecedent discovery. It hardly is necessary to say that

337.

Opinion of the Court.

the discovery of oil upon several contiguous claims does not render it wholly unimportant that assessment work thereafter done by the common owner upon one of the claims, in order to be credited to him as if it had been distributed among the several claims, shall be of general benefit to the group. This is the object of the act, and except as the proviso specifically declares "determination of oil-bearing character" to be of benefit to the contiguous claims, little is added to the effect of § 2324, Rev. Stats., respecting group assessment work. But we cannot declare a determination of the "oil-bearing character" of a claim upon which oil already has been discovered to be a matter so idle as to require us to seek a strained construction of the statute.

In our opinion the act shows no purpose to dispense with discovery as an essential of a valid oil location or to break down in anywise the recognized distinction between the *pedis possessio* of a prospector doing work for the purpose of discovering oil and the more substantial right of possession of one who has made a discovery and performs annual development work to maintain his right to the mineral until patent is obtained. Hence the Supreme Court of California did not err in overruling the contention that by force of the act discovery work upon the "Sampson claim" having a tendency to determine the oil-bearing character of the contiguous "Rawley-Schley claim" conferred upon plaintiff in error inchoate rights in the latter claim, of which it was not in possession and upon which it had made no discovery.

*Judgment affirmed.*



UNITED STATES *v.* UNION PACIFIC RAILROAD  
COMPANY.

## APPEAL FROM THE COURT OF CLAIMS.

No. 199. Argued January 30, 1919.—Decided March 31, 1919.

The term "troops of the United States," as used in land grant acts, and in the agreement of the Union Pacific Company, in relation to transportation for the Government, *held* not to embrace any of the following classes of persons, when traveling separately and not as part of a moving body or detachment of soldiers, *viz*: Discharged soldiers, discharged military prisoners, and rejected applicants for enlistment; applicants for enlistment, provisionally accepted, but subject to final examination and not sworn in; retired enlisted men; and furloughed soldiers *en route* back to their stations.

52 Ct. Clms. 226, affirmed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Brown*, with whom *Mr. Charles H. Weston* was on the brief, for the United States.

*Mr. William R. Harr*, with whom *Mr. Charles H. Bates* was on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Most of the acts of Congress which granted lands in aid of railroads provide that they shall be "free from toll or other charge upon the transportation of any property or troops of the United States."<sup>1</sup> This clause was

---

<sup>1</sup> Circular No. 16, Quartermaster General's Office, 1912, entitled "Schedule of Land-Grant and Bond-Aided Railroads of the United States," p. 28, *et seq.* Act of September 20, 1850, c. 61, § 4, 9 Stat. 466,

construed in *Lake Superior & Mississippi R. R. Co. v. United States*, 93 U. S. 442, as conferring only the free use of the roadbed as a highway. Since then, under appropriate legislation, payment has come to be made by the Government for the transportation of property and troops at rates equal to fifty per cent. of those charged private parties. The Union Pacific, having entered into an agreement to that effect, claimed payment at the full rate for certain persons carried as passengers upon the request of the Government. The Auditor of the War Department refused to allow payment for these passengers at more than half-fares, on the ground that they were within the provision, for transporting "troops of the United States"; and his ruling was sustained by the Comptroller of the Treasury. (21 Decisions of the Comptroller, 651.) Thereupon this suit was brought in the Court of Claims for the amount disallowed; and judgment was rendered for the railroad. 52 Ct. Clms. 226. The case is here on appeal. The questions presented are

---

467. A few of the acts granting lands in aid of railroads provided that the grant is "subject to such regulations as Congress may impose restricting the charges for . . . government transportation." Act of July 27, 1866, c. 278, § 11, 14 Stat. 292, 297. The Army Appropriation Acts make provision for payment under both classes of statutes, payment in neither case to exceed fifty per cent. of the rates charged private parties. See Act of July 16, 1892, c. 195, 27 Stat. 174, 180; Act of March 2, 1913, c. 93, 37 Stat. 704, 715. Fifty per cent. has been adopted by the War Department as the standard rate of payment. The Union Pacific on May 15, and June 3, 1911, became a party to the so-called "Land-Grant Equalization Agreements" entered into by the Quartermaster General of the United States with most of the important roads of the United States in other than New England or Trunk Line territories. By these agreements, the several roads consented (with certain exceptions) to accept the same net rate on both passenger and freight traffic via their respective lines as are effective via land-grant lines. "Freight and Passenger Land-Grant Equalization Agreements and List of Carriers Participating," Circular No. 6, Office of Chief, Quartermaster Corps, 1913.

whether any of the following classes of persons are to be deemed "troops of the United States" within the provision of the land-grant acts:

1. Discharged soldiers; that is, former enlisted men of the Army en route to their homes after discharge.

2. Discharged military prisoners; that is, discharged enlisted men en route to their homes or elsewhere after serving sentence as military prisoners.

3. Rejected applicants for enlistment in the Army; that is, men who having passed the required tests at the recruiting stations and having been forwarded to the recruiting depots for final examination and enlistment, were there rejected and were being returned to the recruiting stations from which they came.

4. Accepted applicants for enlistment in the Army; that is, applicants examined at general recruiting stations, found mentally, morally, and physically fit for service, and being forwarded to recruiting depots for final examination and enlistment.

5. Retired soldiers; that is, enlisted men of the Army en route to their homes after retirement.

6. Furloughed soldiers; that is, enlisted men of the Army on furlough en route back to their proper stations.

None of these persons travelled as part of a moving army, troop, or body of soldiers. That is, they travelled separately as individuals, and (with few exceptions) each on a different day and to widely scattered destinations. Under recent acts of Congress and Army Regulations,<sup>1</sup> the transportation of persons of some of these classes is paid for by the Government.

In defining the transportation rights secured to the United States, these land-grant acts draw a broad distinction between freight and passengers. All "property"

---

<sup>1</sup> See acts cited in note 1, p. 358, *infra*. Army Regulations, 1913, §§ 145, 1235, 1379, 1115. Army Regulations, 1913, wherever cited herein, refers to the edition corrected to April 15, 1917.

of the Government, whatever its character and intended use, is to be carried "free of toll or other charge;" but of the many persons in its service, only "troops." The history of the legislation shows that both the broad term, "any property," and the narrower one, "troops," was adopted deliberately. The earliest land-grant act in which the provision appears is that of September 20, 1850, c. 61, § 4, 9 Stat. 466, 467, under which the Illinois Central was constructed. The bill as introduced<sup>1</sup> provided for the free transportation of "troops and munitions of war." It was amended so as to read "any property or troops." There had been an earlier act granting land to the State of Illinois for the construction of a canal (Act of March 30, 1822, c. 14, 3 Stat. 659) which was amended (Act of March 2, 1833, c. 87, 4 Stat. 662) so as to permit, on the same terms, the use and disposition of the land for railroads. That act provided for the free transportation of "any property of the United States, or persons in their service."

In 1850 the word "troops" had (and it has ever since had) an established meaning:—namely, "soldiers collectively,—a body of soldiers." Thus the Army Appropriation Act of that year (Act of September 28, 1850, c. 78, § 1, 9 Stat. 504, 506) provides for the "transportation of the army, including the baggage of the troops when moving either by land or water" and for "mileage, or the allowance made to officers for the transportation of themselves and baggage when travelling on duty without troops." The contemporary legislation draws a clear distinction also between troops, that is, those then having the status of soldiers, and those who once had been in, or were seeking to enter, the military service. Thus the Army Appropriation Act of March 2, 1847, c. 35, 9 Stat. 149, 151 (which provides in substantially the

---

<sup>1</sup> Cong. Globe, 1850, 31st Cong., 1st sess., vol. 19, pt. 1, p. 844.



same terms as that of 1850 for the transportation of troops) makes specific provision for "forwarding destitute soldiers to their homes," for the "comfort of discharged soldiers," and for "expenses of recruiting," which include the cost of transportation. See Army Regulations, 1857, § 1321. And the Resolution of March 3, 1847, [No. 7], 9 Stat. 206, authorizes the refund of moneys expended by the States and individuals "in organizing, subsisting, and transporting volunteers previous to their being mustered and received into the service of the United States for the present war, and for subsisting troops in the service of the United States." In view of the established meaning of the term "troops" as used by Congress the duty of the court is merely to apply the provisions of the act to the several classes of persons described above.

*First.* The first three classes, namely, discharged military prisoners, discharged enlisted men, and rejected applicants for enlistment, are clearly not "troops of the United States." Their status is that of the civilian. They form no part of the military establishment. They may go where they please and do what they please, subject to no more interference by the military authorities of the Government, than if they had never been, or had never sought to be, connected with the Army. They were travelling for their own personal ends. Congress recognizes the distinction between those forming part of the Army and those who do not, because they are recruits or have been discharged; and it makes special provision for their transportation.<sup>1</sup> Such had formerly been also the opinion of the Comptroller of the Treasury. Compare Digest, Second Comptroller's Decisions, vol. 4, §§ 354 and 355.

---

<sup>1</sup> E. g., Act of March 2, 1913, c. 93, 37 Stat. 704, 715; Act of April 27, 1914, c. 72, 38 Stat. 351, 364; Act of March 4, 1915, c. 143, 38 Stat. 1062, 1076.

*Second.* Applicants for enlistment who have been accepted provisionally, but have yet to be subjected to the final examination at the recruiting depots and to take the oath before they become a part of the soldiery of the Nation, are not "troops of the United States." It is the actual enlistment, the oath of allegiance, that changes the status from a civilian to soldier. Compare *In re Grimley*, 137 U. S. 147, 156-157; *Tyler v. Pomeroy*, 8 Allen, 480; 19 Decisions of the Comptroller, 367; Army Regulations, 1913, § 847. The officers at the recruiting stations are expressly forbidden to administer this oath. Army Regulations, 1913, § 841. Such applicant is then not even a potential soldier; for he may be rejected on final examination.<sup>1</sup> And it is the actual and not the potential status that must govern. Compare *Alabama Great Southern R. R. Co. v. United States*, 49 Ct. Clms. 522, 537. The fact that under the Army Regulations he receives the same rations as an enlisted man, and that he is subject to the same medical attention,<sup>2</sup> does not effect a change of status. And the fact that the transportation is for the purposes of the Government in connection with its military establishment is immaterial. Workmen in armor plants and civilian clerks in the War Department at Washington travel for purposes of the Government, but are obviously not "troops of the United States" within the meaning of the land-grant legislation. The Army Appropriation Acts make specific provision for the transportation of "troops" and of "recruits."<sup>3</sup>

---

<sup>1</sup>Of the 45,111 applicants in the several recruiting districts of the United States provisionally accepted in the year ending June 30, 1915, 5,866 were finally rejected at the recruiting depots; 3,993 provisionally accepted applicants are recorded as having "declined to enlist at depots or eloped en route." Report of the Adjutant General, War Department, Annual Reports, 1915, vol. 1, pp. 202, 203.

<sup>2</sup>Army Regulations, 1913, §§ 1224, 1225, 1232, 1473, 1476.

<sup>3</sup>See, for example, acts cited in note 1, p. 358, *ante*.

*Third.* Retired enlisted men en route to their homes after retirement are also not "troops of the United States." They travel for their own purposes. Congress has declared that such retired men shall for certain purposes be deemed a part of the Army (Act of February 2, 1901, c. 192, § 1, 31 Stat. 748); but they may be employed only after Congress has authorized the raising of volunteer forces; and not even then for field duty. Act of April 25, 1914, c. 71, § 11, 38 Stat. 347, 350. The Army Regulations for 1913 make no provision requiring any service from retired enlisted men. Practically they have retired *from*, and not simply into a different branch of the Army. Compare *Murphy v. United States*, 38 Ct. Clms. 511, 522; Army Regulations, 1913, Article XX. See also *United States v. Tyler*, 105 U. S. 244. The fact that they may thereafter be called into the Army does not make them "troops of the United States." Any male citizen may at some time be called into the service. Compare *Alabama Great Southern R. R. Co. v. United States*, *supra*.

*Fourth.* The furloughed soldier is, of course, a part of the Army or troops of the United States; but his transportation back to the proper station, is not "transportation of troops" within the meaning of the land-grant acts. The furloughed soldier travels for his own purposes. The Government merely advances to him the cost of transportation and subsistence while on furlough; and does this, only if the soldier lacks funds to bear the expense himself. The advance must be repaid. Army Regulations, 1913, § 110.

We have no occasion to consider whether persons not enlisted as soldiers, but forming a part of a moving army or detachment are to be deemed "troops of the United States" within the provision of the land-grant acts; nor whether a soldier travelling for the purposes of the Government, but not for any purpose connected with war

354.

Argument for Appellant.

or the preparation for war, falls within the provisions, 19 Cp. Atty. Gen. 572.

The judgment of the Court of Claims granting full compensation for carriage of persons within the six classes considered is

*Affirmed.*

WISE, TRUSTEE IN BANKRUPTCY OF STAN-  
NARD, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 214. Argued March 11, 1919.—Decided March 31, 1919.

In a contract for the construction of two government laboratory buildings, it was provided that, in case the completion of the work should be delayed beyond a period allowed, the United States, in view of the difficulty of estimating the resulting damages with exactness, and for the cost of extra inspection and rents, salaries and other expenses that would be entailed, might deduct \$200 for each day of delay, until the work should be completed, not as a penalty, but as liquidated damages, computed, estimated and agreed upon. There was such delay, as to both buildings, that the amount, thus computed, exceeded \$20,000. *Held*, that the fact that the amount specified was to be the same whether both buildings were delayed or only one was not a sufficient reason for considering it a penalty, nor was there other ground for not giving effect to the agreement as a genuine pre-estimate of loss. P. 364. *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642.

Whether a party should be relieved from a plain stipulation for liquidated damages upon the ground that a penalty was really intended, will depend upon the facts of the case and not upon a conjectural situation that might have arisen under the contract. *Id.*

52 Ct. Clms. 400, affirmed.

THE case is stated in the opinion.

Mr. William B. King, with whom Mr. George A. King and Mr. William E. Harvey were on the brief, for appellant:



Whether a contract provides for a penalty or liquidated damages is to be decided by considering the essential nature of the deduction provided for and not by the name given to it by the parties. *Sun Printing Association v. Moore*, 183 U. S. 642; *United States v. Bethlehem Steel Co.*, 205 U. S. 105; *District of Columbia v. Harlan & Hollingsworth*, 30 App. D. C. 270, 279; *McCall v. Deuchler*, 174 Fed. Rep. 133, 134; *Chicago, Burlington & Quincy R. R. Co. v. Dockery*, 195 Fed. Rep. 221.

Liquidation of damages necessarily implies a genuine purpose to make a pre-estimate of damages in the light of all conditions shown upon the face of the contract. *United States v. United States Fidelity & Guaranty Co.*, 151 Fed. Rep. 534, 536; *Clydebank Engineering Co. v. Don Jose Ramos*, [1905] L. R. App. Cas. 6; *Mt. Airy Milling Co. v. Runkles*, 118 Maryland, 371, 377.

There is no liquidation of damages here because the contract purports to liquidate damages at the same sum for two necessarily different conditions of damage. *Raymond v. Edelbrock*, 15 N. Dak. 231, 236; *Curry v. Larer*, 7 Pa. St. 470; *Bignall v. Gould*, 119 U. S. 495; *In re Newman*, L. R. 4 Ch. D. 724, 731; *Kemble v. Farren*, 6 Bing. 141; *Astley v. Weldon*, 2 Bos. & Pull. 346, 353; *Price v. Green*, 16 M. & W. 346; *Willson v. Love*, [1896] L. R. 1 Q. B. 626; *Union Pacific R. R. Co. v. Mitchell-Crittenden Tie Co.*, 190 Fed. Rep. 544; *Chicago, Burlington & Quincy R. R. Co. v. Dockery*, *supra*, 224; *O'Brien v. Illinois Surety Co.*, 203 Fed. Rep. 436, 438; *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. Rep. 491; *Watt's Executors v. Sheppard*, 2 Alabama, 425, 445; *Mt. Airy Milling Co. v. Runkles*, *supra*; *Palestine Ice Co. v. Connally*, 148 S. W. Rep. 1109.

It is no answer to say that in this case the contractor defaulted on both buildings and now can not complain because he is obliged to pay the liquidated damages agreed upon for such default. The contractor might have

361.

Opinion of the Court.

defaulted upon only one building and the same liquidated damages would have been claimed because of the failure in respect to only one of the divisible halves of the contract. A contract must be interpreted by what it means, when made, and by the possibilities of the future, not by the particular state of facts which actually results. The "nature of the writings" (quoting the term used in 183 U. S. 645) is the guide for the interpretation of a contract, not its outcome. *Van Buren v. Digges*, 11 How. 461, 477; *Steer v. Brown*, 106 Ill. App. 361, 364.

*Mr. Assistant Attorney General Brown*, with whom *Mr. Leonard Zeisler* was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

In December, 1904, Stannard, represented in this case by his Trustee in Bankruptcy, contracted with the United States to erect two laboratory buildings for the Department of Agriculture, in the city of Washington, D. C., for \$1,171,000. The buildings were both to be completed in thirty months and for a delay of 101 days beyond the contract period the Government deducted from the contract price \$200 a day, the amount stipulated in the contract as liquidated damages, a total of \$20,200, and the claim made in this court is for the recovery of that amount.

The Court of Claims dismissed the petition and the case is here on appeal.

The contract was in writing and the specifications, which the contractor had before him when bidding, were made a part of it. These specifications contain the following:

"11. Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as

of the essence of the contract, and that for the cost of all extra inspection and for all amounts paid for rents, salaries, and other expenses entailed upon the United States by delay in completing the contract, the United States shall be entitled to the fixed sum of \$200, as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States."

The provision of the contract upon the subject is:

"3. To complete the said work in all its parts within thirty months from the date of the receipt of the notice referred to in subdivision 2 hereof. Time is to be considered as of the essence of the contract, and in case the completion of said work shall be delayed beyond said period, the party of the second part may, in view of the difficulty of estimating with exactness the damages which will result, deduct as liquidated damages, and not as a penalty, the sum of two hundred dollars (\$200.00) for each and every day during the continuance of such delay and until such work shall be completed, and such deductions may be made from time to time, from any payment due hereunder."

There is no dispute as to the extent of the delay and the sole contention of the appellant is that, because a single sum in damages is stipulated for, without regard to whether the completion of one or both buildings should be delayed, and because the damage to the Government would probably be less in amount if one were completed on time and the other not, than if the completion of both were delayed, the provision of the contract with respect to liquidated damages cannot be considered the result of a genuine pre-estimate of the loss which would be caused by the delay but must be regarded as a penalty which requires proof of damage in any amount to be deducted.

If it were not for the earnestness with which this claim

361.

## Opinion of the Court.

is presented we should content ourselves with the observation that as there was delay in the completion of both buildings, the case falls literally within the terms of the contract of the parties and that a court will refuse to imagine a different state of facts than that before it for the purpose of obtaining a basis for modifying a written agreement, which evidently was entered into with great deliberation.

The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, applied in *United States v. Bethlehem Steel Co.*, 205 U. S. 105, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

There are, no doubt, decided cases which tend to support



the contention advanced by appellant, but these decisions were, for the most part, rendered at a time when courts were disposed to look upon such provisions in contracts with disfavor and to construe them strictly, if not astutely, in order that damages, even though termed liquidated, might be treated as penalties, so that only such loss as could be definitely proved could be recovered. The later rule, however, is to look with candor, if not with favor, upon such provisions in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, as promoting prompt performance of contracts and because adjusting in advance, and amicably, matters the settlement of which through courts would often involve difficulty, uncertainty, delay and expense.

The result of the application of the doctrine thus stated to the case before us cannot be doubtful. The character of the contract and the amount involved assures experience and large capacity in the contractor and the parties specifically state that the amount agreed upon as liquidated damages had been "computed, estimated and agreed upon" between them. It is obvious that the extent of the loss which would result to the Government from delay in performance must be uncertain and difficult to determine and it is clear that the amount stipulated for is not excessive, having regard, to the amount of money which the Government would have invested in the buildings at the time when such delay would occur, to the expense of securing or continuing in other buildings during such delay, and to the confusion which must necessarily result in the important and extensive laboratory operations of the Department of Agriculture.

The parties to the contract, with full understanding of the results of delay and before differences or interested views had arisen between them, were much more com-

361.

Syllabus.

petent to justly determine what the amount of damage would be, an amount necessarily largely conjectural and resting in estimate, than a court or jury would be, directed to a conclusion, as either must be, after the event, by views and testimony derived from witnesses who would be unusual to a degree if their conclusions were not, in a measure, colored and partisan.

There is nothing in the contract or in the record to indicate that the parties did not take into consideration, when estimating the amount of damage which would be caused by delay, the prospect of one building being delayed and the other not, and the amount of the damages stipulated, having regard to the circumstances of the case, may well have been adopted with reference to the probability of such a result.

The judgment of the Court of Claims must be

*Affirmed.*

---

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

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

No. 441. Argued March 6, 7, 1919.—Decided March 31, 1919.

Under the Code of the District of Columbia, as on general principle, the allowance of the writ of mandamus is a matter of sound judicial discretion, and applications therefor are limited as to time by the equitable doctrine of laches and are not within the general statutes of limitations. P. 371.

After his removal from office and forcible ejection from a government office building, relator waited 20 months before applying for mandamus against his superior, the Secretary of the Interior, to compel reinstatement. In the absence of a satisfactory explanation, *held*,

that the delay amounted to laches, it appearing that another appointee had meantime been filling the office, performing its duties and drawing the salary.

47 App. D. C. 336, affirmed.

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 plaintiff in error, besides arguing the merits, urged that the mere lapse of time was not enough to bar the relief sought, because the petition averred that from the time of his removal the relator made every reasonable effort to have his rights recognized and to be restored to his position, but without avail, and by his attorneys had made formal request for restoration; which allegations were not properly denied. The relator was not to be condemned because he did not fly to the courts without exhausting the possibilities of amicable adjustment. Rather should the law, which discourages litigation, commend his course. And the delay had worked no harm. There was no pretense of loss of evidence; no change of situation; no intervening rights of innocent third parties. The question was one of law, pure and simple, without dispute of fact. And surely, in such circumstances, the doctrine of laches ought not to be allowed to act as a cloak for a grievous injustice. The fact that a successor had drawn the salary did not affect the situation, for relator, if unlawfully removed, was entitled to the compensation of the office (*United States v. Wickersham*, 201 U. S. 390), whether successful in this proceeding or not.

Under c. 42 of the Code of the District of Columbia, §§ 1273-1282, mandamus is a writ of right. It is a common-law remedy, *Heine v. Levee Commissioners*, 19 Wall. 655; *Kentucky v. Dennison*, 24 How. 66; *Decatur v. Paulding*, 14 Pet. 524; *Kendall v. United States*, 12 Pet. 524; and § 1265 of the Code is applicable, allowing three years

367.

Opinion of the Court.

within which to bring action. Laches is no defense to a law action. *Roller v. Clark*, 38 App. D. C. 260, 266; *Wehrman v. Conklin*, 155 U. S. 314, 326; *Abraham v. Ordway*, 158 U. S. 416, 422; *Barbour v. Moore*, 10 App. D. C. 30, 47.

*Mr. Assistant Attorney General Brown* for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The relator, on April 30, 1915, filed his petition in the Supreme Court of the District of Columbia for a writ of mandamus against Franklin K. Lane, as Secretary of the Interior.

He alleged: That when serving as the duly appointed superintendent of Crater Lake National Park on June 7, 1913, the defendant requested him to resign; that protesting against such removal from office, he demanded that he be furnished with a statement in writing of the reasons for his removal and that he be given a reasonable time in which to answer; that upon June 28th, he received a telegram from the defendant notifying him that he had been removed, and directing that he should transfer all Government property to his successor, who was named; that he refused to relinquish his position or to transfer the property until convinced that the order for his removal was lawful; and that upon July 20, he was forcibly ejected from the Government office building and the records and papers of his office were seized by Government officials.

He further averred: That as such superintendent he was in the classified Civil Service of the Government and that he could not lawfully be removed therefrom "except for such cause as would promote the efficiency" of the service and for reasons stated in writing, which he must



be given a reasonable opportunity to answer; that on July 1st, 1913, he notified the defendant that he was able and willing to perform the duties of his office, that he had so continued to the time of the filing of his petition and that he had made every reasonable effort to be restored to his position, but without avail.

His prayer was that the defendant be required to answer his petition and that upon hearing a writ of mandamus should issue requiring the defendant to vacate the order for his dismissal, and to restore him to his former office.

In response to a rule to show cause the defendant filed an answer, containing, among other things, this paragraph:

"10. He denies the allegations of paragraph 10 to the extent that the same attempt to show that he has made every reasonable effort to be restored to the office of superintendent as aforesaid, in this: That if relator were improperly or unlawfully removed from said office, under circumstances such as to justify the interference of the courts, such condition existed immediately upon relator's removal from office and upon the Secretary's refusal to continue him in said office; notwithstanding which and notwithstanding that since said time, to wit, July 1, 1913, another person has been appointed to and has discharged the duties of said office and has received the salary and allowance therefor appropriated from time to time by Congress, the relator did not seek recourse to the courts until the lapse of nearly two years, and therein has by his gross laches barred any right to the relief sought if any such right ever existed."

A demurrer to this answer or return was filed stating as a ground: "Because no cause is shown in and by said return why a writ of mandamus should not issue as prayed in the relator's petition."

This demurrer was overruled and, the relator electing to stand on his demurrer, his petition was dismissed.

367.

## Opinion of the Court.

It will be seen from this statement that although the relator was definitely removed from office as of June 30, 1913, and was forcibly ejected from the Government office building on July 20, 1913, he did not file his petition until more than twenty months later, April 30, 1915. His only explanation for this delay is the allegation, which was denied, that he had made every reasonable effort to have his rights in the premises accorded him and to be restored to office, but without avail.

Without discussion of the authority of the Secretary of the Interior to remove the relator without filing charges against him and giving him an opportunity to answer, the Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia on the ground of laches, and the case is here on writ of error.

In this conclusion we fully concur.

This court has lately said that while mandamus is classed as a legal remedy, it is a remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles, *Duncan Townsite Co. v. Lane*, 245 U. S. 308. It is an extraordinary remedy, which will not be allowed in cases of doubtful right, *Life & Fire Insurance Co., v. Wilson*, 8 Pet. 291, 302, and it is generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches. *Chapman v. County of Douglas*, 107 U. S. 348, 355; *Duke v. Turner*, 204 U. S. 623, 628.

The remedy is provided for in a separate chapter (c. 42) of the Code for the District of Columbia with detailed requirements which differ so greatly from the pleading and practice prescribed for ordinary actions that we cannot doubt that Congress intended to continue the special character which has been given the proceeding from our early judicial history, *United States v. Lawrence*, 3 Dall. 42; *Life & Fire Insurance Co. v. Wilson*, *supra*;

and we cannot discover any intention to include it within the general provisions for the limitation of actions. (§ 1265.)

When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

In this conclusion we are in full agreement with many state courts in dealing with similar problems. *McCabe v. Police Board*, 107 Louisiana, 162; *Stone v. Board of Prison Commissioners*, 164 Kentucky, 640; *Connolly v. Board of Education*, 99 N. Y. Supp. 737, and cases cited; *Clark v. City of Chicago*, 233 Illinois, 113.

We agree with the Court of Appeals that it is entirely unnecessary to consider whether the removal of the relator from office was technically justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed, and the judgment of that court is therefore

*Affirmed.*

Opinion of the Court.

UNITED STATES *v.* GUDGER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF VIRGINIA.

No. 408. Argued December 11, 1918.—Decided April 14, 1919.

The Reed Amendment, prohibiting the transporting of liquor in interstate commerce "into" any State the laws of which prohibit its manufacture, etc., does not preclude its transportation through such a State to another.

Affirmed.

THE case is stated in the opinion.

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

*Mr. Joseph S. Graydon*, with whom *Mr. Lawrence Maxwell* was on the brief, for defendant in error.

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

Virginia being a State which prohibits the manufacture or sale therein of intoxicating liquors for beverage purposes, the defendant in error was indicted for having transported into that State an enumerated quantity of whisky in violation of the provision in § 5 of the Post Office Appropriation Act of March 3, 1917, known as the Reed Amendment. (39 Stat. 1058, 1069). For the purposes of a motion to quash, the United States Attorney furnished a bill of particulars of the evidence which the Government intended to offer to sustain the indictment, and the defendant also made admissions which were recited in such bill. The motion to quash, as elucidated



by the bill of particulars, was granted on the ground that the statute, when rightly construed, did not embrace the acts charged. The United States prosecutes error.

The case stated by the court below is this:

"That the defendant was a passenger on a railroad train from Baltimore, Maryland, to Asheville, North Carolina, and that while the train was temporarily stopped at the station at Lynchburg, Virginia, he was arrested, his baggage examined, and it was found that he had in his valise some seven quarts or more of whisky. The particulars show clearly that the evidence will be that he had no intention of leaving the train at Lynchburg or at any other point in Virginia and that his sole intention was to carry the liquor with him into the State of North Carolina to be there used as a beverage."

In addition to these facts we observe that the bill of particulars contained this recital:

"The charge in the indictment that the defendant caused to be transported liquor to Lynchburg, in the State of Virginia, has no other foundation than the fact that he was arrested while the train was stopped at the railroad station in Lynchburg, Virginia, and while he was en route to Asheville, North Carolina."

The bill stated besides, that the accused was traveling on a through ticket from Baltimore to Asheville and return.

Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce "into any State or Territory the laws of which State or Territory prohibit the manufacture," etc., includes the movement in interstate commerce through such a State to another. No elucidation of the text is needed to add cogency to this plain meaning, which would however be reinforced by the context if there were need

373.

Syllabus.

to resort to it, since the context makes clear that the word "into," as used in the statute, refers to the State of destination, and not to the means by which that end is reached, the movement through one State as a mere incident of transportation to the State into which it is shipped.

The suggestion made in argument that although the personal carriage of liquor through one State as a means of carrying it beyond into another State violates the statute, it does not necessarily follow that transportation by common carrier through a State for a like purpose would be such violation, because of the more facile opportunity in the one case than in the other for violating the law of the State through which the liquor is carried, is without merit. In last analysis it but invites, not a construction of the statute as enacted, but an enactment by construction of a new and different statute.

*Affirmed.*

---

MATTERS v. RYAN.

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

No. 141. Submitted January 16, 1919.—Decided April 14, 1919.

The District Court has no jurisdiction in *habeas corpus* to determine and award the custody of an infant at the suit of an alien against a citizen of the State of forum, when the only substantial question is which of the parties is the mother. P. 377.

The claim that such a case arises under a law of the United States because the infant was imported by the respondent in violation of the Immigration Laws is frivolous. *Id.*

*Quære:* Whether diversity of citizenship with an averment of pecuniary interest could confer jurisdiction on a federal court in *habeas corpus*.

P. 378.

Reversed.

THE case is stated in the opinion.

*Mr. Horace Kent Tenney, Mr. Roger Sherman and Mr. Harry A. Parkin* for appellant.

No appearance for appellee.

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

On the 20th of May, 1916, Margaret Ryan, the appellee, alleging herself to be a subject of the King of Great Britain residing in Ottawa, Canada, applied for a writ of habeas corpus to obtain the possession of her alleged minor child, Irean, by taking her from the asserted illegal custody of Anna D. Matters, the appellant, alleged to be a resident of the State of Illinois.

The petition for habeas corpus charged that the said child was born to petitioner ten months before in a hospital in Ottawa, but shortly after the birth of the child she was kidnapped by the respondent, who secreted her until August when she brought the child by railroad journey to Chicago from Ottawa and there illegally detained her. It was charged that the cause of action arose under the law of the United States, in that the Immigration Laws of the United States forbade the bringing of an alien child under sixteen years of age from Canada into the United States without being accompanied by its father or mother, in the absence of permission by the immigration authorities of the United States. An order was entered allowing the prosecution of the habeas corpus proceedings *in forma pauperis*, and the writ issued.

The respondent denied the averments of possession and kidnapping. She alleged that she had a child of her own about ten months of age, and that if such child was the one referred to in the petition for habeas corpus, the

375.

Opinion of the Court.

petitioner had no right to the custody of the same. The existence of any right in the petitioner to champion the enforcement of the Immigration Laws of the United States was denied, and the jurisdiction of the court to entertain the controversy was expressly challenged.

On the return, after hearing, jurisdiction was maintained, the return was held insufficient, and the petitioner was decreed to be entitled to the custody of the child and the appellant was commanded to deliver her. This direct appeal on the question of jurisdiction alone was then taken.

It is settled that "the jurisdiction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations." *Carfer v. Caldwell*, 200 U. S. 293, 296; *In re Burrus*, 136 U. S. 586, 591; *Andrews v. Swartz*, 156 U. S. 272, 275; *Storti v. Massachusetts*, 183 U. S. 138, 142. It is obvious that on the face of the petition the sole question at issue was the maternity and custody of the child, and as that question was in its nature local and non-federal there was nothing to sustain the jurisdiction unless the averment that the case was governed by the Immigration Laws of the United States had that effect. But when it is observed that the only basis for that assertion rested upon the allegation that the defendant, pretending to be the mother of the infant child, had brought her from Canada into the United States without complying with the administrative requirements of the Immigration Laws, we are of opinion that the case made involved no federal question adequate to sustain the jurisdiction, because of the unsubstantial and frivolous character of the contention made in that respect.

We are constrained to this conclusion since we are unable to perceive the possible basis upon which it can be



assumed that the local question of maternity, and consequent right to custody, which dominated and controlled the whole issue could be transformed and made federal in character by the assertion concerning the Immigration Laws. And this becomes all the more cogent when the absence of power on the part of the petitioner to champion the enforcement of the Immigration Laws is borne in mind.

Whether a case might arise where a court of the United States could take jurisdiction of a petition for habeas corpus upon averment of diversity of citizenship and pecuniary interest, without the assertion of a federal right, does not here arise (a) because the suit was brought exclusively under the assumption that it was governed by the law of the United States which requires a federal question to give jurisdiction, and (b) because, in any event, there is here no averment of jurisdictional amount.

It follows that the decree below must be and it is  
*Reversed and the case remanded with directions to dismiss the writ of habeas corpus.*

---

## EX PARTE HUDGINGS, PETITIONER.

### ON PETITION FOR WRIT OF HABEAS CORPUS.

No. 27, Original. Argued December 9, 1918.—Decided April 14, 1919.

The basis of the power of the federal courts to punish summarily for contempt committed in their presence is to secure them from obstruction in the performance of their judicial duties; and to justify exertion of this power, the element of obstruction must clearly appear. P. 383.

Because perjury is punishable as a criminal offense is no reason why it may not also afford basis for punishment as a contempt. P. 382.

378.

## Opinion of the Court.

Perjury *in facie curiæ* is not of itself punishable as contempt apart from its obstructive tendency. P. 383.

Hence, a District Court has no power to adjudge a witness guilty of contempt solely because in the court's opinion he is wilfully refusing to testify truthfully, and to confine him until he shall purge himself by giving testimony which the court deems truthful. P. 384.

In such a case, *held* that the original jurisdiction of this court in *habeas corpus* was properly invoked. *Id.*

Petitioner discharged.

THE case is stated in the opinion.

*Mr. Jesse Fuller, Jr.*, for petitioner.

*The Solicitor General* for respondent.

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

After hearing and leave granted on a rule to show cause, this petition for habeas corpus seeking the discharge of the petitioner from custody under a commitment for contempt was filed. The grounds for discharge were, that the court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible of being treated as a contempt the action of the court was arbitrary, beyond the limits of any discretion possessed, and violative of due process of law under the Fifth Amendment. Prior to submission and after return and the hearing which ensued an order admitting to bail was made.

The duty to consider the case arises from the permission to file and therefore *prima facie* implies that it is of such a character as to be an exception to the rule of procedure, that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this court. *Ex parte*

*Royal*, 117 U. S. 254; *Riggins v. United States*, 199 U. S. 547; *Glasgow v. Moyer*, 225 U. S. 420, 428; *Johnson v. Hoy*, 227 U. S. 245; *Jones v. Perkins*, 245 U. S. 390; *Re Mirzan*, 119 U. S. 584; *Re Huntington*, 137 U. S. 63. Whether, however, definitively the case is of such exceptional character must depend upon an analysis of the merits, which we now proceed to make upon the petition, the return, argument for the petitioner, suggestions by the United States, a statement by the Judge, and a transcript of the stenographer's notes showing what transpired in the court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record.

In a trial which was proceeding, June 11, 1918, in the court below, presided over by the Judge of the District of Vermont assigned to the Eastern District of New York, the petitioner was recalled as a witness by the Government for the purpose of proving by his testimony the handwriting of MacMillan and Van Amburgh. On being shown the writings referred to, in answer to questions by the Government, he said that he believed, from having often seen the writing of the persons named, that the writings shown him were theirs, but that he could not so state from having seen MacMillan and Van Amburgh write because he could not recollect ever having seen them do so. The court thereupon pointedly questioned the witness on the subject of his recollection and, in view of his persistency in declaring that he could not swear from knowledge derived from a recollection of having seen MacMillan and Van Amburgh write or sign that the writings were theirs, stated to Government counsel that because of the evident unwillingness of the witness the widest latitude would be allowed the Government in its examination. This was availed of and an inquiry followed covering a wide field as to the previous association of the witness with the parties in question, his employment in

378.

Opinion of the Court.

the business in which they were engaged and other circumstances deemed to persuasively establish that his connection with them had been such that his statement that he could not remember having seen them write was untrue.

The inquiries, however, made no change in the statements of the witness, who persisted in saying: "I cannot say that I can recall that I have ever seen him in the act of writing. I would not say I have not, but I would not say that I have." Finally the court interrupted the examination by saying:

"This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife. . . .

"And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, 'I do not remember.'"

In the same direction the court said:

"I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court and I am very sure it has, to deal with you in the manner proposed, I am going to do it."

Before the discharge of the witness from the stand an order for contempt against him was made and he was committed to the custody of the marshal. On the same day he pleaded not guilty to an indictment for perjury which the grand jury had just presented and obtained an order for release on bail which was inoperative because



he continued to be held under the commitment for contempt.

The record states that on July 8th, following, a *nunc pro tunc* order of commitment was spread upon the minutes in which the previous commitment was described as having been made for misbehaviour of the petitioner in the presence of the court when on the witness stand by wilfully refusing "to answer certain questions truthfully" concerning his having seen MacMillan and Van Amburgh write and sign. The new commitment directed that it should continue in force until the petitioner had purged himself of the contempt for which he was being punished.

That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was wilfully refusing to testify truthfully, that is, was committing perjury.

Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury, see *Berkson v. People*, 154 Illinois, 81; *In re Rosenberg*, 90 Wisconsin, 581; *Stockham v. French*, 1 Bing. 365; and see *In re Schulman*, 177 Fed. Rep. 191; *In re Steiner*, 195 Fed. Rep. 299; *In re Ulmer*, 208 Fed. Rep. 461; *United States v. Appel*,

378.

Opinion of the Court.

211 Fed. Rep. 495. This being true, we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both.

Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. *Toledo Newspaper Co. v. United States*, 247 U. S. 402; *Marshall v. Gordon*, 243 U. S. 521.

An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States v. Appel*, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteris-

tic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled.

Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which in the opinion of the court would not be perjured.

In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset

referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore

*Ordered that the petitioner be discharged.*

MR. JUSTICE PITNEY dissents.

---

DELAWARE, LACKAWANNA & WESTERN RAIL-  
ROAD COMPANY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 158. Argued March 26, 1919.—Decided April 14, 1919.

When the Court of Claims fails to state what the contract was between the claimant and the Government, this court cannot find it from facts which do not establish a contract as a matter of law. P. 387.

Where a railroad undertook transportation of mail during a certain period upon notice from the Post Office Department that the compensation had been fixed for the period at certain rates but "subject to future orders," and "unless otherwise ordered," *held*, in view of these qualifying words, that the contract did not guarantee the railroad against any change of the rates during that period. *Id.*

*Eastern R. R. Co. v. United States*, 129 U. S. 391.

A reservation of the right to change the rates for mail transportation may be availed of by the United States through an act of Congress, even though the Postmaster General had no authority when the contract was made to change the rates himself. P. 388.

The Act of March 2, 1907, directing the Postmaster General to readjust the compensation for the transportation of mail on certain railroad routes carrying certain average weights of mail per day, did not require reweighing. *Id.*

51 Ct. Clms. 426, affirmed.

THE case is stated in the opinion.



*Mr. F. Carter Pope and Mr. Benjamin Carter* for appellant.

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

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition to recover additional pay for the carriage of the mails upon two routes from July 1, 1907, to July 1, 1909—the claimant alleging and the United States denying that it had contracts at fixed rates for four years from July 1, 1905. The Court of Claims, without stating in terms what the contracts were, set forth the transactions that fixed the relations of the parties, and rejected the claims. Under the statutes in force at the time a maximum price per mile was fixed with reference to the average weights carried by the railroad. This average was ascertained by weighing the mails for thirty days once in four years. The quadrennial weighing for the two routes concerned (from Hoboken to Buffalo and from Hoboken to Denville, New Jersey,) took place in the spring of 1905, upon a notice from the Post Office Department that it was in order to obtain the data for adjusting the pay from July 1, 1905, to June 30, 1909. At about the same time the Post Office Department in accordance with its practice sent to the Railroad a circular calling for a verified return of the distances on the routes and for an acceptance, as it was called, more properly an offer, in the following form:

“In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the Department.”

Before July 1, 1905, these returns were executed, and on

September 15 the Post Office Department notified the Railroad that the compensation for transporting the mails on the Buffalo route "has been fixed from July 1, 1905, to June 30, 1909," upon returns, at certain sums. "This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week." The notice for the Denville route, sent September 16, 1905, was similar except that there was inserted after "has been fixed from July 1, 1905, to June 30, 1909," the words "unless otherwise ordered." There is nothing else bearing on the contracts except that the Post Office Regulations contemplate contracts for and not exceeding four years.

The rate thus fixed was paid for two years, but on September 12, 1907, in pursuance of an Act of Congress of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, authorizing the Postmaster General to readjust the compensation to be paid after July 1 of that year, and to reduce the rate on certain average weights, he ordered the reduction complained of. The service was continued on an understanding that it was without prejudice to the rights of the Railroad in case it should be decided that it was entitled to the old rate for four years from July 1, 1905. The Court of Claims allowed the higher rate up to the time of the notice of the reduction but disallowed the rest, and the Railroad Company appealed.

It would be very difficult to say that the writings to which we have referred constituted a contract on the part of the Railroad to carry the mails for four years and on the part of the Government to accept the service for that time, even subject to the reservations that were expressed on its side. If in view of the circumstances and past practices a finding of such a contract was warranted no such finding has been made and this Court cannot make it. It is not a conclusion of law from the facts. But, however this may be, the notice to the Railroad that the

compensation has been fixed at certain rates, in one case "unless otherwise ordered" and in both "subject to future orders" excludes the possibility of holding that a change of rate could not be made so far as the written words were concerned. So it was decided in *Eastern R. R. Co. v. United States*, 129 U. S. 391, which answers the argument that the future orders referred to did not extend to a change of rates. In that case, to be sure, the railroad made no protest, but the decision was not placed upon that ground alone but also upon the effect of the words "unless otherwise ordered." It is said that the Postmaster General had no power to change the rates in 1905 when the papers were signed. But that would not obliterate the reservation and bind the United States to a different contract from that which the documents expressed if they expressed anything more than the rate at which the service was rendered while it was rendered. The United States was free to adopt the reservation in its favor and it did adopt it by the Act of 1907. As the case stands, the Railroad was free, as in the *Eastern Railroad Case*, to decline to carry at the new rates, but could not insist upon the old ones after notice that they had been revised.

It is argued that the Act of 1907 could not be put into effect without a reweighing. The act directs the Postmaster General to readjust the compensation to be paid from and after the first day of July, 1907, for the transportation of mail on certain routes "by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds"; with further reductions arrived at in like manner. The references to

385.

Counsel for Plaintiff in Error.

average weights are not enough to require reweighing. They are an enumeration of the elements identifying and determining the present rates that are to be reduced. We see no reason to suppose that Congress intended to require a special and expensive investigation at the cost of the Government rather than to adopt the existing practice and to order the reduction without reference to the exact time when the last thirty days' weighing occurred or should occur.

*Judgment affirmed.*

---

STANDARD OIL COMPANY v. GRAVES, AND  
GRAVES AS COMMISSIONER OF AGRICULTURE  
OF THE STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF  
WASHINGTON.

No. 177. Argued January 23, 1919.—Decided April 14, 1919.

The construction of a state statute must be judged by its necessary effect; the name is not conclusive. P. 394.

A law of the State of Washington requires that products of petroleum, intended for use or consumption in the State, shall be inspected before being sold or offered for sale, and imposes fees for inspection by which in 10 years over \$335,000 was collected, of which only about \$80,000 was disbursed for expenses, leaving a revenue of over \$255,000. *Held*, in respect of such products imported from another State for sale in Washington, that the charge is excessive and an unconstitutional burden on interstate commerce. *Id.*

94 Washington, 291, reversed.

THE case is stated in the opinion.

*Mr. Oscar Sutro*, with whom *Mr. E. S. Pillsbury*,  
*Mr. F. D. Madison*, *Mr. H. D. Pillsbury*, *Mr. Alfred*



*Sutro*, Mr. R. A. Ballinger, Mr. Alfred Battle and Mr. Bruce C. Shorts were on the brief, for plaintiff in error.

Mr. L. L. Thompson, Assistant Attorney General of the State of Washington, with whom Mr. W. V. Tanner, Attorney General of the State of Washington, and Mr. Glenn J. Fairbrook, Assistant Attorney General of the State of Washington, were on the brief, for defendant in error, discussed and relied upon the following: *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *Brown v. Houston*, 114 U. S. 622; *Machine Co. v. Gage*, 100 U. S. 676; *Emert v. Missouri*, 156 U. S. 296; *Bacon v. Illinois*, 227 U. S. 504; *American Steel & Wire Co. v. Speed*, 192 U. S. 500.

The act does not prohibit the solicitation of interstate business, as in *Robbins v. Shelby County Taxing District*, 120 U. S. 489; or the introduction of goods into the State, as in *Leisy v. Hardin*, 135 U. S. 100, and *Schollenberger v. Pennsylvania*, 171 U. S. 1; nor does it impose a tax upon the goods before the transit is completed, as in *Foote & Co. v. Maryland*, 232 U. S. 494. It merely provides that all such products of petroleum, before being sold or offered for sale, shall, at some time and place, be inspected, just as did the statutes sustained in *General Oil Co. v. Crain*, 209 U. S. 211, and *Hinson v. Lott*, 8 Wall. 148. The question is really decided by this court in the *Crain Case*, *supra*. In *Foote & Co. v. Maryland*, *supra*, it is stated in the argument and assumed in the opinion that the inspection was made before the goods reached their destination, and therefore was an interference with articles in course of interstate transportation. This is apparent from the fact that the court nowhere mentions or refers to the *Crain Case*, which clearly holds that an ostensible inspection fee, which is in reality a revenue measure, does not interfere with interstate commerce if imposed upon an article after it has ceased to

389.

Opinion of the Court.

move in such commerce and after it comes within the protection of the state laws. The *Foote Case*, without any discussion of the self-evident fact that the Maryland act did so operate, holds the inspection fee prescribed by that act to be void because it was in reality a revenue measure. If the distinction in the two acts which we have pointed out be adopted, they are in no way inconsistent. If it be rejected, the *Foote Case* must be taken as overruling the *Crain Case*. See *State v. Bartels Oil Co.*, 132 Minnesota, 138.

The first inquiry in determining whether there is an interference with interstate commerce is to ascertain whether the transit has ended. If it has, the goods cease to be in interstate commerce, and whether the particular tax be an inspection law, a general property tax, or an excise tax is immaterial to this court.

MR. JUSTICE DAY delivered the opinion of the court.

Plaintiff in error filed a complaint and an amended complaint in the Superior Court of Thurston County, Washington, to enjoin the collection of fees prescribed by the Oil Inspection Act of that State upon the ground that the statute was in contravention of the Constitution of the United States. The Superior Court held the law to be unconstitutional. Upon appeal the Supreme Court of Washington reversed the judgment. 94 Washington, 291.

The statute is the "State Oil Inspection Law" of the State of Washington. Its provisions are thus summarized in the opinion of the Supreme Court of the State: "The inspection law referred to in the complaint was first passed during the legislative session for the year 1905 (Laws 1905, p. 310). That act was amended in 1907, and will be found in chapter 192 of the Laws of 1907, p. 413 (Rem. Code, § 6051 *et seq.*). Section 3 (*Id.*, § 6052) of this act provides that all gasoline, benzine, distillate or

other volatile product of petroleum intended for use or consumption in this state for illuminating, manufacturing, domestic or power purposes, 'before being sold or offered for sale,' shall be inspected by the state oil inspector or his deputies. When the inspection is made, a certificate is to be issued, and the barrel or receptacle which contains the oil must be labeled or branded. Section 4 (*Id.*, § 6053) of the act contains a schedule of the fees which shall be paid for the inspection. Section 6 (*Id.*, § 6055) provides that if any person or persons, whether manufacturer, vender or dealer, or as agent or representative of any manufacturer, vender or dealer, 'shall sell or attempt to sell' to any person, firm, or corporation in this state, any illuminating oil, gasoline, benzine, distillate or any volatile product of petroleum, intended for use or consumption within this state, that has not been inspected and branded according to the provisions of the act, 'shall be guilty of a misdemeanor.' By the laws of 1913, chapter 60, p. 196 (Rem. Code, § 3000-1 *et seq.*), it was made the duty of the commissioner of agriculture to exercise all the powers and perform all the duties which, by the law of 1907, were vested in, and required to be performed by, the state oil inspector."

The case was heard upon demurrer to the amended complaint.

Among other things, the amended complaint set out: "Plaintiff is engaged in the State of California in the business of producing and buying crude petroleum oil, and of manufacturing and refining the same, and of shipping products of such manufacture, to-wit, illuminating oils, gasoline, distillate and other volatile products of petroleum from its refineries in California into the State of Washington, where the same are sold by this plaintiff in large quantities for use and consumption in the State of Washington, for illuminating, manufacturing, domestic and power purposes. None of the products hereinabove

389.

## Opinion of the Court.

referred to are manufactured by plaintiff in the State of Washington, but all of said products are shipped into said State from the State of California.

"Plaintiff maintains in the State of Washington wharves and docks, tanks, warehouses, buildings, machinery, horses and wagons, and other equipment for receiving, shipping, handling, selling and otherwise distributing said products shipped as aforesaid from the State of California into the State of Washington."

The fees collected under the inspection acts are set out in the amended bill of complaint:

"The total receipts from the fees collected under said statute, chapter 192 of the laws of 1907, and chapter 161, laws of 1905, of the State of Washington, for the inspection therein provided for of said products mentioned in said laws intended for sale or consumption in this State, and the total disbursements in connection with the collection thereof, and in connection with the administration of said laws, and the net revenue from such receipts during the following years have respectively been the following:

Date.	Receipts.	Disbursements.	Revenue.
June 30 to Dec. 31, 1905....	\$5,693.19	\$4,947.70	\$745.49
Jan. 1 to Dec. 31, 1906.....	\$9,539.86	\$6,610.80	\$2,929.06
Jan. 1 to Dec. 31, 1907.....	\$19,684.29	\$7,551.70	\$11,532.59
Jan. 1 to Dec. 31, 1908.....	\$23,493.93	\$8,684.87	\$14,809.06
Jan. 1 to Dec. 31, 1909.....	\$24,799.67	\$8,802.90	\$15,996.77
Jan. 1 to Dec. 31, 1910.....	\$35,174.64	\$8,469.00	\$26,705.64
Jan. 1 to Dec. 31, 1911.....	\$38,344.42	\$8,762.85	\$29,581.57
Jan. 1 to Dec. 31, 1912.....	\$48,489.73	\$8,860.80	\$39,628.93
Jan. 1 to Dec. 31, 1913.....	\$51,816.91	\$8,859.00	\$42,957.91
Jan. 1 to Dec. 31, 1914.....	\$79,339.66	\$8,553.75	\$70,785.91
	<hr/>	<hr/>	<hr/>
	\$335,776.30	\$80,103.37	\$255,672.93"

It thus appears that the expense of administration of the statutes from 1905 to 1914 was \$80,103.37. The total



receipts for the same time \$335,776.30, a difference of \$255,672.93.

It is contended by the plaintiff in error that this inspection law violates the commerce clause, Art I, § 8, of the Constitution of the United States, in that it directly burdens such commerce by imposing inspection taxes far in excess of the cost of inspection. The Supreme Court of the State held that the tax was not upon property, but could be sustained as an excise or occupation tax upon the business of selling oil within the State. The reason given by the court for holding that the tax could not be upheld as a property tax rested upon provisions of the state constitution.

While this court follows the decisions of the highest court of a State, as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void. *Minnesota v. Barber*, 136 U. S. 313, 319; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, and cases cited.

That the State may pass proper inspection laws for oils brought into its borders in interstate commerce, there can be no question. But, taking the allegations of the complaint to be true, as we must for present purposes, the cost of the inspection was greatly less than the tax imposed. The general principle that a State may not impose burdens upon interstate commerce is so well settled, and has been so often declared in the opinions of this court, that a repetition of the reasons which have induced these decisions would be superfluous. In this case the amended complaint alleges that the oils were shipped into Washington from California. They are brought there for sale. This right of sale as to such importations is protected to the importer by the Federal Constitution, certainly while the same are in the original

389.

## Opinion of the Court.

receptacles or containers in which they are brought into the State. Under this law the oils cannot be lawfully sold at all until the importer has paid the inspection fees provided in the statute, after inspection. That inspection fees, so grossly in excess of the cost of inspection imposed upon articles brought into the State in interstate commerce are unconstitutional, was held in *Foot & Co. v. Maryland*, 232 U. S. 494. In that case the plaintiffs were engaged in the business of packing oysters in the City of Baltimore, and brought large quantities in from the State of Maryland and also from the waters of the States of Virginia and New Jersey. These oysters were inspected in Baltimore, where they were unloaded from vessels, by officials appointed under the provisions of the Maryland act which fixed an inspection fee of one cent per bushel to be paid one-half by the seller and one-half by the buyer. The case was brought to this court upon the ground that the inspection fee was excessive, and a burden upon interstate commerce, and levied an unlawful tax upon goods shipped into Maryland from other States. It was held that in view of the excessive nature of the inspection fees the requirement of the payment thereof necessarily imposed a burden upon interstate commerce in excess of the expenses of inspection, and that the act was, therefore, void. The subject was fully considered in an opinion by the late Mr. Justice Lamar, speaking for this court, and after recognizing the power of the State to impose reasonable inspection fees, and that such legislation will not be declared void unless the fees are obviously and largely beyond what is needed for the cost of inspection, he said: "If, therefore, it is shown, that the fees are disproportionate to the service rendered; or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation, obstruct the freedom of commerce among

the States. *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38; *Brimmer v. Rebman*, 138 U. S. 78, 83; *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64; *Papatsco Co. v. North Carolina*, 171 U. S. 345, 354; *Red 'C' Oil Co. v. North Carolina*, 222 U. S. 380, 394; *Savage v. Jones*, 225 U. S. 501." (P. 504.) The principles stated in *Foote & Co. v. Maryland* were recognized in *Pure Oil Co. v. Minnesota*, decided by this court at this term, 248 U. S. 158. The inspection fees there in question were held not excessive, and we said (p. 162) "But if such inspection charge should be obviously and largely in excess of the cost of inspection, the act will be declared void because constituting, in its operation, an obstruction to and burden upon that commerce among the States the exclusive regulation of which is committed to Congress by the Constitution."

It is said that the *Foote Case* did not overrule the previous case of *General Oil Co. v. Crain*, 209 U. S. 211, and that the principles of that case should be controlling here. In the *Crain Case* this court sustained a tax upon oil which had been removed from the tank cars in which it was transported into Tennessee, and which, although destined for points beyond Tennessee, was then in storage in that State. The distinction between that case and the one now under consideration is obvious. *Bacon v. Illinois*, 227 U. S. 504, is also relied upon. In that case this court sustained a property tax upon grain brought from another State, but taken from the carrier and held by the owner in Illinois with full power of disposition in that State, and although intended to be ultimately forwarded to a point beyond the State,—the property tax, after a review of the previous decisions of this court, was sustained.

We reach the conclusion that the statute imposing these excessive inspection fees, in the manner stated, upon all sales of oils brought into the State in interstate

389.

Counsel for Parties.

commerce necessarily imposes a direct burden upon such commerce, and is, therefore, violative of the commerce clause of the Federal Constitution. We may remark that the conclusion at which we have arrived has been reached by the supreme courts of North Dakota and Ohio. *Bartels Northern Oil Co. v. Jackman*, 29 N. Dak. 236; *Castle v. Mason*, 91 Ohio St. 296.

It follows that the judgment of the Supreme Court of Washington must be

*Reversed.*

---

McKINLEY ET AL. v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF GEORGIA.

No. 417. Submitted March 3, 1919.—Decided April 14, 1919.

Congress, under the authority to raise and support armies, may make rules and regulations to protect the health and welfare of the men composing them against the evils of prostitution, and may leave the details of such regulations to the Secretary of War.

Conviction sustained, for setting up a house of ill fame within five miles of a military station, the distance designated by the Secretary of War, under the Act of May 18, 1917, c. 15, § 13, 40 Stat. 76. Affirmed.

THE case is stated in the opinion.

*Mr. R. Douglas Feagin* for plaintiffs in error. *Mr. Oliver C. Hancock* was on the brief.

*Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for the United States.



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

Plaintiffs in error were indicted, convicted, and sentenced upon an indictment in the District Court of the United States for the Southern District of Georgia for violation of a regulation of the Secretary of War made under the authority of the Act of Congress of May 18, 1917, c. 15, § 13, 40 Stat. 76, 83. This statute provides:

"The Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both."

Plaintiffs in error contend that Congress has no constitutional authority to pass this act. The indictment charged that the plaintiffs in error did unlawfully keep and set up a house of ill fame within the distance designated by the Secretary of War, under the authority of the act of Congress, to-wit, within five miles of a certain military station of the United States.

That Congress has the authority to raise and support armies and to make rules and regulations for the protection of the health and welfare of those composing them, is too well settled to require more than the statement of the proposition. *Selective Draft Law Cases*, 245 U. S. 366.

Congress having adopted restrictions designed to guard and promote the health and efficiency of the men composing the army, in a matter so obvious as that embodied in the statute under consideration, may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions. This is also well settled by the repeated decisions of this court. *Buttfield v. Stranahan*, 192 U. S. 470; *Union Bridge Co. v. United States*, 204 U. S. 364; *United States v. Grimaud*, 220 U. S. 506.

The judgment of the District Court is

*Affirmed.*

---

COLUMBUS RAILWAY, POWER & LIGHT COMPANY v. CITY OF COLUMBUS, OHIO, ET AL.

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

No. 715. Argued January 10, 1919.—Decided April 14, 1919.

Constitutional questions not devoid of merit suffice as a basis for jurisdiction in the District Court, however they may be decided. P. 406.

Ordinances passed by the City of Columbus under authority of certain laws of Ohio and accepted by street railway companies, *held* contracts, binding the grantees to furnish street railway service for twenty-five years, at specified rates, in return for the use of the streets, and not permissive franchises which the grantees might surrender when they ceased to be remunerative. P. 407.

If a party charge himself with an obligation possible to be performed, he

must abide by it unless performance becomes impossible through the act of God, the law, or the other party. P. 412.

An unexpected hardship may be considered in determining the scope of a contract obligation, provided the contract is doubtful and requires construction. P. 410.

Where a street car company was under a clear contract obligation to furnish service at specified rates of fare, and various effects of the war, particularly an award of the War Labor Board raising the wages of employees, wrought a serious and unforeseen change of conditions, making the rates grossly inadequate, but it did not appear that performance was thus rendered impossible or that the contract as a whole, for its term of twenty-five years, would prove unremunerative, *held*, that there was no *vis major*, excusing further performance, and that enforcement of the agreed rates would not deprive the company of property without due process of law. P. 413.

Equity cannot relieve from bad bargains simply because they are such. P. 414.

253 Fed. Rep. 499, affirmed.

THE case is stated in the opinion.

Mr. Joseph S. Clark, with whom Mr. Karl E. Burr, Mr. Henry A. McCarthy, Mr. Henry J. Booth and Mr. W. O. Henderson were on the briefs, for appellant.

The franchise ordinances granted permission to operate street cars on the streets of the City upon the terms and conditions therein prescribed, and the Company was bound to comply with these terms and conditions so long as it continued to exercise the franchises, but these grants were permissive only, and have been surrendered and abandoned by the Company. Its reasons for such surrender and abandonment were that the rates of fare prescribed in the grants were no longer compensatory, but, on the contrary, had become confiscatory.

The situation that has been brought about by the War, resulting in a most unexpected increase in operating expenses of all kinds, and particularly the compulsory annual wage increase of \$560,000, due to the award of the National War Labor Board, cannot be held to have been within the

contemplation of the parties when the franchises were granted and accepted, and under these circumstances the Company is entitled to a release of the obligations, if any, that these grants may have imposed upon it to continue to operate under them. *The Kronprinzessin Cecilie*, 244 U. S. 12; *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] App. Cas. 119; *Baily v. De Crespigny*, L. R. 4 Q. B. 185; *Liston v. Steamship Carpathian*, [1915] 2 K. B. (E. & J.) 42; *Tamplin S. S. Co. v. Anglo-Mexican Co.*, [1916] 2 App. Cas. 397, 407; *Brenner v. Consumers Metal Co.*, 41 Ont. L. R. 534; *Krell v. Henry*, [1903] 2 K. B. 740, 749; *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1; *The Styria*, 186 U. S. 1; *B. E. & C. R. Co. v. N. Y., L. E. & W. Co.*, 123 N. Y. 316; *Moore & Tierney, Inc., v. Roxford Knitting Co.*, 250 Fed. Rep. 278.

The Fourteenth Amendment is a complete protection against the enforcement of the confiscatory rates prescribed by the legislative enactments represented by these two franchise grants.

*Mr. Henry L. Scarlett*, with whom *Mr. David F. Pugh* was on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

The Columbus Railway, Power & Light Company filed its complaint and amended bill of complaint in the District Court of the United States for the Southern District of Ohio against the City of Columbus, Ohio, and officials and members of the City Council of the City, asking an injunction against the enforcement of ordinances concerning the operation of street railways upon certain streets in the City of Columbus. Upon motions to dismiss, and for a temporary injunction, the District Court held that there was no jurisdiction as the amended bill of complaint presented no substantial federal question, and,



considering the case upon its merits, held that the amended bill did not state facts constituting a valid cause of action in equity against the defendant, and dismissed the same. An appeal was prosecuted to this court; the case has been argued and submitted.

The amended bill of complaint alleges in substance that the Company and its predecessors have since the enactment of two ordinances, hereinafter mentioned, and until the 20th of August, 1918, operated a system of street railway lines in the City of Columbus. The two ordinances in question are referred to in the bill and attached thereto. The one, denominated the Blanket Franchise Ordinance, was passed February 4, 1901, and the other, called the Central Market Franchise Ordinance, was passed January 21, 1901. The allegations as to these two ordinances are supplemented by a statement of certain so-called perpetual franchise ordinances on certain streets. The two ordinances, above referred to, are each for the term of twenty-five years. The ordinances were duly accepted by the grantees thereof. Under the provisions of the Blanket Franchise Ordinance the grantee and its successors are required to issue and sell eight tickets for twenty-five cents, and give universal free transfers. The issue and sale of such tickets continued until August 20, 1918, when, it is alleged, the franchise under that ordinance was surrendered and canceled by the Railway Company. Under the Central Market Franchise Ordinance the Company issued and sold eight tickets for twenty-five cents, and gave universal transfers, and continued so to do until August 20, 1918, when, it is alleged, the franchise was surrendered and canceled by the Company.

The bill sets forth allegations as to the extent of the business of the Company—that its railway system includes more than one hundred and ten miles of main track, and supplies the only street railway service in the

City of Columbus, except a very limited service furnished by interurban cars running at long intervals upon certain streets, that the Company also supplies power for war and industrial purposes, and is the only commercial company furnishing electricity in the City of Columbus. That Columbus and its suburbs contain a population of more than 250,000 persons, and constitute a large industrial, manufacturing, military, and railroad center. That more than 25,000 persons are employed in the manufacture of munitions, clothing and a great variety of other war materials for use directly by the United States Government, and for the use of others furnishing war supplies to the Government; also large railroad shops in which are employed many thousands of persons engaged in the making and repair of railroad engines, cars, and other equipment used and to be used by the United States Railroad Administration. That a large majority of the employees of these shops do and must depend upon the street railway service of the Company as their means of transportation to and from their places of employment; and in said area is located the Columbus Barracks in which are quartered more than one hundred thousand recruits per annum, who also are dependent upon said railway service. That the discontinuance or impairment of the plaintiff's street railway service would cause irreparable harm to the Government of the United States, to the City of Columbus and to all persons dependent upon the service. That the Company has more than twelve million dollars invested in the street railway lines and equipment. It has large amounts of outstanding mortgage bonds, of which the sum of \$7,295,000 is chargeable against its street railway property, the annual interest charged being more than \$333,000. The operation and management of the Company show increased and increasing costs of operation and decreased and decreasing net revenue as a result of the War in which the United States

was then engaged. The bill charges increases in the cost of coal and in wages paid to the employees. The net earnings of the operations of the lines for the twelve months ending June 30, 1918, after deducting operating expenses, taxes and a proper charge for depreciation were \$301,987, an amount insufficient by more than \$31,000 to pay the interest on the outstanding bonds of the Company, properly chargeable to the railroad property, and barely enough to pay  $2\frac{1}{2}\%$  on the value of the property employed by the Company in furnishing street railway service to Columbus. That in June, 1918, the street railway employees of the Company demanded an increase in wages, and inaugurated a strike, which resulted in the discontinuance of the service of the Company for two days. That the controversy was referred to the National War Labor Board, which Board on July 31, 1918, rendered its decision increasing the wages of the street railway employees more than 50%, thereby increasing the operating expenses of the street railway line by about \$560,000 per year. It is averred that as a result of such operation for the current year ending June 30, 1919, the gross earnings will fall short of paying expenses, depreciation, and taxes by approximately \$250,000, and that there will be no earnings from which to pay its interest charges, or to yield any return to the Company on the value of its property. That on August 20, 1918, the Company surrendered and canceled its Blanket Franchise and its Center Market Franchise by notification in writing, addressed to the City of Columbus, the Mayor, Council and Clerk thereof. The Company charges that the rates of fare prescribed by the terms and conditions of the two ordinances were not either before or when said franchises were surrendered as above stated, and would not be if longer enforced against the Company, sufficient to enable it to maintain its street railway property in good order and repair and to perform its duty as a public

utility; that the further operation of the street railway lines in the City of Columbus under the two ordinances would be not only impracticable but impossible, and that the enforcement of the said rates of fare would violate the Fourteenth Amendment to the Constitution of the United States. That said rates of fare are inadequate and confiscatory, and their enforcement will deprive the Company of its property without due process of law. The Company charges that the defendants, unless enjoined, will attempt to force it to continue to operate its street railway lines under the said Blanket and Center Market Franchises in violation of rights secured to it by the Fourteenth Amendment to the Constitution. The amended bill further sets forth that controversies, confusion, risks, and multiplicity of suits will result from the resistance of the Company to the enforcement of the inadequate and confiscatory rates of fare prescribed in said ordinance. The bill prays for an injunction restraining the defendants from compelling the Company, or attempting so to do, to operate its lines of street railway in the City of Columbus under the said ordinances; from in any way forcing, compelling, or attempting to compel it, to charge and collect only the rates of fare prescribed by the two ordinances for carrying passengers, and from interfering in any way with the operation by the Company of the lines of street railway covered by the said perpetual franchises.

In the written notice of surrender of the franchises, attached to the bill as part thereof, the alleged facts as to the operation of the Company are set forth much as stated in the amended bill, and the award of the National War Labor Board is set out. The request of February 25, 1918, to the City Council to authorize the Company to charge higher rates, is stated, which was refused, as was a later request. A recital of the recommendation of the War Labor Board for increased rates of fare is also



set out in the written notice. The statement is made that the Company refused to continue the issue and sale of tickets as prescribed in the Blanket Franchise and Center Market Ordinances and to longer operate its cars thereunder; that in order to give good street railway service to the people of Columbus the Company will continue to operate the street railway lines, but not under the two franchises or either of them, upon all of the streets of the City, until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises, and the Company gave notice that it would thereafter charge 5 cents for a single ride and one cent for each transfer.

The District Court held that the bill made no case properly invoking the jurisdiction of a federal court upon constitutional grounds; that upon the merits, which the District Court considered, the bill should be dismissed for want of equity.

As to the jurisdiction of the court: If the court had decided the case upon the question of jurisdiction alone, that question should have been certified here, and none other would have been presented upon such appeal. (Judicial Code, § 238.) As we have said, the court decided the case upon the merits, and dismissed the bill. As a constitutional question is involved the appeal brings the whole case here. We are of opinion that there was jurisdiction in the District Court to entertain the bill as it presented questions arising under the Fourteenth Amendment to the Federal Constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court. We think the elaborate and careful opinion of the District Judge of itself shows that substantial questions arising under the Federal Constitution were presented by the bill and that the court had jurisdiction.

Upon the merits the decision of the case turns upon the nature and character of the ordinances granting the twenty-five year franchises. The theory upon which the bill was framed, and the case argued here by appellant, is that the grants were legislative in character, and gave to the Railway Company the right and privilege of using the streets of the City for a period of twenty-five years; that to compel their operation at unremunerative rates is to take the property of the Company without due process of law in violation of the Fourteenth Amendment. The insistence on the part of the City is that under the controlling laws of Ohio, in force when these ordinances were passed and accepted, and the terms of the ordinances, binding contracts were created, obligating the City, which had authority from the State for that purpose, to permit the operation by the Company upon the streets of the City for the period of twenty-five years upon the terms and conditions set forth in the ordinances.

That a city, acting under state authority, may in matters of proprietary right make binding contracts of the nature contained in these ordinances, is well established by the adjudications of this court. *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496.

Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question.

It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this court in *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the court. In the *Cleveland Case* this court held that upon acceptance of the ordinance it became a binding contract, governed by the rates of

fare authorized to be charged during the period of twenty-five years for which the ordinance ran; that the rates contracted for became binding upon the city, and could not be altered by subsequent municipal action consistently with the constitutional rights of the railway company. Summing up the matter, this court said: "In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged." (194 U. S. 536.)

While the precise question now involved was not presented to the court in *Interurban Railway & Terminal Co. v. Public Utilities Commission*, 98 Ohio St. 287, s. c. 16 Ohio Law Reporter, 447, it is evident that the Supreme Court of Ohio takes the same view of the effect of such ordinances as was declared by this court in the *Cleveland Case*. In the opinion in the *Interurban Railway Case* the previous Ohio cases, as well as the decisions of this court, are reviewed and the conclusion as to the effect of the Ohio statutes is in accord with that announced by this court.

The ordinances involved in this case are specific in their terms, and in the so-called Blanket Franchise Ordinance they obligate the Company during the life of the franchise to furnish adequate and efficient service and first-class,

commodious cars for the accommodation of its patrons. The Company is authorized to charge certain fares during the term named, and no more. It is required to run cars upon certain streets, not in excess of certain intervals. Upon the expiration of the franchise the Company, unless a further renewal be granted, is obligated to remove its tracks, etc., from the streets of the City, leaving the same in good condition.

In the Central Market Franchise Ordinance the time was fixed for the running of the cars, and the size of the trains was regulated. The Company was obligated to pay the City 2% of the gross receipts from local passenger fares during the term of the franchise. The grant was expressly limited to twenty-five years. Upon the expiration of that period the City had a right to purchase upon giving notice two years before the expiration of the term of its intention to do so. We can have no doubt that under the authority of the laws referred to and in view of the terms of the ordinances in question and the acceptances by the grantees the City of Columbus made valid and binding contracts with the Companies, binding for the term of twenty-five years. By these contracts, obligatory alike upon the City and the Company, the City granted the right to use the streets and the Company bound itself to furnish the contemplated service at the rates of fare fixed in the ordinances. We cannot agree with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the Company to abandon the uses and purposes for which the franchises were granted because the rates fixed became unremunerative as alleged in the amended bill. The authority under which the City acted came from the State, and was granted by proper statutes passed for that purpose. The contracts were made between the City and the Company, and became mutually binding for the period named in the ordinances.



This case does not involve the remedies which may be invoked against a street railway company which is or may become insolvent because of conditions arising since it entered into a given contract. The Company seeks now by its own action to terminate the contracts, still binding upon it by their terms as to rates of fare to be charged, and seeks to have the aid of a court of equity by enjoining the City from any further requirement of service under them.

There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. This case is not like the *Denver Water Works Case*, 246 U. S. 178, and the *Detroit United Railway Case*, 248 U. S. 429, in both of which the franchise to use the streets of the city had expired by limitation, and it was sought to require continued operation of a waterworks system in the one case and in the other of a street railway system, under rates which would afford no adequate return to the companies. In this case the Company seeks the aid of a court of equity to avoid contracts duly made and entered into while the same are yet in force.

We are unable to find in the allegations in this bill any statement of facts which absolves the Company from the continued obligation of its contracts unless the facts to which we have referred bring the case, as is contended, within the doctrine of *vis major*, justifying the Company in its attempt to surrender its franchise, and be absolved from further obligation.

We come then to consider whether the amended bill shows the happening of an event or events which have released the Company from the obligations of the contract, and authorized it to cancel the same upon the surrender of its franchise. Justification for that course is said to exist in the conditions following the World War

and resulting therefrom, particularly, in the great increase in wages by the arbitral award of the War Labor Board which was due to the necessity of meeting the high cost of living as a direct result of war conditions. This, it is contended, presents a situation that made the subsequent keeping of the contract practically impossible except at a ruinous loss to the Company. It is insisted that the principle recognized by this court in *The Kronprinzessin Cecilie*, 244 U. S. 12, when applied to this case, shows the existence of conditions excusing the performance of the contract. In that case it was held that the master and owner of the German steamship *Kronprinzessin Cecilie* were justified in apprehending that she would be seized as a prize if she completed her voyage to Plymouth and Cherbourg on the eve of the War, and her return to this country was a reasonable and justifiable precaution in view of the situation; that there was no liability for the shipments of gold agreed to be carried in that case; that the contract, not making an exception in the event of war intervening before delivery of the cargo, the circumstances showing peril of belligerent capture afforded an implied exception to the carrier's undertaking.

Much reliance is had by the appellant on the language used by Mr. Justice Jackson speaking for this court in *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1, 14, 15, wherein it was said: "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting

parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. *United States v. Gleason*, 175 U. S. 588, 602, and authorities cited; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164, 165. The latest utterance of this court upon the subject is found in *Day v. United States*, 245 U. S. 159, in which it was said: "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."

In the present case the terms of the contract are not doubtful. The term for which the Company was given

the right to use the streets of the City was definitely stated, and the terms, including the rates of fare which the Company might charge, were explicitly laid down. There is no occasion to interpret general terms in the light of the intention of the parties or the circumstances of the case.

In the *Kronprinzessin Cecilie Case* the unexpected event which excused performance was the imminent danger of the capture of the vessel by a belligerent which would have ended the possibility of performing the contract.

In *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, decided by the House of Lords November 26, 1917, [1918] A. C. 119, a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six years, subject to a proviso that if by reason of any difficulties, impediments, or obstructions howsoever occasioned the contractor should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer to grant an extension of time for completion. By a notice given by the Ministry of Munitions in February, 1916, in exercise of the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were required to cease work on their contract, which they did. It was held that the provision for extending the time did not apply to the prohibition of the Ministry; that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that it had ceased to be operative. In that case there was a direct intervention of the power of the Government, a feature not appearing in the case now under consideration.

It is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent



action of the War Labor Board within the purview of the parties when the contract was made. That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for higher wages might reasonably have been within their contemplation when the contract was made and provisions made accordingly. There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance. It may be, and taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the Company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject-matter.

We reach the conclusion that the District Court was right in holding that this bill presented no grounds absolving the Company from its contract, and justifying the surrender of its franchise. It follows that the decree is

*Affirmed.*

## Opinion of the Court.

BURR ET AL., PARTNERS, DOING BUSINESS  
UNDER THE FIRM NAME OF PARKINSON &  
BURR, v. CITY OF COLUMBUS, OHIO, ET AL.

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

No. 739. Argued January 10, 1919.—Decided April 14, 1919.

Decided upon the authority of *Columbus Ry., Power & Light Co. v. Columbus*, ante, 399.

Affirmed.

THE case is stated in the opinion.

*Mr. Joseph S. Clark*, with whom *Mr. Karl E. Burr*, *Mr. Henry A. McCarthy*, *Mr. Henry J. Booth* and *Mr. W. O. Henderson* were on the briefs, for appellants.

*Mr. Henry L. Scarlett*, with whom *Mr. David F. Pugh* was on the brief, for appellees.

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

This case was argued and submitted with No. 715, just decided, ante, 399. It was brought by owners and holders of more than \$200,000 of certain mortgage bonds of the Street Railway Company. The bill alleged diversity of citizenship, and also rights alleged to arise under the Constitution. The case was heard upon motion for a temporary injunction and upon defendant's motion to dismiss the bill. The injunction was refused, the motion to dismiss was granted and a decree entered accordingly. To all intents the case is controlled by the decision in No. 715. The decree of the District Court is

*Affirmed.*

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* OCHS, DOING BUSINESS UNDER THE NAME OF A. C. OCHS BRICK & TILE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 159. Argued January 20, 1919.—Decided April 14, 1919.

Under the law of Minnesota a siding built by a railroad to reach a private plant under the circumstances in this case becomes a public track, part of the railroad's system and property and wholly under its control. P. 419.

Within the limits of what is reasonable, and not arbitrary, a State, upon due notice and opportunity for hearing, may require a railroad company to alter and extend a side track, as a public track, and as part of the railroad's property and system, for the purpose of serving a private plant, but for all others as well who may have occasion to use it, and may require the railroad to share the expense of construction; and this does not take the railroad's property for private use, or without compensation for public use, in violation of the due process clause of the Fourteenth Amendment. P. 420.

In determining whether such a requirement is within the bounds of reasonable regulation or essentially arbitrary, not only the expense, but also the nature and volume of business to be affected, the revenue derivable from it, the character of the facility required, the need for it and the advantage to shippers and the public, are to be considered. P. 421.

135 Minnesota, 323, affirmed.

THE case is stated in the opinion.

*Mr. Richard L. Kennedy*, with whom *Mr. L. L. Brown*, *Mr. W. D. Abbott* and *Mr. S. H. Somsen* were on the briefs, for plaintiff in error:

That the order for construction and maintenance of this trackage, which involves an expenditure of money and the taking of a part of the railway right of way,

416.

Opinion of the Court.

amounts to a taking of the railway company's property, there can be no question. *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196; *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340; *Chicago, Milwaukee & St. Paul Ry. Co. v. Wisconsin*, 238 U. S. 491; *Oregon R. R. & Nav. Co. v. Fairchild*, 224 U. S. 510; *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403.

Any freight revenue that may come to the railway company by reason of the construction of this trackage, if any, must be in the way of reasonable and legal charges made to all shippers for services performed as a common carrier and not as compensation for the taking of its property. *Chesapeake & Ohio Ry. Co. v. Lumber Co.*, 174 Fed. Rep. 107.

Also the taking of property and the fixed right to compensation therefor must coincide although payment may be deferred. The right must be fixed. *Chicago, Milwaukee & St. Paul Ry. Co. v. Wisconsin*, *supra*; *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196; *Sweet v. Rechel*, 159 U. S. 380.

Property cannot be taken under the police power for private use at all or for public use without compensation.

The track is not a public one under the law of Minnesota.

Since the rendition of the judgment, the railroad has been taken over by the United States Railroad Administration, so that the order cannot be complied with.

*Mr. Henry C. Flannery*, with whom *Mr. Clifford L. Hilton* and *Mr. August G. Erickson* were on the brief, for defendant in error.

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

An order of the Railroad and Warehouse Commission of Minnesota requiring a railroad company to alter and



extend a side track leading from its main line to an adjacent brick and tile manufacturing plant is here in question. The order was made under a local statute (Gen. Stats., 1913, §§ 4231, 4284) on complaint of the owner of the plant, after due notice and full hearing, and on successive appeals was sustained by the district court of the county and the Supreme Court of the State. 135 Minnesota, 323.

The principal controversy before the commission was as to who should bear the cost of the work. The railroad company objected to bearing any part and the owner of the plant was not willing to bear all. If the cost was put on the latter, the railroad company was ready to make the alteration and extension. The statute, as construed by the Supreme Court of the State, authorized the commission, if it ordered the work done, to make a reasonable apportionment of the cost. *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 115 Minnesota, 51. By the order the commission practically assigned two-thirds to the railroad company and one-third to the owner of the plant, and required the latter to secure the right of way at its own expense and to invest the railroad company with a perpetual right to use the same for railroad purposes.

In the state courts the railroad company, without questioning the terms of the apportionment, if the cost was to be divided, contended that the statute as construed and the order as made were repugnant to the due process of law clause of the Fourteenth Amendment, in that to require the company to bear any part of the cost was to take its property for a private use without its consent, or, if the use were public, to take the property for such use without compensation. Both phases of the contention were overruled and this is the matter on which error is assigned.

The facts are not in dispute and are these:

The plant is about a quarter of a mile from the railroad

company's station at Springfield, Minnesota, a place of over 1,500 inhabitants, and has been in operation as much as twenty years. During that time the railroad company has maintained and operated a side track leading from its main line to the plant and the products of the latter have been shipped out and fuel and other supplies shipped in over this track. The railroad company has been free to use the track for other purposes and has done so occasionally. The yearly shipments from the plant have been about 250 car loads and those to the plant about 50 car loads, the freight charges thereon exceeding \$10,000. Without the side track the plant would be a failure and the public would be without its products; with it the plant is a success and the products reach and are used by the public. The demand for the products has come to exceed greatly the capacity of the plant and the owner is now enlarging it at a cost of \$150,000. The output, as also the aggregate freight charges, will be more than doubled thereby. The entire output moves over this railroad, no other being accessible. To serve the enlarged plant and handle the increased shipments, out and in, the present side track—about 460 yards—must be rearranged and extended about 350 yards. The estimated cost of the work according to plans substantially agreed on will be about \$2,300.

Under the settled rule in Minnesota a side track such as is in question here is not merely a private siding, but "additional trackage for public use." If need be the right of way for it may be acquired by condemnation. It becomes the property of the railroad company and an integral part of its railroad system, and is wholly under its control. Besides enabling the public to get the products of the industry served, it is at the service of all who have occasion to use it and must be operated accordingly. *Range Sand-Lime Brick Co. v. Great Northern Ry. Co.*, 137 Minnesota, 314, and cases cited.

Of such a track and of the power of the State to impress on it a public character this court said in *Union Lime Co. v. Chicago & Northwestern Ry. Co.*, 233 U. S. 211, 222:

"The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost."<sup>1</sup> There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. [Citing cases.]

"While common carriers may not be compelled to make unreasonable outlays (*Missouri Pacific Rwy. Co. v. Nebraska*, 217 U. S. 196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow."

In our opinion the conditions here were such as to bring the action of the State through its legislature and commission within the range of that power.

Recognizing then that the side track is for a public and not a private use, we come to the question whether requiring the railroad company to bear a part of the cost involves a taking of its property without compensation.

As a common carrier a railroad company assumes and must discharge the obligations which inhere in the nature of its business. Among these obligations is that of providing reasonably adequate facilities for serving the

---

<sup>1</sup> *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 608.

416.

## Opinion of the Court.

public. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595. To do this requires an expenditure of money, of course, but the expenditure is for property which will belong to the company and be employed in its business. The money is not taken from the company and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the company in the transportation of persons or property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore an enforced discharge of the duty to provide such a facility does not amount to a taking of property without compensation merely because it is attended with some expense. *Wisconsin, Minnesota & Pacific R. R. Co. v. Jacobson*, 179 U. S. 287, 302; *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 193 U. S. 53; *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 26-27; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 278-279; *Oregon R. R. & Navigation Co. v. Fairchild*, 224 U. S. 510, 529; *Michigan Central R. R. Co. v. Michigan Railroad Commission*, 236 U. S. 615, 631; *Chesapeake & Ohio Ry. Co. v. Public Service Commission of West Virginia*, 242 U. S. 603.

Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria we think the order in question is not arbitrary, but reasonable.

The case of *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, on which the railroad company relies, is plainly distinguishable. The Nebraska statute there condemned, as applied by the state court, required the company to



bear the cost of "reduplicating already physically adequate accommodations," on the demand and for the benefit of certain shippers, and this in the absence of exceptional circumstances, if any there could be, making such an extraordinary requirement reasonable. Besides, the statute made no provision for a preliminary hearing before an administrative body and yet subjected the company to the risk of a fine of at least five hundred dollars if it awaited a hearing in court on the reasonableness of the demand.

Here there was provision for a full hearing before the commission and also in the district court of the county. Both found the existing facilities inadequate, and there was ample evidence to sustain the finding; so the order cannot be regarded as calling for a reduplication of what already is supplied.

*Judgment affirmed.*

---

LAKE ERIE & WESTERN RAILROAD COMPANY  
*v.* STATE PUBLIC UTILITIES COMMISSION OF  
ILLINOIS EX REL. CAMERON.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 204. Argued March 13, 1919.—Decided April 14, 1919.

An order of a state commission, under legislative authority, requiring a railroad to restore a siding, is a state law within the meaning of the provisions of the Constitution and acts of Congress regulating the jurisdiction of this court. P. 424.

Under the laws of Illinois, a side track of a railroad company, used principally in moving freight from and to a particular plant, held open to use by the public and subject to public control like other parts of the railroad,—impressed with a public character. *Id.*

*Chicago & Northwestern Ry. Co. v. Ochs, ante*, 416, followed, as to the

422.

## Opinion of the Court.

power of a State to require a railroad company at its own expense to restore a siding, used principally by a particular plant but available generally as a public track, owned and controlled by the railroad as part of its system. P. 424.

Such a requirement does not take the company's property for private use, or for public use without compensation, in contravention of the Fourteenth Amendment. P. 425.

277 Illinois, 574, affirmed.

THE case is stated in the opinion.

*Mr. George B. Gillespie*, for plaintiff in error, submitted.  
*Mr. Jno. B. Cockrum* was also on the briefs.

*Mr. C. S. Schneider*, with whom *Mr. Edward J. Brundage*, Attorney General of the State of Illinois, *Mr. Albert D. Rodenberg*, *Mr. William E. Trautman* and *Mr. Raymond S. Pruitt* were on the brief, for defendant in error.

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

For twenty-five years the Lake Erie & Western Railroad Company maintained and operated on its right of way at Elliott, Illinois, a side track passing a grain elevator and coal yard operated by one Cameron. The elevator stood partly on the right of way and partly on ground owned by Cameron, his occupancy of the former being under a lease. In May, 1915, the elevator was destroyed by fire, whereupon the company exercised a reserved option to cancel the lease and also took up the side track. Cameron protested against the latter, proceeded to rebuild the elevator at its former location, but wholly on his own ground, and in June, 1915, filed with the Public Utilities Commission a petition praying that a restoration of the track be ordered. After notice and hearing the commission granted such an order and it was upheld by the circuit and supreme courts of the State. 277 Illinois, 574.

It is contended here, as it was in the state courts, that the order contravenes the due process of law clause of the Fourteenth Amendment, in that it takes property of the railroad company for private use, or for public use without compensation.

Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction. *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 403; *Ross v. Oregon*, 227 U. S. 150, 162-163; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 295-296; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 555; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 660-661; *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134.

Under the laws of the State the side track before its removal, although used principally in moving freight from and to Cameron's elevator and coal yard, was open to use by the public and subject to public control like other parts of the company's road; in other words, it was a track which the State impressed with a public character. *Truesdale v. Peoria Grape Sugar Co.*, 101 Illinois, 561, 567; *Chicago Dock & Canal Co. v. Garrity*, 115 Illinois, 155, 167, 171; *Chicago & Alton R. R. Co. v. Suffern*, 129 Illinois, 274, 286. Not only so, but the statute under which its restoration was ordered contains express provisions whereby it will retain that character and be open to use by other shippers as well as by Cameron. Hurd's Stats., 1916, c. 111a, § 45.

The shipments for which the track has been used have yielded the company a revenue of about \$20,000 each year for several years. What the cost of restoration will be the record does not disclose, but the commission, with knowledge of such matters, has found that it is justified by the business reasonably to be expected; and the Su-

preme Court of the State, besides sustaining that and other findings of the commission, aptly points out that but for the hasty and improper removal of the track the company "would not be at the expense of replacing it." When the track is restored the company will own it and be entitled to make a reasonable charge for its use, just as is the case with other property employed in the company's transportation service.

Applying the decision just announced in *Chicago & Northwestern Ry. Co. v. Ochs*, ante, 416, we think the order does not take property of the company for private use, or for public use without compensation, in contravention of the Fourteenth Amendment.

*Judgment affirmed.*

BOARD OF PUBLIC UTILITY COMMISSIONERS v.  
COMPAÑIA GENERAL DE TABACOS DE FIL-  
IPINAS.

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

No. 253. Submitted March 18, 1919.—Decided April 14, 1919.

Whether § 16 (e) of Philippine Act 2307 violated the Organic Act, c. 1369, 32 Stat. 691, by delegating to the Board of Public Utility Commissioners power to prescribe the contents of reports required of corporate common carriers, has become a moot question since this case was brought to this court, due to an amendment of § 16 (e), which itself prescribes in detail what the reports shall contain and thereby supersedes the order here in question. The judgment is therefore reversed, with directions to dismiss the cause without costs to either party.

34 Phil. Rep. 136, reversed.

THE case is stated in the opinion.



*Mr. Edward S. Bailey* for appellant and plaintiff in error.

*Mr. F. C. Fisher* for appellee and defendant in error.

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

By a judgment rendered March 8, 1916, the court below annulled an order of the Board of Public Utility Commissioners of the Philippine Islands requiring a corporate common carrier to report annually various matters pertaining to its finances and operations, the ground of the judgment being that § 16 (e) of Act 2307 of the local legislature, under which the board acted, violated the organic law of the Philippines, c. 1369, 32 Stat. 691, in that it confided to the board the determination of what the reports should contain and therefore amounted to a delegation of legislative power. 34 Phil. Rep. 136. The board brought the judgment here for review, and the carrier now suggests that through a change in the local statute the question on which the judgment turned has become merely a moot one.

After the case was brought here the legislature, by Act 2694, so amended § 16 (e) as to cause the section itself to prescribe in detail what such reports should contain and thereby abrogated the provision on which the order was based and which the court held invalid. That provision therefore is no longer in force, and it is to the new provision that the board and carrier must give effect. Even if the original provision was valid, the order made under it became inoperative when the new provision was substituted in its place. Whether the order was based on a valid or an invalid statute consequently has become merely a moot question.

In this situation we are not called upon to consider the propriety of the judgment below, the proper course being,

425.

Syllabus.

as is shown by many precedents, to reverse the judgment and remand the cause with a direction that it be dismissed without costs to either party. *United States v. Schooner Peggy*, 1 Cranch, 103; *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, and 161 U. S. 101; *Dinsmore v. Southern Express Co.*, 183 U. S. 115; *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466; *Berry v. Davis*, 242 U. S. 468.

*Judgment reversed. Cause to be dismissed without costs to either party.*

---

## CORN PRODUCTS REFINING COMPANY v. EDDY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 119. Argued January 14, 1919.—Decided April 14, 1919.

A state regulation respecting the labeling of syrup compounds, which does not discriminate against the manufacturer or his product or against syrups as a class, *held*, not objectionable under the equal protection clause. P. 431.

The right of a manufacturer to maintain secrecy as to his compounds and processes is subject to the right of the State, in the exercise of its police power, to require that the nature of the product be fairly set forth. P. 432. *Held*: That a state regulation, requiring manufacturers of proprietary compound syrups to state definitely in conspicuous letters on the principal label the percentage of each ingredient, is consistent with the due process clause of the Fourteenth Amendment. *Id.*

It is the effect of a regulation as put in force by the State that determines whether it directly burdens interstate commerce, and not its characterization, or its construction by the state court. *Id.*

The proviso in § 8 of the Federal Pure Food Act, that nothing in the act shall be construed as requiring proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient

to disclose their trade formulas, except in so far as the provisions of the act may require to secure freedom from adulteration or misbranding, merely relates to the interpretation of the requirements of that act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions. P. 439.

A regulation adopted by a state board of health, and in effect upheld by the state court as authorized by the state pure food law, must be regarded as state legislation in ascertaining its relation to the federal food law. P. 437.

Neither under the commerce clause directly nor through the Federal Pure Food Law, as amended, is a State forbidden to require that proprietary foods, imported into the State and sold in the original packages, shall bear labels stating the names and percentages of the ingredients composing them. P. 433. *Savage v. Jones*, 225 U. S. 501, followed; *McDermott v. Wisconsin*, 228 U. S. 115, distinguished. 99 Kansas, 63, affirmed.

THE case is stated in the opinion.

*Mr. T. M. Lillard*, with whom *Mr. R. W. Blair* and *Mr. C. A. Magaw* were on the brief, for plaintiff 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. S. N. Hawkes*, Assistant Attorney General of the State of Kansas, were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error (plaintiff in the original action) is a corporation which manufactures in the State of Illinois a proprietary table syrup composed of 85 per cent. corn syrup or glucose, 10 per cent. molasses, and 5 per cent. sorghum, and sells it under the name of "Mary Jane" in cans labeled as follows:

"5 Pounds Net Weight.

Mary Jane.

Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drugs Act, June 30, 1906. Registered under serial number 2317.

Mary Jane. A Table Syrup Prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide.

M'd'd by Corn Products Refining Co.

General Offices—New York, U. S. A."

Prior to the beginning of the action plaintiff had agents and representatives employed in soliciting orders for this syrup from wholesale merchants in the State of Kansas, the orders being filled by shipping the required quantity of the syrup in interstate commerce in the original sealed cans with original labels attached. Defendants, who are the members of the State Board of Health of Kansas, deeming "Mary Jane" to be misbranded in several particulars within the meaning of the Food and Drugs Law of that State (c. 266, Kans. Sess. Laws, 1907, as amended by c. 184, Laws 1909; embodied in c. 35, Kans. Gen. Stats. 1909; c. 32, Kans. Gen. Stats. 1915), and regulations adopted by the Board under authority of that law, notified plaintiff's agents and representatives and other persons selling and dealing in "Mary Jane" syrup that unless plaintiff complied with Regulation 6 of the State Board by attaching in a conspicuous place on the outside of each can sold or offered for sale within the State a label with the word "compound" printed upon it, and stating definitely the percentage of each ingredient of which the syrup was composed, they would be arrested and prosecuted. Similar warnings were communicated to wholesale and retail dealers who were and long had been selling this syrup in Kansas under the original brand and label.

Plaintiff brought an equitable action against the members of the board of health in one of the district courts of the State; setting up the pertinent facts, alleging that defendants were acting under the authority of the state



law and certain regulations adopted by them pursuant to it, and among others Regulation 6, requiring that in the case of syrups the principal label should state definitely the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends; plaintiff further averring that the state law and the regulations referred to, particularly Regulation 6, were void because in conflict with the interstate commerce clause (Art. I, § 8) of the Constitution of the United States and the Act of Congress of June 30, 1906, c. 3915, 34 Stat. 768, and also in conflict with the provisions of § 1 of the Fourteenth Amendment; and that defendants were interfering with plaintiff's interstate commerce and with its lawful business in the State of Kansas, thereby threatening plaintiff with great and irreparable damage; and praying for an injunction.

Their general demurrer having been overruled, defendants answered and the case came on for hearing, with the result that the district court made a finding "that all of the allegations of plaintiff's petition are true"; and adjudged that there should be a perpetual injunction restraining defendants from interfering with the sale of "Mary Jane" in the State of Kansas upon the ground that it was misbranded when sold under the label above referred to, and in particular from interfering, because of Regulation 6, with persons dealing in or selling the syrup, so branded, within the State.

Upon appeal, the Supreme Court of Kansas reversed the judgment with direction that the district court enter judgment for the defendants (99 Kansas, 63); and the case comes here on writ of error under § 237, Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726, upon the contention that the Kansas statute and the regulations adopted by the state board pursuant to it, as interpreted and applied by the state court of last resort, are repugnant to the interstate commerce clause of the Constitution of the United States (Art. I, § 8) and to the due process

and equal protection provisions of the Fourteenth Amendment, and especially are in conflict with the Federal Food and Drugs Act.

Upon the argument here, the attack was centered upon the effect of Regulation 6, which, so far as pertinent, reads as follows: "Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes the name of one or more of the ingredients, the preponderating ingredient shall be named first."

It will be convenient to deal first with the contention made under the Fourteenth Amendment. It is not seriously insisted that there is a denial of the equal protection of the laws, and we see no ground for such a contention. There is no discrimination against plaintiff in error or its product, or against syrups as a class.

It is, however, urged that since plaintiff's syrup is a proprietary food, made under a secret formula and sold under its own distinctive name, and since it contains no deleterious or injurious ingredients, the effect of the regulation in requiring plaintiff to disclose upon the label the ingredients and their proportions amounts to a taking of its property without due process of law. Evidently the purpose of the requirement is to secure freedom from adulteration and misbranding; the mischief of misbranding being that purchasers may be misled with respect to the wholesomeness or food value of the compound. And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain

secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth. *Heath & Milligan Co. v. Worst*, 207 U. S. 338, 353; *Savage v. Jones*, 225 U. S. 501, 524; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 548-549; *Schmidinger v. Chicago*, 226 U. S. 578, 588; *Armour & Co. v. North Dakota*, 240 U. S. 510, 514, 515; *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 159; *Hebe Co. v. Shaw*, 248 U. S. 297, 303.

We turn to the questions raised under the commerce clause and the act of Congress.

Although the Supreme Court in its opinion said nothing about interstate commerce, it cannot be doubted, in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the "Mary Jane" syrup; and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered for sale in domestic commerce but also while in the hands of the importing dealers for sale in the original packages and hence, in contemplation of law, still in the course of commerce from State to State. The silence of the Supreme Court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the State. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362; *Kansas City & c. Ry. Co. v. Kansas*, 240 U. S. 227, 231; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294.

The question of repugnancy to the commerce clause may be treated (a) aside from federal legislation; and (b) in view of the "Food and Drugs Act" of Congress, June 30, 1906, c. 3915, 34 Stat. 768.

Upon this question, in both aspects, the judgment under review is clearly sustained by the decision of this court in *Savage v. Jones*, 225 U. S. 501, which is precisely in point. That case raised a question whether a statute of Indiana relating to concentrated commercial feeding stuffs for animals (Acts 1907, c. 206), which required the packages, when sold or offered for sale, to bear in a conspicuous place a tag or label having plainly printed on it in the English language (among other things) a guaranteed analysis stating the minimum of crude fat and crude protein, determined by a prescribed method, and the ingredients from which the concentrated commercial feeding stuff was compounded, as applied to sales of complainant's products in original packages by importing purchasers, constituted an unwarranted interference with interstate commerce, either independently of or in the light of the Food and Drugs Act of Congress. The court finding (p. 524) that the evident purpose of the Indiana statute was to prevent fraud and imposition in the sale of food for domestic animals; that its requirements were directed to that end and were not unreasonable; and that it was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food; held (p. 528) that the statute was a lawful exercise of the police power of the State, including the required disclosure of the ingredients contained in feeding stuffs offered for sale in that State and the provision for their inspection and analysis. Upon the question whether there was any conflict with the act of Congress, after pointing out (p. 529) that the object of the latter act was to prevent adulteration and misbranding by prohibiting the introduction into any State from another



State of articles of food or drugs adulterated or misbranded within the meaning of the act, and that included in the definition of the term "food" were "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound"; and (p. 531) that in the enumeration of the acts constituting a violation of the statute Congress had not included (as the Indiana statute did include) a failure to disclose the ingredients of the article, save in specific instances where morphine, opium, cocaine, or other substances particularly mentioned were present; and after reciting the provision of the federal act that an article "for the purposes of this Act" shall be deemed misbranded if the package or label bear any statement, design or device regarding it or the ingredients or substances it contains, which shall be false or misleading; the court proceeded to say (p. 532): "But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (§ 8). Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless,

has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act that 'nothing in this Act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding' (§ 8). We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions. Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. [Citing cases.] But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation

is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration." And, after citing many previous decisions of this court, and analyzing several of them, the opinion proceeds (p. 539): "Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That State has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to Federal authority. It follows that the complainant's bill in this aspect of the case was without equity."

An attempt is made to distinguish *Savage v. Jones*, upon the ground that the Indiana statute there under consideration covered a field of regulation which had not been included in the federal statute, whereas, it is said, the Kansas Food and Drugs Law is almost literally a reproduction of the federal law upon the same subject. It is true that the Kansas statute, *mutatis mutandis*, follows quite closely the lines of the act of Congress, and that its 8th section, which defines the term "misbranded" is almost a copy of the corresponding section of the federal act; but in the following proviso at the close of the section the words italicized have been inserted by the state legislature, they not appearing in the federal act: "And pro-

vided further, that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods, which contain no unwholesome ingredients, to disclose their trade formulas, except in so far as the provisions of this act, *or the rules and regulations of the State Board of Health*, may require to secure freedom from adulteration or misbranding." These italicized words make a very substantial difference. Section 3 of the Kansas act provides that "The State Board of Health is authorized and directed to make and publish uniform rules and regulations, not in conflict with the laws of this state, for carrying out the provisions of this act;" and under this authority Regulation 6 was adopted and published, which requires manufacturers of certain proprietary foods, including syrups that are compounds, mixtures, or blends, to state definitely upon the principal label the percentage of each ingredient. It is insisted that the regulation goes beyond the authority conferred upon the state board because it is inconsistent with the definition of "misbranding" contained in the act, and therefore cannot be deemed to be a regulation required to secure freedom from misbranding. Upon this particular point the opinion of the Kansas Supreme Court is silent; but the decision of the district court upon the demurrer sustained the validity of the regulation as being within the authority of the board; the Supreme Court did not overrule this; the question is one of state law; and we must assume that the regulation, having been adopted by the board and in effect sustained by the decision of the Supreme Court, is within the authorization of the statute. This being so, it must be treated as an enactment proceeding from the legislative power of the State; and hence it stands upon precisely the same basis as the requirement of the Indiana statute (quoted in 225 U. S. 504, and referred to above) that commercial feeding stuffs should bear a label showing among other things a guaranteed analysis stating the



minimum percentage of crude fat and crude protein and the ingredients from which the article was compounded. It was because of the absence from the federal act of a provision requiring the ingredients to be disclosed that this court held that Congress had limited the scope of its prohibitions and had not included that at which the Indiana statute aimed.

The Food and Drugs Act of Congress has not been changed in any material respect from the form it bore when *Savage v. Jones* arose. By Acts of August 23, 1912, c. 352, 37 Stat. 416, and March 3, 1913, c. 117, 37 Stat. 732, § 8 has been amended, but not in any manner that affects the present question.

The fact that the Kansas statute *mutatis mutandis* follows quite closely the federal act, and that § 8 defines the term "misbranded" almost in the very words of the corresponding section of the act of Congress, with the significant difference in the final proviso to which we have called attention, is not dispositive of the question whether Congress has covered the field to the exclusion of state regulation. This is to be determined by what the act of Congress omits, not by what it contains; and by considering whether, in words or by necessary implication, Congress has prohibited the States from making any regulation in respect of the omitted matter. Further argument upon the question is foreclosed by the decision in *Savage v. Jones* that an omission from the act of Congress of a provision requiring feeding stuffs transported in interstate commerce to give affirmative information as to the ingredients of the article amounted to a limitation by Congress of the scope of its prohibitions, and that, although not including that at which the Indiana statute aimed, Congress had not denied to the State, with respect to feeding stuffs coming from another State and sold in original packages, the power to prevent imposition upon the public by making a reasonable and non-discriminatory

provision for the disclosure of ingredients and for inspection and analysis.

That decision is conclusive also upon this point: that the proviso in § 8 of the federal act that "nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding," merely relates to the interpretation of the requirements of the federal act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

*Savage v. Jones* was decided after elaborate argument and upon full consideration. We see no reason to reconsider the conclusion there reached or to deny to the case its proper authority. Its doctrine was followed and applied in *Sligh v. Kirkwood*, 237 U. S. 52, 61-62; *Hebe Co. v. Shaw*, 248 U. S. 297, 304.

It is argued that the present case is controlled rather by *McDermott v. Wisconsin*, 228 U. S. 115, 130, and in effect that this case must be taken as overruling *Savage v. Jones*. The contention is unfounded. The authority of the earlier decision was expressly recognized in the opinion of the court in the later; the distinction being placed (pp. 131-132) upon the question whether the regulations of the State concerning the same subject-matter were in conflict with the acts of Congress. The Wisconsin statute was held to be in conflict because it required that packages of food stuffs received through the channels of interstate commerce, bearing labels intended to be in compliance with the act of Congress, while the goods were still unsold and were in the possession of the importer for the purpose of sale and being exposed and offered for sale by him, as a condition of their legitimate sale within the State, should bear the label required by the state law and none other—

in effect requiring the label that showed compliance with the act of Congress to be removed from the package before the first sale by the importer, and while the goods remained still subject to federal inspection.

The judgment under review should be

*Affirmed.*

---

UNITED STATES *v.* LAUGHLIN.

APPEAL FROM THE COURT OF CLAIMS.

No. 200. Argued January 30, 31, 1919.—Decided April 14, 1919.

The Act of March 26, 1908, c. 102, 35 Stat. 48, providing for repayment in all cases where it shall appear to the satisfaction of the Secretary of the Interior that excessive payments have been made to the United States under the public land laws, gives the Secretary exclusive jurisdiction to determine questions of fact; but when the undisputed facts, shown to his satisfaction, call for repayment as a matter of law, his adverse decision is reviewable by the courts and may be reviewed by an action brought by the claimant under Jud. Code, § 145, in the Court of Claims. P. 442.

Under the Northern Pacific land grant Act of July 2, 1864, c. 217, 13 Stat. 365, the filing of a map of general route, although followed by a withdrawal order, did not take the odd sections out of the public domain or exempt them from entry under the preëmption and homestead laws prior to the filing and acceptance of the map of definite location. P. 444. *Nelson v. Northern Pacific Ry. Co.*, 188 U. S. 108.

The Act of 1864, *supra*, fixed no special price for odd-numbered sections within the limits of the Northern Pacific grant, and the right of a qualified person to preëmpt such a section prior to the acceptance of the railway's map of definite location at the minimum price of \$1.25 per acre (Rev. Stats., §§ 2357, 2259), was a substantial right of which he could not be arbitrarily deprived by government officials. P. 446.

Revised Stats., § 2364, providing that the Commissioner of the General Land Office shall fix a price of not less than \$1.25 per acre for

440.

Opinion of the Court.

the lands of any reservation when brought into market, has no application to withdrawn odd sections within the Northern Pacific grant limits, when preempted before definite location of the railroad. P. 447.

The Act of June 22, 1874, c. 400, 18 Stat. 194, confers no authority upon officials of the United States to charge more for land relinquished by the Northern Pacific Company than otherwise might have been charged. P. 446.

52 Ct. Clms. 292, affirmed.

THE case is stated in the opinion.

*Mr. C. Edward Wright*, with whom *Mr. Huston Thompson* and *Mr. Charles D. Mahaffie* were on the brief, for the United States.

*Mr. F. W. Clements*, with whom *Mr. Wm. R. Andrews* was on the brief, for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case, although involving but two hundred dollars, is deemed by the Government to be important because typical of a large group of cases of like character. Suit was brought by Laughlin in the Court of Claims under § 2 of the Act of March 26, 1908, c. 102, 35 Stat. 48, for the repayment of an alleged excess charge exacted of him when he made a preemption cash entry November 20, 1878, for a tract of 160 acres of public land, part of Section 33, Township 5 South, Range 12 East, W. M., in the Dalles, Oregon, land district, for which he was charged by the proper officer of the United States the sum of \$400, or at the rate of \$2.50 per acre. There was a judgment in favor of the claimant (52 Ct. Clms. 292), and the present appeal followed.

The land is a part of an odd-numbered section within 40 miles of the general route of the Northern Pacific Railroad



Company, as shown by its map filed in the Interior Department August 13, 1870, upon the basis of which the Department, on February 14, 1872, issued an order withholding from disposition the odd-numbered sections of public lands and increasing in price to \$2.50 per acre the even-numbered sections within the limits indicated by the map. No map of definite location of this particular portion of the proposed railroad was ever filed; this portion never was constructed, and the grant as to it was forfeited by Act of Congress of September 29, 1890, c. 1040, 26 Stat. 496. Claimant applied to the Secretary of the Interior under the Act of March 26, 1908, for the refund of \$200 of the purchase price, alleging that the lawful price was \$1.25 per acre; but the Secretary, on July 22, 1916, although finding the facts to be as above stated, denied the application upon the ground that the questions of law presented had been previously adjudicated by the Land Department adversely to claimant's contention.

Upon the present appeal it first is insisted in behalf of the Government that the Court of Claims had no jurisdiction of the subject-matter. If there was jurisdiction, it arose from the clause of § 145, Judicial Code, which confers upon that court jurisdiction to hear and determine claims founded upon "any law of Congress"—the Act of March 26, 1908, being the law relied on. Section 2 of this act reads as follows: "That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives." The third section provides machinery for the payment of the amount of the excess when ascertained. It is contended by the Government that a favorable decision by the Secretary is a condition precedent to the right of recovery under

440.

Opinion of the Court.

the section quoted; that since the Secretary disallowed the present claim, because not satisfied that an excessive payment under the law had been made, there has been no violation of any right of claimant; and that hence there is not presented a claim founded upon a law of Congress within the meaning of the term as employed in defining the jurisdiction of the Court of Claims. We cannot accept this construction of § 2 of the Act of 1908. According to it, although facts were made to appear to the entire satisfaction of the Secretary showing that a person had made "payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws," it would rest in the uncontrolled judgment and discretion of the Secretary to deny repayment of the excess because not satisfied that it ought to be repaid, notwithstanding Congress had declared that under the precise state of facts it should be repaid. Under this construction the legislative power would in effect be delegated to the Secretary. In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not and are not in dispute and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment, entitling claimant to repayment under the Act of 1908, was a matter properly within the jurisdiction of the Court of Claims. See *Medbury v. United States*, 173 U. S. 492, 497-498; *McLean v. United States*, 226 U. S. 374, 378; *United States v. Hvoslef*, 237 U. S. 1, 10.

Upon the merits, the question is, what price could a preëmptor lawfully be required to pay for public lands in an odd-numbered section within the primary limits of the Northern Pacific Railroad land grant after the filing

of a map of general route and the making of an order withdrawing the odd-numbered sections from entry; no map of definite location of the line in question having at that time or at any time been filed.

The Company was incorporated by Act of July 2, 1864, c. 217, 13 Stat. 365, by the third section of which there was granted to it "every alternate section of public land, not mineral, designated by odd numbers, . . . [within defined limits] . . . whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." By § 6 it was enacted: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed, except by said company, as provided in this act. . . . And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

Notwithstanding certain expressions in *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, 71-72, it came to be settled

440.

Opinion of the Court.

by a line of more recent cases, ending with *Nelson v. Northern Pacific Ry. Co.*, 188 U. S. 108, 116, 119, 121, that the Act of 1864 granted to the railroad company only those alternate odd-numbered sections to which at the time of definite location the United States had valid title and which then were free from preëmption or other claims or rights; that the company acquired no vested interest in any particular section of land until after a definite location and acceptance of its map thereof; and that until then the grant was in the nature of a "float." In that case the right of a homestead settler who went upon unsurveyed land after the filing of a map of general route and after the making and transmission to the proper local land office of a withdrawal order based upon that map, and who, as soon as survey was made developing the fact that his land was within an odd-numbered section, attempted to enter it under the homestead laws in the local land office, his application being rejected solely because of supposed conflict with the grant to the Northern Pacific Railroad, was sustained as against the company upon the ground that the acceptance by the land department of the map of general route and the making of a withdrawal order based upon it did not, in view of the terms of the granting act, segregate the land from the public domain or withdraw it from occupancy in good faith by homestead settlers prior to definite location. In *Northern Pacific R. R. Co. v. Sanders*, 166 U. S. 620, it was held upon like reasoning that the title of the railroad company was defeated by an entry upon lands within the primary limits of the grant by persons qualified to purchase them as mineral lands, followed by an application to purchase them as such which was pending at the time of the definite location of the railroad although initiated after the filing of the general route, notwithstanding the fact that the lands were not such as properly were to be regarded as mineral lands.



In short, construing §§ 3 and 6 of the granting act together, the filing of a map of general route, although followed by a withdrawal order, did not take the granted sections out of the public domain or exempt them from entry under the preëmption and homestead laws prior to the filing and acceptance of the map of definite location.

It is said on the part of the Government that this land was restored to entry and the claimant's application for purchase accepted because the railroad company had filed a relinquishment pursuant to the Act of June 22, 1874, c. 400, 18 Stat. 194; at the same time it is insisted that the provisions of that act have no bearing upon the determination of this case because not only had the land office never declared that the company's rights had attached to these lands, but in fact it never had any rights. It is said that under such circumstances the department uniformly has held that the Act of 1874 has no application; the practice of the land office having been to permit relinquishments in cases like the present in order to expedite the perfection of settlement claims, while saving to the railroad companies any rights they might have under the Act of 1874 to be determined upon the final adjustment of the grant. There being no finding that the lands in question had been relinquished by the railroad company under the Act of 1874, we give no weight to its provisions, beyond saying that in any point of view they conferred no authority upon the officials of the Government to charge more for the land relinquished than otherwise might have been charged. It declares that "entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted."

It is clear that the price of lands in odd-numbered sections was not fixed by the granting act of 1864. Section 6 fixed a price of two dollars and fifty cents per acre only for the alternate sections reserved to the United

440.

Opinion of the Court.

States—that is, those bearing even numbers. We need not pursue the suggestion of counsel for appellee that there could be no “reserved alternate sections,” within the meaning of the price-fixing clause, until ascertainment of the granted sections by the filing and acceptance of a map of definite location; for, in any event, neither § 6 nor the withdrawal order made any provision for the price of land in the odd-numbered sections. In the absence of special provision the minimum price was fixed by § 2357, Rev. Stats., at one dollar and twenty-five cents per acre, and under § 2259 a qualified preëmtor was entitled to purchase at the minimum price. This was a substantial right, of which he could not be deprived by arbitrary action of the officers of the Government.

The Government invokes the provisions of § 2364, derived from an act contemporaneous with the land grant (Act of July 2, 1864, c. 221, 13 Stat. 374), and reading as follows: “Whenever any reservation of public lands is brought into market, the Commissioner of the General Land-Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.” It is argued that the withdrawal order of 1872 amounted to a “reservation of public lands” within the meaning of this section, so far as it concerned the odd-numbered sections within the limits, and that the sale of the particular quarter-section to claimant amounted to a “bringing into market” of this part of the reservation, so that the commissioner of the general land office was permitted to fix the minimum at such price as he saw fit not less than \$1.25 per acre, and was acting within his authority when he set the price of these lands at \$2.50 per acre. But of this it suffices to say, as was pointed out in *Nelson v. Northern Pacific Ry. Co.*, *supra*, that under the terms of the granting act here under consideration the withdrawal on general route neither did nor could effectively

reserve any of the odd-numbered sections from homestead or preëmption settlement in advance of the definite location of the line of the railroad; and, as has been stated, there never was a definite location of that part of the road which had been proposed to be built opposite to the land that claimant took up.

The judgment of the Court of Claims must be

*Affirmed.*

---

CITIZENS BANK OF MICHIGAN CITY, INDIANA,  
v. OPPERMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 234. Argued March 17, 1919.—Decided April 14, 1919.

When a petition for rehearing is entertained in the state court, the judgment does not become final for the purposes of review here until the petition has been denied or otherwise disposed of, and the three months' limitation prescribed by the Act of September 6, 1916, begins to run from that time. P. 450.

Under the Act of 1916, the review of judgments of state courts by writ of error is limited to cases in which was really drawn in question the validity of a treaty or statute of or an authority exercised under the United States; or the validity of a statute of, or an authority exercised under, a State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States. *Id.*

Writ of error to review 115 N. E. Rep. 55, dismissed.

THE case is stated in the opinion.

*Mr. Jeremiah B. Collins*, with whom *Mr. Worth W. Pepple* was on the brief, for plaintiff in error.

*Mr. S. J. Crumpacker*, with whom *Mr. Samuel Parker*, *Mr. Frank E. Osborn*, *Mr. Lee L. Osborn* and *Mr. Will C. Crabill* were on the brief, for defendant in error.

448.

Opinion of the Court.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Section 7855, Burns' Anno. Indiana Statutes, 1914, provides: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." Relying upon this, defendant in error sued to recover a certificate of National Bank stock issued in her name and held by plaintiff in error bank as security for her husband's indebtedness. The bank defended upon the theory that exercising rights given by § 12 of the National Bank Act (13 Stat. 102; Rev. Stats., § 5139) she transferred the stock to her husband and in turn he had hypothecated it to secure his personal note. Being of the opinion that the National Bank Act did not inhibit an inquiry concerning all the circumstances the trial court permitted introduction of proof to that end; the jury found the bank had knowledge of facts sufficient to charge it with notice that the transaction amounted to a contract of suretyship by the wife; and judgment in her favor was affirmed by the State Supreme Court. A petition to rehear was overruled May 18, 1917, and at that time the judgment below became final for purposes of review here. *Andrews v. Virginian Ry. Co.*, 248 U. S. 272; *Chicago Great Western R. R. Co. v. Basham*, ante, 164. This writ of error was applied for July 13, 1917—within three months.

The Act of September 6, 1916, c. 448, 39 Stat. 726, 727, 728, limited our power to review judgments or decrees in state courts which became final subsequent to date when it went into effect (October 6, 1916), upon writs of error, to those cases "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." It also authorized this court to bring up for review and determination by certiorari "any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, 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." And it further distinctly directed that except as to writs of certiorari addressed to the Supreme Court of the Philippine Islands "no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of." Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from date of such denial or other disposition.

Plaintiff in error presented its petition here for a writ of certiorari to bring up the present cause April 15, 1918; this was denied April 22, 1918. Manifestly, the application was not within the prescribed time.

An examination of the record shows that in the courts below there was not really drawn in question (*Wilson v. North Carolina*, 169 U. S. 586, 595) "the validity of a treaty or statute of, or an authority exercised under the United States" or "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." Consequently, we are without jurisdiction to entertain the writ of error and it must be

*Dismissed.*

---

UNITED STATES *v.* ATCHISON, TOPEKA &  
SANTA FE RAILWAY COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 201. Argued March 11, 12, 1919.—Decided April 14, 1919.

The Act of March 4, 1913, c. 143, 37 Stat. 791, 797, authorizing the Postmaster General to add, not exceeding 5 per cent. per annum, to the compensation of railroads, under certain pending contracts for transportation of mail, left the increases, within that limit, to his discretion; the plain import of the words used must control. P. 454.

52 Ct. Clms. 338, reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Brown*, with whom *Mr. Leonard Zeisler* was on the brief, for the United States.

*Mr. Alex. Britton*, with whom *Mr. Evans Browne* and *Mr. Francis W. Clements* were on the brief, for appellee, invoked the legislative history of the act to prove that an extra allowance of full 5 per cent. was intended, without giving any discretion to the Postmaster General to fix a smaller amount. This was so plain, especially if the act be taken as a whole and with others *in pari materia*, that it ought even to prevail against the letter of the enactment. (1) *Blake v. National Banks*, 23 Wall. 307;

*Lapina v. Williams*, 232 U. S. 78; (2) *United States v. Freeman*, 3 How. 556; *Brown v. Duchesne*, 19 How. 183; (3) *Hawaii v. Mankichi*, 190 U. S. 197, 212; *Atkins v. Disintegrating Co.*, 18 Wall. 272; *Heydenfeldt v. Daney Gold Mining Co.*, 93 U. S. 634; *Holy Trinity Church v. United States*, 143 U. S. 457.

In making this substituted provision, Congress used language legally identical with that employed in the basic statute fixing railway-mail rates, which language for more than forty years has been construed as requiring the payment by the Postmaster General of the rates named in the statute which he was "not to exceed"—from all of which the conclusion is irresistible that Congress intended that the Act of March 4, 1913, should operate the same as had the Act of March 3, 1873. *Wisconsin Central R. R. Co. v. United States*, 164 U. S. 190, 205.

If any discretion was vested in the Postmaster General, it was to fix a flat increase not exceeding 5 per cent. for all routes. There appears no support for the theory that he was to increase the pay of one route 2 per cent., another 4 per cent., and so on. In allowing 5 per cent. increase to certain routes, the Postmaster General exercised whatever discretion was reserved to him, and he was bound by the law to make an equal allowance to all routes.

The method pursued by the Postmaster General of fixing the percentage of increase was not a valid exercise of discretion.

Memorandum opinion by MR. JUSTICE McREYNOLDS.

During 1910 and 1911 the appellee railway company entered into customary arrangements with the Post Office Department to carry mail over a number of routes for quadrennial terms ending June 30, 1914, and 1915, com-

pensation to be based upon ascertained weights. While these were in force, by Act of August 24, 1912, c. 389, 37 Stat. 557, Congress directed establishment of the parcel post service without providing for any additional compensation on account of the large increase in weights which would surely follow.

The Postmaster General called attention to the matter January 20, 1913; and after much consideration the following clause was incorporated in the Act of March 4, 1913, c. 143, 37 Stat. 791, 797:

"That on account of the increased weight of mails resulting from the enactment of section eight of the Act of August twenty-fourth, nineteen hundred and twelve, . . . the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law."

Acting under this provision, the Postmaster General refused to allow increased compensation of five per centum upon all routes, but apportioned payments among them—never in excess of five per centum—according to a carefully worked out formula which he deemed appropriate. Appellee sued for the difference between amount actually received and what it would have received if five per centum had been added. Considering history of the legislation and intent of Congress supposed to be indicated thereby the Court of Claims held that the act "required the Postmaster General to add 5 per cent. to the compensation being paid on all of said routes, and he having failed to do so that the plaintiff is entitled to recover the difference sued for." 52 Ct. Clms. 338, 361.



We are unable to agree with this conclusion. The language of the enactment is clear and we think it vested in the Postmaster General a discretion which, so far as shown by the record, has not been abused. We are not unmindful of the burden imposed upon appellee nor of the circumstances which lend color to a different conclusion; but these are not sufficient to justify a disregard of the plain import of the words which Congress deliberately adopted.

The judgment below must be reversed and the cause remanded with direction to dismiss the petition.

*Reversed and remanded.*

---

## BARBOUR *v.* STATE OF GEORGIA.

### ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 191. Submitted January 24, 1919.—Decided April 14, 1919.

One who acquires liquor after approval and before the effective date of a state law making its possession unlawful is not deprived by the law of his property without due process. P. 459.

It must be presumed that the liquor was acquired between those dates when the date of acquisition is not shown. *Id.*

Whether such a law would be constitutional as applied to one who acquired liquor before its enactment—not decided. P. 460.

A federal question which was not decided by the State Supreme Court because not so raised as to evoke its decision under the local practice will not be decided by this court. *Id.*

146 Georgia, 667, affirmed.

THE case is stated in the opinion.

*Mr. William W. Osborne and Mr. A. A. Lawrence*  
for plaintiff in error:

Wine has from the dawn of civilization been a recognized article of commerce, useful in arts, mechanics and for scientific, medicinal and religious purposes. Its future acquisition may be prohibited, but until some statute has been passed to change its status it retains the status of property given by common consent of mankind through the course of centuries. Under that status it was clothed with the protection afforded by the guarantees of the Fourteenth Amendment, and we insist that the State cannot alter this status under the guise of declaring that that which it had theretofore declared to be property was not property, but a noxious and unwholesome nuisance.

The very statute itself contradicts the announcement of the court that intoxicating liquors are inherently a nuisance, for it recognizes the right of property and the right to possess various specified amounts thereof.

We submit that when duties and revenues are paid upon wines their value inheres in the wines and the owner has a property right under the United States. This value the court below says the State may destroy.

The decision under review announces a dangerous application of the doctrine that innocent transactions may be prohibited to prevent their use as an aid to thwart the particular object.

At the time the statute in question was passed it was unlawful in Georgia to sell wine. [See Code, § 426, Penal Code 1911, appendix (b).] One was permitted under the law to purchase and possess it for his own use or to be used in social intercourse. The effect of a law passed November 18th, to become effective May 1st, and construed as the court below has done, must have been to force the citizen either to consume his wines, which was an aid to insobriety, or to destroy them. This, we submit, was contrary to good morals and repugnant to the protection guaranteed by the Fourteenth Amendment.

We invite the attention of the court to the case of *Wynehamer v. People*, 13 N. Y. 378, in which there is a most extended discussion of this question.

In the opinion of the court there is a suggestion that the wine was acquired between the date of the passage of the act, and the date upon which it, by its terms, became effective. We do not think this is important, for no statute has force until the time it becomes effective. 36 Cyc. p. 1192; Lewis, Sutherland's Statutory Construction. Property acquired before the statute became effective is just as much entitled to protection of the constitutional guarantees as if it were acquired prior to the passage of the act.

The premise upon which the court below based its conclusion was, that property right in wines is not absolute, but only qualified, and taken subject to such legislation as the State might thereafter enact. This, we insist, is opposed to the settled law of the land as announced by decisions of this court. *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Vance v. Vandercook Co.*, 170 U. S. 438.

Property right in liquors is derived, not by grant from the State, but under the Constitution of the United States.

It is true that the foregoing cases involved a conflict between the police power of the State and the commerce clause, while this case involves a conflict between the police power and the due process clause; but this is a distinction without a difference.

The foregoing cases afford a complete reply to the position assumed that if the liquors were acquired between the date of the approval and the effective date of the act, the act in question would not be retroactive.

Under the laws of Georgia as they existed between November, 1915, and May, 1916, it was lawful to ac-

quire and possess intoxicating liquors in any quantity. Under the cases cited one acquiring such property acquired with it all the incidents and protection accorded to property by the Constitution, and in a conflict between the police power of the State and the Constitution the police power must give way. *Bowman v. Chicago & Northwestern Ry. Co.*, *supra*.

*Mr. Clifford Walker*, Attorney General of the State of Georgia, for defendant in error:

The mere possession of whiskey for personal use may be rendered criminal by state legislature. *Crane v. Campbell*, 245 U. S. 304.

The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question. *Lawton v. Steele*, 152 U. S. 133; *Silz v. Hesterberg*, 211 U. S. 31; *People v. West*, 106 N. Y. 293.

If the lawful object warrants the discrimination the means adopted for making it effective also may be adopted. *Patson v. Pennsylvania*, 232 U. S. 138; *Geer v. Connecticut*, 161 U. S. 519.

It is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the act was before the enactment lawful or even innocent and without any element of moral turpitude. *People v. West*, *supra*; *People v. Cipperly*, 101 N. Y. 634; *Commonwealth v. Evans*, 132 Massachusetts, 11.

Intoxicating liquor being dangerous to the morals, good order, health and safety of the people, is not to be placed on the same footing with the ordinary commodities of life. *State v. Aiken*, 42 S. Car. 222; *Schwartz v. People*, 46 Colorado, 239.

The police power is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the



Constitution of the United States, and essentially exclusive. *United States v. Knight Co.*, 156 U. S. 1. This principle applies to prohibiting possession of certain things as a proper means to accomplish an ulterior valid purpose. *Silz v. Hesterberg*, *supra*; *Lawton v. Steele*, *supra*; *Patson v. Pennsylvania*, 232 U. S. 138.

A State may prohibit the sale of non-intoxicating malt liquors if the legislature deems it a necessary means to suppress the trade in intoxicants. *Purity Extract Co. v. Lynch*, 226 U. S. 192.

It is well settled that in legislating in behalf of the public morals, health and safety, the State by reason of its police power may enact laws which incidentally impair property value, *Mugler v. Kansas*, 123 U. S. 623; or destroy it altogether, *Cureton v. State*, 135 Georgia, 660; *Southern Express Co. v. Whittle*, 194 Alabama, 406; *Glenn v. Southern Express Co.*, 170 N. Car. 286; *Preston v. Drew*, 33 Maine, 558; *Patson v. Pennsylvania*, *supra*; *Silz v. Hesterberg*, *supra*; *Barbour v. State*, 146 Georgia, 667.

The State has the power to prohibit the manufacture and sale; it also has the power, as an incident to the right, to restrain the means by which intoxicating liquors for personal use can be obtained. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311.

The constitution of the State of Georgia expressly provides that its police powers cannot be abridged. Const., Art. IV, § 2, par. 2. Intoxicants, because of their inherent evil qualities, are taken and possessed subject to such legislation as the State may enact under its police power.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Georgia prohibitory liquor law was approved November 18, 1915; but, by its terms, did not become effec-

454.

Opinion of the Court.

tive until May 1, 1916. Under it Barbour was convicted for having in his possession on June 10, 1916, more than one gallon of vinous liquor. (Georgia Laws, Extraordinary Session, 1915, Part 1, Title 2, No. 4, §§ 16 & 30, pp. 90, 99, 105.) He asserted that the liquor had been acquired by him before May first; and contended that the statute, if construed to apply to liquor so acquired, was void under the Fourteenth Amendment. The Supreme Court of the State overruled this contention and affirmed the sentence. 146 Georgia, 667. The case comes here on writ of error under § 237 of the Judicial Code.

That a State which has enacted a prohibitory law may forbid the mere possession of liquor within its borders was decided in *Crane v. Campbell*, 245 U. S. 304; but it did not appear there when the liquor had been acquired. Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartemeyer v. Iowa*, 18 Wall. 129, and *Beer Company v. Massachusetts*, 97 U. S. 25, 32-33; but was not decided. The question presented here however is simpler. For the exact date when Barbour acquired the liquor is not shown; and we must assume, as the Supreme Court of Georgia did, that it was acquired during the period of five months and twelve days between the enactment of the law and the date when it became effective. Does the Fourteenth Amendment, by its guarantee to property, prevent a State from protecting its citizens from liquor so acquired?

A State having the power to forbid the manufacture, sale, and possession of liquor within its borders may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the enactment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that

after a day certain its possession will, by mere lapse of time, become a crime. It is well settled that the Federal Constitution does not enable one to stay the exercise of a State's police power by entering into a contract under such circumstances. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 615. Compare *Calder v. Michigan*, 218 U. S. 591, 599. Nor can he do so by acquiring property.

The defendant raised, in his amended motion for a new trial, the further objection that the law was unconstitutional as applied to him, because the liquor had been acquired before the statute was enacted; but the trial judge denied the motion and declined to approve any of the grounds on which it was based. In accordance with the state practice its Supreme Court therefore refused to consider the point. *Dickens v. State*, 137 Georgia, 523; *Harris v. State*, 120 Georgia, 196, 197. Consequently the question is not before us, *Louisville & Nashville R. R. Co. v. Woodford*, 234 U. S. 46, 51; and on it we express no opinion.

The judgment of the Supreme Court of Georgia is

*Affirmed.*

---

## J. E. HATHAWAY & COMPANY v. UNITED STATES.

### APPEAL FROM THE COURT OF CLAIMS.

No. 255. Argued March 19, 20, 1919.—Decided April 14, 1919.

A finding by the Court of Claims that a delay by the Government in approving a contract was reasonable is a finding of ultimate fact, binding upon this court unless made without evidence or inconsistent with other facts found. P. 463.

*Quaere:* Whether unreasonable delay on the part of the Government in approving a contract can entitle the contractor to an extension where the contract fixes a definite date for completion of the work?

460.

## Argument for Appellant.

*Id.* *District of Columbia v. Camden Iron Works*, 181 U. S. 453, distinguished.

A provision for deducting, in addition to an amount fixed as liquidated damages, the expense of superintendence and inspection, in case of failure to complete the work by the time specified, will be enforced when clearly expressed in the contract. P. 464.

A contention that sufficient credit of time was not allowed by the Government to the contractor for extra work *held* not reviewable in this court, it not having been made in the Court of Claims. *Id.*

52 Ct. Clms. 267, affirmed.

THE case is stated in the opinion.

*Mr. George A. King*, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for appellant:

Here was a month taken, at the best season of the year for working, simply to obtain record evidence of the authority of the attorney in fact of the surety company to sign the contract. The delay was wholly on the part of the Government. Whether styled "reasonable" or "unreasonable," it was a delay for which the contractor was in no degree responsible. That the delay in signing the contract on the part of the Government was reasonable is, it is submitted, not a finding of fact but a conclusion of law. *United States v. Pugh*, 99 U. S. 265; *Sun Insurance Co. v. Ocean Insurance Co.*, 107 U. S. 485, 502, 503. Such a conclusion embodied in the findings of fact is not binding in this court.

When the contract was signed by the contractor and the bond executed by a surety company, the contractor had done everything which he could do to enter into a legally binding contract with the Government. To supply the slight defect a telegram should have been sent to the contractor.

The injustice of holding this contractor to a date of completion offered by him on April 29, when he was not



notified of the completion of the contract as a binding obligation of the Government until June 13, is apparent. As soon as the contractor made his bid April 29, 1910, he was bound. *United States v. Porto Rico S. S. Co.*, 239 U. S. 88. He was not notified that the contract was awarded to him until May 11, twelve days thereafter. There is no explanation of this delay and no apparent reason for it. *District of Columbia v. Camden Iron Works*, 181 U. S. 453, is directly in point. See also *American Dredging Co. v. United States*, 49 Ct. Clms. 350; *Itnner v. United States*, 43 Ct. Clms. 336; *Little Falls Knitting Mill Co. v. United States*, 44 Ct. Clms. 1; *Callahan Construction Co. v. United States*, 47 Ct. Clms. 229, 235, 236; *Laidlaw-Dunn-Gordon Co. v. United States*, 47 Ct. Clms. 271; *Missouri Valley Bridge & Iron Co.*, 19 Comp. Dec. 712.

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

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The United States solicited sealed proposals for the repair of a revetment in Michigan; and J. E. Hathaway & Company became the successful bidders. Under a contract, dated May 11, 1910, they agreed to complete the work by December 1, 1910. It was not completed until 68 days later. Of this delay the Government conceded that 29 days were attributable to extra work required by it, and 10 more days were not counted against the contractor, being Sundays and holidays. For the remaining 29 days' delay the Government deducted from the contract price \$3082; claiming that amount under the provisions for liquidated and other damages. To recover the amount disallowed, J. E. Hathaway & Company brought suit in the Court of

Claims, which denied them relief (52 Ct. Clms. 267); and the case comes here on appeal.

*First.* Claimants contend that they were entitled to an extension of more than these 29 days' time for completing the work; because the contract and bond were delivered by them to the Government May 18, duly executed, but were not approved by the Chief of Engineers until June 9, and notice of approval was not given them until June 13. The origin of this delay was the failure of the surety company to file with the War Department a copy of the vote of its directors giving him who signed the bond as attorney in fact authority so to do. But claimants insist that this omission could have been quickly supplied, if the Government had telegraphed for a copy of the vote, and that practically all the delay was due to its unreasonable failure so to do.

The Court of Claims found: "There was no unreasonable delay on the part of the Government in approving the contract." This finding, like one of reasonable value, *Talbert v. United States*, 155 U. S. 45, 46, is a finding of an ultimate fact by which this court is bound, unless it appears that the finding was made without supporting evidence, *Cramp & Sons Co. v. United States*, 239 U. S. 221, 232; *Stone v. United States*, 164 U. S. 380; *United States v. Clark*, 96 U. S. 37, or is inconsistent with other facts found, *United States v. Berdan Fire-Arms Co.*, 156 U. S. 552, 573. There is no such lack of supporting evidence or inconsistency here. We have consequently no occasion to determine whether, as was held in *American Dredging Co. v. United States*, 49 Ct. Clms. 350, unreasonable delay on the part of the Government in approving a contract for an accepted bid can entitle the contractor to a corresponding extension of time, where a definite date is fixed by the contract for completion of the work. Compare *Monroe v. United States*, 184 U. S. 524. The case of *District of Columbia*

v. *Camden Iron Works*, 181 U. S. 453, 461, strongly relied upon by claimants, is clearly distinguishable. There the contract, as interpreted by the court, provided that the work should be completed, not (as here) by a date fixed, but within a certain number of days; and the number of days was to be measured, not from the date of the contract but from "the date of the execution of the contract." What was there decided is merely that under such circumstances it may be "shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face."

*Second.* Claimants contend also that the Court of Claims erred in allowing, in addition to the sum of \$100 a day as liquidated damages, the sum of \$182 for the expense of superintendence and inspection. But the contract expressly provided that time should be deemed of the essence and that in case of failure to complete within the time specified "the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence." There is no reason why parties competent to contract may not agree that certain elements of damage difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner. Provisions of a contract clearly expressed do not cease to be binding upon the parties, because they relate to the measure of damages. *Wise v. United States*, ante, 361.

*Third.* Claimants further contend that the credit of time allowed by the Government on account of the extra work should have been greater. On this matter no issue appears to have been raised below; and it is obviously not open for review here.

The judgment of the Court of Claims is

*Affirmed.*

## Opinion of the Court.

## EX PARTE WAGNER (TRADING AS THE AMERICAN MECHANICAL TOY COMPANY), ET AL., PETITIONERS.

## ON PETITION FOR WRIT OF MANDAMUS.

No. 29, Original. Argued March 17, 1919.—Decided April 14, 1919.

Mandamus may be resorted to, in proper cases, for the purpose of securing judicial action, but not for the purpose of determining in advance what that action shall be. P. 471.

A writ of mandamus could not properly be directed to the Circuit Court of Appeals and its judges, to control proceedings in a case which has been remanded by that court to the District Court and is pending exclusively in the latter. P. 469.

Interlocutory proceedings for an accounting, in the District Court, will not be forbidden by mandamus merely upon the ground that disposition of other proceedings before this court may possibly render the accounting nugatory and a useless expense to the petitioner. P. 471.

So *held*, where the District Court, in the exercise of its judicial discretion, had refused to stay the accounting, upon full consideration of the grounds urged in this court by petitioner.

Rule discharged; petition dismissed.

THE case is stated in the opinion.

*Mr. H. A. Toulmin, Jr.*, and *Mr. H. A. Toulmin*, with whom *Mr. E. H. Turner* and *Mr. W. B. Turner* were on the brief, for petitioners.

*Mr. Reeve Lewis*, with whom *Mr. C. A. L. Massie* and *Mr. Ralph L. Scott* were on the brief, for respondents.

MR. JUSTICE CLARKE delivered the opinion of the court.

The petitioners pray that a writ of mandamus shall issue out of this court, requiring the Circuit Court of Ap-



peals for the Sixth Circuit and the judges thereof and the United States District Court for the Southern District of Ohio, Western Division, and the judge thereof, to stay further proceedings in a suit pending in the District Court, and the execution of a judgment against petitioners rendered therein by that court and affirmed by the Circuit Court of Appeals. The answers of the courts and judges to the usual rule to show cause are before us.

The facts upon which the prayer for this extraordinary remedy is based are as follows: The Meccano, Limited, a corporation, brought a suit, which we shall designate as the Ohio case, in the District Court for the Southern District of Ohio against F. A. Wagner, trading as The American Mechanical Toy Company, and The Strobel & Wilken Company, a corporation, charging: (1) the infringement of letters patent, which the plaintiff claimed to own, covering certain parts of a model-builder or mechanical toy, known by the trade-name of "Meccano;" (2) the infringement of two copyrights which the plaintiff claimed to own upon the manual or book of instructions, which was sold with the toy and which was essential to the use of it, and (3) unfair competition. An accounting and permanent injunction were prayed for. The defendants denied the allegations of the bill and asserted a counter claim.

Upon the trial on the merits the District Court found for the plaintiff on all of the issues, dismissed the counterclaim of defendants and granting an injunction ordered an accounting.

On appeal the Circuit Court of Appeals for the Sixth Circuit affirmed the decree of the District Court except as to the infringement of the patent, which was held to be invalid for want of invention, and remanded the case for a decree not inconsistent with its opinion.

Pursuant to this affirmance the District Court entered a decree, and appointed a master to take an account of

465.

Opinion of the Court.

gains, profits and damages and to report his conclusions to that court.

Thus was the Ohio case ripe for an accounting, which had been ordered, when the petition which we are considering was filed.

After the decision by the District Court in the Ohio case, but before it was affirmed by the Circuit Court of Appeals, the Meccano, Limited, instituted a suit, which we shall designate as the New York case, in the United States District Court for the Southern District of New York against John Wanamaker, a corporation, charging that the defendant, a customer of the defendants in the Ohio case and a retail dealer engaged in selling the toy manufactured by Wagner, was guilty of the same violations of complainant's rights as were alleged in the Ohio case. Upon "affidavits and exhibits" a motion for an injunction *pendente lite* was filed which, upon hearing, was granted. From this order allowing a temporary injunction an appeal was taken to the Circuit Court of Appeals for the Second Circuit, and after the appeal was argued, but before it was decided, the decree of the District Court in the Ohio case was affirmed by the Circuit Court of Appeals for the Sixth Circuit. Thereupon the Meccano Company filed a "motion for a decision on the merits" in the New York case, then pending on appeal in the Circuit Court of Appeals for the Second Circuit, and in support of this motion were filed copies of the opinion of the Circuit Court of Appeals for the Sixth Circuit and of the decree entered by the District Court pursuant thereto.

This motion for a judgment on the merits was bottomed on the claim that the two cases involved the same issues, that Wagner had assumed the defense in the New York case and that the decree rendered by the Circuit Court of Appeals for the Sixth Circuit constituted an estoppel by judgment when pleaded in the case in the Second Circuit, —but the motion was denied.

Later on, the appeal from the order granting a preliminary injunction, which was argued before the motion for judgment on the merits was filed, was decided, and the District Court was reversed, the Circuit Court of Appeals for the Second Circuit holding with the Circuit Court of Appeals for the Sixth Circuit that the patent declared on was invalid for want of invention, but the court also held that a very clear case was necessary to justify a preliminary injunction for a claimed infringement of copyright or for unfair competition, the only remaining claims in the bill, and that the affidavits and exhibits before the District Court were not sufficient to warrant its conclusion. For these reasons the order of the District Court allowing a temporary injunction was reversed.

Following this decision by the Circuit Court of Appeals for the Second Circuit, the Meccano, Limited, filed a petition in this court for a writ of certiorari, giving as the reasons relied upon to secure the writ that there was a conflict of opinion between the Courts of Appeals of the Second and Sixth Circuits upon the questions involved in the case, and that the cause should be brought before this court for review to determine:

(1) The legal effect to be given to a prior decree in the Sixth Circuit against the manufacturer, as against a customer in the Second Circuit;

(2) Whether the preliminary injunction could be legally denied by the Circuit Court of Appeals for the Second Circuit after the prior adjudication of the same issues by the Circuit Court of Appeals for the Sixth Circuit;

(3) Whether or not the prior decree of the Circuit Court of Appeals for the Sixth Circuit entitled the petitioner to a decision in its favor on the "motion for a decision on the merits" filed in the later case in the Second Circuit;

(4) Whether or not an unsuccessful defendant in a suit in one Circuit, in which his product has been adjudged

465.

Opinion of the Court.

unlawful, is to be permitted to re-litigate the same issues with respect to the same product by assuming the defense of a subsequent suit in another Circuit against one of his customers.

Upon this petition a writ of certiorari was allowed and the case was brought to this court for review.

Promptly upon the granting of the writ of certiorari by this court the petitioners herein moved the Circuit Court of Appeals for the Sixth Circuit to stay the accounting proceeding in the Ohio case pending a decision by this court in the New York case.

The Circuit Court of Appeals for the Sixth Circuit denied this motion and, in the answer of that court and of the judges thereof to the rule of this court to show cause, they give as their reason for so deciding, that the court was of the opinion that, as the case had theretofore been remanded to the District Court, it had no jurisdiction to order such a stay or to make an order directing the District Judge to do so,—certainly not until a like application had been made to that court and had been refused. In its journal entry the court sufficiently advised the unsuccessful parties of the reason for its action. It reads as follows:

“That the motion . . . to stay all proceedings herein . . . presents a question which, at this stage of the case, No. 2977, must be determined by the court below.”

And the court and judges add that no application had been made in any way to review the action taken by the District Judge on the motion to stay.

Obviously it is a conclusive answer to the prayer of the petitioners for a writ of mandamus to the Circuit Court of Appeals and to the judges thereof directing the entry of a stay of proceedings, that the case was not, when the stay was refused, and is not now, pending in that court.



After this overruling of their motion for a stay by the Circuit Court of Appeals for the Sixth Circuit, the petitioners herein made a similar application to the District Court for the Southern District of Ohio for a stay of proceedings until the New York case should be decided by this court, which motion was also denied.

The District Court and the judge thereof in the return to the rule issued herein, give as reasons for such denial:

(1) That the defendants had permitted the time to expire in which to apply to this court for a review of the decree of the Circuit Court of Appeals for the Sixth Circuit on certiorari without making any application for such review, and therefore the court concluded that the rights of the parties as to unfair competition and copyright infringement, which remained after the holding that the patent was invalid, had become settled.

(2) That the case before the Circuit Court of Appeals for the Second Circuit was an appeal from an order granting a preliminary injunction and that to the court, not having the record in that suit before it, the New York case seemed to involve only the question as to the effect of the decree of the Circuit Court of Appeals for the Sixth Circuit upon the case in the Second Circuit and could not, therefore, be determinative of the rights of the parties in the Ohio case.

(3) That there did not seem to the court to be any conflict between the decisions by the Sixth and Second Circuit Courts of Appeals because the facts of the two cases, as the court was advised, were so different that the decisions could not be the same upon their merits.

(4) That from the statement of counsel for Wagner that a fire had occurred on the floor of the building in which the Wagner outfits, manuals, etc., and books had been stored, resulting in great injury to them, the court concluded it to be the part of prudence that the marshal should take possession of such property and

465.

Opinion of the Court.

books as soon as possible, and that there seemed to it no good reason for further delay in the accounting.

This answer of the District Court and judge is also clearly sufficient and conclusive. It shows that the court was called upon to judicially determine the scope of the decision of the Circuit Court of Appeals for the Second Circuit, reversing the action of the District Court granting a temporary injunction, and whether or not that decision was in conflict with the decision by the Circuit Court of Appeals for the Sixth Circuit; to forecast, as best it might, what the scope and effect of the decision of this court in the New York case would be upon the rights of the parties as determined in the Ohio case, and, having regard to the rights of the plaintiff and the conduct of the defendants, whether, after four years of obviously very strenuous litigation, the accounting should be further delayed by the prospect that the decision of this court might render the results of it valueless.

Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall be. *In re Rice*, 155 U. S. 396. It may not be resorted to, as the petitioners seek to resort to it here, for the purpose of controlling minor orders made in the conduct of judicial proceedings, and the fact that the result of litigation may possibly be such that interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use for the purpose of forbidding such proceedings, even though the cost of them cannot be recovered from the opposing party or even though the order cannot be reversed on error or appeal. *Ex parte Newman*, 14 Wall. 152, 165, 168. This from *American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 379, is sharply pertinent to the application before us:

"Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reëxamination;' would 'introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;' would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties;' and 'would subvert our whole system of jurisprudence.'"

The petitioners have misconceived the scope and applicability of the remedy of mandamus and the rule is

*Discharged and the petition dismissed.*

---

SOUTHERN PACIFIC COMPANY *v.* STATE OF  
ARIZONA.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 238. Submitted March 13, 1919.—Decided April 14, 1919.

Whether a shipment was at a given time interstate is a question of fact. P. 477.

Evidence *held* insufficient to prove that a traveling show was moving interstate, at the time of proceedings before a state commission, to require transportation within the State and fix the rate. *Id.*

The mere intention to continue the tour of a traveling show beyond the State where it was performing, *held* not enough to give interstate character to a contemplated journey within the State. *Id.*

A claim of federal right which was not set up in the state court and made in the assignments of error *held* not open in this court. P. 478. *Seem*, that when required by a state commission to transport a

472.

## Argument for Plaintiff in Error.

traveling show at a rate which is not objected to and upon terms the same as it has habitually and voluntarily agreed to in like cases, a railroad company has no ground to complain that it is thus deprived of its liberty to make or refuse a contract as a private carrier, in violation of the equal protection and due process clauses of the Fourteenth Amendment. P 478.

19 Arizona, 20, affirmed.

THE case is stated in the opinion.

*Mr. C. W. Durbrow, Mr. Henley C. Booth and Mr. Wm. F. Herrin* for plaintiff in error, in support of the contention that the movement was interstate, cited *South Covington Ry. Co. v. Covington*, 235 U. S. 537, 545; *United States v. Union Stock Yards of Chicago*, 226 U. S. 266, 304; *Missouri, Kansas & Texas Ry. Co. v. Texas*, 245 U. S. 484; *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 348.

In support of the contention that the right of private contract was invaded, in violation of the Fourteenth Amendment,—*Chicago, Rock Island & Pacific Ry. Co. v. Maucher*, 248 U. S. 359; *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Brothers Construction Co.*, 228 U. S. 177; *Baltimore & Ohio S. W. Ry. Co. v. Voigt*, 176 U. S. 498; *Wilson v. Atlantic Coast Line*, 129 Fed. Rep. 774; *affd.* 133 Fed. Rep. 1022; *Chicago, Milwaukee & St. Paul Ry. Co. v. Wallace*, 66 Fed. Rep. 506; *Cluff v. Grand Trunk Western Ry. Co.*, 155 Fed. Rep. 81; 1 *Hutchinson on Carriers*, 3d ed., § 88; *Moore on Carriers*, § 38, pp. 79, 80.

It is not necessary in order to render an order or a statute obnoxious to the Federal Constitution that it in terms or in effect authorize the actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner. *Forster v. Scott*, 136 N. Y. 577; *Monongahela Navigation Co. v. United States*, 148 U. S. 336.



*Mr. Wiley E. Jones*, Attorney General of the State of Arizona, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

An agent for Campbell's United Shows applied to the Southern Pacific Company to transport eighteen cars, carrying a carnival show equipment, including employees and animals, from Tucson via Maricopa, to Phoenix, Arizona.

In reply to this application the company gave two reasons for refusing the request. The first of these was that the company had contracted for the transportation of another show, under an agreement not to carry a second one within thirty days, which had not expired; and the second, that the company was not a common carrier of shows and would not make the customary contract with Campbell, but would serve him only at certain published interstate rates, which it regarded as applicable. These were many times greater than had been charged for the same show and than had been the customary charge by the Southern Pacific and other companies for similar service.

Upon receiving this refusal, an application by the owner of the shows to the Arizona Corporation Commission for relief, resulted in an order to the Southern Pacific Company and the Arizona Eastern Railroad Company, operating a connecting line, to show cause why they should not publish, on one day's notice, a special rate, designated in the order of the commission, for the transportation of the shows between the points named. The reasonableness of the required rate is not contested, and the order permitted the Southern Pacific Company to make the special terms for transportation of the shows which had been customary with it in like cases.

472.

Opinion of the Court.

The company refused to obey the order and the commission issued to it a second rule to show cause why it should not be punished for contempt for such disobedience. On this second rule a hearing was had, and the company was adjudged in contempt and fined \$1500, which it refused to pay.

Thereupon the State of Arizona instituted this suit in a superior court of that State to recover the amount of the fine.

In its answer to the complaint of the State, the Southern Pacific Company alleged:

That the proposed movement of the shows was "interstate in character" because they were engaged in a tour, beginning at the City of El Paso, Texas, and designed to extend through the States of Arizona and New Mexico into the State of California, of which tour the movement from Tucson to Phoenix was a part; that in its necessary operation the order would require the company to accept a rate lower than its published interstate rate and would be a direct burden upon interstate commerce; and that, for these reasons, the order for the transportation was in contravention of the provisions of Article I, § 8, of the Constitution of the United States, and the fine for contempt was unlawfully imposed and void.

The judgment of the superior court was in favor of the State, the company appealed to the Supreme Court of Arizona, which affirmed the judgment, and the case is here on writ of error.

The only claim of error argued in this court which is properly presented by the record is: Whether the persons and property which the commission ordered the railroad company to carry were in interstate transportation when the order was made for the service between two stations in Arizona. If the shipment was then in interstate commerce the order was void, and if

it was not the order was valid and the judgment of the Supreme Court of Arizona must be affirmed.

The evidence which was before the courts and the commission was as follows:

Early in February, 1914, an agent for the shows applied to the Southern Pacific Company for their transportation from El Paso, Texas, to various towns in Arizona where it was desired to exhibit, and ultimately to Cochise, Arizona, from which point another line would be taken into Tucson. Nothing came of this application and an arrangement was made for carriage to Tucson by another road. Before the shows arrived at Tucson the application out of which this suit arose was made. The agent for the shows testified that the tentative purpose of the management was to go from Tucson to Prescott, to Clarkdale, to Kingman, all in Arizona, and then to Needles, California, exhibiting in each town, but when testifying on March 23rd, when his show was exhibiting in Tucson, he said that although he had made application to the Santa Fe Railroad Company for a contract for transportation beyond Phoenix, he had not at that time received a reply.

The agent for the Santa Fe Company at Phoenix testified that about March 20th an application was made to him for a rate and contract for the transportation of the shows over his line from Phoenix to Prescott, "possibly to Clarkdale and to Needles, California."

Two contracts with the Santa Fe Company were introduced in evidence, one dated April 3rd, providing for the transportation of the shows from Phoenix to Prescott, to Kingman and to Needles, and the other dated April 16th, providing for transportation from Prescott direct to Bakersfield, California.

The shows were actually carried by the Southern Pacific Company on March 29th or 30th from Tucson to Phoenix but at an interstate rate insisted upon in

472.

Opinion of the Court.

defiance of the commission's order. At Phoenix the transportation ended so far as the Southern Pacific Company was concerned, and the contract with the Santa Fe Company to carry the shows beyond that city was not concluded, as we have seen, until April 3rd—in its modified form not until April 16th.

This statement of the case decides it. Whether a shipment was at a given time in interstate commerce is a question of fact, *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 108; and it is plainly impossible to say that the property and persons constituting the shipment of the shows here involved were in progress of interstate transportation when the Arizona commission entered its order on March 25 that the company should accept the intrastate shipment from Tucson to Phoenix. For at that time the shows were in the exclusive possession and control of the owner, exhibiting for six days at Tucson, and the application to the Southern Pacific Company, which was refused, shows, incontrovertibly, that the transportation to Tucson had terminated, and that no other transportation had then been contracted for. The company itself proved that interstate transportation was not subsequently arranged for until April 3rd certainly—and probably not until April 16th—and then was via another line from Phoenix, after two weeks for exhibition in that city.

The mere intention of the shipper to ultimately continue his tour beyond the State of Arizona did not convert the contemplated intrastate movement into one that was interstate. The case is ruled by *Coe v. Errol*, 116 U. S. 517; *Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa*, 233 U. S. 334; *Gulf, Colorado & Santa Fe R. R. Co. v. Texas*, 204 U. S. 403; *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, ante, 134.

It is further argued by the plaintiff in error that the



order of the state commission deprived it of its right to make or refuse to make a contract as a private carrier for the transportation of traveling shows, and thereby deprived it of the equal protection of the laws and of its property without due process of law.

It would be enough to say of this contention that no such claim was asserted in the answer of the company in the state court, or even in the assignments of error in this court, and that, therefore, it cannot be considered here. But this omission is not an oversight, for the record shows that it had been the prior practice of the plaintiff in error to transport such shows on application under special contract—a short time before it had transported another show and the year before it had accepted these same shows for transportation—and that the order of the commission was: "It is understood . . . that the . . . company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details, as to responsibility, service, and conditions," which contract was on file with the commission, and was dated March 4, 1914. This form of contract was one also used by the Southern Pacific Company.

Thus this second claim, obviously an afterthought, is so clearly without merit that it cannot be considered, and the judgment of the Supreme Court of Arizona is

*Affirmed.*

Opinion of the Court.

HOUSTON ET AL. v. ST. LOUIS INDEPENDENT  
PACKING COMPANY.

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

No. 264. Argued March 20, 1919.—Decided April 14, 1919.

Under the Meat Inspection Act, the Secretary of Agriculture is authorized to prohibit the use of the word "sausage" as false and deceptive, when applied to a compound of meat, with added cereal in excess of 2 per cent. and added water or ice in excess of 3 per cent. P. 483.

The act does not require the Secretary to mark a meat-food product "inspected and passed" merely because it is wholesome and free from dyes and chemicals, if it is to be sold under a deceptive name. P. 484.

Whether the name "sausage" is deceptive as applied to a compound of meat with added cereal and water is a question of fact which the statute submits to the determination of the Secretary, under the power it gives him to make rules and regulations for carrying it into effect, and his decision, when fairly arrived at on substantial evidence, is conclusive. *Id.*

242 Fed. Rep. 337, reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Frierson*, with whom *Mr. Charles S. Coffey* was on the brief, for appellants.

*Mr. Alexander F. Reichmann*, with whom *Mr. Abram B. Stratton* was on the brief, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Secretary of Agriculture, assuming to exercise authority under the "Meat Inspection" Act, approved

June 30th, 1906, c. 3913, 34 Stat. 669, 676, 678, promulgated a regulation, effective April 1st, 1913, in part as follows, viz:

“Washington, D. C., Feb. 28, 1913.

“For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906 (34 Stat. 674), Regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

James Wilson,  
Secretary of Agriculture.

“(Section 16, paragraph 1.) Sausage shall not contain cereal in excess of two per cent: When cereal is added its presence shall be stated on the label or on the product.

“(Paragraph 2.) Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph.”

Immediately after the effective date of this regulation the appellee, an extensive manufacturer of sausage, correctly interpreting it as prohibiting the marking, stamping or labeling as “sausage” any compound of chopped or minced meats containing cereal in excess of two per cent. and water or ice in excess of three per cent. (except as otherwise provided), filed the bill in this case in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, averring that “sausage” made by it with cereal and water in excess of the requirements of the regulation was wholesome and fit for human food and that the effect of the order would be to exclude its product from interstate commerce, to its great and irreparable damage. The prayer was that

the defendants, the Secretary of Agriculture and the officers subordinate to him, be enjoined from refusing to mark as "Inspected and passed" all "sausage" manufactured by the petitioner found to be sound, healthful, and wholesome, and which contained no dyes, chemicals, preservatives or ingredients which would render such "sausage" unsound, unwholesome or unfit for human food; that they be required by mandatory injunction to mark such "sausage" as "Inspected and passed," and that the regulation be declared to be unauthorized by law, null and void.

The District Court denied the application, on the bill, for an injunction (204 Fed. Rep. 120), but on appeal that holding was reversed and the case was remanded by the Circuit Court of Appeals (215 Fed. Rep. 553).

The Secretary of Agriculture then answered admitting that it was the purpose of the Department to refuse, and that it had refused, to mark as "Inspected and passed" as "sausage" the product of the appellee unless manufactured in compliance with the regulations complained of, and, as warrant therefor, he quoted in his answer from the act of Congress the following:

*"No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted,"* and that "said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act."



Answering the allegation of the bill that the appellee's trade in "sausage" would be ruined by the enforcement of the regulation, the Secretary of Agriculture averred that the appellee manufactured and sold large quantities of sausage which did not contain any cereal or added water, and added:

"That the manufacture and sale of a product as sausage which product contains added cereal and water in quantities as described in plaintiff's bill, or in any quantities in excess of the amount designated in said regulation, effective April 1, 1913, is false and deceptive; that the ordinary consumer of sausage manufactured by this plaintiff has no knowledge or information that sausage contains cereal and added water, that such information is not conveyed to persons who purchase plaintiff's sausage at retail by any method of marking or branding now or heretofore in use by plaintiff, and that it is impracticable and impossible in the ordinary course of manufacture and distribution of sausage to mark or brand the same so that the purchaser at retail or the consumer will be informed as to the amount of cereal and water added thereto."

An elaborate trial on the merits resulted in the dismissal of the bill by the District Court, but this judgment was reversed by a divided Circuit Court of Appeals and the case was remanded with directions to award the appellee injunctions substantially as prayed for. The case is here for review on appeal.

The claim made by the Government in the lower courts that the compound of meats, cereal and water, which the appellee claimed the right to sell as "sausage" was unwholesome is abandoned in this court, and the only question argued and submitted is whether it was within the power of the Secretary of Agriculture to prohibit the use of the word "sausage" as false and deceptive, within the meaning of the act, when applied to the appellee's product.

The foregoing statement shows that the question for decision in this court is: Whether, in promulgating the regulation assailed, the Secretary of Agriculture acted arbitrarily and in excess of the authority given him by the act of Congress, to make, from time to time, such rules and regulations as are necessary for the efficient enforcement of the act, or whether he acted in good faith and upon substantial grounds in deciding that the sale of appellee's product as "sausage" resulted in deception of purchasers and consumers, so that his determination of such question of fact was within the power conferred upon him as the head of an executive department of the Government and is not subject to review by the courts.

The contention of the Government is that the product of the appellee being a meat food product, put up in containers—casings or canvas coverings—it falls within the prohibition of the act that such product shall not be sold or offered for sale by any corporation in interstate commerce "under any false or deceptive name," and that the regulation being for the purpose of preventing its sale under the false or deceptive name of "sausage," it is plainly within the authority given to the Secretary of Agriculture to make rules and regulations for the efficient execution of the act.

On the other hand, the contention of the appellee is that the product being wholesome and containing no dyes or chemicals, which render it unfit for human food, an earlier provision of the act applies, which it is asserted deprives the Secretary of all discretion in such a case and requires that he shall cause the product to be marked "Inspected and passed;" and also, it is claimed, that the word "sausage," when qualified as was required by prior regulations by including in the label such expressions as "Cereal added," or "Sausage and cereal," was not a false or deceptive name.

The contention of the appellee that if its product is

wholesome, and if it does not contain dyes and chemicals, the act imperatively requires the Secretary to mark its product as "Inspected and passed" is clearly unsound if the word "sausage" as applied to it is false and deceptive, for plainly the provision of the act requiring the marking of the product must be harmonized with the subsequent provision that no such meat or meat food product shall be sold or offered for sale under any false or deceptive name.

Whether or not the term "sausage," when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it.

This rule has been most frequently applied in Land Department cases, but often also to decisions by heads of other departments.

Thus, to the action of the Secretary of the Navy in *Decatur v. Paulding*, 14 Pet. 497; to the action of the Secretary of the Interior, on full consideration of the subject, in *Gaines v. Thompson*, 7 Wall. 347, and in *Burfenning v. Chicago &c. Ry. Co.*, 163 U. S. 321; and to decisions of the Postmaster General in *Bates & Guild Co. v. Payne*, 194 U. S. 106, and *Smith v. Hitchcock*, 226 U. S. 53. The doctrine has been extended by act of Congress to decisions by the Secretary of Commerce and Labor, *Tang Tun v. Edsell*, 223 U. S. 673; *Zakonaite v. Wolf*, 226 U. S. 272; *Lewis v. Frick*, 233 U. S. 291.

The scope of the rule is illustrated by this court, saying in *Johnson v. Drew*, 171 U. S. 93, 99:

"If there is any one thing respecting the administra-

479.

Opinion of the Court.

tion of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts."

And in *New Orleans v. Paine*, 147 U. S. 261, 264:

"In *Noble v. Union River Logging Railroad*, decided at the present term (*ante* 165,) we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the Head of a Department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power."

That the case before us is one for the application of this rule is shown by the record, which contains an interesting history of what large manufacturers have come, in a more or less gradual progress, to regard as the proper ingredients of the product which they have sold as sausage, and which also shows, without conflict, that the ultimate purchaser and consumer of the product is not informed and in general does not know of the presence of cereal and added water in it. The evidence shows that the poorer classes of beef and pork are used in making sausage, such as trimmings, hearts, ears, cheeks, liver, snouts and tripe, "and all that kind of things," but the preferred material is bull meat; that such meat, other than bull meat, is dry and has not the cohesive properties which will unite it when ground or minced into the mass popularly known as "sausage" and that, for this reason, corn meal, potato flour and other like substances have come to be used by the trade as "binders" to give it the desired cohesiveness and appearance.



The president of the appellee testified that when he first began making sausage twenty-five years ago he used anywhere from five per cent. to twelve per cent. of cereal and that when the regulation was promulgated he was using two or three per cent. to ten per cent. when he used any at all, but that in a part of his product he did not use any, notably in that which was sent into Pennsylvania, where the use of cereal was prohibited by statute; that when he used ten per cent. of cereal he added from fifteen to twenty per cent. of water, and that in general water was added in double the percentage of cereal used; and that the cereal, usually corn meal or corn flour, was resorted to to cheapen the product and cost about two cents a pound, while the meat used cost from six to fifteen cents a pound.

Before the regulation assailed was promulgated cereal and water were generally used by large manufacturers of sausage, but all of the representatives of manufacturers, other than those of the appellee, who were called as witnesses, testified that they were obeying the regulation, and the agreement of such witnesses was general that retail purchasers and consumers did not know of the presence of cereal in what they were buying as sausage.

There is conflict in the evidence as to whether the use of cereal in excess of the prescribed amounts renders the product less digestible and wholesome, whether it reduces its food value, and whether the sausage will ferment in a shorter time than when cereal is not used at all, or when used in smaller quantities.

The result, thus stated, of the examination of the record before us shows, beyond controversy, that the Secretary of Agriculture in promulgating the regulation complained of acted on substantial evidence and with sufficient reason in concluding that persons purchasing or using as "sausage" the appellee's compound of various meats, cereal and water would be deceived as to its composition and

479.

Syllabus.

as to its value as a food product, and we cannot say that it was an abuse of discretion to prohibit the use of the word "sausage" as applied to it, rather than to prescribe qualifying terms explanatory of it. Few purchasers read long labels, many cannot read them at all, and the act of Congress having committed to the head of the department, constantly dealing with such matters, the discretion to determine as to whether the use of the word "sausage" in a label would be false and deceptive or not, under such circumstances as we have here, this court will not review, and the Circuit Court of Appeals should not have reviewed and reversed the decision of the Secretary of Agriculture.

The decree of the Circuit Court of Appeals for the Eighth Circuit is reversed and the case remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

---

## MOORE v. UNITED STATES.

### APPEAL FROM THE COURT OF CLAIMS.

No. 278. Argued March 21, 1919.—Decided April 14, 1919.

The Act of June 25, 1910, c. 423, 36 Stat. 851, allowing compensation from the United States for use of patented inventions, provides that it shall not apply to any device discovered or invented by a government employee "during the time of his employment or service." *Held*, that this prevents recovery where the invention was completed during such service although in the hours when the inventor was not actually on duty.

52 Ct. Clms. 532, affirmed.

THE case is stated in the opinion.

*Mr. Samuel Herrick*, with whom *Mr. P. M. Liddy* was on the brief, for appellant.

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

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant sued the United States in the Court of Claims to recover compensation for the use, without license or lawful right, of a tool, which was covered by United States Letters Patent, of which he was the owner. In his amended petition he alleged that during the years 1903 to 1914, inclusive, he invented the tool in question, which was adapted to be used "as a reefing-iron on the decks, sides, and bottoms of vessels where wood-caulking is done"; that he entered the employment of the Government as a wood-caulker in a navy yard on March 26, 1913, and continued therein until July 16, 1914; "that during the month of May, 1914, your petitioner, after expending a great deal of time, labor, and study, completed his invention" of the tool afterwards patented; and that during the hours of his employment by the Government he did not do any work upon his invention, but that such work as was performed upon it subsequent to March 26, 1913, when he entered the Government employ, was performed at his home during his absence from duty in the navy yard. For the extensive use which the Government had made of the tool he prayed for compensation, which had been demanded and refused.

The appellant can maintain such a suit, if at all, only by warrant of the Act of Congress, approved June 25, 1910, c. 423, 36 Stat. 851. This act provides that whenever any invention described in and covered by a patent from the United States shall hereafter be used by the United States without the license of the owner thereof or lawful

487.

Opinion of the Court.

right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims.

Of the three provisos in the act the third one is applicable to this case and reads:

“*And provided further, [3] That the benefits of this Act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the Government of the United States; or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service.*”

The appellant was not actually in the employ of the Government when he made his claim by bringing suit, but the Court of Claims dismissed his petition for want of jurisdiction on the ground that it showed on its face that the device was discovered during the time he was in the employment or service of the Government, and that therefore the case fell within the third proviso of the act.

This decision is so obviously right that discussion of it would be superfluous. The act of Congress must be read “according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation.” *United States v. Temple*, 105 U. S. 97, 99. No matter what the appellant may have done prior to May, 1914, it was in that month, he avers, that he completed his invention, and during the whole of that month he was in the employment or service of the Government. To give the effect contended for to the allegation that the appellant confined his work on his invention to the hours when he was not actually on duty, but while he was in the Government employ, would be to amend the statute, not to construe or interpret it.

The judgment of the Court of Claims is

*Affirmed.*



HARTFORD LIFE INSURANCE COMPANY *v.*  
JOHNSON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
MISSOURI.

No. 291. Submitted March 26, 1919.—Decided April 14, 1919.

Under Jud. Code, § 237, as amended by the Act of September 6, 1916, this court cannot consider a claim of federal right which was not made in the state court at the proper time and in the proper manner under the state system of pleading and practice and which, without evasion or for the purpose of defeating the claim, was denied consideration on that ground. P. 493.

The Supreme Court of Missouri, following its established practice, refused to consider a sister state judgment which was rendered six months after the judgment of the Missouri trial court, and was not set up in any pleading or introduced in evidence, but was brought to the notice of the appellate courts only in argument and as an exhibit to a brief. *Held*, that full faith and credit was not denied. *Id.*

Whether a charter granted to an insurance company by a resolution of a state legislature is a public act or record within the meaning of the "full faith and credit clause"—not decided. P. 494.

The exercise of their independent judgment by the courts of one State in construing a charter granted by the legislature of another can raise no federal question, if no statute or decision of the other State, construing the charter, was pleaded or put in evidence. *Id.*

Writ of certiorari to review 271 Missouri, 562, dismissed.

THE case is stated in the opinion.

*Mr. James C. Jones, Mr. Geo. F. Haid and Mr. James C. Jones, Jr.*, for petitioner, in support of the contention that the Connecticut judgment was before the court below, relied on *Jenkins v. International Bank*, 127 U. S. 484, 488, insisting that the only difference between that case and this was that in that one the judgment in the second action was brought forward while the trial court

still retained jurisdiction of the original action, whereas in the case at bar the decree was brought forward for the first time in the Kansas City Court of Appeals because the trial court had, by the appeal to that court, lost all jurisdiction of the action. This decree being entitled, under the Constitution, to full faith and credit, it would seem, on principle, that it should be accorded the same full faith and credit in the Kansas City Court of Appeals and in the Supreme Court of Missouri, even though the cause was then pending on appeal, as it would have been entitled in the trial court had it been rendered and introduced in evidence at the time the trial was had.

*Mr. Matthew A. Fyke* for respondent. *Mr. Peyton A. Parks* was on the brief.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit, on a life insurance policy or certificate, in which judgment was rendered against the company, petitioner, successively, by three courts of the State of Missouri. The case is in this court on writ of certiorari granted on the asserted ground that the State Supreme Court failed and refused to give full faith and credit to the judgment and decree of a superior court of the State of Connecticut, and also to the petitioner's charter, "a public record and act of the State of Connecticut," in violation of the rights secured to it by Article IV, § 1, of the Constitution of the United States.

Respondent moves to dismiss the writ for want of jurisdiction.

The decree of the superior court of Connecticut, to which it is claimed full faith and credit was denied, was rendered in the case of *Charles H. Dresser et al. v. The Hartford Life Insurance Company*, of Hartford, Connecticut,—the petitioner. The character of this decree and

the effect which must be given to it when properly pleaded and introduced in evidence in courts of other States are both sufficiently stated in *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662, and in *Hartford Life Insurance Co. v. Barber*, 245 U. S. 146.

The respondent, on this motion to dismiss, does not seek to have the decisions in the cases cited modified, but asserts that the claim of right now made was not so "set up or claimed" in the state courts that full faith and credit could be or was denied to the Dresser decree.

The judgment in this case in the trial court was rendered against the petitioner in September, 1909, and the decree in the *Dresser Case* was not rendered until six months later, in March, 1910. The latter decree was not set up in any pleading and was not introduced in evidence in this case. The only way in which it came to the notice of the Missouri courts was in argument and as an exhibit to a brief filed in the appellate courts and the Supreme Court of Missouri dealt with it in this single paragraph:

"The case at bar was tried below on May 12, 1909, which was prior in time to the entering of the decree in the *Dresser Case*, and the record in the *Dresser Case* was therefore not offered or presented in the trial of this case. Since the record of the *Dresser Case* is in no manner properly raised or lodged in this case, we do not deem it to be within the scope of our review and likewise the Federal question based thereon. Under such circumstances the rule announced by the Supreme Court of the United States in *Hartford Life Insurance Co. v. Ibs*, *supra* [237 U. S. 662], should not be applied to this case."

The jurisdiction of this court to review the final judgment or decree of the highest court of a State, in such a case as we have here, is defined in § 237 of the Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726, which provides that it shall be competent for this court, by certiorari to require any such cause to be certified to

it for review when there is claimed in it any title, right, privilege or immunity under the Constitution of 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." It is the settled law that this provision means "that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, . . . and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." *Atlantic Coast Line R. R. Co. v. Mims*, 242 U. S. 532, 535; *Gasquet v. Lapeyre*, 242 U. S. 367, 371, and cases cited.

No suggestion is, or could be made, that the Missouri State Supreme Court's holding in this case was framed to evade the consideration of the federal right now asserted, for it had long been the established law of that State that under its system of practice the construction of either the federal or state constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate court by argument or brief of counsel for the purpose of giving jurisdiction. *Miller v. Connor*, 250 Missouri, 677, 684. It has further been uniformly held by that court since 1836 that it will not take judicial notice of the laws of other States, but that they must be proved, as other facts, by evidence introduced at the trial. *Southern Illinois & Missouri Bridge Co. v. Stone*, 174 Missouri, 1, 33.

On the authorities thus cited we are obliged to conclude



that the question as to the faith and credit which should be given to the Dresser decree was not so presented to or ruled upon by the Supreme Court of Missouri as to present a federal question for review by this court.

But, as if anticipating the result we have just reached, the petitioner contends that full faith and credit were denied to its charter, "a public record and act of the State of Connecticut," which was introduced in evidence, for the reason that the Supreme Court of Missouri, interpreting that charter, erroneously approved the charge to the jury by the trial court "that it devolved upon the defendant to prove that the assessment," the non-payment of which was relied upon as forfeiting the policy sued upon, was made by the directors of the defendant. The petitioner introduced evidence tending to prove that the assessment under discussion was made, not by formal action of the board of directors, but by executive officers of the company, "the president and secretary . . . or the vice president and secretary, or possibly the vice president and assistant secretary," and it contended that this was sufficient in law because it had long been the practice of the company and was recognized by the directors as action taken in their behalf under authority delegated by them.

Even if this charter, which was granted by a resolution of the Assembly of Connecticut, be regarded as a public act or record of that State within the scope of the constitutional provision, Article IV, § 1 (which is not decided), nevertheless, since no statute of Connecticut or decision of any court of that State was pleaded or introduced in evidence in this case, giving a construction to the provision of the charter which the Missouri courts, treating as valid, interpreted, the exercise by those courts of an independent judgment in placing a construction upon it cannot present a federal question under the full faith and credit clause of the Constitution. *Louisville & Nashville*

490.

Counsel for Appellants.

*R. R. Co. v. Melton*, 218 U. S. 36, 50, and *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 273, 275.

It is asserted that the record presents other constitutional questions which give this court jurisdiction to review the case, but an examination shows the claims to be too unsubstantial to merit discussion and the writ must be

*Dismissed.*

---

BROUGHAM ET AL. v. BLANTON MANUFACTURING COMPANY.

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

No. 247. Argued March 19, 1919.—Decided April 21, 1919.

The Meat Inspection Law applies to oleomargarine. P. 498.

Registration of a trade-name under the Trade Mark Law has no bearing on the right to use it under the Meat Inspection Law. P. 499.

Under the Meat Inspection Law the power to determine whether a trade-name is false, or deceptive, is lodged with the Secretary of Agriculture, and his determination, if not arbitrary, is conclusive. *Houston v. St. Louis Independent Packing Co.*, ante, 479. *Id.*

The power of the Secretary is a continuing one; approval of a name at one time not precluding its disapproval later. P. 501.

*Held*, that the Secretary, having approved the name "Creamo" as a designation of an oleo product, containing 30% cream, and which was strongly extolled on that ground, was amply justified in denying the use when the cream had been greatly reduced or omitted, and replaced by skimmed milk; notwithstanding evidence that the manufacturer invested heavily upon the faith of the approval. *Id.*

243 Fed. Rep. 503, reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Frierson* for appellants.

*Mr. Shepard Barclay*, with whom *Mr. S. Mayner Wallace* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appellants are officers of the Department of Agriculture charged with the administration of the meat inspection acts. The appellee, Blanton Manufacturing Company, is a manufacturer of oleomargarine and brought this suit against appellants to enjoin and restrain them from interfering with it in the use of the word "Creamo" as a trade-mark in the manufacture and sale of its product and the use of that mark upon packages of its product shipped from St. Louis in interstate commerce.

The District Court granted the injunction and its decree was affirmed by the Circuit Court of Appeals. 243 Fed. Rep. 503.

As a ground of suit and recovery the company relies upon the following facts and they express, in a general way, its contentions. To what extent they should be modified will be apparent as we proceed.

The company is a manufacturer of oleomargarine, having a factory at St. Louis, Missouri, which comprises a group of buildings specially arranged and equipped for the purpose of such manufacture and where the company has made an investment of many thousands of dollars. Its product has been sold in packages of various sizes, marked with a trade label or stencil adopted for that purpose, which trade-mark is the word "Creamo," used since 1904. Its trade has become extensive and valuable, its product has acquired a high reputation and become a source of profit, increasing yearly, and an interruption in the use of its trade-mark and label would cause serious injury in a sum exceeding \$5000.

January 6, 1908, the company applied to the United

495.

Opinion of the Court.

States Patent Office for the registration of "Creamo" as a trade-mark, it was duly registered June 9, 1908, and the company has since enjoyed the use of it and made contracts with dealers under it, and the company's oleomargarine is known to its customers far and wide by that label, trade-name and mark.

In 1906, after the enactment of the Act of June 30, 1906, c. 3913, 34 Stat. 669, concerning the inspection of "meat and meat food products," the company was informed by the Bureau of Animal Industry that its plant would be subject to inspection under the act of Congress. The company objected but yielded to avoid controversy and hazard to its interest, and an inspector was installed. The company, however, contends that its manufacture of oleomargarine is not subject to the power and authority of the bureau.

The Secretary of Agriculture, in 1907, approved the company's trade-mark of "Creamo" and upon the faith of the approval the company has used the same and by expenditure of large sums of money has extended its popularity and publicity; but, notwithstanding, Dr. Brougham (one of the appellants) threatened the company that from and after March 1, 1914, its use would not be allowed and that the inspector in the establishment of the company would enforce the threat and attempt to prevent the use of the trade-mark and label.

The trade-mark is duly registered in the office of the Secretary of State of the State of Missouri.

Some of the contentions of the company are somewhat difficult to handle—indeed, to get at in separation. One of these is that the Bureau of Animal Industry has no authority or power over the company's product, its manufacture or market. The basis of the contention is that the food products indicated by "the meat inspection act" do not include a food product bearing the trade-name 'oleomargarine,' prescribed by a special revenue law to



be used in the sale thereof, and that statutory name is not 'false or deceptive' when so used." And for the contention the company relies on *Homer v. Collector*, 1 Wall. 486, and *Chew Hing Lung v. Wise*, 176 U. S. 156. The further contention is that § 6 of the Oleomargarine Act (24 Stat. 209) requires the article to be packed in a particular way which is not the same as that prescribed by the meat inspection act and was in force before the latter was enacted, and therefore excluded "an article like this oleomargarine having a 'trade-name' by law." And yet again that the Food and Drugs Act, which is "*in pari materia*, enacts that an 'article of food' containing no poisonous or deleterious ingredients shall not be deemed misbranded" which shall thereafter be known as articles of food under their own distinctive names and not offered for sale under the distinctive name of another article if the name be accompanied on the same label or brand by the name of the place where manufactured or produced. And it is said that the company's oleomargarine bears that statutory trade-name and hence should not be considered misbranded. *United States v. Coca Cola Co.*, 241 U. S. 265, is adduced to support the contention. We do not consider it necessary to follow the company's argument in detail. It is rather involved. We disagree with it. In other words, we are of opinion that the meat inspection act is applicable. This was the decision of the Circuit Court of Appeals. The company's oleomargarine is a meat product, compounded, among other things, of oleo oil and neutral lard.<sup>1</sup> Besides, it is not sold under the name of oleomargarine alone; there is the qualifying addition of the word "Creamo," and used, as we shall hereafter see, to qualify and distinguish it from other combinations which might bear the designation oleomargarine.

---

<sup>1</sup> Defined in the testimony to be "a lard produced from the leaf of a pig, neutralized so as to take the taste and smell out of it."

495.

Opinion of the Court.

We pass to the consideration of the meat inspection acts (of June 30, 1906, and March 4, 1907, 34 Stat. 669, 1260). They require an inspection of all meat and meat food products prepared for interstate and foreign commerce and provide that no persons or firm or corporation shall offer for transportation, and no carrier shall transport in interstate or foreign commerce, any such products unless marked "Inspected and passed," and that "no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

It is the contention of the Government that the use of the word "Creamo" is deceptive and induces the belief that cream is a substantial ingredient of the oleomargarine. The company earnestly contends to the contrary and that, besides, the designation "Creamo" has received the approval of the Department of Agriculture and has been sanctioned as an appropriate trade-mark by the Interior Department (Patent Office). The latter contention may be immediately put to one side. The test of the product is the meat inspection laws, not the trade-mark laws, and therefore we are concerned with the action of the Department of Agriculture and not with that of the Interior Department. And so intimately is the case concerned with the action of the Department of Agriculture that the basic and dominant contention of the Government is that to the department is committed the power of determining the fact of the influence of the name and label of the company. In other words, the power of determining whether a trade name is "false or deceptive" given by the law to the Secretary of Agriculture is, when exercised, conclusive of the falsity or deception of the name.

(*Bates & Guild Co. v. Payne*, 194 U. S. 106, and cases cited; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659), and the power necessarily is a continuing one. The contention and the cited cases have been approved very lately in *Houston v. St. Louis Independent Packing Co.*, ante, 479, in which it is declared that the decision of the department, unless arbitrary, is conclusive. A sketch of the evidence, therefore, becomes necessary.

As early as 1904 there was, if not controversy, discussion between the company and the department. It was not of serious extent. The company was indulged in the representation that its product was composed of "Butter, Oleo Oil, Neutral, Cream and Salt" and that these were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." But there was objection to a statement that the oils were "doubly inspected" by the United States Inspectors, "insuring absolute purity and cleanliness." Such was the condition of things, we may deduce from the testimony, until 1908.

We may say, in passing, that in the beginning 30% of cream was used and the word "Creamo" was selected to suggest such ingredient to repel the criticisms of the butter makers who represented that oleomargarine was produced from "sewerage and dead horses." But it appears from the testimony that the use of cream was discontinued, skimmed milk being used instead, it having been discovered by the government chemists that it was not the butter fat in the milk which produced the flavor, but it, the flavor, came from skimmed milk.

October 2, 1912, an objection came from the department to the use of the company's label and discussion ensued, extending over a period of twelve or fifteen months. The department then announced that the use of the word "Creamo" was "considered deceptive and misleading and its future use could not be permitted." It was, however, suggested that "Creamo Brand Oleomargarine"

495.

Opinion of the Court.

be used, the words to be displayed alike in prominent type, and that cream should be used in the product, its use having been discontinued. Upon this ruling of the department and the resistance of the company to it the contest was waged for a time. The company contended that the word "Creamo" was arbitrary and not descriptive; the department asserted the contrary and that it "conveyed a false inference to the consuming public," and, notwithstanding an offer by the company to use 10% of cream, insisted upon the use of the word "brand" and required also some modifications of the label. It further declared that if the requirements of the bureau should not be complied with on and after March 1, 1914, the inspector in charge at St. Louis would be instructed to prohibit "the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number."

Such is the testimony in outline, and it is manifest that the action of the department was not arbitrary but given upon a consideration of the circumstances and the fact of the trade-name "Creamo" having a deceptive implication to the consuming public.

But against the decision of the department the company opposes the previous approval of "Creamo" as a trade-name and alleges that upon the faith of the approval the company has used the same and by the expenditure of large sums of money—testified to be about \$10,000 a year—has made its product public and popular under that name. The answer to the contention is that the meat inspection acts contemplate and confer a continuing inspection and power, a power necessarily not exhausted by one exercise. Besides, the approval was given at a time when the company used 30% of cream in its product and declared that it and other ingredients were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." The indulgence of the department had justifi-



cation. When the practice of the company changed, when it commenced to vary the percentages of cream and finally used none at all, naturally the department changed its ruling. The company can, therefore, claim no right from the prior ruling. There may be value in the use of the trade-name "Creamo," as the company asserts, and detriment, it may be, in any change or qualification of it; but its value may be in its deception—its suggestion of cream appealing to the popular preference for that article over skimmed milk, though the scientific judgment may be in favor of the latter, a judgment possibly not known or if known not appreciated or accepted. And the deception would not be taken away and the purpose of the law satisfied by the addition of 10% of cream which the company offered to make. At least such was the judgment of the department, and we cannot pronounce it arbitrary.

It will be observed from the quoted provisions of the meat inspection act that two conditions are presented: If "Creamo Oleomargarine" is to be regarded as the name of the product it is false and deceptive, whatever it may have been formerly; if it be asserted to be an established trade-name it has not received the approval of the Secretary of Agriculture and hence its use is without legal permission.

*Decree of the Circuit Court of Appeals is reversed and the case remanded to the District Court with direction to dismiss the bill.*

MR. JUSTICE McREYNOLDS took no part in the decision of the case.

Counsel for Appellants.

## RAND ET AL., EXECUTORS OF RAND, v. UNITED STATES.

## APPEAL FROM THE COURT OF CLAIMS.

No. 213. Argued March 10, 11, 1919.—Decided April 21, 1919.

Revised Statutes, § 3226, providing that no suit shall be maintained for recovery of illegal or erroneous taxes until appeal made to the Commissioner of Internal Revenue and decision had thereon, and fixing a period within which suit may be brought when his decision is delayed more than six months, was made applicable by § 31 of the War Revenue Act of June 13, 1898, 30 Stat. 448, 464, to inheritance taxes collected under that act. P. 507.

As applied to a claim for a refund of such inheritance taxes, this bar of Rev. Stats., § 3226, and the bar of § 3228, which requires all claims for the refunding of erroneous or illegal internal taxes to be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, were removed by the Acts of June 27, 1902, c. 1160, § 3, 32 Stat. 406, and of July 27, 1912, c. 256, 37 Stat. 240, if the claimant complied with their requirements and presented his claim to the Commissioner. *Id.*

The fact that a tax was voluntarily paid, without protest, is not an impediment to a refund under the Act of July 27, 1912, *supra*. *United States v. Hvoslef*, 237 U. S. 1. P. 508.

The Act of July 27, 1912, *supra*, § 2, in providing that repayment shall be made to "such claimants as have presented or shall hereafter present their claims," requires a positive and individual assertion of the claim, within the time limited; the claimant may not rely upon claims presented by others not manifestly his own or clearly made on his behalf, nor excuse the presentation of his claim upon the assumption that it would have been useless, judged by results in other cases. *Id.*

52 Ct. Clms. 72, 285, affirmed.

THE case is stated in the opinion.

Mr. H. T. Newcomb, with whom Mr. Frederick L. Fishback was on the briefs, for appellants.

*Mr. Assistant Attorney General Brown, with whom Mr. Charles H. Weston was on the brief, for the United States.*

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves a consideration of the inheritance tax law of June 13, 1898, generally called the War Revenue Act (30 Stat. 448, 464-5), and was brought in the Court of Claims to recover the amount of a tax assessed and collected under that law.

The Court of Claims dismissed the case on the grounds (1) that appellant did not file any claim with the Commissioner of Internal Revenue; (2) that the tax was voluntarily paid. The decision is resisted by appellant and other contentions are made against the tax.

Section 29 of the Act of 1898 provided that any person or persons having in charge or trust, as administrators, etc., any legacies or distributive shares arising from personal property, the amount of the property exceeding \$10,000 in actual value, passing, after the passage of the act, from any person possessed of the property, either by will or by the intestate laws of any State or Territory, was made subject to a tax to be paid to the United States, the amount of tax being dependent upon the degree of relationship of the taker to the person who died possessed of the property. And there was an increase of the tax with an increase of the value of the property possessed in excess of \$25,000.

The facts found we give only in summary: June 6, 1900, Edmund Dwight died testate. His will was admitted to probate June 28, 1900. Elizabeth Cabot, his sister, was named executrix of the will. She accepted and qualified, but died January 30, 1902, and Philip Cabot, her son, was appointed administrator, with the will annexed. He qualified. The will, so far as material,

503.

Opinion of the Court.

provided as follows: "I give to the New England Trust Company, a corporation duly chartered by the State of Massachusetts, and located in the city of Boston, the sum of one hundred and twenty-five thousand dollars (\$125,000), to be invested in the general trust fund of the company and held upon the following trusts: To pay to Mrs. Jennie Lathrop Rand . . . the annual net income thereof in semi-annual payments during her life."

October 1, 1900, the trust fund was deposited with the New England Trust Company, the trustee designated in the will, which accepted the trust. The fund was not invested separately but as part of the general trust fund of the company. Semi-annual payments of the accrued net income were made to Mrs. Rand to January 1, 1915. No other payments were made to her or for her benefit, nor did she become entitled to any other or additional payments on account of the trust.

September 27, 1900, Elizabeth Cabot made to the United States Bureau of Internal Revenue a return of the legacies in her charge as executrix and passing from Dwight's estate to the persons named therein, in which was included the legacy to Mrs. Rand, aged 63, stranger to the decedent, of the clear value of \$125,000, the taxable amount of which, after a particular exemption, she stated to be \$40,355.91, with \$7.50 per hundred dollars as the rate of taxation, and the amount of tax as \$3,026.69, and she reported the legacy as in trust with the New England Trust Company. It is not shown that the collector of internal revenue or other officer made a demand for the tax, but September 28, 1900, Elizabeth Cabot paid to the proper collector the tax out of the funds and it has since been retained by the United States. The sum was advanced by Elizabeth Cabot, at the request of Mrs. Rand and other legatees, pursuant to an agreement made September 28, 1900, by which the taxes paid by Elizabeth Cabot were to be refunded to her and were repaid to her.



The tax paid by her was determined to be the proper tax by regulations of the Commissioner of Internal Revenue on December 16, 1898. The regulations contained rules and tables for the determination of the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the Act of June 13, 1898.

The only assessment ever made under §§ 29 and 31 of the Act of 1898 and amendments upon the interest of Mrs. Rand in the interest created in the trust fund under Dwight's will was made in pursuance of the rules, tables and instructions of the Commissioner and there was no specific investigation by that officer of her expectancy of life or as to the earning capacity of the trust fund otherwise than by application of the tables. The value of her interest was so determined to be \$42,320.60, from which was deducted the inheritance tax of Massachusetts, leaving a net balance of \$40,355.91, upon which the tax was assessed at the statutory rate of \$7.50 per hundred dollars. The computation was from the death of Dwight, the decedent.

Under authority of the Act of Congress of July 27, 1912, c. 256, 37 Stat. 240, a claim for the refund of the sum paid, to-wit, \$3,026.69, was filed with the Commissioner of Internal Revenue, December 24, 1913, by H. T. Newcomb, representing himself to be the attorney for the New England Trust Company, trustee under the will of Dwight. And on December 30, 1913, attorneys Lyon & Lyon, of Washington, D. C., acting for and in behalf of the administrator *de bonis non* of Edmund Dwight, filed with the Commissioner of Internal Revenue a claim for the refund of the tax. The grounds of both claims were that the tax was illegally and erroneously assessed and collected and contrary to the provisions of the Act of 1898 and amendments and that the same should be refunded by virtue of the Act of June 27, 1902, c. 1160, 32

503.

Opinion of the Court.

Stat. 406, and the Act of July 27, 1912. The claims were rejected by the acting commissioner March 28, 1914. It is not shown that Mrs. Rand or any person acting for her or in her behalf filed a claim with the Commissioner.

The court, as we have said, dismissed the claim without considering the validity of the assessment. The conclusion is contested by appellant in an elaborate brief and defended by the Government, relying primarily upon § 3226, Rev. Stats., as the Court of Claims did. The case presents, therefore, at the outset the question whether the conditions of suit required by that section were satisfied, as qualified or relieved by the Acts of 1902 and 1912, hereafter referred to.

Section 3226 provides that no suit shall be maintained for the recovery of a tax illegally or erroneously assessed or collected, "until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein." If, however, it is provided, decision be delayed more than six months from the date of the appeal, suit may be brought within another period prescribed, which it is not necessary to mention.

The section is clear enough and unless modified or changed precludes the present suit as it was applicable to the tax involved (§ 31 of the Act of 1898). But § 3 of the Act of 1902 and § 2 of the Act of 1912, *supra*, are invoked as removing the bar of § 3226. Section 3 of the Act of 1902 directs the Secretary of the Treasury to refund upon proper application being made to the Commissioner of Internal Revenue any tax that may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902. Section 2 of the Act of July 27, 1912, has a like direction to the Secretary of the Treasury to pay "such claimants as have presented

or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them." There is no question that the cited sections remove the bar of §§ 3226 and 3228 if appellant has met their requirements and presented to the Commissioner of Internal Revenue a claim for the refund of the tax. Nor is the fact that the tax was voluntarily paid, that is, without protest, an impediment to the application of the Act of 1912. *United States v. Hvoslef*, 237 U. S. 1.

It will be observed that the repayment is to be made to "such claimants as have presented or shall hereafter so present their claims." Has the appellant satisfied these requirements? Two claims were presented, one by the attorney of the Trust Company and one by attorneys acting for and in behalf of the administrator *de bonis non* of the estate of Edmund Dwight. Both claims were disallowed because, to quote the Commissioner's letter, the "tax was paid upon the absolutely vested interest of a stranger amounting to more than \$25,000 and taxed at the legal rate of \$7.50 per \$100, and accordingly, under the decision of the Supreme Court in the *Knowlton* and *Fidelity Trust* cases, all this tax was legally due."

The first demand, it is said, "was presented by the testamentary trustee, then holding trust funds to the use of the claimant and authorized and required to protect her interests under and in connection with the trust fund. The other claim was filed by the personal representative of the decedent, successor to the executrix who had actually made the payment, although such payment was at the cost of" Mrs. Rand. And it is urged that "the officers of the Government were not misled at any time; there was no question as to the identity of the payment sought to be recovered or that of the person to whose benefit recovery would accrue." The demands, therefore, it is the further contention, satisfied the statute and should

503.

Opinion of the Court.

be ascribed to Mrs. Rand, and that the statute being remedial, its remedy is to be promoted by a liberal construction, not impeded by a strict and technical one; and there are adduced statutes that have been liberally construed. 49 Ct. Clms. 699; 51 Ct. Clms. 408.

The inutility of another demand is emphasized, either for information to the department or for the assertion of her claim. She knew, it is said, the precise facts of the demands that had been made and she knew, besides, that claims of the class to which hers belonged had been uniformly rejected and that another claim in her own name would have been no less a "useless ceremony" than that which was declared in one of the cited cases. And she insists that such ceremony finds exemption in the case of *Weaver v. Ewers*, 195 Fed. Rep. 247 (C. C. A.). The case is not similar to that at bar. The tax there involved was paid under protest and there had been an application in writing by the payer of it for a refund of the amount. The application was held to have satisfied § 3226 and that there was no necessity for another after the tax was paid. The case at bar does not present the same situation. Its tax was paid without protest and appellant seeks to avail herself of the Act of 1912—not by performing its condition, but by asserting an exemption from performance because of its supposed inutility. The Government besides contests the sufficiency and sincerity of her excuse and points out that not only does the record fail to show that the presented claims were made in her behalf but that one of the claims was made eight days and the other two days before the time within which claims could have been made and that the decisions rejecting them were several months afterwards, and she could not therefore have been influenced by the rejection. If it be replied that she relied on the rulings upon claims of the class to which hers belonged, the query occurs, Why did not the trustee of the fund and the representative of the estate



rely on those rulings? Their relation to the taxes, whatever it was, was not as intimate as hers and hers would seem to have called for more solicitude and a demand by her as necessary as suit by her. It seems, therefore, that this suit is a postfact resolution and an experiment with the situation after the indulgent period of the statute. The Act of 1912 cannot be made so compliant. It had its purpose and it is not satisfied by representative or negative action; it requires a positive and individual assertion of claim. The condition was easy of performance, its grant a concession, and there is no room for the plea to enlarge it beyond its words. It is direct and clear and liberal enough of itself. It says to the taxpayer: Make a claim for the tax you have paid, show its illegality, and it will be repaid to you. We cannot relax its requirements—certainly not on the assumption that they might have been useless if complied with.

We see no reason for granting the motion for further findings nor the motion for certiorari, and both are denied.

*Judgment affirmed.*

---

## PERLEY ET AL. v. STATE OF NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 251. Submitted March 19, 1919.—Decided April 21, 1919.

To protect the watersheds held by cities for supplying water to their inhabitants from danger by fire is a governmental purpose, in the execution of which it is not arbitrary for a State, where there is reasonable apprehension of the danger, to require the owners of timber, upon cutting or removing it from land near to such watersheds (in this case within 400 feet), to remove or cause to be burned under proper supervision, the tops, etc., not desired to be taken for commercial or other purposes. P. 513.

510.

## Argument for Plaintiffs in Error.

Mere assertion that the presence of such refuse would be harmless, not a nuisance, etc., *held* not to countervail the judgment of the state courts, the legislative judgment implied in the act making the requirement, and common experience as to the danger of fires spreading from such accumulations. *Id.*

A statute making this requirement of individuals in favor of municipalities does not deny equal protection of the laws in failing to make similar requirements of municipalities for the protection of individuals. P. 514.

173 N. Car. 783, affirmed.

THE case is stated in the opinion.

*Mr. Julius C. Martin, Mr. Thos. S. Rollins and Mr. Geo. H. Wright* for plaintiffs in error:

The statute is unconstitutional and void:

(1) Because it is arbitrary and unreasonable, and the discrimination attempted has no reasonable relation to the object sought to be accomplished; because tree-tops, etc., lying on the land of the owner, 400 feet and less from the land of the City of Asheville, constituting its watershed, are absolutely harmless; they contain no element of injury or damage to anyone and could not by any possibility be construed into a nuisance.

(2) Because municipalities in North Carolina which own watersheds could protect them from fire by cleaning out fire lines on their own property. To require a property owner to clean up his own lands in order to protect the property of a city or town which is engaged in the furnishing of water to its inhabitants, is to deprive him of his property without due process of law and without just compensation.

(3) Because the statute is arbitrary, partial, and unconstitutional in that it does not bear equally upon all. It does not pretend to protect the property of plaintiffs in error, or other persons in like situation, from the acts of municipalities similar to those it condemns.

If the statute had been limited to lumbering operations and had applied only to persons engaged in the business of lumbering, there might have been more reason to sustain it, but it will be noted that this statute is broad and covers all classes of owners of timber trees and therefore embraces all persons who own timber within 400 feet of a city watershed and casts burdens on such persons which are unusual, heretofore unknown, discriminatory, and, as we insist, unconstitutional.

*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 McKENNA delivered the opinion of the court.

A statute of North Carolina provides that any person who owns land or standing timber on land within 400 feet of any watershed held or owned by any city or town for the purpose of furnishing the city or town water supply, upon cutting or removing the timber or permitting either, within 400 feet of the watershed, shall, within three months after cutting, or earlier upon written notice by the city or town, remove or cause to be burned under proper supervision all tree-tops, boughs, laps and other portions not desired to be taken for commercial or other purposes, within 400 feet of the boundary line of the watershed so as to leave such space of 400 feet free and clear of the designated parts required to be removed or burned and other inflammable material caused by or left from cutting the standing timber, so as to prevent the spread of fire from such cut-over area and the consequent damage to the watershed. A violation of the act is a misdemeanor.

Plaintiffs in error (we shall refer to them as defendants)

were indicted for violating the act and upon being arraigned filed a motion to quash the indictment on the ground that the act was unconstitutional and void and in violation of the Constitution of the United States, and particularly the Fifth and Fourteenth Amendments thereof, in that the act abridged privileges and immunities of defendants as citizens of the United States, deprived them of their property without due process of law and denied them the equal protection of the laws. The motion was denied and defendants were put on trial before a jury which specially found that the City of Asheville owned about 16,000 acres of land having an outside boundary of twelve miles and held the land as a watershed; that defendants were owners of standing and fallen timber adjoining the watershed on the north about four miles and within 400 feet of the watershed but did not own the land upon which the timber stood and that the water did not drain from the timber, or the land upon which it stood, on to the watershed. And the jury found all other facts which brought defendants within the provisions of the act and made them violators of it. And the jury found the defendants guilty or not guilty as the court should determine the law to be upon the facts found.

Upon the special verdict the court adjudged defendants guilty and fined each \$300 and costs. Upon appeal the Supreme Court of the State affirmed the judgment.

In considering the contention of defendants we may put to one side what property is or what its rights are, in the abstract. It and they necessarily are subject to some exertions of government.

What then is the case? The City of Asheville is the owner of and conducts a reservoir, and it may be presumed that other cities of the State are in like situation, and the State, by the law in question, seeks to protect their watersheds from damage or devastating fires. The purpose is governmental, but it is contended that the regulation of



the statute under review is too distant from the purpose and is simply an arbitrary exercise of power. And this as a certain proposition of law, having no other basis in the record than that the forbidden litter of the cut-down and removed timber is "absolutely harmless" and contains "no element of injury or damage to any one" and cannot "by any possibility be construed into a nuisance." The assertion eludes exact estimation. "Tree-tops, boughs, and laps" left upon the ground may not of themselves be a nuisance; but they may become dry, and the more quickly and certainly so from the denudation of the land of its trees, and therefore become a source of fires and the perils and damage of fires. This was the conclusion of the courts below and, we may suppose, in application to the Asheville watershed. The conclusion is fortified by the judgment of the State expressed in the statute, and, it may be, from experience in the State and certainly from experience in other States, ignorance of which we cannot feign. We are not able, therefore, to yield to the contention of defendants that the statute is not proportionate in its regulation nor that its application to defendants' property is arbitrary and unconstitutional.

Nor do we find illegal discrimination in the statute. The charge is based upon the contention that the statute condemns acts committed by individuals "when if like and similar acts be done by municipalities there is no violation of the statute." Counsel again insists too much upon the abstract. We concede the aphorism upon which counsel relies that "the equal protection of the laws is a pledge of the protection of equal laws." We, on March 24th last, by an almost prescience of the contention now based on it, defined its extent and declared that the Fourteenth Amendment, which is the foundation of the aphorism, does not regard the impracticable, and that distinction may be made by legislation between objects or persons, and that the power of the State "may be

510.

Counsel for Plaintiff in Error.

determined by degrees of evil or exercised in cases where detriment is specially experienced.' *Armour & Co. v. North Dakota*, 240 U. S. 510, 517." Moreover, we pointed out that "the deference due to the judgment of the legislature on the matter" had "been emphasized again and again. *Hebe Co. v. Shaw*, 248 U. S. 297, 303." *Dominion Hotel v. Arizona*, ante, 265.

Necessarily the legislature of the State did not think, and the courts below did not think, that individuals and municipalities stood in the same relation to the evil aimed at or that a public body charged with the care of the interests and welfare of the people would need the same restraint upon its action as an individual, or be induced to detrimental conduct.

*Judgment affirmed.*

---

GILLIS, ADMINISTRATRIX OF GILLIS, v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 296. Argued March 26, 27, 1919.—Decided April 21, 1919.

In the absence of manifest error, concurrent action of state trial and appellate courts in finding no evidence of defendant's negligence sufficient to go to the jury, in a case under the Federal Employers' Liability Act, will not be reexamined by this court.  
224 Massachusetts, 541, affirmed.

THE case is stated in the opinion.

*Mr. James J. McCarthy*, with whom *Mr. Daniel M. Lyons* and *Mr. Thomas C. O'Brien* were on the brief, for plaintiff in error.

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

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action under the Employers' Liability statute, 35 Stat. 65. Plaintiff in error's intestate, on November 3, 1912, while in the railroad company's service in interstate commerce, was killed, through the negligence, in whole or in part, it is charged, of one of the company's officers, agents or employees.

The defenses of the company were denial of the declaration and averments that the intestate's injuries and death were due to and caused by his own negligence and besides "were the result of acts, conditions and circumstances the happening of which was assumed" by him.

The case was tried to a jury. At the conclusion of the testimony, upon motion of defendant and over the objection and exception of plaintiff, the court ruled that upon all of the evidence the plaintiff was not entitled to recover and directed a verdict for defendant. It was stipulated that the case was to be reported for the determination of the full court and that if the ruling and direction should be held to be right, then judgment was to be entered for defendant. "If the case ought to have been submitted to the jury, then judgment is to be entered for the plaintiff in the sum of forty-five hundred (\$4500) dollars." The case was so reported. The full court reviewed the testimony quite elaborately and concluded from that review that "the only person who was negligent was the deceased and the judge was right in directing a verdict for the defendant," and cited *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444.

That case repeated the established principle that when the evidence justifies it it is competent for a court to direct a verdict for a defendant. The principle is not

attacked by plaintiff. The contention, however, is that the courts below, one of which tried the case, were wrong in their estimate of the evidence and that plaintiff was entitled to the judgment of the jury upon it. We are unable to yield to the contention. Nor do we think it necessary to give a review of the evidence. It will be found in the opinion of the court and we have verified its correctness. The case turns, therefore, upon an appreciation of the testimony and admissible inferences therefrom, and even if the conclusions of the courts were more disputable we should have to defer to them. *Baltimore & Ohio R. R. Co. v. Whitacre*, 242 U. S. 169; *Erie R. R. Co. v. Welsh*, 242 U. S. 303.

*Judgment affirmed.*

---

UNITED RAILROADS OF SAN FRANCISCO *v.* CITY  
AND COUNTY OF SAN FRANCISCO ET AL.

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

No. 282. Argued March 25, 1919.—Decided April 21, 1919.

A general law, in force when a street railroad franchise was granted by a city, provided that in no case must two railroad corporations occupy and use the same street for more than five blocks; and the franchise ordinance, referring to the law, expressed a like limitation on the power of the board of supervisors, as to the streets covered by the franchise. *Held*, that the limitation was not intended to affect the city when constructing a street railroad of its own under a later amendment of the law and of the state constitution. P. 519. *Held*, further, that the grantee took the risk of this judicial interpretation of its franchise and of the city's railroad being run in the same streets on either side of its own, and that any damage inevitably resulting was not a taking of its property requiring resort to eminent domain. P. 520.



*Semble*, that the damage referred to in the California Constitution of 1879, Art. I, § 14, requiring compensation before private property is taken or damaged for public use, is such as results from conduct that would be tortious unless under eminent domain proceedings or some law authorizing it on condition that damages be paid. P. 521.

The plaintiff having failed to establish its right to enjoin the construction of the city's railroad alongside its own, as a violation of franchise rights and taking of property, and the road having been built *pendente lite*, and the right to recover for any damage due to track-crossings, manner of operation, etc., being doubtful, non-equitable in character and dependent on the taking of new evidence—*Held*, that a decree dismissing the bill should be affirmed, without prejudice to further proceedings to recover any damage to which plaintiff might be entitled. *Id.*

The charter provision requiring the City of San Francisco to consider offers for the sale of existing public utilities before constructing new ones affords no ground for a street railroad company to oppose construction of a municipal road alongside its tracks, when such company, in common with others, had received from the board of supervisors a general solicitation for such offers as to any existing street railway. P. 522.

239 Fed. Rep. 987, affirmed.

THE case is stated in the opinion.

*Mr. Garret W. McEnerney*, with whom *Mr. William M. Abbott*, *Mr. William M. Cannon* and *Mr. Andrew F. Burke* were on the briefs, for appellant.

*Mr. Hiram W. Johnson*, with whom *Mr. George Lull* and *Mr. John J. Dailey* were on the briefs, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellant to prevent the construction of a municipal street railway on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double track, for more than five blocks, and also to prevent the inci-

dental cutting of the plaintiff's tracks. The appellant claims the right by grant and contract to forbid the proposed action and relies upon the Constitution of the United States, upon the state constitution which provides that private property shall not be taken or damaged for public use without just compensation having first been made, and upon Article XII, § 2 of the charter of the city, requiring it to consider offers for the sale of existing public utilities before constructing new ones. The answer denies that damage to the plaintiff will ensue from the new tracks and denies as matter of law that the plaintiff has the contract or property rights alleged. On application for a preliminary injunction the District Court held that the plaintiff had failed to make out a case for it, and denied it, intimating an opinion against the plaintiff upon the matter of law involved. It then entered what is called a final decree, denying all relief to the plaintiff with costs to the defendant. 239 Fed. Rep. 987. The present appeal is from that decree.

The franchise of the plaintiff to maintain its two tracks on Market street was granted to its predecessor in title in September, 1879. At that time by § 499 of the Civil Code of California, "two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks." The existence of this general law is the first ground relied upon for the assertion of exclusive rights in the street by the plaintiff. The other ground is the order of the Board of Supervisors of San Francisco granting the franchise, and especially § 5 which is as follows: "It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and

conditions specified in the 499th section of the civil code of this State. This section shall apply to persons and companies, as well as corporations." We agree with the District Court that these sections did not give to the plaintiff the right it claims.

The section of the Code would seem to be a limitation of the powers conferred upon the Board of Supervisors by that and the adjoining sections, not a contract by the State, or an authority to the Board to contract, against a larger use of the streets. It most naturally is read as merely a general law declaring the present legislative policy of the State. *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 292; *Williams v. Wingo*, 177 U. S. 601; *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 387; *San Jose-Los Gatos Interurban Ry. Co. v. San Jose Ry. Co.*, 156 Fed. Rep. 455, 458. But however this may be neither that section nor § 5 of the order granting the franchise purports in terms to prevent the city from itself establishing a parallel road. If it be true, as the plaintiff argues, that the grant or contract in § 5 of the order means what the statute means and is to be construed by that, we have suggested what seems to us the natural construction of the act. But in any event it is decided by *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, that a covenant by a city not to grant to any other person or corporation a privilege similar to that granted to the covenantee does not restrict the city from itself exercising similar power; and it is assumed in that case, that the principle already is established as to legislative grants. 200 U. S. 34. That is the assumption also of an amendment of § 499 by an Act of April 24, 1911. [Stats. 1911, c. 580.] The city now is given power to establish and operate transportation service by the amendment of § 499 just mentioned and by the constitution of the State. Article, XI, § 19. Amendment approved October 10, 1911. The plaintiff took the risk of the

judicial interpretation of its franchise and of this possible event. *Madera Water Works v. Madera*, 228 U. S. 454. Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort to eminent domain.

We understand that the municipal road now has been built, and the question is whether to retain the bill for a claim of damages. But as that would require new evidence and practically would present a new case, and as further, with such light as we now have, the right to damages seems at least doubtful, we deem it sufficient if the rights of the plaintiff, if any, in that regard, are reserved. The question is raised pointedly by Article I, § 14, of the Constitution of 1879. That provides that "private property shall not be taken or damaged for public use without just compensation having first been made," &c. The plaintiff seems to argue that this section entitles it to preliminary compensation for any considerable pecuniary detriment that the city may inflict by the establishment of the new road, however lawfully it may act. Courts and judges have differed widely in their interpretation of this class of provisions in statutes of different sorts; but we should suppose, until otherwise instructed by the Supreme Court of the State, that the damage referred to in this section of the state constitution in the main would be damage resulting from conduct that, like taking, would be tortious unless in proceedings under eminent domain or some law authorizing it on condition that damages be paid.

As to crossing the plaintiff's tracks we are inclined to agree with the District Court that the plaintiff's franchise must be understood to be subject to this incident and that a taking by eminent domain was not necessary. *Market Street Ry. Co. v. Central Ry. Co.*, 51 California,



583. *Consolidated Traction Co. v. South Orange & Maplewood Traction Co.*, 56 N. J. Eq. 569, 574, *et seq.* 3 Dillon, *Municipal Corporations*, 5th ed., § 1241, p. 1983. If we are wrong and if the crossings or the manner of operating the parallel tracks should give or has given rise to any claim, the decree will be without prejudice to such claim. We assume in accordance with the plaintiff's evidence and argument that the damage may be considerable and we think it just to leave open whatever can be left open, but at present we cannot say that the loss is or will be of such a character that it must be paid for, and we are satisfied that it is not such as to call for equitable relief.

A general solicitation of offers for sale to the city of any existing street railway in San Francisco was passed by the Board of Supervisors and was ordered to be sent and was sent to the plaintiff, among others. We agree with the District Court that Article XII, § 2 of the City Charter does not better the plaintiff's case.

*Decree affirmed without prejudice to further proceedings to recover any damages to which the plaintiff may be entitled.*

---

CHALKER, ADMINISTRATOR DE BONIS NON  
OF ESTATE OF WRIGHT, ET AL. *v.* BIRMING-  
HAM & NORTHWESTERN RAILWAY COMPANY  
ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF  
TENNESSEE.

No. 283. Argued March 25, 26, 1919.—Decided April 21, 1919.

A state law making the amount of annual tax for the privilege of doing railroad construction work depend on whether the person taxed has his chief office in the State, viz., \$25.00 if he has and \$100.00 if

522. Argument for Defendants in Error.

he has not—discriminates against citizens of other States, in violation of Art. IV, § 2, of the Constitution. P. 526.

And a citizen of another State who would be liable for the larger tax, if valid, may question its validity without first tendering the lower tax. P. 528.

138 Tennessee, 145, reversed.

THE case is stated in the opinion.

*Mr. C. E. Pigford*, with whom *Mr. Watson E. Coleman* and *Mr. W. N. Key* were on the brief, for plaintiffs in error.

*Mr. R. F. Spragins*, with whom *Mr. Joseph W. Cox* and *Mr. W. H. Biggs* were on the briefs, for defendants in error.

The act applies alike to residents and nonresidents; to citizens of Tennessee as well as to citizens of other States. To argue that few non-resident persons, firms or corporations have their chief offices in Tennessee, or that few resident in Tennessee have their chief offices elsewhere, does not prove discrimination. It is a fact of common knowledge that many have their chief offices in States other than the States in which they reside or are domiciled.

If it is competent for the legislature to exempt from the payment of a privilege tax merchants having their manufacturing plants where goods are offered for sale located within the State, and yet impose the tax on those merchants who have their places of manufacture in another State (*Armour & Co. v. Virginia*, 246 U. S. 1,) manifestly it was competent for the legislature, for a stronger reason, to make the distinction made in this statute treating all alike under the same circumstances. *Reymann Brewing Co. v. Brister*, 179 U. S. 445.

The statute can be sustained as a tax measure, and also under the police power as regulating a business. It

is within the legislative power of classification, because the distinction made is based on substantial reasons.

The business of constructing railroads and other like public works is peculiar. Ordinarily, such construction concerns have and should have the chief office, or a chief office, at or near the work of construction. Usually such contracts involve large sums, and many laborers and sub-contractors are employed on the work. Generally the common labor employed consists of foreigners. The State and the public have an interest in the proper performance of such work, as the public service is involved, and the right of eminent domain is given. It may be deemed important to the proper performance of such work that the chief office be located at or near it. As indicated in the case at bar, the complainant neglected his work and breached his contract, as found by the jury, and his bill shows that he failed to settle with his sub-contractors. Those undertaking such contracts frequently fail and become bankrupt. In practically all such cases, the rights and claims of laborers, sub-contractors and material-men are vitally affected, and it is important that they have a remedy by suit and a personal judgment as well as by attachment and garnishment, which they probably would not have except when the chief office of the principal contractor is within the State.

The State is further justified in making the distinction for the reason that the concern having a chief office within the State would likely be liable for and pay *ad valorem* taxes as well as the privilege tax; it would likely have funds, contracts, securities and other property within the State at its chief office subject to state taxation; it would, under the laws of Tennessee, be subject to suit and service of process and personal judgment in the State, which would not be the case if there were no chief office there; and it would be subject to garnishment in the State as to sums due to sub-contractors and laborers, and would

have there its books of account and other documents and papers within the jurisdiction of the state courts, and subject to subpœna duces tecum. Furthermore, it is more difficult to collect the privilege tax from those having their chief office out of the State. [Among the cases cited were: *Heim v. McCall*, 239 U. S. 175; *McPherson v. Blacker*, 146 U. S. 1; *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *Hayes v. Missouri*, 120 U. S. 68; *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 293; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 76; *Toyota v. Hawaii*, 226 U. S. 190; *Bradley v. Richmond*, 227 U. S. 477; *Cargill Co. v. Minnesota*, 180 U. S. 452; *Southwestern Oil Co. v. Texas*, 217 U. S. 114.]

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

The point for determination is the liability of J. W. Wright, Jr., a citizen and resident of Alabama with his chief office therein, who engaged in the business of constructing a railroad in Tennessee, for the tax prescribed by § 4 of "An Act to provide revenue for the State of Tennessee and the counties and municipalities thereof," approved May 1, 1909 (Acts of Tenn., 1909, c. 479, pp. 1726, 1727, 1735) which provides:

"Sec. 4. Be it further enacted, That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue.

\* \* \* \* \*

"Each foreign construction company, with its chief office outside of this State, operating or doing business



in this State, directly or by agent, or by any subletting contract, each, per annum, in each county . . . \$100.00

"Each domestic construction company and each foreign construction company, having its chief office in this State, doing business in this State, each, per annum, in each county . . . . . \$25.00.

"The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, waterworks, railroads, street-paving construction work, or other structures of a public nature."

Replying to the claim that the statute in effect discriminates against citizens of other States, the Supreme Court of Tennessee, 138 Tennessee, 145, 152, 153, said: "The determining feature in the legislation quoted is the having of one's chief office in this State. Any citizen of this State, as well as any citizen of a foreign State, who has his chief office out of the State, must pay the \$100 tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the State. Any foreign corporation or citizen of another State, or firm, as well as domestic corporations, citizens of this State, and firms of this State having its or their chief office in this State, are all alike entitled to carry on a railroad construction business here on the payment of \$25. There is no discrimination at all."

With this conclusion we are unable to agree. Accepting the construction placed upon it by the Supreme Court, we think the quoted section does discriminate between citizens of Tennessee and those of other States by imposing a higher charge on the latter than it does on the former, contrary to § 2, Art. IV of the Federal Constitution—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The power of a State to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor

otherwise can any State enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States.

“Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.” *Ward v. Maryland*, 12 Wall. 418, 431; *Guy v. Baltimore*, 100 U. S. 434, 439; *Blake v. McClung*, 172 U. S. 239, 254; *Darnell & Son Co. v. Memphis*, 208 U. S. 113, 121.

As the chief office of an individual is commonly in the State of which he is a citizen, Tennessee citizens engaged in constructing railroads in that State will ordinarily have their chief offices therein, while citizens of other States so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other States by imposing higher charges against them than citizens of Tennessee are required to pay. We can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable. Under the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them.

It is insisted that no tender of any sum for license tax was made in time, and therefore plaintiffs in error cannot question the validity of the enactment because of discrimination. But the Supreme Court expressly declared that the statute fixed the liability of Wright at one hundred dollars. A tender of less would have availed nothing and it was therefore unnecessary.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

---

NEW ORLEANS & NORTHEASTERN RAILROAD  
COMPANY ET AL. *v.* SCARLET.

ERROR TO THE SUPREME COURT OF THE STATE  
OF MISSISSIPPI.

No. 242. Argued March 18, 1919.—Decided April 21, 1919.

A state law relieving the plaintiff of the burden of proving negligence is constitutionally inapplicable to a case under the Federal Employers' Liability Act. P. 529. *New Orleans & Northeastern R. R. Co. v. Harris*, 247 U. S. 367.

Under the Boiler Inspection Act, the mere breaking of a king pin and coupling chains, without other evidence, does not establish, as a matter of law, that they were defective. P. 530.

When the decision of the state court upholds a state statute in conflict with a valid law of the United States, review is by writ of error. *Id.*

115 Mississippi, 285, reversed.

THE case is stated in the opinion.

*Mr. J. Blanc Monroe*, with whom *Mr. Monte M. Lemann*, *Mr. Albert S. Bozeman*, *Mr. L. E. Jeffries*, *Mr.*

*S. R. Prince* and *Mr. H. O'B. Cooper* were on the briefs, for plaintiffs in error.

*Mr. Thomas G. Fewell*, for defendant in error, submitted.  
*Mr. C. B. Cameron* was on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Scarlet was a fireman on the New Orleans & Northeastern Railroad. While engaged in the performance of his duties he was injured by being thrown down between the engine and the tender. The accident was caused by the uncoupling of engine and tender; and this was apparently due to the breaking of the king pin, which fastened the draw bar to the tender, and the breaking of the coupling chains between engine and tender. He brought suit in a state court of Mississippi under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and the Boiler Inspection Act of February 17, 1911, c. 103, 36 Stat. 913, as amended by the Act of March 4, 1915, c. 169, 38 Stat. 1192, and recovered judgment which was affirmed by the Supreme Court of the State. 115 Mississippi, 285. The case comes here by writ of error under § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726.

The Railroad contends that the Supreme Court of Mississippi erred in sustaining the action of the trial court, which charged the jury that the so-called "Prima Facie Act" of Mississippi (§ 1985 of the Code of 1906, as amended by c. 215, Laws 1912, p. 290) applied, and that it relieved the plaintiff of the burden of proof to establish negligence. Scarlet concedes now that the statute can not constitutionally be applied to suits under the Federal Employers' Liability Act, since this court has so decided in *New Orleans & Northeastern R. R. Co. v. Harris*, 247



U. S. 367; and that the judgment must be reversed if the rights of the Railroad were prejudiced by this error. But he contends that the Railroad was not prejudiced, because negligence on its part is not essential to recovery. He insists that the Boiler Inspection Act, as amended, imposes upon the Railroad the absolute duty (compare *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281) to have the "locomotive and tender and all parts and appurtenances thereof" in "proper condition and safe to operate;" that the mere breaking of the king pin and coupling chains shows conclusively that they were defective; that the evidence shows conclusively that this was the proximate cause of the injury; and that the plaintiff was therefore entitled, under the federal act, to have the jury peremptorily instructed to render a verdict in his favor. It does not appear that this contention was made before the Supreme Court of the State, and it was apparently not considered by that court. But whether Scarlet is now in a position to avail himself of the contention need not be determined (compare *Yazoo & Mississippi Valley R. R. Co. v. Mullins*, decided this day, *post*, 531); for it is clear that the evidence did not establish as a matter of law that the king pin or the chains were defective. At most it presented a question for the jury. Compare *Minneapolis & St. Louis R. R. Co. v. Gotschall*, 244 U. S. 66. We cannot say, therefore, that the Railroad was not prejudiced by the error of the trial court in instructing the jury that the "Prima Facie Act" was applicable.

The conflict of a state statute with a valid law of the United States being involved and the decision having been in favor of the validity of the statute, the case is properly here on a writ of error; and the petition for a writ of certiorari is denied.

*Reversed.*

Opinion of the Court.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* MULLINS, ADMINISTRATRIX OF MULLINS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 273. Argued March 21, 1919.—Decided April 21, 1919.

A state law relieving the plaintiff of the burden of proving negligence is constitutionally inapplicable to a case under the Federal Employers' Liability Act. P. 532. *New Orleans & Northeastern R. R. Co. v. Harris*, 247 U. S. 367.

For the purpose of determining whether error was prejudicial, this court will examine the whole record, leaving state questions to the decision of state courts in cases coming from them. P. 533.

A flagman was injured while engaged in switching an interstate train. *Held*, that the railroad company was not under an absolute duty to furnish him a safe place for the performance of his duties, but was merely bound to use reasonable care. *Id.*

115 Mississippi, 343, reversed.

THE case is stated in the opinion.

*Mr. Charles N. Burch*, with whom *Mr. H. D. Minor* was on the briefs, for plaintiffs in error.

*Mr. Marion W. Reily*, with whom *Mr. Thomas G. Fewell* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Mullins, a flagman on the Yazoo & Mississippi Valley Railroad, was injured while engaged in switching an interstate train. He died within a few hours; and his administratrix brought suit in a state court of Mississippi

under the Federal Employers' Liability Act. At the trial the Railroad requested a directed verdict on the ground that there was no evidence of negligence on its part. This request was refused; the case was submitted to the jury under instructions, some of which were objected to; and the verdict was for the plaintiff. Upon appeal from the judgment entered thereon the Supreme Court of Mississippi refused to consider the question of sufficiency of the evidence of negligence; and affirmed the judgment on the ground that the so-called "Prima Facie Act" of Mississippi (§ 1985 of the Code of 1906, as amended by c. 215, Laws 1912, p. 290), as to which the trial court had given no instruction, applied and relieved the plaintiff of the burden of establishing negligence. 115 Mississippi, 343. The case comes here by writ of error under § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726.

Since the decision below, this court has decided that the Mississippi "Prima Facie Act" cannot be applied to suits under the Federal Employers' Liability Act, *New Orleans & Northeastern R. R. Co. v. Harris*, 247 U. S. 367; and the Supreme Court of Mississippi now recognizes this rule. *New Orleans & Northeastern R. R. Co. v. Hanna*, 78 So. Rep. 953. The administratrix contends that, as the trial court did not give any instruction concerning the "Prima Facie Act," the error of the Supreme Court in resting its decision on that statute should not prevent an affirmance of the judgment below, because the Railroad was not prejudiced by the error.

It is true generally in cases coming from lower federal courts that the rendering of an erroneous decision on a particular question, *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 351; *West v. Camden*, 135 U. S. 507, 521; or the assignment by the lower court of an erroneous reason for a right decision; *Seaboard Air Line Ry. v. Moore*, 228 U. S. 433, 435; *United States v. One Distillery*,

531.

Opinion of the Court.

174 U. S. 149, 151; will not entitle the complaining party to reversal, if it is clear that his rights were not prejudiced thereby. And this is likewise true of cases coming from state courts. *Chicago, Rock Island & Pacific Ry. Co. v. Wright*, 239 U. S. 548, 551; *New York, Philadelphia & Norfolk R. R. Co. v. Peninsula Exchange*, 240 U. S. 34, 41-42. See *Murdock v. City of Memphis*, 20 Wall. 590. Whether the case comes from a state court or a federal court, this court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record; state questions being left to the decision of the state court in cases coming here from those courts.

But we cannot say here that the rights of the Railroad were not prejudiced by the error of the Supreme Court of Mississippi. It may be, as contended by the administratrix, that there was sufficient evidence of negligence to go to the jury, and that the general instructions concerning negligence were proper. But the trial court also instructed the jury that "It was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment." It is clear that, under the circumstances of this case, the duty was not an absolute one; there was merely a duty to use reasonable care. *Chicago & Northwestern Ry. Co. v. Bower*, 241 U. S. 470; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492; *Choctaw, Oklahoma & Gulf R. R. Co. v. Tennessee*, 191 U. S. 326, 331. As examination of this record does not convince us that the admitted error was harmless, the judgment of the Supreme Court of Mississippi is reversed. The questions presented being properly here on writ of error, the petition for a writ of certiorari is denied.

*Reversed.*



LOUISVILLE & JEFFERSONVILLE BRIDGE COMPANY *v.* UNITED STATES.

## CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 312. Argued March 28, 1919.—Decided April 21, 1919.

The transferring of twenty-six cars as a unit, for delivery from the terminal of one company to that of another, without uncoupling or switching out any car, by a movement through a distance of over three-quarters of a mile, 2600 feet of it, with two startings and stoppings, on main tracks, at speed reaching fifteen miles per hour, and involving crossings at grade of several city streets, *held*, not a mere switching operation but a train movement, subject to the train-brake provisions of the Safety Appliance Act, as amended. P. 538.

The application of the act can not be made to depend on the taking of other than the prescribed precautions, such as providing gates and watchmen, or upon balancing the dangers involved in following its requirements against those involved in its neglect. P. 539.

THE case is stated in the opinion.

Mr. Edward P. Humphrey, with whom Mr. Alex. P. Humphrey and Mr. W. W. Crawford were on the brief, for Louisville & Jeffersonville Bridge Co.:

The cars mentioned in the certificate traveled, all told, a much less distance than those in *United States v. Chicago, Burlington & Quincy R. R. Co.*, 237 U. S. 410; *United States v. Pere Marquette R. R. Co.*, 211 Fed. Rep. 220; *United States v. Grand Trunk Ry. Co.*, 203 Fed. Rep. 775; *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 198 Fed. Rep. 637; *Chesapeake & Ohio Ry. Co. v. United States*, 226 Fed. Rep. 683; *Pennsylvania Co. v. United States*, 241 Fed. Rep. 828; and *United States v. Galveston, H. & H. R. R. Co.*, 255 Fed. Rep. 755. Furthermore, the

movement was not continuous or between two widely separated points, but distinctly local, in a circumscribed area used for switching purposes, the cars not making a train trip over the road in the ordinary acceptance of the term but going back and forth and over switches between points a very short distance apart.

A switching movement is none the less such because the cars pass partly over main track and partly over side track. In small yards, particularly in country districts, the main track is used extensively for switching purposes.

It is obvious that no good result can be accomplished by the continual coupling and uncoupling of air hose during switching movements, where the cars travel comparatively short distances, and the cuts are frequently broken up. Aside from the great expense in the operation of railroad yards, which would be entailed by enforcing such a requirement in this case, no good can result, as it would merely delay the handling of traffic and increase, rather than diminish, the danger which such legislation was intended to prevent.

*The Solicitor General*, with whom *Mr. Assistant Attorney General Frierson* was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

The Circuit Court of Appeals for the Sixth Circuit certifies to this court for answer the question, whether the Safety Appliance Act, as amended, requires that 85 per cent. of the train brakes shall be coupled so as to be under engine control when making the transfer of twenty-six cars, in a movement which is described in the court's certificate.

The pertinent part of the original Act approved March 2, 1893, c. 196, 27 Stat. 531, reads:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or, to *run any train in such traffic . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.*"

And the relevant part of the amendment, approved March 2, 1903, c. 976, 32 Stat. 943, is:

"And the provisions and requirements hereof and of said Acts relating to train brakes . . . *shall be held to apply to all trains . . . used on any railroad engaged in interstate commerce.*"

Section 2 of the amendment provides that when any train is operated with power or train brakes not less than 50 per cent. of the cars in such train shall have their brakes used and operated by the engineer of the locomotive, etc. Authority was given the Interstate Commerce Commission to increase the percentage of cars in any train which must have their brakes so used and operated and in 1910 the Commission increased it to 85 per cent.

The essential facts, somewhat condensed, from the statement of the Circuit Court of Appeals are:

The Bridge Company, a common carrier engaged in interstate commerce, operates a large terminal yard at Louisville, Kentucky, which constitutes the joint terminal of the Big Four and the Chesapeake & Ohio systems of railway. The yard is 1800 feet in length, 700 feet in width, and consists of two main tracks, with from fifteen to twenty-five approximately parallel tracks, which are connected with the main tracks by leads in the customary manner.

For the purposes of this proceeding the following movement of cars was adopted by the parties as typical. Twenty-six cars were assembled at the easterly end of the yard of the Bridge Company and were coupled together, but without any of the air brakes being connected, preparatory to their transfer westerly and delivery into the Illinois Central yard. The engine was at the easterly end of the cars, nearly 1100 feet in length, which were pushed westerly the entire length of the large and necessarily busy yard. Part of this movement in the Bridge Company's yard, how much does not appear, was over a main line track, it was necessarily over many connections with other tracks on which several other engines and crews must have been working, habitually, and it was over four city streets at grade, the crossing over the most westerly one, on account of the grade beyond, being made at a speed of 15 miles an hour. A short distance from the exit from the Bridge Company's yard the cars entered upon a track of the Illinois Central Railroad Company, used as a main line by both the Big Four and the Chesapeake & Ohio companies, and after they had been pushed westerly on that track a distance of 1100 feet, they were stopped on this main track. Next, reversing the movement, the engine, now pulling the cars, moved easterly over three city streets at grade a distance of 1300 feet on a track used by the Chesapeake & Ohio Company for its through main line trains, and stopped on that track. Again reversing, the engine, now pushing the cars, ran westerly over three city streets at grade a distance of 1300 feet, still on the track used as a through main line track by the Chesapeake & Ohio Company, and then into the Illinois Central yard, where the cars were delivered.

The contention of the Bridge Company is that the foregoing describes a mere switching of cars, not a train movement within the meaning of the act of Congress, and



that, therefore, the requirement that 85 per cent. of the cars shall have the train brakes upon them used and operated does not apply.

An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptance of the term must be regarded as constituting a train within the meaning of the statute. It was a train greater in length than most regularly scheduled trains were when this Safety Appliance Act was passed twenty-six years ago, and even yet, probably, exceeds in length, passenger and freight trains considered, more than a majority of the regular road trains in this country.

The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement.

The movement of this train of cars, 1100 feet in length, was for a distance of over three-quarters of a mile, and involved crossing, at grade, three city streets once, two streets twice, one street three times, and a main track movement of at least 2600 feet, with two stops and startings on the main track. This is not only a train movement, but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety of employees, of passengers and of the public which it is the purpose of the act to secure, by requiring that engineers shall be given control sufficient to stop any train they may be moving, promptly on the first signal or sight of danger. The mere inertia of twenty-six cars, which must usually be

loaded, and especially when running 15 miles an hour, would render it impossible to control or to stop them promptly with power-brakes operative only on the engine, and the ability to use such brakes on the entire train must often mean the difference between safety and serious accident when running, as here, in a crowded yard, across busy city streets and on main line tracks of railroads.

It is argued that coupling of the train brakes was not necessary for the reason that the street crossings used were protected by gates, that a yard master from an elevated tower watched over the main line movements, and that the coupling of the train-brake appliances would involve more danger to the employees than the movement of the cars without their being used and operated. These suggestions serve to emphasize the dangerous character of the movement. But the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act. *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 295; *Great Northern Ry. Co. v. Otos*, 239 U. S. 349; *St. Joseph & Grand Island Ry. Co. v. Moore*, 243 U. S. 311.

The case falls within the scope of *United States v. Erie R. R. Co.*, 237 U. S. 402, and *United States v. Chicago, Burlington & Quincy R. R. Co.*, 237 U. S. 410, 413, in

the latter of which it is said that "the controlling test of the statute's application lies in the essential nature of the work done."

For the reasons stated in this opinion, the movement as described in the certificate and the essential nature of the work done, require that the question of the Circuit Court of Appeals be answered in the affirmative.

---

### DARLING *v.* CITY OF NEWPORT NEWS.

#### ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 600. Argued April 15, 1919.—Decided April 28, 1919.

Generally speaking, private rights in land under tidal waters are subject to the right of the State to use such waters as a depository for sewage. P. 542.

Plaintiff held oyster beds in the tidal waters of Hampton Roads by leases from the State of Virginia, under whose laws, as long as he paid rent, he was declared to have the "exclusive right to occupy" the land for twenty years, subject to any rights of other persons previously acquired, with the State's guaranty of an "absolute right" to continue to use and occupy it for that period. *Held*: That the grant, construed strictly, with reference to the public necessity in that vicinity and previous pollution of the water, was subject to the right of the State to authorize the City of Newport News to discharge its sewage into the Roads, and that the consequent pollution of the plaintiff's oysters was neither (1) a taking of his property without due process, nor (2) an impairment of his contract rights, nor (3), (following the state court) a damage in the sense of the Virginia constitution, which requires compensation for property taken or damaged for public use. P. 543.

123 Virginia, 14, affirmed.

THE case is stated in the opinion.

*Mr. Maryus Jones and Mr. John Winston Read* for plaintiff in error:

The Virginia statutes give the lessee a property right (*Powell v. Tazewell*, 66 Virginia, 786; *McCready v. Virginia*, 94 U. S. 391), viz., the absolute and exclusive use and occupancy of this ground for a period of twenty years, with the right to renew for another period of twenty years, upon the same terms and conditions as set out in the original lease from the State. How then can the State afterwards grant to the city the authority to take and destroy this property without providing any compensation whatsoever? It would seem to be plain that such action not only impairs the obligation of the contract previously existing (Cooley's Const. Lim., 6th ed., p. 328; *Fletcher v. Peck*, 6 Cranch, 87, 136; *New Jersey v. Wilson*, 7 Cranch, 64), but likewise takes property for public use without just compensation, which the requirement of due process of law in the Fourteenth Amendment forbids.

[Counsel relied particularly upon the case of *Huffmire v. City of Brooklyn*, 162 N. Y. 584, as practically identical with this, and upon the dissenting opinion in the court below, 123 Virginia, 14, and authorities therein cited.]

*Mr. J. A. Massie* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error brought this bill in equity to prevent the City of Newport News from discharging its sewage in such a way as to pollute and ruin the plaintiff's oysters upon his beds under the tidal waters of Hampton Roads. A demurrer was sustained by the court of first instance and on appeal by the Supreme Court of Appeals, and the bill was dismissed. 123 Virginia, 14. The material facts are few. The plaintiff holds leases of the beds



from the State. The original ones were made in 1884 and 1885 for twenty years. In 1903, 1905 and 1912 they were what is called reassigned to the plaintiff by what we understand to have been new leases, by statute to be deemed continuations of the original leases. In 1896 the City of Newport News was incorporated with the grant of the right to build sewers, which the City built in the manner complained of. The grant, coupled with Acts of 1908, c. 349, pp. 623, 624, authorizes the present discharge through Salter's Creek into the tide waters of Hampton Roads, with the effect alleged. By § 2137 of the Code of Virginia it is provided that so long as a lessee of oyster beds continues to pay the rent reserved "he shall have the exclusive right to occupy said land for a period of twenty years, subject to such rights, if any, as any other person or persons may previously have acquired." By § 2137a, originally Act of March 5, 1894, c. 743, § 10 (2), Acts 1893-4 pp. 840, 847, while he pays rent as required "the state will guarantee the absolute right to the renter to continue to use and occupy the same for the period of twenty years the renter acquired." The bill alleges that if the statutes purport to authorize the destruction of the plaintiff's oysters they are contrary to the Constitution of the United States and specifically to the Fourteenth Amendment. In the assignment of errors to the Supreme Court of Appeals the statutes are said also to violate the contract clause. Article I, § 10. The jurisdiction of this court is clear.

The fundamental question as to the rights of holders of land under tide waters does not present the conflict of two vitally important interests that exists with regard to fresh water streams. There the needs of water supply and of drainage compete. *Missouri v. Illinois*, 200 U. S. 496, 521, 522. The ocean hitherto has been treated as open to the discharge of sewage from the cities upon its shores. Whatever science may accomplish in the future

we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin. Unless precluded by some right of a neighboring State, such as is not in question here, or by some act of its own, or of the United States, clearly a State may authorize a city to empty its drains into the sea. Such at least would be its power unless it should create a nuisance that so seriously interfered with private property as to infringe constitutional rights. And we apprehend that the mere ownership of a tract of land under the salt water would not be enough of itself to give a right to prevent the fouling of the water as supposed. The ownership of such land, as distinguished from the shore, would be subject to the natural uses of the water. So much may be accepted from the decisions in Virginia and elsewhere as established law. *Hampton v. Watson*, 119 Virginia, 95; *Haskell v. New Bedford*, 108 Massachusetts, 208, 214; *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 459.

The question before us then narrows itself to whether the State has done any act that precludes it from exercising what otherwise would be its powers. On that issue we shall not inquire more curiously than did the Supreme Court of Appeals into the statutory warrant for the leases, or go into relative dates, but shall assume, for the purposes of decision, that the plaintiff is a lessee and is entitled to the benefit of the clauses that we have quoted from the Code. But we agree with the court below that when land is let under the water of Hampton Roads, even though let for oyster beds, the lessee must be held to take the risk of the pollution of the water. It cannot be supposed that for a dollar an acre, the rent mentioned in the Code, or whatever other sum the plaintiff paid, he acquired a property superior to that risk, or that by the mere making of the lease, the State contracted, if it

could, against using its legislative power to sanction one of the very most important public uses of water already partly polluted, and in the vicinity of half a dozen cities and towns to which that water obviously furnished the natural place of discharge. See *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387. *Trimble v. Seattle*, 231 U. S. 683. The case is not changed by the guaranty in § 2137a. That is directed to the possession of the land, not to the quality of the water. It is unnecessary to cite the cases that have affirmed so frequently that the construction of public grants must be very strict.

The constitution of Virginia, like some others, requires compensation for property taken or damaged for public use. Const. 1902, § 58. But this seems to be construed by the dissenting judge as well as by the court below as not including damage like this, which would not have been a wrong even without the act of the legislature. It is a question that has been subject to much debate. See for example, *Caledonian Railway v. Walker's Trustees*, 7 App. Cas. 259, 293, *et seq.* *Taft v. Commonwealth*, 158 Massachusetts, 526, 548. *Transportation Co. v. Chicago*, 99 U. S. 635, 642. But upon that point we follow the Supreme Court of the State.

*Decree affirmed.*

Counsel for Appellant.

## COLLETT, TRUSTEE IN BANKRUPTCY OF ESTATE OF COTTEN, BANKRUPT, v. ADAMS.

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

No. 274. Submitted March 21, 1919.—Decided April 28, 1919.

Under the Bankruptcy Law, as amended in 1903 and 1910 [§§ 23b, 60b, and 2 (20),] a suit by the trustee to set aside a transfer of property, as a preference voidable under § 60b, and to recover the property or its value, is cognizable by the District Court within whose district the property is situate, though not the court in which the bankruptcy proceeding is pending, and without regard to the consent of the defendant or the residence of the trustee, the bankrupt or the defendant. P. 547.

In this respect, the jurisdiction is the same whether the suit is based on § 60b, or §§ 67e and 70e, as amended. *Id.*

Such a suit is local, in the sense of Jud. Code, § 54, so that a defendant residing in another district of the same State may be served there with original process. P. 550.

Such local suits, apart from the terms of the Bankruptcy Act, are excepted by § 51 of the Code from the general provision that a defendant may not be sued in any district other than that of which he is an inhabitant. *Id.*

Jurisdiction of the District Court over a suit by a trustee in bankruptcy to set aside a transfer, *held* not affected by the pendency of a prior action for damages brought by the transferee against the bankrupt in a state court, which acquired no lien on the property. *Id.*

The plaintiff's claim, *held* to be sufficiently substantial to entitle him to a decision on the merits in the court below. *Id.*

Reversed.

THE case is stated in the opinion.

*Mr. Wilmer S. Hunt* and *Mr. H. B. Seay* for appellant.  
*Mr. Perry G. Dedmon* and *Mr. Walter F. Seay* were on the brief.



No appearance for appellee.

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

This suit in equity was brought in the District Court for the Southern District of Texas by a trustee in bankruptcy. A motion to dismiss the bill for want of jurisdiction was sustained, and the propriety of that ruling is the sole question presented on this direct appeal. See Jud. Code, § 238; c. 22, 38 Stat. 804.

The allegations of the bill are to this effect: March 17, 1917, a petition in bankruptcy against Ford C. Cotten was filed in the District Court for the Northern District of Texas, on which in due course he was adjudged a bankrupt. The plaintiff became the trustee. On December 22, 1916, and for some time theretofore, Cotten was the owner and in possession of certain real and personal property in Wharton County, Texas, and on that day transferred the same to James R. Adams, the defendant. Adams was then asserting that Cotten was indebted to him in the sum of \$45,311 for property obtained from him through deceit and fraud, and a suit to enforce that claim was pending in a state court in Collin County, Texas. In August, 1916, a writ of attachment in that suit had been levied on the property here in question, but under the laws of Texas the attachment lien was void and of no effect. The transfer from Cotten to Adams was made with the purpose of effecting a settlement of that suit and the claim involved therein, and at the time of the transfer the parties entered into a written agreement wherein it was stipulated that if Cotten was not adjudged a bankrupt on a petition presented within four months after the transfer was filed for record, Adams should dismiss the suit and pay the unpaid costs, and, if on a petition so filed Cotten was adjudged a bankrupt, Adams should have the

545.

Opinion of the Court.

right to prosecute the suit to judgment and to enforce all liens acquired through the attachment. The deed transferring the real property was filed for record shortly after it was executed, but the agreement never was so filed and constituted a secret understanding between the parties. Following the transfer Adams took possession of the property, real and personal; was still in possession, claiming title and exercising the rights of an owner, when this bill was brought, and had refused, on demand made, to surrender the property to the trustee. At the time of the transfer Cotten was insolvent and intended thereby to effect a preference in favor of Adams, all of which the latter knew or had reasonable cause to believe; and in fact the transfer resulted in such a preference, for the assets were not sufficient to pay all creditors. The property transferred was not exempt, but was such as creditors lawfully could subject to the payment of their claims. Some or all of the personalty has been disposed of by Adams. The real property is in the Southern District of Texas, where this suit was brought. Cotten and the trustee reside in the Northern District, where the bankruptcy proceeding is pending, and Adams resides in the Eastern District. The suit in the state court has not been dismissed, but is still pending in substantially the same condition as when the transfer was made.

The bill contains a prayer for the recovery of the real property or its value, for an accounting as to the proceeds of the personalty, and for other relief the detail and propriety of which require no attention here.

The motion which the court below sustained challenged its jurisdiction on the grounds (1) that the bill could not be brought in that court without the defendant's consent, which was not given; (2) that the bill was not brought in the district where the bankruptcy proceeding was pending or in that of the residence of the defendant, and (3) that the subject-matter of the bill already was involved

in the pending suit in the state court in Collin County, a court of competent jurisdiction, and adequate relief could be had in that suit.

On its face the bill shows very plainly that it is brought to avoid a transfer by the bankrupt, which the trustee regards as a voidable preference within the meaning of § 60*b* of the Bankruptcy Act, and to recover the property transferred or its value. There are also present some indications of a purpose to claim relief under §§ 67*e* and 70*e*, but this does not call for special comment, for in point of jurisdiction there is no distinction between a suit under these sections and one under § 60*b*.

It well may be that under the original terms of the Bankruptcy Act, c. 541, 30 Stat. 544, the bill could not have been brought in the court below without the defendant's consent, *Bardes v. Hawarden Bank*, 178 U. S. 524, but the act was amended materially in 1903 and again in 1910 (c. 487, 32 Stat. 797; c. 412, 36 Stat. 838), and it was after those amendments became effective that the bill was brought. The pertinent provisions, with the amendments affecting jurisdiction in italics, are as follows:

Sec. 23*b*. "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if the proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.*"

Sec. 60*b*. "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and

545.

## Opinion of the Court.

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. *And 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.*"<sup>1</sup>

Sections 1 (8) and 2 define "courts of bankruptcy" as including the several District Courts of the United States, and § 2 (20) invests the courts of bankruptcy with power to "*exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.*"

The amendments are couched in plain words and effect a material change in the jurisdiction of suits by trustees to avoid preferential transfers and recover the property or its value under § 60*b*. The exception engrafted on § 23*b* takes such suits out of the restrictive provisions of that section; the sentence added to § 60*b* makes them cognizable in the courts of bankruptcy, as well as in such state courts as could have entertained them if bankruptcy had not intervened, and the new clause in § 2 dispels any doubt that otherwise might exist respecting the power of a court of bankruptcy other than the one in which the bankruptcy proceeding is pending to entertain such a suit where the property sought to be recovered is within its territorial limits.

---

<sup>1</sup> A sentence like that in italics was added to §§ 67*e* and 70*e* by c. 487, 32 Stat. 797.



The court below is a court of bankruptcy and the property in question is within its territorial limits, so the jurisdiction under the terms of the Bankruptcy Act is plain. The suit is a local one in the sense of § 54 of the Judicial Code and this enabled the court to reach the defendant, who resides in another district in the same State, by original process sent to and served in the district of his residence. Such a suit, apart from the terms of the Bankruptcy Act, is excepted by § 51 of the Code from the general provision that a defendant may not be sued in any district other than that of which he is an inhabitant.

Of the objection based on the pendency of the suit in the state court in Collin County it is enough to say that the trustee is not a party to that suit and that it has none of the elements of a suit to avoid the transfer in question. Whether if this were otherwise it would affect the jurisdiction of the court below as a court of the United States we need not consider. See *Louisville Trust Co. v. Knott*, 191 U. S. 225; *Courtney v. Pradt*, 196 U. S. 89; *Mississippi Railroad Commission v. Louisville & Nashville R. R. Co.*, 225 U. S. 272, 279.

We conclude that the court should have overruled the objections urged against its jurisdiction, but we intimate no opinion on the merits other than that the case made by the bill has enough of substance to entitle the plaintiff to a decision therein in the court below in regular course. See *Geneva Furniture Co. v. Karpen*, 238 U. S. 254, 258-259.

*Decree reversed.*

## Opinion of the Court.

## EX PARTE TRACY, PETITIONER.

MOTION FOR LEAVE TO RENEW APPLICATION FOR WRIT OF  
HABEAS CORPUS IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF COLORADO.

No. —, Original. Motion submitted April 21, 1919.—Decided  
April 28, 1919.

Where this court denies leave to file a petition for *habeas corpus*, because of the competency of other courts to afford the relief sought, a motion for leave to apply for the writ to the District Court will be denied as superfluous.

Motion denied.

The case is stated in the opinion. (See also *post*, 588.)

*Mr. C. M. Oneill* for petitioner.

## PER CURIAM:

For the purpose of redressing assumed violations of the Constitution and laws of the United States by means of *habeas corpus*, the jurisdiction of other competent courts to afford relief may not be passed by and the original jurisdiction of this court be invoked, in the absence of exceptional conditions justifying such course. *Matters v. Ryan, ante*, 375.

When leave to file the petition for *habeas corpus* was previously denied, without a suggestion as to the existence of any exceptional condition which would have justified a contrary view, such refusal presumably was based on the existence of the right to seek, if desired, other and appropriate sources of relief. From this it follows that although we pass the application of the doctrine, that the refusal of *habeas corpus* is not the thing adjudged precluding a subsequent granting of such writ

upon the same facts, nevertheless there is here no reason to grant the order prayed, since the previous order rested upon the right and duty to petition for relief, if *habeas corpus* was desired, to other and appropriate sources of judicial power.

No reason, therefore, exists for granting the motion and to avoid any implication of a necessity which does not obtain, the motion is

*Denied.*

---

RATON WATER WORKS COMPANY *v.* CITY OF  
RATON.

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

No. 348. Argued April 29, 30, 1919.—Decided May 5, 1919.

When diverse citizenship is absent and the jurisdiction of the District Court is based solely upon the ground that the suit arises under the Constitution of the United States, an appeal will not lie to the Circuit Court of Appeals, but only, and exclusively, to this court.

THE case is stated in the opinion.

*Mr. Abram J. Rose*, with whom *Mr. Jesse G. Northcutt* and *Mr. Henry W. Coil* were on the brief, for Raton Water Works Co.

*Mr. John Henry Fry*, with whom *Mr. George L. Nye* was on the brief, for City of Raton.

Memorandum opinion by THE CHIEF JUSTICE.

The certificate states that in a cause pending before it on appeal from the district court, the jurisdiction of

the court below to entertain the cause on appeal was questioned on the ground that the judgment of the district court was exclusively susceptible of being reviewed by direct appeal to this court. The certificate further states that the parties to the cause in the district court were both corporations of New Mexico and the jurisdiction of the district court to entertain the suit was based solely upon the ground that it was one arising under the Constitution of the United States.

Resulting from these conditions the question which the certificate propounds is this: "Has this court [the Circuit Court of Appeals] jurisdiction of the appeal?" The solution of the question is free from difficulty, since whatever at one time may have been the basis for hesitancy concerning the question the necessity for a negative answer is now conclusively manifest as the result of a line of decisions determining that, under the circumstances as stated, the Circuit Court of Appeals was without jurisdiction of the appeal, as the exclusive power to review was vested in this court. Judicial Code, §§ 128, 238; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-281; *Huguley Manufacturing Co. v. Guleton Cotton Mills*, 184 U. S. 290, 295; *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 73; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318.

A negative answer to the question propounded is therefore directed.

*And it is so ordered.*



BEAUMONT, ASSIGNEE OF BORCK, *v.* PRIETO ET  
AL., ADMINISTRATORS OF LEGARDA, ET AL.

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

No. 303. Argued April 17, 1919.—Decided May 5, 1919.

In the interest of justice the court may decline to dismiss a case upon the ground that the writ of error and citation were not made returnable in time, where the irregularity had color of authority from the court below and one of its judges. P. 555.

An offer to sell real property, in the form of an option allowing three months in which to buy at a certain price, is not accepted by an offer to purchase at that price, conditioned to be paid on a date specified (beyond the three months) or "before and with delivery" of clear title. *Id.*

The opportunity to accept a continuing offer is lost by making a counter offer. P. 556.

The court will not disturb a decision of the Supreme Court of the Philippines on a local question of contract, unless clearly wrong. *Id.*

Affirmed.

THE case is stated in the opinion.

*Mr. Joseph D. Sullivan*, with whom *Mr. T. T. Ansberry* and *Mr. Thos. D. Aitken* were on the brief, for appellant and plaintiff in error.

*Mr. Alex. Britton*, with whom *Mr. Evans Browne*, *Mr. H. W. Van Dyke* and *Mr. Charles C. Cohn* were on the briefs, for appellees and defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit for the specific performance of an alleged contract to sell land. The court of first instance made a

554.

## Opinion of the Court.

decree for the plaintiff, but the decree was reversed by the Supreme Court of the Philippine Islands and the defendants were absolved from the complaint. There is a motion to dismiss, on the ground that the writ of error and citation were not made returnable in time. But without going into particulars, as the appellant had color of authority from the court and a judge of that court, it appears to us that justice will be better served by dealing with the merits of the case. See *Southern Pine Co. v. Ward*, 208 U. S. 126, 137.

On the merits the only question is whether the alleged contract was made. The first material step was the following offer, dated December 4, 1911: "Mr. W. Borek, Real Estate Agent, Manila, P. I. Sir: In compliance with your request I herewith give you an option for three months to buy the property of Mr. Benito Legarda, known as the Nagtahan hacienda, situated in the district of Sampaloc, Manila, and consisting of about 1,993,000 square meters of land, for the price of its assessed government valuation. B. Valdes." There is no dispute that the assessed government valuation was 307,000 pesos, that Legarda owned the land and that Valdes had power to make the offer. On January 17, 1912, Borek wrote to Valdes: "In reference to our negotiations regarding" the property in question, "I offer to purchase said property for the sum of three hundred and seven thousand (307,000.00) pesos, Ph. C., cash, net to you, payable the first day of May, 1912, or before and with delivery of a torrens title free of all encumbrances as taxes and other debts." There was dispute about the admissibility of this letter and its being signed, but we see no occasion to disturb the opinion of the Supreme Court that it was a part of the transaction and was admissible. No answer was received, and on January 19 Borek wrote again, saying that he was ready to purchase the property at the price and that full payment would be made on or before

March 3, provided all documents in connection with the hacienda were immediately placed at his disposal and found in good order. On January 23, Borek wrote again that he could improve the condition of payment and would pay ten days after the documents had been put at his disposal for inspection, &c., and finally, on February 28, wrote that the price was ready to be paid over and requesting notice when it was convenient to allow inspection of all papers. Before this last letter was written Valdes had indicated that he regarded compliance as an open question by saying in conversation that he wished to communicate with Mr. Legarda. Subsequently conveyance was refused.

The letter of January 17 plainly departed from the terms of the offer as to the time of payment and was, as it was expressed to be, a counter offer. In the language of a similar English case, "plaintiff made an offer of his own . . . and he thereby rejected the offer previously made by the defendant. . . . It was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it." *Hyde v. Wrench*, 3 Beavan, 334. Langdell, Cont., § 18. We do not find it necessary to go into the discussion of the later communications, which led the Supreme Court to the conclusion that they also would not have been sufficient. The right to hold the defendant to the proposed terms by a word of assent was gone, and after that all that the plaintiff could do was to make an offer in his turn. It would need a very much stronger case than this to induce us to reverse the decision of the court below. *Cardona v. Quiñones*, 240 U. S. 83, 88.

*Judgment affirmed.*

Syllabus.

SKINNER & EDDY CORPORATION v. UNITED STATES ET AL.

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

No. 215. Argued March 11, 1919.—Decided May 5, 1919.

Where a suit to enjoin the enforcement of an order of the Interstate Commerce Commission is based upon the ground that the order exceeded the statutory powers of the Commission and, hence, is void, the courts may entertain jurisdiction notwithstanding no attempt has been made by the plaintiff to obtain redress from the Commission itself. P. 562.

Where rates allowed by the Commission in a proceeding initiated by carriers for relief from the long and short haul clause were later increased as a result of orders made when the proceeding was reopened on the application of a state commission and a merchants association, *held*, that the new orders were to be regarded as resting upon the original petition of the carriers, so that, under the jurisdictional Act of October 22, 1913, a suit to enjoin their enforcement was properly brought in a judicial district where one of the carriers, a party defendant, had its residence. P. 563.

The clause in § 4 of the Commerce Act, as amended June 18, 1910, providing that when a railroad carrier shall, in competition with a water route, reduce rates between competitive points, it shall not be permitted to increase them unless, after hearing by the Commission, it shall be found that the proposed increase rests upon changed conditions other than elimination of water competition, has no application where the reduction was with the approval of the Commission, ordered after hearing, upon application by the carrier for relief from the long and short haul clause. P. 564.

*Held*, that, in this case, changed conditions "other than the elimination of water competition," were found by the Commission. P. 569.

An order under § 4 of the act, granting relief from the long and short haul clause, is subject to future modification by the Commission without any application from the carrier. P. 570.

*Affirmed.*

THE case is stated in the opinion.



*Mr. Joseph N. Teal*, with whom *Mr. William C. McCulloch*, *Mr. L. B. Stedman* and *Mr. W. E. Creed* were on the brief, for appellant.

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

*Mr. Albert L. Hopkins*, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

*Mr. John F. Finerty*, with whom *Mr. E. C. Lindley*, *Mr. M. L. Countryman*, *Mr. Charles Donnelly*, *Mr. O. W. Dynes* and *Mr. A. C. Spencer* were on the brief, for the appellee railroad companies.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The last paragraph of § 4 of the Act to Regulate Commerce, as amended by Act of June 18, 1910, c. 309, § 8, 36 Stat. 539, 547, declares that: "Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

On August 21, 1916, Skinner & Eddy Corporation brought this suit in the District Court of the United States for the District of Oregon to enjoin an increase in carload rates on iron and steel products from Pittsburgh to Seattle. The United States, the Commission, and sixteen railroads were joined as defendants. The bill charged that the action of the carriers in increasing

their rates and that of the Commission in authorizing such increase violated the above provision of the Commerce Act and, being beyond their respective powers, was void. The relief asked against the carriers was to prevent the collection of the proposed increased rates until the "Commission shall have held a hearing to determine whether the proposed increases rest upon changed conditions other than the elimination of water competition." The relief asked against the Commission was to prevent its taking any steps to enforce certain orders "so far as the same permit" such increases. An application for an interlocutory injunction heard before three judges on December 29, 1916, was denied; and later the bill and a supplemental bill, filed December 16, 1916, were dismissed on the ground that they do not state any cause of action. The case comes here by direct appeal. The essential facts are these:

After the decision by this court in *Intermountain Rate Cases*, 234 U. S. 476, and while the *Sacramento Case* (*United States v. Merchants & Manufacturers Traffic Association*, 242 U. S. 178) was pending in the District Court, carriers forming connecting lines between Pittsburgh and Seattle applied to the Commission in the same proceeding for further modification of Amended Fourth Section Order No. 124, so as to permit a reduction in carload rates on iron and steel products from Pittsburgh to Seattle without making such reduced rates applicable to intermediate points of destination. An order granting leave for a reduction from 80 cents<sup>1</sup> to 65 cents per 100 pounds was entered March 1, 1916. *Rates on Iron and Steel Articles*, 38 I. C. C. 237. The carriers soon thereafter filed tariffs making that reduction

---

<sup>1</sup> 80 cents was the specific published rate; but the combination of the Pittsburgh-Chicago rate of 18.9 cents and the Chicago-Seattle rate of 55 cents was 73.9 cents, and it was at this rate that the traffic from Pittsburgh actually moved.

effective April 10, 1916; and on that date, the 65-cent rate became operative.

During March, 1916, two applications had been made to the Commission in the same proceeding on behalf of shippers to reopen for further consideration other fourth section applications of carriers concerning westbound transcontinental rates and for modification of orders issued thereon. The petitioners for such modification were the Spokane Merchants' Association and the Railroad Commission of Nevada, which had theretofore taken an active part in the proceedings (*Railroad Commission of Nevada v. Southern Pacific Co.*, 21 I. C. C. 329; *Commodity Rates to Pacific Coast Terminals*, 32 I. C. C. 611). Their prayer was for removal of the existing discrimination in transcontinental freight rates against the intermountain territory and in favor of the Pacific Coast ports. The ground alleged for seeking the modification was that by reason of slides in the Panama Canal and the increased demand for shipping due to the World War, water competition, which had theretofore been held to justify lower rates to the Pacific Coast ports, had in large part disappeared. Thereupon the Commission reopened on April 1, 1916, these applications, including that on which was entered the order of March 1, 1916, respecting iron and steel rates from Pittsburgh to Seattle; and a hearing was ordered "respecting the changed conditions which are alleged in justification of a modification of the Commission's orders."

None of the railroads had requested the reopening of the applications or the hearing; and when it was held, all opposed further modification of the transcontinental rates. No increased rates were proposed by them; and no specific increased rates were considered by the Commission. The petitioners introduced evidence respecting the changed conditions as a basis for modifying the several fourth section orders. On June 5, 1916, the Com-

mission filed a report (*Reopening Fourth Section Applications*, 40 I. C. C. 35) in which it found that while the Panama Canal had been meanwhile reopened there was not then "any effective water competition between the two coasts" or likely to be any in the near future, and that "the war and an unparalleled rise in prices for ocean transportation have so changed the situation as to transform a relation of rates which was justified when established to one that is now unjustly discriminatory against intermediate points." It found also that these conditions were temporary. An order (amended July 13, 1916) was then entered, effective September 1, 1916, rescinding those previously entered on the several applications of carriers, including that of March 1, 1916, authorizing the 65-cent Pittsburgh-Seattle rate; and the carriers were directed to reduce the degree of discrimination then existing in favor of Pacific Coast ports as against intermediate territory.

Upon entry of this order the carriers filed tariffs effective September 1, 1916, raising, among others, the Pittsburgh-Seattle iron and steel rates from 65 cents to 94 cents. Promptly, on August 4, 1916, Skinner & Eddy Corporation protested, requested that the tariffs be suspended until a hearing could be had thereon, and alleged that the proposed increase violated, as later set forth in its bill of complaint, the last paragraph of the fourth section. Their request was not then granted. Thereafter, by action of the Commission and the carriers, not necessary to detail, the effective date of the tariff fixing the 94-cent rate was postponed to December 30, 1916; and meanwhile these tariffs were, with consent of the Commission, canceled upon the understanding that new tariffs fixing a 75-cent rate effective on that day would be filed. When the 75-cent rate was filed, Skinner & Eddy Corporation again protested on the same ground and made, as theretofore, the same request for a sus-



pension of the tariffs and a hearing; and again the request was not granted.

*First.* The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under §§ 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission, *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 146; *The Minnesota Rate Cases*, 230 U. S. 352, 419; *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law, *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 482; *Pennsylvania Co. v. United States*, 236 U. S. 351, 361; *Los Angeles Switching Case*, 234 U. S. 294, 311; *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423, 440; *Procter & Gamble Co. v. United States*, 225 U. S. 282, 297-298; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541. But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Com-*

*merce Commission v. Diffenbaugh*, 222 U. S. 42, 49; *Louisiana & Pacific Ry. Co. v. United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co. v. Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. *The Sacramento Case*, *supra*, was a case of this character. Compare *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit.

*Second.* The defendants contend, also, that if the subject-matter was within the jurisdiction of a District Court of the United States, it was not within that of Oregon. The objection is based upon the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, which declares: "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." And it is asserted that the parties upon whose petition the order was made, are the Merchants' Association of Spokane, a resident of the Eastern District of Washington, and the Railroad Commission of Nevada, a resident of the District of Nevada. The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original applications of carriers for relief under the fourth section. The report and the order are entitled, "In the Matter of Reopening Fourth Section Applications." One of the carriers which had made such application for relief from the provisions of the fourth section was a resident of Oregon, namely, the Oregon-Washington Railroad and Navigation Company; and as it was joined as defendant in the suit, the District Court for Oregon had jurisdiction over the parties.

*Third.* The main contention of plaintiff is that, as the carriers had in 1916 reduced the rate from 80 cents to 65 cents, neither the carriers nor the Commission had power to increase the rate without a prior finding by the Commission upon proper hearing "that such proposed increase rests upon changed conditions other than the elimination of water competition;" and that no such hearing had been had or finding made.

In construing this provision it is important to bear in mind the limits of the Commission's control over rates. Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them.<sup>1</sup> Legislation of Congress confers now upon the Commission ample powers to prevent by direct action the exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits public carriers from charging more than reasonable rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196-197; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 161. Effective control was not secured until the Act of 1906 had given to the Commission the

---

<sup>1</sup> By Act of August 9, 1917, c. 50, § 4, 40 Stat. 270, 272, it was provided that until January 1, 1920, no increased rate or fare shall be filed except after approval thereof has been secured from the Commission. On the 28th day of December, 1917, the Government took control of the railroads, as a war measure, under Act of August 29, 1916, c. 418, 39 Stat. 619, 645. Proclamation of December 26, 1917, 40 Stat. 1733, 1734.

power to fix, after such hearing, the rate which should be charged; *Interstate Commerce Commission v. Humboldt S. S. Co.*, 224 U. S. 474, 483; and the Act of 1910 had given it power to suspend, during investigation, tariffs for new rates, and placed upon the carrier the burden of proof to establish the reasonableness of the increased rates. *M. C. Kiser Co. v. Central of Georgia Ry. Co.*, 236 Fed. Rep. 573.

Congress, however, steadfastly withheld from the Commission power to prevent by direct action the charging of unreasonably low rates. The common law did not recognize that the rate of a common carrier might be so low as to constitute a wrong; and Congress has declined to declare such a rule. Despite the original Act to Regulate Commerce and all amendments, railroads still have power to fix rates as low as they choose and to reduce rates when they choose.<sup>1</sup> The Commission's power over them in this respect extends no further than to discourage the making of unduly low rates by applying deterrents. One such deterrent is found in the fact that low rates, because voluntarily established by the carrier, may be accepted by the Commission as evidence that other rates, actual or proposed, for comparable service are unreasonably high. *Board of Trade of Carrollton, Ga., v. Central of Georgia Ry. Co.*, 28 I. C. C. 154, 164; *Sheridan Chamber of Commerce v. Chicago, Burlington & Quincy R. R. Co.*, 26 I. C. C. 638, 647. Compare *Louisville & Nashville R. R. Co. v. United States*, 238 U. S. 1, 11 *et seq.* The voluntary making of unremuneratively low rates in important traffic may also tend to induce the Commission to resist appeals of carriers for general rate increases on the ground of financial necessities. But the main source of the Commission's influence to prevent excessively low

---

<sup>1</sup> Subject only to the requirement of notice as provided in § 6 of the Act to Regulate Commerce, as amended.



rates lies in its power to prevent unjust discrimination. Compare *Houston, East & West Texas Ry. Co. v. United States*, 234 U. S. 342. The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained, the rate applicable to the locality or article discriminated against must be reduced. That is, the carrier may remove the discrimination either by raising the lower rate to the relative level of the higher, or by lowering the higher to the relative level of the lower, or by equalizing conditions through fixing rates at some intermediate point. *American Express Co. v. Caldwell*, 244 U. S. 617, 624.

A special group of cases in which the Commission may indirectly prevent unduly low rates through its power to prevent unjust discrimination is that provided for by the long and short haul clause. It was enacted to remedy one large class of discriminations by creating a legislative presumption that the charge of more for a short haul under substantially similar circumstances and conditions than for a longer distance over the same line in the same direction was unjust. As originally enacted, the provision was construed to authorize the carrier to determine primarily whether the required dissimilarity of circumstances and conditions existed and also to authorize the acceptance of competitive conditions as a justification of a lower rate for the longer distance. So construed, the provisions proved inefficacious, and the act was amended in 1910 by striking out the "substantially similar circumstances and conditions" clause and making the prohibition absolute except to "the extent to which such designated common carrier may be relieved from the operation of this section" by the Commission. *Intermountain Rate Cases*, *supra*. But the lack of power to prevent by direct action excessively low rates remains; the carrier still having the option, if relief from the operation of the fourth section is denied,

to keep in effect the low rate to the more distant point by lowering the rates to intermediate points.

The last paragraph of § 4, here in question, which was added by the Act of 1910, was designed to prevent the railroads from killing water competition by making excessively low rates. But again Congress refrained from prohibiting the carrier to reduce the rate and declined to confer upon the Commission power to prevent by direct action a reduction. The act still leaves the carrier absolutely free to make as low a rate as it chooses; and merely provides another deterrent, in declaring that, if the rate is once reduced in competition with a water route or routes, it cannot, thereafter, be increased, "unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." This provision may become operative in any case where there has been competition between a railroad and a water line, inland or coastwise. But we have now to determine merely whether the prohibition applies where the rates in question were reduced with the approval of the Commission given after hearing, by order entered upon application of the carrier for relief from the operation of the fourth section.

The language of the paragraph is general and read alone might compel that construction. But it may not be read alone. It must be construed in the light of the purpose of its enactment, of the earlier paragraphs of § 4, and of other sections in the Act to Regulate Commerce designed to prevent unjust discrimination. The specific purpose of § 4 was to prevent discrimination by charging less for the longer haul, unless in the opinion of the Commission the circumstances make such action just. Discrimination, just when sanctioned, may become most unjust. Recognizing this fact, Congress provided that the judgment of the Commission should be exercised

"from time to time" to determine "the extent to which [the] . . . carrier may be relieved from the operation of this section." In other words, the leave granted is not for all time. It is revocable at any time, either because it was improvidently granted or because new conditions have arisen which make its continuance inequitable. The specific purpose of the last paragraph of § 4 is to ensure and preserve water competition; to prevent competition that kills. A reduction made under the authority of a fourth section order after full hearing must have been found by the Commission to have been reasonably necessary in order to preserve competition between the rail and the water carrier. A reduction so made is not within the reason of the prohibition declared by the last paragraph. Transportation conditions are not static; the oppressor of today may tomorrow be the oppressed. And in order to preserve competition between rail and water carriers it is necessary that the Commission's power to approve a modification of rates be as broad as it is to approve a modification in order to prevent unjust discrimination. Even a literal reading of § 4 would not require that the prohibition contained in the last paragraph be extended to reductions made with the approval of the Commission. The preceding paragraph declares that "the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section." The last paragraph is a part of the section. Why should not the Commission's power to relieve be extended to it?

The construction contended for by plaintiff would rather ensure monopoly than preserve competition. If a rail rate reduced in competition with a water route for the avowed purpose of preserving competition by rail should result, contrary to the Commission's expectations, in eliminating the water competition, because so low as to drive the water carrier out of business, then the pro-

hibitively low rate would have to be continued permanently and other water competition be thereby prevented from arising; unless, perchance, some changed condition should develop which might make removal of the bar possible. Or, if the reduction in the rail rate, sanctioned by the Commission under the fourth section as not unjustly discriminating against intermediate points, because forced upon the rail carriers by oppressive water competition designed to destroy its business to the port, should become thereafter unjustly discriminatory, because the water carrier, destroyed by its own rate cutting, abandoned the route, still the low rail rate and resulting discrimination would have to continue. Only compelling language could cause us to impute to Congress the intention to produce results so absurd; and the language of the last paragraph of § 4 is clearly susceptible of the more reasonable construction contended for by defendants.

*Fourth.* The defendants further contend that, even if the prohibition of the last paragraph of § 4 be construed to apply also where the reduction was made with the authority of the Commission, the increase of the Pittsburgh-Seattle rate to 75 cents is valid, because the finding of the Commission complies with the prescribed condition that the increased rate must rest "upon changed conditions other than the elimination of water competition." It found in terms that: "the conditions formerly existing have materially changed"; that "the withdrawal of boats from this [coast to coast] service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights"; that the substantial disappearance of water competition was merely temporary; that competing water carriers "announced their intention ultimately to return to this service" and "that the time of such return depended in



part upon the measure of the rates they would be able to secure for this service in competition with the rail lines." It is clear that the changed conditions so found are something other than the "elimination of water competition" which Congress intended should not justify raising the reduced rates. Compare *American Insulated Wire & Cable Co. v. Chicago & North Western Ry. Co.*, 26 I. C. C. 415, 416.

*Fifth.* The plaintiff attacks, however, the validity of the order of June 5, 1916 (amended July 13, 1916) also on the ground that it was not made upon application of the carrier—insisting that application by the carrier is not only a prerequisite to the original granting of relief under the fourth section, but also to the modification from time to time by the Commission of the relief afforded. This court expressed in the *Sacramento Case*, *supra*, at p. 187, its doubt whether such application was a prerequisite even to the original granting of relief. It is clear that application by the carrier is not a prerequisite to modification. As shown above, orders granting relief under the fourth section are not grants in perpetuity. Neither a carrier nor a favored community acquires thereby vested rights. Necessarily implied in each such order is the term, "until otherwise ordered by the Commission"; and the original application is always subject to be reopened, as it was here.

The District Court did not err in dismissing the bill (and supplemental bill) on the merits; and its decree is

*Affirmed.*

Counsel for Parties.

STANDARD COMPUTING SCALE COMPANY,  
LIMITED, *v.* FARRELL, AS STATE SUPERIN-  
TENDENT OF WEIGHTS AND MEASURES OF  
THE STATE OF NEW YORK.

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

No. 228. Argued March 14, 1919.—Decided May 5, 1919.

A statement to the effect that all scales of a certain kind must be equipped with automatic devices, to compensate for changes of temperature, appearing as an item in a "bulletin of instruction and information to dealers, and weights and measures officials," issued by the New York Superintendent of Weights and Measures, was acted upon by certain county and city sealers of weights, with resulting injury to the business of the plaintiff, a manufacturer of scales of the kind specified but not equipped with such devices. *Held*, considering the Superintendent's functions and powers under the New York law, and the purpose of the statement, that it was educational and advisory merely, not binding on the city and county sealers and not a rule or regulation of a legislative character such as might impair the plaintiff's constitutional rights under the Fourteenth Amendment or the commerce clause. P. 573.

242 Fed. Rep. 87, affirmed.

THE case is stated in the opinion.

*Mr. Herbert C. Smyth*, with whom *Mr. Frederic C. Scofield* and *Mr. Frederick W. Bisgood* were on the briefs, for appellant.

*Mr. Edward G. Griffin*, Deputy Attorney General of the State of New York, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, was on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the statutes of New York a sealer of weights and measures is appointed in every county and every city by the local authorities with the duty, among other things, to keep safely the standards and to seal and mark such weights as correspond with the standards in his possession. The statutes provide also for a State Superintendent of weights and measures with, among other things, a like duty to keep the state standards, and "where not otherwise provided by law" to "have a general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state." General Business Law of New York, sections 11-15, Laws 1909, c. 25, amended 1910, Laws 1910, c. 187. Under a specific appropriation he publishes and distributes "bulletins of instruction and information to dealers, and weights and measures officials." Laws 1914, c. 521, p. 2093. In the bulletin for August, 1914, there appeared, among other matter, the following item:

"Specifications.

"Automatic Computing Scales.

"All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations."

The Standard Company manufactures a combination spring and lever computing scale which was then being used and sold in New York. It is equipped with a compensating device which is not automatic. Because of these "specifications," some county and city sealers of weights neglected to seal scales of plaintiff's make and warned scale users to discontinue the use thereof. A state inspector, who was a subordinate of the State Superintend-

571.

Opinion of the Court.

ent, also marked some of these scales "slow and faulty." As a result, the Standard Company's business in New York was injured; sales diminished and collections for scales theretofore sold became difficult. The Standard Company contends that its scales with a mechanical compensating device are at least as trustworthy as those of its competitor with the automatic device; and it presented these views to State Superintendent Farrell both before the "specifications" were issued and thereafter. Failing to secure a withdrawal of the "specifications," it brought, in February, 1915, this suit in the District Court of the United States for the Southern District of New York against the State Superintendent, setting forth, in substance, the facts above stated and praying that the issuing of the "specifications," which it termed a "rule," be declared an invalid exercise of the police power of the State and their enforcement enjoined on the ground that the rule violates the Federal Constitution, in that it impairs the obligation of contracts, interferes with interstate commerce, abridges the privileges and immunities of a citizen, deprives the plaintiff of property without due process, and denies to it equal protection of the laws. An answer was filed; and upon full hearing on the evidence the bill was dismissed on the merits. 242 Fed. Rep. 87. The Circuit Court of Appeals affirmed the decree; but, at appellant's request, the mandate was later withdrawn and the appeal dismissed for want of jurisdiction; because it appeared that the jurisdiction of the District Court had been invoked solely under § 24, paragraph 14, of the Judicial Code, on the ground that the defendant's "rule" was unconstitutional. *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318. Thereupon the case was brought here by direct appeal under § 238 of the Judicial Code.

No question is made as to the constitutionality of the statute creating the office of State Superintendent and defining his duties. The attack is upon the "specifica-



tions" in the bulletin which plaintiff assumes are a regulation, that is, a law. Its contention is that the so-called "rule" is not a proper exercise of the police power, and is void; because it is arbitrary and unreasonable, because it unjustifiably discriminates against plaintiff's product, and because it interferes with interstate commerce. The claim that it impairs the obligation of contracts is not now insisted upon.

The "specifications" were not published as a regulation purporting to prescribe a course of action to be enforced by the power of the State. They embody, as the evidence shows, the result of prolonged investigation and extensive experimentation; and formulate the conclusion reached by the State Superintendent that every known automatic computing scale without an automatic compensating device is likely to mislead the customer who purchases at retail. In other words, the vice in this kind of scales was found by him to be generic; and as the objection was not one due to a defect of an individual machine, it was deemed useless to make individual tests. The "specifications" are a law only in the sense that every truth of general application may be spoken of as a law. If they may be termed a rule, it is only in the sense that they furnish a guide for the action of those interested. That is, the function of the "specifications" is educational and, at most, advisory.

The item was one appropriate for a bulletin "of instruction and information to dealers, and weights and measures officials." That such was its purpose is shown also by the other items contained in the same issue of the Bulletin. In the pages preceding the "specifications" here in question, was one item giving elementary information as to how prosecutions for violation of the General Business Law may be conducted, and two recent opinions of the Attorney-General of New York addressed to the State Superintendent. The first concerned the power of

571.

## Opinion of the Court.

local magistrates to punish for violation of that law, the other the right to mark containers in terms of the metric system. Following the "specifications" in question are two more opinions of the Attorney-General and the opinion of a municipal court. The last item of the Bulletin is entitled "Specifications—Measuring Pumps," and conveys useful information concerning automatic measuring devices. The information given in the "specifications" complained of may, as the plaintiff contends, be incorrect, the instruction may be unsound, and, if it is so, may be mischievous and seriously damage the property rights of innocent persons. But the opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the States.

If the State Superintendent had undertaken to introduce a regulation legislative in character, that is, to prescribe rules of action which the city and county sealers would be forced to follow, and to prohibit the use in the State of scales not sealed in accordance with his regulations, he would have exceeded his powers; for the few conferred upon him are not of that character. The General Business Law substantially as enacted in 1909, provided by § 11 that: "The state superintendent of weights and measures shall take charge of the standards adopted by this article as the standards of the state; cause them to be kept in a fire-proof building belonging to the state, from which they shall not be removed, except for repairs or for certification, and take all other necessary precautions for their safe-keeping. He shall maintain the state standards in good order and shall submit them once in ten years to the national bureau of standards for certification. He shall correct the standards of the several cities and counties, and, as often as once in five years, compare the same with those in his possession, and where not otherwise pro-

vided by law he shall have a general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state." The statutes give the State Superintendent no control of county or city sealers. He does not appoint them and they are, in no respect, his subordinates. The powers which they now exercise are substantially the same as those conferred upon them by the Colonial Act of June 19, 1703,<sup>1</sup> which created those offices. Section 11 of the General Business Law was a reënactment of § 11 of the Domestic Commerce Law, Laws 1896, c. 376; and the latter was substantially a reënactment of § 17 of c. 134 of the Laws of 1851, which act created (by § 16) the office of State Superintendent.<sup>2</sup> Section 11 as enacted in 1909 was amended (Laws 1910, c. 187) so as to prescribe additional specific duties of the State Superintendent.<sup>3</sup> But none of these

---

<sup>1</sup> Report upon Weights and Measures, by John Quincy Adams, Secretary of State, February 22, 1821, p. 189.

<sup>2</sup> An Act passed February 2, 1804, had provided that the Secretary of State should be *ex officio* state sealer of weights and measures and that "from time to time, as occasion may require," "one assistant state sealer" might be appointed. Report upon Weights and Measures, by John Quincy Adams, Secretary of State, February 22, 1821, p. 194.

<sup>3</sup> "He shall upon the written request of any citizen, firm, corporation or educational institution of the state, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in the state. He, or his deputies or inspectors by his direction, shall at least once annually test all scales, weights and measures used in checking the receipt or disbursement of supplies in every institution under the jurisdiction of the fiscal supervisor of state charities and he shall report in writing his findings to said fiscal supervisor and to the executive officer of the institution concerned; and at the request of said officers the superintendent of weights and measures shall appoint in writing one or more employees, then in actual service, of each institution, who shall act as special deputies for the purpose of checking the receipt or disbursement of supplies. He shall keep a complete record of the standards, balances and other apparatus belonging to the state and take receipt for the same from

571.

## Opinion of the Court.

is legislative in character; and the enumeration of them serves rather to limit than to enlarge the meaning of the clause, giving "general supervision of the weights . . . in use in the state."

If the "specifications" had been issued as a regulation, that is, a law, we might have been called upon to enquire whether it was a proper exercise of the police power or was, as plaintiff contends, void because arbitrary and unreasonable, or because it was discriminatory, or as interfering with interstate commerce. For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission. *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 286-288; *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 403. But since the "specifications" are not in the nature of a law or regulation, the prohibitions of the Federal Constitution cannot apply.

The District Court did not err in dismissing the bill; and its judgment is

*Affirmed.*

---

his successor in office. He shall annually during the first two weeks of January make to the legislature a report of the work done by his office. The state superintendent, or his deputies or inspectors by his direction, shall inspect all standards used by the counties or cities at least once in two years and shall keep a record of the same. He, or his deputies or inspectors at his direction, shall at least once in two years visit the various cities and counties of the state in order to inspect the work of the local sealers and in the performance of such duties he may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation."





DECISIONS PER CURIAM, FROM MARCH 3, 1919,  
TO MAY 19, 1919, NOT INCLUDING ACTION ON  
PETITIONS FOR WRITS OF CERTIORARI.

No. —, Original. *Ex parte*: IN THE MATTER OF ALBERT HERSCHEL DE PROPPER. Suggestion of committee submitted January 27, 1919. Decided March 3, 1919. Order of admission vacated, the name of the respondent to be removed from the rolls, and the certificate evidencing his enrollment canceled. The court expresses its grateful acknowledgment to the committee of the bar for the alacrity with which they responded to the request to take charge of the subject-matter of the rule which has been disposed of by the order just stated, and for the promptness, intelligence, and efficiency with which they discharged their duty. *Mr. Albert Herschel de Propper pro se. Mr. Charles W. Needham, Mr. Fred-eric D. McKenney and Mr. Melville Church, committee of the bar appointed by the court.*

---

No. 206. L. C. WATSON, TRUSTEE IN BANKRUPTCY OF DUNCAN & COMPANY, F. P. DUNCAN and F. A. DUNCAN, BANKRUPTS, *v.* GEORGE D. MOTLEY. Error to the Supreme Court of the State of Alabama. Submitted January 30, 1919. Decided March 3, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Rutherford Lapsley* for plaintiff in error. *Mr. George D. Motley* for defendant in error.

---

No. 223. ALFRED W. CHURCH *v.* HORACE M. SWETLAND ET AL. Appeal from the Circuit Court of Appeals

for the Second Circuit. Motion to dismiss submitted January 27, 1919. Decided March 3, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of: (1) § 128 of the Judicial Code; *Stevenson v. Fain*, 195 U. S. 165, 166; *Hull v. Burr*, 234 U. S. 712, 720; *St. Anthony Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444. (2) *Farrell v. O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232; *Goodrich v. Ferris*, 214 U. S. 71, 79; *Brolan v. United States*, 236 U. S. 216, 218. *Mr. Hector M. Hitchings* for appellant. *Mr. Daniel P. Hays* and *Mr. John S. Parker* for appellees.

---

NO. 356. UNITED STATES EX REL. GEORGE W. BILLERMAN *v.* MATTHEW J. LONG, CRIMINAL SHERIFF OF THE PARISH OF ORLEANS, STATE OF LOUISIANA. Appeal from the District Court of the United States for the Eastern District of Louisiana. Motion to dismiss submitted January 20, 1919. Decided March 3, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232; *Goodrich v. Ferris*, 214 U. S. 71, 79; *Brolan v. United States*, 236 U. S. 216, 218. *Mr. Wm. Winans Wall* and *Mr. Robert H. Marr* for appellant. *Mr. Thomas Lee Woolwine* for appellee.

---

NO. 161. SOUTHERN PACIFIC COMPANY *v.* JOHN NEWMAN. Error to the Superior Court of Los Angeles County, State of California. Submitted March 5, 1919. Decided March 10, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial

249 U. S.

Decisions Per Curiam, Etc.

Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Henry T. Gage, Mr. William I. Gilbert, Mr. Wm. F. Herrin, Mr. Henley C. Booth and Mr. C. F. R. Ogilby* for plaintiff in error. *Mr. Frank A. Jeffers* for defendant in error.

---

NO. 208. STATE OF CALIFORNIA *v.* MONO COUNTY IRRIGATION COMPANY. Error to the District Court of Appeal, Third Appellate District, State of California. Submitted March 5, 1919. Decided March 10, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. U. S. Webb and Mr. John T. Nourse* for plaintiff in error. No appearance for defendant in error.

---

NO. 209. STATE OF CALIFORNIA *v.* PACIFIC POWER COMPANY. Error to the District Court of Appeal, Third Appellate District, State of California. Submitted March 5, 1919. Decided March 10, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. U. S. Webb and Mr. John T. Nourse* for plaintiff in error. No appearance for defendant in error.

---

NO. 606. H. A. JASTRO ET AL. *v.* ELIAS FRANCIS ET AL. Error to the Supreme Court of the State of New Mexico. Motion to dismiss or affirm or place on summary docket submitted March 3, 1919. Decided March 10, 1919. *Per Curiam*. Dismissed for want of jurisdiction



upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232; *Goodrich v. Ferris*, 214 U. S. 71, 79; *Brolan v. United States*, 236 U. S., 216, 218. Mr. Alonzo B. McMullen, Mr. Alexander Britton, Mr. Evans Browne and Mr. F. W. Clements for plaintiffs in error. Mr. Bernard S. Rodey for defendants in error.

---

No. 682. BESSIE TYRRELL, ETC., v. CHARLES B. SHAFER ET AL. Certiorari to the Supreme Court of the State of Oklahoma. Submitted March 6, 1919. Decided March 10, 1919. *Per Curiam*. Affirmed with costs upon the authority of *Gilcrease v. McCullough*, ante, 178. Mr. Henry B. Martin and Mr. Richard Clyde Allen for petitioners. Mr. Malcolm E. Rosser for respondents.

---

No. —, Original. *Ex parte*: IN THE MATTER OF JOHN F. DEITZ, PETITIONER. Submitted March 3, 1919. Decided March 10, 1919. Motion for leave to file petition for a writ of *habeas corpus* herein denied. Mr. Frederick S. Tyler for petitioner.

---

No. 418. CITY OF CHICAGO ET AL. v. THOMAS E. DEMPCY, AS CHAIRMAN, ETC., ET AL. Error to the Supreme Court of the State of Illinois. Motion to dismiss as to certain plaintiffs in error submitted March 10, 1919. Decided March 17, 1919. *Per Curiam*. The motion of the Chicago City Railway Company, Chicago Railways Company, Calumet & South Chicago Railway Company, and the Southern Street Railway Company, for leave "to withdraw as plaintiffs in error in said

249 U. S.

Decisions Per Curiam, Etc.

case and to discontinue the writ of error as to them" is granted upon the condition that the exercise of the permission to withdraw shall be a consent to a severance and without prejudice to the right of the City of Chicago to prosecute its writ of error to a final conclusion. *Mr. W. W. Gurley, Mr. Harry P. Weber and Mr. George W. Miller* for the Railway Companies. *Mr. Samuel A. Ettelson and Mr. Chester E. Cleveland* for City of Chicago.

---

No. 373. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS, *v. WILLIAM MARSHALL WILSON*. Error to and on petition for writ of certiorari to the Supreme Court of the State of North Carolina. Argued March 3, 1919. Decided March 17, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Petition for writ of certiorari denied. *Mr. George R. Allen*, with whom *Mr. H. La Rue Brown* and *Mr. W. J. Hughes* were on the brief, for plaintiff in error. *Mr. Thaddeus A. Adams* for defendant in error.

---

No. 226. ANN ARBOR RAILROAD COMPANY *v. STEPHEN MANOLOFF*. Error to the Court of Appeals, Sixth Appellate District, of the State of Ohio. Argued March 13, 1919. Decided March 17, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Alexander L. Smith*, for plaintiff in error, submitted. *Mr. Albert H. Miller*, with whom *Mr. A. J. Miller* was on the brief, for defendant in error.

No. 239. DENVER & RIO GRANDE RAILROAD COMPANY *v.* ORESTA DA VELLA, ROYAL ITALIAN CONSUL, AS ADMINISTRATOR, ETC. Error to the Supreme Court of the State of Colorado. Submitted March 14, 1919. Decided March 17, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Elroy N. Clark* and *Mr. Wm. C. Prentiss* for plaintiff in error. *Mr. W. F. Sanborn* for defendant in error.

---

No. 225. MRS. M. E. SIMS ET AL. *v.* W. H. STARK ET AL. Error to the District Court of the United States for the Eastern District of Texas. Argued March 13, 1919. Decided March 17, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 37; *Brown v. Alton Water Co.*, 222 U. S. 325, 332-334. See *Red Jacket, Jr., Coal Co. v. United Thacker Coal Co.*, Point 3, 248 U. S. 531; *Omaha Baum Iron Store Co. v. Moline Plow Co.*, 244 U. S. 650. *Mr. George P. Dougherty*, with whom *Mr. E. E. Townes* and *Mr. Frederick S. Tyler* were on the brief, for plaintiffs in error. No appearance for defendants in error.

---

No. —, Original. *Ex parte*: IN THE MATTER OF WILFRED TOMPKINS, PETITIONER. Submitted March 10, 1919. Decided March 17, 1919. Motion for leave to file petition for a writ of *habeas corpus* herein denied. *Mr. Frans E. Lindquist* for petitioner.

---

No. 265. CRESCENT MILLING COMPANY *v.* H. N. STRAIT MANUFACTURING COMPANY ET AL. Appeal from

249 U. S.

Decisions Per Curiam, Etc.

the District Court of the United States for the District of Minnesota. Argued for appellant March 21, 1919. Decided March 24, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 6 of the Act of September 6, 1916, c. 448, 39 Stat. 726, 727. *Mr. Harris Richardson* for appellant. *Mr. John I. Dille* and *Mr. John O. P. Wheelwright* for appellees.

---

No. 272. NEELY POWERS, TRUSTEE, ETC., *v.* SCOTT COUNTY MILLING COMPANY. Error to the Supreme Court of the State of Mississippi. Submitted March 21, 1919. Decided March 24, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. James N. Flowers* and *Mr. William H. Watkins* for plaintiff in error. *Mr. Robert H. Thompson* and *Mr. George Butler* for defendant in error.

---

No. 261. CHESAPEAKE & OHIO COAL & COKE COMPANY *v.* TOLEDO & OHIO CENTRAL RAILWAY COMPANY. Error to the Circuit Court of Appeals for the Fourth Circuit. Argued for plaintiff in error March 20, 1919. Decided March 24, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 128 of the Judicial Code; *Stevenson v. Fain*, 195 U. S. 165, 166; *Hull v. Burr*, 234 U. S. 712, 720; *St. Anthony Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444. *Mr. Buckner Clay*, with whom *Mr. George E. Price* was on the brief, for plaintiff in error. *Mr. E. W. Knight* for defendant in error.



Nos. 266 and 267. CRESCENT MILLING COMPANY *v.* H. N. STRAIT MANUFACTURING COMPANY. Error to the District Court of the United States for the District of Minnesota. Argued for plaintiff in error March 21, 1919. Decided March 24, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 6 of the Act of September 6, 1916, c. 448, 39 Stat. 726, 727. *Mr. Harris Richardson* for plaintiff in error. *Mr. John I. Dille* and *Mr. John O. P. Wheelwright* for defendant in error.

---

Nos. 268 and 269. CRESCENT MILLING COMPANY *v.* H. N. STRAIT MANUFACTURING COMPANY. Error to the Circuit Court of Appeals for the Eighth Circuit. Argued for plaintiff in error March 21, 1919. Decided March 24, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 128 of the Judicial Code; *Stevenson v. Fain*, 195 U. S. 165, 166; *Hull v. Burr*, 234 U. S. 712, 720; *St. Anthony Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444. *Mr. Harris Richardson* for plaintiff in error. *Mr. John I. Dille* and *Mr. John O. P. Wheelwright* for defendant in error.

---

No. 270. CRESCENT MILLING COMPANY *v.* H. N. STRAIT MANUFACTURING COMPANY. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Argued for appellant March 21, 1919. Decided March 24, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 128 of the Judicial Code; *Stevenson v. Fain*, 195 U. S. 165, 166; *Hull v. Burr*, 234 U. S. 712, 720; *St. Anthony Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577; *Delaware, Lackawanna &*

249 U. S.

Decisions Per Curiam, Etc.

*Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444. Mr. Harris Richardson for appellant. Mr. John I. Dille and Mr. John O. P. Wheelwright for appellee.

---

No. —, Original. *Ex parte*: IN THE MATTER OF CHRISTOFFER HANNEVIG ET AL., PETITIONERS. Submitted March 17, 1919. Decided March 31, 1919. Motion for leave to file petition for writs of prohibition, mandamus, and certiorari denied. Mr. Frederic R. Coudert and Mr. Howard Thayer Kingsbury for petitioners.

---

No. 704. R. E. ODEN, SHERIFF OF ALLEN PARISH, LOUISIANA, *v.* A. V. COCO, ATTORNEY GENERAL OF LOUISIANA. Error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted March 31, 1919. Decided April 14, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of: (1) *Farrell v. O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232; *Goodrich v. Ferris*, 214 U. S. 71, 79; *Brolan v. United States*, 236 U. S. 216, 218. (2) *Consolidated Turnpike Co. v. Norfolk, &c., Ry. Co.*, 228 U. S. 596, 599; *Municipal Securities Corporation v. Kansas City*, 246 U. S. 63, 69; *Bilby v. Stewart*, 246 U. S. 255, 257. Mr. Chas. Arthur McCoy for plaintiff in error. Mr. Harry P. Sneed for defendant in error.

---

No. 175. DENVER & RIO GRANDE RAILROAD COMPANY *v.* JAMES R. BAIRD. Error to the Supreme Court of the State of Utah. Submitted January 22, 1919.

Decided April 14, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Waldemar Van Cott, Mr. Edward M. Allison, Jr., and Mr. Wm. D. Riter* for plaintiff in error. *Mr. Wm. H. King* for defendant in error.

---

No. —, Original. *Ex parte*: IN THE MATTER OF J. A. TRACY, PETITIONER. Submitted March 31, 1919. Decided April 14, 1919. Motion for leave to file petition for a writ of *habeas corpus* denied. *Mr. C. M. Oneill* for petitioner. See *ante*, 551.

---

No. 22, Original. STATE OF TENNESSEE *v.* STATE OF ARKANSAS ET AL. Argued on motion to dismiss April 14, 1919. Decided April 21, 1919. *Per Curiam*. Bill dismissed with costs for want of equity, on the authority of *Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24, and *Cubbins v. Mississippi River Commission*, 241 U. S. 351. *Mr. Barnette E. Moses and Mr. Frank M. Thompson* for plaintiff. *Mr. W. J. Lamb and Mr. Skipwith Adams* for defendants.

---

No. 26, Original. *Ex parte*: IN THE MATTER OF ROBERT H. THORBURN, PETITIONER. Submitted April 14, 1919. Decided April 21, 1919. Petition for mandamus. Rule to show cause discharged and petition dismissed. Leave to file supplementary petition denied. *Mr. Robert H. Thorburn, pro se. Mr. Augustine L. Humes and Mr. William R. Begg* for respondent.

---

No. 80. JOHN H. COCHNOWER *v.* UNITED STATES. Appeal from the Court of Claims. Motion to amend judg-

249 U. S.

Decisions Per Curiam, Etc.

ment submitted March 10, 1919. Decided April 21, 1919. It is hereby ordered that the judgment in this case entered on January 13, 1919, be, and the same is hereby, restated so as to cause the following to be substituted therefor: This cause came on to be heard on the transcript of the record from the Court of Claims, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Court of Claims with directions to enter a judgment for the claimant for compensation for his services at the rate of one dollar per day from the first of July, 1910, to the thirtieth of June, 1913, inclusive; that is, so as to make up the difference between the four dollars per day actually received during the period stated and the five dollars per day which it is adjudged he was entitled to receive during the said period. *Mr. L. T. Michener* and *Mr. William E. Russell* for appellant. *Mr. Assistant Attorney General Thompson* and *Mr. Harvey D. Jacob* for the United States. See 248 U. S. 405.

---

No. 202. SOUTHERN OREGON COMPANY *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Joint motion to remand submitted March 24, 1919. Decided April 21, 1919. Considering the suggestion made to the court by the parties to the above-entitled cause, that all matters of difference between them arising out of the subject-matter of this litigation have been satisfactorily adjusted and settled pursuant to the provisions of the Act of Congress approved February 26, 1919, entitled "An Act To accept from the Southern Oregon Company, a corporation organized under the laws of the State of Oregon, a reconveyance of the



lands granted to the State of Oregon by the Act approved March third, eighteen hundred and sixty-nine, entitled 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said State,' commonly known as the Coos Bay Wagon Road grant, to provide for the disposition of said lands, and for other purposes," and, further, considering the joint motion by the said parties to remand the cause, It is hereby ordered that this cause be, and the same is hereby, remanded to the District Court, with authority in that court to modify the final decree in the cause so as to carry into effect the said Act of Congress of February 26, 1919. *Mr. John M. Gearin* for appellant. *The Solicitor General* for the United States.

---

No. 163. CENTRAL OF GEORGIA RAILWAY COMPANY *v.* WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA. Restored to the docket for partial rehearing April 21, 1919. The application to file petition for rehearing is allowed and the rehearing is granted in so far as the validity of the tax in question is involved in or depends upon the charters of the Southwestern and the Muskogee Railroad and the subsequent relevant legislation. As to all other questions in the case, therefore, the request for leave to file the application for rehearing is denied and the case for rehearing, limited as above stated, is ordered restored to the docket for reargument. *Mr. A. R. Lawton* and *Mr. T. M. Cunningham, Jr.*, for plaintiff in error. *Mr. John C. Hart* and *Mr. Samuel H. Sibley* for defendant in error. See 248 U. S. 525.

---

No. 277. PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS ET AL. *v.* JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL GAS COMPANY, ET AL.;

249 U. S.

Decisions Per Curiam, Etc.

No. 329. KANSAS CITY, MISSOURI, ET AL. *v.* JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL GAS COMPANY, ET AL.;

No. 330. KANSAS CITY GAS COMPANY ET AL. *v.* KANSAS NATURAL GAS COMPANY ET AL.; and

No. 353. PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS ET AL. *v.* JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL GAS COMPANY, ET AL. Appeals from the District Court of the United States for the District of Kansas. Decree of March 17, 1919, vacated April 28, 1919. In these cases it is ordered that the decree entered March 17, 1919, be vacated and decree now entered as follows: The decrees below are reversed and the cause is remanded to the trial court with directions to hear it anew and determine all the issues involved, including those arising on the several bills, cross bills, and answers in the nature of cross bills, in conformity with the views expressed in the opinion of this court; and to take such further proceedings as may appropriate and consistent with such opinion. All temporary injunctions in force at the time of the entry of the decrees from which appeals were taken here shall be continued in force until otherwise ordered. The costs in this court will be paid one-half by John M. Landon, receiver of the Kansas Natural Gas Company, and the remainder shall be paid, one-third by each of the three groups of appellants.

[For the opinion of the court and names of counsel, see *ante*, 236.]

---

No. 388. WEBB C. HAYES *v.* HOCKING VALLEY RAILWAY COMPANY. Error to the Supreme Court of the State of Ohio. Motion to dismiss submitted April 21, 1919. Decided April 28, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining*

*Co. v. Hanley*, 205 U. S. 225, 232; *Goodrich v. Ferris*, 214 U. S. 71, 79; *Brolan v. United States*, 236 U. S. 216, 218. Mr. Charles A. Seiders for plaintiff in error. Mr. Clarence Brown, Mr. John F. Wilson and Mr. Lloyd T. Williams for defendant in error.

---

No. 644. B. F. MEHARG *v.* ALABAMA POWER COMPANY. Error to the Supreme Court of the State of Alabama. Motion to dismiss submitted April 21, 1919. Decided April 28, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Mr. Oscar W. Underwood and Mr. D. H. Riddle for plaintiff in error. Mr. Thomas W. Martin and Mr. O. R. Hood for defendant in error.

---

No. 504. FENTRESS COAL & COKE COMPANY *v.* BEECHER ELMORE. Error to the District Court of the United States for the Middle District of Tennessee. Motion to dismiss or affirm submitted April 21, 1919. Decided April 28, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 37; *Brown v. Alton Water Co.*, 222 U. S. 325; *Metropolitan Water Co. v. Kaw Valley District*, 223 U. S. 519; *Union Trust Co. v. Westhus*, 228 U. S. 519; *Shapiro v. United States*, 235 U. S. 412. See *Omaha Baum Iron Store Co. v. Moline Plow Co.*, 244 U. S. 650. Mr. W. B. Miller for plaintiff in error. Mr. John F. McNutt for defendant in error.

---

No. 382. SOUTHERN PACIFIC COMPANY *v.* J. V. TERRY. Error to the Supreme Court of the State of California; and

## 249 U. S.

## Decisions Per Curiam, Etc.

NO. 383. SOUTHERN PACIFIC COMPANY *v.* J. V. TERRY. Error to the District Court of Appeal, Second Appellate District, State of California. Argued May 1, 1919. Decided May 5, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. C. F. R. Ogilby*, with whom *Mr. Henry T. Gage*, *Mr. William I. Gilbert* and *Mr. William F. Herrin* were on the brief, for plaintiff in error. *Mr. Frederick S. Tyler*, for defendant in error, submitted.

---

NO. 359. LOUISIANA WESTERN RAILROAD COMPANY *v.* CITY OF CROWLEY. Error to the Supreme Court of the State of Louisiana. Submitted April 29, 1919. Decided May 5, 1919. *Per Curiam*. Dismissed for want of jurisdiction upon the authority of: (1) *Consolidated Turnpike Co. v. Norfolk &c. Ry. Co.* 228 U. S. 596, 599; *Municipal Securities Corporation v. Kansas City*, 246 U. S. 63, 69; *Bilby v. Stewart*, 246 U. S. 255, 257. (2) *Stearns v. Minnesota*, 179 U. S. 223; *Board of Liquidation v. Louisiana*, 179 U. S. 622. *Mr. George Denegre*, *Mr. Victor Leovy*, *Mr. Philip S. Pugh* and *Mr. Henry H. Chaffe* for plaintiff in error. *Mr. P. J. Chappuis* and *Mr. A. P. Holt* for defendant in error.

---

NO. 335. DAN B. ZIMMERMAN *v.* CORSON COUNTY, SOUTH DAKOTA, ET AL. Error to the Supreme Court of the State of South Dakota. Submitted April 25, 1919. Decided May 5, 1919. *Per curiam*. Dismissed for want of jurisdiction upon the authority of: (1) § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. (2) *Consolidated Turnpike Co.*



Decisions on Petitions for Writs of Certiorari. 249 U. S.

*v. Norfolk, &c. Ry. Co.*, 228 U. S. 326, 334; *St. Louis & San Francisco R. R. Co. v. Shepherd*, 240 U. S. 240, 241; *Bilby v. Stewart*, 246 U. S. 255, 257. *Mr. William G. Porter* for plaintiff in error. *Mr. Clarence C. Caldwell* for defendants in error.

---

No. —, Original. *Ex parte*: IN THE MATTER OF MEC-  
CANO, LIMITED, PETITIONER. Submitted May 1, 1919.  
Decided May 5, 1919. Motion for leave to file petition  
for a writ of mandamus or a writ of prohibition denied.  
*Mr. Reeve Lewis* for petitioner.

---

DECISIONS ON PETITIONS FOR WRITS OF CER-  
TIORARI, FROM MARCH 3, 1919, TO MAY 19,  
1919.

(A.) PETITIONS GRANTED.<sup>1</sup>

No. 831. CANADIAN NORTHERN RAILWAY COMPANY *v.*  
GUS EGGEN. March 10, 1919. Petition for a writ of cer-  
tiorari to the Circuit Court of Appeals for the Eighth Cir-  
cuit granted. *Mr. Wm. D. Mitchell* and *Mr. Pierce Butler*  
for petitioner. *Mr. Tom Davis* and *Mr. Ernest A. Michel*  
for respondent.

---

No. 842. GEORGE R. BROADWELL *v.* BOARD OF COUNTY  
COMMISSIONERS OF CARTER COUNTY, OKLAHAMA. March  
10, 1919. Petition for a writ of certiorari to the Supreme  
Court of the State of Oklahoma granted. *Mr. Charles  
L. Moore* and *Mr. George P. Glaze* for petitioner. No ap-  
pearance for respondent.

---

<sup>1</sup> For petitions denied, see *post*, 598.

## 249 U. S. Decisions on Petitions for Writs of Certiorari.

No. 857. *H. E. KIRCHNER v. UNITED STATES*. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. J. W. Vandervort* for petitioner. *Mr. John Lord O'Brian* and *Mr. Alfred Bettman* for the United States.

---

No. 863. *PENNSYLVANIA RAILROAD COMPANY v. KIT-TANING IRON & STEEL MANUFACTURING COMPANY*. March 10, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted. *Mr. F. D. McKenney*, *Mr. J. S. Flannery* and *Mr. Henry Wolf Bikelé* for petitioner. No appearance for respondent.

---

No. 819. *CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL. v. DES MOINES UNION RAILWAY COMPANY ET AL.* March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. James L. Minnis*, *Mr. Burton Hanson* and *Mr. John C. Cook* for petitioners. *Mr. F. W. Lehmann* for respondents.

---

No. 820. *DES MOINES UNION RAILWAY COMPANY ET AL. v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.* March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. F. W. Lehmann* for petitioners. *Mr. James L. Minnis*, *Mr. Burton Hanson* and *Mr. John C. Cook* for respondents.

---

No. 889. *STEPHEN H. P. PELL ET AL. v. W. GORDON McCABE, JR., ET AL.* March 17, 1919. Petition for a

## Decisions on Petitions for Writs of Certiorari. 249 U. S.

writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Lindley M. Garrison, Mr. Emanuel J. Myers and Mr. Gordon S. P. Kleeberg* for petitioners. *Mr. William St. John Tozer* for respondents.

---

No. 849. *C. C. CALHOUN v. BLAND MASSIE*. March 24, 1919. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia granted. *Mr. Charles F. Consaul* for petitioner. No appearance for respondent.

---

No. 901. *KWOCK JAN FAT v. EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION, ETC.* March 31, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. J. H. Ralston* for petitioner. *Mr. Assistant Attorney General Porter* for respondent.

---

No. 924. *GEORGE D. HORNING v. DISTRICT OF COLUMBIA*. April 14, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Henry E. Davis* for petitioner. *Mr. Conrad H. Syme and Mr. P. H. Marshall* for respondent.

---

No. 943. *T. M. DUCHE & SONS, LIMITED, v. AMERICAN SCHOONER JOHN TWOHY, ETC.* April 14, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. William J. Conlen* for petitioner. *Mr. Howard M. Long* for respondent.

## 249 U. S. Decisions on Petitions for Writs of Certiorari.

NO. 860. FIDELITY TITLE & TRUST COMPANY, ANCILLARY ADMINISTRATOR, ETC., *v.* DUBOIS ELECTRIC COMPANY. Motion to reinstate submitted April 14, 1919. Decided April 21, 1919. The motion to reinstate the petition for certiorari, in accordance with the reservation to that effect in the order of March 24, 1919, is allowed. It is ordered that the writ of certiorari be, and the same is hereby, granted. *Mr. Marcus W. Acheson, Jr.*, for petitioner. See *post*, 606.

---

NO. 949. UNITED STATES *v.* NORTHERN PACIFIC RAILWAY COMPANY. April 21, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for the United States. *Mr. Charles W. Bunn* for respondent.

---

NO. 957. FREDERICK J. MACLEOD ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, *v.* NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY. April 21, 1919. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts granted. *Mr. William Harold Hitchcock* and *Mr. Henry C. Attwill* for petitioners. *The Solicitor General* for respondent.

---

NO. 803. THOMAS P. KENNEY, AS ADMINISTRATOR, ETC., *v.* SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE. April 28, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Illinois



Decisions on Petitions for Writs of Certiorari. 249 U. S.

granted. *Mr. Griffith R. Harsh* for petitioner. *Mr. E. J. Henning* for respondent.

---

No. 964. *BERLIN MILLS COMPANY, v. PROCTER & GAMBLE COMPANY*. April 28, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Marcus B. May, Mr. John C. Pennie and Mr. Melville Church* for petitioner. *Mr. Livingston Gifford, Mr. Thomas B. Kerr and Mr. John H. Brickenstein* for respondent. *Mr. Charles E. Hughes and Mr. Royall Victor* as *amici curiæ*.

---

#### (B). PETITIONS DENIED.

No. 784. *CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. O. W. SEAY*. March 3, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Thomas P. Littlepage and Mr. R. J. Roberts* for petitioner. No appearance for respondent.

---

No. 798. *KATE RICHARDS O'HARE v. UNITED STATES*. March 3, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Chester H. Krum* for petitioner. *The Solicitor General* for the United States.

---

No. 801. *FOX TYPEWRITER COMPANY v. AUGUST J. OEHRING ET AL.* March 3, 1919. Petition for a writ of

## 249 U. S. Decisions on Petitions for Writs of Certiorari.

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Fred L. Chappell* for petitioner. *Mr. Hans Von Briesen* for respondents.

---

No. 814. NORFOLK SOUTHERN RAILROAD COMPANY *v.* FURNEY KING. March 3, 1919. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. Robert N. Simms* and *Mr. W. B. Rodman* for petitioner. No appearance for respondent.

---

No. 821. E. I. DU PONT DE NEMOURS & COMPANY *v.* GEORGE C. BRISCO. March 3, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Gordon Bohannon* for petitioner. *Mr. David H. Leake* for respondent.

---

No. 658. ED C. LASATER *v.* MAGNOLIA PETROLEUM COMPANY ET AL. March 3, 1919. Petition for a writ of certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas denied. *Mr. W. E. Pope* for petitioner. *Mr. Barry Mohun* for respondents.

---

No. 812. ATLANTA NATIONAL BANK *v.* WILLIAM A. FULLER, TRUSTEE, ETC. March 3, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jack J. Spalding* for petitioner. *Mr. Luther Z. Rosser* for respondent.

Decisions on Petitions for Writs of Certiorari. 249 U. S.

No. 817. JAMES KENNEY *v.* UNITED STATES. March 3, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Q. Mahaffy, Mr. John J. King and Mr. W. L. Estes* for petitioner. *The Solicitor General and Mr. Assistant Attorney General Porter* for the United States.

---

No. 826. F. R. GLASCOCK ET AL. *v.* ELLIS McDANIEL ET AL., MINORS, by J. O. CRAVENS, GUARDIAN. March 3, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. W. B. Moore and Mr. George S. Ramsey* for petitioners. No appearance for respondents.

---

No. 830. LEHIGH VALLEY RAILROAD COMPANY *v.* NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY. March 3, 1919. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. Gilbert Collins, Mr. Lindley M. Garrison, Mr. George S. Hobart, Mr. Edgar H. Boles, Mr. Charles A. Boston and Mr. Richard W. Barrett* for petitioner. *Mr. Jeremiah F. Hoover* for respondent.

---

No. 543. GIDEON M. FREEMAN *v.* UNITED STATES. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. C. W. Pendleton, Jr.*, for petitioner. No brief filed for the United States.

---

No. 810. AMERICAN RAILROAD COMPANY OF PORTO RICO *v.* PEOPLE OF PORTO RICO. March 10, 1919.

249 U. S. Decisions on Petitions for Writs of Certiorari.

Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis H. Dexter* for petitioner. *Mr. Edward S. Bailey* and *Mr. Howard L. Kern* for respondent.

---

No. 818. FRANCES B. FOSTER, SUING FOR HERSELF AND SURVIVING CHILDREN OF A. G. FOSTER, DECEASED, *v. J. L. LANCASTER ET AL.*, RECEIVERS, ETC. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. H. Winter* for petitioner. *Mr. George Thompson* for respondents.

---

No. 823. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v. J. F. McBRIDE*. March 10, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Thomas S. Buzbee*, *Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* for petitioner. *Mr. Thomas N. Seawell* and *Mr. Frank Pace* for respondent.

---

No. 824. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA *v. J. C. ALLEN ET AL.* March 10, 1919. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. Douglas Brookman* for petitioner. *Mr. Hugh L. Dickson* for respondents.

---

No. 825. ELGIN, JOLIET & EASTERN RAILWAY COMPANY *v. UNITED STATES*. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh



Decisions on Petitions for Writs of Certiorari. 249 U. S.

Circuit denied. *Mr. Wm. D. McKenzie* for petitioner. *The Solicitor General* for the United States.

---

No. 827. JOSEPH P. KEEFE, TRUSTEE, ETC., *v.* WORCESTER TRUST COMPANY. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Arthur T. Johnson* for petitioner. *Mr. Edmund K. Arnold* for respondent.

---

No. 829. J. F. WEEKS ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George E. Wallace* for petitioners. *Mr. Gardiner Lathrop*, *Mr. J. W. Terry* and *Mr. A. H. Culwell* for respondent.

---

No. 836. JOHN RUDOLPH *v.* UNITED STATES. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Alexander S. Drescher* for petitioner. *Mr. John Lord O'Brian* and *Mr. Alfred Bettman* for the United States.

---

No. 839. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY *v.* WILLIAM SHERIDAN. March 10, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Edward Colston* and *Mr. George Hoadly* for petitioner. *Mr. J. H. Frantz*, *Mr. Charles M. Seymour* and *Mr. Robert Bryan Cassell* for respondent.

249 U. S. Decisions on Petitions for Writs of Certiorari.

NO. 844. COMMONWEALTH OF MASSACHUSETTS *v.* LIQUID CARBONIC COMPANY. March 10, 1919. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts denied. *Mr. William Harold Hitchcock* and *Mr. Henry C. Attwill* for petitioner. *Mr. Charles A. Snow* and *Mr. William P. Everts* for respondent.

---

NO. 858. CITY OF NEW YORK *v.* ARTHUR CARTER HUME, AS RECEIVER, ETC. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William P. Burr* for petitioner. *Mr. Joseph A. Kellogg* for respondent.

---

NO. 859. L. P. LARSON, JR., COMPANY *v.* MINT PRODUCTS COMPANY. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George I. Haight*, *Mr. Charles H. Aldrich* and *Mr. Frank F. Reed* for petitioner. *Mr. James R. Offield* for respondent.

---

NO. 861. CHARLES K. DUNCAN, AS TRUSTEE, ETC., *v.* AMERICAN TRUST & SAVINGS BANK. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Claude D. Ritter* for petitioner. *Mr. Forney Johnston* for respondent.

---

NO. 882. DAVID J. KREUZER *v.* UNITED STATES. March 10, 1919. Petition for a writ of certiorari to the

Decisions on Petitions for Writs of Certiorari. 249 U. S.

Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Shepard Barclay* for petitioner. *Mr. Assistant Attorney General Porter* for the United States.

---

No. 884. ST. CHARLES AMUSEMENT & TRANSPORTATION COMPANY *v.* LUDWIG B. ELHARDT ET AL. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lowrie C. Barton* for petitioner. *Mr. T. A. Wright* and *Mr. Will D. Wright* for respondents.

---

No. 885. SAMUEL BERNSTEIN *v.* UNITED STATES. March 10, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Talley* for petitioner. *Mr. Assistant Attorney General Porter* for the United States.

---

No. 373. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS *v.* WILLIAM MARSHALL WILSON. See *ante*, 583.

---

No. 846. IOWA CENTRAL RAILWAY COMPANY *v.* J. W. BREEN. March 17, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied. *Mr. C. H. E. Boardman* for petitioner. *Mr. Milton Remley* for respondent.

---

No. 862. NULOMOLINE COMPANY *v.* JULIUS STROMEYER, TRADING AS JULIUS STROMEYER & COMPANY. March 17,

249 U. S. Decisions on Petitions for Writs of Certiorari.

1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Chester N. Farr, Jr.*, for petitioner. *Mr. Michael J. Ryan* for respondent.

---

No. 866. ZENITH CARBURETOR COMPANY *v.* STROMBERG MOTOR DEVICES COMPANY. March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Clarence P. Byrnes* and *Mr. Melville Church* for petitioner. *Mr. Charles A. Brown* for respondent.

---

No. 872. H. M. LUCK, EXECUTRIX, ETC., *v.* ABRAM P. STAPLES, TRUSTEE, ETC. March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. L. Welborn* for petitioner. *Mr. Abram P. Staples* for respondent.

---

No. 880. NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY *v.* LILLIE WILKINS, ADMINISTRATRIX, ETC. March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Floyd Hughes* and *Mr. Thomas H. Willcox* for petitioner. *Mr. John W. Oast, Jr.*, for respondent.

---

No. 891. ST. LOUIS SOUTHWESTERN RAILWAY OF TEXAS *v.* FRANK SMITH. March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. B. Perkins* for petitioner. No appearance for respondent.



## Decisions on Petitions for Writs of Certiorari. 249 U. S.

NO. 892. THE BISIGHT COMPANY ET AL. *v.* ONEPIECE BIFOCAL LENS COMPANY. March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Cyrus N. Anderson* for petitioners. *Mr. Edward Rector* and *Mr. V. H. Lockwood* for respondent.

---

NO. 896. AMEY HANEY ET AL. *v.* ALBERT ANDERSON ET AL. March 17, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Malcolm E. Rosser* for petitioners. No appearance for respondents.

---

NO. 903. FREDERICK H. CLARKE ET AL. *v.* UNITED STATES. March 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George Haldorn* for petitioner. No brief filed for the United States.

---

NO. 904. OLIVER R. GILLESPIE ET AL. *v.* E. D. SCOTT, TRUSTEE, ETC. March 17, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. Frans E. Lindquist* for petitioners. No appearance for respondent.

---

NO. 860. FIDELITY TITLE & TRUST COMPANY, ANCILLARY ADMINISTRATOR, ETC., *v.* DUBOIS ELECTRIC COMPANY. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied, with reservation of and without prejudice to the

249 U. S. Decisions on Petitions for Writs of Certiorari.

right to apply for a reinstatement of the petition at any time before the end of this term in case the judgment below should fail to award a new trial. *Mr. M. W. Acheson, Jr.*, for petitioner. No appearance for respondent. See *ante*, 597.

---

No. 852. SOUTHERN RAILWAY COMPANY *v.* HUGH PETIT ET AL. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. O'B. Cooper* and *Mr. Caruthers Ewing* for petitioner. *Mr. Julian C. Wilson* and *Mr. Walter P. Armstrong* for respondents.

---

No. 853. NORTH AMERICAN TELEGRAPH COMPANY *v.* NORTHERN PACIFIC RAILWAY COMPANY. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Royal A. Stone*, *Mr. Thomas D. O'Brien*, *Mr. Edward T. Young* and *Mr. Alexander E. Horn* for petitioner. *Mr. Charles W. Bunn* for respondent.

---

No. 854. DALY-WEST MINING COMPANY ET AL. *v.* CATHERINE SAVAGE ET AL. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hiram E. Booth* and *Mr. William H. King* for petitioners. No appearance for respondents.

---

No. 867. TROY DEASON *v.* UNITED STATES. March 24, 1919. Petition for a writ of certiorari to the Circuit

Decisions on Petitions for Writs of Certiorari. 249 U. S.

Court of Appeals for the Fifth Circuit denied. *Mr. H. P. Brown* for petitioner. No brief filed for the United States.

---

No. 873. EDWARD E. GOLD ET AL. *v.* JAMES T. NEWTON, COMMISSIONER OF PATENTS. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William A. Redding* and *Mr. Arthur C. Fraser* for petitioners. No appearance for respondent.

---

No. 875. ARTHUR L. BLUNT *v.* UNITED STATES. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles F. Carusi* for petitioner. No brief filed for the United States.

---

No. 883. J. B. GRAY *v.* BANK OF HARTFORD ET AL. March 24, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Joseph M. Hill* and *Mr. Henry L. Fitzhugh* for petitioner. *Mr. Webb Covington* and *Mr. George L. Grant* for respondents.

---

No. 887. WILHELM KNAUTH ET AL. *v.* JOHN W. KNIGHT ET AL. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George T. Hogg* for petitioners. *Mr. Augustus Benners* for respondents.

---

No. 890. HENRY A. HOUSE *v.* LAURENCE W. LUELLEN. March 24, 1919. Petition for a writ of certiorari to the

249 U. S. Decisions on Petitions for Writs of Certiorari.

Court of Appeals of the District of Columbia denied. *Mr. C. P. Goepel, Mr. J. J. Darlington and Mr. J. D. Sullivan* for petitioner. *Mr. Joseph H. Milans* for respondent.

---

No. 897. JAMES F. BISHOP, ADMINISTRATOR, ETC., ET AL. *v.* GREAT LAKES TOWING COMPANY. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry W. Standidge* for petitioners. *Mr. Harvey D. Goulder, Mr. Thomas H. Garry and Mr. Ralph F. Potter* for respondent.

---

No. 898. NORTH BRITISH & MERCANTILE INSURANCE COMPANY *v.* H. BAARS & COMPANY. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. Roger Englar and Mr. Oscar R. Houston* for petitioner. *Mr. Samuel Pasco and Mr. W. H. Watson* for respondent.

---

No. 907. OTTO HIGEL COMPANY, INC., *v.* AUTOPIANO COMPANY. March 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. F. Hall* for petitioner. *Mr. Louis W. Southgate* for respondent.

---

No. 809. ARKANSAS CENTRAL RAILROAD COMPANY *v.* W. L. GOAD. Error to the Supreme Court of the State of Arkansas. March 31, 1919. Petition for a writ of certiorari herein denied. *Mr. Thomas B. Pryor, for*



## Decisions on Petitions for Writs of Certiorari. 249 U. S.

plaintiff in error, in support of the petition. *Mr. Charles I. Evans*, for defendant in error, in opposition to the petition.

---

No. 910. PULP WOOD COMPANY *v.* GREEN BAY PAPER & FIBRE COMPANY. March 31, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Wisconsin denied. *Mr. Moses Hooper* for petitioner. No appearance for respondent.

---

No. 916. WILLIAM A. HAMILTON *v.* UNITED STATES. March 31, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ralph F. Potter*, *Mr. George I. Haight*, *Mr. James H. Wilkerson* and *Mr. Edwin H. Cassels* for petitioner. *Mr. Assistant Attorney General Porter* for the United States.

---

No. 921. U. S. G. HUGHES *v.* UNITED STATES. March 31, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John T. Barker* for petitioner. *Mr. Assistant Attorney General Porter* for the United States.

---

No. 922. J. H. HUGHES *v.* UNITED STATES. March 31, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John T. Barker* for petitioner. *Mr. Assistant Attorney General Porter* for the United States.

249 U. S. Decisions on Petitions for Writs of Certiorari.

No. 835. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* H. T. TRUE, JR. Error to the Supreme Court of the State of Oklahoma. April 14, 1919. Petition for a writ of certiorari herein denied. *Mr. Thomas B. Pryor*, for plaintiff in error, in support of the petition. *Mr. Finis E. Riddle*, for defendant in error, in opposition to the petition.

---

No. 888. STEWART A. HEWETT *v.* STATE OF WASHINGTON. April 14, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Hannis Taylor* for petitioner. No appearance for respondent.

---

No. 899. ETHA DAVIS, NEE HUTTON, *v.* ALICE R. THOMPSON ET AL. April 14, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. E. J. Van Court* for petitioner. *Mr. George S. Ramsey* for respondents.

---

No. 906. C B LIVE STOCK COMPANY *v.* CROSBYTON INDEPENDENT SCHOOL DISTRICT. April 14, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. W. Burton* and *Mr. Joseph W. Bailey* for petitioner. No appearance for respondent.

---

No. 911. MAUD MORRISON, ADMINISTRATRIX, ETC., *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. April 14, 1919. Petition for a writ of certiorari to the

## Decisions on Petitions for Writs of Certiorari. 249 U. S.

Supreme Court of the State of Washington denied. *Mr. O. C. Moore* for petitioner. *Mr. Heman H. Field* and *Mr. George W. Korte* for respondent.

---

No. 923. *W. C. Welch et al. v. George W. Kirby, Administrator, etc.* April 14, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. I. N. Watson* for petitioners. No appearance for respondent.

---

No. 925. *Christoffer Hannevig et al., as Hannevig & Johnsen, v. R. W. J. Sutherland & Company.* April 14, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic R. Coudert* and *Mr. Howard Thayer Kingsbury* for petitioners. No appearance for respondent.

---

No. 928. *Roy J. Bishop, Administrator, etc., v. John H. Hungate, Executor, etc., et al.* April 14, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas E. D. Bradley* for petitioner. *Mr. Felix T. Hughes* for respondents.

---

No. 941. *Hassan Abdu et al. v. Steamship Nigretia, etc.* April 14, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Silas B. Axtell* for petitioners. *Mr. L. de Grove Potter* and *Mr. John M. Woolsey* for respondent.

249 U. S. Decisions on Petitions for Writs of Certiorari.

No. 553. CENTRAL TRUST COMPANY OF NEW YORK ET AL. *v.* TEXAS COMPANY. April 21, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. M. Garwood* for petitioners. *Mr. Amos L. Beaty* for respondent.

---

No. 868. HARRY B. DUANE ET AL. *v.* MERCHANTS LEGAL STAMP COMPANY ET AL.; and

No. 869. HARRY B. DUANE *v.* MERCHANTS LEGAL STAMP COMPANY ET AL. April 21, 1919. Petition for writs of certiorari to the Supreme Judicial Court of the State of Massachusetts denied. *Mr. Boyd B. Jones* for petitioners. *Mr. Charles F. Perkins* and *Mr. Anson M. Lyman* for respondents.

---

No. 893. UNITED STATES ON THE RELATION OF VERDINE R. HALL *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. April 21, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Patrick H. Loughran* for petitioner. *The Solicitor General*, *Mr. Charles E. Mehaffie* and *Mr. C. Edward Wright* for respondent.

---

No. 908. E. A. LAUGHTER *v.* UNITED STATES; and

No. 909. E. A. LAUGHTER ET AL. *v.* UNITED STATES. April 21, 1919. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. E. Humphrey* for petitioners. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for the United States.



## Decisions on Petitions for Writs of Certiorari. 249 U. S.

NO. 927. EVALYN CHARLTON, ADMINISTRATRIX, ETC., *v.* CHESAPEAKE & OHIO RAILWAY COMPANY. April 21, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Winston Read* and *Mr. Maryus Jones* for petitioner. No appearance for respondent.

---

NO. 934. ELI G. FRANKENSTEIN *v.* CARL M. JACOBS, TRUSTEE, ETC. April 21, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. B. Mente* for petitioner. *Mr. Walter A. DeCamp* and *Mr. Sidney G. Stricker* for respondent.

---

NO. 935. CHARLES MCKNIGHT *v.* UNITED STATES. April 21, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. B. B. Blakeney* and *Mr. J. H. Maxey* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for the United States.

---

NO. 940. EDNA M. RAWLS *v.* PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA. April 21 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John S. Maxwell* and *Mr. George C. Bedell* for petitioner. *Mr. W. M. Bostwick, Jr.*, and *Mr. Lake Jones* for respondent.

---

NO. 954. W. D. RENFRO *v.* CHARLES OLENTINE ET AL. April 21, 1919. Petition for a writ of certiorari to the

249 U. S. Decisions on Petitions for Writs of Certiorari.

Supreme Court of the State of Oklahoma denied. *Napoleon B. Maxey* for petitioner. No appearance for respondents.

---

No. 979. *MAX MANSON v. HARRY S. MESIROV, TRUSTEE, ETC., ET AL.* April 21, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry Felix* for petitioner. No appearance for respondents.

---

No. 900. *W. F. HALLOWELL v. UNITED STATES.* April 28, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William P. Richardson* for petitioner. *Mr. Assistant Attorney General Porter* for the United States.

---

No. 933. *WALTER L. ROSS, AS RECEIVER OF TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, v. PEARL I. SCHOOLEY, ADMINISTRATRIX, ETC.* April 28, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. C. E. Pope* and *Mr. Charles A. Schmettau* for petitioner. No appearance for respondent.

---

No. 972. *ILLINOIS CENTRAL RAILROAD COMPANY v. FIRST TRUST COMPANY;*

No. 973. *CHICAGO & NORTHWESTERN RAILWAY COMPANY v. FIRST TRUST COMPANY;*

No. 974. *NORTHERN PACIFIC RAILWAY COMPANY v. FIRST TRUST COMPANY.* April 28, 1919. Petition for

writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James C. Davis* and *Mr. Charles A. Helsell* for petitioners. *Mr. Dennis M. Kelleher* for respondent.

---

No. 956. MISSISSIPPI CENTRAL RAILROAD COMPANY *v.* LAURA LOTT, ADMINISTRATRIX, ETC. May 5, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. S. E. Travis* for petitioner. No appearance for respondent.

---

No. 958. JAMES DORSEY *v.* UNITED STATES. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Benjamin C. Bachrach* for petitioner. *Mr. Assistant Attorney General Porter* and *Mr. H. S. Ridgely* for the United States.

---

No. 959. DENNIS KELLEY ET AL. *v.* UNITED STATES. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ralph Crews*, *Mr. Judson Harmon* and *Mr. E. H. Moore* for petitioners. *Mr. Assistant Attorney General Porter* and *Mr. W. C. Herron* for the United States.

---

No. 963. HELEN K. KINNEY *v.* OAHU SUGAR COMPANY, LIMITED. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. David L. Withington*, *Mr. E. Hasket Derby*, *Mr. Alexander Britton* and *Mr. Evans Browne*

249 U. S.     Decisions on Petitions for Writs of Certiorari.

for petitioner. *Mr. Walter F. Frear, Mr. Frank E. Thompson and Mr. Robbins B. Anderson* for respondent.

---

No. 984. CLARENCE H. VENNER, ETC., *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY ET AL. May 5, 1919. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Elijah N. Zoline* for petitioner. *Mr. Walter C. Noyes* for respondent.

---

No. 985. D. W. ENSLEN *v.* MECHANICS & METALS NATIONAL BANK OF THE CITY OF NEW YORK. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Forney Johnston* for petitioner. *Mr. Augustus Benners* for respondent.

---

No. 987. EDWARD THOMPSON ET AL. *v.* UNITED STATES. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Alexander S. Drescher* for petitioners. *Mr. Assistant Attorney General Porter and Mr. W. C. Herron* for the United States.

---

No. 992. JULIUS F. SMJETANKA, AS COLLECTOR OF INTERNAL REVENUE, ETC., *v.* AMERICAN STEEL FOUNDRIES. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *The Solicitor General and Mr. Assistant Attorney General Frierson* for petitioner. *Mr. Max Pam and Mr. H. B. Hurd* for respondent.



Cases Disposed of Without Consideration by the Court. 249 U. S.

No. 993. UNION SULPHUR COMPANY *v.* FREEPORT TEXAS COMPANY. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles Neave* and *Mr. Frederick P. Fish* for petitioner. *Mr. Elihu Root*, *Mr. Livingston Gifford*, *Mr. Samuel R. Betts*, *Mr. James R. Sheffield* and *Mr. Joseph C. Fraley* for respondent.

---

No. 1000. HENRY W. GORDON ET AL. *v.* STEAMSHIP CUBADIST, HARRY L. MICHELSON, CLAIMANT. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alexander T. Howard* for petitioners. No appearance for respondent.

---

No. 399. ENRIQUE FLORES MAGON ET AL. *v.* UNITED STATES. May 5, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank P. Walsh* for petitioners. *The Solicitor General* and *Mr. Assistant Attorney General Frierson* for the United States.

---

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MARCH 3, 1919, TO MAY 19, 1919.

No. 482. DORSEY LAND & LUMBER COMPANY *v.* BOARD OF DIRECTORS OF GARLAND LEVEE DISTRICT. Error to the Supreme Court of the State of Arkansas. March 3, 1919. Dismissed with costs, per stipulation. *Mr. William H. Arnold* for plaintiff in error. *Mr. Henry Moore, Jr.*, for defendant in error.

249 U. S. Cases Disposed of Without Consideration by the Court.

No. 834. U. B. BUSKIRK ET AL., AS PARTNERS COMPOSING KENTUCKY RIVER HARDWOOD COMPANY *v.* ISHAM CAUDILL, AS ADMINISTRATOR, ETC. Error to the Court of Appeals of the State of Kentucky. March 3, 1919. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Ed. C. O'Rear* for plaintiffs in error. No appearance for defendant in error.

---

No. 152. DOUGLAS PARK JOCKEY CLUB *v.* T. H. TALBOTT ET AL., COMPOSING KENTUCKY STATE RACING COMMISSION. Error to the Court of Appeals of the State of Kentucky. March 13, 1919. Dismissed with costs, per stipulation. *Mr. John Bryce Baskin* and *Mr. Harvey Myers* for plaintiff in error. *Mr. John P. Shelby*, *Mr. Robert L. Northcutt* and *Mr. John Craig Shelby* for defendants in error.

---

No. 250. JOHN E. ROLLER *v.* O. B. COOLEY. Error to the Supreme Court of Appeals of the State of Virginia. March 17, 1919. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Charles A. Hammer* for defendant in error. *Mr. John E. Roller* pro se.

---

No. 572. NORTHERN PACIFIC RAILWAY COMPANY *v.* J. R. THOMPSON, AS COUNTY TREASURER OF FLATHEAD COUNTY, MONTANA. Error to the Circuit Court of Appeals for the Ninth Circuit. March 19, 1919. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Milton S. Gunn* and *Mr. Charles W. Bunn* for plaintiff in error. No appearance for defendant in error.

Cases Disposed of Without Consideration by the Court. 249 U. S.

No. 295. J. F. HAZELTON ET AL. *v.* CITY OF ATLANTA. Error to the Supreme Court of the State of Georgia. March 26, 1919. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Walter T. Colquitt* for defendant in error. *Mr. James K. Hines* for plaintiffs in error. *Mr. Walter T. Colquitt* and *Mr. Samuel D. Hewlett* for defendant in error.

---

No. 354. UNITED STATES *v.* SHERIDAN-KIRK CONTRACT COMPANY; and

No. 355. SHERIDAN-KIRK CONTRACT COMPANY *v.* UNITED STATES. Appeals from the Court of Claims. March 28, 1919. Dismissed, on motion of counsel for appellants. *The Attorney General* and *Mr. Assistant Attorney General Frierson* for the United States. *Mr. George A. King* and *Mr. William B. King* for Sheridan-Kirk Contract Co.

---

No. 951. L. R. GARRETT *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of California. March 31, 1919. Docketed and dismissed, on motion of *The Solicitor General* for the United States. No one opposing.

---

No. 952. L. R. GARRETT *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of California. March 31, 1919. Docketed and dismissed, on motion of *The Solicitor General* for the United States. No one opposing.

---

No. 953. L. R. GARRETT *v.* UNITED STATES. Appeal from the District Court of the United States for the

249 U. S. Cases Disposed of Without Consideration by the Court.

Northern District of California. March 31, 1919. Docketed and dismissed, on motion of *The Solicitor General* for the United States. No one opposing.

---

No. 271. CORN PRODUCTS REFINING COMPANY ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Southern District of New York. March 31, 1919. Dismissed, on motion of counsel for appellants. *Mr. Charles E. Hughes, Mr. Morgan J. O'Brien, Mr. Preston Davie, Mr. James N. Sheean, Mr. Junius Parker and Mr. Frank N. Hall* for appellants. *The Attorney General* for the United States.

---

No. 387. STATE OF WISCONSIN EX REL. SALLIE F. MOON COMPANY *v.* WISCONSIN TAX COMMISSION. Error to the Supreme Court of the State of Wisconsin. March 31, 1919. Dismissed, on motion of counsel for plaintiff in error. *Mr. C. T. Bundy* for plaintiff in error. No appearance for defendant in error.

---

No. 252. SEATTLE ELECTRIC COMPANY ET AL. *v.* CITY OF SEATTLE ET AL. Error to the District Court of the United States for the Western District of Washington. April 14, 1919. Dismissed with costs, on motion of counsel for appellants. *Mr. James B. Howe* for appellants. *Mr. Hugh M. Caldwell* for appellees.

---

No. 297. MINERVA B. CRUZAN, ADMINISTRATRIX, ETC., *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD



Cases Disposed of Without Consideration by the Court. 249 U. S.

COMPANY. Error to the Superior Court of the State of Massachusetts. April 14, 1919. Dismissed, per stipulation. *Mr. H. La Rue Brown, Mr. James J. McCarthy and Mr. Thomas C. O'Brien* for plaintiff in error. *Mr. Lowell A. Mayberry* for defendant in error.

---

No. 302. SANBORN-CUTTING COMPANY *v.* V. A. PAINE, AS TRUSTEE, ETC. Appeal from the Circuit Court of Appeals for the Ninth Circuit. April 14, 1919. Dismissed with costs, on motion of counsel for appellant. *Mr. George C. Fulton* for appellant. *Mr. Harvey M. Friend and Mr. R. E. Robertson* for appellee.

---

No. 307. ALAMEDA MINING COMPANY *v.* SUCCESS MINING COMPANY. Error to the Supreme Court of the State of Idaho. April 14, 1919. Dismissed with costs, per stipulation. *Mr. John P. Gray* for plaintiff in error. *Mr. James F. Ailshie* for defendant in error.

---

No. 314. GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION ET AL. Error to the Supreme Court of the State of Minnesota. April 14, 1919. Dismissed with costs, per stipulation. *Mr. E. C. Lindley* for plaintiffs in error. *Mr. Frank J. Morley* for defendants in error.

---

No. 982. GEORGE J. WAGONER ET AL. *v.* CITY OF LA-GRANDE, OREGON, ET AL. Error to the Supreme Court

249 U. S. Cases Disposed of Without Consideration by the Court.

of the State of Oregon. April 15, 1919. Docketed and dismissed with costs, on motion of *Mr. Will R. King* for defendants in error. No one opposing.

---

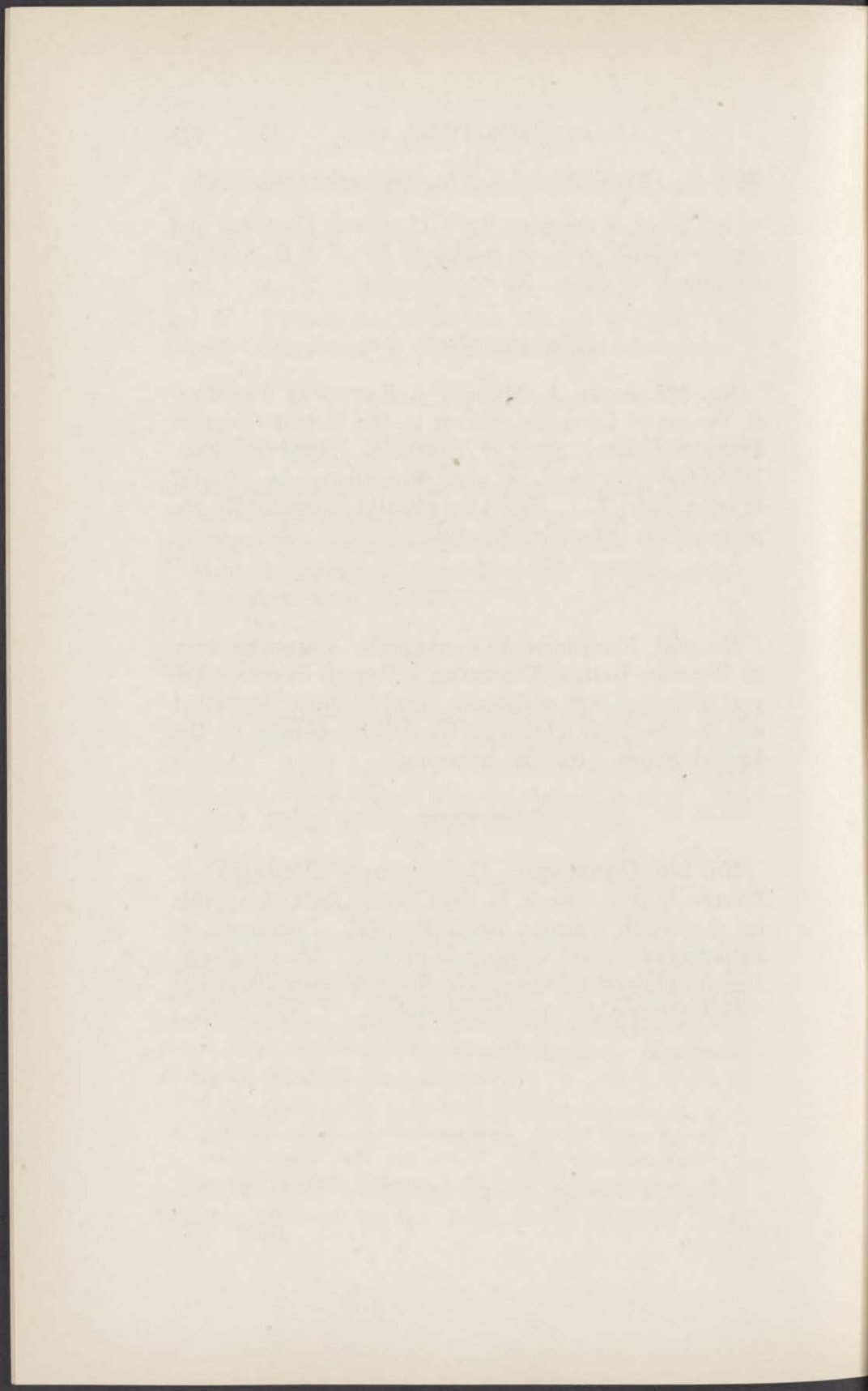
No. 328. JAMES A. MURRAY *v.* KENTUCKY TRACTION & TERMINAL COMPANY. Error to the Circuit Court of Franklin County, State of Kentucky. April 21, 1919. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. T. L. Edelen* for plaintiff in error. No appearance for defendant in error.

---

No. 999. ELIZABETH A. PENDLETON, ADMINISTRATRIX OF WILLIAM BAILEY, DECEASED, *v.* UNITED STATES. Appeal from the Court of Claims. April 28, 1919. Docketed and dismissed, on motion of *The Solicitor General* for the United States. No one opposing.

---

No. 366. OCCIDENTAL CONSTRUCTION COMPANY *v.* UNITED STATES. Error to the Circuit Court of Appeals for the Ninth Circuit. April 30, 1919. Dismissed, on authority of counsel for plaintiff in error. *Mr. Charles E. Dow* for plaintiff in error. *The Attorney General* and *The Solicitor General* for the United States.



# INDEX.

	PAGE
<b>ABANDONED PROPERTY ACT.</b> See <b>Claims</b> , 1.	
<b>ACCEPTANCE.</b> See <b>Contracts</b> , 1, 12.	
<b>ACCOUNTING.</b> See <b>Banks and Banking</b> ; <b>Mines and Mining</b> , 8.	
1. Under constitution and laws of South Dakota, interest received by state treasurer on state funds deposited by him in bank belongs to State, and treasurer must account therefor. <i>South Dakota v. Collins</i> . . . . .	220
2. Interlocutory proceedings for accounting in District Court will not be forbidden by mandamus upon ground that disposition of other proceedings before this court may render accounting nugatory and useless expense. <i>Ex parte Wagner</i>	465
<b>ACTIONS AND DEFENSES.</b> See particular titles.	
<b>ACT OF GOD.</b> See <b>Carriers</b> , 4.	
<b>ACTS OF CONGRESS.</b> See Table at front of volume.	
<b>ADMINISTRATIVE DECISIONS.</b> See <b>Interstate Commerce Acts</b> , 1-4; <b>Meat Inspection Act</b> , 3, 6-9; <b>Mines and Mining</b> , 5; <b>Public Lands</b> , 5, 7; <b>Taxation</b> , III, 1.	
<b>ADMIRALTY:</b>	
1. <i>Jurisdiction of District Court; Shipping Board.</i> Requisition of ship under Act of June 15, 1917, for war purposes, but without displacing custody and possession of marshal, does not oust jurisdiction in admiralty. <i>Ex parte Whitney Steamboat Co.</i> . . . . .	115
2. <i>Id. Appearance of Owner.</i> Owner who has not appeared cannot object to order, on consent of libelants and Shipping Board, for use of ship by Government, while vessel remains in custody of court through designation of its master as special deputy marshal. <i>Id.</i>	



**ADMIRALTY—Continued.**

PAGE

3. *Maritime Contracts.* For maritime service within admiralty jurisdiction, although not to be executed on navigable waters. *North Pacific S. S. Co. v. Hall Bros. Co.* . . . 119
4. *Id.* Place of performance—upon navigable waters or elsewhere—merely an evidentiary circumstance. *Id.*
5. *Id.* Difference between construction contract, or lease of facilities on land for repair, and contract for repair by use of such facilities. *Id.*
6. *Id.* Repairs under superintendence of ship owner. *Id.*
7. *Id. Materialman.* Furnishing supplies or repairs, may proceed *in rem* or *in personam*. *Id.*
8. *Seaworthiness; Personal Contract; Limited Liability.* Owner who warrants seaworthiness, and is also privy to and has knowledge of unseaworthiness, to which is due loss of cargo, not within Limited Liability Act of 1884. *Capitol Transp. Co. v. Cambria Steel Co.* . . . . . 334

**ADULTERATION.** See **Food.**

**AGENCY.** See **Contracts, 7; Estoppel, 1; Interstate Commerce Acts, 8.**

**AGRICULTURE, SECRETARY OF.** See **Meat Inspection Act.**

**ALASKA.** See **Jurisdiction, III (6).**

**ALIENATION, RESTRAINT ON.** See **Indians, 1, 2.**

**ALIENS.** See **Jurisdiction, V, 2, 3.**

**ALLOTMENTS.** See **Indians.**

**AMENDMENT:**

Effect on prior offenses. See **Criminal Law, 5.**

**ANNUAL LABOR.** See **Mines and Mining, 13, 14.**

**APPEAL AND ERROR.** See **Injunction; Jurisdiction; Procedure.**

Effect of reversal on further proceedings. *Arkadelphia Co. v. St. Louis S. W. Ry.* . . . . . 134

**ARIZONA:**

PAGE

Creation of State did not affect corporate status of Indian pueblo, previously acquired. *Lane v. Pueblo of Santa Rosa* 110

**ARMY.** See **Criminal Law**, 3-5, 9, 15, 19.

Power of Congress to punish conspiracy to obstruct recruiting. See **Constitutional Law**, VI.

1. Persons designated, registered and enrolled and subject to be called under Draft Act are, it seems, part of military forces of the United States, within § 3 of Espionage Act. *Debs v. United States* . . . . . 211

2. The term "troops of the United States," as used in land grant acts, and agreement of Union Pacific Co., in relation to transportation for Government, *held* not to embrace following, when not traveling as part of moving body of soldiers: discharged soldiers, discharged military prisoners and rejected applicants for enlistment; applicants for enlistment, provisionally accepted, but subject to final examination and not sworn in; retired enlisted men; furloughed soldiers *en route* back to their stations. *United States v. Union Pac. R. R.* . . . . . 354

**ASSESSMENTS.** See **Mines and Mining**, 13, 14; **Taxation**, IV, 1-10.

**ASSETS.** See **Bankruptcy Act**.

**ASSIGNMENTS OF ERROR.** See **Procedure**, IV.

**ASSUMPTION OF RISK.** See **Constitutional Law**, XI, 11.

**ATTACHMENT.** See **Admiralty**, 1, 2.

**AUTHORITY OF LAW.** See **Carriers**, 4.

**BANKRUPTCY ACT:**

1. *Jurisdiction of District Court; Venue.* Suit by trustee to avoid preference cognizable by District Court in district where property is, without regard to consent of defendant, or his residence or that of trustee or bankrupt. *Collett v. Adams* . . . . . 545

2. *Id.* This jurisdiction the same whether suit under § 60b, or §§ 67e and 70e, as amended. *Id.*

**BANKRUPTCY ACT—Continued.**

PAGE

3. *Id.* *Service of Process.* Such suit is local, under Jud. Code, § 54, so that defendant residing in another district of same State may be served at his residence. *Id.*
4. *Id.* Such suits, apart from Bankruptcy Act, are excepted by Jud. Code, § 51, from general provision that defendant may not be sued in any district other than that of which he is inhabitant. *Id.*
5. *Pendency of State Court Action,* for damages, by transferee against bankrupt, in which no lien is acquired, does not affect jurisdiction of District Court over suit to set aside preference. *Id.*
6. *Adjudication; When not Conclusive.* Although an adjudication of bankruptcy concludes all the world as to the status of the debtor *qua* bankrupt, it does not bind strangers as to the facts or subsidiary questions of law upon which it is based. *Gratiot State Bank v. Johnson* . . . . . 246
7. *Id.* *Insolvency.* In suit by trustee to recover, as illegal preferences, payments made by bankrupt, within 4 months of filing of involuntary petition, to creditor who did not appear, adjudication not conclusive evidence of bankrupt's insolvency when such payments were made. *Id.*
8. *Id.* *Interventions.* Sections 18b and 59f, allowing creditors to intervene, are permissive only; and, unless creditor exercises right, he remains stranger to proceedings. *Id.*
9. *Liens; Priority.* Only general creditors deferred to taxes under § 64a. *Richmond v. Bird* . . . . . 174
10. *Id.* *Taxes.* Local superiority of private lien over taxes, preserved by § 67d, prior to 1910. *Id.*

**BANKS AND BANKING. See Accounting, 1.**

1. Right of national bank to withdraw credit extended and rescind loan agreement for fraud and failure to furnish agreed collateral. *Harriman Natl. Bank v. Seldomridge* . . . . . 1
2. Not estopped from rescinding credit and loan agreement by fact that, while *in fieri*, they are made false basis of credit in another bank, by its cashier, upon which latter bank pays check drawn upon itself. *Id.*
3. Book entries of loan do not create liability, in absence of consideration and ground for estoppel. *Id.*

**BENEFITS.** See **Taxation**, IV, 1. PAGE

**BILLBOARDS.** See **Constitutional Law**, XI, 12-16.

**BILL OF EXCEPTIONS.** See **Criminal Law**, 8.

**BILL OF LADING.** See **Interstate Commerce Acts**, 5, 7, 8.

**BOILER INSPECTION ACT:**

Breaking of king pin and coupling chains, without other evidence, does not establish, as matter of law, that they were defective. *New Orleans & N. E. R. R. v. Scarlet* . . . . . 528

**BONDS.** See **Injunction**, 2-9.

**BOOK ENTRIES.** See **Banks and Banking**, 3.

**BOUNDARIES.** See **Public Lands**, 5.

**BURDEN OF PROOF.** See **Interstate Commerce Acts**, 5.

**CALIFORNIA:**

Right of City of San Francisco to build new street railroad on street occupied by another, under its charter and state constitution. *United Railroads v. San Francisco* . . . . . 517

**CANAL ZONE:**

1. Order of the President continuing in force "the laws of the land, with which the inhabitants are familiar," ratified by act of Congress, neither fastened upon Zone a specific civil-law interpretation of Civil Code nor overthrew principle of common-law construction adopted by Supreme Court of Zone before act was passed. *Panama R. R. v. Bosse* . . . . . 41

2. Provisions of Civil Code touching the relation of master and servant are not inconsistent with common-law rule holding former liable for personal injuries caused by negligence of latter while in course of employment; and Supreme Court of Zone may apply common-law interpretation, at least in cases arising since Zone was expropriated and became peopled only by employees of Canal, the Panama Railroad and licensee steamship lines and oil companies. *Id.*

3. Pain may be considered in fixing damages for personal injuries in the Zone. *Id.*



**CANCELLATION.** See **Banks and Banking.**

PAGE

**CARMACK AMENDMENT.** See **Interstate Commerce Acts, 5-8.**

**CARRIERS.** See **Boiler Inspection Act; Employers' Liability Act; Interstate Commerce Acts; Safety Appliance Act.**

Street railways. See **Eminent Domain, 1, 2; Franchises; Jurisdiction, III, 21.**

Transportation of troops. See **Army, 2.**

Transportation of mails. See **Mails.**

Review of rates fixed by State. See **Jurisdiction, III, 10.**

Liability to refund to shippers rates collected under erroneous injunction. See **Injunction, 5-9.**

Liability of sureties on injunction bond. See **Injunction, 3, 4.**

1. *Employees; Place of Work.* Railroad company not under absolute duty to furnish flagman engaged in switching a safe place to work. *Yazoo & M. V. R. R. v. Mullins* . . . . . 531

2. *Hours of Service Act; Who is Carrier.* Whether carrier is common carrier within act, does not depend upon whether charter declares it to be such, nor upon whether State of incorporation so considers it, but upon what it does. *United States v. Brooklyn Eastern Dist. Term.* . . . . . 296

3. *Id.* Fact that carrier acts only as agent for other carriers may affect contractual obligations to shippers, but cannot change obligations under Hours of Service Act. *Id.*

4. *Duty to Carry; Act of God.* Delay of shipment, when not attributable to act of God or authority of law. *Chicago & E. I. R. R. v. Collins Produce Co.* . . . . . 186

5. *Interstate Shipment; What is.* Whether a shipment was at a given time interstate is a question of fact. *Southern Pac. Co. v. Arizona* . . . . . 472

6. *Id.* Evidence held insufficient to prove traveling show moving interstate. *Id.*

7. *Id.* Mere intention to continue tour beyond State where show was performing, held not enough to give interstate character to contemplated journey within State. *Id.*

**CARRIERS**—*Continued.*

PAGE

8. *Private Contract of Carriage.* *Semble*, that when required by state commission to transport show at rate which is not objected to and upon terms the same as it has habitually agreed to in like cases, a railroad has no ground to complain that it is thus deprived of liberty to make contract as private carrier. *Id.*

9. *Rates; Discrimination.* Objection that state rate discriminates between shippers, not available to carriers. *Arkadelphia Co. v. St. Louis S. W. Ry.*..... 134

10. *Id.* May contest particular schedules as to particular shippers after failure to enjoin state rates, generally, as confiscatory. *Id.*

11. *Side Tracks; Private and Public.* Tracks reaching private plants and open to public use *held* public tracks and part of railroad's system, subject to public control. *Chicago & N. W. Ry. v. Ochs*..... 416  
*Lake Erie & W. R. R. v. Public Utilities Comm.*..... 422

12. *Id. Expense of Installation.* Within reasonable limits, State may require railroad at its own expense to alter and extend, or to restore, side tracks. *Id.*

13. *Id.* In determining whether requirement is reasonable, not only expense, but also nature and volume of business to be affected, revenue, character of facility required, need for it and advantage to shippers and public, are to be considered. *Chicago & N. W. Ry. v. Ochs*..... 416

**CERTIORARI.** See **Jurisdiction**, III, 8, 22, 28.

**CIRCUIT COURT OF APPEALS.** See **Jurisdiction**, III, (3); IV.

**CITIES.** See **Municipal Corporations.**

Ordinances. See **Franchises; Jurisdiction**, III, 21;  
**Ordinances.**

**CITIZENSHIP:**

Diversity. See **Jurisdiction**, III, 12; V, 4.

Privileges and immunities. See **Constitutional Law**, VII.

**CIVIL LAW.** See **Canal Zone.**

**CIVIL WAR:**

PAGE

Claims against Government. See **Claims**, 1.**CLAIMS:**Under contracts to erect government buildings. See **Contracts**, 8-11.To furnish post office supplies. *Id.*, 12-16.For transporting mails. *Id.*, 17-20; **Mails**, 4.For transporting troops. See **Contracts**, 21.Time for presenting, for refund of inheritance taxes, as prerequisite to suit in Court of Claims. See **Taxation**, III.

1. Act of July 2, 1864, providing for purchase for United States of products of States declared in insurrection, etc., was in addition to Abandoned Property Act, and not amendment of that act in sense of Jud. Code, § 162, which gives jurisdiction to Court of Claims over claims for property taken under latter act and amendments and sold. *O'Pry v. United States* ..... 323

2. Act of 1910, allowing compensation by United States for use of patented inventions, prevents recovery where invention of government employee completed during employment though in hours when inventor not on duty. *Moore v. United States* ..... 487

**COMMERCE.** See **Constitutional Law**, II; **Interstate Commerce**; **Interstate Commerce Acts**.

**COMMISSIONER:**

Appointing to take additional proofs in original action.

*New York v. New Jersey* ..... 202

**COMMISSIONER OF INTERNAL REVENUE.** See **Taxation**, II, 4, 5; III.

**COMMON CARRIERS.** See **Boiler Inspection Act**; **Carriers**; **Employers' Liability Act**; **Interstate Commerce Acts**; **Safety Appliance Act**.

**COMMON LAW.** See **Canal Zone**.

**CONDEMNATION.** See **Eminent Domain**.

**CONGRESS:**

PAGE

For acts cited. See Table at front of volume.

For powers. See **Constitutional Law**.

Legislative history as aid to construction. See **Statutes**, 1.

**CONSPIRACY.** See **Criminal Law**, 3-14.

**CONSTITUTIONAL LAW:**

I. Judicial Power; Contempts, p. 633.

II. Commerce Clause, p. 633.

III. Contract Clause, p. 636.

IV. Excise Taxes, p. 636.

V. Full Faith and Credit, p. 636.

VI. War Power; Espionage Act; Army Regulations, p. 637.

VII. Privileges and Immunities, p. 637.

VIII. First Amendment; Freedom of Speech and Press; Espionage Act, p. 637.

IX. Fourth Amendment; Unreasonable Seizure, p. 637.

X. Fifth Amendment; Self-incrimination, p. 638.

XI. Fourteenth Amendment:

(1) General, p. 638.

(2) Notice and Hearing, p. 638.

(3) Liberty and Property; Police Power, p. 638.

(4) Equal Protection of the Laws, p. 640.

XII. Who May Question Constitutionality of Statutes, p. 641.

See **Jurisdiction; Procedure**.

Delegation of powers. See *infra*, VI, 3.

Damage to private property, under California constitution.

See **Eminent Domain**, 2.

*Id.*; under Virginia constitution. See **Eminent Domain**, 3.

**I. Judicial Power; Contempts.**

Basis of power of federal courts to punish summarily for contempt committed in their presence is to secure them from obstruction in performance of judicial duties. *Ex parte Hudgings* . . . . . 378

**II. Commerce Clause.**

1. *Effect of State Regulation as Enforced* determines whether it directly burdens interstate commerce, and not its charac-



CONSTITUTIONAL LAW—Continued.		PAGE
terization, or its construction by state court. <i>Corn Products Refg. Co. v. Eddy</i> . . . . .		427
2. <i>Id.</i> <i>Food; Labels; Original Package.</i> State may require that proprietary foods, imported and sold in original packages, shall bear labels stating percentage of each ingredient. <i>Id.</i>		
3. <i>A Mere Advisory Statement</i> , issued by state official, not controlling official conduct, not of such legislative character as can impair rights under commerce and due process clauses. <i>Standard Scale Co. v. Farrell</i> . . . . .		571
4. <i>Employers' Liability Cases.</i> A case within federal act can not be reached by state workmen's compensation law. <i>New York Cent. R. R. v. Porter</i> . . . . .		168
5. <i>Id.</i> <i>Negligence.</i> State law relieving plaintiff of burden of proving negligence is constitutionally inapplicable to case under federal act. <i>New Orleans &amp; N. E. R. R. v. Scarlet</i> . . . . .		528
	<i>Yazoo &amp; M. V. R. R. v. Mullins</i> . . . . .	531
6. <i>Telegraph Companies; State License Tax.</i> State may impose tax upon company doing both interstate and local business, provided tax restricted to local and does not burden interstate business. <i>Postal Tel.-Cable Co. v. Richmond</i> . . . . .		252
7. <i>Id.</i> Where tax on intrastate business exceeds net receipts so that payment must come in part from interstate business, <i>semble</i> , that tax is invalid; but only if incidence on interstate commerce is clearly shown. <i>Id.</i>		
8. <i>Id.</i> <i>Pole Tax.</i> A telegraph company, though it has accepted Act of 1866 and is engaged in interstate commerce, may be charged for each pole maintained in city streets, both as compensation for use, and to cover expense entailed on city by presence of poles. <i>Id.</i>		
9. <i>Id.</i> Such tax, if reasonable in amount, is not objectionable because it exceeds net returns from local business and must be paid from interstate earnings. <i>Id.</i>		
10. <i>Excessive Inspection Fees.</i> When state inspection fees exceeding cost of inspection, in respect of products imported from another State, constitute burden on interstate commerce. <i>Standard Oil Co. v. Graves</i> . . . . .		389

CONSTITUTIONAL LAW—Continued.

PAGE

11. *Tax on Movables; Tank Cars.* State may tax movables of foreign corporation, regularly employed therein, although devoted to interstate commerce. *Union Tank Line Co. v. Wright* ..... 275
12. *Id. Valuation.* Need not be limited to mere worth of articles taken separately, but may include intangible value due to organic relation to whole system. *Id.*
13. *Id. Methods.* Where tangibles constitute part of going concern operating in many States, and absolute accuracy impossible, court has sustained methods producing results approximately correct, *e. g.*, mileage basis in case of telegraph company and average amount of property habitually brought in by car company. *Id.*
14. *Id.* If plan is arbitrary and valuation excessive, it violates commerce clause. *Id.*
15. *Id.* Where company owning tank cars was assessed for those running in and out of Georgia, without regard to their value, upon a track-mileage basis, *held*, that rule adopted had no necessary relation to real value in Georgia, and that tax was void. *Id.*
16. *What Constitutes Interstate Commerce; Pipe Lines.* While piping of gas from State to State, and sale to independent local gas companies, is interstate commerce, the retailing by latter to consumers is intrastate commerce; and in such case, regulation of rates of local companies has indirect effect upon interstate business of the transporting company—at least when latter is in hands of receivers who have not become bound by contracts with former; and such receivers may not complain that rates fixed for local companies are confiscatory or burdensome to interstate business, even though that business consists exclusively in selling gas to such local companies. *Public Utilities Comm. v. Landon* ..... 236
17. *Id. Actual Movement Determinative.* Movement of rough lumber to place in same State, to be manufactured, in expectation that products will be marketed and shipped outside State, not interstate commerce. *Arkadelphia Co. v. St. Louis S. W. Ry* ..... 134
18. *Id. Intent.* Whether a shipment at a given time was interstate is a question of fact, and not dependent on mere intention. *Southern Pac. Co. v. Arizona* ..... 472

**CONSTITUTIONAL LAW—Continued.**

PAGE

**III. Contract Clause.**

1. *Street Railways.* Grantee of franchise takes risk of judicial interpretation allowing city to build another road in same streets, and inevitable damage is not a taking of property. *United Railroads v. San Francisco* . . . . . 517
2. *Oyster Bed Grant; Sewage.* Grant under Virginia law construed as subject to right of State to authorize discharge of municipal sewage, polluting the oysters. *Darling v. Newport News* . . . . . 540
3. *Judgments; Interest.* When legislature may stop further running of interest on judgments based on county warrants. *Missouri & Arkansas Lumber Co. v. Sebastian County* . . . . . 170

**IV. Excise Taxes.**

1. *Plenary Power of Congress.* To levy excise taxes, uniform throughout the United States, at its discretion. *United States v. Doremus* . . . . . 86
2. *Means Available; Motive.* Where the provisions of law have reasonable relation to power, fact that they may have been impelled by motive, or may accomplish purpose, other than raising of revenue, cannot invalidate them; nor can fact that they affect business subject to regulation by state police power. *Id.*
3. *Id. Narcotic Drug Act.* Provisions of § 2 of act have reasonable relation to the enforcement of tax provided by § 1, which is clearly unobjectionable. *Id. Webb v. United States.* . . . . . 96

**V. Full Faith and Credit.**

1. Not denied where Supreme Court of Missouri, following state practice, refused to consider sister state judgment rendered 6 months after judgment of Missouri trial court and not pleaded or put in evidence. *Hartford Life Ins. Co. v. Johnson.* . . . . . 490
2. *Quære:* Whether charter granted insurance company by resolution of state legislature is a public act or record within meaning of clause? *Id.*

CONSTITUTIONAL LAW—*Continued.*

PAGE

VI. War Power; Espionage Act; Army Regulations.

1. *Protecting Draft.* Conspiracy to circulate among men called for military service a circular tending to influence them to obstruct draft, followed by overt acts, is within power of Congress to punish, and is punishable under Espionage Act, although unsuccessful. *Schenck v. United States* ..... 47  
*Frohwerk v. United States* ..... 204
2. *Id.* So of attempt to obstruct recruiting by spoken words. *Debs v. United States* ..... 211  
*See infra*, VIII.
3. *Prostitution.* Congress may make regulations to protect men composing army against prostitution, and leave details to Secretary of War. *McKinley v. United States* ..... 397

VII. Privileges and Immunities.

1. State law making amount of annual tax for privilege of doing railroad construction work depend on whether person taxed has his chief office in State, discriminates against citizens of other States. *Chalker v. Birmingham & N. W. Ry.* ..... 522
2. Citizen of another State who would be liable for larger tax, if valid, may question its validity without first tendering lower tax. *Id.*

VIII. First Amendment; Freedom of Speech and Press; Espionage Act.

- Words ordinarily within freedom of speech or press may be prohibited when of such a nature and used in such circumstances as to create danger that they will bring about evils which Congress has right to prevent, such as obstruction to the draft. *Schenck v. United States* ..... 47  
*Frohwerk v. United States* ..... 204  
*Debs v. United States* ..... 211

IX. Fourth Amendment; Unreasonable Seizure.

Incriminating documents seized under search warrant directed against a Socialist headquarters, *held* admissible in evidence, consistently with Fourth and Fifth Amendments, in



**CONSTITUTIONAL LAW**—*Continued.*

PAGE

criminal prosecution against general secretary of a Socialist party, who had charge of office. *Schenck v. United States* . . . 47

**X. Fifth Amendment; Self-incrimination.** See IX, *supra*.**XI. Fourteenth Amendment.**(1) *General.*

1. *Presumption*, that discrimination in state law is on adequate ground. *Middleton v. Texas Power & Light Co.* . . . 152

2. *Tests of Reasonableness.* Effect of legislative judgment and opinion of state courts as upholding reasonableness of state regulation. *Perley v. North Carolina* . . . . . 510

3. *What is State Action.* Advisory statement issued by state official, not controlling official conduct, not of such legislative character as can impair rights under commerce and due process clauses. *Standard Scale Co. v. Farrell* . . . . . 571

(2) *Notice and Hearing.* See 21, *infra*.

4. *Tax Assessment.* When assessment for local improvement made in accordance with fixed rule prescribed by legislative act, property owner not entitled to be heard in advance on question of benefits. *Withnell v. Ruecking Constr. Co.* . . . . 63

(3) *Liberty and Property; Police Power.* See II, 16, *supra*.

5. *Food Regulations; Disclosure of Ingredients.* Right to secrecy as to compounds and processes is subject to right of State to require that nature of product be set forth; and it is consistent with due process to require that labels on proprietary compound syrups shall state percentage of ingredients. *Corn Products Refg. Co. v. Eddy* . . . . . 427

6. *Intoxicating Liquor.* One who acquires liquor after approval and before effective date of state law making its possession unlawful is not deprived by the law of property without due process. *Barbour v. Georgia* . . . . . 454

7. *Id. Quære:* Whether law would be constitutional as applied to one who acquired liquor before enactment? *Id.*

8. *Judgments; Interest.* When legislature may stop further running of interest on judgments based on county warrants. *Missouri & Arkansas Lumber Co. v. Sebastian County* . . . . 170

**CONSTITUTIONAL LAW—Continued.**

PAGE

9. *Sewage; Oyster Beds.* Private rights in beds under tidal waters subject to right of State to use them for disposal of sewage. *Darling v. Newport News* . . . . . 541

10. *Protecting Watersheds.* State may require removal of timber refuse from vicinity of watershed of municipal water supply, to prevent danger by fire. *Perley v. North Carolina* 510

11. *Workmen's Compensation Law.* Imposing liability on employer for injuries to employees, irrespective of fault, and limiting compensation in reasonable substitution for prior law—not deprivation of liberty without due process. *Middleton v. Texas Power & Light Co.* . . . . . 152

12. *Billboards; Regulation and Taxation.* City ordinance regulating size, and exacting permit fee, within police power. *St. Louis Poster Adv. Co. v. St. Louis* . . . . . 269

13. *Id.* Making billboards safe against wind and fire may not exempt them from power of restriction or prohibition. *Id.*

14. *Id. Aesthetic Considerations.* Such regulations may not improperly include incidental and relatively trifling requirements founded in part on æsthetic reasons, such as requirement of conformity to building line. *Id.*

15. *Id.* Tax imposed by city on billboards for purpose of discouraging them, not objectionable. *Id.*

16. *Id. Land Ownership; Præexisting Contracts.* It is no answer to such ordinance, that billboards are on land belonging to their owner, or that owner has contracted to maintain advertisements upon them, or that size allowed is too small for standard posters. *Id.*

17. *Local Improvement Assessment.* The method of assessing part of cost according to frontage, as provided in St. Louis charter, sustained. *Withnell v. Ruecking Constr. Co.* . . . . . 63

18. *Id.* The system of area assessment provided by St. Louis charter is not *per se* obnoxious to Fourteenth Amendment, and becomes so in its application only when results are arbitrary or grossly unequal. *Id.*

19. *Foreign Corporations; Tax on Movables.* Where plan in valuing tangible property, (part of going concern operating

**CONSTITUTIONAL LAW—Continued.**

PAGE

in many States) for taxing part regularly employed in State, is arbitrary and valuation excessive, it violates Amendment.

*Union Tank Line Co. v. Wright* . . . . . 275

20. *Id. Tank Cars.* Where company owning tank cars was assessed for those running in and out of Georgia, without regard to their value, upon track-mileage basis, *held*, that rule adopted had no necessary relation to real value in Georgia, and that tax was void. *Id.*

21. *Railroads; Requiring Side Tracks.* Within limits of what is reasonable, a State, upon notice and hearing, may require railroad at its own expense to alter and extend, or to restore, side tracks reaching private plants and open to public use; and this does not take property for private use, or without compensation for public use. *Chicago & N. W. Ry. v. Ochs.* . . . . . 416

*Lake Erie & W. R. R. v. Public Utilities Comm.* . . . . . 422

22. *Id. Liberty to Contract as Private Carrier.* *Semble*, that when required by state commission to transport traveling show at rate which is not objected to and upon terms same as it has habitually agreed to in like cases, a railroad has no ground to complain that it is thus deprived of liberty to make contract as private carrier, in violation of equal protection and due process clauses. *Southern Pac. Co. v. Arizona* . . . . . 472

23. *Street Railways; Franchise Contract Rates.* Enforcement of rates, where effects of war made them grossly inadequate but it did not appear that performance was rendered impossible or that contract as a whole would prove unremunerative. *Columbus Ry. & Power Co. v. Columbus* . . . . . 399

See also *Burr v. Columbus* . . . . . 415

24. *Id. Right of City to Build in Same Street.* Grantee of franchise takes risk of judicial interpretation allowing city to build another road in same streets, and inevitable damage is not a taking of property. *United Railroads v. San Francisco* . . . . . 517

(4) *Equal Protection of the Laws.* See 18, 22, *supra*.

25. *Workmen's Compensation Laws; Classification.* Fact that regulation does not include all classes it might, unobjectionable. *Middleton v. Texas Power & Light Co.* . . . . . 152

**CONSTITUTIONAL LAW—Continued.**

PAGE

26. *Id.* Discrimination in workmen's compensation act between employees in different classes of work, valid. *Id.*
27. *Id.* So of employees in same kind of work, where employers do not all exercise option to come under act. *Id.*
28. *Id.* Giving such option to employer and not to employee. *Id.*
29. *Classification.* State may do what it can to prevent evil and stop short of those cases in which harm to few is less important than harm to public that would ensue if rule were made mathematically exact. *Dominion Hotel v. Arizona*.. 265
30. *Id. Hours of Labor.* Arizona law, restricting hours of labor of women in hotels, excepts in part railroad restaurants and eating-houses operated by any railroad. *Held*, that court cannot say, upon judicial knowledge, that legislature had no adequate ground for distinction. *Id.*
31. *Food; Labels.* Regulation *re* labeling of syrup compounds, which does not discriminate against manufacturer or his product or against syrups as a class, *upheld.* *Corn Products Refg. Co. v. Eddy*..... 427
32. *Classification; Individuals and Municipalities.* No discrimination in requiring individuals to remove timber refuse from vicinity of municipal watersheds while not requiring like service by municipalities to individuals. *Perley v. North Carolina*..... 510
33. *Id. Shippers and Carriers.* Objection that a state rate discriminates between shippers, not available to carriers. *Arkadelphia Co. v. St. Louis S. W. Ry.*..... 134

**XII. Who May Question Constitutionality of Statutes.**

1. Whether a mode of assessing for special public improvements is unconstitutional depends on results in particular case. *Withnell v. Ruecking Constr. Co.*..... 63
2. Objection that state rate discriminates between shippers, not available to carriers. *Arkadelphia Co. v. St. Louis S. W. Ry.*... 134
3. Where state law makes amount of privilege tax depend on whether person taxed has chief office in State, citizen of an-



**CONSTITUTIONAL LAW**—*Continued.*

PAGE

other State who would be liable for larger tax, if valid, may question validity without first tendering lower tax. *Chalker v. Birmingham & N. W. Ry.* . . . . . 522

**CONSTRUCTION.** See **Admiralty; Canal Zone; Constitutional Law; Contracts; Copyright; Criminal Law; Customs Law; Deeds; Food; Franchises; Hours of Service Act; Indians; Interstate Commerce Acts; Intoxicating Liquors; Jurisdiction; Mails; Meat Inspection Act; Mines and Mining; Narcotic Drug Act; Public Lands; Safety Appliance Act; Statutes; Taxation; Treaties.**

**CONSTRUCTIVE NOTICE.** See **Deeds, 2; Mines and Mining, 3.**

**CONTEMPT:**

1. Basis of power of federal courts to punish summarily for contempt committed in their presence is to secure from obstruction in performance of judicial duties; element of obstruction must clearly appear. *Ex parte Hudgings* . . . . . 378
2. Perjury, punishable as criminal offense, may also afford basis for punishment as contempt. *Id.*
3. Perjury *in facie curiæ* is not punishable as contempt apart from its obstructive tendency. *Id.*
4. District Court may not adjudge witness guilty of contempt because in court's opinion he is wilfully refusing to testify truthfully, and confine him until he shall give testimony which court deems truthful. *Id.*

**CONTINUANCE.** See **Criminal Law, 14.**

**CONTRACTS.** See **Carriers; Interstate Commerce Acts; Mails.**

Warranty of seaworthiness. See **Admiralty, 8.**

Live stock; written notice of damage. See **Interstate Commerce Acts, 7, 8.**

Sale of growing crop. See **Indians, 1, 2.**

Impairment of obligation. See **Constitutional Law, III.**

1. *Offer and Acceptance.* Opportunity to accept continuing offer of sale lost by making a counter offer. *Beaumont v. Prieto* . . . . . 554

**CONTRACTS—Continued.**

PAGE

2. *Maritime Contracts.* What constitutes maritime contract for repairs, as distinguished from construction contract, or lease of facilities on land. *North Pacific S. S. Co. v. Hall Bros. Co.*..... 119

3. *Franchise Contracts.* Ordinances passed by city under laws of Ohio and accepted by street railway companies, held contracts, binding grantees to furnish railway service for 25 years, at specified rates, in return for use of streets. *Columbus Ry. & Power Co. v. Columbus*..... 399  
See also *Burr v. Columbus*..... 415

4. *Id. Performance.* If party charge himself with obligation possible to be performed, he must abide by it unless performance becomes impossible through act of God, the law, or the other party. *Id.*

5. *Id. Unexpected Hardship.* May be considered in determining scope of contract obligation, provided contract is doubtful and requires construction. *Id.*

6. *Id. Vis Major.* Effects of war, rendering street railway franchise rates inadequate, not *vis major* excusing further performance. *Id.*

7. *Carriers; Agency; Hours of Service Act.* Fact that carrier acts only as agent for other carriers may affect contractual obligations to shippers, but cannot change obligations under Hours of Service Act. *United States v. Brooklyn Eastern Dist. Term*..... 296

8. *Government Contracts; Building; Time Extension. Quære:* Whether unreasonable delay on part of Government in approving contract entitles contractor to extension where contract fixes date for completion of work? *Hathaway & Co. v. United States*..... 460

9. *Id. Damages.* Provision for deducting, in addition to an amount fixed as liquidated damages, expense of superintendence and inspection, in case of failure to complete work by time specified, will be enforced when clearly expressed in contract. *Id.*

10. *Id. Liquidated Damages.* Contract for construction of two government buildings, provided that in case of delay beyond specified period United States might deduct \$200 for

**CONTRACTS**—*Continued.*

PAGE

each day of delay until completion as liquidated damages. *Held*, that fact that amount specified was to be same whether both buildings were delayed or only one was no reason for considering it a penalty. *Wise v. United States* . . . 361

11. *Id. Penalty.* Whether party should be relieved from plain stipulation for liquidated damages upon ground that penalty was intended, depends upon facts and not conjectural situation that might have arisen under contract. *Id.*

12. *Id. Post Office Supplies.* When acceptance of bid by Postmaster General completes contract. *United States v. Purcell Envelope Co.* . . . . . 313

13. *Id. Findings of Court of Claims.* Charges that contract procured by one without financial standing, by imposing on Postmaster General, concluded by judgment of Court of Claims. *Id.*

14. *Id. Damages.* Upon Government's repudiation of contract before time for performance, measure of damages is difference between contract price and cost of performance. *Id.*

15. *Id. Evidence.* Presumption that evidence touching amount of damages, including expense necessary to make contractor ready for performance, was duly considered by Court of Claims. *Id.*

16. *Id. Construction.* Contract to furnish in quantities as ordered envelopes that contractor may be called upon by Post Office Department to furnish during four years, *construed* as entitling contractor to supply all needed in that period. *Id.*

17. *Id. Transportation of Mails; Findings of Court of Claims.* When Court of Claims fails to state what contract was between claimant and Government, this court cannot find it from facts which do not establish contract as matter of law. *Del., Lack. & W. R. R. v. United States* . . . . . 385

18. *Id. Change of Rates.* Where railroad undertook transportation of mail during certain period upon notice that compensation had been fixed for period but "subject to future orders," *held*, that contract did not guarantee railroad against change of rates. *Id.*

**CONTRACTS**—*Continued.*

PAGE

19. *Id.* *Reservation of Right to Change Rates.* May be availed of through act of Congress, even though Postmaster General had no authority when contract was made to change rates. *Id.*
20. *Id.* *Weighing.* Act of Mar. 2, 1907, directing Postmaster General to readjust compensation for transportation of mail on certain railroad routes carrying certain average weights of mail per day, did not require reweighing. *Id.*
21. *Id.* *Transportation of Troops.* Classes of persons not embraced within term "troops of the United States," as used in land grant acts, and agreement of Union Pacific Co. *United States v. Union Pac. R. R.* . . . . . 354
22. *Rescission.* Right of bank to withdraw credit extended and to rescind loan agreement for fraud and failure to furnish agreed collateral. *Harriman Natl. Bank v. Seldomridge* . . . 1

**CONVEYANCE.** See **Deeds; Indians.**

**COPYRIGHT:**

1. *Liability* imposed by § 25 of Copyright Act attaches in respect of each copyright infringed, though by same party. *Westermann Co. v. Dispatch Co.* . . . . . 100
2. *Several and Distinct Liabilities,* arise from several, distinct infringements of same copyright by same party. *Id.*
3. *Damages.* Where not shown that infringer made profits, and damages, though actual, cannot be estimated in money, damages "in lieu of actual damages and profits" are assessable under § 25. *Id.*
4. *Id.* Court's conception of what is just in particular case is measure of damages, but assessment must be within maximum and minimum limits prescribed by the section. *Id.*

**CORPORATIONS.** See **Municipal Corporations.**

Regulation of rates and public service. See **Carriers; Gas Companies; Interstate Commerce Acts.**  
Telegraph and tank car companies; state tax. See **Constitutional Law**, II, 6-9, 11-15; XI, 19, 20.  
Street railways. See **Eminent Domain**, 1, 2; **Franchises; Jurisdiction** III, 21.



**CORPORATIONS—Continued.**

PAGE

Foreign, taxation of. See **Taxation**, IV, 6-10, 13.Income tax. See **Taxation**, II.Receivership; jurisdiction of District Court, as to several States of circuit. See **Jurisdiction**, V, 8.1. Distinction between joint-stock association and real estate trust. *Crocker v. Malley* . . . . . 2232. *Quære*: Whether charter granted insurance company by resolution of state legislature is public act or record within meaning of full faith and credit clause? *Hartford Life Ins. Co. v. Johnson* . . . . . 4903. Corporate status of Pueblo of Santa Rosa, and capacity to sue to protect rights claimed under Spanish and Mexican grants. *Lane v. Pueblo of Santa Rosa* . . . . . 110**COUNTY WARRANTS:**

Right of legislature to stop interest on judgments based on.

*Missouri & Arkansas Lumber Co. v. Sebastian County* . . . . . 170**COURT OF CLAIMS.** See **Claims**; **Jurisdiction**, III (5); VI; **Procedure**, V, 7-9.Time for presenting claims for refund of inheritance taxes, as prerequisite to suit in Court of Claims. See **Taxation**, III.**COURTS.** See **Admiralty**; **Bankruptcy Act**; **Contempt**; **Equity**; **Jurisdiction**; **Mandamus**; **Procedure**.Power over administrative decisions. See **Interstate Commerce Acts**, 1-4; **Meat Inspection Act**, 3, 6-9; **Mines and Mining**, 5; **Public Lands**, 5, 7; **Taxation**, III, 1.Judicial discretion. See **Criminal Law**, 14.**CREDITORS.** See **Bankruptcy Act**.Priority over taxes. See **Bankruptcy Act**, 9, 10.**CRIMINAL LAW.** See **Evidence**, 2, 3.1. *Contempt*; *Perjury*. Perjury, punishable as criminal offense, may also afford basis for punishment as contempt. *Ex parte Hudgings* . . . . . 3782. *Id.* Perjury *in facie curiæ* is not punishable as contempt apart from obstructive tendency; District Court may not

**CRIMINAL LAW—Continued.**

PAGE

adjudge witness guilty of contempt because in court's opinion he is wilfully refusing to testify truthfully. *Id.*

3. *Conspiracy; Espionage Act.* Conspiracy to circulate among men called and accepted for military service a circular tending to influence them to obstruct draft, followed by overt acts, is punishable under Espionage Act, § 4, though unsuccessful. *Schenck v. United States* . . . . . 47

4. *Id. Recruiting.* "Recruiting," as used in Espionage Act, means gaining of fresh supplies of men for military forces, as well by draft as otherwise. *Id.*

5. *Id. Prior Offenses.* Amendment of Espionage Act by Act of 1918 did not affect prosecution of offenses previously committed. *Id.*

See also *Frohwerk v. United States* . . . . . 204

6. *Id. Allegations; Intent.* Allegations of conspiracy to accomplish an object necessarily alleges intent to do so. *Frohwerk v. United States* . . . . . 204

7. *Id. Duplicity.* Allegation of conspiracy to commit several offenses not duplicitous, the conspiracy being a unit. *Id.*

8. *Id. Bill of Exceptions.* In absence of, court must presume that evidence sustained conviction. *Id.*

9. *Id. Espionage Act.* Conspiracy to obstruct recruiting by newspaper articles circulated in places where they would tend to effect object, an offense under Act of 1917. *Id.*

10. *Id. Allegations.* Means need not be specifically agreed on; and need not be alleged. *Id.*

11. *Id. Allegation of making, or intent to make, false reports, unnecessary.* *Id.*

12. *Id. Under § 4, overt acts sufficiently charged as done to effect object.* *Id.*

13. *Id. Treason.* Acts not treasonable, punishable under Espionage Act, even if others, included by it, could be punished only as treason. *Id.*

14. *Id. Trial.* Ordering plea of not guilty, setting case and beginning trial, in two days after overruling demurrer, not abuse of District Court's discretion. *Id.*

**CRIMINAL LAW—Continued.**

PAGE

15. *Espionage Act*. Delivery of speech in such words and circumstances that its probable effect will be to prevent recruiting, punishable under Act of 1917, as amended in 1918.  
*Debs v. United States* ..... 211
16. *Id. Motive*. General purpose to advance socialism and conscientious belief back of expressions used, immaterial. *Id.*
17. *Id. Evidence; Intent*. Records of prosecutions of third parties whose acts were referred to in defendant's speech with apparent understanding and approval, and of writings of third parties in like case, *held* admissible to explain true import of remarks and his intent. *Id.*
18. *Id. Military Forces*. Persons designated, registered and enrolled and subject to be called under Draft Act are, it seems, part of military forces of the United States within § 3 of Espionage Act. *Id.*
19. *Prostitution*. Conviction sustained, for setting up house of ill fame within 5 miles of military station, distance designated by Secretary of War, under Act May 18, 1917.  
*McKinley v. United States* ..... 397
20. *Narcotic Drug Act*. Prosecutions for violations.  
*United States v. Doremus* ..... 86  
*Webb v. United States* ..... 96

**CROPS:**

Validity of sale. See **Indians**, 1, 2.

**CUSTOMS LAW:**

1. Allowances under acts of Parliament on exportation of British spirits *held* a "grant" within par. E, § 4, of Tariff Act of 1913, providing for countervailing duty whenever any country shall pay or bestow any bounty or grant upon exportation of any article dutiable under act. *Nicholas & Co. v. United States* ..... 34
2. Notwithstanding such allowances intended as compensation for costs due to British excise regulations and not confined to cases of exportation, they are, as applied to exports, governmental payments—"grants"—made only upon exportation, which, by lessening burden of British taxation, enable spirits to be sold more cheaply here than at home.  
*Id.*

**DAMAGES.** See **Contracts**, 9-11, 14, 15; **Copyright**, 3, 4; **PAGE Eminent Domain; Judgments**, 10.

Under erroneous injunction; assessment of, after reversal.

See **Injunction**, 2-9.

1. Pain considered in fixing damages for personal injuries in Canal Zone. *Panama R. R. v. Bosse* . . . . . 41

2. Upon Government's repudiation of contract before time for performance, measure of damages is difference between contract price and cost of performance. *United States v. Purcell Envelope Co.* . . . . . 313

3. Whether party should be relieved from plain stipulation for liquidated damages upon ground that penalty was intended, depends upon facts and not conjectural situation that might have arisen under contract. *Wise v. United States* . . . . . 361

4. When right to, left without prejudice on dismissal of bill for injunction. *United Railroads v. San Francisco* . . . . . 517

**DEBTORS.** See **Bankruptcy Act**.

**DECREES.** See **Judgments; Procedure**, VI.

**DEEDS.** See **Exception**.

1. Quitclaim of an undivided interest in mining claim, held to pass only rights and interests appertaining to that claim and not to affect extralateral rights appertaining to adjoining claim owned by grantor. *Butte & Superior Co. v. Clark-Montana Co.* . . . . . 12

2. Act of June 21, 1906, creating a new recording district and naming place for recording instruments affecting title to land, made no provision whereby during interval from date of act and time when clerk was appointed for new district and opened office a deed of land in new district might be filed in older district in which land was located; deed so filed not constructive notice to subsequent purchaser. *Whitehead v. Galloway* . . . . . 79

3. Provision of Act of Feb. 19, 1903, for transfer of recorded instruments to indices of new recording districts, applied only to instruments recorded before date of act. *Id.*



**DELEGATION OF POWER.** See **Constitutional Law**, VI, 3. PAGE

**DEPOSITIONS.** See **Estoppel**, 1.

**DISCOVERY.** See **Mines and Mining**, 9-15.

**DISTRICT COURT.** See **Jurisdiction**, II; III (4); V.

**DISTRICT OF COLUMBIA:**

Under Code, as on general principle, allowance of writ of mandamus is matter of sound judicial discretion, and applications are limited as to time by equitable doctrine of laches and are not within general statutes of limitations.

*Arant v. Lane* . . . . . 367

**DIVERSITY OF CITIZENSHIP.** See **Jurisdiction**, III, 12; V, 4.

**DIVIDENDS.** See **Taxation**, II.

**DOCUMENTS.** See **Deeds; Evidence**, 3, 4.

**DRAFT ACT.** See **Criminal Law**, 3, 18.

Power of Congress to punish conspiracy to obstruct. See **Constitutional Law**, VI.

**DRUGS.** See **Narcotic Drug Act**.

**DUE PROCESS OF LAW.** See **Constitutional Law**, XI (3).

**DUPLICITY:**

In indictment. See **Criminal Law**, 7.

**DUTIES.** See **Customs Law**.

**EMINENT DOMAIN:**

1. Damages inevitably resulting to street railway company from exercise of city's right to run its own line on same street not a taking, requiring resort to eminent domain.

*United Railroads v. San Francisco* . . . . . 517

2. *Semble*, that damage referred to in California constitution of 1879, as requiring compensation, is such as results from

**EMINENT DOMAIN**—*Continued.*

PAGE

conduct that would be tortious unless under proceedings providing for payment of damages. *Id.*

3. Pollution of private oyster-beds by municipal sewage not damage to property for public use requiring compensation under Virginia constitution. *Darling v. Newport News* . . . 540

**EMPLOYER AND EMPLOYEE.** See **Boiler Inspection Act**; **Carriers**, 1; **Claims**, 2; **Constitutional Law**, XI, 11, 25-30; **Employers' Liability Act**; **Hours of Service Act**; **Master and Servant**; **Safety Appliance Act**.

**EMPLOYERS' LIABILITY ACT.** See **Carriers**, 1; **Jurisdiction**, III, 22.

1. *Shoveling Snow* between track and platform, employment in interstate commerce. *New York Cent. R. R. v. Porter* . . 168

2. *State Laws.* State workmen's compensation law inapplicable where case falls within act. *Id.*

3. *Id.* State law relieving plaintiff of burden of proving negligence is constitutionally inapplicable to case under federal act. *New Orleans & N. E. R. R. v. Scarlet* . . . . . 528  
*Yazoo & M. V. R. R. v. Mullins* . . . . . 531

4. *Negligence.* In absence of manifest error, concurrent findings by state courts that evidence of negligence in case under federal act is insufficient to go to jury, will not be re-examined. *Gillis v. N. Y., N. H. & H. R. R.* . . . . . 515

**ENROLLMENT.** See **Indians**, 5.

**EQUAL PROTECTION OF THE LAWS.** See **Constitutional Law**, XI (4).

**EQUITY.** See **Injunction**; **Judgments**, 2-5; **Laches**.

Scope and form of decree. See **Procedure**, VI.

Relief from penalty. See **Contracts**, 11.

Assessment of damages under erroneous injunction, after reversal. See **Injunction**, 2-9.

1. *Bad Bargains.* Equity cannot relieve from simply because they are such. *Columbus Ry. & Power Co. v. Columbus* . . . 399

2. *Injunction.* Official resurvey of boundary of patented Mexican grant, for purpose of defining contiguous public

**EQUITY**—*Continued.*

PAGE

land, does not operate as adjudication against grant owner or otherwise so affect rights as to afford ground for injunction against Secretary of Interior. *Lane v. Darlington*. . . . . 331

3. *Receivership; Dependent Bill.* District Court, having extended receivership under Jud. Code, § 56, over entire business and property of company engaged in interstate transportation and sale of gas in several States of circuit, has jurisdiction of dependent bill by receiver to enjoin state officials from imposing rates alleged confiscatory and burdensome to interstate business. *Public Utilities Comm. v. Landon* . . . . . 236

4. *Right to Answer.* Where trial court dismisses bill on defendants' motion, it is error for appellate court, finding bill made case for relief sought, to award permanent injunction; defendants entitled to answer to merits as if motion had been overruled originally. *Lane v. Pueblo of Santa Rosa* . . . 110

**ESPIONAGE ACT.** See **Constitutional Law**, VI; VIII; **Criminal Law**, 3-18.

**ESTOPPEL.** See **Judgments**, 7; **Public Lands**, 5.

Book entries. See **Banks and Banking**, 3.

Failure to assign error and appeal as to part of decree releasing preliminary injunction bonds; effect of on assessment of damages after erroneous final injunction reversed. See **Injunction**, 2-9.

1. Party introducing depositions taken by opponent of telephone and postal communications estopped to deny that agency of senders was shown. *Chicago & E. I. R. R. v. Collins Produce Co.* . . . . . 186

2. Heavy investment on faith of Government's approval of trade-name, under Meat Inspection Act, does not bar subsequent disapproval. *Brougham v. Blanton Mfg. Co.* . . . . . 495

**EVIDENCE.** See **Admiralty**, 4; **Boiler Inspection Act**; **Judicial Notice**; **Presumptions**.

Burden of proof. See **Employers' Liability Act**, 3; **Interstate Commerce Acts**, 5.

1. *Depositions; Estoppel.* Defendant by introducing depositions taken by plaintiff of telephone and postal communications is estopped to deny that senders were properly

**EVIDENCE—Continued.**

PAGE

identified as defendant's agents. *Chicago & E. I. R. R. v. Collins Produce Co.*..... 186

2. *Sufficiency.* Evidence held sufficient to connect defendants with mailing of printed circulars in pursuance of conspiracy to obstruct recruiting, contrary to Espionage Act. *Schenck v. United States*..... 47

3. *Incriminating Documents*, seized under search warrant directed against a Socialist headquarters, held admissible, consistently with Fourth and Fifth Amendments, in criminal prosecution against general secretary of Socialist party, who had charge of office. *Id.*

4. *Extraneous Documents; Admissibility; Intent.* Records of prosecutions of third parties whose acts were referred to in defendant's speech with apparent understanding and approval, and of writings of third parties in like case, held admissible to explain true import of remarks and his intent. *Debs v. United States*..... 211

5. *Evidence of Interstate Movement.* Evidence held insufficient to prove traveling show moving interstate, at time of proceedings to require transportation within State and fix rate. *Southern Pac. Co. v. Arizona*..... 472

6. *Oral Evidence of Age.* When admissible to supplement roll of Five Civilized Tribes. *Gilcrease v. McCullough*..... 178

7. *Adjudication of Bankruptcy; When Conclusive.* In suit by trustee to recover, as illegal preferences, payments made by bankrupt, within 4 months of filing of involuntary petition, to creditor who did not appear, adjudication of bankruptcy is not conclusive evidence of bankrupt's insolvency when such payments were made. *Gratiot State Bank v. Johnson*..... 246

8. *Original Suits.* Taking additional proofs. *New York v. New Jersey*..... 202

**EXCEPTION:**

Fishing right stipulated for in Yakima treaty, not to be construed as exception from their general cession of land, but extends to other regions. *Seufert Bros. Co. v. United States*.. 194

**EXCEPTIONS, BILL OF.** See **Criminal Law**, 8.



- EXCISE TAXES.** See **Constitutional Law**, IV. PAGE
- EXECUTIVE OFFICERS.** See **Accounting**, 1; **Canal Zone**, 1; **Contracts**, 12; **Criminal Law**, 19; **Mails**, 2-4; **Mandamus**, 5; **Meat Inspection Act**, 1, 2; **Public Lands**, 2-4; **Taxation**, II, 4; III; **Weights and Measures**.  
 Administrative decisions. See **Interstate Commerce Acts**, 1-4; **Meat Inspection Act**, 3, 6-9; **Mines and Mining**, 5; **Public Lands**, 5, 7, **Taxation**, III, 1.  
 When suit against becomes moot by expiration of term. See *Shaffer v. Howard* . . . . . 200
- EXPORTS.** See **Customs Law**.
- FACTS:**  
 Findings. See **Jurisdiction**, III (5); **Procedure**, V.  
 Administrative decisions. See **Interstate Commerce Acts**, 1-4; **Meat Inspection Act**, 3, 6-9; **Mines and Mining**, 5; **Public Lands**, 5, 7; **Taxation**, III, 1.  
 Questions of. See **Interstate Commerce**, 1, 3, 4.
- FEDERAL EMPLOYERS' LIABILITY ACT.** See **Employers' Liability Act**.
- FEDERAL QUESTIONS.** See **Jurisdiction**, III, V; **Procedure**, V, 2, 3.
- FIFTH AMENDMENT.** See **Constitutional Law**, X.
- FINALITY OF JUDGMENT.** See **Jurisdiction**, III, 8, 23, 24.
- FINDINGS OF FACT.** See **Jurisdiction**, III (5); **Procedure**, V.  
 Administrative decisions. See **Interstate Commerce Acts**, 1-4; **Meat Inspection Act**, 3, 6-9; **Mines and Mining**, 5; **Public Lands**, 5, 7; **Taxation**, III, 1.
- FIRST AMENDMENT.** See **Constitutional Law**, VIII.
- FISHERIES.** See **Indians**, 3, 4.
- FIVE CIVILIZED TRIBES.** See **Indians**, 5.
- FOOD.** See **Jurisdiction**, III, 26; **Meat Inspection Act**.  
 1. Right of manufacturer to maintain secrecy as to compounds and processes, subject to right of State to require

**FOOD—Continued.**

PAGE

that nature of product be set forth. *Corn Products Refg. Co. v. Eddy*. . . . . 427

2. Neither commerce clause nor Federal Pure Food Law forbid State to require that proprietary foods, imported and sold in original packages, shall bear labels stating percentage of ingredients. *Id.*

**FOOD AND DRUGS ACT.** See **Food, 2.**

**FOREIGN CORPORATIONS.** See **Constitutional Law, II, 6-9, 11-15; XI, 19, 20; Taxation, IV, 6-10, 13.**

**FOURTEENTH AMENDMENT.** See **Constitutional Law, XI.**

**FOURTH AMENDMENT.** See **Constitutional Law, IX.**

**FRANCHISES.** See **Constitutional Law, III, 1; Eminent Domain, 1, 2; Jurisdiction, III, 21.**

1. *Street Railway; Parallel Municipal Line.* General law of California limiting proximity of street railroads, in force on granting of franchise, does not give vested right against railway being constructed by city under later amendment of law and of state constitution. *United Railroads v. San Francisco*. . . . . 517

2. *Id.* Damage inevitably resulting from city's road not a taking requiring resort to eminent domain. *Id.*

3. *Id. Purchase by City.* Construction of charter provision requiring San Francisco to consider offers for sale of existing public utilities before acquiring new ones. *Id.*

4. *Id. Surrender by Grantee.* City ordinances, passed under Ohio laws and accepted by street railway companies, held contracts, binding grantees to furnish service, and not subject to surrender when unremunerative. *Columbus Ry. & Power Co. v. Columbus* . . . . . 399  
See also *Burr v. Columbus*. . . . . 415

5. *Id.* Effects of war, making rates grossly inadequate, but not making performance impossible or contract as a whole unremunerative, held not *vis major*, excusing further performance. *Id.*

**FREEDOM OF SPEECH.** See **Constitutional Law**, VIII; **PAGE**  
**Criminal Law**, 3-13, 15-18.

**FRAUD:**

Right of bank to withdraw credit extended and to rescind  
loan agreement for fraud and failure to deliver collateral.

*Harriman Natl. Bank v. Seldomridge* . . . . . 1

**FULL FAITH AND CREDIT CLAUSE.** See **Constitutional**  
**Law**, V.

**GAS COMPANIES:**

1. While piping of natural gas from State to State, and its  
sale and delivery to independent local companies, is inter-  
state commerce, retailing by latter to consumers is intrastate  
commerce. *Public Utilities Comm. v. Landon* . . . . . 236

2. In such case, regulation of rates of local companies has  
indirect effect upon interstate business of transporting and  
selling company; at least when latter is in hands of receivers  
who have not become bound by contracts with former; and  
such receivers have no ground to complain that rates fixed  
for local companies are confiscatory or burdensome to inter-  
state business, even though that business consists exclusively  
in selling gas to such local companies. *Id.*

**HABEAS CORPUS.** See **Jurisdiction**, III, 4, 5; V, 2-4.

**HOURS OF LABOR.** See **Hours of Service Act**; **Labor**.

**HOURS OF SERVICE ACT:**

1. Whether carrier is common carrier within act, does not  
depend upon whether its charter declares it to be such, nor  
upon whether State of incorporation so considers it, but upon  
what it does. *United States v. Brooklyn Eastern Dist. Term.* 296

2. Fact that carrier acts only as agent for other carriers can-  
not change obligations concerning physical operation of its  
railroad, and safety of employees and public which act aims  
to secure. *Id.*

3. A navigation company, owning terminal, docks, etc., en-  
gaged for railroads in receiving and delivering freight, held  
a common carrier within act. *Id.*

**HOURS OF SERVICE ACT**—*Continued.*

PAGE

4. Crews engaged in moving locomotive and cars between docks and warehouses of terminal company, *held* engaged in movement of a "train," within § 1 of act. *Id.*

**IMMIGRATION LAWS.** See **Jurisdiction**, V, 3.

**IMPAIRMENT OF CONTRACT OBLIGATION.** See **Constitutional Law**, III.

**IMPORTS.** See **Customs Law**.

**IMPROVEMENT DISTRICTS.** See **Taxation**, IV, 1-5.

**INCOME TAX.** See **Taxation**, II.

**INDIANS:**

1. *Trust Patent; Lease on Shares.* Indian holding trust patent under Act of 1887, who leases allotment under Act June 25, 1910, may sell his share of crop reserved as rental. *Miller v. McClain* ..... 308
2. *Id. Sale of Crop.* Would mere sale of growing crop be void under Act of 1887, in State where such crops are personalty? *Id.*
3. *Fisheries; Yakima Treaty, 1855.* Right to fish at usual and accustomed places, etc., extends to places beyond Yakima cession within region covered by similar right of Walla-Wallas and Wascos. *Seufert Bros. Co. v. United States* ..... 194
4. *Id. Liberal Construction.* Provision to be liberally construed as understood by Indians, not as a mere exception from their general cession of land. *Id.*
5. *Evidence of Age.* In declaring enrollment records of Five Civilized Tribes conclusive evidence of age, Act of 1908 does not exclude other evidence on subject consistent with records and enrollment. *Gilcrease v. McCullough* ..... 178
6. *Pueblo of Santa Rosa; Capacity to Sue.* Under law of New Mexico Territory, as extended to Gadsden Purchase and Territory of Arizona by act of Congress, Pueblo of Santa Rosa is a legal entity, with capacity to sue to protect its rights in land claimed by it as grantee under laws of Spain and Mexico. *Lane v. Pueblo of Santa Rosa* ..... 110



**INDIANS**—*Continued.*

PAGE

7. *Id.* The fact that Arizona has become a State does not affect this corporate status of the Pueblo. *Id.*

8. *Id.* Assuming that these Indians are wards of the Government, that fact would not affect capacity to sue in District of Columbia to restrain Secretary of Interior from offering, etc., under public land laws, lands to which Pueblo alleges perfect title under laws of Spain and Mexico. *Id.*

**INDICTMENT.** See **Criminal Law**, 6, 7, 10-12.

**INFANTS.** See **Indians**, 5; **Parent and Child**.

**INFRINGEMENT.** See **Copyright**; **Patents for Inventions**; **Treaties**.

**INHERITANCE TAXES.** See **Taxation**, III.

**INJUNCTION.** See **Equity**, 2-4.

Enjoining orders of Interstate Commerce Commission; venue. See **Interstate Commerce Acts**, 3, 4.

1. *Damages.* When right to damages left without prejudice on dismissal of bill for injunction. *United Railroads v. San Francisco*. . . . . 517

2. *Id.* Power of District Court to assess damages under injunction bonds, after reversal. *Arkadelphia Co. v. St. Louis S. W. Ry.*. . . . . 134

3. *Id.* *Sureties.* Effect of release of bonds and discharge of sureties before appeal. *Id.*

4. *Id.* Cessation of sureties' liability under preliminary injunction bonds with final injunction in District Court. *Id.*

5. *Id.* *Railroad Rates.* Preliminary injunction bonds conditioned to refund excess of rates collected by railroad if eventually decided injunction orders should not have been made, breached by ultimate failure to show rates inadequate, although preliminary injunction may have been proper. *Id.*

6. *Id.* *Refund.* Liability of railroad to refund to shippers as a class excess charges made under erroneous injunction. *Id.*

7. *Id.* *Intervention.* Right of shippers to intervene on reference to ascertain damages under the injunction bonds. *Id.*

**INJUNCTION**—*Continued.*

PAGE

8. *Id.* *Form of Reversal.* Effect on liability to refund of decree reversing the injunction decree without prejudice to future suit under changed conditions. *Id.*

9. *Id.* *Interest.* Interest on such overcharges. *Id.*

**INJUNCTION BONDS.** See **Injunction**, 2-9.

**INSOLVENCY.** See **Bankruptcy Act.**

**INSPECTION.** See **Meat Inspection Act.**

Validity of state inspection fees, under commerce clause.  
See **Constitutional Law**, II, 10.

**INSTRUCTIONS:**

Judge not obliged to adopt exact language of instructions requested, or repeat instructions already given in substance.  
*Sugarman v. United States* ..... 182

**INSURANCE.** See **Corporations**, 2.

**INTENT.** See **Constitutional Law**, IV, 2; **Criminal Law**, 3, 6, 9, 11, 16, 17; **Evidence**, 4; **Interstate Commerce**, 3, 6.

**INTEREST:**

On judgments; power of legislature. See **Judgments**, 8-11.  
On excess rates collected under erroneous injunction. See **Injunction**, 9.

Under constitution and laws of South Dakota, interest received by state treasurer on state funds deposited by him in bank belongs to State, and treasurer must account therefor.  
*South Dakota v. Collins* ..... 220

**INTERNAL REVENUE.** See **Taxation**, II, 4, 5; III.

**INTERNATIONAL LAW.** See **Treaties.**

Order of President continuing in force for government of Canal Zone "the laws of the land, with which the inhabitants are familiar," was construed by Government as including Civil Code of Panama, and was followed by act of Congress ratifying laws and orders promulgated by President. *Held*, that order merely embodied rule that change of sovereignty does not end existing private law, and that act neither fastened upon Zone a specific civil-law interpretation of Code nor overthrew principle of common-law construction adopted and applied by Supreme Court of Zone before act was passed. *Panama R. R. v. Bosse* ..... 41

**INTERPRETATION.** See references under **Construction.** PAGE

**INTERSTATE COMMERCE.** See **Constitutional Law, II.**

1. *Test of.* Interstate commerce is a practical conception, and what falls within it must be determined upon considerations of established facts and known commercial methods. *Public Utilities Comm. v. Landon* ..... 236
2. *Id. Piping and Sale of Gas.* While piping of natural gas from State to State, and its sale and delivery to independent local gas companies, is interstate commerce, retailing of gas by latter to consumers is intrastate commerce and not a continuation of such interstate commerce. *Id.*
3. *Question of Fact, not Expectation or Intent.* Movement of rough lumber to place in same State, to be manufactured, in expectation that products will be marketed and shipped outside State, not interstate commerce. *Arkadelphia Co. v. St. Louis S. W. Ry.* ..... 134
4. *Id.* Whether shipment was at given time interstate is question of fact. *Southern Pac. Co. v. Arizona* ..... 472
5. *Id.* Evidence held insufficient to prove that traveling show was moving interstate, at time of proceedings before state commission, to require transportation within State and fix rate. *Id.*
6. *Id.* Mere intention to continue tour beyond State where show was performing, held not enough to give interstate character to contemplated journey within State. *Id.*
7. *Shoveling Snow,* between track and platform, employment in interstate commerce, within Federal Employers' Liability Act. *New York Cent. R. R. v. Porter* ..... 168

**INTERSTATE COMMERCE ACTS.** See **Boiler Inspection Act; Employers' Liability Act; Food, 2; Hours of Service Act; Intoxicating Liquors, 1; Meat Inspection Act; Safety Appliance Act.**

1. *Rates; Power of Commission.* Rates reduced with approval of Commission because of water competition may be increased with its approval without finding that increase rests on changed conditions other than elimination of water competition. *Skinner & Eddy Corp. v. United States* ..... 557

**INTERSTATE COMMERCE ACTS—Continued.**

PAGE

2. *Id. Long and Short Haul.* Orders under § 4, as amended in 1910, granting relief from long and short haul clause, subject to future modification by Commission without application by carrier. *Id.*

3. *Jurisdiction; Enjoining Commission.* A suit to enjoin an order claimed to be beyond powers of Commission may be entertained without preliminary application for relief to the Commission. *Id.*

4. *Id. Venue.* Under jurisdictional Act of Oct. 22, 1913, suit to enjoin order of Commission increasing rates previously fixed on an application under long and short haul clause, may be brought in the district of residence of a defendant carrier who joined in original application. *Id.*

5. *Carmack Amendment; Proof of Loss.* In action against initial carrier for goods lost on connecting line shipper need not prove loss "caused by" connecting carrier. *Chicago & E. I. R. R. v. Collins Produce Co.* . . . . . 186

6. *Id.* Defendant initial carrier introducing shipper's depositions of conversations with connecting carrier's agents estopped to object that agents were not identified. *Id.*

7. *Carmack Amendment; Written Claim of Loss.* Bill of lading may condition carrier's liability for damages on service of written claim within 5 days after removal of stock from cars. *Balt. & Ohio R. R. v. Leach* . . . . . 217

8. *Id.* Condition not waived or satisfied by oral notice to connecting carrier's agents. *Id.*

**INTERSTATE COMMERCE COMMISSION.** See **Interstate Commerce Acts.**

**INTERVENTION.** See **Bankruptcy Act, 8; Injunction, 7.**

**INTOXICATING LIQUORS:**

1. Reed Amendment, prohibiting transportation "into" any State the laws of which prohibit manufacture, etc., does not preclude transportation through such State to another. *United States v. Gudger* . . . . . 373

2. One who acquires liquor after approval and before effective date of state law making its possession unlawful is not



**INTOXICATING LIQUORS—Continued.**

PAGE

deprived by the law of property without due process. *Barbour v. Georgia* . . . . . 454

3. Presumption that liquor was acquired between those dates when date of acquisition not shown. *Id.*

4. *Quære*: Whether law would be constitutional as applied to one who acquired liquor before enactment. *Id.*

**INVENTIONS.** See **Patents for Inventions.**

**JOINT STOCK ASSOCIATION:**

Under Income Tax Law. See **Taxation, II.**

**JUDGMENTS.** See **Injunction.**

Finality. See **Jurisdiction, III, 8, 23, 24.**

Scope and form of decree. See **Procedure, VI.**

Full faith and credit. See **Constitutional Law, V.**

Findings of Court of Claims. See **Procedure, V, 7-9.**

Administrative decisions. See **Interstate Commerce Acts, 1-4; Meat Inspection Act, 3, 6-9; Mines and Mining, 5; Public Lands, 5, 7; Taxation, III, 1.**

1. *Adjudication of Bankruptcy; Effect.* Concludes all the world as to status of debtor *qua* bankrupt, but does not bind strangers as to facts or subsidiary questions of law upon which it is based. *Gratiot State Bank v. Johnson* . . . . . 246

2. *Reversal; Effect on Power to Assess Damages.* Effect of reversal of erroneous injunction decree, on power to assess damages under injunction and preliminary injunction bonds, the mandate allowing further consistent proceedings and reversed decree reserving right to make future orders. *Arkadelphia Co. v. St. Louis S. W. Ry.* . . . . . 134

3. *Id. Second Appeal.* When supplementary proceedings in District Court, after reversal, are part of main cause, directly appealable to this court. *Id.*

4. *Id.* Effect of failure to assign error and appeal from part of original decree releasing preliminary injunction and discharging sureties. *Id.*

5. *Reversal; When Conclusive.* Decree reversing injunction of state rates with directions to dismiss bill, conclusive as to their general adequacy and right of shippers to recover excess

**JUDGMENTS—Continued.**

PAGE

collected under injunction, though without prejudice to further suit under changed conditions. *Id.*

6. *Against Revenue Collector; Satisfaction by United States.* Where tax sustained by Commissioner of Internal Revenue and its invalidity under statute not clear, there is probable cause for its exaction by collector, and under Rev. Stats., § 989, in an action against him, recovery will be from United States. *Crocker v. Malley* . . . . . 223

7. *Id. Set-off.* Where collector, with probable cause, collects excessive tax, amount due United States should be deducted from recovery, in an action against him, and such deduction will conclude United States. *Id.*

8. *Interest on; Power of Legislature.* Revivor to escape statute of limitations adds no new efficacy to judgment with respect to power of legislature to stop running of interest. *Missouri & Arkansas Lumber Co. v. Sebastian County* . . . . . 170

9. *Id.* Interest on judgments, when subject to legislative termination. *Id.*

10. *Id.* Statutory interest on judgments not contractual, but penalty or liquidated damages. *Id.*

11. *Id. Quære:* As to judgment on contract stipulating for interest. *Id.*

12. *Allowing Further Proceedings.* Dismissal of bill for injunction without prejudice to further proceedings for damages. *United Railroads v. San Francisco* . . . . . 517

13. *Stare Decisis.* What is said in an opinion upon point not properly involved cannot control in subsequent case where very point is presented for decision. *Union Tank Line Co. v. Wright* . . . . . 275

**JUDICIAL CODE. See Jurisdiction.****JUDICIAL DISCRETION. See Criminal Law, 14; Mandamus.****JUDICIAL NOTICE:**

1. Use of horse-hair mats in extracting oil. *Werk v. Parker* 130

2. Danger of fire spreading from timber débris to nearby watersheds. *Perley v. North Carolina* . . . . . 510

**JUDICIAL NOTICE**—*Continued.*

PAGE

3. Court cannot say, upon judicial knowledge, that legislature, in excepting railroad restaurants, etc., from law placing restrictions on hours of labor of women in hotels, had no adequate ground for distinction; possibly one might be found in need of adjusting service in excepted restaurants to hours of trains. *Dominion Hotel v. Arizona* . . . . . 265

**JURISDICTION:**

- I. In General; Moot Cases, p. 664.
- II. Of Federal Courts; in Contempt, p. 665.
- III. Jurisdiction of this Court.
- (1) In General, p. 665.
  - (2) Original, p. 665.
  - (3) Over Circuit Court of Appeals, p. 666.
  - (4) Over District Court, p. 666.
  - (5) Over Court of Claims, p. 667.
  - (6) Over District Court for Alaska, p. 667.
  - (7) Over Supreme Court of Philippines, p. 667.
  - (8) Over State Courts, p. 668.
- IV. Jurisdiction of Circuit Court of Appeals, p. 669.
- V. Jurisdiction of District Court, p. 669.
- VI. Jurisdiction of Court of Claims, p. 671.
- See **Admiralty; Bankruptcy Act; Constitutional Law; Equity; Procedure.**
- As to facts decided by administrative officers. See **Inter-state Commerce Acts**, 1-4; **Meat Inspection Act**, 3, 6-9; **Mines and Mining**, 5; **Public Lands**, 5, 7; **Taxation**, III, 1.
- Federal questions. See *infra*, III, V; **Procedure**, V, 2, 3.
- Local law. See *infra*, III, 18, 20, 21, 27, 29, 30.
- Local action. *Id.* V, 5, 6.

**I. In General. Moot Cases.**

1. When suit against state tax officials becomes moot by expiration of their term. *Shaffer v. Howard* . . . . . 200
2. Whether act of local legislature violated Philippine Organic Act, by delegating to Public Utility Commissioners power to prescribe contents of reports of corporate common carriers, has become moot question since case brought to this court, due to amendment prescribing what reports shall contain. *Public Utility Commrs. v. Compañia General* . . . . . 425

**JURISDICTION—Continued.**

PAGE

**II. Jurisdiction of Federal Courts; in Contempt.**

1. Basis of power of federal courts to punish summarily for contempt committed in their presence is to secure from obstruction in performance of judicial duties; element of obstruction must clearly appear. *Ex parte Hudgings*, . . . . . 378
2. Perjury *in facie curiæ* is not punishable as contempt apart from obstructive tendency; District Court may not adjudge witness guilty of contempt because in court's opinion he is wilfully refusing to testify truthfully. *Id.*

**III. Jurisdiction of this Court.**

(1) *In General.*

1. *Constitutional Question* affording jurisdiction must be substantial and properly raised below. *Sugarman v. United States*, . . . . . 182
2. *Irregularities.* May decline to dismiss on ground that writ of error and citation were not made returnable in time, when irregularity had color of authority from court below. *Beaumont v. Prieto*, . . . . . 554
3. *Mandate.* Effect of mandate allowing further proceedings after reversal. *Arkadelphia Co. v. St. Louis S. W. Ry.*, 134

(2) *Original.*

4. *Habeas Corpus.* Where this court declined leave to file petition for *habeas corpus*, because of competency of other courts to afford relief, motion for leave to apply for writ to District Court denied, as superfluous. *Ex parte Tracy*, . . . . . 551
5. *Id.* Where District Court exceeded its power in committing witness for contempt, original jurisdiction in *habeas corpus* properly invoked. *Ex parte Hudgings*, . . . . . 378
6. *Mandamus* can not be directed to Circuit Court of Appeals to control proceedings in case remanded to District Court and pending exclusively in latter. *Ex parte Wagner*, . . 465
7. *Interlocutory Proceedings* for accounting in District Court will not be forbidden upon ground that disposition of other proceedings before this court may possibly render accounting nugatory and useless expense. *Id.*



**JURISDICTION—Continued.**

PAGE

(3) *Over Circuit Court of Appeals.* See 12, 17, *infra*.

8. *Alaska.* Under §§ 134, 247, 241, Jud. Code, when case involving constitutional as well as other issues is taken from District Court for Alaska to Circuit Court of Appeals for the Ninth Circuit, judgment of latter court not reviewable by writ of error but only by certiorari. *Alaska Pacific Fisheries v. Alaska* ..... 53  
*Alaska Salmon Co. v. Alaska* ..... 62

9. *Federal Question; Mining Law.* In suit in District Court to determine extralateral rights between patented mining claims, complaint averred that construction and application of §§ 2322-2332, Rev. Stats., were involved, set up discovery, location and patent of plaintiffs' claim, and, to meet defect of location notice under state law, averred possession and working of plaintiffs' claim for more than 5 years from date of discovery, the limitation period provided by § 2332. *Held*, that latter allegations were part of plaintiffs' case, and involved construction and application of § 2332, and hence judgment of Circuit Court of Appeals was reviewable in this court by appeal. *Butte & Superior Co. v. Clark-Montana Co.* ..... 12

(4) *Over District Court.*

10. *What is State Law.* Orders of state commission fixing railroad rates are laws within Jud. Code, § 238, allowing direct review when state law is claimed to be unconstitutional. *Arkadelphia Co. v. St. Louis S. W. Ry.* ..... 134

11. *Supplementary Proceedings* assessing damages on injunction, taken after reversal by this court, are part of main cause and reviewable by this court directly. *Id.*

12. *Exclusive Jurisdiction.* When diverse citizenship is absent and jurisdiction of District Court is based solely upon ground that suit arises under Constitution, appeal will not lie to Circuit Court of Appeals, but only, and exclusively, to this court. *Raton Water Works Co. v. Raton.* 552

13. *Federal Question.* To empower this court to review judgment of District Court as involving Constitution, under Jud. Code, § 238, writ of error must present substantial constitutional question, properly raised below. *Sugarman v. United States.* ..... 182

**JURISDICTION—Continued.**

PAGE

(5) *Over Court of Claims.* See VI, *infra*.

14. *Finding* that delay by Government in approving contract was reasonable is a finding of ultimate fact, binding on this court unless made without evidence or inconsistent with other facts found. *Hathaway & Co. v. United States* . . . . . 460

15. *Afterthought.* Contention that sufficient credit of time not allowed for extra work *held* not reviewable in this court, it not having been made in Court of Claims. *Id.*

16. *Lack of Finding.* When Court of Claims fails to state what contract was between claimant and Government, this court cannot find it from facts which do not establish contract as matter of law. *Del., Lack. & W. R. R. v. United States* . . . . . 385

(6) *Over District Court for Alaska.* See III, 8, *supra*.

17. Provisions of Jud. Code governing review of cases coming from Alaska are to be construed in light of their legislative history and of Judiciary Act of 1891. *Alaska Pacific Fisheries v. Alaska* . . . . . 53  
*Alaska Salmon Co. v. Alaska* . . . . . 62

(7) *Over Supreme Court of Philippines.* See I, 2, *supra*.

18. *Local Law.* This court will not disturb decision on local question of contract, unless clearly wrong. *Beaumont v. Prieto* . . . . . 554

19. *Treaty Cases.* Appeal from Supreme Court of Islands perfected before Act of 1916, is governed by § 248, Jud. Code, which gives this court jurisdiction in all cases in which any treaty is involved. *Compañia General v. Alhambra Cigar Co* . . . . . 72

20. *Id.* Decision that name is geographical and descriptive term not subject to registration as trade-name under law before or since cession of Islands, that its use was not unfair competition, and that suit was not for infringement of trade name, *held* not to involve Treaty of Paris of 1898. *Id.*

21. *Local Question; Value in Dispute.* Judgment which denied right of Public Utility Commissioners to require Manila street car company to give free transportation to

**JURISDICTION—Continued.**

PAGE

detectives, based upon construction of franchise ordinance, held not reviewable under Jud. Code, § 248, before amendment of 1916, (1) as not involving Constitution or any statute, treaty, title or privilege of United States, and (2) because value in controversy did not exceed \$25,000. *Public Utility Commrs. v. Manila Elec. R. R. Co.* . . . . . 262

(8) *Over State Courts.*

22. *Rights and Immunities.* Under § 237, Jud. Code, as amended, denial of rights and immunities under Federal Employers' Liability Act reviewable only by certiorari. *Chicago & G. W. R. R. v. Basham* . . . . . 164

23. *Finality; Rehearing.* Under § 237, as amended, judgment must be final; judgment is not final until petition for rehearing disposed of by state court. *Id.*

24. *Id. Limitation.* When petition for rehearing entertained in state court, judgment not final for purposes of review until petition denied or otherwise disposed of, and 3 months' limitation of Act 1916 begins to run from that time. *Citizens Bank v. Opperman* . . . . . 448

25. *Cases Reviewable.* Classes of cases to which, under Act 1916, power to review judgments from state courts by writ of error is limited. *Id.*

26. *What is State Law.* Regulation of state board of health, upheld by state court under state pure food law, is state legislation in ascertaining relation to federal food law. *Corn Products Refg. Co. v. Eddy* . . . . . 427

27. *Id.* Order of state commission, under legislative authority, requiring railroad to restore a siding, is state law within Constitution and acts of Congress regulating jurisdiction of this court. *Lake Erie & W. R. R. v. Public Utilities Comm.* 422

28. *Error or Certiorari.* When decision of state court upholds state statute in conflict with valid law of United States, review is by writ of error. *New Orleans & N. E. R. R. v. Scarlet* . . . . . 528

29. *Local Question.* Objections based on manner of laying out improvement district, and on alleged failure to conform with city charter, raise only local questions. *Withnell v. Ruecking Constr. Co.* . . . . . 63

**JURISDICTION—Continued.**

PAGE

30. *Id. Examining Whole Record.* For determining whether error was prejudicial, this court will examine whole record, leaving state questions to the decision of state courts in cases coming from them. *Yazoo & M. V. R. R. v. Mullins* . . . . . 531

31. *Raising Federal Question.* Under Jud. Code, § 237, as amended, this court cannot consider claim of federal right not made in state court at proper time and in proper manner under state practice and which was denied consideration on that ground. *Hartford Life Ins. Co. v. Johnson* . . . . . 490

32. *Federal Question.* Exercise of independent judgment by courts of one State in construing charter granted by another raises no federal question, if no statute or decision of the other State, construing the charter, was pleaded or put in evidence. *Id.*

33. *Concurrent Findings; Negligence.* In absence of manifest error, concurrent findings by state courts that evidence of negligence in case under Federal Employers' Liability Act is insufficient to go to jury, will not be reexamined. *Gillis v. N. Y., N. H. & H. R. R.* . . . . . 515

**IV. Jurisdiction of Circuit Court of Appeals.** See III, (3); 6, 12, 17, *supra*.

1. When diverse citizenship absent and jurisdiction of District Court based upon ground that suit arises under Constitution, appeal will not lie to Circuit Court of Appeals, but only, and exclusively, to this court. *Raton Water Works Co. v. Raton* . . . . . 552

2. In cases from Alaska. See *Alaska Pacific Fisheries v. Alaska* . . . . . 53

**V. Jurisdiction of District Court.** See II, 2; III (4); *supra*; **Bankruptcy Act.**

1. *Constitutional Questions*, not devoid of merit, suffice as basis for jurisdiction in District Court, however decided. *Columbus Ry. & Power Co. v. Columbus* . . . . . 399

2. *Habeas Corpus; Custody of Infant.* No jurisdiction in *habeas corpus* to determine and award custody of infant at suit of alien against citizen of State of forum, when only question is which of parties is the mother. *Matters v. Ryan* . . . . . 375



**JURISDICTION—Continued.**

PAGE

3. *Id.* Claim that such case arises under law of United States because infant was imported by respondent in violation of Immigration Laws is frivolous. *Id.*
4. *Id.* *Diverse Citizenship; Pecuniary Interest. Quære:* Whether diversity of citizenship with averment of pecuniary interest could confer jurisdiction on federal court in *habeas corpus. Id.*
5. *Local Suits; Service of Process.* Suit to set aside a transfer of property is local, in the sense of Jud. Code, § 54, allowing service on defendant in his district of residence in the same State. *Collett v. Adams* ..... 545
6. *Id.* Such local suits excepted by Jud. Code, § 51, from general rule against suing defendant in district other than that of his inhabitancy. *Id.*
7. *Admiralty; Requisition of Ship,* under Act of June 15, 1917, for war purposes, but without displacing custody and possession of marshal, does not oust jurisdiction of District Court in admiralty. *Ex parte Whitney Steamboat Co.* ..... 115  
See **Parties, 2.**
8. *Receivership; Enjoining Officials in Several States.* District Court, having extended receivership under Jud. Code, § 56, over entire business and property of company engaged in interstate transportation and sale of gas in several States of circuit, has jurisdiction of dependent bill by receiver to enjoin state officials from imposing rates alleged confiscatory and burdensome to interstate business. *Public Utilities Comm. v. Landon* ..... 236
9. *Effect of Mandate,* allowing further proceedings after reversal. *Arkadelphia Co. v. St. Louis S. W. Ry.* ..... 134
10. *Id. To Assess Damages on Injunction Bonds after Reversal,* with directions to dismiss without prejudice, the mandate allowing further consistent proceedings. *Id.*
11. *Id.* Effect of order releasing bonds and discharging sureties, not appealed from, on power to assess damages, under such mandate, where reversed decree reserved right to make further orders. *Id.*
12. *Id. Reference,* under rule of court referring only to damages under injunction bonds, may extend to other damages suffered under injunction. *Id.*

**JURISDICTION**—*Continued.*

PAGE

13. *Enjoining Order of Interstate Commerce Commission*, claimed to be beyond powers of Commission, without preliminary application for relief to Commission. *Skinner & Eddy Corp. v. United States* . . . . . 557

14. *Id. Venue.* Under jurisdictional Act of Oct. 22, 1913, suit to enjoin order increasing rates previously fixed on application under long and short haul clause, may be brought in district of residence of a defendant carrier who joined in original application. *Id.*

**VI. Jurisdiction of Court of Claims.** See III (5), *supra*.

1. Act of July 2, 1864, providing for purchase for United States of products of States declared in insurrection, etc., was in addition to Abandoned Property Act, and not amendment of that act in sense of Jud. Code, § 162, which gives jurisdiction to Court of Claims over claims for property taken under latter act and sold. *O'Pry v. United States* . . . 323

2. Jurisdiction, under Jud. Code, § 145, to review decision of Secretary of Interior under Act Mar. 26, 1908, providing for repayment where excessive payments made to United States under public land laws. *United States v. Laughlin* . . 440

**JURY AND JURORS.** See **Instructions.**

**LABELS.** See **Food; Meat Inspection Act.**

**LABOR.** See **Hours of Service Act.**

Annual labor. See **Mines and Mining**, 13, 14.

Arizona law, restricting hours of labor of women in hotels and excepting railroad restaurants, sustained. *Dominion Hotel v. Arizona* . . . . . 265

**LACHES:**

1. Mandamus limited by equitable doctrine of laches and not within general statutes of limitations. *Arant v. Lane* . . . 367

2. In absence of satisfactory explanation, delay of 20 months after removal from office in applying for mandamus against Secretary of Interior to compel reinstatement, *held* laches, it appearing that another appointee had meantime been filling office and drawing salary. *Id.*

**LAND DEPARTMENT.** See **Mines and Mining**, 5; **Public** PAGE  
**Lands.**

**LANDLORD AND TENANT:**

Lease. See **Indians**, 1.

Tenancy at will. See **Mines and Mining**, 10.

**LANDS.** See **Deeds**; **Indians**; **Mines and Mining**; **Public**  
**Lands**; **Waters.**

Opportunity to accept a continuing offer of sale lost by  
making counter offer. *Beaumont v. Prieto* . . . . . 554

Right to erect billboards. See **Constitutional Law**, XI, 16.

**LEASE.** See **Contracts**, 2; **Indians**, 1.

**LEGISLATIVE ACTS.** See **Constitutional Law**, V, 2.

**LICENSE:**

For purpose of exploring for minerals. See **Mines and**  
**Mining**, 10.

License fees. See **Constitutional Law**, II, 6-9; VII; XI,  
12, 15.

**LIENS.** See **Bankruptcy Act**, 9, 10.

**LIMITATION OF LIABILITY.** See **Admiralty**, 8.

**LIMITATIONS.** See **Laches.**

Time for presenting and suing on claims to refund of inher-  
itance taxes, erroneously collected. See **Taxation**, III.

Allowance of mandamus is not within general statutes of  
limitations. *Arant v. Lane* . . . . . 367

**LIQUIDATED DAMAGES.** See **Contracts**, 9-11.

**LIQUOR LAWS.** See **Intoxicating Liquors.**

**LIVE STOCK:**

Stipulation for written claim of loss. See **Interstate**  
**Commerce Acts**, 7, 8.

**LOAN.** See **Banks and Banking.**

**LOCAL ACTION.** See **Jurisdiction**, V, 5, 6.

**LOCAL QUESTIONS.** See *Jurisdiction*, III, 18, 20, 21, 27, PAGE 29, 30.

**LOCATION.** See *Mines and Mining; Public Lands*, 1-3.

**LONG AND SHORT HAUL.** See *Interstate Commerce Acts*, 1-4.

**MAILS:**

1. *Transportation Contracts.* Where railroad undertook transportation during certain period upon notice from Post Office Department that compensation had been fixed at certain rates but "subject to future orders," held, that contract did not guarantee against change of rates during that period. *Del., Lack. & W. R. R. v. United States*..... 385
2. *Id. Changing Rates.* Reservation of right to change rates may be availed of by United States through act of Congress, even though Postmaster General had no authority when contract was made to change rates. *Id.*
3. *Id. Reweighing.* Act of Mar. 2, 1907, directing Postmaster General to readjust compensation for transportation of mail on certain railroad routes carrying certain average weights of mail per day, did not require reweighing. *Id.*
4. *Id. Increased Compensation.* Act of Mar. 4, 1913, authorizing Postmaster General to add not exceeding 5% per annum to compensation of railroads, under pending contracts for transportation of mail, left increases, within that limit, to his discretion. *United States v. Atchison, T. & S. F. Ry.*..... 451
5. *Espionage Act.* Prosecution for use of mails in furtherance of conspiracy to obstruct recruiting, in violation of Espionage Act. *Schenck v. United States*..... 47

**MANDAMUS:**

1. *To Control Lower Court.* May be resorted to for purpose of securing judicial action, but not for purpose of determining in advance what that action shall be. *Ex parte Wagner*..... 465
2. *Id.* Writ can not be directed to Circuit Court of Appeals to control proceedings in case remanded to District Court. *Id.*



**MANDAMUS**—*Continued.*

PAGE

3. *Id.* Interlocutory proceedings for accounting, in District Court, will not be forbidden merely upon ground that disposition of other proceedings before this court may possibly render accounting nugatory and useless expense. *Id.*

4. *Laches and Limitations.* Under Code of District of Columbia, as on general principle, allowance of writ is matter of sound judicial discretion, and applications are limited as to time by equitable doctrine of laches and are not within general statutes of limitations. *Arant v. Lane* . . . . . 367

5. *Id.* In absence of satisfactory explanation, delay of 20 months after removal from office in applying for mandamus against Secretary of Interior to compel reinstatement, *held* laches, it appearing that another appointee had meantime been filling office and drawing salary. *Id.*

**MANDATE.** See **Judgments**, 2-5; **Jurisdiction**, III, 3; V, 9-12; **Procedure**, IV.

Effect of mandate allowing further proceedings after reversal. *Arkadelphia Co. v. St. Louis S. W. Ry.* . . . . . 134

**MARITIME LAW.** See **Admiralty**.

**MASTER:**

To assess damages. See **Injunction**, 7.

**MASTER AND SERVANT.** See **Carriers**, 1; **Claims**, 2; **Constitutional Law**, XI, 11, 25-30; **Employers' Liability Act**; **Hours of Service Act**; **Labor**; **Safety Appliance Act**.

Provisions of Civil Code of Canal Zone touching relation of master and servant not inconsistent with common-law rule holding former liable for personal injuries caused by negligence of latter while in course of employment. *Panama R. R. v. Bosse* . . . . . 41

**MATERIALMEN.** See **Admiralty**, 7.

**MEAT INSPECTION ACT:**

1. Secretary of Agriculture may prohibit use of word "sausage" as deceptive, when applied to compound of meat, with added cereal and water in excess of certain percentage. *Houston v. St. Louis Packing Co.* . . . . . 479

**MEAT INSPECTION ACT.**—*Continued.*

PAGE

2. Secretary not required to mark meat-food product "inspected and passed" merely because it is wholesome, if sold under deceptive name. *Id.*
3. Whether name "sausage" is deceptive as applied to such compound is question of fact for Secretary, under power to make regulations for carrying act into effect, and his decision, fairly arrived at, is conclusive. *Id.*
4. Applies to oleomargarine. *Brougham v. Blanton Mfg. Co.* 495
5. Registration of trade-name under trade-mark law has no bearing on right to use it under Meat Inspection Act. *Id.*
6. Decision of Secretary of Agriculture that trade-name is deceptive conclusive on courts. *Id.*
7. He may revoke approval and disapprove. *Id.*
8. Name "Creamo" properly disapproved when percentage of cream in product seriously reduced. *Id.*
9. Investment on faith of approval does not prevent subsequent disapproval. *Id.*

**MEXICAN GRANTS.** See **Indians**, 6-8; **Public Lands**, 5.

**MILITARY FORCES.** See **Army**; **Criminal Law**, 3-5, 9, 15, 11.

**MINES AND MINING.** See **Jurisdiction**, III, 9; **Procedure**, V, 4.

1. *Location Notice; Extralateral Rights.* In determining extralateral rights between adjoining patented claims, failure of earlier location notice to comply with state law is immaterial if junior locator, at time of locating, knew that earlier locator was in possession of and working his claim. *Butte & Superior Co. v. Clark-Montana Co.* . . . . . 12
2. *Id.* Purpose of location notice is to give warning of prior appropriation. *Id.*
3. *Id.* *Possession.* Unequivocal possession of claim gives constructive notice of possessor's rights thereunder. *Id.*
4. *Extralateral Rights; Priority.* As between two patented claims, priority of right to vein of one where it dips beneath

**MINES AND MINING—Continued.**

PAGE

and unites with vein on the other is not determined by dates of entries and patents but by priority of discovery and location. *Id.*

5. *Id. Presumption from Patent.* In absence of adverse suit, no presumption that anything was considered by Land Department, in patenting claim, except question of right to the surface. *Id.*

6. *Id. Duty to Adverse.* An application to patent a lode mining claim invites only such contests as affect surface; and where no surface conflict involves the apex, a prior locator of adjacent unpatented claim is not obliged to adverse to protect his right to follow his vein extralaterally on the dip. *Id.*

7. *Id. Conveyance.* Quitclaim of undivided interest in claim, held to pass only rights appertaining to that claim and not to affect extralateral rights appertaining to adjoining claim owned by grantor. *Id.*

8. *Id. Decreeing Relief.* In suit to determine extralateral mining rights and for accounting, plaintiff may be granted relief which proven conditions warrant without prejudice to future supplemental proceedings based on revelations of future mining development. *Id.*

9. *Discovery and Location; Oil Lands.* To create valid rights or initiate title as against United States, discovery within location essential. *Union Oil Co. v. Smith* . . . . . 337

10. *Id. Possession before Discovery.* For purpose of exploring for mineral, a qualified person who has entered peaceably upon public land is a licensee or tenant at will of United States and allowed a right of possession, the extent of which, *i. e.*, whether confined to *pedis possessio* or coterminous with boundaries of his inchoate location,—not decided. *Id.*

11. *Id.* Right of possession before discovery may be maintained only by continued actual occupancy by qualified locator engaged in prosecution of work looking to discovery. *Id.*

12. *Id. Marking and Recording.* Discovery may follow marking and recording of mining claim, and perfect location as of time of discovery, provided no rights of third parties have intervened. *Id.*

**MINES AND MINING**—*Continued.*

PAGE

13. "Assessments," "annual assessment labor," and "assessment work;" meaning of, in acts of Congress and practice of miners. *Id.*

14. *Id.* *Oil Lands.* Act of 1903, providing that annual assessment labor may be done upon any one of group of contiguous oil-land locations not exceeding 5, in same ownership, provided it will tend to development or to determine oil-bearing character, refers to locations based each on discovery of oil within its limits, and evinces no purpose to break down distinction between mere *pedis possessio* of prospector before discovery and rights resulting from discovery and perfected location. *Id.*

15. *Id.* *Discovery Work; Adverse Claimant.* Where two contiguous tracts are claimed by same party under locations without discovery, drilling well on one of them, even though it tends to determine oil-bearing character of the other also, will not avail to hold other against an intervening qualified claimant who enters peaceably and prosecutes discovery work on his own account. *Id.*

**MISBRANDING.** See **Food; Meat Inspection Act.**

**MISSOURI:**

Assessment for local improvement in accordance with rule prescribed by charter of City of St. Louis, adopted under Missouri constitution, sustained. *Withnell v. Ruecking Constr. Co.* . . . . . 63

**MOOT CASES.** See **Jurisdiction, I; Procedure, VI, 2.**

**MOTIVE.** See **Constitutional Law, IV, 2; Criminal Law, 3, 6, 9, 11, 16, 17; Evidence, 4; Interstate Commerce, 3, 6.**

**MUNICIPAL CORPORATIONS.** See **Franchises, 4; Jurisdiction, III, 21; Taxation, IV, 1-5, 13.**  
Ordinances regulating billboards. See **Constitutional Law, XI, 12-16.**

1. Pollution of private oyster beds by sewage from. *Darling v. Newport News* . . . . . 540



**MUNICIPAL CORPORATIONS**—*Continued.*

PAGE

2. Right of State to require individuals to remove timber  
refuse from vicinity of municipal watersheds. *Perley v.*  
*North Carolina* ..... 510
3. Right of San Francisco to construct street railroad on  
streets occupied by other lines. *United Railroads v. San*  
*Francisco* ..... 517

**NARCOTIC DRUG ACT:**

1. Upheld as within taxing power. *United States v. Doremus* 86  
*Webb v. United States* .. 96
2. Section 2 prohibits retail sales to persons who have no  
physician's prescription, or order blank, and who cannot  
obtain one because not of class to which such blanks may  
be issued. *Webb v. United States* ..... 96
3. If registered physician issues order to habitual user not  
in course of professional treatment, but to provide user with  
drug to keep him comfortable by maintaining his customary  
use, such order is not a physician's prescription under excep-  
tion (b) of § 2. *Id.*

**NATIONAL BANKS.** See **Banks and Banking.****NAVIGATION COMPANIES.** See **Hours of Service Act, 3.**

**NEGLIGENCE.** See **Constitutional Law, XI, 11, 25-28;**  
**Employers' Liability Act; Master and Servant.**  
Concurrent findings. See **Procedure, V, 5.**

**NEWSPAPERS.** See **Constitutional Law, VIII; Criminal**  
**Law, 9.**

**NEW YORK:**

Law as to weights and measures. *Standard Scale Co. v.*  
*Farrell* ..... 571

**NOTICE.** See **Constitutional Law, XI, 4, 21; Judicial**  
**Notice.**

Of claim of loss. See **Interstate Commerce Acts, 7, 8.**  
Location notice. See **Mines and Mining.**  
From possession of mining claim. *Id.*, 3.  
From record of deed. See **Deeds, 2.**

**OFFICERS.** See **Canal Zone**, 1; **Contracts**, 12; **Criminal Law**, 19; **Mails**, 2-4; **Meat Inspection Act**, 1, 2; **Public Lands**, 2-4; **Taxation**, II, 4; III; **Weights and Measures**.  
Mandamus to compel reinstatement. See **Mandamus**, 5.

Interest on public moneys. See **Accounting**, 1.

Administrative decisions. See **Interstate Commerce Acts**, 1-4; **Meat Inspection Act**, 3, 6-9; **Mines and Mining**, 5; **Public Lands**, 5, 7; **Taxation**, III, 1.

When suit against becomes moot by reason of expiration of their term. *Shaffer v. Howard* . . . . . 200

**OIL LANDS.** See **Mines and Mining**, 9-15.

**OILS:**

State inspection. See **Constitutional Law**, II, 10.

**OLEOMARGARINE.** See **Meat Inspection Act**, 4.

**ORDINANCES.** See **Franchises; Jurisdiction**, III, 21.

Validity of ordinance regulating billboards. See **Constitutional Law**, XI, 12-16.

**ORIGINAL CASES.** See **Procedure**, I.

**ORIGINAL JURISDICTION.** See **Jurisdiction**, III, (2).

**ORIGINAL PACKAGE.** See **Constitutional Law**, II, 2.

**OYSTER BEDS:**

Pollution of, by sewage. See *Darling v. Newport News* . . . 540

**PAIN.** See **Damages**, 1.

**PANAMA.** See **Canal Zone**.

**PARENT AND CHILD:**

Question as to maternity and custody of infant is non-federal in character. *Matters v. Ryan* . . . . . 375

**PARTIES:**

Who may question constitutionality of statutes. See **Constitutional Law**, XII.

Right of shipper, enjoined as a class, to intervene in proceedings to assess damages under erroneous injunction of state rates. See **Injunction**, 7.

**PARTIES**—*Continued.*

PAGE

1. Pueblo of Santa Rosa is legal entity, with capacity to sue to protect rights claimed under Spanish and Mexican grants; and fact that Indians are wards of Government does not affect capacity to sue in District of Columbia to restrain Secretary of Interior from offering and listing lands to which Pueblo alleges title. *Lane v. Pueblo of Santa Rosa* . . . . . 110
2. Owner who has not appeared cannot object to order, on consent of libelants and Shipping Board, for use of ship by Government, while vessel remains in custody of court through designation of its master as special deputy marshal. *Ex parte Whitney Steamboat Co.* . . . . . 115
3. Sections 18b and 59f of Bankruptcy Act, allowing creditors to intervene, are permissive only; and, unless creditor exercises right, he remains stranger to proceedings. *Grat-iot State Bank v. Johnson* . . . . . 246
4. Where tax sustained by Commissioner of Internal Revenue and invalidity under statute is not clear, there is probable cause for its exaction by collector, and under Rev. Stats., § 989, in action against him, recovery will be from United States. *Crocker v. Malley* . . . . . 223

**PATENTS FOR INVENTIONS:**

1. Application in oil extraction of mats made of long hair, woven as designated but without improvement in art of weaving, is mere mechanical adaptation. *Werk v. Parker* . . 130
2. Act of 1910, allowing compensation for use by United States of patented inventions, prevents recovery where invention is by government employee, completed during employment although in hours when inventor not on duty. *Moore v. United States* . . . . . 487

**PATENTS FOR LANDS.** See **Indians; Mines and Mining; Public Lands.**

**PAYMENT.** See **Banks and Banking, 2.**

**PENALTIES.** See **Damages, 3.**

**PERFORMANCE.** See **Contracts, 3-6, 8, 9, 15.**

**PERJURY.** See **Contempt; Criminal Law, 1, 2.**

**PERSONAL INJURY.** See Constitutional Law, XI, 11, 25- PAGE  
28; Employers' Liability Act; Master and Servant.

**PHILIPPINE ISLANDS.** See Jurisdiction, III, (7).

**PHYSICIANS.** See Narcotic Drug Act.

**PLEADING.** See Equity, 4.

Sufficiency of allegations of indictment. See Criminal  
Law, 6, 7, 10-12.

In suit to determine extralateral rights between mining  
claims, complaint averred that construction and application  
of §§ 2322-2332, Rev. Stats., were involved, set up discov-  
ery, location and patent of plaintiffs' claim, and, to meet de-  
fect of location notice under state law, averred possession  
and working of plaintiffs' claim for more than 5 years from  
date of discovery, the limitation period provided by § 2332.  
*Held*, that latter allegations were part of plaintiffs' case, and  
involved construction and application of § 2332. *Butte &*  
*Superior Co. v. Clark-Montana Co.* . . . . . 12

**POLE TAX.** See Constitutional Law, II, 8, 9.

**POLICE POWER.** See Constitutional Law.

**POSSESSION.** See Mines and Mining.

**POSTMASTER GENERAL.** See Contracts, 12-16; Mails.

**POST OFFICE DEPARTMENT.** See Contracts, 12-16;  
Mails.

**POST ROADS.** See Constitutional Law, II, 8.

**PREËMPTION.** See Public Lands, 1-4.

**PREFERENCES.** See Bankruptcy Act.

**PRESIDENT.** See Canal Zone, 1.

**PRESUMPTION:** See Procedure, V, 9.

1. In absence of adverse suit, no presumption that anything  
was considered by Land Department, in patenting mining



**PRESUMPTION**—*Continued.*

PAGE

- claim, except question of right to surface. *Butte & Superior Co. v. Clark-Montana Co.*..... 12
2. When date of acquisition not shown, presumed that liquor was acquired after approval and before effective date of law making its possession unlawful. *Barbour v. Georgia*.. 454
3. In favor of validity of state legislation. *Middleton v. Texas Power & Light Co.*..... 152
- Perley v. North Carolina*..... 510

**PRINCIPAL AND AGENT.** See **Contracts**, 7; **Estoppel**, 1; **Interstate Commerce Acts**, 8.

**PRIVILEGES AND IMMUNITIES.** See **Constitutional Law**, VII.

**PROCEDURE.** See **Accounting**, 2; **Admiralty**; **Bankruptcy Act**; **Contempt**, 4; **Criminal Law**; **Eminent Domain**; **Employers' Liability Act**; **Equity**; **Evidence**; **Injunction**; **Instructions**; **Interstate Commerce Acts**; **Judgments**; **Judicial Notice**; **Laches**; **Limitations**; **Mandamus**; **Parties**; **Pleading**; **Presumption**.

*Certiorari.* See **Jurisdiction**, III, 8, 22, 28.

Copyright, assessing damage. See **Copyright**.

Claims, time for presenting, as prerequisite to suit for refund of taxes in Court of Claims. See **Taxation**, III.

Damages. See **Contracts**; **Copyright**; **Damages**; **Eminent Domain**; **Injunction**; **Judgments**, 10.

District of Columbia. See **Mandamus**, 4.

Answer, to merits, when demurrer overruled. See **Equity**, 4.

Estoppel to question depositions introduced in evidence. See **Estoppel**, 1.

Interest. See **Injunction**, 9; **Judgments**, 8-11.

Intervention. See **Bankruptcy Act**, 8; **Injunction**, 7.

Judgment, finality of. See **Jurisdiction**, III, 8, 23, 24.

Liens. See **Bankruptcy Act**, 9, 10.

Master. See **Injunction**, 7.

Receivers. See **Jurisdiction**, V, 8.

Reference. See **Injunction**, 7.

Reversal, assessment of damages after. See **Injunction**, 2.

Taxes, suits to recover. See **Taxation**, II, 4-5; III.

Trial. See **Criminal Law**, 14.

Witnesses, self-incrimination. See **Constitutional Law**, IX.

**PROCEDURE—Continued.**

PAGE

**I. Original Actions. See Mandamus.**

1. Appointing commissioner and taking additional proofs.  
*New York v. New Jersey* . . . . . 202
2. Where this court declined leave to file petition for *habeas corpus*, because of competency of other courts to afford relief, motion for leave to apply for writ to District Court, denied as superfluous. *Ex parte Tracy* . . . . . 551
3. *Habeas Corpus*, to relieve from unauthorized imprisonment for contempt. *Ex Parte Hudgings* . . . . . 378

**II. Moot Cases. See infra, VI, 2.**

- When suit against state official must be dismissed on appeal upon expiration of his term. *Shaffer v. Howard* . . . . . 200
- See *Public Utilities Commrs. v. Compañia General* . . . . . 425

**III. Dismissal.**

This court may decline to dismiss on ground that writ of error and citation were not made returnable in time, when the irregularity had color of authority from court or judge below. *Beaumont v. Prieto* . . . . . 554

**IV. Mandate; Proceedings after Reversal.**

Effect of failure to appeal and assign error as to part of decree releasing injunction bonds and discharging sureties, on authority to assess damages after reversal, where mandate allows further consistent proceedings and decree appealed from contained reservation of power. *Arkadelphia Co. v. St. Louis S. W. Ry.* . . . . . 134

2. Proceedings to assess damages under erroneous injunction of state railroad rates, and liability of sureties on preliminary injunction bonds. *Id.*

**V. Scope of Review.**

1. *Examination of Whole Record.* For determining whether error was prejudicial, this court will examine whole record, leaving state questions to decision of state courts in cases coming from them. *Yazoo & M. V. R. R. v. Mullins* . . . . . 531
2. *Federal Question.* Under Jud. Code, § 237, as amended, this court cannot consider claim of federal right not made in

**PROCEDURE—Continued.**

PAGE

state court at proper time and in proper manner under state practice and which was denied consideration on that ground.	
<i>Hartford Life Ins. Co. v. Johnson</i> .....	490
<i>Barbour v. Georgia</i> .....	454
<i>Southern Pacific v. Arizona</i> .....	472

**See Jurisdiction, III, 9.**

3. <i>Id.</i> Constitutional question affording jurisdiction must be substantial and properly raised below. <i>Sugarman v. United States</i> .....	182
--	-----

4. <i>Concurrent Findings.</i> Findings of fact by District Court concerning apexes, courses and dips of mineral veins in dispute, and affirmed by Circuit Court of Appeals, must be accepted by this court unless clearly wrong. <i>Butte &amp; Superior Co. v. Clark-Montana Co.</i> .....	12
--	----

5. <i>Id.</i> In absence of manifest error, concurrent findings by state courts that evidence of negligence in case under Federal Employers' Liability Act is insufficient to go to jury, will not be reëxamined. <i>Gillis v. N. Y., N. H. &amp; H. R. R.</i> .....	515
--	-----

6. <i>Id.</i> Findings of fact by two lower courts accepted. <i>Chicago &amp; E. I. R. R. v. Collins Produce Co.</i> .....	186, 192
<i>Capital Transp. Co. v. Cambria Steel Co.</i> .....	334

7. <i>Findings of Court of Claims.</i> When Court of Claims fails to state what contract was between claimant and Government, this court cannot find it from facts which do not establish a contract as a matter of law. <i>Del., Lack. &amp; W. R. R. v. United States</i> .....	385
---	-----

8. <i>Id.</i> Charges embodied in requests for findings that contract with Government was procured by one without financial standing, by imposing on Postmaster General, concluded by judgment of Court of Claims sustaining contract. <i>United States v. Purcell Envelope Co.</i> .....	313
---	-----

9. <i>Id.</i> Presumption that evidence touching amount of damages, including expense necessary to make contractor ready for performance, was duly considered by Court of Claims. <i>Id.</i>	
--	--

10. <i>Absence of Bill of Exceptions.</i> Effect of. <i>Frohwerk v. United States</i> .....	204
---	-----

**PROCEDURE**—*Continued.*

PAGE

**VI. Scope and Form of Decree.**

1. *Opportunity to Answer; Judgment Absolute.* Where trial court dismisses bill on defendants' motion, it is error for appellate court, finding the bill made a case for the relief sought, to award a permanent injunction; for defendants are entitled to answer to merits as if their motion had been overruled originally. *Lane v. Pueblo of Santa Rosa* . . . . . 110
2. *Moot Cases.* Form of judgment when case becomes moot during appeal. *Public Utility Commrs. v. Compañía General* 425  
*Shaffer v. Howard* . . . . . 200
3. *Leaving Questions Open.* Right to damages due to parallel street railway left without prejudice in affirming decree dismissing bill to enjoin construction, the road having been built pending appeal. *United Railroads v. San Francisco* . . 517
4. *Id.* In suit to determine extralateral mining rights and for accounting, plaintiff may be granted relief which proven conditions warrant, without prejudice to future supplemental proceedings based on revelations of future mining development. *Butte & Superior Co. v. Clark-Montana Co.* . . . . . 12

**VII. Stare Decisis.**

What is said in an opinion upon point not raised or properly involved cannot control in subsequent case where very point is presented for decision. *Union Tank Line Co. v. Wright* . . 275

**PROCESS, SERVICE OF.** See **Bankruptcy Act**, 1-5.

**PROSTITUTION.** See **Criminal Law**, 19.

**PUBLIC ACTS.** See **Constitutional Law**, V, 2.

**PUBLIC CONTRACTS:**

United States. See **Contracts**, 8-21.  
 Franchises. *Id.*, 3-6.

**PUBLIC LANDS.** See **Mines and Mining.**

Capacity of Pueblo of Santa Rosa to sue to restrain Secretary of Interior from offering, etc., under public land laws, lands to which Pueblo alleges title under Spanish and Mexican grants. See **Indians**, 6-8.



**PUBLIC LANDS—Continued.**

PAGE

1. *Railroad Grant; Preemption before Definite Location.* Under Northern Pacific grant of 1864, filing of map of general route, followed by withdrawal order, did not take odd sections out of public domain or exempt them from preemption entry prior to filing and acceptance of map of definite location. *United States v. Laughlin* . . . . . 440
2. *Id. Preemption Price.* Act of 1864 fixed no price for odd sections within limits of grant, and right of qualified person to preempt prior to acceptance of map of definite location at minimum price was substantial right of which he could not be deprived by government officials. *Id.*
3. *Id. Public Reservations.* Rev. Stats., § 2364, providing that Commissioner of General Land Office shall fix price of not less than \$1.25 for lands of any reservation when brought into market, has no application to withdrawn odd sections within Northern Pacific grant limits, when preempted before definite location of railroad. *Id.*
4. *Id.* Act of June 22, 1874, confers no authority upon officials to charge more for land relinquished by Northern Pacific than otherwise might have been charged. *Id.*
5. *Survey; Contiguous Grant.* Official resurvey of boundary of patented Mexican grant, for purpose of defining contiguous public land, does not operate as adjudication against grant owner or otherwise so affect rights as to afford ground for injunction against Secretary of Interior. *Lane v. Darlington* . . . . . 331
6. *Transportation of Troops.* Classes of persons not embraced within term "troops of the United States," as used in land grant acts, and in agreement of Union Pacific Co., in relation to transportation for Government. *United States v. Union Pac. R. R.* . . . . . 354
7. *Refunds; Effect of Decision.* When decision of Secretary of Interior, under Act Mar. 26, 1908, providing for repayment where it appears to his satisfaction that excessive payments have been made to United States under public land laws, reviewable by courts. *United States v. Laughlin* . . . . 440

**PUBLIC MONEYS.** See **Accounting**, 1.**PUBLIC OFFICERS.** See **Officers**.

**PUEBLO OF SANTA ROSA.** See **Indians**, 6-8.

PAGE

**PURE FOOD LAWS.** See **Food**.

**QUITCLAIM.** See **Deeds**, 1.

**RAILROADS.** See **Boiler Inspection Act**; **Carriers**; **Employers' Liability Act**; **Hours of Service Act**; **Interstate Commerce Acts**; **Safety Appliance Act**.

Transportation of troops of United States. See **Army**, 2.

Transportation of mails. See **Mails**.

Street railways. See **Eminent Domain**, 1, 2; **Franchises**; **Jurisdiction**, III, 21.

Private and public tracks. See **Carriers**, 11-13.

Land.grants. See **Public Lands**, 1-4, 6.

Taxation; tank cars. See **Taxation**, IV, 6-10.

Taxation; license fee; railroad construction work. *Id.*, 11, 12.

**RATES.** See **Carriers**, 8-10; **Franchises**, 4, 5; **Gas Companies**; **Injunction**, 5-9; **Interstate Commerce Acts**, 1-4.

**REAL PROPERTY.** See **Deeds**; **Indians**; **Mines and Mining**; **Public Lands**; **Waters**.

Opportunity to accept continuing offer of sale lost by making counter offer. *Beaumont v. Prieto* . . . . . 554

Right to erect bill-boards. See **Constitutional Law**, XI, 16.

#### **RECEIVERSHIP:**

Jurisdiction of District Court, as to several States of circuit. See **Jurisdiction**, V, 8.

**RECORDATION OF INSTRUMENTS.** See **Deeds**, 2, 3. )

**REED AMENDMENT.** See **Intoxicating Liquors**, 1.

**REHEARING.** See **Jurisdiction**, III, 23, 24.

#### **REFERENCE:**

To assess damages under injunction and injunction bonds, after reversal. See **Injunction**, 7.

**RENT.** See **Indians**, 1.

- REQUISITION.** See Admiralty, 1, 2. PAGE
- RESCISSION.** See Banks and Banking.
- RESERVATION.** See Contracts, 19; Public Lands, 1-4.
- RESIDENCE.** See Jurisdiction, V, 5, 6, 14.
- RES JUDICATA.** See Judgments; Meat Inspection Act, 3, 6-9; Public Lands, 5, 7.
- RETURN DAY.** See Procedure, III.
- REVENUE.** See Taxation.
- REVERSAL:**  
Assessment of damages after. See Injunction, 2-9.
- REVIVOR.** See Judgments, 8; Jurisdiction, I, 1.
- RICHMOND, CITY OF.** See Taxation, IV, 13-15.
- RIGHTS OF WAY.** See Franchises, 1-3; Public Lands, 1-4.
- SAFETY APPLIANCE ACT:**
1. What amounts to a train movement, subject to train-brake provision, as distinguished from switching. *Louisville &c. Bridge Co. v. United States* . . . . . 534
  2. Act does not allow of substitute precautions or depend on balancing dangers involved in following its requirements against those involved in its neglect. *Id.*
- ST. LOUIS, CITY OF.** See Taxation, IV, 1-5.
- SALES.** See Deeds; Narcotic Drug Act; Real Property.  
Authority of Indian holding trust patent, leasing allotment under Act of June 25, 1910, to sell share of crop reserved as rental. *Miller v. McClain* . . . . . 308
- SAN FRANCISCO:**  
Right of City to build new street railroad on street occupied by another, under its charter and state constitution. *United Railroads v. San Francisco* . . . . . 517

<b>SANTA ROSA, PUEBLO OF.</b>	See <b>Indians, 6-8.</b>	<b>PAGE</b>
<b>SATISFACTION.</b>	See <b>Judgments, 6, 7.</b>	
<b>SAUSAGE.</b>	See <b>Meat Inspection Act, 1-3.</b>	
<b>SEARCHES AND SEIZURES.</b>	See <b>Constitutional Law, IX.</b>	
<b>SEAWORTHINESS.</b>	See <b>Admiralty, 8.</b>	
<b>SECRETARY OF AGRICULTURE.</b>	See <b>Meat Inspection Act.</b>	
<b>SECRETARY OF THE INTERIOR.</b>	See <b>Indians, 1, 2, 6-8; Mandamus, 5; Public Lands, 5, 7.</b>	
<b>SECRETARY OF WAR.</b>	See <b>Criminal Law, 19.</b>	
<b>SELECTIVE DRAFT LAW.</b>	See <b>Criminal Law, 3, 18.</b>	
<b>SELF-INCRIMINATION.</b>	See <b>Constitutional Law, IX.</b>	
<b>SERVICE OF PROCESS.</b>	See <b>Bankruptcy Act, 1-5.</b>	
<b>SET-OFF.</b>	See <b>Judgments, 7.</b>	
<b>SEWAGE.</b>	See <b>Waters, 2.</b>	
<b>SHIPPING.</b>	See <b>Admiralty.</b>	
<b>SOUTH DAKOTA:</b>		
	Under constitution and laws of South Dakota, interest received by state treasurer on state funds deposited by him in bank belongs to State, and treasurer must account therefor.	
	<i>South Dakota v. Collins</i> .....	220
<b>SOVEREIGNTY.</b>	See <b>International Law.</b>	
<b>SPANISH GRANTS.</b>	See <b>Indians, 6-8.</b>	
<b>STARE DECISIS.</b>	See <b>Procedure, VII.</b>	



**STATES.** See **Constitutional Law; Jurisdiction; Taxation**, PAGE IV.

1. Creation of, does not affect corporate status previously acquired under territorial laws and act of Congress. *Lane v. Pueblo of Santa Rosa* . . . . . 110
2. Duty of treasurer of South Dakota to account for interest on state funds deposited by him in bank. *South Dakota v. Collins* . . . . . 220

**STATUTES.** See Table of Statutes Cited, at front of volume; **Admiralty; Army; Bankruptcy Act; Boiler Inspection Act; Canal Zone; Claims; Constitutional Law; Copyright; Criminal Law; Customs Law; Deeds; Employers' Liability Act; Food; Hours of Service Act; Indians; Interstate Commerce Acts; Intoxicating Liquors; Jurisdiction; Labor; Mails; Meat Inspection Act; Mines and Mining; Narcotic Drug Act; Public Lands; Safety Appliance Act; Taxation; Weights and Measures.**

**I. Principles of Construction.**

1. *In Pari Materia.* Provisions of Jud. Code governing review of cases coming from Alaska are to be construed in light of their legislative history and of Judiciary Act of 1891. *Alaska Pacific Fisheries v. Alaska.* . . . . . 53
2. *Tenor.* In construing a statute, plain import of words used must control. *United States v. Atchison, T. & S. F. Ry.* . . . 451
3. *Effect.* Construction of state statute judged by its necessary effect; name not conclusive. *Standard Oil Co. v. Graves.* . . . . . 389
4. *Liberal.* Provisions of Hours of Service Act, concerning operation of railroad, and safety of employees and public which act aims to secure, liberally construed. *United States v. Brooklyn Eastern Dist. Term.* . . . . . 296
5. *Tax Law.* Law should not be construed to tax same income twice, unless intent to do so clearly expressed. *Crocker v. Malley.* . . . . . 223
6. *Liberal.* Provision of Yakima Treaty of 1855 liberally construed, as understood by Indians. *Seufert Bros. Co. v. United States.* . . . . . 194

**STATUTES—Continued.**

PAGE

7. "Amendment." The words "addition" and "amendment" as applied to statutes, may or may not have same meaning, according to purpose. *O'Pry v. United States* . . . 323
8. Amendment of 1918 did not affect indictments found under Espionage Act of 1917. *Frohwerk v. United States* . . 204

**STOCKHOLDERS.** See **Taxation**, II.

**STREET RAILWAYS.** See **Constitutional Law**, III, 1; XI, 23, 24; **Eminent Domain**, 1, 2; **Franchises**; **Jurisdiction**, III, 21.

**STREETS AND HIGHWAYS.** See **Taxation**, IV, 1-5.

**SURETIES:**

Liability on preliminary injunction bonds after reversal of erroneous final decree of injunction. See **Injunction**, 2-9.

**SURRENDER.** See **Franchises**, 4.

**SURVEY.** See **Public Lands**, 5.

**TANK CARS.** See **Taxation**, IV, 6-10.

**TARIFF ACT, 1913.** See **Customs Law**.

**TAXATION.** See **Bankruptcy Act**, 9, 10; **Customs Law**.

Validity of state inspection fees, and occupation taxes, under commerce clause. See **Constitutional Law**, II, 6-10.

Taxation, to abate billboards. *Id.*, XI, 12-16.

**I. Excise Taxes. Narcotic Drug Act.**

1. Power to levy excise taxes, uniform throughout United States, exercised at discretion of Congress. *United States v. Doremus* . . . . . 86
2. Provisions of § 2 of Narcotic Drug Act of 1914 have a reasonable relation to enforcement of tax provided by § 1, and do not exceed power of Congress. *Id.*

**II. Income Tax of 1913.**

1. *Trust or Joint Stock Assn: Extra Tax on Dividends.*  
Where shares and property of a corporation were transferred

**TAXATION—Continued.**

PAGE

to trustees, upon trust to convert into money and distribute proceeds among shareholders within given period, and in the meantime to have powers of owner, distributing income and applying funds to development, etc., of property, *held*, that neither trustees nor beneficiaries could be regarded as joint stock association, within meaning of § 11, G. (a); dividends upon stock left with trustees not subject to extra tax imposed by that section. *Crocker v. Malley* . . . . . 223

2. *Strict Construction.* Law should not be construed to tax same income twice, unless intent to do so clearly expressed. *Id.*

3. *Extra Tax; Purpose.* *Semble*, that purpose in taxing corporations and joint stock companies upon dividends of corporations that themselves pay tax was to discourage concentration of corporate power through holding companies and share ownership. *Id.*

4. *Suit against Collector.* Where tax sustained by Commissioner of Internal Revenue and invalidity under statute not clear, there is probable cause for its exaction by collector, and under Rev. Stats., § 989, in action against him, recovery will be from United States. *Id.*

5. *Id. Satisfaction; Set-off.* Where collector, with probable cause, collects excessive tax, amount due United States should be deducted from recovery, in action against him, and such deduction will conclude United States. *Id.*

**III. Inheritance Taxes. War Revenue Act, 1898.**

1. *Suit for Refund; Limitations.* Provisions of § 3226, Rev. Stats., that suit for refund shall be preceded by appeal to and decision by Commissioner of Internal Revenue and fixing time for suit when his decision is delayed more than 6 months, applies to inheritance taxes erroneously collected under War Revenue Act of 1898. *Rand v. United States* . . . 503

2. *Id.* Time for presenting such claims barred under §§ 3226 and 3228 was extended by refund acts of June 27, 1902, and July 27, 1912. *Id.*

3. *Id.* Act of 1912 requires explicit individual assertion of each claim, as prerequisite to suit to recover such taxes in Court of Claims; failure not excused by filing of claims by others or likelihood that claim will be disallowed. *Id.*

## TAXATION—Continued.

PAGE

## IV. State Taxation.

1. *Assessment for Local Improvement.* When made in accordance with fixed rule prescribed by legislative act, property owner not entitled to be heard in advance on question of benefits. *Withnell v. Ruecking Constr. Co.* . . . . . 63
2. *Id.* Assessment made in accordance with rule prescribed by charter of City of St. Louis held legislative in character. *Id.*
3. *Id.* Method of assessing part of cost of local improvements according to frontage, as provided in St. Louis charter, sustained. *Id.*
4. *Id.* System of area assessment provided by St. Louis charter not *per se* obnoxious to Fourteenth Amendment, and becomes so in application only when results are arbitrary or grossly unequal. *Id.*
5. *Id.* Objections based on manner of laying out improvement district, and failure to conform with city charter, raised only local questions. *Id.*
6. *Foreign Corporations; Movables.* State may tax movables regularly employed therein, although devoted to interstate commerce. *Union Tank Line Co. v. Wright* . . . . . 275
7. *Id. Valuation.* Valuation need not be limited to mere worth of articles taken separately, but may include intangible value due to organic relation of property in State to whole system. *Id.*
8. *Id. Methods.* Where tangibles constitute part of going concern operating in many States, and where absolute accuracy is impossible, court has sustained methods producing results approximately correct, *e. g.*, mileage basis in case of telegraph company, and average amount of property habitually brought in by car company. *Id.*
9. *Id.* But if plan is arbitrary and valuation excessive, it must be condemned because of conflict with commerce clause or Fourteenth Amendment, or both. *Id.*
10. *Id. Tank Cars.* Where company owning tank cars was assessed for those running in and out of Georgia, without regard to their value, upon track-mileage basis, held, that



**TAXATION**—*Continued.*

PAGE

rule adopted had no necessary relation to real value in Georgia, and that tax was void. *Id.*

11. *Occupation Tax; Discrimination.* State law making amount of tax for privilege of doing railroad construction work depend on whether person taxed has his chief office in State, discriminates against citizens of other States. *Chalker v. Birmingham & N. W. Ry.* . . . . . 522

12. *Id. Tender.* Citizen of another State who would be liable for larger tax, if valid, may question its validity without first tendering lower tax. *Id.*

13. *License Tax; Telegraph Companies.* City of Richmond is authorized by its charter and statutes of Virginia to impose occupation or license tax on business of telegraph company done within city. *Postal Tel.-Cable Co. v. Richmond* . . 252

14. *Personal Tax; Priority.* Under law of Virginia and charter of Richmond, city's claim for undistrained personal taxes inferior to landlord's lien. *Richmond v. Bird* . . . . . 174

15. *Id.* Same relation under Bankruptcy Act. *Id.*

16. *Suit Against Tax Officers.* When suit becomes moot by expiration of their term. *Shaffer v. Howard* . . . . . 200

**TELEGRAPH COMPANIES.** See **Constitutional Law**, II, 6-9; **Taxation**, IV, 13.

**TENANT AT WILL.** See **Mines and Mining**, 10.

**TENDER.** See **Taxation**, IV, 12.

**TERRITORIES.** See **Arizona; Canal Zone.**

**TEXAS:**

Workmen's Compensation Law sustained. *Middleton v. Texas Power & Light Co.* . . . . . 152

**TITLE.** See **Deeds; Mines and Mining; Public Lands.**

**TRADE-NAMES.** See **Meat Inspection Act**, 5, 6; **Treaties.**

**TRADE-SECRETS.** See **Food.**

**TRANSPORTATION.** See **Army, 2; Carriers; Interstate Commerce Acts.** PAGE

**TREASON.** See **Criminal Law, 13.**

**TREATIES.** See **Indians, 3, 4.**

Decision of Supreme Court of Philippines that name is a geographical and descriptive term and not subject to registration as trade-name under law before or since cession of Islands, that its use was not unfair competition, and that suit was not for infringement of trade-name registered under Spanish régime, *held* not to involve provision of Treaty of 1898 that property rights, copyrights and patent rights shall be respected. *Compañia General v. Alhambra Cigar Co.* 72

**TRIAL.** See **Criminal Law, 14.**

**TROOPS.** See **Army.**

**TRUST PATENTS.** See **Indians, 1, 2.**

**TRUSTS AND TRUSTEES:**

Where shares and property of corporation were transferred to trustees, upon trust to convert into money and distribute proceeds among shareholders within given period, and in meantime to have powers of owner, distributing income and applying funds to development, etc., of property, *held*, that neither trustees nor beneficiaries could be regarded as joint stock association, within meaning of Income Tax Act of 1913. *Crocker v. Malley* . . . . . 223

**UNFAIR COMPETITION.** See **Treaties.**

**UNITED STATES.** See **Army; Claims; Contracts, 8-21; Judgments, 6, 7; Mails.**

**UNITED STATES SHIPPING BOARD.** See **Admiralty, 1, 2.**

**VALUATION.** See **Taxation, IV, 7-10.**

**VENDOR AND VENDEE.** See **Deeds; Sales; Real Property.**

**VENUE.** See **Bankruptcy Act, 1-5; Jurisdiction, V, 14.**

**VESSELS.** See **Admiralty.**

PAGE

**VIRGINIA:**

1. When property not damaged for public use within state constitution. *Darling v. Newport News* . . . . . 540
2. City of Richmond is authorized by its charter and statutes of Virginia to impose occupation or license tax on business of telegraph company done within city. *Postal Tel.-Cable Co. v. Richmond* . . . . . 252
3. Under law of Virginia and charter of City of Richmond, city's claim for undisturbed personal taxes inferior to landlord's lien. *Richmond v. Bird* . . . . . 174

**VIS MAJOR.** See **Contracts, 6.****WAIVER.** See **Interstate Commerce Acts, 8.**

Failure to assign error and appeal as to part of decree releasing preliminary injunction bonds; effect of on assessment of damages after erroneous final injunction reversed. See **Injunction, 2-9.**

**WAR.** See **Army.**

War power of Congress. See **Constitutional Law, VI.**  
Effect on performance of franchise contract. See **Contracts, 6.**

**WAR REVENUE ACT, 1898.** See **Taxation, III.****WARRANTS.** See **County Warrants.****WARRANTY:**

Of seaworthiness. See **Admiralty, 8.**

**WATERS:**

1. Protection of watersheds of municipal water supply. *Perley v. North Carolina* . . . . . 510
2. Oyster bed grant under Virginia law subject to right of State to authorize discharge of municipal sewage, polluting the oysters. *Darling v. Newport News* . . . . . 540

**WEIGHING.** See **Mails, 3.**

**WEIGHTS AND MEASURES:**

PAGE

Functions of superintendent of weights and measures, and city and county sealers, under law of New York. *Standard Scale Co. v. Farrell* . . . . . 571

**WITNESSES:**

Self-incrimination. See **Constitutional Law**, IX.  
Refusing to testify. See **Contempt**.

**WOMEN.** See **Labor**.

**WORDS AND PHRASES:**

1. "Addition;" "amendment." *O'Pry v. United States* . . 323
2. "Assessments;" "annual assessment labor;" "assessment work." *Union Oil Co. v. Smith* . . . . . 337
3. "Bounty" or "grant." *Nicholas & Co. v. United States* . . . . . 34
4. "Recruiting." *Schenck v. United States* . . . . . 47
5. "Military Forces." *Debs v. United States* . . . . . 211
6. "Sausage." See *Houston v. St. Louis Packing Co.* . . . . 479
7. "Train." *United States v. Brooklyn Eastern Dist. Term.* . 296
8. Transportation "into" a State. *United States v. Gudger* 373
9. "Troops of the United States." *United States v. Union Pac. R. R.* . . . . . 354

**WORKMEN'S COMPENSATION LAWS.** See **Constitutional Law**, II, 4; XI, 11, 25-28.

**WRITINGS.** See **Contracts**; **Deeds**; **Evidence**, 3, 4.

**WRIT OF ERROR.** See **Jurisdiction**; **Procedure**.

**YAKIMA INDIANS.** See **Indians**, 3, 4.



