T
98919942 6

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

UNITED STATES
OCT 17 1920
SENATE LIBRARY

PROPERTY
OF THE
U. S.

UNITED STATES REPORTS

VOLUME 251

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1919

FROM NOVEMBER 17, 1919, TO MARCH 1, 1920

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1920

COPYRIGHT, 1920, BY
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.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
JOHN H. CLARKE, Associate Justice.

A. MITCHELL PALMER, Attorney General.
ALEXANDER C. KING, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1916.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, LOUIS D. BRANDEIS, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

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

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

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

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

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

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

TABLE OF CASES REPORTED

PAGE

American Brewing Co., United States *v.* . . 210
American Car & Fdry. Co., Hines Lumber Co. *v.* . 557
American Fidelity Co., American Guaranty Co. *v.* . 559
American Guaranty Co. *v.* American Fidelity Co. . 559
Arbuckle, Attorney General, State of Arkansas *ex rel.*, Fort Smith Lumber Co. *v.* . . . 532
Archer, Admx., *v.* United States 548
Arctic Iron Co. *v.* Cleveland-Cliffs Iron Co. . . 558
Arkansas, State of, *ex rel.* Arbuckle, Attorney General, Fort Smith Lumber Co. *v.* . . . 532
Armour & Co. *v.* Texas & Pacific Ry. . . . 551
Atlanta Terminal Co. *v.* United States . . 559
Atlantic Coast Line R. R. *v.* United States . . 546
Ausplund *v.* State of Oregon 563

Bailey, Baltimore & Ohio Southwestern R. R. *v.* . 564
Baltimore Dry Dock & Ship Bldg. Co. *v.* New York & Porto Rico S. S. Co., Clmt. . . . 556
Baltimore & Ohio R. R. *v.* Coffland . . . 545
Baltimore & Ohio Southwestern R. R. *v.* Bailey . 564
Bank of North America, Wysong & Miles Co. *v.* . 568
Bates, Receiver, *v.* Bunker *et al.*, Admrs. . . 524
Bates, Receiver, *v.* Dean, Exr. 524
Bates, Receiver, *v.* Dresser, Admr. . . . 524
Belknap, State of Washington *v.* 553
Ben Avon Borough, Ohio Valley Water Co. *v.* . 542
Benham, Wilson, Trustee, *v.* 560
Berkman *v.* Caminetti, Commr. of Immigration . 540
Birge-Forbes Co. *v.* Heye 317
Birmingham Trust & Savgs. Co., Trustee, *v.* United States 550
Bishop, Admr., *Ex parte* 543

PAGE

Board of County Commrs., Osage County, United States *v.* 128
Board of Public Utility Commrs. *v.* Ynchausti & Co. 401
Boegli, Western Union Tel. Co. *v.* 315
Bollis, Missouri Pacific R. R. *v.* 538, 552
Bone *v.* Commissioners of Marion County . . 134
Boone, Gulf & Ship Island R. R. *v.* . . . 561
Bowles, Gulf, Colorado & Santa Fe Ry. *v.* . . 538
Bowman & Bull Co., Postal Tel.-Cable Co. *v.* . 562
Bragg *v.* Weaver 57
Branson, Sheriff, *v.* Bush, Receiver . . . 182
Briggs, Admx., *v.* Union Pacific R. R. . . . 540
Brooklyn Eastern District Terminal, Liverpool, Brazil & River Plate Steam Nav. Co. *v.* . . 48
Brooks-Scanlon Co. *v.* Railroad Comm. of Louisiana 396
Broussard, *Ex parte* 546
Broussard *v.* Crawford, Trustee 560
Broward Drainage Dist., Everglades Drainage League *v.* 567
Brown *v.* United States 554
Bruce, Admr., *v.* Tobin 552
Buena Vista, City of, Commonwealth of Virginia *ex rel.*, Virginia-Western Power Co. *v.* . . 557
Bunker *et al.*, Admrs., Bates, Receiver, *v.* . . 524
Burke, Union Pacific R. R. *v.* 548
Bush, Receiver, Branson, Sheriff, *v.* . . . 182
Byron *v.* United States 556

Caffey, United States Attorney, Jacob Ruppert *v.* 264
California, State of, Kisin *v.* 547
California Industrial Accident Comm., Southern Pacific Co. *v.* 259
California R. R. Comm., Napa Valley Elec. Co. *v.* 366
California R. R. Comm., Producers Transp. Co. *v.* 228
Caminetti, Commr. of Immigration, Berkman *v.* . 540

PAGE
Caminetti, Commr. of Immigration, Goldman *v.* . 565
Camors *et al.*, Trustees, Schall *v.* 239
Carbon Steel Co. *v.* Lewellyn, Collector of Internal Revenue 501
Central R. R. Co. of New Jersey, Drago *v.* . . 553
Chicago, Duluth & Georgian Bay Transit Co., owner, *v.* Moore 553
Chicago, Milwaukee & St. Paul Ry. *v.* McCaull-Dinsmore Co. 549
Chicago, Rock Island & Pacific Ry. *v.* Cole, Admx. 54
Chipman, Ltd., *v.* Jeffery Co. 373
Cleveland-Cliffs Iron Co., Arctic Iron Co. *v.* . 558
Clifton Forge, City of, Commonwealth of Virginia *ex rel.*, Virginia-Western Power Co. *v.* . . 557
Coffland, Baltimore & Ohio R. R. *v.* . . . 545
Cole, Admx., Chicago, Rock Island & Pacific Ry. *v.* 54
Columbus, City of, Ohio State Tel. Co. *v.* . . 567
Commissioners of Marion County, Bone *v.* . . 134
Connors, Erie R. R. *v.* 557
Consolidated Window Glass Co. *v.* Window Glass Mach. Co. 558
Continental Bank of New York *v.* Prentice, Trustee 561
Cornell Steamboat Co., Morris & Cumings Dredging Co. *v.* 559
Corsicana Natl. Bank *v.* Johnson 68
Covington, City of, Gilligan *v.* 104
Covington, City of, Wagner *et al.*, Partners, *v.* . 95
Covington, Town of, Commonwealth of Virginia *ex rel.*, Virginia-Western Power Co. *v.* . . 557
Crawford, Trustee, Broussard *v.* 560

Darkow *v.* United States 466
Davidovich, known as Davis, Superior & Pittsburgh Copper Co. *v.* 544
Davis, Mergenthaler Linotype Co. *v.* . . . 256
Davis, Davidovich, known as, Superior & Pittsburgh Copper Co. *v.* 544

PAGE

Day, Sheriff, Thompson *v.* 536
Dean, Exr., Bates, Receiver, *v.* 524
Delaware & Bound Brook R. R. to use of Philadelphia & Reading Ry., United States *v.* . . . 540
Delaware, Lackawanna & Western R. R., Tomasco *v.* 551
Denver, City and County of, Mountain States Tel. & Tel. Co. *v.* 545
Divisor Cases 326
Doran, Commr. of Revenue, Twohy, Exr., *v.* . 541
Drago *v.* Central R. R. Co. of New Jersey . . 553
Dresser, Admr., *v.* Bates, Receiver . . . 524
Dryfoos *v.* Edwards, Collector of Internal Revenue 146
Duart, Simmons *v.* 547
Duhne *v.* State of New Jersey 311
Dunbar *v.* City of New York 516
Duncan *v.* United States 566
D'Utassy, Southern Pacific Co. *v.* . . . 539

Eastern Extension, Australasia & China Tel. Co. *v.* United States 355
Edward Hines Lumber Co. *v.* American Car & Fdry. Co. 557
Edwards, Collector of Internal Revenue, Dryfoos *v.* 146
Egan, Chief of State Police, Hartford Poster Adv. Co. *v.* 564
Equi *v.* United States 560
Equitable Trust Co., Toledo & Cincinnati R. R. *v.* 553
Erie R. R. *v.* Connors 557
Ervien, Commr. of Public Lands, *v.* United States 41
Estopinal, Sheriff, Godchaux Co., Inc., *v.* . . 179
Evans, Receiver, *v.* National Bank of Savannah . 108
Evansville & Bowling Green Packet Co. *v.* Logan . 543
Everglades Drainage League *v.* Broward Drainage Dist. 567
Ex parte Bishop, Admr. 543
Ex parte Broussard 546
Ex parte United States 546

PAGE
Fetters *v.* United States 554
Fink *v.* Okmulgee Window Glass Co. . . . 563
First Savgs. & Banking Co., Kilmer, Trustee, *v.* . 556
Forged Steel Wheel Co. *v.* Lewellyn, Collector of Internal Revenue 511
Fort Smith Lumber Co. *v.* State of Arkansas *ex rel.* Arbuckle, Attorney General 532
Frey & Son, Inc., *v.* Welch Grape Juice Co. . . 551
Fuller, Admx., Oregon-Washington R. R. & Nav. Co. *v.* 551
Fulton, City of, *v.* Public Service Comm. of Missouri 546

Garcia *v.* Townshend, Commanding Officer . . 567
Garanflo *v.* United States 565
Geary *v.* Geary 535
Gilligan *v.* City of Covington 104
Gilson *v.* United States 555
Godchaux Co., Inc., *v.* Estopinal, Sheriff . . 179
Goldman *v.* Caminetti, Commr. of Immigration . 565
Goodspeed *v.* Law 555
Gordon *v.* State of Illinois 566
Gouge *v.* Hart, Collector of Internal Revenue . 542
Gray, Seaboard Air Line Ry. *v.* 566
Great Northern Ry. *v.* State of Washington . . 565
Gulf, Colorado & Santa Fe Ry. *v.* Bowles . . 538
Gulf & Ship Island R. R. *v.* Boone . . . 561
Gutierrez Hermanos *v.* Insular Collector of Customs 562

Hallowell *v.* United States 559
Hamilton, Collector of Internal Revenue, *v.* Kentucky Distilleries & Warehouse Co. . . 146
Hardin-Wyandot Lighting Co. *v.* Village of Upper Sandusky 173
Harris *v.* State of Kansas 541
Hart, Collector of Internal Revenue, Gouge *v.* . 542
Hartford Poster Adv. Co. *v.* Egan, Chief of State Police 564

PAGE

Hays *v.* Port of Seattle 233
Henry, Exr., *v.* United States 393
Herman *v.* United States 558
Heye, Birge-Forbes Co. *v.* 317
Hill, J. J., The Steamer, Smith *v.* . . . 554
Hiltscher, Jones *v.* 545
Hines Lumber Co. *v.* American Car & Fdry. Co. . 557
Hitchcock *v.* Scattergood 564
Horton, Admx., Seaboard Air Line Ry. *v.* . . 566
Houston, Admx., *v.* Seaboard Air Line Ry. . . 538
How, Jeong Quey, *v.* White, Commr. of Immigration 559
Hughes Tool Co., Reed *v.* 561
Hurni Packing Co. *v.* Mutual Life Ins. Co. . . 556

Illinois, State of, Gordon *v.* 566
Illinois Commercial Men's Assn., Pembleton *v.* . 549
Industrial Accident Comm. of California, Southern Pacific Co. *v.* 259
Insular Collector of Customs, Gutierrez Hermanos *v.* 562
Insular Collector of Customs, Viegelmann & Co. *v.* 563
International Nickel Co., State of New York *v.* . 568
Inter-Urban Ry. *v.* Smith 552
Isabella, The Steamship, Baltimore Dry Dock & Ship Bldg. Co. *v.* 556

Jacob Ruppert *v.* Caffey, United States Attorney . 264
Jeffery Co., Chipman, Ltd., *v.* 373
Jeong Quey How *v.* White, Commr. of Immigration 559
J. J. Hill, The Steamer, Smith *v.* 554
Johnson, Corsicana Natl. Bank *v.* 68
Jones *v.* Hiltscher 545
Joslin *v.* City of Providence . . . 535, 550
Joslin Mfg. Co. *v.* City of Providence . . 535, 550
Junior Order United American Mechanics *v.* Nicodemus 536

Kane Glass Co. *v.* Window Glass Mach. Co. . . 558
Kansas, State of, Harris *v.* 541

PAGE
Kansas City, Mexico & Orient Ry. *v.* United States 326
Kansas City Southern Ry. *v.* Smith 552
Kentucky Distilleries & Warehouse Co., Hamilton, Collector of Internal Revenue, *v.* 146
Keown *v.* Keown 567
Kilmer, Trustee, *v.* First Savgs. & Banking Co. . 556
Kisin *v.* State of California 547

Laughter *v.* United States 561
Law, Goodspeed *v.* 555
Lederer, Collector of Internal Revenue, Worth Bros. Co. *v.* 507
Lee, Admr., Malleable Iron Range Co. *v.* . . . 562
Lemke *v.* United States 466
Lewellyn, Collector of Internal Revenue, Carbon Steel Co. *v.* 501
Lewellyn, Collector of Internal Revenue, Forged Steel Wheel Co. *v.* 511
Lexington, Town of, Commonwealth of Virginia *ex rel.*, Virginia-Western Power Co. *v.* . . . 557
Liverpool, Brazil & River Plate Steam Nav. Co. *v.* Brooklyn Eastern District Terminal . . 48
Logan, Evansville & Bowling Green Packet Co. *v.* 543
Los Angeles, City of, *v.* Los Angeles Gas & Elec. Corp. 32
Los Angeles Gas & Elec. Corp., City of Los Angeles *v.* 32
Louisiana R. R. Comm., Brooks-Scanlon Co. *v.* . 396

McCarthy, United States Marshal, Smedley *v.* . 564
McCaull-Dinsmore Co., Chicago, Milwaukee & St. Paul Ry. *v.* 549
McKnight *v.* United States 543
McLaughlin *v.* United States 541
Mackay, Norma Mining Co. *v.* 556
Magma Copper Co. *v.* Rissala 565
Mail Divisor Cases 326
Malleable Iron Range Co. *v.* Lee, Admr. . . . 562

PAGE
Marion County, Commissioners of, Bone *v.* . . 134
Maryland Casualty Co. *v.* United States . . 342
Maynard *v.* United Thacker Coal Co. . . . 555
Mergenthaler Linotype Co. *v.* Davis . . . 256
Mill Creek & Mine Hill Nav. & R. R. Co. to use of Philadelphia & Reading Ry., United States *v.* 539
Missouri, State of, *ex rel.* City of Sedalia, *v.* Public Service Comm. of Missouri 547
Missouri, Kansas & Texas Ry. *v.* Zuber . . 549
Missouri Pacific R. R. *v.* Bollis . . . 538, 552
Missouri Public Service Comm., City of Fulton *v.* 546
Missouri Public Service Comm., State of Missouri *ex rel.* City of Sedalia *v.* 547
Moore, Chicago, Duluth & Georgian Bay Transit Co., Owner, *v.* 553
Moore, Trustee, Wartell *v.* 563
Morris & Cumings Dredging Co. *v.* Cornell Steamboat Co. 559
Mountain Gas Co., V. & S. Bottle Co. *v.* . . 544
Mountain States Tel. & Tel. Co. *v.* City and County of Denver 545
Mutual Life Ins. Co., Hurni Packing Co. *v.* . . 556

Napa Valley Elec. Co. *v.* Railroad Comm. of California 366
Napoleon B. Broward Drainage Dist., Everglades Drainage League *v.* 567
National Bank of Savannah, Evans, Receiver, *v.* 108
National Council Junior Order United American Mechanics *v.* Nicodemus 536
New Jersey, State of, Duhne *v.* 311
New York, City of, Dunbar *v.* 516
New York, State of, *v.* International Nickel Co. . 568
New York, State of, Sanger *v.* 537
New York, State of, *v.* Standard Oil Co. . . 568
New York Central & Hudson River R. R. *v.* United States 326

PAGE

New York, New Haven & Hartford R. R. *v.* United States 123
New York & Porto Rico S. S. Co., Clmt., Baltimore Dry Dock & Ship Bldg. Co. *v.* 556
New York Public Service Comm., O'Brien *v.* . 537
Nichols, Thompson *v.* 569
Nichols & Co., Yazoo & Mississippi Valley R. R. *v.* 550
Nicodemus, National Council Junior Order United American Mechanics *v.* 536
Norfolk-Southern R. R. *v.* Owens 550
Norma Mining Co. *v.* Mackay 556
North America, Bank of, Wysong & Miles Co. *v.* . 568
Northern Pacific Ry. *v.* United States 326
North Pennsylvania R. R. to use of Philadelphia & Reading Ry., United States *v.* 540

O'Brien *v.* Public Service Comm. of New York . 537
Ohio State Tel. Co. *v.* City of Columbus . . 567
Ohio Valley Water Co. *v.* Ben Avon Borough . 542
Oregon, State of, Ausplund *v.* 563
Oklahoma Ry. *v.* Severns Paving Co. 104
Okmulgee Window Glass Co., Fink *v.* 563
Oregon-Washington R. R. & Nav. Co. *v.* Fuller, Admx. 551
Osage County, Board of Commrs., United States *v.* 128
Owens, Norfolk-Southern R. R. *v.* 550

Pacific Gas & Elec. Co. *v.* Police Court, City of Sacramento 22
Partan *v.* United States 561
Pembleton *v.* Illinois Commercial Men's Assn. . 549
Pennsylvania Window Glass Co. *v.* Window Glass Mach. Co. 558
Peters *v.* Veasey, Admx. 121
Petroleum Rectifying Co., Reward Oil Co. *v.* . 554
Philadelphia & Reading Ry., Delaware & Bound Brook R. R. to use of, United States *v.* . . 540

PAGE

Philadelphia & Reading Ry., Mill Creek & Mine Hill Nav. & R. R. Co. to use of, United States *v.* 539
Philadelphia & Reading Ry., North Pennsylvania R. R. to use of, United States *v.* . . . 540
Pittsburgh S. S. Co., Clmt., Smith *v.* . . . 554
Planters Natl. Bank, Wysong & Miles Co. *v.* . 568
Poland, United States *v.* 221
Police Court, City of Sacramento, Pacific Gas & Elec. Co. *v.* 22
Postal Tel.-Cable Co. *v.* Bowman & Bull Co. . 562
Postal Tel.-Cable Co. *v.* Warren-Godwin Lumber Co. 27
Powers *v.* City of Richmond 539
Prentice, Trustee, Continental Bank of New York *v.* 561
Producers Transp. Co. *v.* Railroad Comm. of California 228
Providence, City of, Joslin *v.* . . . 535, 550
Providence, City of, Joslin Mfg. Co. *v.* . 535, 550
Providence, City of, Scituate Light & Power Co. *v.* 535, 550
Public Service Comm. of Missouri, City of Fulton *v.* 546
Public Service Comm. of Missouri, State of Missouri *ex rel.* City of Sedalia *v.* 547
Public Service Comm. of New York, O'Brien *v.* . 537
Public Utility Commrs. *v.* Ynchausti & Co. . 401

Quey How, Jeong, *v.* White, Commr. of Immigration 559

Railroad Comm. of California, Napa Valley Elec. Co. *v.* 366
Railroad Comm. of California, Producers Transp. Co. *v.* 228
Railroad Comm. of Louisiana, Brooks-Scanlon Co. *v.* 396
Reed *v.* Hughes Tool Co. 561
Reitz *v.* United States 560
Reward Oil Co. *v.* Petroleum Rectifying Co. . 554
Rex, Admx., *v.* United States and Ute Indians . 382

PAGE
Richmond, City of, Powers *v.* 539
Rissala, Magma Copper Co. *v.* 565
Rucker *v.* Tatlow 537
Rudbach, South Coast S. S. Co., Clmt., *v.* . . 519
Ruppert, Jacob, *v.* Caffey, United States Attorney 264

St. Louis, Iron Mountain & Southern Ry. *v.* United States 198
St. Louis, Iron Mountain & Southern Ry. *v.* Williams 63
Sanger *v.* State of New York 537
Scattergood, Hitchcock *v.* 564
Schaefer *v.* United States 466
Schall *v.* Camors *et al.*, Trustees 239
Scituate Light & Power Co. *v.* City of Providence 535, 550
Seaboard Air Line Ry. *v.* Gray 566
Seaboard Air Line Ry. *v.* Horton, Admx. . . 566
Seaboard Air Line Ry., Houston, Admx., *v.* . . 538
Seaboard Air Line Ry. *v.* United States . . 326
Seattle, Port of, Hays *v.* 233
Sedalia, City of, State of Missouri *ex rel.*, *v.* Public Service Comm. of Missouri 547
Seufert Bros. Co., United States, Trustee, etc., and *ex rel.* Williams *v.* 566
Severns Paving Co., Oklakoma Ry. *v.* 104
Shaffer *v.* United States 552
Sheehan, Admx., Wabash Ry. *v.* 562
Shreveport, City of, Sullivan *v.* 169
Silverthorne Lumber Co. *v.* United States . . 385
Simmons *v.* Duart 547
Smedley *v.* McCarthy, United States Marshal . 564
Smith, Inter-Urban Ry. *v.* 552
Smith *v.* The Steamer J. J. Hill 554
Smith, Kansas City Southern Ry. *v.* 552
South America, The Steamship, *v.* Moore . . 553
South Coast, The 519
South Coast S. S. Co., Clmt., *v.* Rudbach . . 519
Southern Pacific Co. *v.* D'Utassy 539

PAGE

Southern Pacific Co. *v.* Industrial Accident Comm. of California 259
Southern Pacific Co., United States *v.* 1
Southwick, Western Union Tel. Co. *v.* 549
Standard Brewery, Inc., United States *v.* . . . 210
Standard Oil Co., State of New York *v.* . . . 568
Stroud *v.* United States 15, 380
Sullivan *v.* City of Shreveport 169
Superior & Pittsburgh Copper Co. *v.* Davidovich, known as Davis 544

Tatlow, Rucker *v.* 537
Texas & Pacific Ry., Armour & Co. *v.* 551
Thomas B. Jeffery Co., Chipman, Ltd., *v.* . . . 373
Thompson *v.* Day, Sheriff 536
Thompson *v.* Nichols 569
Thompson, United States *v.* 407
Thompson *v.* United States 553
Tiedemann *v.* Tiedemann 536
Tobin, Bruce, Admr., *v.* 552
Toledo & Cincinnati R. R. *v.* Equitable Trust Co. 553
Tomasco *v.* Delaware, Lackawanna & Western R. R. 551
Townshend, Commanding Officer, Garcia *v.* . . . 567
Trader *v.* United States 555
Twohy, Exr., *v.* Doran, Commr. of Revenue . 541

Union Pacific R. R., Briggs, Admx., *v.* . . . 540
Union Pacific R. R. *v.* Burke 548
United American Mechanics, National Council Junior Order, *v.* Nicodemus 536
United States, *Ex parte* 546
United States *v.* American Brewing Co. . . . 210
United States *v.* Archer, Admx. 548
United States, Atlanta Terminal Co. *v.* . . . 559
United States, Atlantic Coast Line R. R. *v.* . . 546
United States, Birmingham Trust & Savgs. Co., Trustee, *v.* 550

PAGE

United States *v.* Board of County Commrs., Osage County 128
United States, Brown *v.* 554
United States, Byron *v.* 556
United States, Darkow *v.* 466
United States *v.* Delaware & Bound Brook R. R. to use of Philadelphia & Reading Ry. . . 540
United States, Duncan *v.* 566
United States, Eastern Extension, Australasia & China Tel. Co. *v.* 355
United States, Equi *v.* 560
United States, Ervien, Commr. of Public Lands, *v.* 41
United States, Fetters *v.* 554
United States, Garanflo *v.* 565
United States, Gilson *v.* 555
United States, Hallowell *v.* 559
United States, Henry, Exr., *v.* 393
United States, Herman *v.* 558
United States, Kansas City, Mexico & Orient Ry. *v.* 326
United States, Laughter *v.* 561
United States, Lemke *v.* 466
United States, McKnight *v.* 543
United States, McLaughlin *v.* 541
United States, Maryland Casualty Co. *v.* . . 342
United States *v.* Mill Creek & Mine Hill Nav. & R. R. Co. to use of Philadelphia & Reading Ry. . 539
United States, New York Central & Hudson River R. R. *v.* 326
United States, New York, New Haven & Hartford R. R. *v.* 123
United States, Northern Pacific Ry. *v.* . . 326
United States *v.* North Pennsylvania R. R. to use of Philadelphia & Reading Ry. . . . 540
United States, Partan *v.* 561
United States *v.* Poland 221
United States, Reitz *v.* 560
United States, Rex, Admx., *v.* 382

PAGE

United States, St. Louis, Iron Mountain & Southern Ry. *v.* 198
United States, Schaefer *v.* 466
United States, Seaboard Air Line Ry. *v.* . . 326
United States, Trustee, etc., and *ex rel.* Williams *v.* Seufert Bros. Co. 566
United States, Shaffer *v.* 552
United States, Silverthorne Lumber Co. *v.* . . 385
United States *v.* Southern Pacific Co. . . . 1
United States *v.* Standard Brewery, Inc. . . 210
United States, Stroud *v.* 15, 380
United States *v.* Thompson 407
United States, Thompson *v.* 553
United States, Trader *v.* 555
United States *v.* United States Steel Corp. . . 417
United States, Vogel *v.* 466
United States, Werner *v.* 466
United States Steel Corp., United States *v.* . . 417
United Thacker Coal Co., Maynard *v.* . . 555
Upper Sandusky, Village of, Hardin-Wyandot Lighting Co. *v.* 173
Ute Indians, United States and, Rex, Admx., *v.* . 382

Veasey, Admx., Peters *v.* 121
Viegelmann & Co. *v.* Insular Collector of Customs 563
Virginia, Commonwealth of, *ex rel.* City of Buena Vista, Virginia-Western Power Co. *v.* . . 557
Virginia, Commonwealth of, *ex rel.* City of Clifton Forge, Virginia-Western Power Co. *v.* . . 557
Virginia, Commonwealth of, *ex rel.* Town of Covington, Virginia-Western Power Co. *v.* . . 557
Virginia, Commonwealth of, *ex rel.* Town of Lexington, Virginia-Western Power Co. *v.* . . 557
Virginia-Western Power Co. *v.* Commonwealth of Virginia *ex rel.* City of Buena Vista . . 557
Virginia-Western Power Co. *v.* Commonwealth of Virginia *ex rel.* City of Clifton Forge . . 557

PAGE

Virginia-Western Power Co. *v.* Commonwealth of Virginia *ex rel.* Town of Covington . . 557
Virginia-Western Power Co. *v.* Commonwealth of Virginia *ex rel.* Town of Lexington . . 557
Vogel *v.* United States 466
V. & S. Bottle Co. *v.* Mountain Gas Co. . . 544

Wabash Ry. *v.* Sheehan, Admx. 562
Wagner *et al.*, Partners, *v.* City of Covington . 95
Warren-Godwin Lumber Co., Postal Tel.-Cable Co. *v.* 27
Wartell *v.* Moore, Trustee 563
Washington, State of, *v.* Belknap . . . 553
Washington, State of, Great Northern Ry. *v.* . 565
Weaver, Bragg *v.* 57
Welch Grape Juice Co., Frey & Son, Inc., *v.* . 551
Werner *v.* United States 466
Western Union Tel. Co. *v.* Boegli . . . 315
Western Union Tel. Co. *v.* Southwick . . . 549
White, Commr. of Immigration, Jeong Quey How *v.* 559
White, Commr. of Immigration, Yee Won *v.* . 549
Williams, St. Louis, Iron Mountain & Southern Ry. *v.* 63
Williams, United States, Trustee, etc., and *ex rel.*, *v.* Seufert Bros. Co. 566
Wilson, Trustee, *v.* Benham 560
Winchester, City of, *v.* Winchester Water Works Co. 192
Winchester Water Works Co., City of Winchester *v.* 192
Window Glass Mach. Co., Consolidated Window Glass Co. *v.* 558
Window Glass Mach. Co., Kane Glass Co. *v.* . 558
Window Glass Mach. Co., Pennsylvania Window Glass Co. *v.* 558
Won, Yee, *v.* White, Commr. of Immigration . 549
Worth Bros. Co. *v.* Lederer, Collector of Internal Revenue 507

PAGE
Wysong & Miles Co. *v.* Bank of North America . 568
Wysong & Miles Co. *v.* Planters Natl. Bank . . 568

Yazoo & Mississippi Valley R. R. *v.* Nichols & Co. 550
Yee Won *v.* White, Commr. of Immigration . . 549
Ynchausti & Co., Board of Public Utility Commrs. *v.* 401

Zuber, Missouri, Kansas & Texas Ry. *v.* . . 549

TABLE OF CASES

CITED IN OPINIONS.

PAGE

Abbott Bros. Co. *v.* United States, 242 Fed. Rep. 751 414
Abraham *v.* Ordway, 158 U. S. 416 239
Abrams *v.* United States, 250 U. S. 616 477, 482
Adams *v.* Milwaukee, 228 U. S. 572 303
Adams *v.* New York, 192 U. S. 585 392
Adams Express Co. *v.* Croninger, 226 U. S. 491 29
Addyston Pipe Co. *v.* United States, 175 U. S. 211 461
Adirondack Ry. *v.* New York, 176 U. S. 335 59
Ætna Life Ins. Co. *v.* Ward, 140 U. S. 76 80
Akron *v.* Bone, 221 Fed. Rep. 944 138, 140
Allen *v.* St. Louis, I. Mt. & So. Ry., 230 U. S. 553 65
American Express Co. *v.* Caldwell, 244 U. S. 617 300
Anheuser-Busch Assn. *v.* United States, 207 U. S. 556 515
Arizona Employers' Liability Cases, 250 U. S. 400 55, 544
Associated Oil Co. *v.* R. R. Comm., 176 Cal. 518 231
Atchison, T. & S. F. Ry. *v.* United States, 225 U. S. 640 127, 330, 339, 546
Atlantic Transp. Co. *v.* Imbrovek, 234 U. S. 52 122
Baccus *v.* Louisiana, 232 U. S. 334 102
Backus *v.* Fort Street Union Depot Co., 169 U. S. 557 59, 62

PAGE

Badger *v.* Badger, 2 Wall. 87 239
Bagdon *v.* Phila. & Read. C. & I. Co., 217 N. Y. 432 378, 379
Bailey *v.* Western Union Tel. Co., 97 Kans. 619 31
Balbas *v.* United States, 257 Fed. Rep. 17 486
Ball Eng. Co. *v.* White & Co., 250 U. S. 55 366
Bank of Newport *v.* Cook, 60 Ark. 288 113
Barbour *v.* Georgia, 249 U. S. 454 157, 302
Barnet *v.* National Bank, 98 U. S. 555 109
Bartemeyer *v.* Iowa, 18 Wall. 129 157
Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1 217
Bateman *v.* Western Union Tel. Co., 174 N. Car. 97 31
Bates *v.* Dresser, 229 Fed. Rep. 772 526, 532
Battle *v.* United States, 209 U. S. 36 300
Beer Co. *v.* Massachusetts, 97 U. S. 25 157
Bell's Gap R. R. *v.* Pennsylvania, 134 U. S. 232 188
Bessette *v.* Conkey Co., 194 U. S. 324 541
Beuttell *v.* Magone, 157 U. S. 154 324
Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111; 74 N. J. Eq. 457 84, 85
Bilby *v.* Stewart, 246 U. S. 255 541
Birge-Forbes Co. *v.* Heye, 234 U. S. 759 322, 324

PAGE

Birge-Forbes Co. *v.* Heye, 212 Fed. Rep. 112; 248 *id.* 636 318, 322, 324
Black *v.* McClelland, 3 Fed. Cas. 504 250
Blackheath, The, 195 U. S. 361 53
Blair *v.* United States, 250 U. S. 273 414
Blood *v.* Morrin, 140 Fed. Rep. 918 324
Boise Artesian Water Co. *v.* Boise City, 213 U. S. 276 133
Bone *v.* Commrs. of Marion County, 249 Fed. Rep. 211 135, 140
Boom Co. *v.* Patterson, 98 U. S. 403 58
Boston & Fairhaven Iron Works, *In re*, 23 Fed. Rep. 880 250
Bowe *v.* Scott, 233 U. S. 658 537, 538
Bowersock *v.* Smith, 243 U. S. 29 55
Bowling Green *v.* McMullen, 134 Ky. 742 283, 296
Bradshaw *v.* State, 76 Ark. 562 283, 284
Bragg *v.* Weaver, 251 U. S. 57 238
Branson *v.* Gee, 25 Oreg. 462 62
Brennan *v.* Titusville, 153 U. S. 289 104
Briggs *v.* Spaulding, 141 U. S. 132 530
Brolan *v.* United States, 236 U. S. 216 536, 537
Brooks-Scanlon Co. *v.* Railroad Comm., 144 La. 1086 396
Brown *v.* Colorado, 106 U. S. 95 237
Brown *v.* Houston, 114 U. S. 622 103
Brown *v.* State, 17 Ariz. 314 283, 284
Brown *v.* United Button Co., 149 Fed. Rep. 48 253
Browning *v.* Waycross, 233 U. S. 16 104
Bruce *v.* Tobin, 245 U. S. 18 535, 545
Brushaber *v.* Union Pac. R. R., 240 U. S. 1 161

PAGE

Burke *v.* Southern Pac. R. R., 234 U. S. 669 7
Bush *v.* Branson, 248 Fed. Rep. 377 182
Calaf *v.* Calaf, 232 U. S. 371 373
Caldwell *v.* Donaghey, 108 Ark. 60 238
Caldwell *v.* North Carolina, 187 U. S. 622 104
California *v.* Pacific R. R., 127 U. S. 1 300
California *v.* Southern Pac. Co., 157 U. S. 229 313
California Powder Works *v.* Davis, 151 U. S. 389 537, 544
Caminetti *v.* United States, 242 U. S. 470 217
Capital Trac. Co. *v.* Hof, 174 U. S. 1 59, 476
Carbon Steel Co. *v.* Lewellyn, 251 U. S. 501 512
Carbon Steel Co. *v.* Lewellyn, 258 Fed. Rep. 533 502
Carey *v.* Houston & Tex. Cent. R. R., 150 U. S. 171 541
Carroll *v.* Greenwich Ins. Co., 199 U. S. 401 156
Cass Farm Co. *v.* Detroit, 181 U. S. 396 188
Castillo *v.* McConnico, 168 U. S. 674 539
Castle *v.* Mason, 91 Oh. St. 296 171
Central Trust Co. *v.* Chicago Assn., 240 U. S. 581 250
Cheatham *v.* United States, 92 U. S. 85 354
Cheney Bros. Co. *v.* Massachusetts, 246 U. S. 147 104
Chicago *v.* Dempcy, 250 U. S. 651 545, 547
Chicago, Burl. & Q. Ry. *v.* Drainage Commrs., 200 U. S. 561 231
Chicago, Burl. & Q. R. R. *v.* Iowa, 94 U. S. 155 232
Chicago & N. W. Ry. *v.* Ochs, 249 U. S. 416 231
Chicago & N. W. Ry. *v.* Ohle, 117 U. S. 123 80
Chicago, R. I. & Pac. Ry. *v.* Davis, 114 Ark. 519 67
Chipman, Ltd., *v.* Jeffery Co., 260 Fed. Rep. 856 374

PAGE

Citizens' Natl. Bank *v.* Donnell, 195 U. S. 369 119
City & Suburban Ry. *v.* Mayor, 77 Ga. 731 26
Clark Distilling Co. *v.* Western Maryland Ry., 242 U. S. 311 158
Clarke *v.* Rogers, 183 Fed. Rep. 518; 228 U. S. 534 251, 254
Clay County Produce Co. *v.* Western Union Tel. Co., 44 I. C. C. 670 31
Cleveland &c. Ry. *v.* Backus, 154 U. S. 439 185, 187
Cleveland & Pittsburgh R. R. *v.* Cleveland, 235 U. S. 50 544
Cochran *v.* United States, 157 U. S. 286 82
Coe *v.* Armour Fertilizer Works, 237 U. S. 413 535
Coffey *v.* Harlan County, 204 U. S. 659 67
Collard *v.* Pittsburgh, C., C. & St. L. Ry., 246 U. S. 653 535
Collins *v.* Johnston, 237 U. S. 502 67
Commonwealth *v.* Allen, 14 Pa. Co. Ct. 546 415
Commonwealth *v.* Blos, 116 Mass. 56 294
Commonwealth *v.* McGrath, 185 Mass. 1 283, 294
Commonwealth *v.* Peaslee, 177 Mass. 267 465
Commonwealth *v.* Priestly, 24 Pa. Co. Ct. 543 415
Commonwealth *v.* Stoner, 70 Pa. Super. Ct. 365 415
Commonwealth *v.* Whitaker, 25 Pa. Co. Ct. 42 415
Consolidated Turnpike Co. *v.* Norfolk &c. Ry., 228 U. S. 326 541
Coolidge *v.* Inglee, 13 Mass. 26 323
Coon *v.* Kennedy, 248 U. S. 457 257
Cooper *v.* National Bank, 21 Ga. App. 356 108
Coulter *v.* Louis. & Nash. R. R., 196 U. S. 599 134

PAGE

Courtney *v.* Pradt, 196 U. S. 89 541, 542
Crawford *v.* Burke, 195 U. S. 176 249, 251
Creekmore *v.* United States, 237 Fed. Rep. 743 414
Crenshaw *v.* Arkansas, 227 U. S. 389 103
Crescent Lumber Co., *In re*, 154 Fed. Rep. 724 253
Cross Lake Shooting Club *v.* Louisiana, 224 U. S. 632 179
Crozier *v.* Krupp, 224 U. S. 290 62
Cruickshank *v.* Bidwell, 176 U. S. 73 133
Cummings *v.* National Bank, 101 U. S. 153 119, 134
Dakota Cent. Tel. Co. *v.* South Dakota, 250 U. S. 163 161
Davidson *v.* New Orleans, 96 U. S. 97 533
Dawson *v.* Columbia Trust Co., 197 U. S. 178 237
Dean *v.* Davis, 242 U. S. 438 254
Debs, *In re*, 158 U. S. 564 301
Debs *v.* United States, 249 U. S. 211 477
De La Rama *v.* De La Rama, 241 U. S. 154 531
Del., Lack. & W. R. R. *v.* United States, 249 U. S. 385 127, 339
Detroit *v.* Parker, 181 U. S. 399 188
Diamond Coal Co. *v.* United States, 233 U. S. 236 14, 15, 225
Dickerson *v.* Western Union Tel. Co., 114 Miss. 115 28, 29
Dickinson *v.* Cole, 74 Okla. — 54
Dobbins *v.* Los Angeles, 195 U. S. 223 173
Doggett *v.* Emerson, 1 Woodb. & M. 195 250
Dollar Co. *v.* Canadian Car Co., 220 N. Y. 270 379
Donaldson, J. P., The, 167 U. S. 599 52
Dorr *v.* United States, 195 U. S. 138 407

PAGE

Dowdell *v.* United States, 221 U. S. 325 407
Downes *v.* Bidwell, 182 U. S. 244 407
Dozier *v.* Alabama, 218 U. S. 124 104
Dresser *v.* Bates, 250 Fed. Rep. 525 525, 526
Drumm-Flato Comm. Co. *v.* Edmisson, 208 U. S. 534 531
Dryfoos *v.* Edwards, 251 U. S. 146 281
Dunbar *v.* Dunbar, 190 U. S. 340 249
Dunbar *v.* City of New York, 177 App. Div. 647 516
Durre *v.* Western Union Tel. Co., 165 Wis. 190 31
Dusar *v.* Murgatroyd, 1 Wash. C. C. 13 250
E. Clemens Horst Co. *v.* Railroad Comm., 175 Cal. 660 372
Eastern Extension &c. Tel. Co. *v.* United States, 231 U. S. 326 357
Eastern Extension &c. Tel. Co. *v.* United States, 54 Ct. Clms. 108 356
Eastern R. R. *v.* United States, 129 U. S. 391 127, 339
Eastern States Lumber Dealers' Assn. *v.* United States, 234 U. S. 600 461
Eberle *v.* Michigan, 232 U. S. 700 157
Eckman's Alterative *v.* United States, 239 U. S. 510 156
El Paso Sash & Door Co. *v.* Carraway, 245 U. S. 643 537, 538
Embree *v.* Kansas City Road Dist., 240 U. S. 242 190
Emert *v.* Missouri, 156 U. S. 296 102
Empire State Cattle Co. *v.* Atchison, T. & S. F. Ry., 210 U. S. 1 324
Erie Lighter 108, The, 250 Fed. Rep. 490 54
Estes *v.* State, 13 Okla. Crim. Rep. 604 292

PAGE

Eugene F. Moran, The, 212 U. S. 466 52
Evans *v.* United States, 153 U. S. 584 220
Extract & Tonic Co. *v.* Lynch, 100 Miss. 650 283, 287
Farmers' & Mechanics' Natl. Bank *v.* Dearing, 91 U. S. 29 109, 111, 115
Farrugia *v.* Phila. & Read. Ry., 233 U. S. 352 542
Fitts *v.* McGhee, 172 U. S. 516 313
Fitzpatrick *v.* United States, 178 U. S. 304 18
Flagg *v.* United States, 233 Fed. Rep. 481 392
Fleckner *v.* United States Bank, 8 Wheat. 338 113, 116
Fort Smith Lumber Co. *v.* State, 211 S. W. Rep. 662 532
Frank *v.* Mangum, 237 U. S. 309 56
French *v.* Barber Asphalt Co., 181 U. S. 324 188
Friend *v.* Talcott, 228 U. S. 27 251
Frohwerk *v.* United States, 249 U. S. 204 477
Fuller *v.* Jackson, 97 Miss. 237 287
Galliher *v.* Cadwell, 145 U. S. 368 239
Gardner *v.* Michigan, 199 U. S. 325 303
Gardner *v.* Western Union Tel. Co., 231 Fed. Rep. 405 31
Gast Realty Co. *v.* Schneider Granite Co., 240 U. S. 55 190
Georgia *v.* Brailsford, 3 Dall. 1 56
Ghriest *v.* Railroad Comm., 170 Cal. 63 372
Gibbons *v.* Ogden, 9 Wheat. 1 161
Globe Refg. Co. *v.* Landa Cotton Oil Co., 190 U. S. 540 531
Godchaux Co. *v.* Estopinal, 251 U. S. 179 257, 259
Godchaux Co. *v.* Estopinal, 142 La. 812 179, 180
Goodrich *v.* Ferris, 214 U. S. 71 536, 537

PAGE

Grant Shoe Co. *v.* Laird Co., 212 U. S. 445 250
Gray, *Ex parte*, 83 S. W. Rep. 828 297
Grays Harbor Co. *v.* Coats-Fordney Co., 243 U. S. 251 545
Great Northern Ry. *v.* Hower, 236 U. S. 702 228
Great Western Ry. *v.* Swindon Ry., L. R. 9 A. C. 787 218
Greene *v.* Louis. & Interurban R. R., 244 U. S. 499 119, 133, 134, 237
Gulf, Colo. & S. F. Ry. *v.* Texas, 246 U. S. 58 65
Hale *v.* Henkel, 201 U. S. 43 414
Hamilton *v.* Kentucky Distilleries Co., 251 U. S. 146 220, 281, 300, 303, 305, 308
Hammond *v.* Hopkins, 143 U. S. 224 239
Hancock *v.* Muskogee, 250 U. S. 454 190
Hanger *v.* Abbott, 6 Wall. 532 323
Hans *v.* Louisiana, 134 U. S. 1 313
Hansberg *v.* People, 120 Ill. 21 283, 289
Hardin-Wyandot Co. *v.* Upper Sandusky, 93 Oh. St. 428 174
Harding *v.* Illinois, 196 U. S. 78 537, 538, 544
Hardt *v.* Heidweyer, 152 U. S. 547 239
Harriman *v.* Northern Securities Co., 197 U. S. 244 461
Hart Steel Co. *v.* R. R. Supply Co., 244 U. S. 294 373
Haseltine *v.* Central Bank, 183 U. S. 130 535
Haseltine *v.* Central Bank, 183 U. S. 132 109, 111, 115
Haskell, *Ex parte*, 112 Cal. 412 37
Haskell Implement Co. *v.* Postal Tel.-Cable Co., 114 Me. 277 31
Hawaii *v.* Mankichi, 190 U. S. 197 407
Hayes *v.* Missouri, 120 U. S. 68 21

PAGE

Hays *v.* Robertson, 271 Mo. 475 256, 257
Hays *v.* Port of Seattle, 226 Fed. Rep. 287 233, 234
Henry *v.* United States, 53 Ct. Clms. 641 393
Hepburn *v.* Dubois, 12 Pet. 345 80
Hijo *v.* United States, 194 U. S. 315 161, 165
Hipolite Egg Co. *v.* United States, 220 U. S. 45 156
Hirschman, *In re*, 104 Fed. Rep. 69 253
Hoke *v.* United States, 227 U. S. 308 156
Holt *v.* United States, 218 U. S. 245 21
Hooper & Co. *v.* Railroad Comm., 175 Cal. 811 372
Hopt *v.* Utah, 120 U. S. 430 21
Horst Co. *v.* Railroad Comm., 175 Cal. 660 372
Houck *v.* Little River Drainage Dist., 239 U. S. 254 185, 190
Howard *v.* Acme Brewing Co., 143 Ga. 1 283
Intoxicating Liquor Cases, 25 Kans. 751 283, 285
Itow *v.* United States, 233 U. S. 581 541
J. P. Donaldson, The, 167 U. S. 599 52
Jackson *v.* Wauchula Mfg. Co., 230 Fed. Rep. 409 253
Jacksonville *v.* Southern Bell Tel. Co., 57 Fla. 374 194
James Gray, The, *v.* The John Fraser, 21 How. 184 52
John G. Stevens, The, 170 U. S. 113 52
Johnson *v.* Gearlds, 234 U. S. 422 162, 171
Jones Natl. Bank *v.* Yates, 240 U. S. 541 72
Kammann *v.* United States, 259 Fed. Rep. 192 486
Kansas City, Fort Scott &c. Ry. *v.* Kansas, 240 U. S. 227 405
Kansas City, M. & O. Ry. *v.* United States, 53 Ct. Clms. 258 327, 339, 340

PAGE
Kelly *v.* United States, 250 Fed. Rep. 947 414
Kemmler, *In re*, 136 U. S. 436 156
Kennon *v.* Gilmer, 131 U. S. 22 20
Kentucky Railroad Tax Cases, 115 U. S. 321 187
Kepner *v.* United States, 195 U. S. 100 18
Kershaw *v.* Kelsey, 100 Mass. 561 323
Kidd *v.* Pearson, 128 U. S. 1 157, 306
King's County Savgs. Inst. *v.* Blair, 116 U. S. 200 354
Kinzell *v.* Chicago, Mil. & St. P. Ry., 250 U. S. 130 263
Kneeland *v.* American L. & T. Co., 138 U. S. 509 531
Kohl *v.* United States, 91 U. S. 367 300
Kurz *v.* State, 79 Ind. 488 283, 290
La Follette *v.* Murray, 81 Oh. St. 474 283, 287
Lake County *v.* Rollins, 130 U. S. 662 217
Lancaster *v.* Collins, 115 U. S. 222 80
Landsdale *v.* Smith, 106 U. S. 391 239
Lange, *Ex parte*, 18 Wall. 163 18
Langford *v.* United States, 101 U. S. 341 366
Lawton *v.* Steele, 152 U. S. 133 303
Lennon, *In re*, 150 U. S. 393 541
Lent *v.* Tillson, 140 U. S. 316 59
Lewellyn *v.* Forged Steel Wheel Co., 258 Fed. Rep. 533 511
Lewensohn, *In re*, 99 Fed. Rep. 73; 104 *id.* 1006 252
Lewisville Gas Co. *v.* State, 135 Ind. 49 194
Lincoln *v.* Claflin, 7 Wall. 132 531
Lincoln Gas Co. *v.* Lincoln, 250 U. S. 256 162, 171
Linn *v.* United States, 251 Fed. Rep. 476 392
Liverpool Nav. Co. *v.* Brooklyn Eastern Dist. Term., 250 Fed. Rep. 1021 48, 52
PAGE
Lockman, *In re*, 18 Idaho, 465 283, 285
Loganville Banking Co. *v.* Forrester, 143 Ga. 302 112, 116, 117, 119, 120
Long Sault Development Co. *v.* Call, 242 U. S. 272 179
Lord *v.* Thomas, 64 N. Y. 107 238
Los Angeles Gas Co. *v.* Los Angeles, 241 Fed. Rep. 912 33
Lottery Case, 188 U. S. 321 156, 162
Louisiana *v.* Texas, 176 U. S. 1 314
Louisiana Nav. Co. *v.* Oyster Comm., 226 U. S. 99 545
Louis. & Nash. R. R. *v.* Barber Asphalt Co., 197 U. S. 430 107
Louis. & Nash. R. R. *v.* Mottley, 219 U. S. 467 232
Louis. & Nash. R. R. *v.* Rice, 247 U. S. 201 538
Louis. & Nash. R. R. *v.* West Coast Co., 198 U. S. 483 231
Louis. & Nash. R. R. *v.* Western Union Tel. Co., 234 U. S. 369 542
Luther *v.* State, 83 Nebr. 455 283, 291
McCall *v.* Herring, 116 Ga. 235 112, 117
McCarthy *v.* First Natl. Bank, 223 U. S. 493 113
McCaskill Co. *v.* United States, 216 U. S. 504 15
McCoach *v.* Pratt, 236 U. S. 562 394
M'Connell *v.* Hector, 3 B. & P. 113 323
McCray *v.* United States, 195 U. S. 27 156, 161
McCulloch *v.* Maryland, 4 Wheat. 316 161
McCurdy *v.* United States, 246 U. S. 263 129
McGourkey *v.* Toledo & Ohio Ry., 146 U. S. 536 90
McKinley *v.* United States, 249 U. S. 397 155
Machine Co. *v.* Gage, 100 U. S. 676 102, 103
Mackenzie *v.* Flannery & Co., 90 Ga. 590 112, 117

PAGE

Maillard *v.* Lawrence, 16 How. 251 347
Main, The, *v.* Williams, 152 U. S. 122 52, 53
Male *v.* Atchison, T. & S. F. Ry., 240 U. S. 97 543
Market Co. *v.* Hoffman, 101 U. S. 112 218
Marks *v.* State, 159 Ala. 71 283, 284
Marsh *v.* Whitmore, 21 Wall. 178 239
Marvin *v.* Trout, 199 U. S. 212 66
Maryland Casualty Co. *v.* United States, 52 Ct. Clms. 201, 288; 53 *id.* 81 343
Mason, W. G., The, 142 Fed. Rep. 913 52–54
Maxwell *v.* Dow, 176 U. S. 581 56
Maxwell *v.* Kennedy, 8 How. 210 239
Maxwell *v.* McGee, 66 Mass. 137 346
Maynard *v.* Hecht, 151 U. S. 324 541
Meadows *v.* Postal Tel. & Cable Co., 173 N. Car. 240 31
Meisukas *v.* Greenough Coal Co., 244 U. S. 54 379
Memphis & Little Rock R. R. *v.* R. R. Commr., 112 U. S. 609 186
Meyer *v.* Wells, Fargo & Co., 223 U. S. 298 405
Milligan, *Ex parte*, 4 Wall. 2 156, 306
Mills *v.* Chicago, 127 Fed. Rep. 731 194
Milwaukee *v.* Milwaukee E. R. & L. Co., 144 Wis. 386 26
Minneapolis & St. Louis R. R. *v.* Bombolis, 241 U. S. 211 56
Minnesota Rate Cases, 230 U. S. 352 162, 171
Missouri Pac. Ry. *v.* Humes, 115 U. S. 512 66
Missouri Pac. Ry. *v.* Kansas, 216 U. S. 262 399
Missouri Pac. Ry. *v.* Nebraska, 217 U. S. 196 65

PAGE

Missouri Pac. Ry. *v.* Taber, 244 U. S. 200 181
Missouri Pac. Ry. *v.* Tucker, 230 U. S. 340 65
Missouri Rate Cases, 230 U. S. 474 162
Monongahela Nav. Co. *v.* United States, 148 U. S. 312 156
Morgan *v.* Louisiana, 93 U. S. 217 186
Mount Konocti Light Co. *v.* Thelen, 170 Cal. 468 372
Mugler *v.* Kansas, 123 U. S. 623 157, 301, 302
Municipal Gas Co. *v.* Public Service Comm., 225 N. Y. 89 171
Munn *v.* Illinois, 94 U. S. 113 231, 399
Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291 181
Myles Salt Co. *v.* Iberia Drainage Dist., 239 U. S. 478 190
Napa Valley Co. *v.* Railroad Comm., 257 Fed. Rep. 197 367
Narragansett Brewing Co. *v.* Baker, U. S. D. C., Nov. 12, 1919 164
Nashua R. R. *v.* Lowell R. R., 136 U. S. 356 89
National Bank *v.* Carpenter, 101 U. S. 567 239
National Bank *v.* Johnson, 104 U. S. 271 111
Newcomb *v.* Norfolk Western St. Ry., 179 Mass. 449 26
New Orleans Gas Co. *v.* Drainage Comm., 197 U. S. 453 39
Newport *v.* French Bros. Bauer Co., 169 Ky. 174 101
Newport *v.* Wagner, 168 Ky. 641 101
New York *v.* Barker, 179 U. S. 279 534
New York Cent. R. R. *v.* Porter, 249 U. S. 168 263
New York Cent. R. R. *v.* Winfield, 244 U. S. 147 263
New York, N. H. & H. R. R. *v.* United States, 251 U. S. 123 334, 339

PAGE

New York, N. H. & H. R. R. *v.* United States, 53 Ct. Clms. 222 123, 127
New York Tunnel Co., *In re*, 159 Fed. Rep. 688 253
Norfolk & Western Ry. *v.* West Virginia, 236 U. S. 605 399
Norris *v.* Western Union Tel. Co., 174 N. Car. 92 31
North American Storage Co. *v.* Chicago, 211 U. S. 306 303
North Carolina *v.* Temple, 134 U. S. 22 313
Northern Pac. Ry. *v.* North Dakota, 236 U. S. 585 231, 399
Northern Pac. Ry. *v.* Puget Sound Ry., 250 U. S. 332 178
Northern Securities Co. *v.* United States, 193 U. S. 197 461
Norwood *v.* Baker, 172 U. S. 269 190
Ocampo *v.* United States, 234 U. S. 91 407
Oklahoma Ry. *v.* Severns Pav. Co., 67 Okla. —— 105, 106
Old Wayne Mut. Life Assn. *v.* McDonough, 204 U. S. 8 379
O'Neal *v.* United States, 190 U. S. 36 541
Owens *v.* Hannay, 9 Cr. 180 323
Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358 197, 198
Pacific Gas Co. *v.* Police Court, 28 Cal. App. 412 23
Parker *v.* Griffith, 151 N. Car. 600 297
Paulsen *v.* Portland, 149 U. S. 30 61
Pawhuska *v.* Pawhuska Oil Co., 250 U. S. 394 545, 547
Pearsall *v.* Great Northern Ry., 161 U. S. 646 461
Pedersen *v.* Del., Lack. & W. R. R., 229 U. S. 146 263
Penn Mutual Life Ins. Co. *v.* Austin, 168 U. S. 685 239
Pennell *v.* State, 141 Wis. 35 283, 289
Pennoyer *v.* Neff, 95 U. S. 714 379

PAGE

Pennsylvania R. R. *v.* Hughes, 191 U. S. 477 29
Pennsylvania R. R. *v.* Pub. Service Comm., 250 U. S. 566 400
People *v.* Clements, 5 N. Y. Crim. 288 415
People *v.* Cox, 106 App. Div. 299 283, 287
People *v.* Dillon, 197 N. Y. 254 415, 416
People *v.* Neidhart, 71 N. Y. S. 591 415
People *v.* O'Reilly, 129 App. Div. 522; 194 N. Y. 592 283, 287
People *v.* Strickler, 25 Cal. App. 60 293
People *v.* Warren, 109 N. Y. 615 415, 416
People's Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79 380
Perrin *v.* United States, 232 U. S. 478 162, 171
Phila. & Reading Ry. *v.* McKibbin, 243 U. S. 264 379
Pipe Line Cases, 234 U. S. 548 232
Pittsburgh &c. Ry. *v.* Backus, 154 U. S. 421 134
Postal Tel.-Cable Co. *v.* Warren-Godwin Co., 251 U. S. 27 316
Prentis *v.* Atlantic Coast Line, 211 U. S. 210 56
Primrose *v.* Western Union Tel. Co., 154 U. S. 1 27, 28, 30
Producers Transp. Co. *v.* R. R. Comm., 176 Cal. 499 229, 230
Protector, The, 12 Wall. 700 161, 165
Provident Institution *v.* Jersey City, 113 U. S. 506 517
Pullman Co. *v.* Kansas, 216 U. S. 56 404
Purity Extract Co. *v.* Lynch, 226 U. S. 192 283, 289, 308
Quong Wing *v.* Kirkendall, 223 U. S. 59 534
Railway Co. *v.* Gill, 54 Ark. 101 66

PAGE

Rast *v.* Van Deman & Lewis Co., 240 U. S. 342 161
Raymond *v.* Chicago Union Trac. Co., 207 U. S. 20 134
Rea *v.* State, 3 Okla. Crim. 269, 281 415, 416
Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362 134
Rearick *v.* Pennsylvania, 203 U. S. 507 104
Reduction Co. *v.* Sanitary Works, 199 U. S. 306 303
Reisenberg *v.* State, 84 S. W. Rep. 585 283, 297
Rex *v.* United States, 53 Ct. Clms. 320 382
Reynolds *v.* New York Trust Co., 188 Fed. Rep. 611 255
Rhutassel, *In re*, 96 Fed. Rep. 597 252
Richardson *v.* Green, 133 U. S. 30 90
Richardson *v.* Shaw, 209 U. S. 365 254
Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489 103
Robinson *v.* Lundrigan, 227 U. S. 173 225
Rogers *v.* Arkansas, 227 U. S. 401 103
Rowland *v.* St. Louis & S. F. R. R., 244 U. S. 106 65
Rowand *v.* Commonwealth, 92 Pa. St. 405 415
Russell *v.* Sebastian, 233 U. S. 195 38, 39
Sage *v.* United States, 250 U. S. 33 394
St. Louis, I. Mt. & So. Ry. *v.* McKnight, 244 U. S. 368 65
St. Louis, I. Mt. & So. Ry. *v.* United States, 53 Ct. Clms. 45 198, 205
St. Louis, I. Mt. & So. Ry. *v.* Waldrop, 93 Ark. 42 66
St. Louis, I. Mt. & So. Ry. *v.* Williams, 131 Ark. 442 63, 64
St. Louis & S. F. R. R. *v.* Shepherd, 240 U. S. 240 181, 541
St. Louis S. W. Ry. *v.* Alexander, 227 U. S. 218 379

PAGE

St. Louis S. W. Ry. *v.* Arkansas, 235 U. S. 350 102, 533
St. Paul *v.* St. Paul City Ry., 114 Minn. 250 26
St. Paul Gas Co. *v.* St. Paul, 181 U. S. 142 237
Sandberg *v.* United States, 257 Fed. Rep. 643 486
Savage *v.* Commonwealth, 84 Va. 582 293
Sawyer *v.* Botti, 147 Ia. 453 283, 285
Sayward *v.* Denny, 158 U. S. 180 537, 544
Schall *v.* Camors, 250 Fed. Rep. 6 240, 248, 253
Schenck *v.* United States, 249 U. S. 47 477, 482
Schlosser *v.* Hemphill, 198 U. S. 173 535, 545
Schmohl *v.* Travelers' Ins. Co., 197 S. W. Rep. 60 258
Schuchardt, *In re*, 8 Ben. 585 250
Scotland, The, 118 U. S. 507 532
Seaboard Air Line Ry. *v.* Duvall, 225 U. S. 477 544
Seaboard Air Line Ry. *v.* Seegers, 207 U. S. 73 67
Sears *v.* Akron, 246 U. S. 242 59
Second Employers' Liability Cases, 223 U. S. 1 300
Seibert *v.* State, 121 Ark. 258 283, 284
Seven Cases *v.* United States, 239 U. S. 510 156
Shanks *v.* Del., Lack. & W. R. R., 239 U. S. 556 263
Shreveport *v.* Sullivan, 142 La. 573 169
Shreveport Ice Co. *v.* Brown, 128 La. 408 286
Silz *v.* Hesterberg, 211 U. S. 31 308
Simon *v.* Southern Ry., 236 U. S. 115 379
Smyth *v.* Ames, 169 U. S. 466 133
South Carolina *v.* United States, 199 U. S. 437 39
South Coast, The, 233 Fed. Rep. 327; 247 *id.* 84 519, 522
Southern Pac. Co. *v.* Denton, 146 U. S. 202 404

PAGE
Southern Pac. Co. *v.* Industrial Accident Comm., 178 Cal. 20 258
Southern Pac. Co. *v.* Jensen, 244 U. S. 205 122
Southern Pac. Co. *v.* Lowe, 247 U. S. 330 345
Southern Pac. Co. *v.* United States, 237 U. S. 202 207
Southern Pac. Co. *v.* United States, 249 Fed. Rep. 785 2, 7
Southern Ry. *v.* United States, 222 U. S. 20 300
Southern Steel Co., *In re*, 183 Fed. Rep. 498 253
Sparf *v.* United States, 156 U. S. 51 56
Spencer *v.* Merchant, 125 U. S. 345 189
Spies *v.* Illinois, 123 U. S. 131 21, 382
Standard Oil Co. *v.* Commonwealth, 107 Ky. 606 101
Standard Oil Co. *v.* United States, 221 U. S. 1 451, 455–457, 461, 462
State *v.* Burk, 151 Mo. App. 188 291
State *v.* Canal & C. R. R., 50 La. Ann. 1189 26
State *v.* Carmody, 50 Oreg. 1 292
State *v.* Centennial Brewing Co., 55 Mont. 500 283, 296
State *v.* Collis, 73 Ia. 542 415, 416
State *v.* Colvin, 127 Ia. 632 283, 285
State *v.* Currie, 8 N. Dak. 545 295
State *v.* Danenberg, 151 N. Car. 718 297
State *v.* Ellison, 268 Mo. 225; 269 Mo. 151 258
State *v.* Ely, 22 S. Dak. 487 283, 288
State *v.* Fargo Bottling Works, 19 N. Dak. 397 283, 295
State *v.* Frederickson, 101 Me. 37 290
State *v.* Gamma, 149 Mo. App. 694 291
State *v.* George, 136 La. 906 283, 286
PAGE
State *v.* Gill, 89 Minn. 502 291
State *v.* Hemrich, 93 Wash. 439 289
State *v.* Henry, 74 W. Va. 72 293
State *v.* Intoxicating Liquors, 76 Ia. 243 285
State *v.* Maroun, 128 La. 829 283, 286
State *v.* Miller, 92 Kans. 994 283, 285
State *v.* Missouri & K. Tel. Co., 189 Mo. 83 194
State *v.* Oliver, 26 W. Va. 422 283, 293
State *v.* Olsen, 95 Minn. 104 283
State *v.* Piche, 98 Me. 348 290
State *v.* Reno Brewing Co., 42 Nev. 397 292
State *ex rel.* Hays *v.* Robertson, 271 Mo. 475 256, 257
State *v.* Sheboygan, 111 Wis. 23 194
State *v.* Spaulding, 61 Vt. 505 294
State *v.* Thornton, 63 N. H. 114 283, 294
State *v.* Trione, 97 Kans. 365 283, 285
State *v.* Virgo, 14 N. Dak. 293 283, 295
State *v.* Walder, 83 Oh. St. 68 283, 288
State *v.* Wills, 154 Mo. App. 605 291
State Railroad Tax Cases, 92 U. S. 575 185, 187
Stewart *v.* Kahn, 11 Wall. 493 161
Stilson *v.* United States, 250 U. S. 583 470, 474
Straus *v.* American Publishers' Assn., 231 U. S. 222 461
Stroud *v.* United States, 251 U. S. 15 380
Sugarman *v.* United States, 249 U. S. 182 470, 536, 537, 541
Sullivan *v.* Portland R. R., 94 U. S. 806 239
Sunbeam, The, 195 Fed. Rep. 468 53
Sutton *v.* Commonwealth, 97 Ky. 308 415, 416

PAGE

Sweet *v.* Rechel, 159 U. S. 380 62
Swift & Co. *v.* United States, 196 U. S. 375 445, 465
Tauza *v.* Susquehanna Coal Co., 220 N. Y. 259 379
Tempel *v.* United States, 248 U. S. 121 366
Tennessee *v.* Whitworth, 117 U. S. 129 533
Thomas *v.* Brownville R. R., 109 U. S. 522 90
Thomas *v.* Iowa, 209 U. S. 258 537, 538
Thomas *v.* Taylor, 224 U. S. 73 72
Thompson Towing Assn. *v.* McGregor, 207 Fed. Rep. 209 53
Tide Water Oil Co. *v.* United States, 171 U. S. 210 515
Tindle *v.* Birkett, 205 U. S. 183 251
Toledo Newspaper Co. *v.* United States, 247 U. S. 402 541
Transfer No. 21, The, 248 Fed. Rep. 459 54
Trono *v.* United States, 199 U. S. 521 18
Troxell *v.* Del., Lack. & W. R. R., 227 U. S. 434 80
Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587 90
Twining *v.* New Jersey, 211 U. S. 78 56
Union Dry Goods Co. *v.* Georgia Pub. Serv. Corp., 248 U. S. 372 232
Union Natl. Bank *v.* Louisville &c. Ry., 163 U. S. 325 115, 120
Union Pac. Ry. *v.* Cheyenne, 113 U. S. 516 133
Union Pac. R. R. *v.* Weld County, 247 U. S. 282 134
Union Savgs. Bank *v.* Dottenheim, 107 Ga. 606 112, 117
Union S. S. Co. *v.* The "Aracan," L. R. 6 P. C. 127 52
United Button Co., *In re*, 140 Fed. Rep. 495 253
United Fuel Co. *v.* Commonwealth, 159 Ky. 34 196

PAGE

United Shoe Mach. Co. *v.* Ramlose, 210 Mo. 631 258
United States *v.* American Tobacco Co., 221 U. S. 106 455–457, 461, 462, 465
United States *v.* American Tobacco Co., 191 Fed. Rep. 371 465
United States *v.* Anderson, 9 Wall. 56 161, 165
United States *v.* Atchison, T. & S. F. Ry., 249 U. S. 451 330
United States *v.* Bank, 234 U. S. 245 217
United States *v.* Barber, 219 U. S. 72 412
United States *v.* Birdsall, 233 U. S. 223 349
United States *v.* Board of Commrs., 254 Fed. Rep. 570 128
United States *v.* Buffalo Pitts Co., 234 U. S. 228 366
United States *v.* Cohn, 2 Ind. Ter. 474 283, 288
United States *v.* Cress, 243 U. S. 316 156
United States *v.* Del. & Hudson Co., 213 U. S. 366 220
United States *v.* Des Moines Nav. Co., 142 U. S. 510 161
United States *v.* Doremus, 249 U. S. 86 156
United States *v.* Ervien, 246 Fed. Rep. 277 41
United States *v.* Fidelity Trust Co., 222 U. S. 158 395
United States *v.* George, 228 U. S. 14 220
United States *v.* Grimaud, 220 U. S. 506 349
United States *v.* Hall, 248 Fed. Rep. 150 486
United States *v.* Jin Fuey Moy, 241 U. S. 394 220
United States *v.* Joint Traffic Assn., 171 U. S. 505 156
United States *v.* Jones, 109 U. S. 513 59
United States *v.* Jones, 236 U. S. 106 394
United States *v.* Larkin, 208 U. S. 333 540

PAGE

United States *v.* Minor, 114 U. S. 233 15
United States *v.* Morehead, 243 U. S. 607 349
United States *v.* Oppenheimer, 242 U. S. 85 412
United States *v.* Pacific R. R., 120 U. S. 227 155, 303
United States *v.* Poland, 231 Fed. Rep. 810 221, 222
United States *v.* Reading Co., 226 U. S. 324 461
United States *v.* Russell, 13 Wall. 623 155
United States *v.* Schafer, 254 Fed. Rep. 135 467
United States *v.* Schutte, 252 Fed. Rep. 212 486
United States *v.* Smull, 236 U. S. 405 349
United States *v.* Standard Brewery, 251 U. S. 210 305
United States *v.* Standard Brewery, 260 Fed. Rep. 486 211
United States *v.* Trans-Missouri Freight Assn., 166 U. S. 290 461
United States *v.* Union Pac. R. R., 226 U. S. 61 461
United States *v.* U. S. Steel Corp., 223 Fed. Rep. 55 419, 437, 438, 458
United States *v.* United Verde Copper Co., 196 U. S. 207 218, 220
United Surety Co. *v.* American Fruit Co., 238 U. S. 140 536, 537
Van Eyken *v.* Erie R. R., 117 Fed. Rep. 712 54
Veasey *v.* Peters, 142 La. 1012 121, 122
Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496 39
Vilas *v.* Manila, 220 U. S. 345 39
Von Bank *v.* United States, 253 Fed. Rep. 641 486
Wadley Southern Ry. *v.* Georgia, 235 U. S. 651 65
Wagner *v.* Baltimore, 239 U. S. 207 190

PAGE

Wagner *v.* Covington, 177 Ky. 385 95, 100, 101
Waite *v.* Macy, 246 U. S. 606 220
Walker *v.* Sauvinet, 92 U. S. 90 56
Walling *v.* Michigan, 116 U. S. 446 102
Wardell *v.* Railroad Co., 103 U. S. 651 90
Warner *v.* Penoyer, 91 Fed. Rep. 587 530
Warren-Godwin Co. *v.* Postal Tel.-Cable Co., 116 Miss. 660 27
Washington Securities Co. *v.* United States, 234 U. S. 76 15
Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86 67
Watts, Watts & Co. *v.* Unione Austriaca, 248 U. S. 9 323
Weber *v.* Freed, 239 U. S. 325 161
Webster *v.* Luther, 163 U. S. 331 225
Weeks *v.* United States, 232 U. S. 383 21, 391, 392
Weeks *v.* United States, 216 Fed. Rep. 292 414
Weems Steamboat Co. *v.* People's Co., 214 U. S. 345 231
Wells, Fargo & Co. *v.* Nevada, 248 U. S. 165 59
Welton *v.* Missouri, 91 U. S. 275 102
Western Oil Refg. Co. *v.* Lipscomb, 244 U. S. 346 104
Western Union Tel. Co. *v.* Bank of Spencer, 53 Okla. 398 31
Western Union Tel. Co. *v.* Bilisoly, 116 Va. 562 31
Western Union Tel. Co. *v.* Boegli, 187 Ind. 238 315
Western Union Tel. Co. *v.* Brown, 234 U. S. 542 29
Western Union Tel. Co. *v.* Crovo, 220 U. S. 364 29
Western Union Tel. Co. *v.* Foster, 247 U. S. 105 405
Western Union Tel. Co. *v.* Foster, 224 Mass. 365 32
Western Union Tel. Co. *v.* Hawkins, 14 Ala. App. 295 32

	PAGE
Western Union Tel. Co. *v.* Kansas, 216 U. S. 1	404
Western Union Tel. Co. *v.* Lee, 174 Ky. 210	31
Western Union Tel. Co. *v.* Schade, 137 Tenn. 214	31
Western Union Tel. Co. *v.* Showers, 112 Miss. 411	28, 29
W. G. Mason, The, 142 Fed. Rep. 913	52–54
Willard *v.* Wood, 164 U. S. 502	239
Willcox *v.* Consolidated Gas Co., 212 U. S. 19	65
Williams *v.* Bruffy, 102 U. S. 248	373
Williams *v.* Parker, 188 U. S. 491	62
Winona & St. Peter Land Co. *v.* Minnesota, 159 U. S. 526	59
Withnell *v.* Ruecking Constr. Co., 249 U. S. 63	190
Wolf *v.* United States, 259 Fed. Rep. 388	486
Woodruff *v.* Parham, 8 Wall. 123	102
Worth Bros. Co. *v.* Lederer, 251 U. S. 507	512, 513
Worth Bros. Co. *v.* Lederer, 258 Fed. Rep. 533	507
Worthington *v.* Robbins, 139 U. S. 337	515
Wright-Blodgett Co. *v.* United States, 236 U. S. 397	228
Yates, *In re*, 114 Fed. Rep. 365	253
Yates *v.* Jones Natl. Bank, 206 U. S. 158	71
Young, *Ex parte*, 209 U. S. 123	65

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

PAGE

1800, April 4, c. 19, 2 Stat. 19 250
1834, June 30, c. 161, 4 Stat. 729, § 17 383
1841, Aug. 19, c. 9, 5 Stat. 440 250
1853, Feb. 9, c. 59, 10 Stat. 155 202, 208
§ 4. 202, 208
§ 6 204, 208
1864, June 3, c. 106, 13 Stat. 99 (see National Bank Act)
1866, July 27, c. 278, 14 Stat. 292 6
1866, July 28, c. 300, 14 Stat. 338, § 1 202, 208
1867, March 2, c. 176, 14 Stat. 517, §§ 11, 19 250
1872, June 8, c. 355, 17 Stat. 283 329, 335
§ 210 335
§ 211 329
§ 212 339
§ 214 341
1873, March 3, c. 231, 17 Stat. 556 330, 335
1875, Feb. 18, c. 80, 18 Stat. 320 111
1875, March 3, c. 128, 18 Stat. 340 334
1876, July 12, c. 179, 19 Stat. 78 204, 330, 338
§ 13 204, 341
1878, June 17, c. 259, 20 Stat. 140 338
1880, June 16, c. 244, 21 Stat. 287 228
1882, June 30, c. 254, 22 Stat. 120 207
1884, May 17, c. 53, 23 Stat. 24, § 8 222

PAGE

1887, Feb. 4, c. 104, 24 Stat. 379 (see Interstate Commerce Acts)
1890, July 2, c. 647, 26 Stat. 209 (Sherman Act) 436, 457
§ 4 462
1891, March 3, c. 538, 26 Stat. 851, § 1 383
1891, March 3, c. 561, 26 Stat. 1095, § 11 223
1895, March 1, c. 145, 28 Stat. 697, § 8 288
1897, March 3, c. 391, 29 Stat. 692 144
1898, May 14, c. 299, 30 Stat. 409 223
1898, June 13, c. 448, 30 Stat. 448, §§ 29, 30 393
1898, July 1, c. 541, 30 Stat. 544 (see Bankruptcy Act)
1902, April 12, c. 500, 32 Stat. 96, § 7 393
1902, June 27, c. 1160, 32 Stat. 406, § 3 393
1902, July 1, c. 1369, 32 Stat. 691 365, 407
§ 86 407
1903, Feb. 5, c. 487, 32 Stat. 797 (see Bankruptcy Act)
§ 5 251
§ 13 254
1903, March 3, c. 1002, 32 Stat. 1028 223
1904, April 15, c. 1314, 33 Stat. 181 402
1905, March 3, c. 1480, 33 Stat. 1082 331, 337
1906, June 22, c. 3516, 34 Stat. 451 70

PAGE

1906, June 28, c. 3572, 34 Stat. 539 129
1906, June 30, c. 3935, 34 Stat. 816 409
1907, March 2, c. 2513, 34 Stat. 1205 .....333, 334
1907, March 2, c. 2564, 34 Stat. 1246 (see Criminal Appeals Act)
1908, April 22, c. 149, 35 Stat. 65 (see Employers' Liability Act)
1908, May 27, c. 206, 35 Stat. 412 203
1909, March 4, c. 321, 35 Stat. 1088 (see Criminal Code)
1909, Aug. 5, c. 6, 36 Stat. 11 344
§ 38 345
1910, May 12, c. 230, 36 Stat. 355 341
1910, June 18, c. 309, 36 Stat. 539 (see Interstate Commerce Acts)
1910, June 20, c. 310, 36 Stat. 557, § 10 45
1910, June 23, c. 373, 36 Stat. 604, §§ 1, 3 523
1910, June 25, c. 412, 36 Stat. 838 (see Bankruptcy Act)
§ 11 254
1911, March 3, c. 231, 36 Stat. 1087 (see Judicial Code)
1911, Aug. 21, Joint Resolution, 37 Stat. 39 45
1913, Oct. 3, c. 16, 38 Stat. 166 (Income Tax Act). 344
§ G (a), (b) 345
1915, Jan. 11, c. 7, 38 Stat. 791 383
1916, June 3, c. 134, 39 Stat. 166 156
1916, July 28, c. 261, 39 Stat. 412 .....127, 334, 341
1916, Aug. 29, c. 416, 39 Stat. 545 403
1916, Sept. 6, c. 448, 39 Stat. 726, § 2 ..181, 257, 535, 536, 538–541, 544, 545, 547
1916, Sept. 8, c. 463, 39 Stat. 756, Tit. I, § 14 355
Tit. III, § 301 .502, 508, 512

PAGE

1917, Feb. 14, c. 53, 39 Stat. 903 288
1917, March 2, c. 146, 39 Stat. 969 131
1917, March 2, c. 153, 39 Stat. 999 (see Bankruptcy Act)
1917, March 3, c. 165, 39 Stat. 1123 288
1917, March 4, c. 180, 39 Stat. 1168 .....155, 156
1917, May 18, c. 15, 40 Stat. 76, § 12 (Selective Service Act) 298
1917, June 15, c. 29, 40 Stat. 182 .....155, 165
1917, June 15, c. 30, 40 Stat. 217 (Espionage Act) 468, 493
§ 3 476
1917, Aug. 10, c. 53, 40 Stat. 276 ....155, 165, 215, 278
§ 2 279
§ 15 .....158, 278
§ 24 165
1917, Oct. 3, c. 63, 40 Stat. 311, § 307 280
1917, Oct. 6, c. 97, 40 Stat. 395 122
1917, Oct. 6, c. 106, 40 Stat. 411 166
1917, Dec. 8, Proclamation, 40 Stat. 1728 .....216, 278
1918, March 8, c. 20, 40 Stat. 440, § 603 166
1918, March 21, c. 25, 40 Stat. 451 .....156, 165
1918, April 10, c. 50, 40 Stat. 516, § 2 453
1918, April 22, c. 62, 40 Stat. 535 .....155, 165
1918, May 16, c. 74, 40 Stat. 550 156
1918, May 20, c. 78, 40 Stat. 556 165
1918, May 31, c. 90, 40 Stat. 593 166
1918, June 4, c. 92, 40 Stat. 594 156
1918, July 1, c. 113, 40 Stat. 634 155
1918, July 9, c. 143, 40 Stat. 889, c. XVI 165

PAGE

1918, July 16, c. 154, 40 Stat. 904 156
1918, July 18, c. 157, 40 Stat. 913 .....156, 165
1918, Sept. 16, Proclamation, 40 Stat. 1848 .....216, 278
1918, Oct. 5, c. 181, 40 Stat. 1009 156
1918, Nov. 4, c. 201, 40 Stat. 1020 .....155, 165
1918, Nov. 21, c. 212, 40 Stat. 1045 (War Time Prohibition Act)...153, 215, 279, 308
1919, Jan. 29, Proclamation, 40 Stat. 1941 164
1919, Jan. 30, Proclamation, 40 Stat. 1930 216
1919, March 4, c. 125, 40 Stat. 1348 160
§ 11 166
1919, March 4, Proclamation, 40 Stat. 1937....216, 279
1919, Oct. 28 (National Prohibition Act).160, 280, 305
Tit. I, § 1 281

Constitution. See Index at end of volume.

Revised Statutes.
§ 722 416
§ 913 239
§ 914 239
§ 2156 383
§ 2289 225
§ 2304 225
§ 2306 225
§ 2330 226
§ 2331 226
§ 3226 353
§ 3227 353
§ 3228 353
§ 3242 280
§ 3339 280
§ 3997 335
§ 3998 330
§ 3999 .....329, 339

PAGE

Revised Statutes (*cont.*)
§ 4001 341
§ 4002 .....126, 330, 335
§ 4283 51
§ 4284 51
§ 4285 51
§ 4886 144
§ 5014 250
§ 5067 250
§§ 5133 *et seq* 109
§ 5136 110
§ 5197 .....110, 115
§ 5198 .....110, 115
§ 5200 70
§ 5211 83
§ 5239 70
1 Supp. Rev. Stats. 375, 376. 207
U. S. Comp. Stats.
Vol. 10, § 10504 17
Bankruptcy Act ...248, 251, 252, 254, 517
§ 1 (11) 249
§ 5 255
§ 5f 248
§ 17 252
§ 60a 254
§ 60b 254
§ 63a 249
§ 63b 249
§ 67e 254
§ 70e 254
Criminal Appeals Act ...214, 412
Criminal Code.
§ 330 17
Employers' Liability Act 262
Interstate Commerce Acts 28, 30, 315
Judicial Code.
§ 24 (3) 122
§ 237 .....181, 257, 535, 536, 538–541, 544, 545, 547
§ 238 .....154, 234, 281
§ 256 (3) 122
§ 287 470
National Bank Act.109, 115, 409
§ 8 109
§ 30 109

(B.) STATUTES OF THE STATES AND TERRITORIES.

Alabama.
1907, Laws, Sp. Sess., No. 53, § 1 284
1919, Laws, No. 7 284

Arizona.
Constitution, Art. 23, § 1 284
Arkansas.
Constitution 183, 534

PAGE

Arkansas (*cont.*)
1887, Acts, p. 227..... 64
1911, Acts, Sp. & Priv., p. 642..... 183
§ 5..... 189
1911, Acts, p. 233, § 2.. 184
1915, Acts, p. 365..... 64
1917, Acts, No. 13..... 284
1919, Acts, No. 87..... 284
Kirby's Dig., 1904, § 6620 64
Kirby & Castle's Dig., 1916, § 8094..... 64

California.
Constitution....24, 39, 372
1911, Stats., c. 351, § 21 293
1911, Stats., Ex. Sess., c. 14..... 229
1913, Stats., c. 327..... 229
1915, Stats., c. 91, § 67.. 370
Civ. Code..... 371
§ 1001..... 231
Code Civ. Proc., §§ 1237, 1238..... 231
Workmen's Compensation Act..... 262

Colorado.
1915, Laws, c. 98, § 30... 284
1919, Laws, c. 141..... 285

Connecticut.
1919, Acts, c. 241..... 289

Delaware.
1917, Laws, c. 10..... 289

Florida.
1918, Acts, Sp. Sess., c. 7736, § 7..... 289
1919, Acts, c. 7890..... 289

Georgia.
1915, Acts, Sp. Sess., pp. 77, 79..... 289
1919, Acts, p. 931..... 283
Code 1910, §§ 3426, 3427, 3436.....111, 116
Park's Ann. Code, Supp. 1917, Penal Code, § 448 (b)..... 289

Hawaii.
Rev. Laws, 1915, § 2101. 285

Idaho.
Constitution (Amendment Nov. 7, 1916)... 285

PAGE

Idaho (*cont.*)
1909, Laws, p. 18..... 285
1911, Laws, c. 15..... 285
1915, Laws, c. 11, § 23.. 285
1915, Laws, c. 28..... 285
1917, Laws, p. 528..... 285

Illinois.
1919, Laws, p. 931..... 290
Rev. Stats., 1874, c. 43, § 1..... 289

Indiana.
1911, Laws, c. 119, § 29. 290
1917, Laws, c. 4, § 2.... 290
Rev. Stats., 1881, § 2094 290

Iowa.
Rev. Code, 1897–1915, § 2382..... 285

Kansas.
1881, Laws, c. 128, § 1... 285
1909, Laws, c. 164, § 4 283, 285
1917, Laws, cc. 215, 216. 286
Gen. Stats., 1915, §§ 5498, 5501..... 285

Kentucky.
1906, Laws, c. 21..... 296
Stats., 1903, § 2554..... 296
Stats., § 3290..... 197
§ 3490 (8)..... 195
§ 3490 (25)..... 194
§ 3490 (30), (33). 195

Louisiana.
Constitution, Art. 281 (Amendment, 1914).. 180
1910, Acts, Ex. Sess., No. 171..... 286
1914, Acts, No. 20..... 121
1914, Acts, No. 146. 283, 286
1914, Acts, No. 211.283, 286
1916, Acts, No. 14..... 286

Maine.
1919, Laws, c. 235, § 21. 290
Rev. Stats., 1916, c. 127, § 21..... 290

Maryland.
1914, Laws, c. 831, § 1... 286
1916, Laws, c. 389, § 1... 286
1917, Laws, Ex. Sess., c. 13, § 1..... 290
1918, Laws, c. 219..... 296

PAGE

Massachusetts.
Rev. Laws, 1902, c. 100, § 2 294
Rev. Laws, Supp. 1908, c. 100, § 1 294

Michigan.
1919, Acts, No. 53, § 3... 286

Minnesota.
1919, Laws, c. 455...283, 291
Gen. Stats., 1913, § 3188 291
Gen. Stats., Supp. 1917, § 3161 291

Mississippi.
1908, Laws, c. 115 287
1918, Laws, c. 189, § 1... 287
Code, 1906, § 1746 287
Code, 1917, § 2086 287

Missouri.
Constitution 258
1919, Laws, c. —, § 15.. 291
Rev. Stats., 1909, §§ 3037–3040 257
§ 3342 257
§ 7243 291

Montana.
1917, Laws, c. 143, § 2... 295

Nebraska.
1917, Laws, c. 187, § 1.. 291
Cobbey's Comp. Stats., 1907, § 7161 291

Nevada.
1919, Laws, c. 1, § 1..... 292

New Hampshire.
1917, Laws, c. 147, § 60.. 294
Gen. Laws, 1878, c. 109, § 15 294
Supp. Pub. Stats. & Laws, 1901–1913, p. 7 294

New Jersey.
1918, Laws, c. 2, § 1.... 297

New Mexico.
Constitution 46
Constitution (Amendment, 1917) 287
1915, Laws, c. 60 45
§ 1 46
1917, Laws, p. 352..... 287
Stats. 1915, §§ 2874, 2937 287

PAGE

New York.
1897, Laws, c. 312, § 2... 287
1903, Laws, c. 486, § 2... 287
1905, Laws, c. 679, § 2... 287
1917, Laws, c. 624, § 2... 287
Code Civ. Proc..... 379

North Carolina.
1908, Laws, Sp. Sess., c. 71, § 1..... 297
1909, Laws, c. 438, Schedule B, §§ 26, 63..... 297

North Dakota.
1897, Laws, c. 65, § 10.. 295
1909, Laws, c. 187..283, 295
Rev. Code, 1895, § 7598 295
Rev. Code, 1899, § 7598 295

Ohio.
84 O. L. 7 176
92 O. L. 204 176
1919, Laws, §§ 6212–15. 288
Rev. Stats., 1880, §§ 3461, 3471a..... 176
Rev. Stats., 1906, §§ 4364–9 287

Oklahoma.
Constitution 130
Constitution, Art. 23, § 6 55
1913, Laws, c. 26, § 6.... 292
1917, Laws, c. 186..... 292

Oregon.
1905, Laws, c. 2..... 292
1915, Laws, c. 141, § 2.. 292

Philippine Islands.
Bill of Rights..... 402
Administrative Code, 1916, § 309..... 403
Administrative Code, 1917, § 568..... 403

Rhode Island.
1887, Laws, c. 634, § 2... 296
1919, Laws, c. 1740, §§ 1, 2, 5..... 296
Gen. Laws, c. 123, § 1... 296

South Carolina.
1917, Acts, No. 94..... 294
Rev. Stats., 1893, Crim. Stats., § 437..... 294

PAGE

South Carolina (*cont.*)
Code, 1902, Crim. Code, § 555 294
Code, 1912, Crim. Code, § 794 294

South Dakota.
1890, Laws, c. 101, § 6... 288
Rev. Pol. Code, 1903, § 2834 288
Rev. Code, 1919, § 10237 288

Tennessee.
1917, Acts, c. 4..... 292
Ann. Code, 1918, § 6798a 34 292

Texas.
Rev. Stats., 1895, Art. 5060a 297
Vernon's Sayles' Civ. Stats., 1914, Arts. 5687, 5688, 5690..... 85
Gen. Laws, 1918, c. 24.. 297

Utah.
1911, Laws, c. 106, § 2... 292
1913, Laws, c. 81, § 2.... 292
1917, Laws, c. 2, § 2..... 292

Vermont.
1902, Laws, No. 90, § 1.. 294
Rev. Laws, 1880, § 3800. 294
Gen. Laws, 1917, § 6452 294

PAGE

Virginia.
1912, Laws, c. 151..... 58
1914, Laws, c. 174..... 58
1916, Laws, c. 146, § 1... 293
1916, Laws, c. 279..... 58
Code, 1887, § 587..... 293
Pollard's Code, 1904, § 838..... 60
§ 944a, cl. 5..... 60
cl. 21, 22..... 58

Washington.
1893, Laws, p. 241..... 234
1911, Laws, p. 412..... 236
1913, Laws, p. 195..... 234
1915, Laws, c. 2, § 2.... 288
Code 1912, Tit. 267, § 45 288
Rem. & Ball. Code, §§ 886–890..... 238

West Virginia.
1877, Acts, c. 107..... 293
1913, Acts, c. 13, § 1... 293
Code, c. 32, § 1..... 293
Code, 1906, c. 32, § 1... 293

Wisconsin.
Gen. Stats., 1911, § 1565c 289

Wyoming.
1919, Laws, c. 25, § 2.... 295
Comp. Stats., 1910, § 2838..... 295

(C.) Treaties.

Spain.
1898, Dec. 10, 30 Stat. 1754..... 359

Versailles.
June 28, 1919..... 166

(D.) Foreign Laws.

Germany. Civ. Code, § 477..... 325

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1919.

UNITED STATES *v.* SOUTHERN PACIFIC COMPANY ET AL.

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

No. 179. Argued March 5, 6, 1919.—Decided November 17, 1919.

Lands valuable for oil and known to be so at the time of their selection by and patent to the Southern Pacific Railroad Company under the granting Act of July 27, 1866, c. 278, 14 Stat. 292, were excepted from the grant as mineral lands; and a patent for such lands, issued in reliance upon representations that the lands were not mineral, made by the company's officials when they believed the fact was otherwise, is subject to be set aside in a suit by the United States. Pp. 7 *et seq.*

In order to establish the character of lands, in this connection, as lands valuable for oil, it is not necessary that they shall have been demonstrated to be certainly such by wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping; it suffices if the conditions known at the time of patent, as to the geology, adjacent discoveries, and other indicia upon which men prudent and experienced in such matters are shown to be accustomed to act and make large expenditures, were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end. P. 12.

In this case the conditions evincing oil value in this sense persisted

after the date of patent; and the court therefore does not consider the question whether, if such conditions were proven illusory by subsequent drilling, the demonstration would support the patent. P. 14.

A report of a special agent that lands embraced in a railroad selection were non-mineral, but made in another connection and not relied on by the railroad company in renewing the selection or considered by the land officers in approving it and issuing patent, can not avail against proof that the lands were known by the company to be valuable for oil; nor is it of value as evidence of their non-mineral character if based on a superficial examination by one who was neither a geologist nor familiar with oil-mining. *Id.*

249 Fed. Rep. 785, reversed.

THE case is stated in the opinion.

Mr. J. Crawford Biggs, Special Assistant to the Attorney General, and *Mr. Assistant Attorney General Kearful* for the United States.

Mr. Charles R. Lewers, with whom *Mr. William F. Herrin* and *Mr. Joseph P. Blair* were on the brief, for appellees:

Opinion or surmise that oil might exist, at an unknown depth, from four to ten miles from its nearest known occurrence is not convincing proof that the conditions in 1904 "were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 240.

The "belief" here referred to must be a belief practically tantamount in its effect to actual knowledge, that is, a belief based on facts so complete as to exclude rational doubt. Even actual knowledge (or such a fully warranted belief) on the part of the railroad agents would not justify the relief here asked by the Government if it went merely to the existence of some oil somewhere within the area sued for. This knowledge (or belief) must be shown to

have also comprehended every element of location, quantity and quality which would have given this oil commercial availability and value under conditions then existing. Without such knowledge there could be no fraud, that is, there could be no consciousness that the Government was being deprived of land which it ought to retain. The case of the Government is based on a theory which leaves out of consideration all questions of extent, position, availability or value of oil within the disputed areas. It frankly attempts to obtain a decree on the ground that every acre in suit has that nebulous thing termed an "oil value," that is, a speculative value, because the surroundings are claimed to promise that perchance oil will be found somewhere in the Elk Hills.

If hope or suspicion that oil might be found somewhere in the Elk Hills can give to the particular lands in suit the requisite mineral character to warrant cancellation, the railroad company may lose by judicial decree lands which subsequent drilling may prove to fall unquestionably within its grant. Such a result is hardly in accord with equity.

Only those lands may be lawfully taken from the railroad company which were in fact mineral lands at the time of patent. *Burke* v. *Southern Pac. R. R. Co.*, 234 U. S. 669, 679–680; *Davis* v. *Weibbold*, 139 U. S. 507, 524; *Deffeback* v. *Hawke*, 115 U. S. 392; *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 239.

It is fair to assume that in the use of the two terms "mineral lands" and lands "not mineral" in the various acts of Congress for the disposal of the public domain, all public lands were intended to be described. "Mineral lands" were those which could be acquired under the mining laws. Lands "not mineral" were disposed of by the homestead, railroad, school and other "non-mineral" grants. *Cf. Benjamin* v. *Southern Pacific R. R. Co.*, 21 L. D. 390.

But, if the present contention of the Government is correct, there must be a third class not capable of disposal under any law (see comment of Circuit Court of Appeals on this, 249 Fed. Rep. 797). It is conceded that a mineral patent would not issue for a single acre in the Elk Hills on the showing of mineral made by the Government in this case, because the evidence is not sufficient to prove a *discovery* of mineral. *Chrisman* v. *Miller*, 197 U. S. 313. If there was not a sufficient "discovery" of oil on these lands to sustain a mining location, there obviously was not a discovery of oil sufficient to establish them as actually "valuable" oil lands. The word "discovery" in the mining laws means simply the ascertainment of the existence of the mineral, its disclosure. Unless these lands were known in 1904 to be actually valuable for the oil that was in them, the Government suffered no legal damage by their loss and the railroad company gained nothing not due it under its contract. Without legal damage to the Government there can be no relief on the ground of fraud. *Southern Development Co.* v. *Silva*, 125 U. S. 247; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 285; *United States* v. *Stinson*, 197 U. S. 200, 205.

The government case is founded entirely on the use of the word "belief" by this court in the case of *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 239–240, without recognition, apparently, of the fact that the context indicates that what was there meant by "belief" was a conviction resulting from evidence so full and definite that it points with convincing force to a conclusion which includes not only the fact of the existence of the mineral but its extent and value as well. *United States* v. *Beaman*, 242 Fed. Rep. 876.

In the present case the mineral in question is oil, which is notoriously uncertain in its occurrence, extent and value as compared with coal; and the circumstances were such that a belief that these were valuable oil lands

could not have been a conviction that merchantable oil existed.

The fact that mere "indications" of the existence of oil are not proof of its existence or of its quantity or location has received judicial recognition on many occasions. *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. Rep. 801, 806; *Nevada Sierra Oil Co.* v. *Home Oil Co.*, 98 Fed. Rep. 673, 675.

It is unsound to say that decisions under the mining law are here inapplicable because that law requires ocular demonstration of mineral in the land claimed. All that the word "discovery" means in that law (Rev. Stats., § 2320) is ascertainment of the existence of the vein or lode within the claim, and even in the case of a lode the exposure to the eye may be elsewhere. *Brewster* v. *Shoemaker*, 28 Colorado, 176, 182. The statute concerning placer claims makes no special requirement as to the actual place of discovery. The special statute of 1897 for the location of oil claims makes no change in this respect except the requirement that the proof show that the claim is "chiefly valuable" for oil (29 Stat. 525). Under the placer law it has been held that evidence of gold appearing within the claim, held insufficient in itself to constitute a discovery, might be supplemented by evidence showing greater amounts of gold disclosed in adjacent ground. These cases really hold that the evidence which actually constituted the full discovery came from without the claims. That such a condition might also exist as to an oil claim under exceptional facts is indicated by *Nevada Sierra Oil Co.* v. *Miller*, 97 Fed. Rep. 681, 688, 689. It is obvious that the practical question, with which the mining law is alone concerned, is whether there is valuable mineral within the claim. Evidence which certainly indicates this is discovery, no matter where the evidence is found, and the word "discovered" is used in the mining law in exactly the same sense in which it was used by this

court in the case of *Deffeback* v. *Hawke*, 115 U. S. 392, 404. Mere indications do not suffice.

Cases arising under the mining laws, in which it is held that oil is so uncertain in its occurrence and extent that surrounding conditions do not prove a discovery, are therefore directly in point. *Chrisman* v. *Miller*, 197 U. S. 313, 323; *Miller* v. *Chrisman*, 140 California, 444, 446; *Olive Land Co.* v. *Olmstead*, 103 Fed. Rep. 568; *United States* v. *McCutchen*, 238 Fed. Rep. 575, 591; *Bay* v. *Oklahoma Oil Co.*, 13 Oklahoma, 425; *Weed* v. *Snook*, 144 California, 439; *New England &c. Co.* v. *Congdon*, 152 California, 211; *McLemore* v. *Express Oil Co.*, 158 California, 559; *Dughi* v. *Harkins*, 2 L. D. 721; *Hutton* v. *Forbes*, 31 L. D. 325, 330; *Southwestern Oil Co.* v. *Atlantic &c. Ry. Co.*, 39 L. D. 335; *Butte Oil Co.*, 40 L. D. 602.

That belief not based on clear demonstration is not proof of mineral character, see also *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374; *Iron Silver Mining Co.* v. *Mike & Starr Co.*, 143 U. S. 394; *Sullivan* v. *Iron Silver Mining Co.*, 143 U. S. 431.

Fraud cannot be predicated upon the expression of an opinion concerning the existence of hidden mineral deposits. 2 Addison on Torts, Wood's ed., § 1186; *Southern Development Co.* v. *Silva*, 125 U. S. 247, 252; *Gordon* v. *Butler*, 105 U. S. 553; *Holbrook* v. *Connor*, 60 Maine, 578; *Synnott* v. *Shaughnessy*, 130 U. S. 572.

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

This is a suit by the United States to cancel a patent issued December 12, 1904, to the Southern Pacific Railroad Company for eight full and two partial sections of land within the indemnity limits of the grant made to that company by an act of Congress, c. 278, 14 Stat. 292, it being charged in the bill that the railroad company

fraudulently obtained the patent by falsely representing to the Land Department that the lands were not mineral but agricultural, when it was known that they were mineral. From the evidence presented the District Court found that the charge was true and entered a decree of cancellation, and this was reversed by the Circuit Court of Appeals, one judge dissenting. 249 Fed. Rep. 785.

"All mineral lands" other than those containing coal or iron were excluded from the grant, and this exclusion embraced oil lands. *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 676–679. As will be seen presently, there can be no doubt that the patent was procured by representing that the lands were not mineral. Whether this representation was false turns upon the character of the lands as known when the patent was sought and obtained. If they then were known to be valuable for oil, as the Government asserts they were, they were mineral in the sense of the granting act.

To compensate for losses to the grant within its primary limits the railroad company was entitled to select other lands of like area within the indemnity limits, approval by the Secretary of the Interior being essential to passing the selections to patent. The established mode of making the selections was by presenting at the local land office selection lists designating the lands lost and those selected, with supporting affidavits showing, among other things, that the lands selected were of the character contemplated, that is to say, were not mineral but agricultural. These lists and affidavits would then be examined in that office and in the General Land Office, and ultimately the selections would be passed to the Secretary of the Interior for his action. That course was followed here.

The original list was presented November 14, 1903, but it encountered obstacles which led to the presentation of a substituted list covering the same lands on Septem-

ber 6, 1904. Both lists were presented by the company's land agent, Mr. Eberlein, and were accompanied by affidavits made by him stating that the lands selected "are not interdicted mineral" but "are of the character contemplated by the grant" and that "he has caused" them "to be carefully examined by the agents and employees of said company as to their mineral or agricultural character, and that to the best of his knowledge and belief none of the lands returned in said list are mineral lands." In acting on the substituted list the officers of the Land Department relied upon and gave effect to the statements in the supporting affidavits, and the selections were accordingly approved and passed to patent.

In truth Mr. Eberlein had not examined the lands or caused them to be examined by others. Nor had any examination of them been made on behalf of the railroad company, save such as is inferable from the conduct of its geologists and others presently to be noticed.

The lands were in the Elk Hills in Kern County, California; were rough, semi-arid and unfit for cultivation; were devoid of timber, springs or running water, and had but little value for grazing. Oil had been discovered in that region as early as 1899 and this had been followed by development and production on an extensive scale. In 1903 and 1904 there were many producing wells about 25 miles to the east and many within a much shorter distance to the west and south, some within three or four miles. The railroad company was then maintaining a corps of geologists—all informed by experience in the California oil fields—and under their supervision was searching for, developing and producing oil for fuel purposes. In 1902, upon the recommendation of one of its geologists, it withdrew from sale many of its patented lands surrounding and adjacent to those in suit "because they were in or near oil territory"; and early in 1903 it entered upon a systematic examination of its lands in

that territory "to determine as far as can be done from surface indications and geological structure where oil is to be expected in this region." In a letter to Mr. Kruttschnitt, one of the company's vice presidents, the chief geologist said when about to take up the examination: "So far as I can judge from the trip I have just made over this territory, this work promises results of greatest value to the company."

The lands in suit were surveyed in 1901 and the approved plat was filed in the local land office in May, 1903. The field notes denominated the lands as mineral and described them as in a mineral district "within which many successful oil wells have been developed." As before stated, the original selection list was presented November 14, 1903. Mr. Kruttschnitt already had written to the company's attorney at Washington requesting that "special attention" be given to securing a patent for the lands when selected; and shortly thereafter Mr. Eberlein wrote to the attorney, saying: "I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it." Other letters and telegrams show that this special concern or anxiety persisted until the patent was issued.

In 1903 the company concluded to lease such of its lands as were considered "valuable for oil purposes" to a subsidiary company which was to be a sort of fuel department and to have charge of the development and production of oil. The geologists were requested to designate the lands to be thus leased and as a result of their investigation and recommendation several sections adjacent to and some immediately adjoining those in suit were included. The lease was to be signed on behalf of the railroad company by Mr. Eberlein as land agent and was laid before him for that purpose on August 2, 1904. Perceiving at once that its execution would not be in ac-

cord with his action in pressing the pending selection list he took the matter up with some of his superiors. To one he said in a letter: "We have selected a large body of lands interspersed with the lands sought to be conveyed by this lease, and which we have represented as non-mineral in character. Should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to, and which are still unpatented. We could not successfully resist a mineral filing after we have practically established the mineral character of the land. I would suggest delay at least until this matter of patent can be adjusted." To the same officer he protested against the action of the geologists in examining unpatented lands because "it was charging the company with notice." And to another, in New York, he explained "all phases of the matter," with the result that the "impropriety of the lease at that time" and the "very ambiguous position in which we would be placed" were recognized and he was instructed to withhold his signature and to place and keep all correspondence and papers relating to the lease in a separate and private file not accessible to others. He followed the instruction and the special or secret file remained in his possession "until," as he testified, "it was pried out" at the hearing.

But notwithstanding what was brought to his attention through the proposed oil lease, Mr. Eberlein continued actively to press the pending selection, and when, about a month later, he presented the substituted selection list it was accompanied by affidavits wherein he repeated his prior representation that the lands were not mineral. After presenting this list he had a conference with the chief geologist which prompted the latter, when writing to a superior officer, to explain that "for reasons of policy regarding certain unpatented lands it will be best not to execute the lease . . . at present."

The lease was placed by Mr. Eberlein in the special or secret file and some time afterward, when an effort was made to find it, he denied all knowledge of it. The denial was brought to the attention of the chief geologist, and he at once wrote to Mr. Eberlein calling attention to the conference just mentioned, and stating: "You explained that you were rushing certain lands for final patent and that the immediate execution of the lease showing our idea of what were oil lands might interfere with you and we agreed to defer the execution until that danger was passed." The chief geologist was a witness at the hearing and when asked what danger was meant, answered: "The danger that these lands might be delayed and not be patented because of their mineral character."

All that has been recited thus far is proved so well that it is beyond dispute. Fairly considered, it shows that when the patent was sought and obtained the lands had no substantial value unless for oil mining; that the interest and anxiety displayed by the company's officers in securing the patent were wholly disproportionate to the value of the lands for any other purpose; that the lands lay within a recognized and productive oil region which the company's geologists had been systematically examining to determine in what lands oil was to be expected, and that upon the advice and recommendation of its geologists the company was treating and dealing with adjacent and adjoining lands, of which it was the owner, as valuable for oil. Of course among practical men the character—whether oil or otherwise—of these adjacent and adjoining lands had some bearing on the character of those in suit, and this was given pointed recognition when the company's officers halted the signing of the proposed oil lease pending action on the selection list and caused the correspondence and papers relating to the lease to be secreted in a special and private file.

We think the natural, if not the only, conclusion from

all this is that in pressing the selection the officers of the railroad company were not acting in good faith, but were attempting to obtain the patent by representing that the lands were not mineral when they believed the fact was otherwise.

The observable geological and other physical conditions at the time of the patent proceedings, as shown by the evidence, were as follows: The area called the Elk Hills was about six miles wide and fifteen long and constituted an anticlinal fold or elongated dome—an occurrence favorable to the accumulation and retention of oil. The lands in suit were about its center. From five to ten miles to the west was the Temblor Range, the main uplift of that region. Along the east flank of that uplift for a distance of thirty miles was a series of outcrops or exposures of Monterey (diatomaceous) shales, the source of oil in California, and porous sandstone in which oil generally finds its ultimate reservoir. These strata were of exceptional thickness and it was apparent that oil in considerable quantity had been seeping or wasting from the sandstone. The dip of the strata was towards the Elk Hills and there were no indications of any faulting or thinning in that direction. Between the outcrop and the Elk Hills upwards of two hundred wells had found the oil-bearing strata and were being profitably operated, several of the wells being on a direct line towards the lands in suit and within three or four miles of them. In and beyond the Elk Hills were oil seepages and other surface indications of the existence of oil in the underlying strata, one of the seepages being near the lands in suit. Two wells had been sunk in the Elk Hills but obviously had not gone to an adequate depth and were not productive, although some oil was reached by one.

Geologists and men of wide experience and success in oil mining—all of whom had examined that territory and

some of whom had been familiar with it for years—were called as witnesses by the Government and gave it as their opinion, having regard to the known conditions in 1903 and 1904, as just outlined, that the lands were valuable for oil, in that an ordinarily prudent man, understanding the hazards and rewards of oil mining and desiring to engage therein for profit, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

Other geologists and oil operators, called by the company, gave it as their opinion that the lands were not, under the conditions stated, valuable for oil; but as respects the testimony of some it is apparent that they were indisposed to regard any lands as within that category until they were demonstrated to be certainly such by wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping. This is a mistaken test, in that it takes no account of geological conditions, adjacent discoveries and other external conditions upon which prudent and experienced men in the oil mining regions are shown to be accustomed to act and make large expenditures. And the testimony of some of these witnesses is weakened by the fact that their prior acts in respect of these lands, or others in that vicinity similarly situated, were not in accord with the opinions which they expressed.

After considering all the evidence, we think it is adequately shown that the lands were known to be valuable for oil when the patent was sought and obtained, and by this we mean that the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify ex-

penditures to that end. See *Diamond Coal Co.* v. *United States*, 233 U. S. 236.

The railroad company places some reliance on the fact that after the presentation of the original selection list and before the substituted one was tendered a special agent of the General Land Office examined the lands and reported them as non-mineral. But there is nothing in this that can help the company. The agent's report was made in another connection and was not considered by the land officers when they approved the selection. It did not relieve the company from showing that the lands selected were not mineral; nor did the company understand that it had any such effect. Mr. Eberlein knew of the report several months before he and other officers of the company became troubled over the proposed oil lease and concluded that, if given publicity, it would endanger the pending selection. Besides, if the report could be considered here, it would be without any real evidential value, for it appears from testimony given by the agent at the hearing that he was not a geologist or familiar with oil mining and that his examination of the lands was at best only superficial.

The company makes the contention that drilling done since the patent was issued has demonstrated that the lands have no value for oil. Assuming, without so deciding, that the contention would help the company if sustained by the evidence, we think it is not sustained. The drilling relied upon was done after 1909 upon lands in the Elk Hills other than those in suit. Several wells were started and not more than three were successful. The three were the only ones that were drilled in favorable locations and to an adequate depth, and they penetrated oil sands of considerable thickness and produced a large quantity of oil, but were shut down for reasons not made clear by the record. They were drilled by an oil company which was controlled by the railroad company.

1. Syllabus.

The other wells failed for reasons which prevent the outcome from having any significance here. In some the drilling was not carried to an adequate depth because the right to proceed was thought to be uncertain by reason of an executive withdrawal of the lands.

We conclude that the application of prior decisions to the case made by the evidence entitles the Government to the relief sought, as was held by the District Court. See *United States* v. *Minor*, 114 U. S. 233; *McCaskill Co.* v. *United States*, 216 U. S. 504; *Diamond Coal Co.* v. *United States, supra; Washington Securities Co.* v. *United States*, 234 U. S. 76.

Decree of Circuit Court of Appeals reversed.
Decree of District Court affirmed.

STROUD *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 276. Argued October 22, 1919.—Decided November 24, 1919.

A verdict of guilty as charged in the indictment, under an indictment charging murder in the first degree, is a conviction of murder in the first degree, and no less so because the jury adds "without capital punishment," as permitted by § 330 of the Criminal Code. P. 17.

And when a sentence to life imprisonment, based on such a verdict, is reversed upon the defendant's application (the mandate calling for further proceedings,) he is not placed twice in jeopardy, in violation of the Fifth Amendment, when tried again, under the same indictment, found guilty as charged, but without qualification as to punishment, and sentenced to be hanged. *Id.*

Motions for change of venue and to quash the jury panel, in a capital case, because of alleged local prejudice and of statements made to the District Judge by counsel for the Government and of the judge's

comments upon them, in the presence of the prospective jurors, are addressed to the discretion of the judge. P. 18.

Error in overruling a challenge for cause made by the defendant in a capital case is not ground for reversal if he excluded the objectionable juror by a peremptory challenge, and was permitted to exercise, in addition, more peremptory challenges than the statute allowed, the record not showing that any juror who sat upon the trial was objectionable in fact. P. 20.

A person committed a homicide while a prisoner in a penitentiary and afterwards, while still so incarcerated, voluntarily wrote letters which, under the practice and discipline of the institution, without threat or coercion, were turned over to the warden, who furnished them to the United States attorney. *Held*, that the use of the letters in the prosecution for the homicide was not violative of the constitutional provisions against compelling testimony from an accused and against unreasonable searches and seizures. P. 21.

Affirmed.

THE case is stated in the opinion. See also *post*, 380.

Mr. Martin J. O'Donnell, with whom *Mr. Isaac B. Kimbrell* was on the brief, for plaintiff in error.

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

MR. JUSTICE DAY delivered the opinion of the court.

Robert F. Stroud was indicted for the killing of Andrew Turner. The indictment embraced the elements constituting murder in the first degree. The homicide took place in the United States prison at Leavenworth, Kansas, where Stroud was a prisoner and Turner a guard. The record discloses that Stroud killed Turner by stabbing him with a knife which he carried concealed on his person.

Stroud was convicted in May, 1916, of murder in the first degree, and sentenced to be hanged. Upon confession of error by the United States District Attorney the Circuit Court of Appeals reversed this judgment. Stroud was

again tried at the May term, 1917, the jury in the verdict rendered found Stroud "guilty as charged in the indictment without capital punishment." Upon writ of error from this court the Solicitor General of the United States confessed error, and the judgment was reversed. The mandate commanded: "Such further proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding." In pursuance of this mandate the District Court issued an order vacating the former sentence, and ordered a new trial. The trial was had, the jury found Stroud guilty of murder in the first degree as charged in the indictment, making no recommendation dispensing with capital punishment. Upon this verdict sentence of death was pronounced. This writ of error is prosecuted to reverse the judgment.

The case is brought directly to this court because of assignments of error alleged to involve the construction and application of the Constitution of the United States. The argument has taken a wide range. We shall dispose of such assignments of error as we deem necessary to consider in justice to the contentions raised in behalf of the plaintiff in error.

It is alleged that the last trial of the case had the effect to put the plaintiff in error twice in jeopardy for the same offense in violation of the Fifth Amendment to the Constitution of the United States. From what has already been said it is apparent that the indictment was for murder in the first degree; a single count thereof fully described that offense. Each conviction was for the offense charged. It is true that upon the second trial the jury added "without capital punishment" to its verdict, and sentence of life imprisonment was imposed. This recommendation was because of the right of the jury so to do under § 330 of the Criminal Code, 35 Stat. 1152; 10 U. S. Comp. Stats.,

§ 10504. This section permits the jury to add to the verdict, where the accused is found guilty of murder in the first degree, "without capital punishment," in which case the convicted person is to be sentenced to imprisonment for life. The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder. *Fitzpatrick* v. *United States*, 178 U. S. 304, 307.

The protection afforded by the Constitution is against a second trial for the same offense. *Ex parte Lange*, 18 Wall. 163. *Kepner* v. *United States*, 195 U. S. 100, and cases cited in the opinion. Each conviction was for murder as charged in the indictment which, as we have said, was murder in the first degree. In the last conviction the jury did not add the words "without capital punishment" to the verdict, although the court in its charge particularly called the attention of the jury to this statutory provision. In such case the court could do no less than inflict the death penalty. Moreover, the conviction and sentence upon the former trials were reversed upon writs of error sued out by the plaintiff in error. The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution. *Trono* v. *United States*, 199 U. S. 521, 533.

It is insisted that the court erred in not granting a change of venue. The plaintiff in error made a motion in the trial court asking such an order. The chief grounds for the application appear to have been that the testimony for the Government in the former trials had been printed and commented upon by the local press; that the evidence published was only such as the Government had introduced, and its wide circulation by the medium of the press created prejudice in the minds of the inhabitants of Leav-

enworth County against him, and that this prejudice existed to such an extent that the jury impanelled to try the case, though not inhabitants of Leavenworth County, were influenced more or less by the prejudice existing in that county against him; that at defendant's last trial the Government, by issuing pardons to prisoners who claimed to have witnessed the homicide, produced only such witnesses as tended to support its theory of the guilt of the defendant of the crime of first degree murder, and that at the same time the Government invoked the rule that prisoners in the penitentiary who witnessed the homicide, being still prisoners under conviction and serving terms of more than one year, were not qualified witnesses on behalf of the defendant; that the cause was set for trial at a special term of the court beginning on May 20, 1918, and on said date the defendant's counsel were engaged in the State of Missouri in the trial of a cause, that the attorneys advised the judge of their inability to be present during the week the case was set for trial; that an affidavit, setting forth the above facts, was filed with the court praying it not to enter upon the trial; that the counsel for the Government submitted an affidavit in which it was stated that counsel for the defendant, Stroud, stated their wish and desire to escape further responsibility for the conduct of the defense and expressed their hope that something would occur to make it unnecessary to appear longer in this cause in Stroud's behalf, and proposed that the Government consent that the defendant plead guilty to the charge of second degree murder, with the understanding that as a result thereof the court might sentence the defendant to prison for the remainder of his life; that said statement and affidavit were read in the presence and hearing of the special panel of prospective jurors in open court, said jurors being among those before whom the Government proposed to put the defendant upon trial for murder; that at the close of the reading of the affidavit in the presence of the pros-

pective jurors, the District Judge stated from the bench that in view of the statements set forth in the affidavit he was compelled to feel that counsel had acted unprofessionally by not being there in court, at least one of them; that said facts were commented upon by the public press of Leavenworth County, and created prejudice against defendant and his attorneys; that defendant never authorized any person or attorney to make any such proposal to attorneys for the Government, concerning a plea of guilty, for the reason that the defendant was not guilty of the charge contained in the indictment, or of murder in any degree and that unless the jurors who had theretofore attended the court during the week of May 20, 1918, were discharged by order of the court the defendant could not enjoy the right of a public trial by an impartial jury secured to him by the Constitution, and prayed an order transferring the case to another division of the district. The court overruled the motion except in so far as it asked for an exclusion of inhabitants of Leavenworth County as jurors, to that extent it was sustained. The motion to quash the panel, called to act as jurors, was made on like grounds, and was also overruled.

The division in which Leavenworth County is situated consists of fifty counties, and, after hearing these applications, the District Court excluded persons from the jury who were residents of Leavenworth County, and refused to quash the panel upon the grounds alleged. Matters of this sort are addressed to the discretion of the trial judge, and we find nothing in the record to amount to abuse of discretion such as would authorize an appellate court to interfere with the judgment. *Kennon* v. *Gilmer*, 131 U. S. 22, 24.

Certain jurors were challenged for cause upon the ground that they were in favor of nothing less than capital punishment in cases of conviction for murder in the first degree. It may well be that as to one of these jurors, one

Williamson, the challenge should have been sustained. This juror was peremptorily challenged by the accused, and did not sit upon the jury. The statute, in cases of this character, allowed the accused twenty peremptory challenges; it appears that he was in fact allowed twenty-two peremptory challenges. Thus his right to exercise peremptory challenges was not abridged to his prejudice by an erroneous ruling as to the challenge for cause. In view of this fact, and since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground. See *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Hopt* v. *Utah*, 120 U. S. 430; *Spies* v. *Illinois*, 123 U. S. 131; *Holt* v. *United States*, 218 U. S. 245, 248.

Certain letters were offered in evidence at the trial containing expressions tending to establish the guilt of the accused. These letters were written by him after the homicide and while he was an inmate of the penitentiary at Leavenworth. They were voluntarily written, and under the practice and discipline of the prison were turned over ultimately to the warden, who furnished them to the District Attorney. It appears that at the former trial, as well as the one which resulted in the conviction now under consideration, application was made for a return of these letters upon the ground that their seizure and use brought them within principles laid down in *Weeks* v. *United States*, 232 U. S. 383, and kindred cases. But we are unable to discover any application of the principles laid down in those cases to the facts now before us. In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither

testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights.

Other objections are raised in the elaborate brief filed in behalf of the plaintiff in error. We do not find it necessary to discuss them. In view of the gravity of the case they have been examined and considered with care, and we are unable to find that any error was committed to the prejudice of the accused.

Affirmed.

PACIFIC GAS & ELECTRIC COMPANY *v.* POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, ET AL.

ERROR TO THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA.

No. 31. Submitted October 9, 1919.—Decided December 8, 1919.

When an intermediate state court assumes jurisdiction and renders a judgment which the state Supreme Court declines to review for want of power, the writ of error to review federal questions involved runs to the judgment of the intermediate court, and the jurisdiction of that court is not subject to question here. P. 24.

In the absence of any particular contract provision touching the subject, the question whether an ordinance requiring a street railroad company to sprinkle the street within and near its tracks imposes an undue burden, in view of its general right to operate the railroad under its franchise, is a question of police power and does not involve the contract clause. P. 25.

A city ordinance requiring a street railway company, without cost to the city, to sprinkle the street occupied by its railroad, between the rails and for a sufficient distance beyond to lay the dust and prevent it from rising when cars are in operation, is within the police power. *Id.*

Such an ordinance does not violate the equal protection clause in dis-

criminating between street railroad cars and other vehicles on the same streets. P. 26.

28 Cal. App. 412, affirmed.

THE case is stated in the opinion.

Mr. Wm. B. Bosley for plaintiff in error.

Mr. Archibald Yell, Mr. Hugh B. Bradford and *Mr. Edward M. Cleary* for defendants in error.

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

By ordinance the City of Sacramento provides: "every person, firm, or corporation owning, controlling or operating any street railroad, suburban railroad, or interurban railroad upon and along any of the streets of the City of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation."

The Gas Company, plaintiff in error, operated lines of street railway in Sacramento under franchise granted by the city. It refused to obey the ordinance and was prosecuted in the city police court and there asserted that the ordinance was in conflict with the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

From a sentence imposing upon it a money penalty, it appealed to the Superior Court for the County of Sacramento, and from the judgment of that court confirming

the conviction it prosecuted an appeal to the Supreme Court of the State, which court refused to review the case on the ground that it was without jurisdiction. Thereupon the Company, alleging the illegality of the conviction upon various grounds, among others that the ordinance was repugnant to the Fourteenth Amendment, petitioned the District Court of Appeal for the Third Appellate District for a writ of certiorari requiring the Superior Court to send up the record for review. The petition was demurred to as stating no cause of action and on the further ground that it disclosed no jurisdiction in the court to review. Although it expressed doubt on the subject, the court took jurisdiction, reviewed the conviction, held that the city had power under the state constitution and laws to pass the ordinance and that it was not repugnant to the Constitution of the United States. The certiorari was refused. A review of this judgment was then asked at the hands of the Supreme Court of the State, but that court again refused to interfere on the ground of its want of jurisdiction. The writ of error which is before us was then prosecuted by the Gas Company to the judgment of the District Court of Appeal refusing to grant the writ of certiorari.

At the threshold a motion to dismiss requires to be considered. It is based upon the ground that the court below had, under the state constitution and laws, no power to review by certiorari the action of the Superior Court and therefore that court was the court of last resort competent to decide the cause. But this disregards the fact that the District Court of Appeal assumed jurisdiction of the cause and that the Supreme Court of the State declined to review its judgment for want of jurisdiction. As whether, under the circumstances, the District Court of Appeal rightfully assumed jurisdiction by certiorari is a question of purely state law which we may not review, the judgment of that court is the judgment of the state

court of last resort having power to consider the case and the motion to dismiss is denied.

Besides the due process and equal protection clauses of the Fourteenth Amendment, the contract clause of the Constitution of the United States is relied upon in the assignments. In argument, however, that contention is based, not upon the impairment by the ordinance of any particular contract right, but upon the unwarranted burden which it is asserted would result from enforcing the ordinance as against the railroad company because of the general authority which it possessed under its franchises to operate its railroad in the streets. But this at once establishes that the consideration of the contract clause is negligible and hence that it is only necessary to pass upon the contentions under the due process and equal protection clauses. This results, since, if the police power of the city, to provide by the ordinance for the protection of the health and safety of the people, was unrestrained by any contract provision, the police power necessarily dominated the right of the company under its franchises to use the streets and subjected that right to the authority to adopt the ordinances in question.

Further, as the right of the city to adopt such ordinance, so far as the state constitution and laws are concerned, is concluded by the decision below and as it is elementary that the due process clause of the Fourteenth Amendment does not restrain the States in the exercise of their legitimate police power, it follows that the case narrows down to a consideration of whether the ordinance in question was generically embraced by the police power of the State and, if it was, whether the power was so abused as to cause its exertion to exceed the limits of the police power, thus bringing the ordinance under the prohibitions of the due process and equal protection clauses of the Fourteenth Amendment.

That the regulation made by the ordinance was in-

herently within the police power is we think too clear for anything but statement. We cite in the margin, however, decided cases dealing with the subject, in some of which the power here in question when exerted for the same purpose and to the same extent was upheld, and in others of which, although the manifestations of the exercise of the power were somewhat different, its existence was accepted as indisputable; and text writers who state the same view.[1]

That the power possessed was on the face of the ordinance not unreasonably exerted and therefore that its exercise was not controlled by the due process clause of the Fourteenth Amendment is, we are also of opinion, equally clear. And this is true likewise of the contention as to the equal protection clause of the Amendment, since that proposition rests upon the obviously unwarranted assumption that no basis for classification resulted from the difference between the operation of the street railway cars moving on tracks in the streets of the city and the movement of a different character of vehicles in such streets.

Affirmed.

---

[1] *Milwaukee* v. *Milwaukee E. R. & L. Co.*, 144 Wis. 386; *City & Suburban Ry. Co.* v. *Mayor of Savannah*, 77 Ga. 731; *State* v. *Canal & C. R. R. Co.*, 50 La. An. 1189; *St. Paul* v. *St. Paul City Ry. Co.*, 114 Minn. 250; *Newcomb* v. *Norfolk Western Street Ry. Co.*, 179 Mass. 449; Elliott on Railroads, § 1082; Dillon on Municipal Corporations, 5th ed., § 1276; Nellis, Street Railways, § 157; McQuillin on Municipal Corporations, p. 3774; Elliott on Roads and Streets, § 958.

POSTAL TELEGRAPH-CABLE COMPANY *v.* WARREN-GODWIN LUMBER COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 91. Argued November 17, 1919.—Decided December 8, 1919.

Under the Act of June 18, 1910, c. 309, 36 Stat. 539, 545, a telegraph company providing one rate for unrepeated interstate messages and another, higher rate for those repeated, may stipulate for a reasonable limitation of its responsibility when the lower rate is paid; and the validity of such contracts is not determinable by state laws. P. 30.

116 Mississippi, 660, reversed.

THE case is stated in the opinion.

Mr. Ellis B. Cooper, with whom *Mr. J. T. Brown* and *Mr. J. N. Flowers* were on the brief, for petitioner.

Mr. William D. Anderson, for respondent, submitted.

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

In *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, the court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from

liability for its negligence, but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be valid and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited.

In *Western Union Telegraph Co.* v. *Showers*, 112 Mississippi, 411, the Supreme Court of that State was called upon to consider the validity of a contract by a telegraph company limiting its responsibility for missending an unrepeated message essentially like the contract which was considered and upheld in the *Primrose Case*. The court decided that as the Act of Congress of June 18, 1910, c. 309, 36 Stat. 539, 545, had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, Congress has taken possession of the field and thus excluded state legislation and hence such a contract was valid and enforcible in accordance with the rule laid down in the *Primrose Case*. In holding this, however, the court pointed out that but for the act of Congress a different rule would apply, as under the state law such a contract was invalid because it was a stipulation by a carrier limiting its liability for its negligence.

In *Dickerson* v. *Western Union Telegraph Co.*, 114 Mississippi, 115, the validity of a like contract by a telegraph company for the sending of an unrepeated message once again arose for consideration. In passing upon it the court declared that the ruling previously made in the *Showers Case*, as to the operation of the Act of Congress of 1910, was erroneous. Coming therefore to reconsider that subject, it was held that the Act of Congress of 1910 had not extended the power of Congress over the rates of telegraph companies for interstate business and the contracts made by them as to such subject, and hence the

Showers Case, in so far as it held to the contrary, was overruled. Thus removing the contract from the operation of the national law and bringing it under the state law, the court held that the contract was void and not susceptible of being enforced because it was a mere contract exempting the telegraph company from the consequences of its negligence.

The case before us, involving the extent of the liability of the Telegraph Company for an unrepeated interstate message governed by a contract like those considered in the previous cases, was decided by a state circuit court after the decision in the *Showers Case* and before the overruling of that case by the *Dickerson Case*. Presumably therefore the court, because of the *Showers* decision, upheld the validity of the contract and accordingly limited the recovery. The appeal which took the case to the court below, however, was there heard after the decision in the *Dickerson Case*. In view of that situation the court below in disposing of the case expressly declared that the only issue which was open was the correctness of the ruling in the *Dickerson Case*, limiting the operation and effect of the Act of Congress of June 18, 1910. Disposing of that issue, the ruling in the *Dickerson Case* was reiterated and the contract, although it concerned the transmission of an interstate message, was declared not affected by the act of Congress and to be solely controlled by the state law and to be therefore void. That subject presents then the only federal question, and indeed the only question in the case.

For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court below in the *Dickerson Case* as to the correctness of its ruling in the *Showers Case* (*Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477; *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542), but content

ourselves with saying that we are of opinion that the effect which was given to them was a mistaken one. We come at once therefore to state briefly the reasons why we conclude that the court below mistakenly limited the Act of Congress of 1910 and why therefore its judgment was erroneous.

In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws.

In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the *Primrose Case*, the right to contract on such subject was embraced within the grant of the primary rate-making power.

In the third place, as the act expressly provided that the telegraph, telephone or cable messages to which it related may be "classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the federal

control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission, (*Clay County Produce Co.* v. *Western Union Telegraph Co.*, 44 I. C. C. 670,) from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (*Gardner* v. *Western Union Telegraph Co.*, 231 Fed. Rep. 405); and by the numerous and conclusive opinions of state courts of last resort which in considering the Act of 1910 from various points of view reached the conclusion that that act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefore was an occupation of the field by Congress which excluded state action. *Western Union Tel. Co.* v. *Bank of Spencer*, 53 Oklahoma, 398; *Haskell Implement Co.* v. *Postal Tel.-Cable Co.*, 114 Maine, 277; *Western Union Tel. Co.* v. *Bilisoly*, 116 Virginia, 562; *Bailey* v. *Western Union Tel. Co.*, 97 Kansas, 619; *Durre* v. *Western Union Tel. Co.*, 165 Wisconsin, 190; *Western Union Tel. Co.* v. *Schade*, 137 Tennessee, 214; *Meadows* v. *Postal Tel. & Cable Co.*, 173 N. Car. 240; *Norris* v. *Western Union Tel. Co.*, 174 N. Car. 92; *Bateman* v. *Western Union Tel. Co.*, 174 N. Car. 97; *Western Union Tel. Co.* v. *Lee*, 174

Kentucky, 210; *Western Union Tel. Co.* v. *Foster*, 224 Massachusetts, 365; *Western Union Tel. Co.* v. *Hawkins*, 14 Ala. App. 295.

It is indeed true that several state courts of last resort have expressed conclusions concerning the act of Congress applied by the court below in this case. But we do not stop to review or refer to them as we are of opinion that the error in the reasoning upon which they proceed is pointed out by what we have said and by the authorities to which we have just referred.

It follows that the judgment below was erroneous and it must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE PITNEY dissents.

CITY OF LOS ANGELES ET AL. *v.* LOS ANGELES GAS & ELECTRIC CORPORATION.

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

No. 50. Argued October 23, 1919.—Decided December 8, 1919.

A distinction is to be drawn between the powers of a city when acting in its governmental capacity, i. e., the police powers,—and those which belong to it in its proprietary or quasi-private capacity. P. 38.

Merely for the sake of establishing a lighting system of its own, a city has no right to displace or remove without compensation the fixtures of a lighting company already occupying the streets in virtue of rights guaranteed by its franchise. P. 37.

Declarations in an ordinance to the effect that speedy establishment of a municipal lighting system, and therein the removal or relocation of poles and other fixtures maintained in the streets by the owners of other lighting systems, are necessary for the public peace, health

and safety, do not suffice to convert such acts of interference into a legitimate exercise of police power. Pp. 34, 38.

A franchise to use the streets for supplying a city and its inhabitants with electric light, acquired under the California Constitution, Art. XI, § 19, before the amendment of 1911, conveys contract rights which the city is not at liberty to destroy, and the property employed in their exercise can not be taken by the city without due process of law—the payment of compensation. P. 39. *Russell* v. *Sebastian*, 233 U. S. 195.

241 Fed. Rep. 912, affirmed.

THE case is stated in the opinion.

Mr. W. B. Mathews, with whom *Mr. Albert Lee Stephens* and *Mr. Charles S. Burnell* were on the briefs, for appellants.

Mr. Paul Overton, with whom *Mr. Herbert J. Goudge* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellant city is a municipal corporation of the State of California and the other appellants are its officers, having official relation to it and its rights and powers.

The appellee is a California corporation invested with and in exercise of a franchise for generating and selling electricity through a system of poles and wires and other works in the public streets of Los Angeles, among others in that known as York Boulevard.

The appellee—to which we shall refer as the corporation—brought this suit in the District Court to declare invalid and restrain the execution of an ordinance of the city providing for a municipal electric street-lighting system and making way for it in such way, it is charged, that it obstructed, trespassed upon and made dangerous

the system of the corporation in violation of its rights under the Constitution of the United States.

The District Court granted the prayer of the bill upon the grounds relied on and hence the appeal from its decision direct to this court.

The ordinance attacked is very long by reason of its repetitions. It, however, can be intelligibly reduced to a few provisions. It was passed March 6, 1917, and approved the next day, and declares in its title its purpose to be to provide for the removal and relocation of poles and other property in the public streets of the city "when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained." Such system and its installation "as speedily as may be practicable" is declared necessary for "the public peace, health and safety."

It is recited that certain "fixtures, appliances and structures" (they are enumerated) are maintained in the streets and it is necessary "in order that sufficient space may be secured for said municipal electrical system . . . and that the work of constructing and establishing the same may be carried on, to provide for the removal or relocation of certain of said poles and other properties so maintained by said persons and corporations."

It is therefore ordained that (§ 1) whenever it shall appear to the Board of Public Works that the removal or relocation of such "fixtures, appliances or structures" (there is an enumeration again which we omit as useless repetition) is necessary in order that the municipal system may have place, the Board shall give notice to the person, firm or corporation owning or controlling the property to remove or relocate the same, the notice to designate the property to be removed and the place to which it shall be removed, and it shall be the duty of such person, firm or corporation to comply with the notice within five days of its receipt. To fail or refuse to so

comply or to diligently prosecute the work of removal is made unlawful (§§ 2 and 3) and (§ 4) made a misdemeanor punishable by a fine of not more than $500 or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment. Each day's delay is made a separate offense.

In case of failure to remove or prosecute the work of removal the Board of Public Works is given power to do what the notice directs. (§ 5.)

By § 6 the dependency of the city upon private contracts for lighting the public streets and other public places is declared, some of which contracts, it is said, have expired and all will have expired by July, 1917, thus making the completion of the municipal system necessary to provide for lighting the streets without interruption and the removal or relocation of the appliances owned or controlled by various persons, firms or corporations immediately necessary in order that the city may complete and install its system. And it is declared that the "ordinance is urgently required for the immediate preservation of the public peace, health and safety."

The ordinance was preceded by acts of interference by the city with the property of the corporation in other streets and also in York Boulevard, which interference was enjoined by interlocutory and final decree by the Superior Court of Los Angeles County in a suit brought by the corporation—the city not defending. And it was interference, not displacement, and the court's decree was adapted to the extent of the interference. The decree as to other streets than York Boulevard was as follows: ". . . from in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff [the corporation in this case]; or erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon

any pole, cross-arm or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliance or equipment owned or controlled wholly or in part by plaintiff, [the corporation in this case], as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of said State; . . ." As to York Boulevard the decree was as follows: ". . . from conveying, running or transmitting electric power or energy through the lines and wires heretofore erected and constructed by said City of Los Angeles, its agents, servants or employees," until the wires, poles, and equipment of the city are removed to the distance "prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof."

The decree contained a provision upon which the city bases a contention, or rather a suggestion, to which we shall presently refer. The provision is as follows: "Nothing herein contained shall be construed as prohibiting or restraining the City of Los Angeles or its proper boards, officers or agents from carrying into effect any ordinance of said City providing for the removal or relocation of poles, anchors, cross arms, wires, street lamps or other fixtures, appliances or structures owned or controlled by said plaintiff [the corporation in this case] and located in, upon, over or under any public street or other public place of said city."

The ground or basis of the ordinance of March 6, 1917, here involved is the same as that of the interference in the suit in the state court, that is, the right to displace the corporation's property in order that the municipal system may be operated or erected. There is no attempt here, as there was no attempt in that suit, at absolute displacement. The order of the Board of Public Works, issued in accordance with the direction of the ordinance, required the corporation to change or shift or lower its wires to

the detriment of their efficient use, as it is contended. There is some conflict as to the extent and effect which, however, we are not called upon to reconcile. It was stipulated "that the value of the right to exercise the franchises of the Los Angeles Gas & Electric Corporation in the public streets and thoroughfares of the City of Los Angeles exceeded the sum of $3,000 and was in excess of $4,000." And it was testified that if the city in constructing its system proceeds as it has done in ordering the removal of poles and wires, it will cost the corporation between $50,000 and $60,000; but passing by the particular instance of interference and considering the ordinance's broad assertion of right, the contentions of the city and the corporation are in sharp contradiction.

We say "the ordinance's broad assertion of right" to distinguish the narrower right of the city to erect a system of its own. Of the latter right there is no question. The District Court conceded it, indeed praised the project, but decided that it could not be exercised to displace other systems, without compensation, occupying the streets by virtue of franchises legally granted. Thus the only question is whether the city may as matter of public right and without compensation clear a "space" for the instrumentalities of its system by removing or relocating the instrumentalities of other systems. The city asserts the affirmative—asserts the right to displace other systems as an exercise of the police power, and, further, as an incident of its legislative power. It is further asserted that these powers are attributes of government, and that their exercise when not palpably arbitrary, is not subject to judicial interference. "And that 'every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power [in this case the city]; and a contrary conclusion will never be reached upon light consideration.'" *Ex parte Haskell,* 112 California, 412.

In counter propositions the corporation urges its franchise and the right it conveys to occupy the streets of the city—rights, it is said, having the inviolability of a contract and the sanctity of private property, not indeed free from reasonable regulation, if such regulation is governmental, but free from molestation or displacement to make "space" for a city system, for that is proprietary. We have, therefore, the not unusual case of rights asserted against governmental power—a case somewhat fruitful of disputable considerations and upon which judgment may not be easy or free from controversy. But there is some point where power or rights must prevail, however plausible or specious the argument of either against the other may be. As for example, in the present case. The city has undoubtedly the function of police; it undoubtedly has the power of municipal lighting and the installation of its instrumentalities (*Russell* v. *Sebastian*, 233 U. S. 195, 202); but function and power may be exceeded and so far as wrongful be restrained. And such was the conclusion of the District Court applying the Constitution of the United States, and such the ground of its judgment.

In what way the public peace or health or safety was imperiled by the lighting system of the corporation or relieved by its removal or change, the court was unable to see and it is certainly not apparent. The court pointed out that there were several lighting systems in existence and occupying the streets and that there was no contest, or disorder or overcharge of rates or peril, or defect of any kind, and therefore concluded that the conditions demonstrated that while the city might install its own system there was no real "public necessity" arising from consideration of public health, peace or safety requiring the city to engage in the business of furnishing light.

The court reasoned and concluded that what the city did was done not in its governmental capacity—an exertion of the police power—but in its "proprietary or quasi-

private capacity" and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized and the difference in attendant powers pointed out in decisions of this court. *Vilas* v. *Manila*, 220 U. S. 345; *Russell* v. *Sebastian*, 233 U. S. 195; *South Carolina* v. *United States*, 199 U. S. 437; *New Orleans Gas Co.* v. *Drainage Commission*, 197 U. S. 453; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496, 508.

The city's contentions are based on a confusion of these capacities and the powers or rights respectively attributed to them and upon a misunderstanding of the reservations in the decree of the state court. The reservations were made only in prudence, not to define the existence or extent of powers, and forestall their challenge, but to leave both to the occasion when either of them might be asserted or denied. And it is clear that it was not intended to confound the capacities in which the city might act and the relation of the city's acts to those capacities.

It is not necessary to repeat the reasoning or the examples of the cases cited above, by which and in which the different capacities of the city are defined and illustrated. A franchise conveys rights and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law—the payment of compensation.

The franchise of the present controversy was granted prior to 1911 and hence has the attributes and rights described in *Russell* v. *Sebastian*, *supra*. Its source, as was that of the franchise in that case, is the constitution of

the State and is that "of using the public streets and thoroughfares thereof . . . for introducing into and supplying" a city "and its inhabitants either with gas light or other illuminating light." We said of such that the "breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light." And again, "The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served." We can add nothing to this definition of rights, and, we may repeat, they did not become immediately violable or become subsequently violable.

It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids. What the grant was at its inception it remained and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated.

We think, therefore, that the decree of the District Court protecting the corporation's rights from disturbance under the ordinance in question must be and it is

Affirmed.

Mr. Justice Pitney and Mr. Justice Clarke dissent.

ERVIEN, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO, *v.* UNITED STATES.

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

No. 72. Submitted November 11, 1919.—Decided December 8, 1919.

The Enabling Act of June 20, 1910, § 10, c. 310, 36 Stat. 557, provides that the public lands granted and confirmed to the State of New Mexico, their natural products and money proceeds, shall be held in trust for the several objects for which the lands were granted or confirmed, and that any disposition of such lands, money, etc., for other objects shall be deemed a breach of trust; and the Attorney General of the United States is required to prosecute in the name of the United States proceedings necessary to enforce the provisions of the act relative to the application and disposition of the said lands, the products thereof, and the funds derived therefrom. In such a suit, *held*, that the use of such funds for advertising the resources and advantages of the State generally would be a breach of the trust and that the state land commissioner should be enjoined from so using them under authority of an act of the state legislature. P. 47.

246 Fed. Rep. 277, affirmed.

THE case is stated in the opinion.

Mr. A. B. Renehan and *Mr. Carl H. Gilbert* for appellant:

The District Court was without jurisdiction. The State of New Mexico was the real party in interest, and the suit could only have been maintained as an original proceeding in this court. Jud. Code, § 238; *Louisiana* v. *Jumel*, 107 U. S. 711, 727; *Smith* v. *Reeves*, 178 U. S. 436, 439; *In re Ayers*, 123 U. S. 443, 502; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, 232; *Governor of Georgia* v.

Madrazo, 1 Pet. 110; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Antoni* v. *Greenhow*, 107 U. S. 769; *Minnesota* v. *Hitchcock*, 185 U. S. 373.

The appellant, as land commissioner, did not threaten to expend the full three per cent. of the income, but only so much of it as should seem expedient and desirable, in advertising the resources and advantages of the State generally, and particularly to homestead seekers and investors. This would not constitute a breach of the trust, but only a legitimate expense in the administration of the trust estate, resulting in an increased demand for the lands, which would increase rather than diminish the proceeds to be distributed to the beneficiaries. No provision was made in the trust agreement for the payment of expenses incident to proper administration. The proposed expenditure is not unreasonable and the right to make it is implied. Perry on Trusts, § 910; *Trustees* v. *Greenough*, 105 U. S. 527; *Meddaugh* v. *Wilson*, 151 U. S. 333; *Worrall* v. *Harford*, 8 Vesey, 8; *Attorney General* v. *Mayor of Norwich*, 2 M. & C. 406, 424; *Rex* v. *Inhabitants of Essex*, 4 Term Rep. 591; *Rex* v. *Commissioners of Sewers*, 1 B. & Ad. 232; *Crump* v. *Baker*, 18 Vesey, 285; Hill on Trustees, c. 5, p. 570.

The advertisement required by § 10 of the Enabling Act has only to do with the manner of conducting a sale or lease. This must be by public auction, of which there shall be at least the published notice required. There is nothing to prohibit a greater notoriety in exposition of the advantages of the lands.

The act looks to the production of funds for the particular objects stated, but it has in mind also the aggrandizement and enrichment of the new State, whose people are the real beneficiaries; and this enrichment and aggrandizement must come through homeseekers, settlers and investors. To attract these was the particular purpose of the state statute. The general advertisement

of the State was purely incidental; and both sorts of publicity tended to the same end—more competition for the lands.

It is the duty of a trustee in selling to sell under the best possible conditions. *Dounes* v. *Grazebrook*, 3 Mer. 208; *Wilkins* v. *Fry*, 1 Mer. 268; 2 Rose, 375; *Ord* v. *Noel*, 5 Madd. 440; *Mortlock* v. *Buller*, 10 Vesey, 309. Trustees should proceed according to good business. *Phelps* v. *Harris*, 101 U. S. 370, 383; 2 Perry on Trusts, § 770.

Administration of the trust should not be interfered with by injunction unless a gross abuse of discretion be shown. *Nichols* v. *Eaton*, 91 U. S. 716; *Colton* v. *Colton*, 127 U. S. 300.

Mr. Assistant Attorney General Nebeker and *Mr. Leslie C. Garnett* for the United States:

The bill in this case is framed upon the theory that the act of the New Mexico legislature is in contravention of §§ 9 and 10, Art. 21, of the constitution of New Mexico, by which the grant and confirmation of the lands, upon the conditions and limitations prescribed in the Enabling Act, were accepted by the State, and also in conflict with the terms of the Enabling Act, and that the defendant as commissioner of public lands of New Mexico, a public officer of the State charged with the enforcement of its laws, is about to proceed wrongfully and in breach of the trust declared in the Enabling Act and in violation of the laws and rights of the United States. Such a suit cannot be regarded as one against the State. *Ex parte Young*, 209 U. S. 123; *Truax* v. *Raich*, 239 U. S. 33, 37; *Looney* v. *Crane Co.*, 245 U. S. 178, 191; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456.

In the Enabling Act Congress created definite, express, and independent trusts. Each specified quantity of land granted or confirmed was to be devoted to a particular

object, and applying the proceeds from any particular land to any other object than that specified was expressly inhibited as a breach of trust. The Court of Appeals very aptly points out that the granted and confirmed lands aggregate only one twenty-sixth of the area of the State. Manifestly, the remaining twenty-five twenty-sixths of the State and all other public and private property therein are interested in the benefits to be derived from giving publicity to its resources and advantages. It is nowhere shown that any other provision of state law is made to give publicity to the resources and advantages of New Mexico, but the funds derived from these trust lands are made to bear the entire expense of any such publicity for the whole State as the commissioner of public lands of the State may determine is advantageous. This is so palpably a breach of trust as not to require argument.

If these funds can be at all diverted by the state legislature from the objects to which Congress devoted them, there is hardly any limit to which the legislature can not go in order to advertise the State's resources. Congress expressly provided for the necessary advertisement for the sales and leases of the lands, and for the sales of timber thereon, in § 10 of the Enabling Act. This express provision for advertising the sale of these lands negatives the idea of the necessity for any other advertisement.

The act of the state legislature in providing for the diversion of these trust moneys from the fund corresponding to the grant under which the particular land producing such moneys was conveyed or confirmed, and covering them into the general treasury of the State to be expended for the general expenses of the state government, and not investing them in "safe interest-bearing securities," is plainly in conflict with the Enabling Act, constitutes a breach of trust, and is void.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to enjoin the expenditure by appellant, Commissioner of Public Lands of the State of New Mexico, of any of the funds derived from the sale and lease of lands granted and confirmed to the State by the act admitting her into the Union. The right to sell or lease is asserted under a certain act of New Mexico entitled "An Act concerning the Publicity and Promotion of Public Resources and Welfare." [Laws 1915, c. 60.]

The Enabling Act was passed June 20, 1910, [c. 310, 36 Stat. 557] and on August 21, 1911, [37 Stat. 39] by a joint resolution of the Senate and House of Representatives New Mexico and Arizona were admitted into the Union upon an equal footing with the original States.

By the Enabling Act certain grants of public lands were made to New Mexico for purposes of which there was a specific enumeration.

It is provided by § 10 of the act that the lands granted and transferred thereby "shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

And it is further provided that the "disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust."

It is made the duty of the Attorney General of the

United States to prosecute in the name of the United States such proceedings at law or in equity as may be necessary to enforce the provisions of the act "relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

The constitutional convention was required to provide, by an ordinance irrevocable without the consent of the United States and the people of the State, that the State and its people consent to the provisions of the act, and the constitution of the State did so provide.

The legislature of the State on March 8, 1915, passed, over the Governor's veto, an act entitled as we have designated, the first section of which is as follows:

"Section 1. It shall be unlawful for the Commissioner of Public Lands to expend for making known the resources and advantages of this State generally and particularly to homeseekers and investors, more than three cents on the dollar of the annual income of his office from sales and leases of lands, but, up to such limit of money annually, he may give or cause to be given publicity to such resources and advantages, and do or cause to be done all incidental work, in his judgment advisable to be done."

The Commissioner receives from sales and leases of the lands granted a large income annually, the income for the year ending December 31, 1914, being approximately $741,000, and he threatens to expend three cents on the dollar of the annual income derived from sales and leases to give publicity to the resources and advantages of the State generally in conformity with the act of the legislature of March 8, 1915, and, unless restrained, will do so.

The answer, though in form a denial of some of the averments of the bill and an admission of others, is really an objection to its sufficiency to authorize the relief prayed, and the ground of objection is that the bill taken as a whole, "is no more than an attempt to interfere with the due administration of a trust estate by the trustee, the

State of New Mexico, which requires the payment of necessary and proper expenses out of the income or proceeds of the trust property, the grantor of the trust, the Government of the United States, having made no other provision for the payment of such necessary and proper costs and expenses; and defendant avers that the expenditure of a small portion of such income and proceeds for the purpose of advertising the resources of the State and the value of its lands, with the hope of thereby increasing the demand for the purchase and leasing of such lands and in the enhancing of the prospective prices to be derived therefrom, is a proper and necessary expense of the administration of said trust estate."

A temporary injunction was applied for and denied and subsequently the case by stipulation was submitted upon bill and answer, upon which it was ordered that the bill be and it was dismissed.

The decree was reversed by the Circuit Court of Appeals and the case remanded with direction to enter a decree for the United States. This appeal was then prosecuted.

The case is not in broad range and does not demand much discussion. There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose. And to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same. To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should "be deemed a breach of trust."

The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, in prophetic realization, it may be, that the State might be tempted

to do that which it has done, lured from patient methods to speculative advertising in the hope of a speedy prosperity.

It must be admitted there was enticement to it and a prospect of realization, and such was the view of the District Court. The court was of opinion that a private proprietor of the lands would without hesitation use their revenues to advertise their advantage and that that which was a wise administration of the property in him could not reach the odious dereliction of a breach of trust in the State.

The phrase, however, means no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations. The careful opinion of the Circuit Court of Appeals has made it unnecessary. We approve, therefore, its conclusion and affirm its decree.

Affirmed.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY *v.* BROOKLYN EASTERN DISTRICT TERMINAL.

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

No. 81. Argued November 14, 1919.—Decided December 8, 1919.

A steam tug, propelling, lashed to its sides, other vessels of the same owner, in pursuit of the owner's business, brought one of them—a float carrying the cargo—in collision with libelant's vessel. *Held*, that under Rev. Stats., §§ 4283–4285, the value of the tug, and not the value of the flotilla, was the limit of their owner's liability. P. 51.

250 Fed. Rep. 1021, affirmed.

48. Argument for Petitioner.

THE case is stated in the opinion.

Mr. Van Vechten Veeder, with whom *Mr. Charles C. Burlingham* was on the brief, for petitioner:

The two tugs and the car float, physically united in the performance, through the servants of a common owner, of a common adventure, constitute in reality but a single instrumentality and must all be surrendered as a condition to the limitation of the owner's liability. *The Main* v. *Williams*, 152 U. S. 122, 131. It would seem to be too obvious for argument that the car float must be surrendered. Apart from the fact that she was the vessel which actually did the damage, she was the instrumentality by which the respondent undertook to perform the service for which it was paid. It surely can make no difference in principle, for the purposes of the limitation statute, whether cargo is carried in the hold of the same vessel which contains the motive power of transportation, or whether, as in this case, the motive power is in one vessel and the cargo is towed in another. In both cases the motive power and the hold are necessary instruments of the transportation. So the tug, which was without steam and was joined to the flotilla for the convenience of the respondent, was, like the car float, also instrumental in causing the collision, inasmuch as her presence as part of the floating unit increased to that extent the difficulty of navigating the flotilla, and added to that extent to its momentum in the negligent course which brought about the disaster. *Thompson Towing & Wrecking Assn.* v. *McGregor*, 207 Fed. Rep. 209; *The Columbia*, 73 Fed. Rep. 226; *s. c.*, 90 Fed. Rep. 295; *The San Rafael*, 141 Fed. Rep. 270; *Shipowners' & Merchants' Tugboat Co.* v. *Hammond Lumber Co.*, 218 Fed. Rep. 161; *The Bordentown*, 40 Fed. Rep. 682, 687; *The Anthracite*, 162 Fed. Rep. 384, 388.

The W. G. Mason, 142 Fed. Rep. 913, has been a source of much confusion. It is undoubtedly true that the per-

sonal liability of the owner is not a determining factor as to the liability of a vessel *in rem*. We also agree that the fact that the two vessels are to be regarded as one for the purposes of a joint undertaking of their owner may have no bearing upon the question of their respective liabilities *in rem*. But neither of these considerations has any bearing upon the question of what must be surrendered by a respondent as a condition of limiting his liability. There may be no liability whatever *in rem*, and yet the shipowner may be entitled to limit his liability by surrendering the vessel which was concerned in the disaster.

The actual decision in *The W. G. Mason, supra*, was simply that while the two tugs were engaged in towing the steamship, they were acting in independent capacities. This is made clear by a later decision of the same court in *The Anthracite, supra*.

In *The Transfer No. 21*, 248 Fed. Rep. 459, the same court considered for the first time a state of facts substantially similar to the case at bar, applying the principle underlying the action *in rem* to a limitation proceeding. The result is that in the Second Circuit the owner of two or more vessels engaged for profit in a particular adventure may limit his responsibility for the damage done by them to the value of one. Although the liability is said to be strictly as *in rem*, the result may be, as in the case at bar, that the vessel which physically did the damage is not required to respond either in itself or through its owner; while another vessel, which was not actually in collision at all, is held solely liable for the fault of its navigator. Yet, according to the same court's decision in *The Anthracite, supra*, it is sufficient that the navigator of a vessel is actually directing her movements; it is not necessary that he shall be technically master, or, indeed, aboard. But the master of a tug which has a car float, without motive power, lashed by it, is cer-

tainly the only person who has any control over its movements.

In *The Eugene F. Moran*, 212 U. S. 466, this court refused to extend the fiction of the personification of a vessel to the situation where a tow was being navigated by an independent contractor. Where, however, the two vessels, as tug and tow, belong to the same owner, the objection that an application of the fiction would result in the taking of a man's property for the wrong of another does not apply; and there is good reason for holding both his vessels liable for the damage occasioned by the wrongful manner in which he himself manages his own vessels where both are involved in the mismanagement.

Congress intended only to protect an owner from losing all his property in a single disaster. It limited his liability to the property engaged in the adventure in which the disaster occurred. It was clearly not the intention of Congress to single out a particular portion of the property engaged in an adventure and limit the owners' liability to such portion.

Mr. Samuel Park, with whom *Mr. Henry E. Mattison* was on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the court.

This is a libel in admiralty brought by the petitioner against the respondent for a collision with the petitioner's steamship Vauban while it was moored at a pier in Brooklyn. The respondent does not deny liability but claims the right to limit it under Rev. Stats., §§ 4283, 4284 and 4285, to the value of the vessel that caused the damage. The moving cause was the respondent's steam tug Intrepid which was proceeding up the East River, with a car float loaded with railroad cars lashed to its port side and on its starboard side a disabled tug, both belonging to the

respondent. By a stipulation dated August 3, 1917, it was agreed that the damage sustained was $28,036.98 with $5,539.84 interest. The value of the tug Intrepid was found to be $5,750, and the liability of the respondent was limited by the District Court to that sum with interest. The Circuit Court of Appeals affirmed the decree without an opinion. 250 Fed. Rep. 1021; 162 C. C. A. 664. The case is brought here on the question whether the value of the whole flotilla should not have been included in the decree.

The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid that fact does not affect the question of responsibility. *The James Gray* v. *The John Fraser*, 21 How. 184. *The J. P. Donaldson*, 167 U. S. 599, 603, 604. *The Eugene F. Moran*, 212 U. S. 466, 474, 475. *Union Steamship Co.* v. *Owners of the "Aracan,"* L. R. 6 P. C. 127. The rule is not changed by the ownership of the vessels. *The John G. Stevens*, 170 U. S. 113, 123. *The W. G. Mason*, 142 Fed. Rep. 913, 917. 212 U. S. 466, 475. L. R. 6 P. C. 127, 133. These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it. If this were a proceeding *in rem*, it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid and so were more helplessly under its control than in the ordinary case of a tow.

It is said, however, that when you come to limiting liability the foregoing authorities are not controlling—that the object of the statute is "to limit the liability of vessel owners to their interest in the *adventure*," *The Main* v. *Williams*, 152 U. S. 122, 131, and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it

was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. But that is the question, and it is not answered by putting it. The respondent answers the argument with the suggestion that if sound it applies a different rule in actions *in personam* from that which, as we have said, governs suits *in rem*. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the appellant contends.

The statute follows the lead of European countries, as stated in *The Main* v. *Williams*, 152 U. S. 122, 126, 127. Whatever may be the doubts as to the original grounds for limiting liability to the ship or with regard to the historic starting point for holding the ship responsible as a moving cause, *The Blackheath*, 195 U. S. 361, 366, 367, it seems a permissible conjecture that both principles, if not rooted in the same conscious thought, at least were influenced by the same semi-conscious attitude of mind. When the continental law came to be followed by Congress, no doubt, alongside of the desire to give our shipowners a chance to compete with those of Europe, there was in some sense an intent to limit liability to the venture, but such a statement gives little help in deciding where the line of limitation should be drawn. No one, we presume, would contend that other unattached vessels, belonging if you like to the same owner, and coöperating to the same result with the one in fault, would have to be surrendered. *Thompson Towing & Wrecking Assn.* v. *McGregor*, 207 Fed. Rep. 209, 212–214. *The Sunbeam*, 195 Fed. Rep. 468, 470. *The W. G. Mason*, 142 Fed. Rep. 913, 919. The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me." Fitz. Abr., Barre, 290. The words of the

statute are "The liability of the owner of any vessel for any . . . injury by collision . . . shall in no case exceed the amount or value of the interest of such owner in such vessel." The literal meaning of the sentence is reinforced by the words "in no case." For clearly the liability would be made to exceed the interest of the owner "in such vessel" if you said frankly, In some cases we propose to count other vessels in although they are not "such vessel"; and it comes to the same thing when you profess a formal compliance with the words but reach the result by artificially construing "such vessel" to include other vessels if only they are tied to it. Earlier cases in the Second Circuit had disposed of the question there, and those in other circuits for the most part if not wholly are reconcilable with them. We are of opinion that the decision was right. *The Transfer No. 21*, 248 Fed. Rep. 459. *The W. G. Mason*, 142 Fed. Rep. 913. *The Erie Lighter 108*, 250 Fed. Rep. 490, 497, 498. *Van Eyken* v. *Erie R. Co.*, 117 Fed. Rep. 712, 717.

Decree affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* COLE, ADMINISTRATRIX OF ROBERTS, ETC.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 290. Motion to dismiss or affirm submitted November 17, 1919.—Decided December 8, 1919.

The Federal Constitution does not prevent the States from leaving the defense of contributory negligence to the jury in all cases, those in which it is a mere question of law as well as those in which it is a question of fact. P. 55.

Oklahoma Constitution, Art. 23, § 6, sustained on this point.

74 Oklahoma, —, affirmed.

THE case is stated in the opinion.

Mr. W. A. Ledbetter, *Mr. H. L. Stuart*, *Mr. R. R. Bell* and *Mr. E. P. Ledbetter*, for defendant in error, in support of the motion.

Mr. R. J. Roberts and *Mr. C. O. Blake*, for plaintiff in error, in opposition to the motion.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by the defendant in error for knocking down and killing her intestate, Roberts. He stepped upon the railroad track when a train was approaching in full view and was killed. It may be assumed, as the State Court assumed, that, if the question were open for a ruling of law, it would be ruled that the plaintiff could not recover. But the Oklahoma Constitution provides that "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." Art. 23, § 6. The case was left to the jury and they found a verdict for the plaintiff. Judgment was entered for her and was affirmed on error by the Supreme Court of the State, which held that the provision applied to the case and that when so applied it did not contravene the Fourteenth Amendment of the Constitution of the United States.

The state constitution was in force when the death occurred and therefore the defendant had only such right to the defense of contributory negligence as that constitution allowed. The argument that the Railroad Company had a vested right to that defense is disposed of by the decisions that it may be taken away altogether. *Arizona Employers' Liability Cases*, 250 U. S. 400. *Bowersock* v. *Smith*, 243 U. S. 29, 34. It is said that legislation cannot

change the standard of conduct, which is matter of law in its nature into matter of fact, and this may be conceded; but the material element in the constitutional enactment is not that it called contributory negligence fact but that it left it wholly to the jury. There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether, *Walker* v. *Sauvinet*, 92 U. S. 90, modify its constitution, *Maxwell* v. *Dow*, 176 U. S. 581, the requirements of a verdict, *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, or the procedure before it. *Twining* v. *New Jersey*, 211 U. S. 78, 111. *Frank* v. *Mangum*, 237 U. S. 309, 340. As it may confer legislative and judicial powers upon a commission not known to the common law, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and the controversy with regard to their powers in matters of law more generally as illustrated in *Sparf* v. *United States*, 156 U. S. 51, and *Georgia* v. *Brailsford*, 3 Dallas, 1, 4, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed.

Judgment affirmed.

Counsel for Parties.

BRAGG *v.* WEAVER ET AL.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 22. Argued October 13, 1919.—Decided December 8, 1919.

The necessity or expediency of taking property for public use are legislative questions upon which the owner is not entitled to a hearing under the due process clause of the Fourteenth Amendment. P. 58.

When the amount of compensation is fixed in the first instance by viewers, due process does not demand an opportunity for a hearing before them, if the owner be given notice and opportunity to have the matter fully heard and determined *de novo* in a court of general jurisdiction, on appeal, as is provided by the laws of Virginia in cases where earth is taken from private land for the repair of public roads. P. 59.

Under the law of Virginia (Pollard's Code, 1904, § 944a, clauses 21, 22, 5; § 838), the owner of land from which earth is taken for repairing public roads can initiate the proceedings for assessment of compensation, and is entitled to have notice of the supervisors' determination of the amount, either by notice in writing or through being present when the decision is made; and he is allowed 30 days in which to appeal for a trial *de novo* in the Circuit Court. P. 61.

Where adequate provision is made by a State for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law merely because it precedes the ascertainment of what compensation is just. P. 62.

Affirmed.

THE case is stated in the opinion.

Mr. George E. Allen, with whom *Mr. John Garland Pollard* was on the briefs, for plaintiff in error.

Mr. J. D. Hank, Jr., Assistant Attorney General of the State of Virginia, with whom *Mr. Jno. R. Saunders*, Attorney General of the State of Virginia, *Mr. F. B.*

Richardson and *Mr. N. S. Turnbull, Jr.*, were on the brief, for defendants in error.

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

By this suit the owner of land adjoining a public road in Virginia seeks an injunction against the taking of earth from his land to be used in repairing the road. The taking is from the most convenient and nearest place, where it will be attended by the least expense, and has the express sanction of a statute of the State, Pollard's Code, 1904, § 944a, clauses 21 and 22.[1] Whether the statute denies to the owner the due process of law guaranteed by the Fourteenth Amendment is the federal question in the case. It was duly presented in the state court and, while no opinion was delivered, the record makes it plain that by the judgment rendered the court resolved the question in favor of the validity of the statute.

It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.

Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. *Boom Co.* v. *Patterson*, 98 U. S. 403, 406;

[1] Other enactments of March 12, 1912, c. 151; March 21, 1914, c. 174, and March 17, 1916, c. 279, make the statute specially applicable here, but they require no particular attention.

Backus v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568; *Adirondack Ry. Co.* v. *New York*, 176 U. S. 335, 349; *Sears* v. *Akron*, 246 U. S. 242, 251.

But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. *United States* v. *Jones*, 109 U. S. 513, 519; *Backus* v. *Fort Street Union Depot Co.*, *supra*, p. 569. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. *Lent* v. *Tillson*, 140 U. S. 316, 326, *et seq.*; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165, 168. And see *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 18–30, 45.

With these principles in mind we turn to the statute in question. By clause 21 it authorizes certain officers engaged in repairing public roads to take earth for that purpose from adjacent lands, and by clause 22 it declares:

"If the owner or tenant of any such land shall think himself injured thereby, and the superintendent of roads, or his deputy, can agree with such owner as to the amount of damage, they shall report the same to the board of supervisors, or, if they cannot agree, a justice, upon application to him, shall issue a warrant to three freeholders, requiring them to view the said land, and ascertain what is a just compensation to such owner or tenant for the damage to him by reason of anything done under the preceding section. The said freeholders, after being sworn according to the provisions of section three of this act,[1]

[1] ". . . that they will faithfully and impartially discharge their duty as viewers."

shall accordingly ascertain such compensation and report the same to the board of supervisors. Said board may allow the full amount so agreed upon, or reported by said freeholders, or so much thereof as upon investigation they may deem reasonable, subject to such owner or tenant's right of appeal to the circuit court as in other cases."

The same statute, in clause 5, deals with the compensation to be paid for lands taken for roadways, and in that connection provides that the proprietor or tenant, if dissatisfied with the amount allowed by the supervisors, "may of right appeal to the circuit court of said county, and the said court shall hear the matter *de novo*" and determine and certify the amount to be paid. And a general statute (§ 838), which regulates the time and mode of taking appeals from decisions of the supervisors disallowing claims in whole or in part, provides that the claimant, if present when the decision is made, may appeal to the Circuit Court within thirty days thereafter, and, if not present, shall be notified in writing by the clerk and may appeal within thirty days after service of the notice.

Apart from what is implied by the decision under review, no construction of these statutory provisions by the state court of last resort has been brought to our attention; so for the purposes of this case we must construe them. The task is not difficult. The words employed are direct and free from ambiguity and the several provisions are in entire harmony. They show that, in the absence of an agreement, the compensation is to be assessed primarily by viewers, that their award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable, and that from the decision of the supervisors an appeal lies as of right to the Circuit Court where the matter may be heard *de novo*. Thus, by exercising the right to appeal the owner may obtain a full hearing in a court of justice,—one concededly possessing and exercising a general jurisdiction. An opportunity to have such a

hearing, before the compensation is finally determined, and when the right thereto can be effectively asserted and protected, satisfies the demand of due process.

Under the statute the proceedings looking to an assessment may be initiated by the owner as well as by the road officers. Either may apply to a justice for the appointment of viewers. Thus the owner is free to act promptly and upon his own motion, if he chooses.

But it is contended that where the road officers take the initiative—as they do in many instances—the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore without his having an opportunity to take an appeal. We think the contention is not tenable. It takes into account some of the statutory provisions and rejects others equally important. It is true there is no express provision for notice at the inception or during the early stages of the proceedings; and for present purposes it may be assumed that such a requirement is not even implied, although a different view might be admissible. See *Paulsen* v. *Portland*, 149 U. S. 30. But the provisions relating to the later stage—the decision by the supervisors—are not silent in respect of notice, but speak in terms easily understood. Clauses 5 and 22 taken together provide that the owner, if dissatisfied with the decision, shall have the right to appeal as in other cases. This presupposes that he will have some knowledge of the decision, and yet neither clause states how the knowledge is to be obtained, or when or how the right of appeal is to be exercised. All this is explained, however, when § 838 is examined. It deals with these questions in a comprehensive way and evidently is intended to be of general application. Of course, newly created rights of appeal of the same class fall within its operation unless the legislature provides otherwise. Here the legislature has not provided otherwise, and so has indicated that it is content to have the general statute applied. As before stated, that

statute provides that the claimant, if not present when the supervisors' decision is made, shall be notified thereof in writing and shall have thirty days after such notice within which to appeal. If he be present when the decision is made, he is regarded as receiving notice at that time, and the thirty days for taking an appeal begins to run at once. It is apparent therefore that special care is taken to afford him ample opportunity to appeal and thereby to obtain a full hearing in the Circuit Court.

The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just. *Sweet* v. *Rechel*, 159 U. S. 380, 402, 407; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568; *Williams* v. *Parker*, 188 U. S. 491; *Crozier* v. *Krupp*, 224 U. S. 290, 306. And see *Branson* v. *Gee*, 25 Oregon, 462. As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

We conclude that the objections urged against the validity of the statute are not well taken.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* WILLIAMS ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 66. Argued November 11, 1919.—Decided December 8, 1919.

A railroad company in defense of an action for penalties imposed for exceeding passenger rates prescribed by a state law has no ground to claim that the penalties are unconstitutional in that, by their severity, they prevent resort to the courts to test the adequacy of the rates, when it did not avail itself of its opportunity to have such a test in a suit against the state railroad commission pending which the penalty provision could have been suspended by injunction, and when it did not question the prescribed rates in the action to collect the penalties. P. 65.

A provision for the collection of such penalties in an action by the aggrieved passenger and for his use irrespective of his private damages, is consistent with due process of law. P. 66.

In determining whether such penalties are so severe, oppressive, and unreasonable as to violate the due process clause, they should be tested not by comparison with the overcharges in particular instances but by the public interest in having the rates adhered to uniformly and the relation of the penalties to that object. *Id.*

131 Arkansas, 442, affirmed.

THE case is stated in the opinion.

Mr. Robert E. Wiley, with whom *Mr. Edward J. White* and *Mr. Edgar B. Kinsworthy* were on the brief, for plaintiff in error.

No appearance for defendants in error.

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

By a statute of Arkansas, regulating rates for the transportation of passengers between points within the State,

any railroad company that demands or collects a greater compensation than the statute prescribes is subjected "for every such offense" to a penalty of "not less than fifty dollars, nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee," and the aggrieved passenger is given a right to recover the same in a civil action. Act April 4, 1887, Laws 1887, p. 227; Kirby's Digest, 1904, § 6620; Act March 4, 1915, Laws 1915, p. 365; Kirby & Castle's Digest, 1916, § 8094.

In June, 1915, a company operating a line of railroad within the State demanded and collected sixty-six cents more than the prescribed fare from each of two sisters carried over part of its line when returning to their home from a school commencement elsewhere in the State; and in suits separately brought for the purpose, and afterwards consolidated, these passengers obtained judgments against the company for the overcharge, a penalty of seventy-five dollars and costs of suit, including an attorney's fee of twenty-five dollars. The company appealed, asserting that the provision for the penalty was repugnant to the due process of law clause of the Fourteenth Amendment; but the Supreme Court of the State sustained the provision and affirmed the judgments. 131 Arkansas, 442. To obtain a review of that decision the company prosecutes this writ of error.

The grounds upon which the provision is said to contravene due process of law are, first, that the penalty is "so severe as to deprive the carrier of the right to resort to the courts to test the validity" of the rate prescribed, and, second, that the penalty is "arbitrary and unreasonable, and not proportionate to the actual damages sustained."

It is true that the imposition of severe penalties as a means of enforcing a rate, such as was prescribed in this instance, is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity

of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches. The reasons why this is so are set forth fully and plainly in several recent decisions and need not be repeated now. *Ex parte Young*, 209 U. S. 123, 147; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196, 207–208; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 659, *et seq.*

And it also is true that where such an opportunity is afforded and the rate is adjudged valid, or the carrier fails to avail itself of the opportunity, it then is admissible, so far as due process of law is concerned, for the State to enforce adherence to the rate by imposing substantial penalties for deviations from it. *Wadley Southern Ry. Co.* v. *Georgia*, *supra*, p. 667, *et seq.*; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 246 U. S. 58, 62.

Here it does not appear that the carrier had not been afforded an adequate opportunity for safely testing the validity of the rate, or that its deviation therefrom proceeded from any belief that the rate was invalid. On the contrary, it is practically conceded—and we judicially know—that if the carrier really regarded the rate as confiscatory, the way was open to secure a determination of that question by a suit in equity against the Railroad Commission of the State, during the pendency of which the operation of the penalty provision could have been suspended by injunction. *Wadley Southern Ry. Co.* v. *Georgia*, *supra*. See also *Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight*, *ibid.* 368. And the record shows that at the trial the carrier not only did not raise any question about the correct fare, but proposed and secured an instruction to the jury wherein the prescribed rate was recognized as controlling.

It therefore is plain that the first branch of the company's contention cannot prevail.

The second branch is more strongly urged, and we now turn to it. The provision assailed is essentially penal, because primarily intended to punish the carrier for taking more than the prescribed rate. *Railway Co.* v. *Gill*, 54 Arkansas, 101, 106; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Waldrop*, 93 Arkansas, 42, 45. True, the penalty goes to the aggrieved passenger and not the State, and is to be enforced by a private and not a public suit. But this is not contrary to due process of law; for, as is said in *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, 523, "the power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion." Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the State. See *Marvin* v. *Trout*, 199 U. S. 212, 225.

The ultimate question is whether a penalty of not less than fifty dollars and not more than three hundred dollars for the offense in question can be said to bring the provision prescribing it into conflict with the due process of law clause of the Fourteenth Amendment.

That this clause places a limitation upon the power of the States to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the States still possess a wide latitude of discretion in the matter and that their enactments transcend the limitation only where the penalty

prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. *Coffey* v. *Harlan County*, 204 U. S. 659, 662; *Seaboard Air Line Ry.* v. *Seegers*, 207 U. S. 73, 78; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111; *Collins* v. *Johnston*, 237 U. S. 502, 510.

Of this penalty and the need for it the Supreme Court of the State says: "It is commonly known that carriers are not prone to adhere uniformly to rates lawfully prescribed and it is necessary that deviation from such rates be discouraged and prohibited by adequate liabilities and penalties, and we regard the penalties prescribed as no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached." *Chicago, Rock Island & Pacific Ry. Co.* v. *Davis*, 114 Arkansas, 519, 525.

When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS dissents.

CORSICANA NATIONAL BANK OF CORSICANA *v.* JOHNSON.

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

No. 23. Argued January 16, 1919.—Decided December 8, 1919.

A loan made by a national bank to two persons jointly, or in form one half to each but in substance as a single loan, violates the National Bank Act if in excess of the limit set by Rev. Stats., § 5200; and, in a complaint filed by the bank to recover resulting damages from a director under § 5239, a designation of the borrowers as a firm is descriptive merely and not essential. P. 80.

There was substantial evidence in this case from which the jury might find that there was a single, excessive loan to two persons, in making which defendant as a director of the plaintiff bank knowingly participated, rather than two loans, neither of them excessive, made to the borrowers severally. *Id.*

Contingent liabilities incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not "liabilities . . . for money borrowed" in the sense of Rev. Stats., § 5200. P. 82. *Cochran* v. *United States*, 157 U. S. 286; Rev. Stats., § 5211, distinguished.

And where the surety signs ostensibly as joint maker, a director who knew and relied upon his suretyship is entitled to prove it when sued under § 5239 for participating in the making of an alleged excessive loan. P. 83.

A director's liability for knowingly participating in the making of a loan in excess of the limit prescribed by Rev. Stats., § 5200, is not affected by the supposed standing of the borrowers, the propriety of his motive, the continued prosperity of the bank, its failure to sue other officers or directors, or to sue him until after a change in the stockholding interest or control, or by the fact that incoming stockholders purchased their shares with knowledge of the loan and of his alleged liability and may profit by a recovery against him. *Id.*

An action in Texas by a national bank against a former director, under Rev. Stats., § 5239, for damages resulting from an excessive loan,

is not barred in two years, but in four. Vernon's Sayles' Civ. Stats., 1914, Arts. 5687, 5690. P. 85.

The liability imposed upon the director under Rev. Stats., § 5239, is direct, not contingent or collateral; the cause of action and the damages are complete when the money is loaned, and, while the damages may be diminished by what the bank collects from the borrowers, it is not obliged to proceed primarily against them. P. 86.

The excessive loan being unlawful *in toto*, the bank's damage in such cases is not measured by the part in excess of what might have been lent lawfully, but by the whole amount plus interest and less salvage. P. 87.

When a director and vice president of a national bank makes an excessive loan, and, afterwards, knowing the borrowers to have become insolvent, joins in causing their paper to be transferred for full consideration but "without recourse" from the bank to a loan corporation, closely affiliated with the bank and having identical officers, directors and shareholders with ratable distribution of shares, the transaction, not having been ratified or acquiesced in by the shareholders, is subject to rescission by the loan company through resolution of a majority in interest at a regular shareholders' meeting, followed by appropriate action of its directors and officers; and an acquiescence in such rescission upon the part of the bank, through its shareholders, directors and officers, is not to be regarded as a voluntary reacceptance of the paper in such a sense that the damages resulting from nonpayment of the loan must be treated, in an action against the director under Rev. Stats., § 5239, as flowing from such voluntary action and not from the unlawful loan itself. P. 88.

In such a case, although the two corporations are distinct in so far that a loss on the paper to the loan company would not be the same in law as a loss to the bank, the shareholders nevertheless have a right to consider the practical effect of the transfer upon their common interest and to be guided by that interest in determining whether and upon what terms to rescind the transfer. P. 89.

Since the transfer would operate only provisionally to satisfy the damages to the bank from the excessive loan, the rescission leaves the director liable for the damages in full; nor is it open to him to object that the rescission was brought about for the purpose of holding him so liable, through changes in the boards of directors involving the introduction of figureheads or "dummies," nor to criticise the terms of the re-transfer agreed to by the two corporations. P. 93.

Reversed.

THE case is stated in the opinion.

Mr. Joseph Manson McCormick, with whom *Mr. Richard Mays* and *Mr. Francis Marion Etheridge* were on the brief, for plaintiff in error.

Mr. Cullen F. Thomas, *Mr. W. J. McKie* and *Mr. Henry C. Coke*, for defendant in error, submitted.

Mr. Justice Pitney delivered the opinion of the court.

This was an action brought under § 5239, Rev. Stats., in the then Circuit now District Court of the United States for the Northern District of Texas by plaintiff in error, a national banking association which we may call for convenience the Bank, against defendant in error, formerly a member of its board of directors and its vice president, to hold him liable personally for damages sustained by the Bank in consequence of his having knowingly violated, as was alleged, the provisions of § 5200, Rev. Stats., as amended June 22, 1906, c. 3516, 34 Stat. 451, by participating as such director and vice president in a loan of the Bank's funds to an amount exceeding one-tenth of its paid-in capital and surplus.

The action appears to have been commenced in February, 1910, and, after delays not necessary to be recounted, was tried before the District Court with a jury. A verdict was directed in favor of defendant, and the judgment thereon was affirmed by the Circuit Court of Appeals, no opinion being delivered in either court. The judgment of affirmance is now under review.

The amended § 5200, Rev. Stats., as it stood at the time the alleged cause of action arose, reads as follows, the matter inserted by the amendment being indicated by brackets:

"Sec. 5200. The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company

or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such associations, actually paid in [and unimpaired and one-tenth part of its unimpaired surplus fund: *Provided, however,* That the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association]. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed."

The pertinent portion of the other section reads as follows:

"Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. . . . And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Under the rule settled by familiar decisions of this court, in order for the Bank to prevail in this action it must appear not only that the liabilities of a person, company, firm, etc., to the Bank for money borrowed were permitted to exceed the prescribed limit, but that defendant, while a director, participated in or assented to the excessive loan or loans not through mere negligence but knowingly and in effect intentionally, *Yates* v. *Jones National Bank,* 206 U. S. 158, 180; with this qualification, that if he deliberately refrained from investigating that which it was his duty to investigate, any resulting violation of the statute must be regarded as "in effect inten-

tional," *Thomas* v. *Taylor*, 224 U. S. 73, 82; *Jones National Bank* v. *Yates*, 240 U. S. 541, 555.

The facts are involved, and need to be fully stated. And necessarily, in order to test the propriety of the peremptory instruction given by the trial judge, we must bring into view the facts and the reasonable inferences which tended to a different conclusion, and where the evidence was in substantial dispute must adopt a view of it favorable to plaintiff; but of course we do this without intending to intimate what view the jury ought to have taken, had the case been submitted to it.

On June 10, 1907, plaintiff, whose banking house was at Corsicana, Texas, had $100,000 capital and $100,000 surplus, aggregating $200,000, and making $20,000 the applicable limit under § 5200. Defendant was a director and vice president of the Bank, active—perhaps dominant—in the conduct of its banking business, and familiar with the state of its finances.

The averment of a breach of duty relates to an alleged excessive loan or loans made on or about the date last mentioned to Fred Fleming and D. A. Templeton, who for a considerable time had been engaged in business as private bankers in Corsicana and in several other towns in Texas under the firm name of Fleming & Templeton, and also had conducted at Corsicana a branch bank for the Western Bank & Trust Company, a state institution of which Fleming was president and Templeton vice president and whose main banking house appears to have been at Dallas, about 50 miles from Corsicana. There was evidence that early in June, 1907, Fleming & Templeton terminated their private banking business at Corsicana and turned over their deposit accounts—between $30,000 and $40,000—to the Corsicana National Bank, plaintiff herein, together with money or exchange on the Western Bank & Trust Company sufficient to meet them. Whether the firm was in fact dissolved at that time or later, and

whether the dissolution applied to their other branches, or to the Corsicana business only, were points concerning which under the evidence there was some doubt.

On or about June 10th, while the president of the Bank was absent on vacation, defendant loaned for the Bank to Fleming and Templeton $30,000 (less discount) upon two promissory notes for $15,000 each, maturing in six months. Defendant testified that both Fleming and Templeton negotiated with him, asking for two separate loans of $15,000 each, telling him that they had dissolved partnership and were winding up and closing out at Corsicana, and would turn over between $30,000 and $40,000 of deposits to the Corsicana National Bank. He further testified: "One of the considerations of this loan was the transfer of the deposits and with it the accounts of Fleming & Templeton." He insisted that two separate loans were made, of $15,000 each, one to Fleming for which Templeton was surety, the other to Templeton for which Fleming was surety. But defendant's own account of the circumstances under which and the special inducement upon which the loan was made, with other evidence to be recited below, left room for a reasonable inference that there was in fact but a single loan, and that separate notes were taken in order to avoid the appearance of a loan in excess of the limit. They were in the usual form of joint and several notes, payable to plaintiff's order. One was signed "Fred Fleming, D. A. Templeton," the other "D. A. Templeton, Fred Fleming," without naming either maker as surety. Discount to the amount of $900 was deducted, and the net proceeds, $29,100, were paid by a draft drawn by the Bank on the Western Bank & Trust Company to the order of "Fleming & Templeton," which was sent by mail inclosed in a letter written upon the Bank's letter-head, dated June 10, 1907, and addressed to Templeton at Dallas, in which letter, after acknowledging receipt of the two notes for $15,000 each, "signed by

yourself and Fred Fleming," it was stated: "We have deducted the discount, $900.00, and hand you herewith our draft #A, 7830, on Western Bank & Trust Co., order Fleming & Templeton, for $29,100.00." The retained copy of this letter appears to have been introduced in evidence; at the foot, opposite the place of signature, are the initials "V. P." With regard to this, as also to certain other "V. P." letters dated in the following December and relating to renewal of the notes, defendant testified: "I think I signed the letters which are offered in evidence as Exhibits H," etc.

There was evidence that the draft for $29,100 was indorsed in the firm name by Templeton and deposited in the Western Bank & Trust Company at Dallas to the credit of the joint account of Fleming & Templeton, to make up in part an overdraft amounting to more than $125,000; this account having been overdrawn constantly, and in large but varying amounts, since the preceding April.

As a result of an examination of the Bank made a few days later, the Comptroller of the Currency wrote to its president under date June 22, severely criticising the Fleming-Templeton loan, among others, as excessive under § 5200, Rev. Stats., and saying: "Immediate arrangements must be made to reduce these loans to the legal limit." It was a fair inference that defendant knew of this letter, or in the proper performance of his duties would have known of it. Whether any reply was made to it did not appear.

Notwithstanding the warning thus given, when the notes matured in December they were renewed with defendant's assent for a further period of six months, joint notes being given to the Bank as before, and the further sum of $900 being paid by Fleming & Templeton to the Bank for interest in this way: plaintiff, under defendant's direction, charged the amount in a single

item to the Western Bank & Trust Co., for account of the borrowers, and the latter institution acknowledged the charge, gave credit to plaintiff for the amount, and charged it against the joint account of Fleming & Templeton. During December some correspondence passed between defendant at Corsicana, he writing as vice president of the Bank, and Templeton at Dallas, relating to the renewal of the notes, tending to show that they were regarded by both writers as representing a single obligation of "Fleming & Templeton." Thus, Templeton on December 3d wrote to defendant: "Referring to the notes of Fleming & Templeton," etc.; and defendant wrote to him on the following day mentioning "renewal notes of loan to you and Mr. Fleming."

The evidence tended to show that up to the time of the renewal the borrowers were apparently solvent, but that about January 15, 1908, they became manifestly and notoriously insolvent. The Western Bank & Trust Company closed its doors on that date and went into liquidation, with Fleming and Templeton owing it several hundred thousand dollars. About the same time Fleming and perhaps Templeton went into bankruptcy, and Templeton afterwards died, and their respective estates paid small dividends upon their obligations. The jury would have been warranted in finding that it was evident to defendant, as a banker, on and after the 15th of January, that there would be a substantial loss upon the Fleming and Templeton notes.

On February 6, 1908, an official bank examiner visited the Bank, with the result that on the 26th the Deputy Comptroller wrote calling the attention of its officers to alleged repeated violations of the national banking law in the conduct of its affairs, specifying certain loans in excess of the limit prescribed by § 5200, among them "Fleming & Templeton, $30,000," and stating that "the directors who are responsible for the loans or permitted

them to be made should assume liability for any loss that may be sustained thereon and not throw the burden of such loss on innocent stockholders." On March 11 the directors, including defendant, united in signing a letter to the Comptroller in reply to his criticisms, among other things saying: "Reference to the Fleming & Templeton item of $30,000 we beg to say that this item has been disposed of by the Bank and they now owe us nothing." It was a reasonable inference that defendant intended to admit that it was a single loan and in excess of the limit.

In explanation of the statement that it had been "disposed of by the Bank," the evidence tended to show that on February 12, 1908, nearly a month after the insolvency of Fleming and Templeton had become notorious and a few days after the bank examiner's visit, defendant and the president of the Bank caused the two notes of December 10 to be transferred "without recourse" to an affiliated corporation known as the Corsicana National Land & Loan Company (they being directors and officers of this corporation also), upon payment of $29,400, the full face value less discount, as consideration; the payment being made by a transfer of credit upon the books of the Bank. Defendant relies upon this as wholly relieving the Bank from loss by reason of the loan, and consequently as releasing him from responsibility to the Bank. But the evidence tended to show further that the loan company in January, 1910, shortly before this suit was brought, rescinded the transaction upon the ground of fraud, and that there was a settlement as between the loan company and the Bank based upon an acknowledgment by the latter of the former's right to rescind.

A brief account of the relations between these two corporations, and of their dealings respecting the notes in question, becomes material. The loan company was organized in the month of May, 1907, under the laws of the State of Texas, with $50,000 capital stock and with

stockholders and directors identical with those of the Bank. The capital of the company was subscribed for and paid out of a special dividend declared by the directors of the Bank for the purpose, and each stockholder had the same proportion of stock in the company as in the Bank. The purpose of the new corporation, as declared in its charter, was the "accumulation and loan of money." Defendant testified: "The purpose of the loan company, a state corporation, was to take such paper as the bank could not handle. It was organized by the stockholders of the bank and paid for out of the earnings of our bank. . . . The loans of the loan company were largely real estate loans. It was to help out the bank in every possible [way]." From the organization of the company in the spring of 1907 until the spring of 1909, defendant was a director and active in the management of the company as well as of the Bank. He testified that the stockholders of the two corporations were identical, and continued to be so during the entire period just mentioned; that "whenever there was a sale of bank stock, it carried with it that particular shareholder's stock in the loan company." During the same period the two corporations had the same president, vice president, and directors, while the assistant cashier of the Bank was secretary of the loan company.

So far as appeared, the transfer of the Fleming and Templeton notes to the loan company, and the payment made by the company to the Bank, were never expressly authorized or ratified by the stockholders of either corporation; nor did it appear that the stockholders of the loan company ever authorized its directors to employ its funds in taking bad or doubtful paper off the hands of the Bank at a loss; much less, to relieve the directors of the Bank from responsibility for its losses.

In April or May, 1909, there was a change in the control of the Bank due to sales of a majority of the stock followed

by a change of officers, defendant retiring as both stockholder and director. The corresponding shares of the stock of the loan company were transferred at the same time, and the new management officered the company as well as the Bank. So far as appeared from the evidence, the transfer of defendant's stock carried with it no agreement that he should not be held responsible to the Bank because of the Fleming and Templeton loan, nor any approval of the transfer of the loan to the loan company.

The Bank and the loan company held annual meetings of stockholders on January 11, 1910, at which, for the first time so far as appears, the boards of directors were so selected that a majority of one board no longer were directors of the other corporation. This was done by electing, as five out of nine directors of the loan company, individuals holding one share of stock each, recently placed in their names for the purpose of qualifying them. They were not stockholders of the Bank; but, except for them, the stockholders of the two corporations still were the same, and it was a reasonable inference that the two meetings were attended by the same individuals. Minutes of these stockholders' meetings, and of certain meetings of the respective boards of directors, were introduced in evidence and supplemented by other testimony, from all of which the following additional corporate proceedings appeared. The stockholders of the loan company, more than a majority in interest being present, unanimously adopted a resolution reciting the taking of the notes of December 10, 1907, by the Bank from Fleming and Templeton, and that on or about January 15, 1908, the makers became insolvent and the notes worthless and uncollectible; and setting forth that, with knowledge of this fact, certain of the directors and officers of the Bank illegally and wrongfully transferred the notes to the loan company, for which the same officers and directors,

being likewise officers and directors of the loan company, illegally and wrongfully transferred to the Bank out of the funds of the loan company the face value of the notes, whereby the Bank had committed a wrong upon the loan company and was liable to it therefor; and by this resolution the directors of the company were authorized to adjust and settle this demand against the Bank and to tender and return to the Bank the Fleming and Templeton notes and indebtedness with any collateral security held for them. The directors of the loan company thereafter and on the same day passed a resolution to the like effect, and appointed a committee to make demand upon the Bank for return of the money wrongfully transferred to the Bank for the notes and to adjust and settle this demand; the notes and indebtedness of Fleming and Templeton and any collateral security held therefor being at the same time tendered and ordered to be returned to the Bank. This committee appeared before the stockholders' meeting of the Bank and formally presented the demand, whereupon these stockholders authorized their board of directors to act upon the claim made on the Bank by the loan company and to adjust and settle it if they should conclude that the Bank was liable to the loan company, otherwise to reject it. A few days later a meeting of the new board of directors of the Bank was held, at which a communication from the loan company committee was presented, in substance the same as that previously presented to the Bank stockholders, and the resolution of the Bank stockholders thereon was read; and thereupon the directors authorized the president of the Bank, if he believed the claim of the loan company to be just, to proceed to settle it in such a way as he might deem to be to the best interest of the Bank. Under this authority, the president of the Bank communicated to the loan company committee in substance that the Bank recognized the legality and justness of the claim of the loan company and

would pay it provided the company would purchase from the Bank a certain cotton mill property for the sum of $65,000, accept $30,000 of this in payment of its demand against the Bank, transfer to the Bank the Fleming and Templeton notes and indebtedness, with all collateral securing the same, and execute to the Bank its own promissory note for the remaining $35,000, with the cotton mill property as security. This was agreed to by the directors of the loan company, and the settlement was carried out accordingly. Shortly after this, the present action was brought.

The "collateral security" above referred to appears to have consisted of certain shares of stock in a corporation known as the Fleming Ranch & Cattle Company, acquired in the winding-up of the bankrupt estate of Fleming. These shares, so far as the evidence showed, were the only thing of value recovered either by the loan company or by the Bank from the estates of the borrowers. After the present suit was commenced, the Fleming Ranch & Cattle Company was liquidated, and in the distribution of its assets the Bank received sums aggregating $9,149.34, which are credited as payments on account of its claim against defendant.

So far as the above-recited facts were in dispute, there was substantial evidence tending to support a view of them favorable to plaintiff's contentions. What weight should be given to it was for the jury, not the court, to determine. *Hepburn* v. *Dubois*, 12 Pet. 345, 376; *Lancaster* v. *Collins*, 115 U. S. 222, 225; *Chicago & Northwestern Ry. Co.* v. *Ohle*, 117 U. S. 123, 129; *Ætna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 91; *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434, 444.

We proceed to consider, in the order of convenience, the questions raised upon the record.

(1) And first, as to the direction of a verdict in favor of defendant. Plaintiff, in the amended petition upon which

the case went to trial, after a circumstantial statement respecting the transaction of June 10, 1907, alleged that the discount of the notes "was an excessive loan, whether regarded as one loan to the firm of Fleming & Templeton, as plaintiff alleges the fact to be, or regarded as two loans, as contended for by the defendant in his pleadings heretofore filed herein." The designation of Fleming & Templeton as a "firm" is but descriptive and not essential, and the pleading is sufficient if the proof tended to show a single and excessive loan made to them jointly in any capacity, or made in form one-half to each but in substance as a single loan.

In our opinion, the trial judge clearly erred in holding, as in effect he must have held, that there was no substantial evidence from which the jury might find that there was an excessive loan in the making of which defendant, as a director of the Bank, knowingly participated. That he acted for the Bank in the matter, and that he knew that any loan in excess of $20,000 was prohibited, he admitted. His denial that it was a single loan, or that he knew it to be such, is not conclusive; there being substantial evidence inconsistent with it, tending to show facts and circumstances attendant upon the transaction, of which he had knowledge, and also subsequent conduct in the nature of admissions by him, inconsistent with his testimony upon this point. The account of the negotiations, as given in defendant's own testimony; the fact that he knew that the firm of Fleming & Templeton, even if dissolved, was still in liquidation; that one of the inducements for the loan (or "loans") was the transfer of deposit accounts of equal or greater amount from the firm to the Bank; that Templeton alone (as shown by the exhibits) appears to have corresponded with defendant concerning the notes; that defendant himself, as vice president of the Bank, wrote to Templeton acknowledging receipt of the two notes for $15,000 each, "signed

by yourself and Fred Fleming," and having "deducted the discount, $900," inclosed the Bank's draft "order Fleming & Templeton for $29,100"; that when the notes fell due in December the correspondence concerning their renewal was conducted by defendant with Templeton alone, and they were treated as representing a single loan and the discount was charged by defendant or under his direction in a single item; that after the borrowers had become notoriously insolvent, in February, 1908, defendant took part in transferring the notes "without recourse" to the affiliated loan company in the manner and under the circumstances above stated; that the transfer was effected a few days after the visit of the bank examiner; that when the Deputy Comptroller wrote to the Bank, classifying "Fleming & Templeton $30,000" as an excessive loan and demanding that the directors responsible for making it should assume the loss, defendant joined in signing the reply that has been quoted;—all this, to say nothing of other circumstances that might be mentioned, would have warranted the jury in finding, notwithstanding defendant's denial, that in fact the disputed transaction was a single loan of $30,000 less discount, or, to be precise, $29,100, made to Fleming and Templeton jointly; that defendant knew and assented to this at the time; and that the taking of two notes was but a device to conceal the true nature of the transaction.

(2) Irrespective of whether there was but a single loan or were two separate loans, plaintiff in error contends that the liability of a surety must be added to his direct and primary liability in determining his total liabilities for money borrowed within the meaning of § 5200, and that in the present case, although the notes should be found to have represented two entirely separate loans, each within the limit, they must be added together in order to determine whether the limit was exceeded. *Cochran* v. *United States*, 157 U. S. 286, 295, 296, is cited, where it was held

that the word "liabilities," as employed in § 5211, Rev. Stats., included contingent liabilities. We do not regard the case as controlling, because the purpose of that section, and the language employed, differ materially from the purpose and the language of the provision we are dealing with. As to whether in § 5200 the words "the total liabilities . . . of any person . . . for money borrowed," etc., require the liability of a surety or of an indorser for money borrowed by another to be added to his direct liability for money borrowed by himself in ascertaining whether the limit is exceeded—whatever view we might entertain were the matter *res nova*—we are advised that by the practice and administrative rulings of the Comptroller of the Currency during a long period, if not from the beginning of national banking, liabilities which are incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not included in the computation. We feel constrained to accept this as a practical construction of the section. And we are not prepared to say that in an action against a director who knows and relies upon the fact that a particular obligation is signed by one merely as surety, although not so described, the defendant may not be permitted to show the truth.

(3) In view of certain contentions urged here in behalf of defendant, and perhaps acceded to by the courts below, it should be said that the question whether defendant knowingly participated in or assented to the making of a loan in excess of the limit prescribed by § 5200 is not to be confused by any consideration of the supposed standing of the borrowers, personal or financial. The statutory limit is a special safeguard prescribed by Congress for the very purpose (among others) of preventing undue reliance upon the financial standing of borrowers. Nor would the absence of any improper motive or a desire for personal profit on defendant's part be a defense; nor the fact that

in spite of a loss upon this transaction the Bank remained solvent or even prosperous. Neither is the question of defendant's liability, or the extent of it, to be affected by the fact, if it be a fact, that other officers or directors of the Bank were in part responsible, yet defendant alone was sued; nor that the Bank refrained from suing him until after a change in the stockholding interest or control. Again, in the absence of some special agreement—and none such appears—it is immaterial whether the new stockholders were aware of the excessive loan, or of defendant's alleged liability in the premises, at the time they acquired their stock; or whether they possibly may now profit by an increase in the value of the shares in the event of a recovery against him.

It is clear from the language of § 5239, Rev. Stats., that *every* director knowingly participating in or assenting to a violation of any of the provisions of the act is "liable in his *personal* and *individual* capacity," without regard to the question whether other directors likewise are liable. The violation is in the nature of a tort, and the party injured may sue one or several of the joint participants. *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 132. And the liability extends to "all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." In the present action the Bank represents the interest of its shareholders, as well as of its creditors; and if there was a violation of the act by defendant, with resulting diminution of its assets, the Bank is entitled to recover the damages thus sustained, notwithstanding it remained solvent, and irrespective of any changes in its stockholding interest or control occurring between the time the cause of action arose and the time of the commencement of the suit or of the trial. Even if it appeared that new stockholders acquired their interests with knowledge of the fact that such a loss had been sustained and that defendant was responsible for it,

neither they nor the Bank would be thereby estopped from having full recovery from defendant. There is no reason in the law to disentitle a purchaser of shares from even relying upon the responsibility of directors to make good previous losses as an element adding intrinsic value to the shares. Compare *Bigelow* v. *Old Dominion Copper Co.*, 74 N. J. Eq. 457, 500.

(4) Defendant, among other defenses, pleaded the two-year statute of limitations of the State of Texas. Plaintiff demurred on the ground that this limitation was not a bar; and also replied setting up certain facts that need not now be recited. The demurrer was overruled.

The provisions of the Texas statutes upon the subject are Vernon's Sayles' Tex. Civ. Stats., 1914, Arts. 5687, 5688, and 5690, set forth in the margin.[1]

---

[1] Article 5687.—There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such personal property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitations shall run against each item from the date of such delivery, unless otherwise specially contracted.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured.

Article 5688.—There shall be commenced and prosecuted within

In our opinion, the action is not one of the kinds specified in Art. 5687, to which the two-year limitation applies, but is within the general description of Art. 5690 and subject only to the limitation of four years. Hence the limitation pleaded was no defense; and it is not contended that there was any basis in fact for pleading the four-year limitation.

(5) Assuming the Fleming and Templeton notes were found to represent an excessive loan, knowingly participated in or assented to by defendant as a director of the Bank, in our opinion the cause of action against him accrued on or about June 10, 1907, when the Bank through his act parted with the money loaned, receiving in return only negotiable paper that it could not lawfully accept because the transaction was prohibited by § 5200, Rev. Stats. The damage as well as the injury was complete at that time, and the Bank was not obliged to await the maturity of the notes, because immediately it became the duty of the officers or directors who knowingly participated in making the excessive loan to undo the wrong done by taking the notes off the hands of the Bank and restoring to it the money that had been loaned. Of

---

four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his co-partner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.

Article 5690.—Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward.

course, whatever of value the Bank recovered from the borrowers on account of the loan would go in diminution of the damages; but the responsible officials would have no right to require the Bank to pursue its remedies against the borrowers or await the liquidation of their estates. The liability imposed by the statute upon the director is a direct liability, not contingent or collateral.

(6) The question is raised whether the entire sum loaned, plus interest and less salvage, should be treated as damages sustained by the Bank through the violation of the provisions of § 5200, Rev. Stats.—assuming it be found that defendant did knowingly violate them—or whether only the excess above what lawfully might have been loaned (presumably $20,000) should be so regarded. We assume that if, in good faith and in the ordinary course of business, defendant had made a loan of $20,000 to Fleming and Templeton, and if while this loan remained unpaid he had afterwards and as a separate transaction unlawfully loaned them an additional $10,000, in excess of the limit, the damage legally attributable to his violation of the limiting provision would have been but $10,000. But that is not this case. According to the evidence, the $30,000 less discount was paid out by the Bank as a single payment; and if the jury found it to have been loaned in excess of the statutory limit (whether in form one loan or two) it must be upon the ground that it was a single transaction. That being so, it would follow that the entire amount disbursed by the Bank was disbursed in violation of the law. The cause of action against a director knowingly participating in or assenting to such excessive loan would be complete at that moment, and entire; there would be no legal presumption that the borrowers would have accepted a loan within the limit, if their application for the excessive loan had been refused; nor that a director who in fact violated his duty as defined by law would, if mindful of it, have loaned them even $20,000. To mitigate in his favor

the damages resulting from a breach of his statutory duty by resorting to the hypothesis that if he had not disregarded the law in this respect he would have pursued a different course of action within the law, would be an unwarranted resort to fiction in aid of a wrongdoer, and at the expense of the party injured. Hence, the entire excessive loan would have to be regarded as the basis for computing the damages of the Bank.

(7) In behalf of defendant it is insisted that, assuming the loan was excessive, no loss accrued to the Bank by reason of it, because the Fleming and Templeton notes and indebtedness were transferred to the loan company February 12, 1908, for a cash consideration equivalent to their face value less interest to maturity.

Plaintiff in error contends that the Bank and the loan company were so identical in ownership and united in management that the latter was but the *alter ego* of the former, and a loss to the loan company on the notes was the same as a loss to the Bank, not only practically but in contemplation of law. On the other hand, the argument of defendant in error regards the two corporations as if they were wholly independent; treats the transfer of the notes from the Bank to the loan company, in February, 1908, as valid and the money or credit contemporaneously transferred to the Bank like money coming from an outside party; and looks upon the retransfer in January, 1910, as voluntary on the part of the Bank and an unnecessary assumption of a loss that otherwise it had escaped.

We cannot accede to either contention in the extreme. Because the Bank and the loan company were distinct legal organizations, operating under separate charters derived from different sources, and possessing independent powers and privileges, we are constrained to hold that, notwithstanding the identity of stock ownership and their close affiliation in management, for some purposes they must be regarded as separate corporations, for

instance, as being capable in law of contracting with each other. See *Nashua Railroad* v. *Lowell Railroad*, 136 U. S. 356, 372, 373, 375, *et seq.* But in considering the practical effect of such inter-corporate dealings, especially as bearing upon the duties of the common directors and the authority of the stockholders to control them, we need not and ought not to overlook the identity of stock ownership. Thus, the transfer of the notes in February, 1908, from the Bank to the loan company, in consideration of their full face value ostensibly or actually paid by the company to the Bank, evidently could have no effect in relieving the stockholding interest from loss, since each stockholder of one corporation had a corresponding interest in the stock of the other, and any theoretical saving that accrued to him as a stockholder of the Bank was balanced by a corresponding loss sustained in his capacity as a stockholder of the company. At the same time the stockholders in reviewing that transaction might lawfully and properly base their action upon all the facts of the situation; recognizing the legal separateness of the corporations as existing in order to test the validity of the transfer and the feasibility of setting it aside without litigation, while giving effect to their community of interest in deciding whether this should be done, and, if so, then in what manner and upon what terms.

(8) Regarding the two corporations as legally separate, and ignoring for the moment the community of stockholding interest, it is plain that the transaction of February 12, 1908, in which the Bank sold the Fleming and Templeton notes and indebtedness to the loan company for their full face value, was *prima facie* tantamount to a satisfaction of the damages that the Bank had sustained by reason of the excessive loan; but that it had this effect only provided the transaction was good and valid as against the loan company and its stockholders, or was duly ratified by them. For if it was invalid, or was made

under circumstances rendering it voidable by the loan company, or the stockholders, neither the Bank nor defendant was entitled to have the transaction stand for their benefit; and if in fact it was avoided for good cause, the Bank would be entitled to its action against defendant the same as if the annulled transaction never had occurred.

Was there good cause for the rescission? The fact that the same persons were directors and managers of both corporations subjects their dealings *inter sese* to close scrutiny. That two corporations have a majority or even the whole membership of their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where in addition to this the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 589; *Wardell* v. *Railroad Company*, 103 U. S. 651, 657, *et seq.*; *Thomas* v. *Brownville, &c. R. R. Co.*, 109 U. S. 522, 524; *Richardson* v. *Green*, 133 U. S. 30, 43; *McGourkey* v. *Toledo & Ohio Ry. Co.*, 146 U. S. 536, 552, 565.

The evidence having tended to show a transfer of the notes in question from the Bank to the loan company "without recourse," for a consideration equivalent to their full face value, after the insolvency of the makers had been brought to light, with resulting discredit of the notes as marketable paper and probable inability of the makers to pay them; a transaction carried out by directors and

officers who acted as agents or trustees for both corporations, and one at least of whom, as the jury might find, was subject to criticism from the Comptroller of the Currency, and to an action at the suit of the Bank, for making an excessive loan; it clearly was open to the jury to find that the transfer was fraudulent as against the loan company, and as against the stockholders of both companies. The jury should have been instructed to this effect; and further, that if they found the transfer to have been fraudulent, the stockholders had the right to rescind it within a reasonable time after discovery of the fraud; and that if, having such right, the stockholders of the loan company asserted it and gave notice of its claim to the Bank in the manner shown by the minutes, and the Bank recognizing and acknowledging the justness of the claim restored to the loan company what was accepted as the equivalent in value of that which the Bank had received in the transaction of February, 1908, this was not to be regarded as a voluntary or unnecessary assumption of loss by the Bank, but on the contrary the result, so far as defendant was concerned, was the same as if by court decree, in a suit brought by the loan company, or by the stockholders, the Bank had been compelled to make such restitution; and that thereafter the rescinded transaction could not be regarded as amounting, even in form of law, to a satisfaction of the damages sustained by the Bank as a result of the Fleming and Templeton loan.

So far as the evidence showed, neither the stockholders of the loan company, nor indeed its board of directors, ever expressly ratified or affirmed the transfer. Nor does it appear that there was any unreasonable delay on the part of the stockholders in taking action to set it aside after they had become aware of the circumstances; such delay as there was the Bank waived, as it had a right to do; and defendant does not appear to have changed his position or to have been prejudiced by reason of it.

Assuming, in defendant's favor, that because the corporations were legally separate they could not undo the transaction of February, 1908, without formal corporate action, the procedure adopted was sufficient for the purpose. It is objected that the personnel of the boards was changed for the very purpose of accomplishing the rescission, and that the new members were mere figureheads or dummies for the controlling stockholders and had no *bona fide* stock of their own. But if the transaction of 1908 was a fraud as against the loan company, and done without authority of the stockholders, they were quite within their rights in acting through dummies if necessary in order to set it aside. We do not think it was necessary to change the membership of the boards; similar action by boards having identical membership would have had the same effect, if done by the express authority of the stockholders in order to undo an improper and unlawful act of former directors injurious to their interests.

It is said that the rescission was put through in order to enable the Bank to bring the present action against defendant. But it was not done to build up a ground of action against him, for this arose if at all prior to February 12, 1908, the damage to the Bank being sustained when with his participation and assent its money was paid to Fleming and Templeton in June, 1907, for promissory notes that the Bank could not lawfully take. Defendant's liability to the Bank, if he was liable, was direct and primary, and to it the notes occupied the status of collateral security. Had the disposition made of them in February, 1908, been valid and unassailable, it would have borne the appearance of a satisfaction of the damages only because the two corporations were legally separate; but in substance, so far as the stockholders were concerned, it would have satisfied nothing because it merely transferred money to them in one capacity by taking it from them in another. Defendant had no right to have the transaction remain

in effect as a screen to protect him from suit by the Bank under § 5239, Rev. Stats. So far as it may be supposed to have protected him while it remained unrescinded, the result was entirely gratuitous, no consideration having proceeded from him in the matter. Indeed, if his act in shifting the discredited loan was done in part to give him immunity from such an action as the present, this would furnish an additional ground entitling the stockholders to set the transfer aside. And if, either on this ground, or on the ground that the transfer was put through for the advantage of one corporation at the expense of the other by officers or directors acting at the same time for both and without the authority of the stockholders, the transaction was voidable by the stockholders and they resolved to avoid it, it would savor of absurdity to sustain defendant's contention that this was done in order to enable the Bank to sue him; for of course they would have the right to do it for that very purpose.

(9) In defendant's behalf it is insisted that at the time of the proceedings of January, 1910, the value of the cotton mill property was much less than $65,000, so that in the exchange made the Bank in effect parted with little or no value for the return to it of the Fleming and Templeton notes and indebtedness. But for reasons already sufficiently indicated, we are of opinion that defendant is not entitled to raise an inquiry into the value of this property, as bearing either upon the question of the Bank's right of action against him or upon the question of damages. If the loan company or the stockholders had good ground for rescinding the 1908 transaction, and this was done pursuant to their resolution, they might waive a return of the precise consideration and accept such equivalent in exchange as to them seemed proper. Because of the identity of the stockholding interest the transaction, even while it stood, was, as we have shown, only a pseudo-satisfaction of the Bank's loss in the Flem-

ing and Templeton loan; and when the real parties affected by this loss undertook on just grounds to set aside the transfer of the notes, and took such proceedings through action of the two corporations as were necessary for that purpose, they had a right to recognize the community of interest in settling the terms upon which this should be done; and defendant has no standing to complain.

If there be a seeming inconsistency in sustaining a rescission of the 1908 transaction avowedly based upon the ground that the loan company had unjustly been subjected to a loss therein, while at the same time we treat as unimportant the question whether upon such rescission full restitution was made to that company, it should be said that we treat it as unimportant only so far as defendant is concerned; and if there be inconsistency it is no more than corrective of the unreality of the 1908 transaction itself. It is defendant who invokes that transaction as an actual realization by the Bank of full value through a sale of the notes that it held as collateral security for its claim against him. If, regarding it as an actual sale, it was voidable because done by agents acting at the same time in a dual capacity or for other reasons, he cannot complain that the parties entitled to avoid it treated it as actual for the purpose of setting it aside, and in the consequent readjustment recognized a substantial identity of interest between seller and purchaser in the rescinded transaction that rendered it hardly an actual sale. For, to the extent that the sale was a sham, there was no realization by the Bank upon the collateral security and hence no satisfaction of the damages claimed against him.

The judgment under review must be reversed, to the end that there may be a new trial in accordance with the views above expressed.

Judgment reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

WAGNER ET AL., PARTNERS, DOING BUSINESS UNDER THE NAME OF W. T. WAGNER'S SONS, *v.* CITY OF COVINGTON.

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

No. 61. Argued November 10, 11, 1919.—Decided December 8, 1919.

Where a manufacturer of goods habitually causes them to be carried on his vehicles from the State of manufacture to various establishments of retail dealers who are his customers in an adjoining State, and there sold and delivered to such dealers in the original packages in such quantities as they may desire to purchase at the times of such visits, the business, as thus transacted with them, is that of an itinerant vender or peddler, and may be taxed in the second State under a nondiscriminating license tax law without imposing a direct burden on interstate commerce. P. 102.

A state tax which in substance and effect is constitutional can not be made otherwise by the name it bears in the state laws and decisions. P. 101.

177 Kentucky, 385, affirmed.

THE case is stated in the opinion.

Mr. Harry Brent Mackoy, with whom *Mr. William H. Mackoy* was on the briefs, for plaintiffs in error:

The goods are shipped from Ohio and sold and delivered at wholesale in Kentucky in the original packages; are always in transit except during the short pause incidental to delivery; when shipped, they are appropriated in a practical, if not in a technical, sense to the fulfillment of contracts with certain specific existing customers, with whom a general understanding is previously had that plaintiffs in error will furnish them with such as they may need or desire to purchase of them.

The goods are not carried into Kentucky with the

intention of having them remain there permanently, or for an indefinite period, or for sale to the general public; but merely for a temporary purpose which is either to apply them to fulfilling the contracts, or to carry back into Ohio the part not so applied. This is all done and intended to be done on the same trip of the same vehicle, which consumes at the most but a few hours. They are never hawked about, peddled, offered or sold to the public generally.

This course of dealing constitutes a continuous current of commerce between plaintiffs in error, as residents of Ohio, and their standing customers in Kentucky. The original packages do not become part of the general mass of property in Kentucky until after the sale and delivery to the customers, and hence are not subject to state regulation or control in the hands of plaintiffs in error. This power does not extend to the taxation of such packages while temporarily within the State, which are in course of transportation or which are being held therein only long enough to find out the exact needs of the customers. The person who imports goods in original packages from one State into another has the right to sell them in such packages in the latter State as a necessary incident to the right to import, without being subject to state regulation or control, and this right continues until the original packages are commingled with the general mass of property in the State either by actual sale, or by breaking up the packages, or by some other act which indicates that they are to be so commingled. *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Austin* v. *Tennessee*, 179 U. S. 343; *Cook* v. *Marshall County*, 196 U. S. 261; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Adams Express Co.* v. *Kentucky*, 238 U. S. 190; *Price* v. *Illinois*, 238 U. S. 446; *Rosenberger* v. *Pacific Express Co.*, 241 U. S. 48.

An examination of the decisions of courts of last resort

in the various States shows that all of them are in accord with this rule, and, so far as we have been able to find, Kentucky stands alone in holding to the contrary.

Where goods are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase in the same form in another State, and when in effect they do so, with only the interruption necessary to consummate the purchase at the point of destination, and when this is a typical, constantly recurring course of business, the current thus existing is a current of commerce among the States and the purchase of the goods is a part and incident of such commerce. *Swift & Co.* v. *United States*, 196 U. S. 375.

The current does not cease to flow until the articles are delivered to the persons for whom they are intended, or to whom they are destined to be sold, even though the consignor ships them at the starting point by a common carrier consigned to himself at the point of destination, and himself makes delivery to such persons instead of by the common carrier, and even though the title does not pass until then. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Stewart* v. *Michigan*, 232 U. S. 665; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346; *York Mfg. Co.* v. *Colley*, 247 U. S. 21.

In each of the last-mentioned cases the article was started to move in pursuance of a previously existing definite contract of sale—but this is not essential. It is sufficient that the intention be conditional, depending upon the ability to negotiate a sale upon exhibition or after pause for negotiation; or it suffices if the article is started because of an expectation to sell. *Swift & Co.* v. *United States*, *supra*; *Dozier* v. *Alabama*, 218 U. S. 124; *Coe* v. *Errol*, 116 U. S. 517; *Kelley* v. *Rhoads*, 188 U. S. 1; *Davis* v. *Virginia*, 236 U. S. 697; *General Oil Co.* v. *Crain*, 209 U. S. 211. See also *Weigle* v. *Curtice Bros. Co.*, 248

U. S. 285; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 362; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295–298; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 326–327.

Original packages of interstate commerce themselves only become taxable when they have come to rest at their destination or have become part of the general mass of property in the State.

There is a distinction between the right to impose a tax on the non-resident importer for the privilege of selling goods in the original packages and the right to impose a tax on the original packages themselves after they reach their destination and come to rest in the State.

There is also a distinction between the right to impose a tax on an importer who is using persons licensed by the State to make sales for him within the State and the right to impose a tax on the importer himself for making such sales, as is sought to be done here.

The so-called "peddler" cases, *Machine Co.* v. *Gage*, 100 U. S. 676, and *Emert* v. *Missouri*, 156 U. S. 296, do not apply, because the license here involved is one for dealing at wholesale in soft drinks, and under the decisions of the Court of Appeals of Kentucky and the statutes of that State, the plaintiffs in error are not engaged in a peddling business. *City of Newport* v. *French Brothers Bauer Co.*, 169 Kentucky, 174, 183 S. W. Rep. 532, 536, 537. Moreover, the business there carried on was purely intrastate, as an examination of the two cases will show. See *Watters* v. *Michigan*, 248 U. S. 65; *Crenshaw* v. *Arkansas*, *supra*.

Mr. E. A. Stricklett for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This was an action brought by plaintiffs in error in a state court of Kentucky against the City of Covington, a

municipal corporation of that State, to recover license fees theretofore paid by them under certain ordinances of the city for the conduct of their business in Covington, and to enjoin the enforcement against them of a later ordinance calling for further like payments. The several ordinances, each in its turn, required all persons carrying on certain specified businesses in the city to take out licenses and pay license fees; among others, the business of wholesale dealer in what are known as "soft drinks." Plaintiffs were and are manufacturers of such drinks, having their factory and bottling works in the City of Cincinnati, in the State of Ohio, on the opposite side of the Ohio River from Covington. They have carried on and do carry on the business of selling in Covington soft drinks, the product of their manufacture, in the following manner: They have a list of retail dealers in Covington to whom they have been and are in the habit of making sales; two or three times a week a wagon or other vehicle owned by plaintiffs is loaded at the factory in Cincinnati and sent across the river to Covington, and calls upon the retail dealers mentioned, many of whom have been for years on plaintiffs' list and have purchased their goods under a general understanding that plaintiffs' vehicle would call occasionally and furnish them with such soft drinks as they might need or desire to purchase from plaintiffs; when a customer's place of business is reached by the vehicle the driver goes into the storeroom and either asks or looks to see what amount of drinks is needed or wanted; he then goes out to the vehicle and brings from it the necessary quantity, which he carries into the store and delivers to the customer; upon his trips to Covington he always carries sufficient drinks to meet the probable demands of the customers, based on past experience; but, with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiffs' place of business in Cincinnati, all

sales in Covington are made from the vehicle by the driver in the manner mentioned. Sometimes the driver succeeds in selling there the entire supply thus carried upon the wagon, sometimes only a part thereof; or he may return after having made but a few sales, or none at all, in which event he carries the unsold supply back to plaintiffs' place of business in Cincinnati. The soft drinks in question are delivered in stopped bottles or siphons, according to their nature, and these are placed (at the bottling works) in separate wooden or metal cases, each case being open at the top and holding a certain number of bottles or siphons according to the nature of the drinks and the custom of the trade; the filled bottles or siphons are carried upon the vehicle, sold, and delivered in these cases, each case remaining entire and unbroken, and nothing less than a case being sold or delivered. The retail dealers usually pay cash, and purchase only the contents of the bottles, while the bottles and cases remain the property of plaintiffs and are subsequently collected, when empty, by plaintiffs' drivers or agents on their regular visits; there are, however, a few customers who pay for and thereafter own the bottles in which distilled water is delivered. The ordinances were and are respectively applicable to all wholesale dealers in such soft drinks in Covington, whether the goods were or are manufactured within or without the State.

The trial court and, on appeal, the Court of Appeals of Kentucky gave judgment for defendant, overruling the contention of plaintiffs that the ordinances as carried into effect against them were repugnant to the "commerce clause" (Art. I, § 8) of the Constitution of the United States, 177 Kentucky, 385; and upon this federal question the case is brought here by writ of error.

It is important to observe the precise point that we have to determine. It is indisputable that with respect to the goods occasionally carried upon plaintiffs' wagon from one

State to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality. The Court of Appeals in the present case, in line with its previous decisions in *City of Newport* v. *Wagner*, 168 Kentucky, 641, 646, and *City of Newport* v. *French Brothers Bauer Co.*, 169 Kentucky, 174, recognizing the authority of the decisions of this court bearing upon the subject, conceded that this part of plaintiffs' business was not subject to state regulation (177 Kentucky, 388). At the same time the court held that with respect to the remaining and principal part of the business conducted in Covington, that which consists in carrying a supply of goods from place to place upon wagons, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold, plaintiffs were subject to the licensing ordinances; and it is with this alone that we have to deal. If, with respect to this portion of their business, plaintiffs may be subjected to the regulatory power of the State acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from State to State, might be repugnant to the Federal Constitution.

From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of itinerant vender or peddler; a traveling from place to place within the State selling goods that are carried about with the seller for the purpose. Plaintiffs in error insist that this view of the matter is untenable because the courts of Kentucky have held that sales made to a retail merchant for resale do not constitute peddling within the meaning of the statutes of that State. *Standard Oil Co.* v. *Commonwealth*, 107 Kentucky, 606, 609; *City of Newport* v. *French Brothers Bauer Co.*, 169

Kentucky, 174, 185. These decisions, however, deal merely with a question of statutory definition; and it hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the State, but rather upon the practical operation and effect of the tax as applied and enforced. The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362.

We have, then, a state tax upon the business of an itinerant vender of goods as carried on within the State, a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other States. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a State with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the State, and does not conflict with the "commerce clause." *Woodruff* v. *Parham*, 8 Wall. 123, 140; *Machine Co.* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *Baccus* v. *Louisiana*, 232 U. S. 334.

The peddler's license tax considered in *Welton* v. *Missouri*, 91 U. S. 275, was denounced only because it amounted to a discrimination against the products of other States, and therefore to an interference with commerce among the States. To the same effect, *Walling* v. *Michigan*, 116 U. S. 446, 454.

Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the City of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not.

The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized. In *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, Mr. Justice Bradley, who spoke for the court, said (p. 497): "When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown* v. *Houston*, 114 U. S. 622; *Machine Co.* v. *Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce." See, also, *Crenshaw* v. *Arkansas*, 227 U. S. 389, 399–400, where the distinction was clearly set forth. And in all the "drummer cases" the fact has appeared that there was no selling from a stock of goods carried for the purpose, but only a solicitation of sales, with or without the exhibition of samples; the goods sold to be thereafter transported from without the State. *Rogers* v. *Arkansas*, 227 U. S. 401, 408;

Brennan v. *Titusville*, 153 U. S. 289; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 510; *Dozier* v. *Alabama*, 218 U. S. 124; *Browning* v. *Waycross*, 233 U. S. 16; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346; *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 153.

Judgment affirmed.

No. 62. *Gilligan* v. *City of Covington.* By stipulation of counsel this case was heard with No. 61, and it is agreed that a similar judgment is to be entered.

Judgment affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent.

OKLAHOMA RAILWAY COMPANY *v.* SEVERNS PAVING COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 106. Argued November 19, 20, 1919.—Decided December 8, 1919.

A decree of a state court directing an assessment of land to pay for a public improvement should not be so framed as to leave in doubt the right of the property owner to be heard on the amount of the assessment. P. 107.

In platting land outside of a city the owners dedicated in fee to a street railway company, to induce it to extend its line, a strip, for a right of way, 40 feet wide, along the center of a boulevard, on condition that the strip be subject to reasonable police regulations and that the grantee construct crossings and curb and pave them whenever the boulevard should be paved. *Held*, that the strip was subject to special assessment by the city for paving

the roadways of the boulevard, after inclusion in the city limits, and that the company's contract rights were not thereby impaired. *Id.*

Provisions in a street railway franchise defining the grantee's obligation to pave certain portions of the city streets occupied by its lines, *held* not to affect the city's right to impose a paving tax on a strip of land, in the center of the street paved, owned by the company in fee. *Id.*

67 Oklahoma, ——, modified and affirmed.

THE case is stated in the opinion.

Mr. John B. Dudley and *Mr. Henry G. Snyder*, with whom *Mr. Henry E. Asp* was on the brief, for plaintiff in error, contended:

(1) That the duty of the company as to paving was fully defined in its franchise from the city, and could not be enlarged without impairing that contract.

(2) That the company's duty in respect of paving, in so far as related to its private right of way, was determined, as a matter of contract, binding on and not subject to be impaired by the City, by the terms of the dedications by which such right of way and the adjacent street were granted, as they were afterwards included in the city limits, and upon the faith of which the company had extended its line.

(3) That the company's right to due process, under the Fourteenth Amendment, was violated, by a refusal of the courts below to permit it to prove that the paving of the boulevard did and could confer no benefit whatever upon the right of way in question.

Mr. D. A. Richardson, with whom *Mr. Russell G. Lowe*, *Mr. T. G. Chambers*, *Mr. B. A. Ames* and *Mr. Streeter B. Flynn* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In 1909 the owners platted Linwood Place, adjacent to Oklahoma City, for building lots, streets, etc. To procure extension of a street car line therein, they dedicated a strip forty feet in width, lying along the center of what is now known as Linwood Boulevard, to plaintiff in error's predecessor, "its successors and assigns, with a like effect as though deeded and conveyed to said company in fee simple by separate deed," on condition, however, that the property should be subject to reasonable police regulations, that the grantee should construct crossings over the tracks and also put down curbing and pave the crossings whenever the boulevard itself should be paved. Subordinate to above grant the streets as shown on the plat were dedicated to the public for ordinary purposes of travel. Afterwards car tracks were laid in the center of the forty-foot strip and the corporate limits of Oklahoma City were extended to include Linwood Place.

In order to provide funds for paving the public roadways along Linwood Boulevard, the City undertook in 1910 to lay a tax upon the adjacent property, and directed that it be apportioned according to benefits. The Board of Commissioners apportioned to the central strip as its proper share of the expenses, $12,046.16. Instead of assessing this amount directly against the property, the City Council erroneously assessed it against the street car company. Thereafter, the City and the Severns Company, which had put down the paving, procured from the District Court of Oklahoma County a mandamus directing a re-assessment against the land itself, but a hearing upon objections thereto was not specifically provided for.

The Supreme Court of the State (67 Oklahoma, —) declared: "The fee title to the strip of land in question

here appears to be in the railway company. . . . Its right is not merely an intangible privilege or an easement, but under the terms of the dedication is a fee simple title. . . . The dominion and control of the strip of land in question here is not in the city authorities. If the street should be vacated by the city authorities, this private right of way would not revert to the abutting owners, but would continue to be the property of the railway company. The company took the fee from the original grantors by the dedication before the abutting owners acquired their titles." It then held the land was subject to assessment according to benefits resulting from the paving, and "that when the commissioners proceed in obedience to the decree of the court to reassess the property of the railway company, an opportunity will be given the company to be heard and to complain or object to the amount of the assessment." Nevertheless, it ordered an affirmance of the judgment of the trial court, without more, and by so doing left in serious doubt the right of plaintiff in error to a new and adequate hearing in respect of the assessment. We think, therefore, that the judgment below should be modified and corrected so as definitely to preserve such right. So modified, it is affirmed. The costs here will be equally divided.

The terms and conditions in the original franchise granted by Oklahoma City to the plaintiff in error, which require it, under given conditions, to pave or pay for paving certain portions of occupied streets, are not applicable in the circumstances here presented and cannot be relied upon to defeat the assessment now in question. The land supposed to be benefited belongs to the company; the City has made no contract which prevents imposition upon it of a fair share of the cost of beneficial improvements. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430.

Modified and affirmed.

EVANS, SOLE SURVIVING RECEIVER OF THE CITIZENS & SCREVEN COUNTY BANK, *v.* NATIONAL BANK OF SAVANNAH.

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

No. 67. Argued November 11, 12, 1919.—Decided December 8, 1919.

Whether a transaction by a national bank is usurious, and the penalties therefor, must be ascertained from the National Banking Act. P. 109.

That act adopts the usury laws of the States only in so far as they severally fix the rate of interest. P. 111.

Under the National Banking Act, which expressly empowers national banks to discount commercial paper and permits them to "take, receive, reserve, and charge on any loan or discount made . . . interest at the rate allowed by the laws of the state . . . where the bank is located, and no more," such banks in discounting short-time notes in the ordinary course of business may retain an advance charge at the highest rate allowed for interest by the state law, even though such advance taking would be usurious under the state law in the cases to which it applies. P. 112.

To discount, *ex vi termini*, implies reservation of interest in advance. P. 114.

21 Ga. App. 356, affirmed.

THE case is stated in the opinion.

Mr. Frederick T. Saussy for petitioner.

Mr. Edward S. Elliott, with whom *Mr. Jacob Gazan* was on the briefs, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The court below rightly construed the pleadings as presenting only one substantial federal question:—Did

respondent subject itself to the penalties prescribed for taking usury by discounting short-time notes in the ordinary course of business and charging therefor at the rate of eight per centum per annum in advance? And we think it correctly answered that question in the negative.

Respondent is a national bank. Its powers in respect of discounts, whether transactions by it are usurious and the consequent penalties therefor, must be ascertained upon a consideration of the National Bank Act. C. 106, 13 Stat. 99, 101, 108; Rev. Stats., §§ 5133 *et seq.; Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29; *Barnet* v. *National Bank*, 98 U. S. 555, 558; *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 132, 134. Section 8 declares: "That every association formed pursuant to the provisions of this act . . . may elect or appoint directors . . . and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits. . . ." Section 30, printed in the margin,[1] contains regulations

[1] Sec. 30. That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action

presently important in respect of usury. Among other things, it provides: "That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more. . . ." All these provisions were carried into §§ 5136, 5197, and 5198, Revised Statutes, set out below.[1]

---

of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. (13 Stat. 108.)

[1] Rev. Stats., § 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power— . . .

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title. . . .

Rev. Stats., § 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence

The National Bank Act establishes a system of general regulations. It adopts usury laws of the States only in so far as they severally fix the rate of interest. *Farmers' & Mechanics' National Bank* v. *Dearing, supra; National Bank* v. *Johnson*, 104 U. S. 271; *Haseltine* v. *Central Bank of Springfield, supra.*

The Georgia Code (1910) contains the following:

"Sec. 3426.—What is lawful interest. The legal rate of interest shall remain seven per centum per annum, where the rate per cent. is not named in the contract, and any higher rate must be specified in writing, but in no event to exceed eight per cent. per annum.

"Sec. 3427.—What is usury. Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest."

"Sec. 3436.—Beyond eight per cent. interest forbidden.

---

of debt has to run. And the purchase, discount, or sale of a bona-fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Rev. Stats., § 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. [That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. (Act February 18, 1875, c. 80, 18 Stat. 320.)]

It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

Construing these sections, in *Loganville Banking Co.* v. *Forrester* (1915), 143 Georgia, 302, the Georgia Supreme Court held that charges reserved in advance by a state bank at the highest permitted rate of interest on a loan, whether short or long time, constitute usury, and said (p. 305): "If the intent be to take only legal interest, a slight and trifling excess, due to mistake or inadvertence, will not taint the transaction with usury. . . . But if the purpose be to take from the money advanced, at the time of the loan, the legal maximum rate of interest, the transaction is an usurious one." Earlier opinions by the court express a different view of the same sections. In *Mackenzie* v. *Flannery & Co.* (1892), 90 Georgia, 590, 599, it is said: "Nor can we determine, without reference to the evidence, whether the taking of eight per cent. interest in advance by way of discount was usurious. Eight per cent. was legal if agreed upon in writing; and it is well settled that the taking of interest in advance on short loans in the usual and ordinary course of business is not usurious, if the interest reserved does not exceed the legal rate." See also, *Union Savings Bank & Trust Co.* v. *Dottenheim*, 107 Georgia, 606, 614; *McCall* v. *Herring*, 116 Georgia, 235, 243.

Petitioner maintains the loans in question would have been usurious if made in Georgia by an individual or a state bank and that the same rule applies notwithstanding the lender happened to be a national bank. Respondent insists that the Federal Act permits it to discount short-time notes, reserving interest in advance at the maximum

interest rate allowed by the state law—in this instance, eight per centum.

In *Fleckner* v. *United States Bank*, 8 Wheat. 338, 349, 354, the charter of the Bank of the United States inhibited it from taking interest "more than at the rate of six per centum" and plaintiff claimed that by deducting interest at the rate of six per centum from the amount of a discounted note, the bank received usury. Replying to that point, this court, through Mr. Justice Story, said: "If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts, generally, for the practice is believed to be universal; and, probably, few, if any, charters, contain an express provision, authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed, that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged, that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious." See also *McCarthy* v. *First National Bank*, 223 U. S. 493, 499.

This view has been generally adopted. Many supporting cases are collected in a note to *Bank of Newport* v. *Cook* (60 Arkansas, 288), 29 L. R. A. 761, and in 39 Cyclopedia of Law and Procedure, 948 *et seq.* "The taking of interest in advance, upon the discount of a note in the usual course of business by a banker, is not usury. This has long been settled, and is not now open for controversy." Tyler on Usury (1872), p. 155. "That it is not

usury to discount commercial paper in the ordinary course of business is absolutely settled. This rule of law arose out of custom and does not depend upon statute." Webb on Usury (1898), § 111.

Associations organized under the National Bank Act are plainly empowered to discount promissory notes in the ordinary course of business. To discount, *ex vi termini*, implies reservation of interest in advance; and, under the ancient and commonly accepted doctrine, when dealing with short-time paper such a reservation at the highest interest rate allowed by law is not usurious. Recognizing prevailing practice in business and the above stated doctrine concerning usury, we think Congress intended to endow national banks with the power, which banks generally exercise, of discounting notes reserving charges at the highest rate permitted for interest. To carry out this purpose, the National Bank Act provides that associations organized under it may reserve on any discount interest at the rate allowed by the State; and only when there is reservation at a rate greater than the one specified does the transaction become usurious.

The maximum interest rate allowed by the Georgia statute is eight per centum. That marks the limit which a national bank there located may charge upon discounts; but its right to retain so much arises from federal law. The latter also completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate.

Affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE, dissenting.

I agree that in this case but one federal question is properly presented for our consideration, and that is whether the National Bank of Savannah took usury,

in violation of §§ 5197 and 5198, Rev. Stats., when, in discounting short-term notes in the ordinary course of business at its banking house in the State of Georgia, it knowingly reserved in advance a discount at the rate of eight per centum per annum, computed upon the face of such notes, when by the laws of Georgia this was not allowed to be done by state banks of issue.

I agree that this question is to be determined by the provisions of § 5197; but, so far as it depends upon ascertaining the local rate of interest, we must determine it according to the law of the State of Georgia, because the cited sections make that law the criterion. It is settled that although the consequences of acceptance of usurious interest by a national bank and the penalties to be enforced are to be determined by the provisions of the National Banking Act, the ascertainment of the rate of interest allowable is to be according to the state law. *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 32; *Union National Bank* v. *Louisville &c. Ry. Co.*, 163 U. S. 325, 331; *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 132, 134.

The language of § 5197 is explicit. It allows a national bank to "take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State . . . where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, . . . the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. . . ."

I regard it as clear that by "the laws of the State" is meant not merely acts of legislation, much less a particular act or section, or a particular phrase in a single section. In order to determine the point in controversy we must take all applicable provisions of the statutes as interpreted and construed by the decisions of the court of last resort, and from their combined effect determine what is "interest at the rate allowed by the laws of the State."

The pertinent statute law of the State of Georgia is found in §§ 3426, 3427, and 3436 of the Code. The first of these defines "what is lawful interest," and prescribes seven per centum per annum as the legal rate where no rate is named in the contract, and permits a higher rate to be specified in writing, "but in no event to exceed eight per cent. per annum." Section 3427 defines usury as "reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." And § 3436 declares: "It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

I agree that under the decisions of this court and the general current of authority, the discounting of short-term notes with a reservation of interest in advance at the highest rate allowed by statute is permissible in the absence of special restriction. *Fleckner* v. *United States Bank*, 8 Wheat. 338, 349, 354.

And I understand it to have been permitted in Georgia prior to the recent decision by the Supreme Court of that State in *Loganville Banking Co.* v. *Forrester*, 143

Georgia, 302. See *Mackenzie* v. *Flannery & Co.*, 90 Georgia, 590, 599; *Union Savings Bank & Trust Co.* v. *Dottenheim*, 107 Georgia, 606, 614; *McCall* v. *Herring*, 116 Georgia, 235, 243.

The *Forrester Case* was decided April 13, 1915. The claim involved in the present suit includes a series of transactions, the first of which was on November 2, 1914, the last on October 18, 1915. A majority of these were prior to the decision in the *Forrester Case;* and as to them I agree that there was no violation of the federal statute.

With respect to the others, I have reached a different conclusion. The case was decided on a demurrer to plaintiff's petition, in which it was alleged that defendant (now respondent) knowingly received and charged interest in excess of the highest contractual rate allowed under the laws of the State, specifying the particular dates and amounts. This necessarily imports a knowledge at the time of each transaction as to what then constituted the law of the State, supposing such knowledge need be averred.

As to these later transactions, with great respect for the views of my brethren, I am constrained to dissent from the opinion and judgment of the court because convinced that there is error in holding without qualification that since the decision of the *Forrester Case* 8 per cent. is the rate of interest allowed and limited for state banks of issue by the laws of the State of Georgia. It seems to me erroneous to regard that decision as merely defining usury and thus settling what lawfully may be done by state banks in respect of taking interest in advance, and to ignore its effect, in combination with the quoted sections of the Code, as constituting the law of the State which fixes the maximum rate of interest for such banks and therefore, under § 5197, Rev. Stats., establishes the limit for national banks located in that State. Plainly, I think, the purpose of Congress was

to place national banks upon a precise equality in this respect with banks of issue organized under state laws, and that where the local law places a higher or a lower limit upon such banks of issue than upon other lenders of money the same limit should be imposed upon the national banks.

The section has regard to substance, not merely to form; and in determining what is in substance the local rate of interest it is fallacious, I submit, to regard the multiplier only (say, 8 per cent.) and ignore the multiplicand, since both factors have equal influence in producing the result. As in other cases of testing state laws by a federal standard, the question is, what is the effect and operation of those laws, as construed and applied by the state court of last resort?

The difference between the effect of computing discount taken in advance according to the custom of bankers, by applying the allowed percentage to the face of the note —termed "bank discount"—and the effect of deducting an amount equivalent to exact interest on the sum actually loaned—termed "true discount"—is very substantial, and is recognized in the standard interest and discount tables, which contain computations on both bases. To illustrate by a comparison: If interest at the rate of 8 per centum per annum be reserved in advance and computed upon the face of a three months' note, it amounts to 2.0408 per cent. for the period, or at the rate of 8.1632 per centum per annum upon the money loaned; upon a six months' note it amounts to 4.1667 per cent. for the period, or at the rate of 8.3333 per centum per annum; upon a nine months' note, to 6.383 per cent. for the period, or at the rate of 8.511 per centum per annum; upon a one year note it amounts to 8.695 per cent.

The legal problem is precisely analogous to that involved in comparing respective burdens of taxation imposed upon different properties or classes of property;

concerning which this court has more than once held that a law requiring that one class shall be taxed at the "same rate of taxation" paid by another requires that not only the percentage of the rate but the basis of the valuation shall be the same. *Cummings* v. *National Bank*, 101 U. S. 153, 158, 162–163; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 515.

The laws of Georgia do not prohibit the taking of interest in advance by a state bank; and they permit it to be charged according to the usual course of banking, with this qualification, that if reserved in advance at the highest percentage, or at any percentage that has the effect of yielding to the lender more than at the rate of 8 per centum per annum upon the amount actually loaned, it is usurious. This qualification, which since the decision of the *Forrester Case* must be deemed to be the law of Georgia, has precisely the same effect as if it had been inserted by way of an amending proviso to § 3426 of the Code. That it happens to arise from the construction and application of that section together with §§ 3427 and 3436 by the state court of last resort can make no difference for present purposes.

The case before us comes squarely within the principle of *Citizens' National Bank* v. *Donnell*, 195 U. S. 369, 373–374. There the question was whether a national bank in Missouri had taken usury, contrary to §§ 5197 and 5198, Rev. Stats., in taking interest computed at a percentage less than the highest rate allowed by the state law if agreed upon in writing, but at the same time violating a state prohibition against compounding interest oftener than once a year. This court held that the prohibition against frequent compounding affected the "rate of interest" within the meaning of those words in § 5198, and that this section was violated because the local prohibition was violated. I quote from the opinion (p. 374): "The rate of interest which a man receives is greater when

he is allowed to compound than when he is not, the other elements in the case being the same. Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point, and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the state court. *Union National Bank* v. *Louisville, New Albany & Chicago Ry.*, 163 U. S. 325, 331. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year it was at a rate greater than was allowed by U. S. Rev. Stat. § 5197, and it was forfeited."

For these reasons I am convinced that the respondent national bank, in knowingly discounting notes and reserving interest at the rate of 8 per centum per annum upon the face of the notes, in violation of the limitation imposed by the quoted sections of the Georgia Code as construed by the Supreme Court of that State in the *Forrester Case*, charged more than "interest at the rate allowed by the laws of the State," and that therefore the judgment in its favor ought to be reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this dissent.

PETERS ET AL. *v.* VEASEY, ADMINISTRATRIX OF VEASEY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 77. Argued November 14, 1919.—Decided December 8, 1919.

Prior to the Act of October 6, 1917, c. 97, 40 Stat. 395, amending Jud. Code, §§ 24, cl. 3, and 256, cl. 3, a state workmen's compensation law had no application to a case of personal injuries suffered by one employed as a longshoreman, while engaged as such, on board, in unloading a ship. P. 122. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

The Act of October 6, 1917, *supra*, was not intended to apply to a cause of action of that character, which arose before the act was passed. *Id.*

142 Louisiana, 1012, reversed.

THE case is stated in the opinion.

Mr. George Janvier, with whom *Mr. William C. Dufour*, *Mr. Gustave Lemle*, *Mr. A. A. Moreno* and *Mr. John St. Paul, Jr.*, were on the brief, for plaintiffs in error.

Mr. Walter S. Penfield, *Mr. Solomon Wolff*, *Mr. E. M. Stafford*, *Mr. F. B. Freeland* and *Mr. Howell Carter, Jr.*, for defendant in error, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In a proceeding under the Workmen's Compensation Law of Louisiana (No. 20, Acts La., 1914), the Supreme Court of that State affirmed a judgment against plaintiffs in error and in favor of Veasey, who claimed to have suffered injuries, August 6, 1915, while employed by Henry

and Eugene Peters as a longshoreman on board the "Seria," then lying at New Orleans. The steamer was being unloaded. While upon her and engaged in that work, Veasey accidentally fell through a hatchway. 142 Louisiana, 1012.

A compensation policy in favor of Peters, issued by the Ætna Life Insurance Company, was in force when the accident occurred.

The work in which Veasey was engaged is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. In such circumstances, the Workmen's Compensation Law of the State had no application when the accident occurred. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59, 60, 61; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 217, 218.

Clause third, § 24, of the Judicial Code, confers upon the District Courts of the United States jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Clause third, § 256, provides that the jurisdiction of the courts of the United States shall be exclusive in "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." By an act approved October 6, 1917, c. 97, 40 Stat. 395, Congress directed that both of these clauses be amended by inserting after "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," the words "*and to claimants the rights and remedies under the workmen's compensation law of any State.*" The court below erroneously concluded that this act should be given retroactive effect and applied in the

present controversy. There is nothing in the language employed, nor is there any circumstance known to us, which indicates a purpose to make the act applicable when the cause of action arose before its passage; and we think it must not be so construed.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 74. Argued May 2, 1919.—Decided December 8, 1919.

Semble, that under Rev. Stats., § 4002, as amended, the Postmaster General may fix the sums payable to a railroad company for transporting the mails upon the basis of weights taken immediately before the beginning of the four-year term of the contract, and that annual weighings are not required. P. 126.

A railroad company which knowingly contracts and receives on this basis less than it would have received on the basis of annual weighings has no implied contract right to be paid the difference by the United States. P. 127.

Prior to the Act of July 28, 1916, c. 261, 39 Stat. 429, a non-land-grant railroad was not required to carry the mails; and when it voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it cannot claim more upon the ground that its property was taken. *Id.*

53 Ct. Clms. 222, affirmed.

THE case is stated in the opinion.

Mr. Edward G. Buckland and *Mr. S. S. Ashbaugh*, with whom *Mr. Arthur P. Russell* was on the briefs, for appellant:

The claimant carried the mails during the period involved with the distinct declaration that it would not accept the amount of pay offered by the Postmaster General as full compensation for the services, which declaration in writing was acknowledged by the Postmaster General, the mails were then delivered for carriage, and the usual pay orders were issued thereon. That there was no agreement between the claimant and the Post Office Department as to the compensation for carrying the mails during the two quadrennial periods beginning July 1, 1909, and July 1, 1913, is clearly shown in the correspondence between the parties.

The offer of the claimant to perform the service must not be confused with its refusal to accept the compensation offered. This refusal placed the responsibility on the Postmaster General; if he delivered the mails for transportation they would be accepted only on the ground that the compensation was to be fixed by the courts.

When the Postmaster General sends out his distance circular to a railroad company in operation, calling upon it to fill out the circular and return it to him preparatory to carrying the mails, he has demanded performance of a governmental function, and this cannot be refused, but the railroad company may protect itself by filing a protest to the compensation offered and instituting an action in the proper court. In performing this governmental function in carrying the mails there is no difference between a land-grant and a non-land-grant railroad. The obligation rests upon both alike.

Railroads became government agencies when they were made post roads by Congress, and are performing a governmental function when required by the Postmaster General to carry the mails. He may exercise a discretion

as to routes and kinds of service. The powers granted in § 3965 cannot, however, be defeated by a refusal of the railroad company to perform the service. The Act of July 28, 1916, 39 Stat. 429, 431, created no new obligations.

It is not following the law to weigh the mails before the quadrennial period begins, extend the weight into four years, divide it into four equal parts for the purpose of payment, and thus get a different and smaller amount as a basis than would be secured by an annual weighing. This is not giving "pay per mile per annum"; it is simply giving one-quarter of an incorrect quadrennial amount.

The claimant has not by performance waived any right to demand pay for the true weight of mail carried each year. The statute cannot be waived. This point is covered in the case of the *Union Pacific R. R. Co.* v. *United States*, 104 U. S. 666.

From and after January 1, 1913, the claimant carried each day an increased amount of mail furnished as parcel post packages, for which increased compensation can be recovered. The Parcel Post Law of August 24, 1912, took effect January 1, 1913, and by this means the amount of mail carried by the claimant was vastly increased. On the 4th of March, 1913, Congress provided that an increase of pay should be given, not exceeding 5 per cent. per annum. The full amount of this 5 per cent. was not given the claimant, according to the allegations in the petition, and this is held to be a violation of the statute in the case recently decided by the court below. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 52 Ct. Clms. 338.

The mails on the claimant's lines were weighed in the fall of 1912, as of October 27th, and this weight taken for the quadrennial period beginning July 1, 1913. In the meantime the Parcel Post had been established, taking effect January 1, 1913, but no new weighing was had, and

this new and additional amount of mail was carried on the old weights.

Under the rules and regulations of the Post Office Department, the Postmaster General has required the claimant to gather and deliver mails at intermediate stations off from and beyond the right of way and at a distance not exceeding 80 rods. This is not authorized by law, and the claimant is entitled to recover the value of this service.

Mr. Assistant Attorney General Brown for the United States.

Mr. Justice McReynolds delivered the opinion of the court.

Appellant sued the United States to recover the difference between amounts received through the Post Office Department and what it claims should have been paid for its services in carrying the mails during a series of years, ending June 30, 1914. The demand is based upon implied contracts alleged to arise from the following circumstances. First.—Acceptance and transportation of the mails in reliance upon § 4002, Rev. Stats., as amended. This directs payment of specified sums per mile per annum according to weights; and the claim is that because the Post Office Department improperly construed and applied it, appellant received much less than it should have. Second.—Acceptance and transportation of the mails under orders and coercion of the Post Office Department, followed by failure to allow reasonable compensation therefor. Appellant claims its property was taken for public use and adequate compensation must be paid.

Concerning the challenged interpretation and application of § 4002, Rev. Stats., resulting in payments during each four-year term upon the basis of weights taken

immediately prior to the beginning of the same instead of annually, it suffices to say that the action taken accords with prior practice followed for many years; the letter of the statute permits it; the carrier submitted with full knowledge; and, impliedly at least, it was sanctioned by this court in *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385.

We think it must be treated as settled doctrine that prior to the Act of July 28, 1916, c. 261, 39 Stat. 412, 429,—with the exception of certain roads aided by land grants—railroads were not required by law to carry the mails. *Eastern R. R. Co.* v. *United States*, 129 U. S. 391, 394; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, *supra*. And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it cannot now claim an implied contract for a greater sum. It may be that any railroad by failing to carry the mails would incur the hostility of those living along its lines and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States and cannot constitute the basis of a justiciable claim against them for taking property.

The Court of Claims (53 Ct. Clms. 222) dismissed the petition upon demurrer, and its judgment is

Affirmed.

Mr. Justice Brandeis dissents.

UNITED STATES *v.* BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, ET AL.

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

No. 309. Argued April 16, 1919.—Decided December 15, 1919.

As the guardian of non-competent Osage Indians, whose surplus allotments are submitted to state taxation, under the Act of June 28, 1906, c. 3572, 34 Stat. 539, the United States may maintain a suit to protect such allottees as a class from being despoiled of their property through arbitrary, excessive and discriminating taxes, imposed upon them by the state tax officials in systematic and intentional disregard of the state laws. P. 132.

The proper officials of the United States (the United States Attorney under direction of the Attorney General) have implied authority to institute and conduct such a suit; and this is recognized by the Act of March 2, 1917, c. 146, 39 Stat. 969, 983, providing for an appraisement of the lands to ascertain the extent of over-assessment. *Id.*

In such a case the United States is not obliged to resort to the remedies afforded to individuals by the state law for the correction of mistakes committed in the tax proceedings, but may invoke the equity jurisdiction to avoid a multiplicity of suits, and secure an adequate remedy for the Indians as a class. P. 133.

254 Fed. Rep. 570, reversed.

THE case is stated in the opinion.

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

Mr. Preston A. Shinn, with whom *Mr. Corbett Cornett* was on the brief, for appellees.

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

Although the subject was fully stated in *McCurdy* v. *United States*, 246 U. S. 263, nevertheless to throw light on this case, we recall the facts concerning the distribution of the land and funds of the Osage Tribe of Indians made under the Act of Congress of June 28, 1906, c. 3572, 34 Stat. 539.

Of the tribal land there were reserved from allotment certain parcels, some of which were used by the United States or the tribe and others of which were used by individuals for the benefit of the tribe. From the remainder, each member was allotted three tracts of 160 acres each, of which one was to be designated and held as a homestead. Any land which remained was also to be allotted. The funds in trust in the hands of the United States were divided pro rata, to be held subject to the supervision of the United States. The oil, gas, coal, and other mineral rights in all the lands were reserved for the benefit of the tribe. The tract selected as a homestead was made inalienable and non-taxable, subject to the action of Congress. The land embraced by other than the homestead allotment, called surplus land, was made inalienable for a period of twenty-five years and non-taxable for three, subject to the action of Congress. Power was conferred, however, on the Secretary of the Interior to give to the allottee a certificate of competency, upon receipt of which the surplus land held by such an allottee became immediately alienable and taxable.

In September, 1917, the United States District Attorney for the Western District of Oklahoma, by direction of the Attorney General, commenced this suit in the name of the United States, for the benefit of named non-competent members of the Osage Tribe and of all other mem-

bers in the same situation, to prevent the enforcement of state and local taxes assessed against the surplus, although taxable, lands of said Indians for the eight years between 1910 and 1917 inclusive.

The defendants were the Board of County Commissioners of Osage County, including the county clerk and county treasurer, officials charged by the laws of the State with the enforcement of the taxes which were assailed. After averring the existence of authority in the United States, in virtue of its guardianship of the Indians and as a result of the terms of the allotment act, to protect and safeguard the interests of the Indians from the enforcement of the illegal taxes complained of, the bill charged that the taxes in issue were "arbitrary, grossly excessive, discriminatory, and unfair, and were made in violation of the rights of the said Osage Indians guaranteed by the Constitution of the United States and the constitution of the State of Oklahoma; . . . that the State Board of Equalization . . . arbitrarily and systematically increased the assessments on Osage Indian lands for the year 1911 to an amount approximately nearly double the original amount of such assessments. . . ." It was averred that the tax assessments made on the Indian lands involved "were made without an inspection or examination of the land . . .; that the said appraisers in making said appraisements discriminated against the lands of the Osage Indians as a class and systematically overvalued the same and systematically undervalued other property in said County; . . . that the assessments so made by said assessors were made in such an arbitrary and capricious manner as to amount to constructive fraud upon the taxpayers, and that the overvaluations made by said assessors were so grossly excessive as to justify the interference of a court of equity. . . ." It was alleged that the assessments complained of were of such a character that the

Secretary of the Interior had endeavored to have them corrected, but without result; that, in consequence of his having called the attention of Congress to the subject, the Act of March 2, 1917, c. 146, 39 Stat. 969, 983, was passed authorizing an appraisement by the said Secretary for the purpose of fixing the extent of the overassessment and that such appraisement, which had been virtually completed, sustained the charges set forth in the bill.

There was annexed to the bill a statement of the result of the appraisement in 36 cases as compared with the assessments complained of. In one case it was alleged that the land of the Indian was assessed at $20 an acre, although by the affidavit of the county clerk it was shown that it was worth $3 per acre. In another case it was alleged that, for the purpose of taxation, the land was shown to be overvalued by 119 per cent. It was further averred that an offer had been made through the Secretary of the Interior to pay all the taxes assessed for all the years assailed upon the basis of the assessment made as the result of the act of Congress, but that the same had been refused, and that process for the sale of the lands for delinquent taxes was immediately threatened. The prayer was for relief by injunction as against the illegal assessments and for action by the court looking to a payment of all delinquent taxes due by non-competent Osage Indians on the basis of the appraisement made under the act of Congress.

On motion the court dismissed the bill on the ground "that the lands involved were by Act of Congress, approved June 28, 1906, declared subject to taxation, and that the plaintiff has no interest in said lands, and has no duty or authority to contest the taxes thereon, or the sale of said lands for unpaid taxes. . . ." On appeal the decree was affirmed on the ground that as the state law afforded adequate means to the United States and the noncompetent Indians to correct errors in assessing

taxes, if any, there was no basis for invoking relief from a court of equity.

The argument here is exclusively directed to two grounds, the one enforced by the trial court and the other sustained by the court below. The first, however, is in argument here expanded into two points of view, since it challenges not only the authority of the officers of the United States to bring the suit, but the power of the United States to authorize them to do it. So far as the latter aspect is concerned, it proceeds upon the assumption that by the Act of 1906 the United States exhausted its power as the protector and guardian of the Osage Indians and as to them had no longer any mission or authority whatever. We pass from this contention without further notice, as it is so obviously opposed to the doctrine upon the subject settled from the beginning and so in conflict with the terms of the act of Congress that nothing more need to be said concerning it. As to the first point of view, the proposition is this: That as the Act of 1906 subjected the surplus lands to taxation, it therefore brought them under the taxing laws of the State, and, it is insisted, that having been so brought, it results that until Congress otherwise provides there exists no lawful authority in an officer of the United States to act in the name of the United States for the purpose of attacking the legality of a tax levied upon said lands under the laws of the State. But although the premise upon which the argument proceeds be admitted, that is, that in subjecting the lands to state taxation it was the purpose of Congress to subject them to the methods of levying and collecting the taxes provided by state law, including the remedial processes for the correction of errors, we fail to understand what relation that concession can have to the case in hand, since on the face of the pleadings the action taken by the United States was not to frustrate the act of Congress by preventing the operation of the state

law, but to prevent the systematic violation of the state law committed for the purpose of destroying the rights created by the act of Congress. The argument therefore disregards the foundation for the relief sought and proceeds upon the assumption that the exertion of power to prevent a perversion of state laws made to defeat the rights which the act of Congress gave is to be treated as a violation of the act of Congress and a refusal to apply the state law.

Certain is it that as the United States as guardian of the Indians had the duty to protect them from spoliation and, therefore, the right to prevent their being illegally deprived of the property rights conferred under the Act of Congress of 1906, the power existed in the officers of the United States to invoke relief for the accomplishment of the purpose stated. Indeed the Act of Congress of 1917, providing for the appraisement of the lands in question, by necessary implication, if not in express terms, treated the power of the officers of the United States to resist the illegal assessments as undoubted.

And the existence of power in the United States to sue which is thus established disposes of the proposition that because of remedies afforded to individuals under the state law the authority of a court of equity could not be invoked by the United States. This necessarily follows because, in the first place, as the authority of the United States extended to all the non-competent members of the tribe it obviously resulted that the interposition of a court of equity to prevent the wrong complained of was essential in order to avoid a multiplicity of suits (see *Union Pacific Ry. Co.* v. *Cheyenne*, 113 U. S. 516; *Smyth* v. *Ames*, 169 U. S. 466, 517; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 81; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 283; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506); in the second place because, as the wrong relied upon was not a mere mistake or error

committed in the enforcement of the state tax laws, but a systematic and intentional disregard of such laws by the state officers for the purpose of destroying the rights of the whole class of non-competent Indians who were subject to the protection of the United States, it follows that such class wrong and disregard of the state statute gave rise to the right to invoke the interposition of a court of equity in order that an adequate remedy might be afforded. *Cummings* v. *National Bank*, 101 U. S. 153; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390; *Pittsburgh, etc., Ry. Co.* v. *Backus*, 154 U. S. 421; *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 507. In fact the subject is fully covered by the ruling in *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282.

Reversed and remanded for further proceedings in conformity with this opinion.

BONE *v.* COMMISSIONERS OF MARION COUNTY.

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

No. 63. Argued November 11, 1919.—Decided December 15, 1919.

Patent No. 705,732, (claims 1, 3, 5, 16 and 17,) to Frank A. Bone, for the combination, with a retaining wall having a heel, of a metal structure embedded vertically in the wall and obliquely in the heel, so that the weight of the retained material upon the heel of the metal structure will operate to retain the wall in vertical position; or of such a structure having also a toe opposite to the heel; *held* anticipated in principle by other patents and publications. Pp. 136, *et seq.*

Patentable novelty or originality cannot be asserted of a device which

has previously been described in printed publications in foreign countries although unknown in this one and to the patentee. Rev. Stats., § 4886; c. 391, 29 Stat. 692. P. 144.

249 Fed. Rep. 211, affirmed.

THE case is stated in the opinion.

Mr. Clarence E. Mehlhope, with whom *Mr. Arthur H. Ewald* was on the brief, for petitioner.

Mr. V. H. Lockwood for respondents.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit brought in the District Court of the United States for the District of Indiana to restrain the infringement of a patent for a retaining wall, which, to quote petitioner, is "a wall to prevent the material of an embankment or cut from sliding."

After issue joined and proofs submitted, the District Court (Anderson, J.,) entered a decree dismissing the bill for want of equity. The decree was affirmed by the Circuit Court of Appeals, to review which action this writ of certiorari was granted.

The bill in the case is in the conventional form and alleges invention, the issue of a patent numbered 705,732, and infringement by respondent. The prayer is for treble damages, an injunction and accounting.

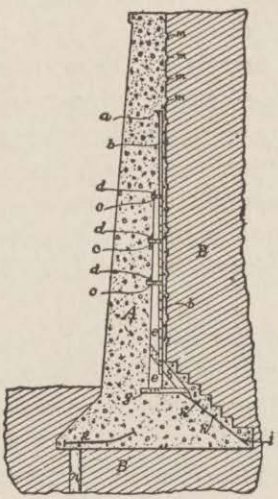
The answer of respondents is a serial denial of the allegations of the bill and avers anticipation of petitioner's device by prior patents and publications, in this and other countries.

This summary of the issues is enough for our purpose and we need only add preliminarily to their discussion that Bone's device has the sanction of a patent and a decision sustaining it by the District Court for the Northern District of Ohio and the Circuit Court of Appeals for the

Sixth Circuit. The difference of decision in that Circuit and the Seventh Circuit is an important consideration and must be accounted for, which is best done by a display of the patent and the case.

First as to the patent: It describes the invention as being one that "relates to improvements in retaining-walls for abutments of bridges . . ., and such places as it is desired to retain earth or other matter permanently in place with its face at an angle nearer vertical than it would naturally repose when exposed to the action of the elements or gravity;" and "consists principally of introducing into masonry of concrete, stone, or brick a framework of steel or iron in such a way that the whole wall is so much strengthened thereby that the volume of the masonry may be greatly reduced, and yet the height, base, and strength against overturning, bulging, or settling will still be ample."

The following figure represents a cross-sectional view of the device—A representing the masonry, B the material retained, and B^1 the earth on which the wall rests. The metal parts within A are indicated by the smaller letters.



The patent does not insist upon that form of the masonry in all particulars. The base of the wall may be, it is said, "varied to suit the circumstances;" the base may extend to the rear rather than the front "with proper proportions of metal . . . the form shown in the drawings being what might be called an inverted T, while those suggested would be in the form of an L or reversed L."

The utility of the wall of these shapes is represented to be that it is "not so liable to be overturned from the pressure of material behind it as would a wall of the same height and area of section, but having a rectangular trapezoidal or triangular-shaped section," the latter shapes requiring more masonry. And it is said that the patented wall, "having more base and less weight" than such other shapes, "will rest more securely on a soft or yielding foundation, the weight of the material resting on the heel" causing the latter "to press on the earth below and thus cause friction to prevent the whole wall from sliding outward." This is the especial effect of the patent, achieved by the wall of the shape described and distinguishes it, is the contention, from the retaining walls of the prior art.

The patentee admits, however, that retaining walls had been "constructed of concrete and steel, but none" to his "knowledge" had "been supported on their own base as" his, nor had "any of them entirely inclosed the steel within the concrete" nor had "any of them used the weight of the material retained as a force to retain itself."

Such, then, is the wall and the utility attributed to it. The combinations which may be made with it are set forth in 17 claims, of which 1, 3, 5, 16 and 17 are involved in the present action. Counsel for petitioner considers, however, that 1 and 17 are so far illustrative that the others need not be given. They are as follows:

"1. The combination with a retaining-wall having a

heel, of a metal structure embedded vertically in said wall and obliquely in said heel, so that the weight of the retained material upon the heel of the metal structure will operate to retain the wall in vertical position."

"17. The combination with a retaining-wall having an inclined heel and a toe at opposite sides thereof, of a metal structure embedded within said wall and heel, said structure consisting of upright bents at the back part of the vertical wall and continuing down along the upper part of the heel of said wall to the back part thereof, whereby by reason of the toe and the heel the weight of the retained material upon the heel of the metal structure will operate to maintain the wall in a vertical position."

So much for the device of the patent. How far was it new or how far was it anticipated?

Bone's idea was conceived in 1898 and his patent issued in 1902 upon an application made in 1899, but according to his counsel, the value of the invention was not recognized "until after the lapse of several years," when he, Bone, brought a suit against the City of Akron, Ohio, in the District Court for the Northern District of Ohio, in vindication of the patent and in reparation for its infringement. He was given a decree which was affirmed by the Circuit Court of Appeals for the Sixth Circuit. [*City of Akron* v. *Bone*, 221 Fed. Rep. 944.]

The District Court (Judge Day) gave a clear exposition of the patent, the relation of its metal parts [1] to the ma-

[1] The following is an extract from Judge Day's opinion:

"The reënforcing members [metallic members] are placed near the back face of the wall and heel and near the lower face of the toe. The oblique reënforcing bars in the heel acting in conjunction with the uprights serve the function of a cantilever beam whereby the weight of the material pressing upon the heel is transferred to the upright portion of the wall and operates to retain the wall in a vertical position. . . .

"Considering the claims of the patent, and the testimony, I am of the opinion that Bone, the patentee, was the first to reënforce the retaining wall, or similar wall of concrete or masonry in such a manner

sonry parts, and their coöperating functions, and adjudged the patent valid and the wall of the City of Akron an infringement of it.

The Circuit Court of Appeals affirmed the decree. The court said that the record disclosed nothing which anticipated "the substantial thought of the patent." If it had done so, or, to quote the exact language of the court, "If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures."[1]

---

that the weight of the retained material would be utilized to impart through the reënforcing members tensile resistance to the stern or vertical part of the wall, thereby fortifying this part of the wall against breaking strains.

"This was an advancement in the art and possessed novelty and the structure of the defendant city infringed this patent.

"While many of the features of concrete structures were old, yet this combination as outlined and described in this Bone application for a patent, was new. It is also in evidence that there has been a large sale and general acquiescence in the Bone patent."

[1] The following is an extract from the opinion of the Circuit Court of Appeals:

"The record discloses nothing anticipating the substantial thought of the patent. Masonry or concrete retaining walls were deep and heavy, and maintained by gravity in their resistance against a horizontal stress. There was no occasion for reinforcement. Sustaining walls had been built of concrete with vertical reinforcement; but they were maintained against side strain by cross-ties or beams, without which they might tip over. If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures. Those which have that shape are sustaining walls only, and were so obviously unfit for use as retaining walls that no one seems to have seen the utility for that purpose, of which the

On application for rehearing the court refused to direct the District Court to open the case to permit the defendant to put in proof regarding a German publication of 1894.

Those decisions confronted the District Court in the present suit and fortified the pretensions of the patent. They were attacked, however, as having been pronounced upon a different record and this conclusion was accepted by the District Court. The latter court found from the new evidence the existence of a structure upon the nonexistence of which the Circuit Court of Appeals for the Sixth Circuit based its conclusion. The District Court said that Bone was not the first to do the things he asserted he was the first to do, and that whatever the record in the Sixth Circuit might have shown, so far as the record before the court "was concerned, the absolute converse of that proposition" had "been demonstrated."

The court, therefore, as we have said, dismissed the bill for want of equity.

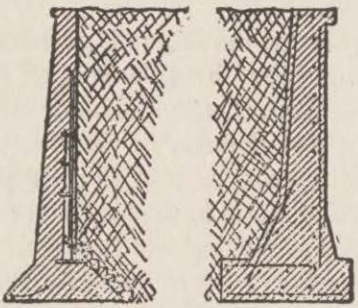
The decree was affirmed by the Circuit Court of Appeals; indeed, the reasoning of the District Court was approved after painstaking consideration of the patent and an estimate of the anticipatory defenses; none of which the court said was introduced in the *Akron Case*, "otherwise a different conclusion would have been reached," adducing the opinion of the court. 249 Fed. Rep. 214. This being so, and there is no doubt it is so, the present case is relieved of the authority or persuasion of the *Akron Case* and it becomes necessary to consider the prior art and decide the extent and effect of its anticipation.

We have given a cross-section of the device of the

---

form, when properly adapted and strengthened, was capable. There is also a prior wall, wholly of metal, fairly disclosing a unitary heel adapted to hold the wall erect; but to see that this could become merely a skeleton imbedded in concrete may well have required, in 1898, more than ordinary vision. Upon the whole, we think invention was involved, and the claims are valid."

patent, showing its shape and strengthening "metallic members," and the patent informs of their coöperative function. We reproduce the device and set by its side the Marion County wall for comparison.



BONE MARION COUNTY

If we may assign novelty to the Bone wall and consider it a broad advance upon the prior art (the extent of its advance, if any, we shall consider later), we may assign infringement of it by the Marion County wall. To an examination of the prior art we are, therefore, brought.

It would be difficult to add anything to the consideration and comment of the Court of Appeals. The court cited in support of its judgment a patent issued to Francois Coignet in 1869, and one issued to Stowell & Cunningham in 1899 upon an application made in 1897, and two articles written by P. Planat which appeared in 1894 and 1896 in a scientific magazine called "La Construction Moderne," published in Paris; also a publication which appeared in Germany in 1894 concerning a wall which is given the name of Bauzeitung wall. The article recites that a "utility model patent" had been granted, consisting "of a vertical and a horizontal member."

The Coignet patent is somewhat indefinite. It relates, according to its declaration, to "monolithic structures, or articles made of artificial stone paste" into which irregular shaped irons are introduced to be "arranged in such a

manner as to interlace each other, so that by the combination of this metallic skeleton and of agglomerated artificial-stone paste the thickness of the walls or size of the articles may be considerably reduced and yet great strength be attained."

It will be observed that there is nothing explicit of how "stone paste" and the "irregular shaped irons" operate or coöperate, aside from their cohesion or interlacing. Their arrangement is not definite as the "metallic members" in the Bone patent are, so that there might be, as in that patent, reinforcing metal in the heel of the wall acting with its upright portion serving the function, to quote Judge Day, "of a cantilever beam whereby the weight of the material pressing upon the heel is transferred to the upright portion of the wall and operates to retain the wall in a vertical position."

If there was any prophecy (to borrow counsels' word) in it the world was slow to discern it, and we are not disposed to give much anticipating effect to it, a view in which we have confirmation in the disclaimer of Bone—he conceding he was not the first to discover the art of reinforcing concrete.

The Planat publications are more explicit. We there see a relation between the metallic and masonry parts of a wall and their coöperation to produce strength in the wall and resistance to the pressure of and bulging from the stress of earth behind it. Both articles, the Court of Appeals said, "deal with retaining walls of reinforced concrete of the cantilever type" and quoted from the article of 1896 as follows:

"These computations suppose that one has effectively realized the fixing of the vertical wall to the horizontal slab at their junction. This fixing requires special precautions. The bars at the point of junction exert a pulling force which tends to pull them out of the concrete. . . . But here we have only a half beam on a cantilever span. It is necessary that the extremities of the bars in the

region of fixation should be held in a sufficient mass of concrete or maintained by some other means. . . .

"One is able to reduce these projections in a very large measure if one takes care to bind together the vertical bars and the horizontal bars at their point of intersection. In this way the pull of the bar is carried not only on its prolongation, arranged for anchorage, but also on the bar which is perpendicular to it and whose great length permits it to offer a large resistance to the force tending to pull it out transversely."

The court did not enlarge upon other examples of the prior art nor do we think that it is necessary to do so. The court, however, referred to a publication in "Bauzeitung" and the patent to Stowell & Cunningham. The former is too technical to quote and the latter has not the simplicity of the Bone device; but both publication and patent represent structures that resist a tendency to tilting or bulging from the pressure of the earth in their rears. The Bauzeitung article did this by a wall which consisted of a "vertical and a horizontal member" which were "rigidly connected with each other" and "the ratios are so chosen that the resultant of the earth thrust passes through the horizontal part or through the foundation respectively, so that there exists no longer any tendency to tilting so long as the two parts continue to be firmly connected with each other." It is further said, "To increase the stability, the horizontal part is furthermore connected at its rear end by means of anchors with the underground." It will be observed, therefore, that there are no metallic reinforcing members. It is the shape of the wall—one having a base extending to the rear in the form of an L, the exact antecedent of one of the shapes described by Bone as having advantage over other shapes. And there was also the suggestion of the value of a firm connection between the "vertical and horizontal member." In other words, the publication showed a retaining

wall having a heel such that the weight of the earth thereon would tend to keep the wall erect, an effect and operation that Bone declares in his patent no wall had attained prior to his invention. And that effect and operation the Circuit Court of Appeals for the Sixth Circuit considered the essence of the Bone patent, and the court said that "it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength."

The Stowell & Cunningham structure is, as we have said, somewhat complex in its mechanical parts. But these are but details; the physical laws that they are to avail of are explained so that "the volume of masonry" of retaining walls may be reduced yet retain their strength by the use of metallic reinforcements.

Counsel attack the sufficiency of the asserted anticipations, especially the publications, and in effect say that whatever conceptions lurked in them conveyed no suggestion of a "concrete entity," to use counsels' words, to execute them, and lament that Bone should be robbed of the credit and reward of adding to the world useful instrumentalities which, but for him, would have remained in theories and the "dust from which respondent recovered them."

To execute theories by adequate instrumentalities may indeed be invention, but an answer to petitioner's contention we have given by our comment on the Bauzeitung and Planat publications and the fulness of their expositions. Bone may have been ignorant of them and his device may not have been their suggestion. They seem to have been unknown to American engineers, not even the interest of the controversy in the Sixth Circuit having developed their existence. From this local ignorance nothing can be deduced favorable to the patent. Its device having been described in printed publications, although in foreign countries, patentable novelty or originality cannot be asserted for it. § 4886, Rev. Stats.; 29 Stat. 692, c. 391.

Such is the provision of the law and we cannot relax it in indulgence to what may seem the individual's merit.

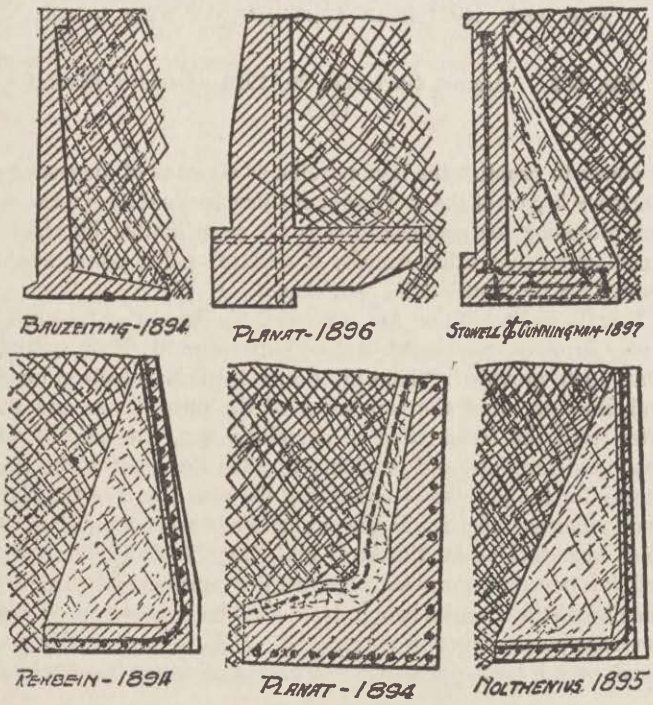
The Circuit Court of Appeals, to show the progress of the prior art, made use of the illustrations [1] of the patents and publications that preceded Bone's and we also avail ourselves of the same to show that Bone's patent was a step, not a leap, in that progress, and that the only originality that can be accorded it is in its special form and there can be no infringement except by a copy of that form or a colorable imitation of it. We do not think the Marion County wall is subject to either accusation and the decree of the Circuit Court of Appeals is

Affirmed.

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

---

[1]



HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, *v.* KENTUCKY DISTILLERIES & WAREHOUSE COMPANY.

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

DRYFOOS ET AL. *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF NEW YORK.

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

Nos. 589, 602. Argued November 20, 1919.—Decided December 15, 1919.

The power to prohibit the liquor traffic as a means of increasing war efficiency is part of the war power of Congress, and its exercise without providing for compensation is no more limited by the Fifth Amendment than a like exercise of a State's police power would be limited by the Fourteenth Amendment. P. 154.

The War-Time Prohibition Act, approved ten days after the armistice with Germany was signed, Act of November 21, 1918, c. 212, 40 Stat. 1046, provided: "That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export." *Held*, in respect of liquors in bond, even if belonging to one who made and owned them before the

act was passed and paid revenue taxes upon them since June 30, 1919:

(1) That the act was not an appropriation of such liquors for public purposes. P. 157.

(2) That the time allowed for disposing of all liquors in bond on November 21, 1918, could not be declared unreasonable, as a matter of law, even if they were not sufficiently ripened or aged to be disposed of advantageously during the period limited. P. 158.

(3) That the prohibition was not in violation of the Fifth Amendment as a taking of property without compensation. P. 157.

(4) That it was within the war power when passed (notwithstanding the cessation of hostilities under the armistice), as a means of war efficiency and for the support and care of the Army and Navy during demobilization. P. 158.

A wide latitude of discretion must be accorded to Congress in the exercise of the war powers. P. 163.

The court cannot inquire into the motives of Congress, in determining the validity of its acts, or into the wisdom of the legislation; nor pass upon the necessity for the exercise of a power possessed. P. 161.

It is settled that the war power carries with it the power to guard against immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. *Id.*

Assuming that the continuing validity of an act passed under the war power may depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or by a proclamation of peace, but upon some actual war emergency or necessity, the court cannot say that the necessity for the prohibition had ceased when these suits were begun, in view of the facts that the treaty of peace has not been concluded, that various war activities,—among them national control of railroads,—continue, and that the man power of the nation has not been completely restored to a peace footing. P. 161.

The Eighteenth Amendment did not operate to repeal the War-Time Prohibition Act. P. 163.

In defining the period of the prohibition, Congress in the War-Time Prohibition Act, doubtless expecting that the war would be definitely ended by a peace under a ratified treaty or a proclamation before demobilization was complete, intended that the prohibition should continue until the date of the termination of demobilization had been definitely ascertained by the President and made known by him through a proclamation to that end. P. 164.

The reference to the "demobilization of the army and navy," in the

President's message communicating his veto of the National Prohibition Act, is not the proclamation required by the War-Time Prohibition Act. P. 167.

In an exact sense, demobilization had not terminated then or when these suits were begun, as is shown by the report on the subject of the Secretary of War, made to the President and transmitted to Congress; nor does it appear that it has yet so terminated. P. 168.

No. 589. Reversed.

No. 602. Affirmed.

THE cases are stated in the opinion.

The Solicitor General and *Mr. Assistant Attorney General Frierson*, with whom *Mr. W. V. Gregory* was on the briefs, for appellant in No. 589 and appellee in No. 602.

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for appellee in No. 589:

Congress has no power to prohibit the sale of whisky within a State, except under its war powers. By the Tenth Amendment the States reserved to themselves the police power over the liquor traffic with the right to abolish future manufacture, sale or possession. This power is absolute and exclusive, since, as before, the Fourteenth Amendment. But it is still an open question whether a State can make unlawful the possession, use or sale of liquors lawfully acquired (as in the present case) before the passage of the prohibitory statute. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 459; *Wynehamer* v. *People*, 13 N. Y. 378.

Congress can waive the interstate character of liquor in order to subject it to the laws of a State when once introduced therein, or can prohibit its transportation to a State where its possession is prohibited. *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 323. But Congress has no power, in peace time, to prohibit the sale of whisky. *In re Rahrer*,

140 U. S. 545, 554; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *Matter of Heff*, 197 U. S. 488, 505; *Hammer* v. *Dagenhart*, 247 U. S. 251, 273–276; *Keller* v. *United States*, 213 U. S. 138, 144, 148.

In order to guard and promote the health, welfare and efficiency of the men composing the army and navy, and to increase the efficiency of the workers in the production of arms, munitions, ships, food and clothing for them, Congress has the right temporarily to regulate the sale of liquor, and, if reasonably necessary to accomplish such objects, to forbid its sale. *McKinley* v. *United States*, 249 U. S. 397, 399; *Selective Draft Law Cases*, 245 U. S. 366; *Schenck* v. *United States*, 249 U. S. 47, 52; *Grancourt* v. *United States*, 258 Fed. Rep. 25; *United States* v. *Casey*, 247 Fed. Rep. 362; *Pappens* v. *United States*, 252 Fed. Rep. 55. But the exercise of this power, like all others, is subject to the Fifth Amendment. *Ex parte Milligan*, 4 Wall. 2; *Johnson* v. *Jones*, 44 Illinois, 142; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *McCray* v. *United States*, 195 U. S. 27, 61. It necessarily follows that if, in the exercise of the war power, private property is taken, the owner thereof is entitled to just compensation therefor.

Whisky is property and when taken for public use is entitled to the protection of the Fifth Amendment. *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Wynehamer* v. *People*, 13 N. Y. 378, 383, 384; *Commonwealth* v. *Campbell*, 133 Kentucky, 50; *Barber* v. *Commonwealth*, 182 Kentucky, 200; *Commonwealth* v. *Kentucky Distilleries & Warehouse Co.*, 143 Kentucky, 314.

The War-Time Prohibition Act takes appellee's private property for public use, but makes no provision for just compensation to the owner. Therefore, the act is unconstitutional. The act prohibits appellee from either selling the whisky which it has in its own possession fully tax paid, or obtaining possession of its property which is in

the Government's bonded warehouses. The effect is that the appellee has been deprived of every attribute of ownership, except the necessity of paying taxes to the United States upon the very property which the Government refuses to allow the owner to use or sell. If this does not constitute a taking of a person's property, the English language has lost its meaning. *Buchanan* v. *Warley*, 245 U. S. 60, 74, 81; *Wynehamer* v. *People*, 13 N. Y. 387, 389, 396, 398; *Foster* v. *Scott*, 136 N. Y. 577; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Lynah*, 188 U. S. 445. The appellee was required by the federal statute to provide, at its own expense, bonded warehouses, which were under the exclusive control of the Government. *Taney* v. *Penn National Bank*, 232 U. S. 174; *Dale* v. *Pattison*, 234 U. S. 399. By statute, it was also authorized to leave its whisky in bond for eight years, and to bottle it in bond at any time after the first four years. The whisky in question was rightfully in appellee's bonded warehouses and it had the right to rely upon the "bottling in bond statute," and furthermore it could not have bottled a large part of the whisky because it had not been in the warehouses four years at the time the War Prohibition Act was enacted. It is therefore no answer to suggest that the appellee should have withdrawn the whisky from bond and sold the same before the War Prohibition Act was enacted. As the taking is solely under the war power, it is concededly for a public use. No provision for any compensation was made; but, on the contrary, Congress (February 24, 1919) imposed a heavy retroactive tax (double the then existing tax) on all whisky, including that already tax-paid; the tax was assessed and collected; and the owners are now prohibited from selling the very whisky on which they have paid that tax, a large part of which the appellee was compelled to pay as late as September 24, 1919. It is a false analogy to say that under the war power Congress is endowed with what are commonly

called the police powers of the States and consequently may exercise them as unlimitedly as do the States. For the police powers of the States are not subject to the Fifth Amendment, whereas the war powers of Congress are. It has not been decided that even the state police powers may prohibit sale of liquor made before the passage of the law. While it is true that Congress' exercise of the war power can accomplish anything which the States can accomplish under their police power, yet the qualifications imposed thereon are different. It may not, for instance, require excessive bail, refuse a public trial in a criminal case, or cause the accused to be a witness against himself. The instances might be multiplied where States are free in the exercise of their police powers, from requirements to which Congress, even in the exercise of its war power, is subject. The law is abundantly settled that while the Fifth Amendment does not require that the just compensation shall be actually paid in advance of the taking, nevertheless, the owner is entitled to some reasonable, certain and adequate provision for obtaining such compensation before his ownership or possession can be interfered with.

The War-Time Prohibition Act has, by its own terms, ceased to be operative. The evil sought to be remedied was the danger of intoxication of soldiers, sailors and war workers during the war and during the subsequent period of demobilization. Cong. Rec., vol. 56, pp. 9627, 9641. Demobilization is the act of disbanding troops; the reduction of military armaments to a peace footing. Century Dictionary; 18 Corpus Juris, 484; Cong. Rec., *loc. cit.*

The President's acts and declarations amount to a proclamation of "the date of the conclusion of the present war," in the sense of actual hostilities, and *thereafter* the "termination of demobilization." [Counsel quoted also statements made by the War Department and by General Pershing, to the effect that demobilization was at an end.]

The demobilization process has continued steadily until the strength of both the army and navy has been reduced to less than the authorized peace quota. The production of war munitions has stopped, all existing contracts have been canceled and the Government is actively disposing of its surplus war supplies of arms, munitions, food and clothing, etc.

What is meant by "conclusion of the present war" must be determined by the purpose of this particular act, and the evident belief of Congress that the ending of the war would precede demobilization. Cases like *Hijo* v. *United States*, 194 U. S. 315, holding war existent until ratification of peace, are inapplicable. That Congress purposely did not intend to make the "conclusion of the present war" dependent upon any treaty of peace is illustrated by a comparison of the language of this act with that of other war legislation wherein the "end of the war" was involved.

A foreign war may not be terminated in respect of various considerations arising under international law and yet be concluded in respect of the rights and duties of citizens of the United States under the Federal Constitution; and it does not follow that because a technical state of war still prevails between the United States, Germany and Austria, notwithstanding the complete demobilization of our army and navy, the constitutional rights of the citizens of the United States are to be tested as if war actually existed. It is not necessary that there should ever be a definite treaty of peace. History presents many instances where there has been a "conclusion of war" without any treaty of peace. Whether or not war has been terminated is, after all, a question of fact to be determined in each case by the situation presented.

The War-time Prohibition Act has become obsolete with the passing of the emergency [citing various rate cases, and the *Perrin* and *Gearlds Case*, which are considered in the court's opinion, *infra*, 162].

Mr. Walter C. Noyes, with whom *Mr. Moses J. Stroock*, *Mr. Arthur L. Strasser* and *Mr. Walter S. Dryfoos* were on the brief, for appellants in No. 602.

Mr. Wayne B. Wheeler and *Mr. R. C. Minton*, by leave of court, filed a brief as *amici curiæ* in No. 589.

Mr. Levi Cooke and *Mr. George R. Benneman*, by leave of court, filed a brief as *amici curiæ* in No. 602.

Mr. Justice Brandeis delivered the opinion of the court.

The armistice with Germany was signed November 11, 1918. Thereafter Congress passed and, on November 21, 1918, the President approved the War-Time Prohibition Act (c. 212, 40 Stat. 1045, 1046), which provides as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. . . ."

On October 10, 1919, the Kentucky Distilleries and Warehouse Company, owner of distillery warehouses and of whisky therein, brought in the District Court of the United States for the Western District of Kentucky a suit against Hamilton, Collector of Internal Revenue for that District, alleging that the above act was void or had become inoperative and praying that he be enjoined from interfering, by reason of that act, with the usual process of

withdrawal, distribution and sale of the whisky in bond. The case was heard before the District Judge on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss. A decision without opinion was rendered for the plaintiff; and, the defendant declining to plead further, a final decree was entered granting a permanent injunction in accordance with the prayer of the bill. A similar suit seeking like relief was brought on October 29, 1919, by Dryfoos, Blum & Co., in the District Court of the United States for the Southern District of New York, against Edwards, Collector for that District. That case was heard on November 5 before the District Judge on like motions for a preliminary injunction and to dismiss. An opinion was filed November 14, 1919, holding the act in force; and on the following day a final decree was entered dismissing the bill.

The essential facts in the two cases differ in this: In the Kentucky case the whisky was stored in a distillery warehouse; the plaintiff was the maker of the whisky; had owned it prior to the passage of the act; and had, since June 30, 1919, paid the revenue tax on part of it. In the New York case the liquors were in general and special bonded warehouses; the plaintiffs were jobbers; and it does not appear when they became the owners of the liquors. Both cases come here by direct appeal under § 238 of the Judicial Code, were argued on the same day, and may be disposed of together. Four contentions are made in support of the relief prayed for: (1) that the act was void when enacted because it violated the Fifth Amendment; (2) that it became void before these suits were brought by reason of the passing of the war emergency; (3) that it was abrogated or repealed by the Eighteenth Amendment; (4) that by its own terms it expired before the commencement of these suits. These contentions will be considered in their order.

First: Is the act void because it takes private property

for public purposes without compensation in violation of the Fifth Amendment? The contention is this: The Constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power "to make all laws which shall be necessary and proper for carrying into execution" the war powers expressly granted. Article I, § 8, clause 18. Congress might under this implied power temporarily regulate the sale of liquor and, if reasonably necessary, forbid its sale in order to guard and promote the efficiency of the men composing the army and the navy and of the workers engaged in supplying them with arms, munitions, transportation and supplies. *McKinley* v. *United States*, 249 U. S. 397, 399. But the exercise of the war powers is (except in respect to property destroyed by military operations, *United States* v. *Pacific Railroad*, 120 U. S. 227, 239) subject to the Fifth Amendment. *United States* v. *Russell*, 13 Wall. 623, 627. The severe restriction imposed by the act upon the disposition of liquors amounts to a taking of property; and being uncompensated would, at least as applied to liquors acquired before the passage of the act, exceed even the restriction held to be admissible under the broad police powers possessed by the States. Therefore, since it fails to make provision for compensation, which in every other instance Congress made when authorizing the taking or use of property for war purposes,[1] it is void. Such is the argument of the plaintiffs below.

---

[1] War Acts authorizing the seizure or requisition of property:

March 4, 1917, c. 180, 39 Stat. 1168, 1193, July 1, 1918, c. 113, 40 Stat. 634, 651, factories, ships, and war materials; June 15, 1917, c. 29, 40 Stat. 182, 183, April 22, 1918, c. 62, 40 Stat. 535, November 4, 1918, c. 201, 40 Stat. 1020, street railroads, equipment, etc., and the acquisition of title to lands, plants, etc.; August 10, 1917, c. 53, 40 Stat. 276, 279 (Food Control Act), foods, fuels, factories, packing

That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. *Lottery Case*, 188 U. S. 321, 357; *McCray* v. *United States*, 195 U. S. 27; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 58; *Hoke* v. *United States*, 227 U. S. 308, 323; *Seven Cases* v. *United States*, 239 U. S. 510, 515; *United States* v. *Doremus*, 249 U. S. 86, 93–94. The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121–127; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 571; *McCray* v. *United States*, 195 U. S. 27, 61; *United States* v. *Cress*, 243 U. S. 316, 326); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. *In re Kemmler*, 136 U. S. 436, 448; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410. If the nature and conditions of a restric-

houses, coal mines, coal supplies, etc.; March 21, 1918, c. 25, 40 Stat. 451, railroads; May 16, 1918, c. 74, 40 Stat. 550, 551, June 4, 1918, c. 92, 40 Stat. 594, houses, buildings, properties, etc., in District of Columbia; July 18, 1918, c. 157, 40 Stat. 913, 915, ships; July 16, 1918, c. 154, 40 Stat. 904, telephone and telegraph systems; October 5, 1918, c. 181, 40 Stat. 1009, 1010, mines, mineral lands, etc.

See also Act of June 3, 1916, c. 134 (39 Stat. 166, 213), for the mobilization of industries, which authorizes the seizure of munition plants and provides that the compensation therefor shall be "fair and just," and the Act of March 4, 1917, c. 180, 39 Stat. 1168, 1169, authorizing the acquisition of aëroplane patents by condemnation, for which $1,000,000 was appropriated.

tion upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency.

There was no appropriation of the liquor for public purposes. The War-Time Prohibition Act fixed a period of seven months and nine days from its passage during which liquors could be disposed of free from any restriction imposed by the Federal Government. Thereafter, until the end of the war and the termination of demobilization, it permits an unrestricted sale for export and, within the United States, sales for other than beverage purposes. The uncompensated restriction upon the disposition of liquors imposed by this act is of a nature far less severe than the restrictions upon the use of property acquired before the enactment of the prohibitory law which were held to be permissible in cases arising under the Fourteenth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623, 668; *Kidd* v. *Pearson*, 128 U. S. 1, 23. The question whether an absolute prohibition of sale could be applied by a State to liquor acquired before the enactment of the prohibitory law has been raised by this court but not answered, because unnecessary to a decision. *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32–33; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 459. See, however, *Mugler* v. *Kansas*, *supra*, pp. 623, 625, 657. But no reason appears why a state statute, which postpones its effective date long enough to enable those engaged in the business to dispose of stocks on hand at the date of its enactment, should be obnoxious to the Fourteenth Amendment; or why such a federal law should be ob-

noxious to the Fifth Amendment. We cannot say that seven months and nine days was not a reasonable time within which to dispose of all liquors in bonded warehouses on November 21, 1918. The amount then in storage was materially less than was usually carried;[1] because no such liquor could be lawfully made in America under the Lever Food and Fuel Control Act (August 10, 1917, c. 53, § 15, 40 Stat. 276, 282) after September 9, 1917. And if, as is suggested, the liquors remaining in bond November 21, 1918, were not yet sufficiently ripened or aged to permit them to be advantageously disposed of within the limited period of seven months and nine days thereafter, the resulting inconvenience to the owner, attributable to the inherent qualities of the property itself, cannot be regarded as a taking of property in the constitutional sense. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 332.

Second: Did the act become void by the passing of the war emergency before the commencement of these suits? It is conceded that the mere cessation of hostilities under the armistice did not abridge or suspend the power of Congress to resort to prohibition of the liquor traffic

---

[1] The amount of distilled spirits of all kinds in bonded warehouses June 30, 1919, was 72,358,151.1 gallons as compared with 282,036,460.2, June 30, 1914; 253,668,341.3 gallons, June 30, 1915; 232,402,878.3 gallons, June 30, 1916; 194,832,682.6 gallons, June 30, 1917; 158,959,264.5 gallons, June 30, 1918. Report of the Commissioner of Internal Revenue for 1919, p. 173. The following explanation is given by the Commissioner, p. 51, why more was not withdrawn: "The high rates of tax on spirits, fermented liquors and wines which were provided in the bill subsequently enacted into law as the Revenue Act of 1918, prompted many dealers to make heavy purchases of these commodities prior to the passage of the Act and, as a consequence of this action on the part of the dealers as well as of the expansion of prohibition territory throughout the United States the withdrawals from bonded warehouses materially declined after the passage of the Act."

as a means of increasing our war efficiency; that the support and care of the army and navy during demobilization was within the war emergency; and that, hence, the act was valid when passed. The contention is that between the date of its enactment and the commencement of these suits it had become evident that hostilities would not be resumed; that demobilization had been effected; that thereby the war emergency was removed; and that when the emergency ceased the statute became void.

To establish that the emergency has passed, statements and acts of the President and of other executive officers are adduced; some of them antedating the enactment of the statute here in question. There are statements of the President to the effect that the war has ended [1] and peace has come; [2] that certain war agencies and activities should be discontinued; [3] that our enemies are impotent to renew hostilities [4] and that the objects of the act here in question have been satisfied in the demobilization of the army and navy.[5] It is shown that many war-time activities have been suspended; that vast quantities of war materials have been disposed of; that trade with Germany has been resumed; and that the censorship of postal, telegraphic and wire communications has been removed.[6] But we have also the fact that since these statements were made and these acts

[1] Address to Congress, Official U. S. Bulletin, Nov. 11, 1918, p. 5.

[2] Thanksgiving Proclamation, Official U. S. Bulletin, Nov. 18, 1918, p. 1.

[3] Address to Congress, Dec. 2, 1918, Official U. S. Bulletin, Dec. 2, 1918, p. 6.

[4] Armistice Commemoration Proclamation, Nov. 11, 1919.

[5] Veto Message, October 27, 1919, Congressional Record, Oct. 27, 1919, p. 8063.

[6] U. S. Official Bulletin, Nov. 12, 1918, p. 3; Nov. 22, 1918, p. 1; Nov. 27, 1918, p. 7; Dec. 12, 1918, p. 4; Dec. 20, 1918, p. 4; Dec. 30, 1918, p. 7; United States Bulletin, Feb. 27, 1919, p. 6; May 8, 1919; May 12, 1919, p. 14; Oct. 20, 1919, p. 17.

were done, Congress, on October 28, 1919, passed over the President's veto the National Prohibition Act which, in making further provision for the administration of the War-Time Prohibition Act, treats the war as continuing and demobilization as incomplete; that the Senate, on November 19, 1919, refused to ratify the Treaty of Peace with Germany;[1] that under the provisions of the Lever Act the President resumed, on October 30, 1919, the control of the fuel supply which he had relinquished partly on January 31, 1919, and partly on February 20, 1919;[2] that he is still operating the railroads of which control had been taken as a war measure; and that on November 18, 1919, he vetoed Senate Bill 641, because it diminished that control;[3] that pursuant to the Act of March 4, 1919, c. 125, 40 Stat. 1348, he continues to control, by means of the Food Administration Grain Corporation, the supply of grain and wheat flour; that through the United States Sugar Equalization Board, Inc., he still regulates the price of sugar; that in his message to Congress on December 2, 1919, he urgently recommended the further extension for six months of the powers of the Food Administration; that as commander-in-chief he still keeps a part of the army in enemy occupied territory and another part in Siberia; and that he has refrained from issuing the proclamation declaring the termination of demobilization for which this act provides.

The present contention may be stated thus: That notwithstanding the act was a proper exercise of the war power of Congress at the date of its approval and contains its own period of limitation—"until the conclusion of the present war and thereafter until the termination of demob-

[1] Congressional Record, Nov. 19, 1919, p. 9321.

[2] United States Bulletin, Nov. 10, 1919, p. 9; U. S. Official Bulletin, Jan. 18, 1919, p. 1.

[3] Congressional Record, Nov. 19, 1919, p. 9323.

ilization,"—the progress of events since that time had produced so great a change of conditions and there now is so clearly a want of necessity for conserving the man power of the nation, for increased efficiency in the production of arms, munitions and supplies, that the prohibition of the sale of distilled spirits for beverage purposes can no longer be enforced, because it would be beyond the constitutional authority of Congress in the exercise of the war power to impose such a prohibition under present circumstances. Assuming that the implied power to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace (*United States* v. *Anderson*, 9 Wall. 56, 70; *The Protector*, 12 Wall. 700, 702; *Hijo* v. *United States*, 194 U. S. 315, 323,) but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in *Stewart* v. *Kahn*, 11 Wall. 493, 507, "The power is not limited to victories in the field and the dispersion of the [insurgent] forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress. *United States* v. *Des Moines Navigation Co.*, 142 U. S. 510, 544; *McCray* v. *United States*, 195 U. S. 27, 53–59; *Weber* v. *Freed*, 239 U. S. 325, 330; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184. Nor may the court enquire into the wisdom of the legislation. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Gibbons* v. *Ogden*, 9 Wheat. 1, 197; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 25; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357. Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a

power is not an argument against its existence. *Lottery Case*, 188 U. S. 321, 363.

That a statute valid when enacted may cease to have validity owing to a change of circumstances has been recognized, with respect to state laws, in several rate cases. *Minnesota Rate Cases*, 230 U. S. 352, 473; *Missouri Rate Cases*, 230 U. S. 474, 508; *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 268. That the doctrine is applicable to acts of Congress was conceded *arguendo* in *Perrin* v. *United States*, 232 U. S. 478, 486; and *Johnson* v. *Gearlds*, 234 U. S. 422, 446. In each of these cases Congress had prohibited the introduction of liquor into lands inhabited by Indians, without specified limit of time; in one case the prohibition was in terms perpetual; in the other it was to continue "until otherwise provided by Congress." In both cases it was contended that the constitutional power of Congress over the subject-matter necessarily was limited to what was reasonably essential to the protection of the Indians. In the *Perrin Case* it was contended (p. 482) that the power was transcended because the prohibition embraced territory greatly in excess of what the situation reasonably required, and because its operation was not confined to a designated period reasonable in duration but apparently was intended to be perpetual. In *Johnson* v. *Gearlds* the contention was (p. 442) that a prohibition originally valid had become obsolete by reason of changes in the character of the territory included in it and the status of the Indians therein. In both cases the court, while assuming that since the power to impose a prohibition of this character was incident to the presence of the Indians and their status as wards of the Government and did not extend beyond what was reasonably essential to their protection, it followed that a prohibition valid in the beginning would become inoperative when in regular course the Indians affected were completely emancipated from federal guardianship and con-

trol, nevertheless held that the courts would not be justified in declaring that the restriction either was originally invalid or had become obsolete if any considerable number of Indians remained wards of the Government within the prohibited territory. In each case the decision rested upon the ground that the question what was reasonably essential to the protection of the Indians was one primarily for the consideration of the law-making body; that Congress was invested with a wide discretion; and that its action, unless purely arbitrary, must be accepted and given full effect by the courts.

Conceding, then, for the purposes of the present case, that the question of the continued validity of the war prohibition act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid.

Third: Was the act repealed by the adoption of the Eighteenth Amendment? By the express terms of the

Amendment the prohibition thereby imposed becomes effective after one year from its ratification. Ratification was proclaimed on January 29, 1919, 40 Stat. 1941. The contention is that, as the Amendment became on its adoption an integral part of the Constitution, its implications are as binding as its language; that in postponing the effective date of the prohibition the Amendment impliedly guaranteed to manufacturers and dealers in intoxicating liquors a year of grace; and that not only was Congress prohibited thereby from enacting meanwhile new prohibitory legislation, but also that the then existing restriction imposed by the War-Time Prohibition Act was removed. See *Narragansett Brewing Co.* v. *Baker and O'Shaunessy*, U. S. D. Ct. R. I., November 12, 1919.

The Eighteenth Amendment with its implications, if any, is binding not only in times of peace, but in war. If there be found by implication a denial to Congress of the right to forbid before its effective date any prohibition of the liquor traffic, that denial must have been operative immediately upon the adoption of the Amendment, although at that time demobilization of the army and the navy was far from complete. If the Amendment effected such a denial of power then it would have done so equally had hostilities continued flagrant or been renewed. Furthermore, the Amendment is binding alike upon the United States and the individual States. If it guarantees a year of immunity from interference by the Federal Government with the liquor traffic, even to the extent of abrogating restrictions existing at the time of its adoption, it is difficult to see why the guaranty does not extend also to immunity from interference by the individual States, with like results also as to then existing state legislation. The contention is clearly unsound.

Fourth: Did the prohibition imposed by the act expire by limitation before the commencement of these suits? The period therein prescribed is "until the conclusion of

the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." It is contended both that the war has been concluded and that the demobilization has terminated.

In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace. *Hijo* v. *United States*, 194 U. S. 315, 323; *The Protector*, 12 Wall. 700, 702; *United States* v. *Anderson*, 9 Wall. 56, 70. From the fact that other statutes concerning war activities contain each a specific provision for determining when it shall cease to be operative,[1] and from the alleged absence of

[1] The provisions fixing the date of expiration of the several war acts are as follows:

(Aircraft Act being c. XVI, of the Army Appropriation Act of July 9, 1918, c. 143, 40 Stat. 889.) "Within one year from the signing of a treaty of peace with the Imperial German Government."

(Departmental Reorganization Act of May 20, 1918, c. 78, 40 Stat. 556.) "That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace."

(Emergency Shipping Fund Act of June 15, 1917, c. 29, 40 Stat. 182, as amended by the Act of April 22, 1918, c. 62, 40 Stat. 535, and by the Act of November 4, 1918, c. 201, 40 Stat. 1020.) "All authority . . . shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire."

(Charter Rate and Requisition Act of July 18, 1918, c. 157, 40 Stat. 913.) "All power and authority . . . shall cease upon the proclamation of the final treaty of peace between the United States and the Imperial German Government."

(Railroad Control Act of March 21, 1918, c. 25, 40 Stat. 451, 458.) ". . . Federal control . . . shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace."

(Food Control Act of August 10, 1917, c. 53, 40 Stat. 276, 283.) "Sec. 24. That the provisions of this Act shall cease to be in effect

such a provision here, it is argued that the term "conclusion of the war" should not be given its ordinary legal meaning; that instead it should be construed as the time when actual hostilities ceased; or when the treaty of peace was signed at Versailles, on June 28, 1919, by the American and German representatives; or, more generally, when the actual war emergencies ceased by reason of our complete victory and the disarmament of the enemy coupled with the demobilization of our army and the closing of war activities; or when the declared purpose of the act of "conserving the man power of the Nation, and to increase

---

when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

(Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, 412.) "The words 'end of the war' as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act."

(Soldiers' and Sailors' Civil Relief Act of March 8, 1918, c. 20, 40 Stat. 440, at 441 and 449.) "(5) The term 'termination of the war' as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President. . . . Sec. 603. That this Act shall remain in force until the termination of the war, and for six months thereafter."

(Saulsbury Resolution of May 31, 1918, c. 90, 40 Stat. 593.) "That until a treaty of peace shall have been definitely concluded between the United States and the Imperial German Government, unless in the meantime otherwise provided by Congress . . ."

(Wheat Price Guarantee Act of March 4, 1919, c. 125, § 11, 40 Stat. 1348, 1353.) "That the provisions of this Act shall cease to be in effect whenever the President shall find that the emergency growing out of the war with Germany has passed and that the further execution of the provisions of this Act is no longer necessary for its purposes, the date of which termination shall be ascertained and proclaimed by the President; but the date when this Act shall cease to be in effect shall not be later than the first day of June, nineteen hundred and twenty."

efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy" shall have been fully satisfied. But there is nothing in the words used to justify such a construction. "Conclusion of the war" clearly did not mean cessation of hostilities; because the act was approved ten days after hostilities had ceased upon the signing of the armistice. Nor may we assume that Congress intended by the phrase to designate the date when the treaty of peace should be signed at Versailles or elsewhere by German and American representatives, since by the Constitution a treaty is only a proposal until approved by the Senate. Furthermore, to construe "conclusion of the war" as meaning the actual termination of war activities, would leave wholly uncertain the date when the act would cease to be operative; whereas Congress evinced here, as in other war statutes, a clear purpose that the date of expiration should be definitely fixed. The reason why this was not directed to be done by a proclamation of peace is made clear by the use of the word "thereafter." It was expected that the "conclusion of the war" would precede the termination of demobilization. Congress, therefore, provided that the time when the act ceased to be operative should be fixed by the President's ascertaining and proclaiming the date when demobilization had terminated.

It is insisted that he has done so. The contention does violence to both the language and the evident purpose of the provision. The "date of which shall be determined and proclaimed by the President" is a phrase so definite as to leave no room for construction. This requirement cannot be satisfied by passing references in messages to Congress, nor by newspaper interviews with high officers of the army or with officials of the War Department. When the President mentioned in his veto message the "demobilization of the army and navy" the words were doubtless used in a popular sense,

just as he had declared to Congress, on the occasion of the signing of the armistice: "The war thus comes to an end." If he had believed on October 28, 1919, that demobilization had, in an exact sense, terminated, he would doubtless have issued then a proclamation to that effect; for he had manifested a strong conviction that restriction upon the sale of liquor should end. Only by such proclamation could the purpose of Congress be attained; and the serious consequences attending uncertainty be obviated. But in fact demobilization had not terminated at the time of the veto of the Act of October 28, 1919; or at the time these suits were begun; and, for aught that appears, it has not yet terminated. The Report of the Secretary of War made to the President under date of November 11, 1919 (and transmitted to Congress on December 1), in describing the progress of demobilization, shows (p. 17) that during the preceding ten days (November 1–10) 2,018 officers and 10,266 enlisted men had been discharged; the rate of discharge being substantially the same as during the month of October—in which 8,690 officers and 33,000 enlisted men were discharged.

The War-Time Prohibition Act being thus valid and still in force, the decree in Number 589 is reversed and the case is remanded to the District Court with directions to dismiss the bill; and the decree in Number 602 is affirmed.

No. 589. *Reversed.*
No. 602. *Affirmed.*

Counsel for Defendant in Error.

SULLIVAN *v.* CITY OF SHREVEPORT.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 89. Submitted November 17, 1919.—Decided December 15, 1919.

The enforcement of a city ordinance requiring each street car to be operated by a motor-man and a conductor, as against a company seeking to substitute, at less cost, cars run each by one man with the aid of automatic safety and other operating devices, cannot be declared an arbitrary and unreasonable exercise of police power in the absence of a clear demonstration that the substitutes, thus operated, would prove as safe and convenient for the public as cars operated by two men. P. 171.

142 Louisiana, 573, affirmed.

THE case is stated in the opinion.

Mr. E. H. Randolph, for plaintiff in error, contended, in part, that, inasmuch as the court below found the new car, operated by one man only, quite as safe as the car in use when the ordinance was passed, when operated by two, the imposition of the cost of a second man on the new car, upon the ground that, in the opinion of the city council, even more safety and convenience would result, was nothing less than a burden on the business of the company taking its property without due process. When the ordinance was passed the city council had no knowledge of such improvements and of course no intention to apply the ordinance to them. And the council does not require now that the new cars be substituted for the old, but permits the operation of either kind, provided two men are employed on each.

Mr. James E. Smitherman for defendant in error. *Mr. B. F. Roberts* and *Mr. John F. Phillips* were on the brief.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1907 the City of Shreveport, Louisiana, passed an ordinance requiring that each street car used in its streets should be operated during designated hours by two persons, a conductor and a motor-man, and providing penalties for its violation.

The company with street railway lines in the city complied with the requirement until in June, 1917, when it procured some cars equipped for operation by one man, and attempted to use them on its "Allendale Line," with only a motor-man in charge. Thereupon the plaintiff in error, hereinafter designated the defendant, who was superintendent of the railway company, was arrested for violation of the ordinance.

He defended by filing a motion to quash the affidavit for arrest, on the ground that the ordinance was unreasonable and arbitrary and that the enforcement of it would deprive the company of its property without due process of law and without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

The motion to quash was "referred to the merits," a full trial was had, the motion was overruled and the defendant, found guilty, was sentenced to pay a fine. The judgment of the Supreme Court of Louisiana affirming this judgment is before us for review on writ of error.

The defense introduced evidence tending to show that the new type of car used was so equipped that it could be operated by one motor-man with safety to the public as great as was secured by cars theretofore used when operated by two men. The car, designated in the record as "a one-man car," is described as so arranged that passengers enter and leave it only at the front end, where the motor-man is placed. It is so equipped electrically that the motor-man must remain in an assigned

position necessary for the discharge of his duties and must perform "some conscious act" at all times when the car is in motion. If he fails in this "conscious act" the current is automatically cut off, the brakes are applied in emergency, the rail is sanded and the door of the car is unlocked, and is so adjusted that opening it lowers the step for use. There is testimony tending to show economy in the use of such cars, not only in the saving of the wages of one man but also in immunity from accident.

It is apparent from this description derived from the record that it presents for decision the question: Whether the ordinance of 1907, confessedly a valid exercise of the police power when it was passed, was rendered arbitrary and invalid by the development of a car which it is claimed can be operated by one man with as much safety to the traveling public as, and with less cost than, was secured by the two-man car, in use at the time the ordinance was passed and which was contemplated by it.

It is not necessary to decide in this case whether a valid regulating ordinance can be rendered invalid by a change of conditions which render it arbitrary and confiscatory (*Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 269; *Minnesota Rate Cases*, 230 U. S. 352, 473; *Johnson* v. *Gearlds*, 234 U. S. 422, 426; *Perrin* v. *United States*, 232 U. S. 478, 481; *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 95, 97, and *Castle* v. *Mason*, 91 Ohio St. 296, 303), for the claim that such a change of condition had arisen in the case is stoutly disputed by the city authorities.

While on the record before us it might be plausibly contended that when all the appliances on the "one-man car" work as it was intended they should, it could be operated with a high degree of safety in streets where the traffic is not heavy, yet there is evidence that in the short period of the operation of such cars in Shreveport,

the brakes on one of them failed to operate on a descending grade, resulting in the car getting out of control under conditions, which, except for good fortune, might have resulted in serious accident. A passenger testified to receiving slight injuries when entering a car due to the premature closing of the door, and he attributed the accident to the presence of other persons between him and the motor-man whose duty it was to close the door. It was in evidence that the line on which these cars were placed, while in general one of light travel, extended into the principal business section of a city of 40,000 inhabitants; that it had at least one steep grade in it, and that at times the travel was heavy and the cars crowded.

It is obvious, and not disputed, that such cars are better adapted to light than to heavy travel, for all passengers must enter and leave at one door, and one man must take fares, make change, issue transfers, answer questions and also remain in position to start the car promptly. So occupied and placed, plainly this one man could not render such assistance as is often necessary to infirm or crippled or very young passengers, or to those encumbered with baggage or bundles, and it would not be difficult to suggest emergencies of storm or accident in which a second man might be of first importance to the safety and comfort of passengers.

These "one-man cars" at the time of trial were, as yet, experimental, and enough has been said to show that in each community the operation of street cars presents such special problems,—due to the extent and character of the travel, to grades and other conditions,—that with peculiar appropriateness they have been committed by the law primarily to the disposition of the local authorities, whose determination will not be disturbed by the courts, except in cases in which the power has been exercised in a manner clearly arbitrary and oppressive. The rule is, "that every

intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." *Dobbins* v. *Los Angeles*, 195 U. S. 223, 235. Since the record, as we have thus discussed it, fails to show a clear case of arbitrary conduct on the part of the local authorities, the judgment of the Supreme Court of Louisiana is

Affirmed.

HARDIN-WYANDOT LIGHTING COMPANY *v.* VILLAGE OF UPPER SANDUSKY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 10. Argued October 13, 1919.—Decided December 15, 1919.

The law of Ohio providing that the mode of use of village streets by electric light and power companies should be determined by the probate court if a company and village authorities could not agree, was amended so as to leave the control of the matter with the municipal authorities alone and to forbid the erection of poles and wires without their consent. *Held*, that the amendment was within the police power; and that a company whose plant was constructed and operated before the amendment under authority of a village ordinance granting it the right to use the streets, but which, without the consent of the village, after the amendment was passed, removed its poles and wires used for street lighting, had no ground to complain that its franchise contract was impaired by the amendment, and its property taken without due process, because under it the poles and wires thus removed could not be replaced, nor the system otherwise extended in the streets, without first obtaining the consent of the village authorities. P. 176.

The validity of an ordinance purporting to repeal an earlier franchise ordinance cannot be considered under the contract clause in a case from a state court decided independently of the later ordinance and without giving it any effect. P. 178.

93 Ohio St. 428, affirmed.

THE case is stated in the opinion.

Mr. H. T. Mathers, with whom *Mr. Thomas M. Kirby* was on the briefs, for plaintiff in error.

Mr. W. R. Hare for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1889 the Council of the Village of Upper Sandusky, Ohio, enacted an ordinance, authorizing an electric light and power company, and its assigns, to use the streets of the village for the purpose of erecting and operating electric light wires for the distribution of electric light and power. The ordinance declared that: "The privilege hereby granted" should entitle the company "to manufacture, sell and distribute light and power by means of electricity to the citizens of Upper Sandusky, Ohio, for public and private uses."

The grantee, accepting the franchise, constructed a generating plant, erected poles, wires and lamps, and until the year 1912 lighted the streets of the village and sold current to private consumers. In that year the plant and franchise were purchased by the plaintiff in error, hereinafter referred to as the Company, which continued to light the streets until the contract which its predecessor had with the village expired. Upon the expiration of that contract the parties entered upon negotiations for a new one, but, failing to agree, the company in October, 1913, removed all of its street lights and took down its poles and

wires used for such lighting, but continued its commercial business.

In about a year after the company ceased to light the village streets this action was commenced by the filing of a petition by the village which, averring the facts we have stated, further alleged that prior to the removal of the street lighting appliances the village had submitted to the company a schedule of fair prices which it was able and willing to pay for street lighting and which it was willing to authorize the company to charge for commercial lighting and for power, but this was rejected; that by dismantling its street lighting system the company had rendered itself wholly unable to furnish any light whatever for the purpose of public lighting; that, without the consent of the village, it was threatening to place new poles and wires in the streets "to further advance its private interests;" that it had forfeited all rights in the streets, and that it was not possible for the village and company to agree upon terms for future lighting.

The prayer was that the company be enjoined from erecting additional poles, that its franchise be declared forfeited and that it be required to remove all of its equipment from the public streets.

The trial court dismissed the petition, but on appeal the Court of Appeals enjoined the company from erecting poles, wires or lamps in the streets "until the consent of said village shall have been obtained." This decree was affirmed by the Supreme Court of Ohio in the judgment we are reviewing.

In its opinion the Supreme Court held that there was no bill of exceptions or properly authenticated finding of facts before it and that therefore the case must be decided upon the assumption that all of the allegations of the petition were sustained by the evidence; that at the time the ordinance of 1889 was passed and accepted, the applicable state statute provided that the "mode" of use of

the streets "shall be such as shall be agreed upon between the municipal authorities of the . . . village and the company; and, if they cannot agree," "the probate court of the county . . . shall direct" what the mode of use shall be, Rev. Stats. (1880), § 3471a; 84 O. L. 7, and Rev. Stats., § 3461; and that by an act of the legislature passed in 1896, seven years after the date of the village ordinance, the state law was amended into the form which continued to the time of trial, providing that "in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, . . . without the consent of such municipality." (92 O. L. 204.)

This amended law of 1896 is made the basis of the only contention in the case which is sufficiently substantial for special notice, viz., that by it the obligation was impaired of the contract which the company had with the State and village, arising from its acceptance of the ordinance of 1889, and that it was thereby deprived of its property without due process of law.

As we have seen, when the ordinance of 1889 was passed the statute then in force provided that the "mode" in which the streets could be used for electric lighting and power appliances must be agreed upon between the village and the company, but that if they failed to agree it must be determined by the Probate Court, and the amendment, now claimed to be unconstitutional, consisted simply in giving to the municipality the exclusive control over the erection of any such appliances in the streets instead of the prior qualified control. In this case the original "mode" of use was determined by agreement without action by the Probate Court.

The prayer of the petition was that because of the dismantling of the street lighting plant and of its refusal to

agree to reasonable rates for the future, all rights of the company in the streets should be declared forfeited and that it should be ordered to remove from them all of its constructions, but the decree of the Court of Appeals, affirmed by the Supreme Court, went to the extent, only, of restraining the company from erecting any poles and wires in the streets "until the consent of said village shall have been obtained." There was nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting, when the case was commenced, and that this omission was of deliberate purpose appears from the fact that both courts held that the state statutes in force at the time the grant became effective, and the form of the proceeding, were such, that a decree annulling such rights as the company had then retained in the streets could not properly be entered in the cause. On this point the Supreme Court said:

"In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law."

From this state of the record we conclude that the state Supreme Court did not intend to deal with the right of the company to maintain, repair or replace such poles and wires as it was using for commercial lighting when the case was commenced, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction "until the consent of said village shall have been obtained," and so restrained its judgment will be affirmed, based, as it is, upon the statute of 1896, which the court

holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the State.

This act was a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the State, and all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the "mode" of using the streets.

We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation. Any modification of its rights which the company may suffer from this law passed in a reasonable exercise of the police power does not constitute an impairing of the obligation of its contract with the State or village and is not a taking of its property without due process of law within the meaning of the constitutional prohibition. *Northern Pacific Ry. Co.* v. *Puget Sound & Willapa Harbor Ry. Co.*, 250 U. S. 332, and cases cited.

Of the contention that if an ordinance passed in 1915 by the village, repealing the ordinance of 1889, were given effect it would result in impairing the obligation of the contract, it is enough to say that it first appears in a supplemental answer filed in the Court of Appeals, and the case, as we have seen, was disposed of on the assumption that all of the allegations of the petition were sustained by the evidence. No effect whatever was given to that ordinance, either by the Court of Appeals or by the Su-

preme Court, but each reached the conclusion we are reviewing independently of, and without reference to it. *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 639; *Long Sault Development Co.* v. *Call*, 242 U. S. 272, 277.

It results that, since the change of law complained of did not impair any federal constitutional right of the plaintiff in error, the judgment of the Supreme Court of Ohio, restrained to the scope of its opinion, as we have interpreted it, must be

Affirmed.

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

GODCHAUX COMPANY, INCORPORATED, *v.* ESTOPINAL, SHERIFF OF THE PARISH OF ST. BERNARD, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 101. Argued November 17, 18, 1919.—Decided December 22, 1919.

A writ of error will not lie under Jud. Code, § 237, as amended, to review a judgment of a state court upon the ground that it erroneously sustained an amendment to the state constitution, where the validity of such amendment under the Federal Constitution was first drawn in question by a petition for rehearing which was not entertained. P. 180.

Writ of error to review 142 Louisiana, 812, dismissed.

THE case is stated in the opinion.

Mr. R. C. Milling, with whom *Mr. R. E. Milling* was on the briefs, for plaintiff in error.

Mr. William Winans Wall, with whom *Mr. N. H. Nunez* was on the brief, for defendants in error.

Mr. Justice McReynolds delivered the opinion of the court.

By petition filed in the District Court, St. Bernard Parish, plaintiff in error sought to restrain collection of an acreage tax assessed against its lands not susceptible of gravity drainage. Invalidity of the tax was alleged upon the ground that no statute of Louisiana authorized it and also because its enforcement would produce practical confiscation and take property without due process of law contrary to the Fourteenth Amendment. Answering, defendant in error asked dismissal of the petition, claiming the tax was properly assessed and also that an amendment to Article 281 of the Louisiana Constitution, adopted November, 1914, deprived the court of jurisdiction to entertain the contest. The trial court exercised jurisdiction, sustained the tax and dismissed the petition. Upon a broad appeal the Supreme Court, after declaring that the constitutional amendment deprived the courts of the State of jurisdiction over the controversy, affirmed the judgment of the trial court. 142 Louisiana, 812.

The record fails to disclose that plaintiff in error at any time or in any way challenged the validity of the state constitutional amendment because of conflict with the Federal Constitution until it applied for a rehearing in the Supreme Court. That application was refused without more. Here the sole error assigned is predicated upon such supposed conflict; and, unless that point was properly raised below, a writ of error cannot bring the cause before us.

Such a writ only lies to review "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit 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 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." Judicial Code, § 237; Act September 6, 1916, c. 448, 39 Stat. 726.

The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308; *St. Louis & San Francisco R. R. Co.* v. *Shepherd*, 240 U. S. 240; *Missouri Pacific Ry. Co.* v. *Taber*, 244 U. S. 200.

The writ of error is

Dismissed.

THE CHIEF JUSTICE concurs in the result, solely on the ground that as the court below exerted jurisdiction and decided the cause—by the judgment to which the writ of error is directed—the contention that a federal right was violated by the refusal of the court to take jurisdiction is too unsubstantial and frivolous to give rise to a federal question.

BRANSON, SHERIFF AND COLLECTOR OF CRAWFORD COUNTY, ET AL. *v.* BUSH, RECEIVER OF THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

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

No. 82. Argued November 14, 1919.—Decided December 22, 1919.

A tax law of Arkansas (Acts 1911, p. 233), providing for the valuation of all the property of railroad companies, tangible and intangible, with assessment of buildings and side tracks, as real estate, in the town or district where located, and of main line, also as real estate, to be apportioned according to actual mileage in each town or district, declares that the franchises of such companies, "other than the right to be a corporation," are property and "shall be considered" in assessing their property. *Held*, that this does not necessarily import an addition of franchise value, viewed as personal property, to the assessment of tracks and buildings in a particular district, but requires these to be assessed at their value as realty but having regard to their use as part of a railroad; and that a special improvement tax, based on an assessment presumably so made, can not be declared invalid upon the ground of being so unequal, compared with assessments on other real estate of the district, as to violate the equal protection clause of the Fourteenth Amendment. P. 185.

A legislative determination that lands will be benefited by a public improvement for which a special tax is authorized is conclusive, unless it is arbitrary and wholly unwarranted. P. 189.

A declaration by a state legislature that real estate of a railroad company, consisting of main and side tracks and buildings in a road improvement district, will be benefited by a road improvement, is not arbitrary or unwarranted where there is reasonable ground for concluding that the railroad's traffic will thereby be increased. P. 190.

248 Fed. Rep. 377, reversed.

THE case is stated in the opinion.

Mr. G. B. Rose, with whom *Mr. W. E. Hemingway, Mr. D. H. Cantrell* and *Mr. J. F. Loughborough* were on the briefs, for appellants.

Mr. Thomas B. Pryor, with whom *Mr. Edward J. White* was on the briefs, for appellee.

Mr. Justice Clarke delivered the opinion of the court.

By act of the General Assembly the State of Arkansas created "Crawford County Road Improvement District No. 2," a body corporate, and prescribed its boundaries. Special and Private Acts of Arkansas, 1911, p. 642.

To pay the cost of the road improvement contemplated the act provided that it should be made a charge upon all of the real property, railroads and tramroads in the district. Bonds were sold and the road completed before this suit was commenced to enjoin the collection of taxes charged against the property of the railway company, of which the appellee, hereinafter designated the Company, was receiver. The tax objected to was imposed upon the assessed value of the main track, sidetracks, rolling stock, buildings and material of the Company apportioned to the road district under a state law for the valuation of railroad property, and in the bill it is alleged to be invalid because the assessment conflicts with many provisions of the Constitutions of the United States and of Arkansas. The rate was the same for all real property in the district.

The District Court permanently enjoined the tax to the extent that it was imposed on personal property—the rolling stock and materials of the Company. From this part of the decree no appeal was taken and thereafter all question as to the invalidity of the assessment because including rolling stock and materials disappeared from the case. But, for want of equity, the bill was dismissed so

far as applicable to the real estate "designated in the bill of complaint as main track, side track, and buildings." On appeal by the Company from this part of the decree, the Circuit Court of Appeals reversed the decree of the District Court and enjoined the collection of the tax on the real estate on two grounds:

(1) Because the including of the franchise and other intangible property of the Company in the assessment results in "a higher rate of taxation" on the property of the railway company than on the other property in the district, and

(2) Because the evidence fails to show that the Company would derive any benefit from the improvement of the road.

In this court the appellants, hereinafter referred to as the Road District, assign as errors these two holdings of the Circuit Court of Appeals, and we shall consider them in the order stated.

All property of the railway company in the State was assessed by a State Tax Commission under an act, the validity of which is not assailed, providing:

"The franchises (other than the right to be a corporation) of all railroads . . . are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations." Acts of Arkansas, 1911, p. 233, § 2.

The act also required the Commission to "determine the total value of the entire property of the corporation, tangible and intangible"; that the buildings and sidetracks should be assessed as real estate in the town or district where located, but that the main track, also to be assessed as real estate, should be apportioned among the several towns and districts through which the road ran according to the "actual mileage in each town and district."

The Circuit Court of Appeals did not hold either the railroad valuation or the district road improvement law unconstitutional, both being types of laws often upheld by this court (*State Railroad Tax Cases*, 92 U. S. 575; *Cleveland, etc., Ry. Co.* v. *Backus*, 154 U. S. 439, and *Houck* v. *Little River Drainage District*, 239 U. S. 254), but the first ground of its decision was, only, that the assessment of the main track under the former law, as applied to the case of taxation for benefits provided for by the latter, resulted in unequal taxation to an extent amounting to a denial of the equal protection of the laws.

The court was carried to its conclusion by this process: The act creating the Road District, and the general law applicable to local assessments in proportion to benefits, both required that only real estate should be assessed to pay for the improvement here involved; only the real estate of the other property owners of the District was assessed, and therefore when the franchises, personalty, of the railroad company were "considered" in making the assessment complained of, the Company was taxed a "higher rate," a greater amount, than other property owners and by such discrimination was denied the equal protection of the laws.

It is argued by the Road District that this conclusion is erroneous, for the reasons following:

The assessment law, which we have quoted, provides that the franchises of railroad companies ("other than the right to be a corporation") " shall be considered " by officials when assessing their property.

It is to be noted that this law does not provide for the assessment of the franchises of railroad companies separately as personal, or intangible, property, as the laws of some States require, but only declares that they are "property" which "shall be *considered* by the assessing officers when assessing the property of such corporations" and they are not valued separately in the

assessment complained of, as it is itemized in the bill of complaint.

It is not easy to define just what is meant by the "franchise" of a railroad company "other than the right to be a corporation" and the record does not attempt a definition. *Morgan* v. *Louisiana*, 93 U. S. 217, 223. The record is also silent as to what, if any, value was placed upon the franchises of the Company here involved by the State Tax Commission, and as to what extent, if at all, they were "considered" in arriving at the assessment objected to, and therefore, it is contended, that the conclusion of the Circuit Court of Appeals that personal property value was included in the assessment of the real estate within the District has no foundation on which to rest, other than the assumption that the Tax Commission conformed to the law and "considered" the franchises when assessing the real estate and that this necessarily resulted, in fact, if not in form, in such inclusion—an unusually meager basis surely for invalidating a tax of the familiar character of this before us.

If, however, the distinction sometimes taken between the "essential properties of corporate existence" and the franchises of a corporation (*Memphis & Little Rock R. R. Co.* v. *Railroad Commissioner*, 112 U. S. 609, 619), be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the State Commission in making the assessment here involved, this would result, not in adding personal property value to the value of the real estate of the Company in the district, but simply in determining what the value of the real property was—its right of way, tracks and buildings—having regard to the use which it made of it as an instrumentality for earning money in the conduct of railroad operations. This at most is no more than giving to the real property a value greater as a part of a railroad unit and a going concern

than it would have if considered only as a quantity of land, buildings and tracks.

This is the method of assessing railroad property often approved by this court, specifically in *Cleveland, etc., Ry. Co.* v. *Backus*, 154 U. S. 439, 445, saying:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another."

And long experience has confirmed the statement by Mr. Justice Miller in *State Railroad Tax Cases*, 92 U. S. 575, 608, that: "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." And see *Kentucky Railroad Tax Cases*, 115 U. S. 321, in which, also, the contention is disposed of that the railroad track should be valued by the same officials and on the same basis of acreage as farm lands adjacent to it.

Thus, the assessment complained of was made under valid laws and in a manner approved and customary in arriving at the value of that part of railroad tracks

situate in a State, county or district. So far as this record shows, the assessment, modified by the part of the decree of the District Court not appealed from, is not a composite of real and personal property values, but is the ascertained value of the real estate—the tracks and buildings—of the Company within the taxing district, enhanced, no doubt, by the special use made of it, but still its value as a part of the railroad unit, resulting from the inherent nature of the business in which it is employed, a value which will not be resolved into its constituent elements for the purpose of defeating contribution to a public improvement. No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employees of the Company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes which does not fall within the scope of the Fourteenth Amendment, which "was not intended to compel the State to adopt an iron rule of equal taxation." *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237. And see *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 398; *Detroit* v. *Parker*, 181 U. S. 399.

Thus, the basis for assuming that the franchises of the railroad company were added as a separate personal property value to the assessment of the real property of the Company becomes, upon this record, much too unsubstantial to justify invalidating the tax involved if it be otherwise valid, and the first assignment of error must therefore be sustained.

But the holding of the Circuit Court of Appeals that

"the evidence fails to show that the railroad company derives any benefit from the road" is also assigned as error.

In the act of the General Assembly creating this Road District it is provided:

"Section 5. It is ascertained and hereby declared that all real property within said district, including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as appropriated in the county assessment of each piece of property within the district, for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized; . . ." Special and Private Acts of Arkansas, 1911, 642, 645.

Where, in laws creating districts for local improvements and taxation, there is such a legislative declaration as this, as to what lands within the district will be benefited by the improvement, the law with respect to the extent to which such determination may be reviewed by the courts is so well settled, and has so lately been reëxamined and restated by this court, that extended discussion of the subject is not justified.

In *Spencer* v. *Merchant*, 125 U. S. 345,—a decision often cited and approved—it is decided that if the proposed improvement is one which the State had authority to make and pay for by assessments on property benefited, the legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited by it; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard on the question whether their lands have been benefited or not.

The subject was carefully reëxamined and the law

restated in cases so recent as *Wagner* v. *Baltimore*, 239 U. S. 207, and *Houck* v. *Little River Drainage District*, 239 U. S. 254, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the Fourteenth Amendment only where the legislative action is "arbitrary and wholly unwarranted," "a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property." And see *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63, 69; *Hancock* v. *Muskogee*, 250 U. S. 454, 457; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 250.

The decisions relied upon by the Company, *Norwood* v. *Baker*, 172 U. S. 269; *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, are not in conflict with the rule but plainly fall within, and are illustrations of, the qualification of it.

An application of this rule to the case before us renders not difficult the decision of the second assignment of error.

The road to be improved was "a little less than three and a half miles in length" and extended from Alma, a considerable village, on the north, southerly to an east and west road which had its western terminus at the City of Van Buren, eight miles west of the junction of the two roads. It was the principal road to and from Alma, the travel on it being greater than on all the other roads which served that village combined. In wet seasons the road was practically impassable for wagons, sometimes for three or four months together. People living south of the east and west road, who made Van Buren their trading point in wet weather, after the road was improved traded exclusively at Alma, it being four and a half miles nearer for many of them. The railway of the appellee was the only

one at Alma, but at Van Buren there was a competing road, with a line two hundred and fifty miles shorter than that of the appellee to St. Louis, the chief market for the staples of the region.

On the question of benefits which would come to the railroad property from the construction of the road, the appellee receiver called four witnesses, three of them engineers and one a superintendent of the Company. Two of these were familiar with the location of the road and the other two testified that they knew of its location in a general way. All four testified in general terms that the road was not and never would be of any benefit to the railroad. It is significant that no traffic man was called and that no evidence was introduced showing the extent of business done at Alma before and after the improvement of the road.

For the District, three witnesses were called, one a doctor, one a merchant and one a long-time resident of the village of Alma. Each of these testified that, in his opinion, the road, by making the village of Alma more accessible, particularly in the wet seasons of the year, and by developing the adjacent country, would increase the business of the railway company and would divert business from Van Buren where there was a competing railroad, to Alma where appellee had the only line. It was in evidence also that after the act was passed, but before the road was completed, a large gas producing district was discovered not far south of the southern terminus of the improved road which was tributary to it.

To this must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads.

This discussion of the record makes it clear that it is impossible to characterize as arbitrary, capricious or confiscatory the action of the General Assembly, in de-

claring that the property of the railroad company within the District would be benefited by the construction of the contemplated road improvement, but, on the contrary, it makes it apparent that the case is one so fully within the general rule that the holding of the Circuit Court of Appeals that the railroad would not be benefited by the improvement cannot be sustained.

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

Reversed.

MR. JUSTICE MCREYNOLDS dissents.

CITY OF WINCHESTER ET AL. *v.* WINCHESTER WATER WORKS COMPANY.

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

No. 51. Argued October 24, 1919.—Decided January 5, 1920.

A city cannot regulate the rates chargeable by a water company unless authority to do so has been plainly granted by the legislature. P. 193.

Such authority cannot be implied from powers to grant water companies rights of way in the public streets and grounds and to supervise and control their use. P. 194.

Kentucky Statutes, § 3490 (8), (25), (30), (33), considered. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. J. Smith Hays, with whom *Mr. J. Smith Hays, Jr.*, *Mr. John M. Stevenson*, *Mr. James F. Winn* and *Mr. F. H. Haggard* were on the brief, for appellants.

Mr. Beverley R. Jouett, with whom *Mr. James M. Benton* and *Mr. Stephen T. Davis* were on the brief, for appellee.

Mr. Justice Day delivered the opinion of the court.

The Winchester Water Works Company filed its bill in the United States District Court for the Eastern District of Kentucky seeking to enjoin the enforcement of an ordinance establishing maximum rates for water to be furnished the city for public use and to the people thereof for private use. By the bill and amended bill it was charged that the city had no authority to pass or enforce an ordinance fixing such rates, because (1) no power had been granted to the city so to do by the legislature of Kentucky; (2) because the rates established were so low as to be confiscatory in their character, and, consequently, the ordinance was violative of rights secured to the company by the Fourteenth Amendment to the Federal Constitution. An answer was filed, and the court decided the case and made a final decree in favor of the company upon the ground that under the laws of Kentucky the city had no authority to pass or enforce an ordinance fixing rates. The court found it unnecessary to pass upon the question of the confiscatory character of the rates. The bill invoked jurisdiction upon a constitutional ground, and the case was brought here by direct appeal.

It appears that the company had a contract with the city, which expired in 1916, and thereafter the ordinance in controversy was passed. That a city has no power to regulate rates of this character unless it has legislative authority so to do is established, and does not seem to be disputed by the appellants. "Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate the rates to be charged by water, lighting, or

other public service corporations in the absence of express or plain legislative authority to do so." 3 Dillon on Municipal Corporations, 5th ed., § 1325. Nor does such authority arise from the power to regulate the opening and use of streets, nor a grant of the general right to control and regulate the right to erect works and lay pipes in the streets of the city. *State* v. *Missouri & K. Telephone Co.*, 189 Missouri, 83; *Jacksonville* v. *Southern Bell Tel. Co.*, 57 Florida, 374; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49; *Mills* v. *Chicago*, 127 Fed. Rep. 731; *State* v. *Sheboygan*, 111 Wisconsin, 23.

Bearing this general principle in mind, we come to examine the sections of the laws of Kentucky which, it is insisted, give the authority to fix water rates. The appellants insist that this power is expressly conferred in subsection 25 of § 3490 of the Kentucky Statutes, which reads as follows: "The board of council may grant the right of way over the public streets or public grounds of the city to any railroad company or street railroad company, on such conditions as to them may seem proper, and shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant the right of way that may be necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies; and may compel any railroad company to erect and maintain gates at any or all street crossings, and to prevent railways from blocking or obstructing the streets or public ways of the city, and to fix penalties for the violation of these provisions: *Provided*, etc."

Other subsections claimed to be applicable are given in the margin.[1]

[1] Kentucky Statutes:

"3490. The board of council, in addition to other powers herein granted, shall have power within the city: . . .

Examining subsection 25, we are unable to discover any grant of authority to fix the rates for water consumption. It is therein first provided that the council may grant the right-of-way over the public streets to any railroad or street railroad company on such conditions as to the council may seem proper, and shall have a supervising control over the use of the same, and the council is given the right to regulate the speed of cars and signals and fare on street cars, and under like conditions and supervision, the council may grant the right-of-way to water companies among others. This language is certainly very far from that express authority to regulate rates, which is essential in order to enable municipalities so to do. The power to grant a right-of-way to water companies is specifically granted, and this under like conditions and supervision already provided as to railroad and street

"(8) To provide the city with water, or erect, purchase, or lease water-works and maintain same, or to make all necessary contracts with any person or corporation for such purposes; to erect hydrants, cisterns, fire-plugs and pumps in the streets within or beyond the limits of the city. . . .

"(30) The board of council shall have power, by ordinance, to prescribe the punishment, by fine, not exceeding $100, or imprisonment not exceeding 60 days, of any person who shall molest, damage or interfere with any system of water-works laid in said city, or the pipes and mains, hydrants, or any part thereof, and shall have power to punish by ordinance and impose the same penalty as for damaging or molesting any other public property; and may, subject to the rules of any water company which may establish such system, select persons who shall have the right to open, tap or make connection with such pipes or mains in the streets, alleys, or public ways of said city. . . .

"(33) Said city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all of the powers herein granted for the government of the city, and to do all things properly belonging to the police of incorporated cities. Said board of council may change the boundary line of any ward or wards of any city now divided into wards, or hereafter divided into wards, under the provision of this act, not less than sixty days previous to any November election."

railroad companies. This is the full measure of the grant of authority to deal with water companies. The right to regulate fares is in the same sentence which grants authority to deal with water companies, and is specifically limited to fares on street cars.

Nor do we find in other subsections of this section any provision from which the right to fix the rates of water companies can be inferentially deduced.

Counsel call to our attention but one case from Kentucky, whose court of last resort is final authority upon the construction of the statutes, and that is *United Fuel & Gas Co.* v. *Commonwealth*, 159 Kentucky, 34. There the United Fuel and Gas Company held a franchise from a city in Kentucky under an ordinance providing that the grantee of the franchise should furnish for public and private use for the city and its inhabitants natural and artificial gas at a reasonable price not exceeding in any event one dollar per one thousand cubic feet, and that the grantee in delivering gas should not discriminate against the consumers in the city. The company proposed to sell gas to the inhabitants of the city at 20 cents per thousand feet if they would sign a contract for five years, but it charged persons who did not sign such a contract 25 cents a thousand feet. The city council passed an ordinance providing that a gas company should not charge one citizen more than another, and imposed a fine for violation of the ordinance. The city was of the fifth class, and was given authority to make "all other local, police, sanitary and other regulations as do not conflict with general laws." The court held that the act for the government of this city of the fifth class must be read in connection with the statutes conferring power on larger cities, and, that thus construed, there was no grant of authority to the city to impose a fine such as the one in question in the absence of legislative authority so to do. The section from Dillon on Municipal Corpora-

tions, stating that the authority of a municipality to regulate rates to be charged by public service corporations is limited to cases in which express or plain legislative authority has been given was quoted with approval. Cases from other States in which the principle has been approved were also cited.

It is true that this case is not precisely in point, but it contains a recognition by the Court of Appeals of Kentucky of the accepted principle that the right to fix rates must be granted to municipal corporations by a plain expression of legislative authority. It is said, however, that our decision in *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, holds a contrary view. So far as apposite that case dealt with the power of a city of the third class to fix rates for water consumers. As to cities of that class, § 3290 of the Kentucky Statutes specifically provides authority to provide the city and inhabitants thereof with water, light, etc., service by contract or by works of its own, and to make regulations for the management thereof, and to fix and regulate the price to consumers and customers. Dealing with that section, and the authority conferred upon cities of the third class, this court said: "The purpose of section 3290 was to provide the inhabitants of cities of the third class with the services mentioned—water, light, power, heat and telephone. They could be provided by the cities directly or they could be provided by private persons; but whatever way provided, the power was given to regulate the management and fix the rates of the services, and this was but the endowment of a common governmental power."

This language was used in regard to the authority given in express terms to fix rates. It was said of such authority that it was but the endowment of a common governmental power. This is undoubtedly true. But it is equally certain that the governmental power rests with the State, and must be conferred upon the municipality

in an unmistakable way. We find nothing in the *Owensboro Case* which at all conflicts with the construction which we have given to § 3490, applicable to cities of the fourth class to which the City of Winchester belongs.

Finding no error in the judgment of the District Court, the same is

Affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 71. Argued November 12, 1919.—Decided January 5, 1920.

A railroad company which contracted to carry the mail for a compensation fixed by test weighings made after withdrawing empty mail bags, as directed by the Act of May 27, 1908, c. 206, 35 Stat. 412, is not injured by such withdrawal although its purpose was to diminish the pay for mail carriage. P. 205.

Empty mail bags withdrawn from the mails, and which, with other articles of furniture and equipment, are, under the Act of May 27, 1908, *supra*, required to be transmitted by freight or express, are "property of the United States," within the free transportation provisions of the railroad land-grant Acts of February 9, 1853, c. 59, § 4, 10 Stat. 155, and July 28, 1866, c. 300, § 1, 14 Stat. 338. P. 206.

The provision of the land-grant Act of 1853, *supra*, § 6, requiring transportation of the mail over claimant's land-aided road at such price as Congress may by law direct, and that of the Act of July 12, 1876, c. 179, § 13, 19 Stat. 82, fixing the compensation in such cases at 80 per cent. of that generally allowed, do not embrace, as part of the mail, empty mail bags which by the Act of May 27, 1908, are classified with other property of the United States for transportation by freight or express. *Id.*

The Act of June 30, 1882, c. 254, 22 Stat. 120, directing payment on a 50 per cent. basis for army transportation by land-grant railroads, is inapplicable to transportation of empty mail bags. P. 207.

53 Ct. Clms. 45, affirmed.

THE case is stated in the opinion.

Mr. Benjamin Carter for appellant:

The railroad companies obtained public lands for the consideration of serving the Government, by transporting its troops and its property. The contents of the mail bags are not property of the United States, and the mail bags, whether loaded with mails, or going back empty for reloading, are merely appurtenant to the matter carried in them. So, naturally, the loaded bags always had been, and still are, treated as part of the mails and for this reason subject on land-aided railroads to 80 per cent. of the rates of mail pay established, not by the land-grant acts above referred to, but by the Act of July 12, 1876, c. 179, 19 Stat. 78. Inasmuch as every mail bag, while used in the mail service, must sometimes be full and sometimes empty, it would seem to fall reasonably under the operation of this latter act, rather than of the acts which relate to freights and passengers. The acts relating to troops and property have been strictly construed. *United States* v. *Union Pacific R. R. Co.*, 249 U. S. 354; *Alabama Great Southern R. R. Co.* v. *United States*, 49 Ct. Clms. 522; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 50 Ct. Clms. 413; *Louisville & Nashville R. R. Co.* v. *United States*, 54 Ct. Clms. 213.

Fifty per cent. rates for freights, the property of the Government, were made generally applicable by the Act of June 30, 1882, c. 254, 22 Stat. 120, and this provision became permanent by codification in the supplement to the Revised Statutes, 1st Supp. Rev. Stats., 376. It seems safe to say that no member of the Congress which enacted that law (knowing that 80 per cent. of full rates was already established by statute for mail service on land-aided routes) believed that, in regard to the carriers' compensation, any element of the mails would ever, by interpretation, be counted as among its subjects.

Did Congress, in providing by the Act of May 27, 1908, that the empty mail bags should be carried by freight trains, mean, besides saving a difference between mail rates and freight rates, to obtain for the bags on land-aided railroad track a different abatement from full rates than that which had applied to them when carried in the mail cars? To say the least, nothing occurred, in the making of this new law, to indicate any such purpose. If it was the purpose that the empty bags should go on a basis of 50 per cent., as against 80 per cent., of full pay on some lines and should be carried free of charge on other lines, it is remarkable that no such consideration was mentioned.

Not merely do the "free-land grant" lines (five in number) suffer a peculiar hardship from the present practice; they thus suffer for the first time. The Act of July 12, 1876, was always construed as giving to land-aided lines uniformly 80 per cent. of the full mail-pay rates. So for twenty-two years the appellant had received for carrying the mail bags, full or empty, the same rates that were paid on those lines to which, as regards passenger and freight service, 50 per cent. compensation was paid by the Government. This fact is shown by the reports of the Postmaster General, judicially known to this court. It was necessarily known to Congress in 1908. In the absence of any legislative avowal or suggestion of a purpose to do so revolutionary a thing, is it not rash to conclude that Congress finally willed that, while all land-aided railroads should remain on one footing as regards loaded mail bags (and their loads) there should be, with respect to the empty bags, one paid class and one unpaid class of land-aided railroads? Is it not more reasonable to say that, in shifting the empty bags from mail-car service to freight-train service and from statutory mail pay to freight rates of pay, Congress did not intend to put any new qualification into the term "rail-road-companies

whose railroad was constructed . . . by a land-grant made by Congress" which it used in the Act of July 12, 1876?

For purposes of compensation, mail bags always, outgoing and incoming and between times, *i. e.*, for repairs, safe-keeping and for proper distribution among the mail routes, are in the hands of the postal authorities. They are never thought of as having any but a mail use.

The Comptroller of the Treasury (17 Comp. Dec. 900) ruled that shipment of "blue tag" matter by freight trains was lawful provided the amount paid therefor, added to the amount due at mail rates for the weight of matter carried in the mail trains, did not exceed the amount which the Postmaster General was authorized to pay for the total weight of mails carried.

The appellant in accepting a land grant (Act of February 9, 1853), contracted that "compensation" for its mail service should be named provisionally by the Postmaster General, ultimately by Congress. By force of the Act of July 12, 1876, its contract was to carry the mails and to receive 80 per cent. of the statutory rates of compensation. The contract is not carried out if it receives no compensation for carrying the mails; and in applying the law relating to the mails at large the courts would not incline to any interpretation which would have that effect. Is it any more conscionable, when the Act of May 27, 1908, is applied, to say that all compensation should be denied with respect to one essential element of the mails?

If possible, a statute, whatever its terms, will be construed so as to avoid doing a serious injury or producing absurd consequences. Is it not a serious injustice if a railroad company, having contracted to carry the mails for special, reduced rates of compensation, receives no compensation whatever for something that was included in the mails so contracted for and still is inseparable therefrom?

Mr. Assistant Attorney General Frierson for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents questions arising upon a suit brought by the Railway Company in the Court of Claims to recover compensation for the carriage of mail bags under facts found in the Court of Claims in the record sent up for our consideration. These facts are: That the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized under the laws of the State of Missouri, operated a line of railway between Tower Grove, Missouri, and Texarkana in Arkansas. So much of the railway line as lies between Poplar Bluff, Missouri, and Texarkana, Arkansas, was aided in its construction by a grant of land from the United States by the Act of February 9, 1853, c. 59, 10 Stat. 155, and by the Act of July 28, 1866, c. 300, 14 Stat. 338.

The fourth section of the Act of February 9, 1853, provides:

"The said railroad and branches shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

The first section of the Act of July 28, 1866, with respect to said railway, provides:

"All property and troops of the United States shall at all times be transported over said railroad and branches at the cost, charge, and expense of the company or corporation owning or operating said road and branches respectively, when so required by the government of the United States."

February 4, 1910, the Post Office Department transmitted to the claimant company a distance circular which

relates to mail transportation, the same was duly filled out and certified and returned to the Post Office Department. Between the 17th of February and the 1st day of June, 1910, the Post Office Department made the quadrennial weighing of mail in the weighing division which included the Railway Company's lines. Before this weighing of the mails, Congress passed the Act of May 27, 1908, c. 206, 35 Stat. 412, making appropriations for the Post Office Department, which provides: "The Postmaster-General shall require, when in freightable lots and whenever practicable, the withdrawal from the mails of all postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the postal service, except postage stamps, in the respective weighing divisions of the country, immediately preceding the weighing period in said divisions, and thereafter such postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the postal service, except postage stamps, shall be transmitted by either freight or express."

Subsequent to the passage of the Act of May 27, 1908, the Post Office Appropriation Acts provided for specific sums for the payment of expressage on postal cards, stamped envelopes, newspaper wrappers and empty mail bags, and they carried similar provisions as to the withdrawal of said articles from the mails preceding weighing periods.

Before the weighing of the mails of the Railway Company the Postmaster General, acting under authority of the provisions of the Act of 1908, withdrew from the mail the empty mail bags, and the same were thereafter transported by freight over claimant's line of railway, and the weights were not included in estimating the weight of the mail carried during the contract term beginning July 1, 1910.

The findings give the number of pounds of empty mail

bags withdrawn from the mails during the weighing season of 1910 and sent by freight to St. Louis from Texarkana, Arkansas, and Little Rock, Arkansas, and show that if these empty bags had not been so withdrawn and the weight thereof had been included with the weight of the mails, upon which compensation was based, the claimant would have received $15,296.82 more than it did receive for service performed between July 1, 1910, and February 1, 1912.

During the period from July 1, 1910, to and including January 31, 1912, a total of 1,452,271 pounds of empty mail bags were transported over the railroad of the claimant in freight trains from Texarkana, Arkansas, to St. Louis, Missouri, for which service the claimant submitted bills at the published tariff rate against the United States amounting in the aggregate to $14,043.17. In making settlement of these charges the Auditor for the Post Office Department made a deduction for the entire charge for the services performed from Texarkana, Arkansas, to Poplar Bluff, Missouri, amounting to $8,251.45.

The sixth section of the Act of 1853 provides: "The United States Mail shall at all times be transported on the said road and branches, under the direction of the Post-Office Department, at such price as Congress may by law direct."

And the thirteenth section of the Act of July 12, 1876, c. 179, 19 Stat. 78, 82, provides: "That rail-road-companies whose railroad was constructed in whole or part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act."

The findings further state that ever since the passage of said last-mentioned act it has been the custom and practice of the Post Office Department to pay all the railroads

whose construction was aided by grants of land from the United States 80 per centum of the rate of compensation paid to non-land-aided roads for carrying the mails.

Claimant presented its bill for the transportation of said freight at the full commercial rate provided by the duly published and approved tariffs. In making settlement therefor, the Postmaster General made deduction of the entire charge between Texarkana, Arkansas, and Poplar Bluff, Missouri, and refused to pay anything therefor, on the ground that the Railway Company was obliged by the provisions of the Acts of 1853 and 1866 to transport said empty mail bags without cost or expense to the United States.

Upon these findings the Court of Claims decided against the claimant, and dismissed its petition. 53 Ct. Clms. 45.

Two questions are presented, which are thus stated in the opinion of the Court of Claims:

"(1) Could the empty mail bags be lawfully withdrawn from the mails merely for the purpose of reducing claimant's compensation for mail transportation service?

"(2) And assuming that said empty mail bags were lawfully withdrawn from the mails and shipped by freight, were they 'property' of the United States within the purview of the land-grant acts of 1853 and 1866?"

As to the first question there can be little difficulty. There was nothing in any law or contract of the Government which required it to permit the weighing of empty sacks or containers as part of the mail in determining the compensation to be paid for carrying the same. While, generally speaking, a bag or container in which letters or other mailable matter is carried is part of the mail, and collectively the containers might be considered as part of the mail essential to carry the mailable matter from one place to another, nevertheless there was nothing to prevent Congress, in fixing compensation for the carriage of the mails to expressly withdraw therefrom the empty

mail bags, and this it did by the Act of May 27, 1908, above quoted.

For the purposes of fixing compensation in the weighing of the mail Congress directed that the weight of the empty bags should be withheld in determining the average weight of the mails as the basis of fixing compensation. We agree with the Court of Claims that such action violated no contractual or other right of the claimant.

Concerning the other question presented there is perhaps more difficulty. By the sixth section of the Act of 1853 it was directed that the United States mail should be transported over the claimant's road at such prices as Congress may by law direct, and by the thirteenth section of the Act of July 12, 1876, a railroad aided by grants of land made by Congress on condition that Congress should fix the basis of compensation for transportation of mails over its lines should receive 80 per centum of the compensation provided for in the act. These acts make specific reference to the amounts to be paid for the transportation of the mails. The payment provided in them is for the transportation of the mails which, it may be conceded, might include with the mail-matter the bags in which the same was carried. However, by the Act of May 27, 1908, the Congress has classified empty mail bags with furniture and equipment and other supplies for the postal service, to be transported by freight or express. Congress thus undertook to make a separate provision covering the carrying of empty mail containers after they had served their purpose of enclosing the mail-matter during transportation.

It is insisted that the return of the empty mail bags is but part of the transportation of the mail. But certainly Congress might provide that empty mail bags should be differently treated than those used in the actual transportation of mailable matter. None will dispute that forwarding mail bags from their place of manufacture to

different points in the country for use would not constitute transportation of mail. We see no reason why Congress may not regard empty mail bags, being returned for further use, as no longer a part of the mails. Congress authorized contracts for the transportation of the mail, but by the Act of May 27, 1908, it withdrew empty mail bags from mail transportation and directed that they be sent by freight or express. How then was such transportation to be compensated? Ordinarily the applicable freight or express rates would control. But the acts of Congress which provided that property of the United States should be transported at the expense of the company were in full force and effect. It is said that in the report and action upon the legislation which took empty mail bags from carriage as part of the mails and directed the carriage by freight or express there is no intimation that the result of such legislation would have the effect of obtaining free transportation under the land-grant acts, and that no such requirement is made in the act itself. But, Congress must be presumed to have known of its former legislation in the Acts of 1853 and 1866, and to have passed the new laws in view of the provisions of the legislation already enacted. These statutes must be construed together and effect given to all of them. Under the earlier acts this railroad in consideration of benefits received, was bound, when required, to transport troops and property of the United States free of charge.

We have here a question concerning the transportation of property of the United States. See *Southern Pacific Co.* v. *United States*, 237 U. S. 202, 204. The act of Congress providing for fifty per cent. rates concerns only "army" transportation and is not applicable to this case. See 22 Stat. 120; 1st Supp. Rev. Stats., 375, 376. The empty mail bags were property, and belonged to the United States. When the Government required their transportation by freight, the former legislation which accom-

panied the grant of lands to this railway company controlled the terms of carriage.

We find no error in the judgment of the Court of Claims, which was also the conclusion of the Comptroller of the Treasury, 17 Comp. Dec. 749.

Affirmed.

Mr. Justice McReynolds, dissenting.

Appellant's right to recover seems quite plain to me.

The Act of February 9, 1853, c. 59, 10 Stat. 155, granted lands afterwards used to aid in constructing appellant's lines. Section 4—". . . The said railroad and branches shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." Section 6—"That the United States Mail shall at all times be transported on the said road and branches, under the direction of the Post-Office Department, at such price as Congress may by law direct."

The Act of July 28, 1866, c. 300, 14 Stat. 338, among other things, revived and extended the Act of 1853. Section 1—" . . . *And provided further*, That all property and troops of the United States shall at all times be transported over said railroad and branches at the cost, charge, and expense of the company or corporation owning or operating said road and branches respectively, when so required by the government of the United States."

And thus it appears that one section of the statutes directs free transportation of "all property and troops of the United States" and a wholly different section requires transportation of the United States mail "under the direction of the Post-Office Department, at such price as Congress may by law direct."

Through the Post Office Department, the United States

are engaged in handling the mails for pay. Their transportation is part of a well defined business. In the orderly course and as an essential part of that business emptied sacks are constantly being returned for further use. They are property of the United States in a certain sense, whether full or empty; and they are elements of the mail whether going out or coming back.

A clear distinction between property of the United States and United States mail is preserved by the very language of the land-grant statutes; and, I think, Congress had no purpose—if, indeed, the power—to convert mail into property within the meaning of these statutes simply by directing carriage of the former in freight trains. The purpose was to secure transportation at less than former cost, and to such end Congress, in effect, commanded that emptied bags, a portion of the mails for which rapid movement is not essential, "shall be transmitted by either freight or express" and compensation made according to the ordinary rates. Under this interpretation, the railroad would suffer no oppressive burden and contemplated economies would be effectuated.

UNITED STATES *v.* STANDARD BREWERY, INCORPORATED.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

UNITED STATES *v.* AMERICAN BREWING COMPANY.

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

Nos. 458, 474. Argued December 11, 1919.—Decided January 5, 1920.

The War-Time Prohibition Act prohibits the use of grains, fruits, and other food products in the manufacture of "beer, wine, *or other intoxicating* malt or vinous liquor for beverage purposes," until the conclusion of the present war, etc. *Held*, that the word "intoxicating" qualifies the terms preceding, thus excluding from the prohibition beer which is not in fact intoxicating. P. 217.

The act sought to prevent the manufacture of intoxicating liquors because their use might interfere with the consummation of the declared purposes,—to conserve the Nation's man-power and increase efficiency in producing war materials. P. 219.

Rulings of the Treasury Department holding beer containing but one-half of one per cent. of alcohol taxable under revenue laws but not involving the consideration of intoxicating quality, *held* irrelevant in the construction of the War-Time Prohibition Act. *Id.*

The question what percentage of alcohol is enough to constitute a beverage intoxicating within the meaning of the War-Time Prohibition Act is not left by that statute to the determination of the Internal Revenue Department, and its decisions in that regard, though entitled to respect, cannot enlarge the statute so as to make conduct criminal under it. *Id.*.

A construction of an act of Congress which might render it unconstitutional is to be avoided if possible. P. 220.

Quære: Whether Congress under the war power could prohibit the manufacture and sale of non-intoxicating beverages? *Id.*

An indictment must charge each and every element of the offense. P. 220.

The court cannot say, as a matter of law, that a beverage containing not more than one-half of one per cent. of alcohol is intoxicating. *Id.*

260 Fed. Rep. 486, affirmed.

THE cases are stated in the opinion.

The Solicitor General and *Mr. Assistant Attorney General Frierson* for the United States:

This act was passed under the special war powers of Congress. Its primary purpose was the withdrawal of man-power and foodstuffs from nonessential employment and their devotion to employment necessary for the successful conduct of the war. For this Congress could prohibit the manufacture of nonintoxicating as well as intoxicating beverages. What was done was to place a ban upon certain beverages, whose well-known large production and consumption constituted a heavy drain upon both the labor and food resources of the country. Doubtless, for this reason, and also because they were regarded as injurious to man-power, needed both at home and at the front, the purpose was to class generally, as nonessential, alcoholic beverages. Accordingly, the act prohibits by name the best-known and most largely consumed beverages of this class, generally recognized as more or less intoxicating; and, to embrace other similar but less well-known beverages, there were added the general words "or other intoxicating malt or vinous liquor."

The only way to give effect to these words is to say that whatever beverages come within the commonly understood meaning of beer and wine are prohibited, and the prohibition is then extended, by general words, to other beverages which are similar to beer and wine with respect to being malt or vinous and also with respect to their alcoholic content or intoxicating qualities. The word

"intoxicating" can scarcely be said to have a very definite meaning. It is ordinarily defined to mean: Producing intoxication or feelings like those of intoxication; exhilarating; exciting, maddening, or stupefying with delight. (Standard Dictionary.)

But men will differ about what is exhilarating or exciting or intoxicating. Experts differ as to what per cent. of alcohol suffices to render a beverage intoxicating. It is a well-known fact that what will make one man drunk will have no effect upon another, and a drink which, at one time, may seem not to affect a man, may, at another time, make the same man drunk. A law whose enforcement depended upon the determination by juries of such a question would rest upon a most insecure foundation, and anything like a uniform administration of it would be impossible. Hence, the States in passing prohibition laws have always enumerated by name the best-known alcoholic or intoxicating liquors and added general language to include other similar beverages. Congress, in this act, has followed the same course. Beer usually is admittedly an intoxicating beverage and is so classed in the public mind, whether a particular quantity of it will make a particular man drunk or not. To say that the Government must prove in each case that the beer involved is, in fact, intoxicating would make the efficient enforcement almost if not quite impossible.

Under the rule *ejusdem generis* the meaning of general words may take color from the words used in the enumeration which they follow. But there is no rule under which words of a specific meaning used in an enumeration are to be given a different meaning by reason of general language following them and intended to describe other articles or persons. The rule in question leads to the conclusion that any malt or vinous liquor which is intoxicating in the sense that beer and wine are intoxicating is prohibited; but it can not be so applied

as to exclude any beverage which would ordinarily be included under the word "beer." The intention was to prohibit all beverages which are commonly known as beer. The courts of the various States have almost uniformly given this construction to similar language. *United States* v. *Cohn*, 2 Ind. Terr. 474, 492, 501; *State* v. *Ely*, 22 S. Dak. 487, 492–493; *La Follette* v. *Murray*, 81 Ohio St. 474; *Fuller* v. *Jackson*, 97 Mississippi, 237, 253–256; *Extract & Tonic Co.* v. *Lynch*, 100 Mississippi, 650; *Marks* v. *State*, 159 Alabama, 71; *In re Lockman*, 18 Idaho, 465, 469; *Brown* v. *State*, 17 Arizona, 314.

In *United States* v. *Chase*, 135 U. S. 255, the general expression "writing" was given color from the specific words used in the preceding enumeration "book, pamphlet, picture, paper," which were held to imply a "publication" even without reference to the use of that word in the general language following the enumeration. When the amended statute came before the court it was not supposed that the word "publication" used in the general language modified in any way the word "letter" introduced into the specific enumeration. *Grimm* v. *United States*, 156 U. S. 604; *Andrews* v. *United States*, 162 U. S. 420. *Insurance Co.* v. *Gridley*, 100 U. S. 614, does not involve the rule *ejusdem generis*.

All the dictionaries define beer as an alcoholic beverage obtained by the fermentation of malt or certain other substances. But "intoxicating" appears in no definition. In common acceptation, therefore, beer is an alcoholic but not necessarily an intoxicating beverage. If it contains the usual ingredients of beer, including alcohol, a beverage is *beer* even though the quantity of alcohol is not sufficient to produce actual drunkenness. Nothing else appearing, it could be well said that such a beverage is beer if it contains any alcohol. But, when used by Congress, it has come to have a slightly different meaning. For years, a tax has been levied on "beer, lager beer, ale,

porter, and other similar fermented liquors." Revised Statutes, §§ 3335–3339. From the first the Internal Revenue Department has ruled that the tax applied to all such beverages containing as much as one-half of one per cent. of alcohol. Treasury Decisions 1307, 1360, 2354, 2370 and 2410. Manufacturers acquiesced and paid the tax. Such a beverage containing as much as one-half of one per cent. of alcohol has, therefore, long ago come to be recognized both by the Government and the manufacturers as beer. And Congress has continued from time to time in revenue laws to use the same language and may well be said to have adopted the meaning thus placed upon it. Finally, in the Revenue Act of 1917, passed before the act now in question, and the Revenue Act of 1918, passed later, Congress has expressly described beer as containing one-half of one per cent. or more of alcohol and classed similar beverages containing less as soft drinks. It is clear, then, that when Congress used the word "beer" in the Act of November 21, 1918, it used it in that sense.

Mr. William L. Marbury, with whom *Mr. Randolph Barton, Jr.*, and *Mr. William L. Rawls* were on the brief, for defendant in error in No. 458.

Mr. Elihu Root, with whom *Mr. William D. Guthrie* was on the brief, for defendant in error in No. 474.

Mr. Wayne B. Wheeler and *Mr. Andrew Wilson*, by leave of court, filed a brief as *amici curiæ*.

Mr. Justice Day delivered the opinion of the court.

These causes are here under the Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246, and require the construction of the so-called "War-Time Prohibition

Act," of November 21, 1918, c. 212, 40 Stat. 1045, 1046, 1047.

In No. 458 the Standard Brewery, Incorporated, was indicted for unlawfully using certain grains, cereals, fruit, and other food products on the 4th of June, 1919, in the manufacture and production of beer for beverage purposes which, it is charged, contained as much as one-half of one per cent. of alcohol by both weight and volume. In No. 474 the American Brewing Company was indicted for the like use on the 26th day of June, 1919, of certain grains, cereals and food products in the manufacture and production of beer containing a like percentage of alcohol.

In the indictment in No. 474 it was charged that at the time of the alleged offense the termination of demobilization had not been determined and proclaimed by the President.

In each case a demurrer was sustained by the District Court.

Before considering the construction of that portion of the act involved in these cases it will be helpful to give a short history of the preceding legislation that led up to it. The Food Control Act of August 10, 1917, c. 53, 40 Stat. 276, 282, authorized the President to prescribe and give public notice of limitations, regulations, or prohibitions respecting the use of foods, fruits, food materials or feed, in the production of malt or vinous liquors for beverage purposes, including regulations for the reduction of the alcoholic content of any such malt or vinous liquor, in order to assure an adequate and continuous supply of food, and promote the national security and defense. Whenever notice should be given and remain unrevoked no person, after a reasonable time prescribed in such notice, could use any food, fruits, food materials or feeds in the production of malt or vinous liquors, or import any such liquors except under license and in compliance with lawfully prescribed rules and regulations. Under the

authority thus conferred, the President issued various proclamations. On December 8, 1917, 40 Stat. 1728, he issued one forbidding the production of all malt liquor, except ale and porter, containing more than 2.75 per cent. of alcohol by weight. On September 16, 1918, 40 Stat. 1848, he issued a second proclamation, prohibiting after December 1, 1918, the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contained alcohol. On January 30, 1919, 40 Stat. 1930, he issued a third proclamation which modified the others to the extent of permitting the use of grain in the manufacture of non-intoxicating beverages, it being recited therein that the prohibition of the use of grain in the manufacture of such beverages has been found no longer essential in order to assure an adequate and continuous supply of food. And on March 4, 1919, 40 Stat. 1937, he issued a fourth proclamation amending his proclamation of September 16, 1918, so as to prohibit the production only of intoxicating malt liquors for beverage purposes.

It thus appears that the President, acting under the Act of August 10, 1917, has reduced the prohibition of the use of food materials so that now it is limited to the manufacture of such liquors as are in fact intoxicating.

In the light of all this action we come to consider the proper construction of so much of the Act of November 21, 1918, as is here involved, which provides:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for

beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Bank*, 234 U. S. 245, 258; *Caminetti* v. *United States*, 242 U. S. 470, 485. Looking to the act we find these are its declared purposes: (1) To conserve the man power of the nation; (2) to increase efficiency in the production of arms, munitions, ships, and food and clothing for the army and navy. To these ends it is made illegal to sell distilled spirits for beverage purposes or to remove the same from bond for such purposes except for export. And after May 1, 1919, until the conclusion of the war, and until demobilization is proclaimed by the President, no grains, cereals, fruit, or other food products are permitted to be used in the manufacture or production of

beer, wine or other intoxicating malt or vinous liquors for beverage purposes.

The prohibitions extend to the use of food products for making "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." These provisions are of plain import and are aimed only at intoxicating beverages. It is elementary that all of the words used in a legislative act are to be given force and meaning, *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; and of course the qualifying words "other intoxicating" in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect. The Government insists that the intention was to include beer and wine whether intoxicating or not. If so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words.

This court had occasion to deal with a question very similar in character in the case of the *United States* v. *United Verde Copper Co.*, 196 U. S. 207, where an act permitted the use of timber on the public lands for building, agricultural, mining and other domestic purposes, and held that we could not disregard the use of the word "other" notwithstanding the contention that it should be eliminated from the statute in order to ascertain the true meaning. So here, we think it clear that the framers of the statute intentionally used the phrase "other intoxicating" as relating to and defining the immediately preceding designation of beer and wine. "As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all." Lord Bramwell in *Great Western Ry. Co.* v. *Swindon, etc., Ry. Co.*, L. R. 9 App. Cas. 787, 808.

The declared purpose of Congress was to conserve the nation's man power and increase efficiency in producing war essentials; and it accordingly undertook to prohibit the manufacture of intoxicating liquors whose use might interfere with the consummation of that purpose. Other provisions of the act lend support to this view. The sale and withdrawal from bond of distilled spirits (always intoxicating) were declared unlawful after June 30th, 1919—their manufacture had already been prohibited. The sale of beer, wine and other intoxicating malt or vinous liquors was prohibited after the same date and the importation of all such liquors and also of distilled liquors was made immediately unlawful. The President was empowered at once to establish zones about coal mines, manufactories, ship-building plants, &c., &c., and "to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones."

The fact that the Treasury Department may have declared taxable under many revenue acts all beer containing one-half of one per centum of alcohol is not important. Such rulings did not turn upon the intoxicating character of the liquid but upon classification for taxation controlled by other considerations. A liquid may be designated as beer and subjected to taxation although clearly non-intoxicating. "The question whether a fermented malt liquor is intoxicating or nonintoxicating is immaterial under the internal revenue laws, although it may be a very material question under the prohibitory laws of a State or under local ordinances." T. D. 804.

As to the insistence that the Internal Revenue Department has determined that a beverage containing one-half of one per cent. of alcohol should be regarded as intoxicating within the intendment of the act before us little need be said. Nothing in the act remits the determination of that question to the decision of the revenue officers of the Government. While entitled to respect,

as such decisions are, they cannot enlarge the meaning of a statute enacted by Congress. Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. *Waite* v. *Macy*, 246 U. S. 606; *United Staies* v. *George*, 228 U. S. 14, 20; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215.

Furthermore, we must remember in considering an act of Congress that a construction which might render it unconstitutional is to be avoided. We said in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." See also *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. We held in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146, that the war power of Congress, as applied to the situation outlined in the opinion in that case, enabled it to prohibit the sale of intoxicating liquor for beverage purposes. But the question was neither made nor decided as to whether Congress could prohibit even in time of war the manufacture and sale of non-intoxicating beverages.

An indictment must charge each and every element of an offense. *Evans* v. *United States*, 153 U. S. 584, 587. We cannot say, as a matter of law, that a beverage containing not more than one-half of one per cent. of alcohol is intoxicating, and as neither indictment so charges it follows that the courts below in each of the cases correctly construed the act of Congress, and the judgments are

Affirmed.

Counsel for the United States.

UNITED STATES *v.* POLAND ET AL.

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

No. 29. Argued November 19, 1919.—Decided January 5, 1920.

A bill to set aside a patent partly because of a false representation alleged to have been made in an affidavit filed with the land officials, *held* not sustainable upon the ground of fraud, it appearing from the affidavit as set forth that the representation was not as alleged, and the bill also showing that the fact in question was clearly disclosed by the application and other entry papers. P. 224.

But where the facts alleged show that the patent was issued in violation of law the bill states a case for cancellation. P. 227.

The Act of March 3, 1903, c. 1002, 32 Stat. 1028, in providing that "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights, in Alaska, while leaving the holder of several such rights free to exercise all of them and to make as many entries as his rights will sustain, prohibits him from using them to enter and acquire more than 160 acres in a single body, whether through one or more entries. P. 225.

This provision is wholly distinct from the provision of the same act limiting entries to 160 rods along the shores of navigable waters and reserving 80 rods of shore between claims. P. 227.

The defense of *bona fide* purchase must be set up and established affirmatively by the defendant in a suit to set aside a patent. *Id.*

One who without fraud has secured a patent, by means of soldiers' additional homestead rights, which is canceled because issued in violation of law, is free to exercise the rights by which it was obtained, and, under the Act of June 16, 1880, c. 244, 21 Stat. 287, may apply for repayment of the fees and commissions paid to the land officers. P. 228.

231 Fed. Rep. 810, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Nebeker, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Ira Bronson and *Mr. George H. Patrick*, with whom *Mr. H. B. Jones* was on the brief, for respondents. Among the points presented by them was the following:

Assuming that the granting of the patent to survey No. 242 resulted from a mistake of fact and law in the minds of the officers of the Land Department, but without any act of fraud on the part of the patentee, the complaint is open to demurrer for want of an allegation of the return or tender of the return of the consideration paid for the entry. Act of June 16, 1880, c. 244, 21 Stat. 287; *Brent* v. *Bank of Washington*, 10 Pet. 596, 615; *State* v. *Morgan*, 52 Arkansas, 157; *State* v. *Snyder*, 66 Texas, 700. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *Causey* v. *United States*, 240 U. S. 399, distinguished.

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

This is a suit to cancel a patent issued to William B. Poland for one hundred and sixty acres of land in Alaska, the gravamen of the complaint being that by this and another patent, both based upon soldiers' additional homestead rights, Poland acquired a single body of land of larger acreage than was permitted by the statute under which the patents were sought and issued. The defendants, who were the patentee and another claiming under him, separately demurred to the complaint, and the court sustained the demurrers and dismissed the suit. That decision was affirmed by the Circuit Court of Appeals, one judge dissenting, 231 Fed. Rep. 810, and the case is here on writ of certiorari.

Of course, it rested with Congress to determine whether, when, and with what restrictions the general land laws should be extended to Alaska. For many years there was no affirmative action upon the subject. The first steps consisted of limited extensions of the laws relating to mining claims, c. 53, 23 Stat. 24, § 8, and town sites, c. 561,

26 Stat. 1095, § 11; but with these we are not now concerned. The homestead laws were the next to receive attention. By the Act of May 14, 1898, c. 299, 30 Stat. 409, they were extended to that district with the restrictions (a) that "no homestead" should exceed eighty acres in extent and (b) that "no entry" should extend more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods should be reserved from entry between all such claims. And by the amendatory Act of March 3, 1903, c. 1002, 32 Stat. 1028, the extension of the homestead laws was repeated and confirmed, but with the qualifications (a) that an *actual settler* intending to comply with the requirements in respect of continued residence, cultivation, etc., should be entitled to enter three hundred and twenty acres or a less quantity, (b) that "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights, and (c) that "no entry" should extend more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods should be reserved from entry between all such claims. Further restrictions were imposed, but there is no present need for noticing them.

The controversy here is over the meaning and purpose of the provision that no more than one hundred and sixty acres shall be entered in any single body by means of soldiers' additional homestead rights.

The material facts to be gathered from the complaint are these: Poland, who was the assignee of certain soldiers' additional homestead rights entitling their owner to enter and acquire in the aggregate 319.75 acres, wished to use them in entering and acquiring certain land in Alaska. The regular public surveys had not been extended to that locality, so he caused a special survey of the land to be made at his expense, as was permitted by applicable

regulations. 32 L. D. 424; 28 L. D. 149. By that survey the land, which was in a compact or single body, was divided into two tracts—one of 159.75 acres, designated as survey No. 241, and the other of 160 acres, designated as survey No. 242. As surveyed the north boundary of one tract was the south boundary of the other, and this was shown in the surveyor's return. On April 26, 1906, after the survey, he presented at the local land office two applications whereby he sought to make separate entries of the two tracts with his soldiers' additional rights—some of the rights being used on one tract and the others on the other tract. The applications were approved and passed to entry and patent—the patent for the 160 acres being issued a considerable period after the other.

In these circumstances the complaint charges that the 319.75 acres, although surveyed in the form of two tracts, were but a single body of land in the sense of the provision in question; that the land officers in passing both applications to entry and patent acted upon a misconception of the law and of their authority, and that in consequence the later patent, whereby Poland's acquisition was made to exceed one hundred and sixty acres in a single body, was issued in violation of law and should be canceled.

The complaint also contains an allegation that that patent was fraudulently procured in that among the proofs presented to the land officers was an affidavit falsely representing, in effect, that the two tracts were more than eighty rods apart, when in truth they were adjoining tracts. But this allegation must be put out of view, first, because the words of the affidavit as set forth in the complaint do not sustain the pleader's conclusion as to what was represented, and, second, because the complaint makes it certain that the application and other entry papers clearly disclosed that the two tracts were contiguous to the extent of having a common boundary one-half mile in length.

In approaching the consideration of the provision whose meaning and purpose are in question it is well to recall what soldiers' additional homestead rights are and what use could be made of them outside Alaska when the provision was adopted. They are rights to enter and acquire unappropriated non-mineral public land without settlement, residence, improvement or cultivation, and without payment of any purchase price. They are not personal to the original beneficiaries but are transferable at will, and the number that may be assigned to the same person is not limited. A single right is always for less, and generally much less, than one hundred and sixty acres, but rights aggregating many times that number of acres may be and often are held by a single assignee. When the provision was adopted there were almost no restrictions upon the use of such rights outside Alaska. Indeed, the only restriction of any moment was one, uniformly respected, preventing the inclusion of more than one hundred and sixty acres in a single entry. But the number of such entries that might be made by the same person was not restricted, nor was there any limitation upon the amount of land in a single body that might be entered in that way. Thus an assignee having rights aggregating six hundred and forty acres could use them in entering that amount of land in a compact body one mile square, if only he did so through four entries of one hundred and sixty acres each. And, if he had rights the aggregate of which was sufficient, he could in a like way enter a body of land three miles square or even an entire township. See Rev. Stats., §§ 2289, 2304, 2306; *Webster* v. *Luther*, 163 U. S. 331; *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 243; *Robinson* v. *Lundrigan*, 227 U. S. 173, 178–179; 3 L. D. 472; 29 L. D. 599 and 643; 30 L. D. 285; 31 L. D. 441; 32 L. D. 418; 33 L. D. 225; 45 L. D. 236, 3d par.; General Circular of 1904, pp. 11, 26–28.

With this understanding of the circumstances in which

the provision was incorporated into the Act of 1903 extending the homestead laws to Alaska, we think the meaning and purpose of the provision are manifest. It is in form a proviso and says "no more than one hundred and sixty acres shall be entered in any single body" by means of soldiers' additional homestead rights. A purpose to prevent the use of these rights in entering a large acreage in a single body hardly could be more plainly expressed. There is nothing in the provision indicating that it is concerned merely with what may be taken by a single entry; and to construe it in that way would make it practically useless, for a large acreage in a single body still could be taken by merely resorting to two or more entries. Besides, the amount of land that could be taken by a single entry had long been limited to one hundred and sixty acres, and of course to say that no greater amount should be taken in a single body by a single entry would add nothing to that limitation. But the provision does not speak of a single entry but only of the amount that may be "entered in any single body," and if it is to have any real effect it must be construed according to the natural import of its words; that is to say, as limiting the amount of land in a compact or single body that may be entered by means of soldiers' additional homestead rights, whether the entering be by one or several entries. We conclude therefore that the provision, while leaving one who holds several rights free to exercise all of them and to make as many entries as his rights will sustain, prohibits him from using them to enter and acquire more than one hundred and sixty acres in a compact or single body.

The court in Alaska regarded the provision as sufficiently like that relating to the area of placer mining claims (Rev. Stats., §§ 2330, 2331) to require that it be similarly construed. But we think there is a marked difference between the two provisions. That in the placer mining law says "no location" shall exceed a prescribed

area and it means, as the statute otherwise shows, that no single location shall include more.

The Circuit Court of Appeals was of opinion that "what the statute was seeking to protect was the shores of the navigable waters of Alaska and not to prohibit the entry of a tract of land of more than 160 acres." In this the court apparently confused the present provision, which operates in the same way in all parts of Alaska, with another and wholly distinct provision, which relates only to entries along the shore. Their independence and the subjects to which they relate are best shown by quoting both in the order in which they appear in the statute, which we do—

"And provided further that no more than one hundred and sixty acres shall be entered in any single body by . . . soldier's additional homestead right."

"*Provided,* That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims."

There is in this case no question as to what distance along the shore an entry may extend, or as to what space shall be reserved between claims along the shore, but only a question as to whether making separate entries of lands which in point of contiguity and compactness constitute a single body of 319.75 acres is in contravention of the provision first quoted, where both entries are by the same person and are based upon soldiers' additional homestead rights. That question we answer in the affirmative for the reasons before indicated.

It follows that, if the facts be as alleged in the complaint, the second patent was issued in violation of law and the Government is entitled to demand that it be canceled, unless, as is asserted in the brief for the defendants, one of them is a *bona fide* purchaser. The complaint does not show that he is such, and the rule is that this is an

affirmative defense which he must set up and establish. *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 403; *Great Northern Ry. Co.* v. *Hower*, 236 U. S. 702, 710.

If the patent is canceled Poland, or his assignee, will be free to exercise the rights with which the patent was obtained (see 6 L. D. 290 and 459), and also to ask repayment under the Act of June 16, 1880, c. 244, 21 Stat. 287, of the fees and commissions paid to the land officers.

Decree reversed.

PRODUCERS TRANSPORTATION COMPANY *v.* RAILROAD COMMISSION OF THE STATE OF CALIFORNIA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 219. Argued December 12, 1919.—Decided January 5, 1920.

If in the beginning or during its subsequent operation a pipe line is devoted by its owner to the use of the public in transporting oil for hire, and if the right thus extended to the public has not been withdrawn, the pipe line is a public utility and its owner a common carrier whose rates and practices may be subjected to state regulation consistently with the due process clause of the Fourteenth Amendment. P. 230.

The following grounds, relied on by the state court, have adequate support in the evidence and sustain its conclusion that the plaintiff in error had devoted its pipe line to public use, viz: (1) authority in articles of incorporation to establish and carry on a general transportation business for transporting any oils produced by the pipeline company or others; (2) acquisition of part of its right of way through eminent domain proceedings, admissible only, under the state law, if the condemnation was for a public use and was by an "agent of the State," and averments in such proceedings by the condemnor that it was a common carrier seeking the right of way for a public use; (3) transportation in substance for all producers seeking

the service, though done in form through an intermediate agency and a system of contracts, it appearing that membership in such agency was readily obtained and had not been refused. P. 231.

A common carrier cannot, by making contracts for future transportation, prevent or postpone the exertion by a State of the power to regulate the carrier's rates and practices. P. 232.

Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power. *Id.*

176 California, 499, affirmed.

THE case is stated in the opinion.

Mr. A. V. Andrews, with whom *Mr. Thomas O. Toland*, *Mr. Lewis W. Andrews* and *Mr. Paul M. Gregg* were on the briefs, for plaintiff in error.

Mr. Douglas Brookman for defendants in error.

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

We here are concerned with a statute of California and an order made thereunder by the state railroad commission, both of which are said to be repugnant to the Constitution of the United States, and therefore invalid.

The statute declares that every private corporation or individual operating "any pipe line or any part of any pipe line . . . for the transportation of crude oil . . . , directly or indirectly, to or for the public, for hire, . . . and which said pipe line . . . is constructed or maintained upon, along, over or under any public highway, and in favor of whom the right of eminent domain exists," shall be deemed a common carrier and subject to the provisions of a prior act investing the railroad commission with extensive powers over the rates and practices of those who operate public utilities. Stats. 1913, c. 327; Stats. 1911, Ex. Sess., c. 14.

The order of the commission was made after notice and

a full hearing; is based upon a finding that the Producers Transportation Company, the plaintiff in error, has a pipe line from the San Joaquin oil fields to Port Harford, on the Pacific coast, whereby it transports crude oil for pay in such circumstances that the statute requires that it be regarded and dealt with as a common carrier; and directs the filing with the commission of the company's schedule of rates or charges and the rules and regulations under which the transportation is conducted.

In the state court the company contended that the evidence before the commission, all of which was before the court, conclusively established that the pipe line was constructed solely to carry crude oil for particular producers from their wells to the seacoast under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to public use; and the company further contended that the statute, as applied to this pipe line, was repugnant to the due process of law clause of the Fourteenth Amendment and the contract clause of § 10 of Article I of the Constitution, and that the order of the commission was void as offending against these clauses. The state court sustained both the statute and the order, 176 California, 499, and the company sued out this writ of error.

The company was organized under the laws of California in 1909 and its pipe line was put in operation in 1910. The statute in question took effect August 10, 1913, and the order was made December 31, 1914.

It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensa-

tion, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595; *Associated Oil Co.* v. *Railroad Commission*, 176 California, 518, 523, 526. And see *Munn* v. *Illinois*, 94 U. S. 113, 126; *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, 495; *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345, 357; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, 419–420. On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation. *Munn* v. *Illinois*, *supra*.

The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil, and it rested this conclusion upon the grounds, first, that one of the things which the company was authorized to do, if it so elected, as shown in its articles of incorporation, was "to establish and carry on . . . a general transportation business for the purpose of transporting . . . any of the oils . . . produced . . . by this corporation, or any other person, firm, partnership, association or corporation"; second, that in acquiring its right of way it resorted to an exercise of the power of eminent domain,—admissible only if the condemnation was for a "public use," Code Civ. Proc., §§ 1237, 1238, and was by "an agent of the State," Civ. Code, § 1001,—and in that proceeding asserted, and obtained a judgment reciting, that it was engaged in transporting oil by pipe line "as a common carrier for hire" and that the right of way was sought for "a public use"; and, third, that look-

ing through the maze of contracts, agency agreements and the like, under which the transportation was effected, subordinating form to substance, and having due regard to the agency's ready admission of new members and its exclusion of none, it was apparent that the company did in truth carry oil for all producers seeking its service, in other words, for the public. See *Pipe Line Cases*, 234 U. S. 548.

While some criticism is made of this conclusion and the grounds upon which it is rested, we are of opinion that the grounds have adequate support in the evidence and that they sustain the conclusion. True, one witness stated that "the pipe line was not laid upon the right of way which was obtained in the condemnation suit"; but, as his further testimony disclosed that he meant only that a part of the right of way so obtained was not used when the pipe line was laid, we think the state court rightly regarded the company as having acquired some of its actual right of way by exercising the power of eminent domain as a common carrier. If it was a common carrier at the time of the condemnation suit it is such now, for nothing has occurred in the meantime to change its status.

That some of the contracts before mentioned were entered into before the statute was adopted or the order made is not material. A common carrier cannot by making contracts for future transportation or by mortgaging its property or pledging its income prevent or postpone the exertion by the State of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power. *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa*, 94 U. S. 155, 162; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372.

Judgment affirmed.

Counsel for Parties.

HAYS *v.* PORT OF SEATTLE ET AL.

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

No. 70. Argued November 12, 1919.—Decided January 5, 1920.

A bill setting up obligations of a contract with a State and charging that they were impaired by subsequent state legislation *held* to present a controversy under the Constitution, conferring jurisdiction upon the District Court and warranting a direct appeal under § 238, Jud. Code. P. 237.

There is a distinction between a statute that has the effect of violating or repudiating a contract made by a State and one that impairs its obligation. *Id.*

Appellant contracted with the State of Washington to excavate certain waterways in Seattle Harbor for a certain compensation, using excavated material in filling in adjacent state lands, upon which he was to have a lien to secure the compensation; but after long delays without substantial performance by the contractor an act was passed to abandon the project and vest the title to the lands in a municipality. *Held*, that the obligation of the contract was not thereby impaired. *Id.*

An appropriation of private property for a public purpose by an act of a state legislature is not violative of the Fourteenth Amendment if a general law permits the owner, upon giving security for costs, to sue the State in her courts and provides that any judgment for his damages and costs shall be paid out of the state treasury. P. 238.

In the federal equity practice the defense of laches need not be set up by plea or answer but may be taken advantage of either by demurrer or upon final hearing. P. 239.

226 Fed. Rep. 287, affirmed.

THE case is stated in the opinion.

Mr. William F. Hays in propria persona.

Mr. L. T. Turner, with whom *Mr. O. B. Thorgrimson* and *Mr. Harold Preston* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

Appellant filed his bill in equity for an injunction to restrain the enforcement of an act of the legislature of the State of Washington, approved March 11, 1913 (Sess. Laws, p. 195), entitled "An act vacating a portion of Smith's Cove Waterway, in the city of Seattle, and vesting the title of the vacated portion in the port of Seattle," upon the ground (a) that it impaired the obligation of an existing contract between him and the State, in violation of § 10 of Art. I of the Constitution of the United States; and (b) that it deprived him of property without due process of law, contrary to § 1 of the Fourteenth Amendment. The District Court on final hearing dismissed the bill (226 Fed. Rep. 287), and the case is brought here by direct appeal under § 238, Jud. Code, because of the constitutional questions.

The facts, shortly stated, are as follows: Under an act of the legislature approved March 9, 1893 (Sess. Laws, p. 241), which made provision for the excavation by private contract of waterways for the uses of navigation, complainant and another party to whose rights he has succeeded obtained a contract with the State, acting by the Commissioner of Public Lands, which was approved by the Governor on March 7, 1896. It provided for the excavation by complainant of Smith's Cove Waterway, in Seattle Harbor, extending from the outer harbor line through the intervening tide lands to the head of Smith's Cove, the excavated material to be used for filling in and raising above high tide the adjacent tide and shore lands belonging to the State of Washington. For doing this he was to be entitled to compensation equivalent to the cost of the work plus 15 per centum and interest, for which he was to have a lien upon the tide and shore lands so filled in. The State agreed to hold these lands subject to the operation of the contract pending its execution, and

subject to the ultimate lien of the contractor thereon, and that it would perform by its authorized agents all things required by the Act of 1893 to be performed by the State. The contract provided for and specified the character of the bulkheads and retaining walls to be used, reserving, however, to the Commissioner of Public Lands the right to modify these plans and specifications as to "shape, form, and character of material" as might appear necessary. The contract required complainant at his own cost to excavate also a waterway to extend from the north end of the Smith's Cove Waterway across the peninsula separating the Cove from Salmon Bay, such excavation to be made under the direction and in accordance with the plans of an engineer to be designated by the Governor of the State or the Secretary of War of the United States, and when excavated to be owned, possessed, and controlled by the United States or by the State, free of cost to them, if the right of way and the privilege of excavating across the peninsula should be accorded to the contractor free of cost or if fair compensation should be made to him therefor. Work was to be commenced within sixty days and completed within two years from the date of approval.

On May 4, 1896, complainant entered upon performance of the contract and commenced driving piles for the construction of a bulkhead. Almost immediately he was notified by the Commissioner of Public Lands that the latter elected to exercise the right, as provided by the contract, to change the form of bulkhead. This had the effect of requiring a suspension of work until modified plans and specifications for the bulkheads should be prepared. Complainant did suspend the work, and it never was resumed thereafter. There were negotiations and correspondence between him and the Commissioner of Public Lands looking to the preparation of the modified plans and specifications, but they resulted in nothing.

Each party seems to have insisted that it was the duty of the other to furnish them.

Complainant contends that he was at all times ready and prepared to carry out the contract on his part, but was prevented from doing so by acts and omissions of the State and its representatives, including the failure to furnish plans for the modified form of bulkhead and a failure to furnish complainant with a right of way across the peninsula between the head of Smith's Cove and Salmon Bay. Defendants contend that repeatedly, and in particular in the month of November, 1898, complainant was notified that his plans were wholly inadequate and would be insufficient for the purpose for which the retaining wall was designed; and that on the latter occasion he was notified to submit proper plans and specifications and to commence operations within ten days after their approval.

While the excavation project thus remained in suspense, and pursuant to an act "Authorizing Establishment of Port Districts," approved March 14, 1911 (Sess. Laws, p. 412), the Port of Seattle was established as a municipal corporation with territorial limits including Smith's Cove Waterway, Salmon Bay, and the intervening peninsula. This act conferred extensive powers for the regulation, control, and improvement of the harbor and navigable and non-navigable waters within such district, in the interest of the public.

Thereafter, by the statute that is now under attack (Sess. Laws 1913, p. 195) it was enacted that the northerly part of the Smith's Cove Waterway should be vacated and the title thereto vested in the Port of Seattle. Complainant was fully advised of this legislative measure, even prior to its enactment.

After it took effect, which was in June, 1913, the Port Commission took possession of the waterway, exercised control over it, and did a considerable amount of excava-

tion, filling, and bulkhead construction, having spent large sums of money therein between the taking effect of the act and November 14, 1914, when the bill of complaint was filed.

Coming to the questions raised upon the present appeal: The averments of the bill setting up the alleged obligations of complainant's contract with the State, and the contention that they were impaired by the Act of 1913, presented a controversy under the Constitution of the United States, and (a sufficient amount being involved) conferred jurisdiction upon the federal court irrespective of the citizenship of the parties, and at the same time warranted a direct appeal to this court under § 238, Judicial Code. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508.

The merits remain for determination.

Upon the first constitutional point, it is important to note the distinction between a statute that has the effect of violating or repudiating a contract previously made by the State and one that impairs its obligation. Had the legislature of Washington, pending performance or after complete performance by complainant, passed an act to alter materially the scope of his contract, to diminish his compensation, or to defeat his lien upon the filled lands, there would no doubt have been an attempted impairment of the obligation. The legislation in question had no such purpose or effect. It simply, after seventeen years of delay without substantial performance of the contract, provided that the project should be abandoned and title to the public lands turned over to the municipality. Supposing the contract had not been abandoned by complainant himself or terminated by his long delay, its obligation remained as before, and formed the measure of his right to recover from the State for the damages sustained. *Brown* v. *Colorado*, 106 U. S. 95, 98; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148–150; *Dawson* v.

Columbia Trust Co., 197 U. S. 178, 181; *Lord* v. *Thomas*, 64 N. Y. 107; *Caldwell* v. *Donaghey*, 108 Arkansas, 60, 64; 45 L. R. A., N. S., 721; Ann. Cas. 1915 B, 133.

We deem it clear also that the Act of 1913 had not the effect of depriving complainant of property without due process of law, in contravention of the Fourteenth Amendment. Assuming he had property rights and that they were taken, it clearly was done for a public purpose, and there was adequate provision for compensation in §§ 886–890, Rem. & Ball. Code of Washington, which entitle any person having a claim against the State to begin an action thereon in a designated court upon the mere giving of security for costs, whereupon service of the complaint is to be made upon the Attorney General and Secretary of State, the action is to proceed in all respects as other actions, with a right of appeal to the Supreme Court, and, in case of a final judgment against the State, a transcript of it is to be furnished to the Auditor of State, who is required thereupon to "audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury." If his claim has not been barred by limitation of time, this statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking. *Bragg* v. *Weaver*, *ante*, 57.

The District Court, besides finding complainant's case to be otherwise without merits, held in effect that he was barred from relief in equity by laches, because after the taking effect of the Act of 1913 he stood by for more than a year and permitted the Port Commission to enter upon extensive improvements and expend large moneys on the waterway and adjoining lands, before he began his suit. The only answer made to this is that the defense of laches was not pleaded. But in the equity practice of the courts

of the United States (excepted from the Conformity Act, see Rev. Stats., §§ 913–914) laches is a defense that need not be set up by plea or answer. It rests upon the long-established doctrine of courts of equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance. It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it be not excused his laches may be taken advantage of either by demurrer or upon final hearing. *Maxwell* v. *Kennedy*, 8 How. 210, 222; *Badger* v. *Badger*, 2 Wall. 87, 95; *Marsh* v. *Whitmore*, 21 Wall. 178, 185; *Sullivan* v. *Portland, etc., R. R. Co.*, 94 U. S. 806, 811; *National Bank* v. *Carpenter*, 101 U. S. 567; *Landsdale* v. *Smith*, 106 U. S. 391; *Hammond* v. *Hopkins*, 143 U. S. 224, 250; *Galliher* v. *Cadwell*, 145 U. S. 368, 371–373; *Hardt* v. *Heidweyer*, 152 U. S. 547, 559; *Abraham* v. *Ordway*, 158 U. S. 416, 420; *Willard* v. *Wood*, 164 U. S. 502, 524; *Penn Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685, 696–698.

Decree affirmed.

SCHALL ET AL. *v.* CAMORS ET AL., TRUSTEES OF THE BANKRUPT ESTATES OF LEMORE, BANKRUPT, AND OF CARRIERE, BANKRUPT.

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

No. 84. Argued November 17, 1919.—Decided January 5, 1920.

Section 63*a* of the Bankruptcy Act, defining provable debts, does not include a claim for unliquidated damages, arising out of a pure tort which neither constitutes a breach of an express contract nor results

in any unjust enrichment of the tort-feasor upon which a contract may be implied. P. 248.

Clause *b* of that section, in providing that unliquidated claims may be liquidated in such manner as the court shall direct and may thereafter be proved, refers to claims defined as provable by clause *a*, and not already liquidated, especially those founded upon open account or contract, and has not the effect of admitting all unliquidated claims, including those of tortious origin. *Id.*

Section 17 of the Bankruptcy Act, which declares that a discharge shall release the bankrupt from all of his "provable debts" except certain classes specified, refers to § 63 for the definition of what debts are provable, and does not by the excepting clause add other classes but merely limits the effect of a discharge; and this is true also of the amendment of February 5, 1903 (c. 487, § 5, 32 Stat. 797, 798). P. 251.

To permit a person defrauded by a partnership to prove his claim for damages as a *quasi* contract or equitable debt of the partnership which profited, and also of the individual partners who did not profit, by the fraud, would ignore the distinction between partnership and individual debts and the respective equities of the two classes of creditors as established by § 5 of the Bankruptcy Act. P. 254.

Worthless commercial paper, drawn by a partnership, was sold in the course of its business, by means of fraudulent representations, for a full consideration which went to the partnership and did not profit the partners as individuals save through their interests in the partnership. The firm and its members individually having been thrown into bankruptcy, *held*, that the claim of the defrauded persons, against the individual partners,—as distinct from their claim against the firm and therein their right to participate as partnership creditors in any surplus that might remain of individual assets after payment of individual debts—was a claim in tort not provable in bankruptcy.

250 Fed. Rep. 6, affirmed.

THE case is stated in the opinion.

Mr. Ralph S. Rounds, with whom *Mr. Eugene Congleton* was on the briefs, for petitioners:

The nature of an indebtedness incurred by individual

members of a firm for frauds perpetrated by them in firm transactions is authoritatively established in England by the case of *Ex parte Adamson; In re Collie*, L. R. 8 Ch. Div. 807. It is also well established in England that proof can be made as upon an implied contract in cases where an individual member of the firm is implicated in the misappropriation of moneys by the firm. *In re J. & H. Davison; Ex parte Chandler*, 13 Q. B. D. 50. A similar result has been reached in many cases in courts in this country. *Catts* v. *Phalen*, 2 How. 376; *Burton* v. *Driggs*, 20 Wall. 125; *In re E. J. Arnold & Co.*, 133 Fed. Rep. 789; Pomeroy, Equity Jurisprudence, 3d ed., § 1047; *Stanhope* v. *Swafford*, 77 Iowa, 594; *First State Bank* v. *McGaughey*, 38 Tex. Civ. App. 495.

The question whether a claim for pure tort is provable in bankruptcy has never been definitely decided by this court. The ultimate decision will rest upon the construction given to subsection *b* of § 63 of the Bankruptcy Act. *Crawford* v. *Burke*, 195 U. S. 176, 186; *Dunbar* v. *Dunbar*, 190 U. S. 340; *Friend* v. *Talcott*, 228 U. S. 27; *Clarke* v. *Rogers*, 228 U. S. 534. See Collier on Bankruptcy, 9th ed., p. 853; *Jackson* v. *Wauchula Mfg. Co.*, 230 Fed. Rep. 409.

Under the early English bankruptcy statutes proofs of unliquidated claims both in tort and on contract were not permitted; subsequently the rule was relaxed to permit proof of unliquidated claims arising out of contracts, but lest in making the departure it might be inferred that the rule against proof of unliquidated claims had been entirely abrogated, it was thought necessary in both the English Bankruptcy Statutes of 1869 and 1883 to provide expressly against the proof of unliquidated claims in tort. Williams, Bankruptcy Practice, 10th ed., p. 142.

Similarly, the American Bankruptcy Act of 1867, § 19, after enumerating certain debts which might be proved, at the end of the section contained the provision:

"No debts other than those above specified shall be proved or allowed against the estate."

Considered in the light of the history of these statutes, it is quite clear that the change in language in § 63*a* and *b* of our statute of 1898 was designed to abolish the old rule against proof of unliquidated claims and to permit proof of both tort and contract unliquidated claims. The rule was originally grounded in convenience and related to all unliquidated claims and there was no good reason when some unliquidated claims were admitted to proof to exclude others.

The structure of § 63 indicates plainly that "unliquidated claims" in subsection *b* covers an additional and distinct class of provable debts. The categories *a* and *b* were thus separated with reference only to the procedure for proving the different classes of claims.

If § 63*a*, subdivisions (1) to (4), embrace the whole range of provable claims, it was not necessary to add subdivision (5) embracing claims "founded upon provable debts reduced to judgments after the filing of the petition." Section 63*a* is not intended to be an enumeration of provable debts exclusive of all other kinds of debts, demands and claims, but is only an enumeration of claims which because of their form need no assessment of damages and can be made certain by simple computation and are therefore outside the class of claims which must "pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed."

The cases which hold that subsection *b*, in spite of its inclusion with paragraph *a* in a section entitled "Debts which may be Proved" (*Brown* v. *United Button Co.*, 140 Fed. Rep. 495, affirmed 149 Fed. Rep. 48; and *In re New York Tunnel Co.*, 159 Fed. Rep. 688), adds nothing to the enumeration of paragraph *a*, have admitted that under their construction all the debts enumerated in § 63*a* are

claims of a liquidated nature, i. e., claims which would have been admitted to proof under the old English rule, except those embraced in the last part of § 63*a* (4) which embraces "debts . . . founded upon an open account, or upon a contract express or implied" and in order to limit § 63*b* and to give it some application, have applied it to the last part of § 63*a* (4) irrespective of the fact that every other "debt" enumerated in § 63*a* is in the nature of a liquidated demand.

The construction upheld by these cases does violence to the rule of *noscitur a sociis*. This section (63) is entitled "Debts which may be Proved." The word "debts" in the title obviously means debts in the broad sense including all "debts," "demands," and "claims" provable in bankruptcy in the same sense as the word "debts" as used in § 1, subdivision 11.

Section 63*b* relates to the latter class of liabilities, or unliquidated claims. The word "claims" in subsection *b* is used in a sense distinct from that in which the word "debt" is employed in § 63*a* because "debts" may be proved and allowed while "unliquidated claims" must first be liquidated and thereafter proved and allowed. It seems, therefore, to follow that in the title of § 63 the word "debts" is used in the same sense as in the subject of the definition sentence, § 1 (11), and the word "debts" in § 63*a* and the word "claims" in § 63*b* are used in the same sense as those words are used in the predicate of the definition sentence § 1 (11).

When § 63 and § 17, as amended in 1903, are read together, it becomes evident that tort claims are both provable and dischargeable. The enumeration of tort claims in § 17 was considerably augmented by the amendment of 1903 and the only reasonable conclusion to be drawn from the inclusion by the amendment of certain liabilities for torts involving wrongful intent and moral turpitude is that Congress had clearly in mind that by the

original enactment tort claims, even those embracing wrongful intent and moral turpitude, were provable and dischargeable.

Even before the amendment of 1903, § 17 saved from discharge debts of the bankrupt which were "created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." *Crawford* v. *Burke*, 195 U. S. 193.

In the enumeration of debts which are exempted from a discharge contained in § 17 after the amendment of 1903 practically all are liabilities for torts. If tort claims, including the claims enumerated in § 17, were not provable claims, they would not be discharged, and if they were not discharged because they were not provable, there was no reason for exempting them from discharge. The mere recitation of these tort claims in § 17 indicates that Congress believed that the claims therein enumerated were provable claims, and this conclusion is fortified by the reports of the congressional committee.

The amendment of § 17 in 1903 constituted a legislative construction of the act that tort claims were provable. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 308; *Baker* v. *Swigart*, 199 Fed. Rep. 865, 867. It is reasonable to conclude that it was intended to put tort creditors and contract creditors on an equal basis with regard to proof, as indicated by a natural construction of § 63*a* and *b*, so that the effect of § 60 would be to make preferential transfers to each class of creditors within the four month period null and void.

If the statute is ambiguous, the court should adopt such a construction of § 17 as will make it harmonious with § 1 (11) and § 63*a* and *b*, and consistent with § 60, and the sections can only be harmonized by holding that tort claims are provable.

We believe that all the courts which have decided that tort claims are not provable under the Act of 1898 have

proceeded upon the erroneous assumption that the act, although it differed radically from the prior statute of 1867 in its wording and structure, must be made to conform to the older statute, and after a consideration of the words of the statute in order to justify the conclusion reached, have been obliged to admit, either expressly or by implication, that in § 17 as amended in 1903, Congress used the word "liabilities" inadvisedly, in order to sustain their construction; and counsel for the trustees was forced to take this position in his brief and on the argument in the court below. There is no legitimate reason why § 63*b* should be stricken down and the natural and normal meaning of its words disregarded for the purpose of raising an inconsistency between § 63 (with "*b*" eliminated by judicial construction) and § 17, solely to justify the preconceived idea that Congress did not intend that tort claims not reduced to judgment should be admitted to proof. The line of argument of the cases holding that tort claims are not provable is a very clear illustration of the logical fallacy known as reasoning in a circle. See *Brown* v. *United Button Co.*, 149 Fed. Rep. 48.

The act should be construed equitably (*Knowlton* v. *Moore*, 178 U. S. 41, 65), so as to avoid the discrimination between tort creditors who have reduced their claims to judgment and those who have not, and between tort creditors and contract creditors; so as to give tort creditors of a bankrupt corporation their only chance to participate in its assets; to prevent bankrupts from preferring their tort creditors; and to give full effect to the purpose of the act, declared by this court, "to permit all creditors to share . . . and to leave the honest debtor thereafter free." *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, 591.

The Bankruptcy Act of 1898 has lost the characteristics of a traders' statute. Under the present act it has been held that claims for breach of promise of marriage are

provable (*In re Fife*, 109 Fed. Rep. 880; *In re McCauley*, 101 Fed. Rep. 223), and in the absence of the element of seduction are dischargeable. Judgments for all kinds of torts, including claims for negligence of the bankrupt or imputed to him, for assault and battery, libel and slander, nuisance, fraud, criminal conversation and seduction are provable. *Tinker* v. *Colwell*, 193 U. S. 473; *In re Freche*, 109 Fed. Rep. 620. Damages for anticipatory breach of a contract where the contract has not been broken before the bankruptcy and the bankruptcy itself is relied upon as a breach, are provable. *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581.

[Counsel also argued elaborately the proposition that the claims against the individual partners were provable, as *quasi* contracts or equitable debts, and that the right to prove against both firm and individual assets rested on general principles unaffected by § 5*f* and *g*, of the Bankruptcy Act.]

Mr. Monie M. Lemann, with whom *Mr. J. Blanc Monroe* and *Mr. D. B. H. Chaffe* were on the briefs, for respondents.

Mr. Justice Pitney delivered the opinion of the court.

The transactions out of which this controversy arose took place in the years 1913 and 1914. At that time LeMore and Carriere carried on business as partners in the cities of New Orleans, Louisiana, and Mobile, Alabama. Afterwards, and in the month of May, 1914, upon an involuntary petition in bankruptcy, the firm and the individual members thereof were adjudged bankrupts in the United States District Court for the Eastern District of Louisiana, New Orleans Division, and the present respondents were elected and qualified as trustees of both the partnership and the individual estates. The present

petitioners, constituting the firm of Muller, Schall & Company, filed three proofs of claim, one against the partnership and one against each of the individual partners, all based upon the same transactions, which consisted of the purchase by claimants in the City of New York, through an agent of the bankrupt firm named Trippe, of certain bills of exchange and checks drawn by the firm upon London, Paris, and Antwerp, aggregating about $70,000, all of which were sold to petitioners for full value on the faith of certain fraudulent representations not necessary to be specified, and, at maturity, were presented for payment, dishonored and protested, and notice thereof given to the firm. At the time of these transactions Le More was in Europe and Carriere in New Orleans, and neither of them participated in the particular transactions, although both were cognizant of them and responsible for the false representations. The particular drafts and checks were not signed or indorsed by either partner, and neither profited from their sale except through his interest in the firm. The transactions occurred in the ordinary course of the firm's business, except that they were fraudulent, and the proceeds of the drafts and checks went to the credit of the firm and were used in the conduct of its business. Petitioners' claim against the partnership is based upon the drafts and checks as partnership obligations in contract, and also upon the damages sustained by reason of the fraudulent representations. The claims against the individual estates of the partners in terms demand only damages for the false representations, but are relied upon as showing also, by inference, an individual liability in *quasi* contract or equitable debt.

The trustees petitioned the District Court that the latter claims should be expunged. After a hearing the referee in bankruptcy, for reasons expressed in an elaborate opinion, ordered that the claims against the individ-

ual estates should be "expunged and disallowed," and the rights of claimants to participate in dividends in such estates denied. Upon review, the District Court affirmed this order, and, upon appeal, its decree was affirmed by the Circuit Court of Appeals. 250 Fed. Rep. 6. A writ of certiorari brings the case here.

No question is made as to whether the referee's order, in wholly expunging the claims against the individual estates and denying to petitioners all participation therein, went too far in view of the provision of § 5*f* of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544, 548), that "Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts." If the decision be sustained, petitioners nevertheless will be entitled, upon establishing their claim against the partnership, to participate as partnership creditors in any surplus that may remain of individual assets after payment of individual debts. What was asserted and overruled was a right to double proof, establishing a separate and independent liability on the part of the individual partners that would give to the claimants, in addition to their participation in the partnership assets, a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors.

The first and fundamental question is whether a claim for unliquidated damages, arising out of a pure tort which neither constitutes a breach of an express contract nor results in any unjust enrichment of the tort-feasor that may form the basis of an implied contract, is provable in bankruptcy. This question was passed upon by the referee and by the District Court; it has been most elaborately argued *pro* and *con* in this court; its general importance in the administration of the Bankruptcy Act warranted a review of the case by certiorari; and hence it is

proper that we dispose of it, without regard to whether a like result might follow, upon the particular facts of the case, from a decision of any subordinate question.

Considering, therefore, the question stated: Among other definitions included in § 1 of the Bankruptcy Act is this: "(11) 'debt' shall include any debt, demand, or claim provable in bankruptcy." Section 63 runs as follows: "Debts which may be Proved.—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied; . . .

"*b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

In *Dunbar* v. *Dunbar*, 190 U. S. 340, 350, it was said: "This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63*a*, to be liquidated as the court should direct." But in *Crawford* v. *Burke*, 195 U. S. 176, 187, the question whether the effect of paragraph *b* was to cause an unliquidated claim, susceptible of liquidation but not literally embraced by paragraph *a*, to be provable in bankruptcy was regarded as still open.

That clause *b* provides the procedure for liquidating claims provable under clause *a* if not already liquidated, especially those founded upon an open account or a contract express or implied, is entirely clear, and has been

recognized repeatedly in our decisions. *Grant Shoe Co.* v. *Laird Co.*, 212 U. S. 445, 447–448; *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, 592. Has it the further effect of admitting all unliquidated claims, including those of tortious origin?

Historically, bankruptcy laws, both in England and in this country, have dealt primarily and particularly with the concerns of traders. Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely *ex delicto*. Act of April 4, 1800, c. 19, 2 Stat. 19; *Dusar* v. *Murgatroyd*, 1 Wash. C. C. 13; Fed. Case No. 4199 (8 Fed. Cas. 140); Act of August 19, 1841, c. 9, 5 Stat. 440; *Doggett* v. *Emerson*, 1 Woodb. & M. 195; Fed. Case No. 3962 (7 Fed. Cas. 821, 826); Act of March 2, 1867, c. 176, §§ 11 and 19, 14 Stat. 517, 521, 525; Rev. Stats., §§ 5014, 5067; *Black* v. *McClelland*, Fed. Case No. 1462 (3 Fed. Cas. 504, 505); *In re Schuchardt*, 8 Ben. 585; Fed. Case No. 12,483 (21 Fed. Cas. 739, 742); *In re Boston & Fairhaven Iron Works*, 23 Fed. Rep. 880.

Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its 63d section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures proposed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the First Session of the 54th Congress. Having then failed of passage, it was submitted again in the Second Session of the 55th Congress as a substitute for a Senate bill; after disagreeing votes of the two Houses, it went to conference, and as the result of a Conference

Report became law. It is significant that § 63 defining "Debts which may be Proved" remained unchanged from first to last, except for a slight and insignificant variance in clause (5) in the final print, the word "interests" having been substituted for "interest." House Rep. No. 1228, 54th Cong., 1st sess., p. 39; House Rep. No. 65, 55th Cong., 2d sess., p. 21; Senate Doc. No. 294, 55th Cong., 2d sess., p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause *b* fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. Such claims might easily have been mentioned if intended to be included. Upon every consideration, we are clear that claims based upon a mere tort are not provable. Where the tortious act constitutes at the same time a breach of contract a different question may be raised, with which we have no present concern; and where, by means of the tort, the tort-feasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim *quasi ex contractu*. *Crawford* v *Burke*, 195 U. S. 176, 187; *Tindle* v. *Birkett*, 205 U. S. 183, 186; *Clarke* v. *Rogers*, 183 Fed. Rep. 518, 521–522; affd. 228 U. S. 534, 543.

Of course, §§ 63 and 17 are to be read together. The reference in the latter section to "provable debts," defined in the former, would be sufficient to show this. See *Crawford* v. *Burke*, 195 U. S. 176, 193; *Tindle* v. *Birkett*, 205 U. S. 183, 186; *Friend* v. *Talcott*, 228 U. S. 27, 39; *Clarke* v. *Rogers*, 228 U. S. 534, 548. It is petitioners' contention that § 17 as amended in 1903 (Act of February 5, 1903, c. 487, § 5, 32 Stat. 797, 798), amounts to a legislative

construction admitting tort claims to proof. The section as it stood before, and the nature of the amendment, are set forth in the margin.[1] We are referred to the Committee's report (House Rep. No. 1698, 57th Cong., 1st sess., pp. 3, 6) as indicating that by the law as it stood, in the opinion of the Committee, claims created by fraud but not reduced to judgment were discharged; reference having been made to *In re Rhutassel*, 96 Fed. Rep. 597, and *In re Lewensohn*, 99 Fed. Rep. 73 (affd., 104 Fed. Rep. 1006), as contradictory decisions upon the point. But neither the report of the Committee nor the language of the amendment gives the least suggestion of an intent to enlarge the description of provable claims as set forth in § 63. On the contrary, the purpose was to limit more

---

[1] Section as originally enacted (30 Stat. 550).

"Sec. 17. Debts not Affected by a Discharge.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (*2*) *are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another;* (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Amendment of 1903 (32 Stat. 798) inserted in the place of clause 2 the following:

"*(2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.*"

NOTE: By a further amendment (Act of March 2, 1917, c. 153, 39 Stat. 999) there was inserted after the word "female," instead of "or for criminal conversation," the following: "*or for breach of promise of marriage accompanied by seduction, or for criminal conversation.*"

narrowly the effect of a discharge by enlarging the class of provable debts that were to be excepted from it. By the terms of the section, both before and after amendment, the scope of the exception was qualified by the fact that the discharge released the bankrupt only from "provable debts." And if the excepting clause as amended might seem to extend to some claims not otherwise provable, its own force must be deemed to be limited by referring to § 63 for the definition of provability. It is not admissible to give to this amendment, confessedly designed to restrict the scope of a discharge in bankruptcy, the effect of enlarging the class of provable claims.

Aside from § 17 or the amendment thereof, it has been held by the federal courts generally that § 63 does not authorize the liquidation and proof of claims arising *ex delicto* and unaffected by contract express or implied. *In re Hirschman*, 104 Fed. Rep. 69, 70–71; *In re Yates*, 114 Fed. Rep. 365, 367; *In re Crescent Lumber Co.*, 154 Fed. Rep. 724, 727; *In re Southern Steel Co.*, 183 Fed. Rep. 498.

And that the amendment of § 17 does not enlarge the class of provable claims enumerated in § 63 has been recognized in several well-considered decisions of the federal courts, which have held, upon satisfactory grounds, that pure tort claims are not provable. *In re United Button Co.*, 140 Fed. Rep. 495, 499 *et seq.; s. c.* on appeal, *Brown* v. *United Button Co.*, 149 Fed. Rep. 48, 52–53; *In re New York Tunnel Co.*, 159 Fed. Rep. 688, 690. In *Jackson* v. *Wauchula Mfg. Co.*, 230 Fed. Rep. 409, 411; and again in the present case (250 Fed. Rep. 7), the Circuit Court of Appeals for the Fifth Circuit passed the question as unnecessary for the decision.

There is an argument *ab inconvenienti*, based upon the supposed danger that if tort claims be held not provable they may be preferred by failing debtors without redress

under § 60, *a* and *b* (30 Stat. 562); amended February 5, 1903, c. 487, § 13, 32 Stat. 797, 799; amended June 25, 1910, c. 412, § 11, 36 Stat. 838, 842), held to apply only to provable claims (*Richardson* v. *Shaw*, 209 U. S. 365, 381; see, also, *Clarke* v. *Rogers*, 228 U. S. 534, 542). We are not much impressed. If there be danger of mischief here, other than such as may be reached under the provisions of § 67*e* or § 70*e* respecting fraudulent conveyances and transfers (see *Dean* v. *Davis*, 242 U. S. 438, 444), the Congress may be trusted to supply the remedy by an appropriate amendment.

It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable *in solido* not only as partners but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable and were properly proved both against the individual partners and against the firm as claims in *quasi* contract or equitable debt. But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubtless it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where by reason of insolvency it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give petitioners not only a right to share in the partnership assets on equal terms with other partnership creditors but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. 547–548) establishes on a firm basis the respective

equities of the individual and firm creditors.[1] Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise. And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors. *Reynolds* v. *New York Trust Co.*, 188 Fed. Rep. 611, 619–620.

Decree affirmed.

---

[1] "Sec. 5. Partners.— . . .

"d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

* * * * * * * * *

"f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. . . .

"g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. . . ."

MERGENTHALER LINOTYPE COMPANY *v.* DAVIS ET AL.

ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 192. Motion to dismiss submitted December 8, 1919.—Decided January 5, 1920.

The Supreme Court of Missouri, exercising by certiorari its superintending control under the state constitution, quashed a judgment of affirmance by the Court of Appeals, because inconsistent with a prior decision of the Supreme Court, and remanded the cause to the Court of Appeals for decision. *Held*, that a second judgment of the latter court reversing and disposing of the cause was directly reviewable by this court, under Jud. Code, § 237, there being no opportunity for further review by the Supreme Court of the State. P. 258.

A federal question first presented to the state court by a petition for rehearing which was overruled without more, is not a basis for review in this court. *Id.*

A claim that a lease contract was made in interstate commerce and was therefore not subject to state statutes, does not sufficiently challenge their validity, but asserts at most a "title, right, privilege, or immunity" under the Constitution, which might afford ground for certiorari, but not for writ of error, under Jud. Code, § 237, as amended. P. 259.

Writ of error to review 271 Missouri, 475, dismissed.

THE case is stated in the opinion.

Mr. Ernest A. Green and *Mr. J. C. Sheppard*, for defendants in error, in support of the motion. *Mr. A. L. Sheppard* was on the brief.

Mr. Bradford Butler, for plaintiff in error, in opposition to the motion.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Dismissal of this writ is asked—*first*, because it does not run to a final judgment "in the highest court of a State in which a decision in the suit could be had"; *second*, because there was not properly drawn in question below "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." Judicial Code, § 237; Act September 6, 1916, c. 448, 39 Stat. 726; *Coon* v. *Kennedy*, 248 U. S. 457; *Godchaux Co.* v. *Estopinal*, *ante*, 179.

The trial court, proceeding without jury, gave judgment for rentals due the Linotype Company under written lease of a machine, etc. The Springfield Court of Appeals affirmed that action. Thereupon the Supreme Court took jurisdiction by writ of certiorari, rendered an opinion, quashed the judgment of affirmance, and remanded the cause to the Court of Appeals for decision. 271 Missouri, 475.

Following the Supreme Court's opinion, the Court of Appeals ordered the judgment of the trial court "reversed, annulled and for naught held and esteemed; that the said appellants be restored to all they have lost by reason of the said judgment; that the said appellants recover of the said respondent costs and charges herein expended, and have execution therefor." A motion there for rehearing having been overruled, without more, this writ of error was sued out.

The assignments of error here challenge the validity of §§ 3037–3040 and § 3342, Revised Statutes of Missouri, 1909, because in conflict with the Federal Constitution. This claim was first set up in the Court of Appeals upon the motion for rehearing.

The Missouri constitution gives the Supreme Court "superintending control over the courts of appeals by *mandamus*, prohibition and *certiorari*," and provides that "the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." In *State ex rel.* v. *Ellison*, 268 Missouri, 225, 238, a proceeding upon certiorari, the court declared: "We can undo what the Court of Appeals has done; . . . and we can send the record back to them to be heard anew by them, . . . but in the Kansas City Court of Appeals alone lies the jurisdiction to hear and to correctly and finally determine the case to which the instant proceeding is ancillary." See also, *State ex rel.* v. *Ellison*, 269 Missouri, 151; *Schmohl* v. *Travelers' Ins. Co.*, 197 S. W. Rep. 60.

In the present cause, the Supreme Court said: "This is an original proceeding by certiorari. . . . It is urged by relator as his grounds for quashal, that the opinion of the Court of Appeals is in conflict with the case of *United Shoe Machinery Co.* v. *Ramlose*, 210 Missouri, 631. . . . If this decision be opposed to what we said, or the comclusion which we reached upon similar facts (if the facts are similar) in the *Ramlose case*, we ought to quash the judgment of the Court of Appeals. This is the sole question to be determined."

Under the Missouri practice and circumstances here disclosed, we think the judgment of the Springfield Court of Appeals was final within the meaning of § 237, Judicial Code. No suggestion is made that further review by the Supreme Court could be had, as matter of discretion or otherwise.

The only ground mentioned in the assignments of error upon which this writ could be sustained is conflict between specified sections of the Missouri statutes relating to transactions by foreign corporations and the Federal Constitution. But this point came too late, being first

advanced below on the motion for rehearing. *Godchaux Co.* v. *Estopinal, supra.*

The claim that the lease contract was made in course of interstate commerce and therefore not subject to state statutes, was insufficient to challenge the validity of the latter; at most it but asserted a "title, right, privilege, or immunity" under the Federal Constitution which might afford basis for certiorari but constitutes no ground for writ of error from this court.

Dismissed.

SOUTHERN PACIFIC COMPANY *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 118. Submitted December 18, 1919.—Decided January 5, 1920.

Certiorari is the proper means of reviewing a judgment of a state court affirming an award against a railroad company under a workmen's compensation law, where the federal question upon which the applicability, as distinct from the validity, of that law depends, is whether the injured employee was engaged in interstate commerce. P. 262.

A lineman engaged in the necessary work of wiping the insulators supporting a main wire, in use at the time as a conductor of electricity which, flowing from it through a transformer, and thence along the trolley-wires of a railroad, moved cars in interstate and intrastate commerce, *held* employed in interstate commerce, within the Federal Employers' Liability Act. *Id.*

178 California, 20, reversed.

THE case is stated in the opinion.

Mr. Henley C. Booth and *Mr. William F. Herrin* for petitioner.

Their argument, respecting the jurisdiction, may be summarized as follows:

The validity of the state law was not drawn in question but was conceded. By its own terms it does not apply if the federal act does. Laws Calif., 1917, c. 586, § 69 (c). Neither was the "authority" of the State exercised by its tribunals to hear the case drawn in question. Merely the result of their determination is assailed, on a federal ground. The petitioner set up a "right, privilege, or immunity" under the federal act, and the finding against the validity of that claim is reviewable by certiorari, under § 237, Jud. Code, as amended in 1916. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; *Stadelman* v. *Miner*, 246 U. S. 544; *Cave* v. *Missouri*, 246 U. S. 650; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477–481; *Ireland* v. *Woods*, 246 U. S. 323–330.

Mr. Christopher M. Bradley and *Mr. Warren H. Pillsbury*, for respondents, contended that writ of error was the proper remedy and that certiorari would not lie.

On the merits:

Injuries sustained by a railroad employee while repairing a car or locomotive then in use in interstate commerce are within the federal act. *Walsh* v. *New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1. But injuries sustained while caring for machinery or shops used in the repair of such cars or locomotives are not within the federal act. *Illinois Central R. R. Co.* v. *Cousins*, 241 U. S. 641, reversing 126 Minnesota, 172; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, reversing 214 N. Y. 413; *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183, reversing 214 N. Y. 116.

Nor are injuries sustained while repairing cars or locomotives used indiscriminately in interstate and intrastate commerce but out of service for repairs. *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353; *Baltimore*

& Ohio R. R. Co. v. *Branson*, 242 U. S. 623, reversing 128 Maryland, 678.

The repair of tracks, tunnels or bridges then in use for interstate and intrastate commerce comes within the federal act, *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146; while the construction of a new track, tunnel or bridge, prior to its being opened for interstate commerce, does not, *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, *dictum; New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Minneapolis & St. Louis R. R. Co.* v. *Nash*, 242 U. S. 619; *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43.

Similarly, the coaling of an interstate locomotive is within the federal act. *Armbruster* v. *Chicago, Rock Island & Pacific Ry. Co.*, 166 Iowa, 155; *Southern Ry. Co.* v. *Peters*, 194 Alabama, 94. But the mining of coal in the railroad company's mine or its transportation within the State to chutes from which it is to be loaded upon interstate locomotives is not. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177; *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183; *Zavitovsky* v. *Chicago, M. & St. P. Ry. Co.*, 161 Wisconsin, 461.

The general line of demarcation appears to be that the service must be directly connected with the interstate transportation and not preliminary to it. Stated in another way, the service must be proximately and immediately connected with interstate commerce.

In this case the service was important, but importance is not the test. It was too remote from interstate commerce. The case is the same in principle as the *Harrington* and *Yurkonis Cases, supra.* The differences between coal and electricity as power are legally unimportant. They are differences of degree only. The difference in rapidity of movement becomes, upon final analysis, but a difference in reserves maintained.

See *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183; *Barker* v. *Kansas City, M. & O. Ry. Co.*, 94 Kansas, 176; *Giovio* v. *New York Central R. R. Co.*, 162 N. Y. S. 1026; *Zavitovsky* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 161 Wisconsin, 461; *Gallagher* v. *New York Central R. R. Co.*, 167 N. Y. S. 480; *Kelly* v. *Pennsylvania R. R. Co.*, 238 Fed. Rep. 95.

Mr. Justice McReynolds delivered the opinion of the court.

William T. Butler, husband of respondent Mary E. Butler, was killed at Oakland, California, while employed by the Southern Pacific Company as an electric lineman. The Supreme Court of the State affirmed an award rendered by the California Industrial Commission against the company, and the cause is properly here by writ of certiorari.

The fatal accident, which occurred June 21, 1917, arose out of and happened in the course of deceased's employment. He "received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death." At that time the company, a common carrier by railroad, maintained a power house at Fruitvale, California, where it manufactured the electric current which moved its cars engaged in both interstate and intrastate commerce. From the generators this current passed along main lines or cables, through a reduction and transforming station, to the trolley wires, and thence to the motors. When he received the electric shock, deceased was engaged in work on one of the main lines necessary to keep it in serviceable condition. If such work was part of interstate commerce, the Workmen's Compensation Act of the State is inapplicable and the judgment below must be reversed. Otherwise, it must be affirmed. Employers' Liability Act,

April 22, 1908, c. 149, 35 Stat. 65; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *New York Central R. R. Co.* v. *Porter*, 249 U. S. 168.

Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 151; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558; *New York Central R. R. Co.* v. *Porter, supra; Kinzell* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, 133.

Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE CLARKE dissents.

JACOB RUPPERT, A CORPORATION, *v.* CAFFEY, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

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

No. 603. Argued November 20, 21, 1919.—Decided January 5, 1920.

The War-Time Prohibition Act was within the war power of Congress when passed and had neither become invalid by change of circumstances nor expired by its own terms when this suit was begun. P. 281. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146.

For the same reasons, Congress had power to enact new prohibitions at the time when the National Prohibition Act, *infra*, was passed. P. 282.

The National Prohibition Act (October 28, 1919, Title I, § 1) in its provision that "The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume," *held* constitutional. P. 282.

As a measure reasonably necessary to make the prohibition of intoxicating liquors effectual, Congress in the exercise of the war power may prohibit those containing as much as one-half of 1 per cent. by volume of alcohol, even though they be not in fact intoxicating. *Id.*

The argument that power to prohibit non-intoxicating liquors is merely an incident to the power to prohibit intoxicating liquors, implied from clause 18, § 8, of Art. I, of the Constitution, and cannot be upheld, because one implied power cannot be grafted upon another, is merely a matter of words, since, rightly understood, the power in question is a single, broad power, not merely to prohibit but to prevent the liquor traffic, like the police power of the States as applied to the same subject. P. 299.

Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the term express and implied, the term specific and general had been used; for the power conferred by clause 18, § 8, of Art. I, "to make all laws which shall be necessary and proper for carrying into execution" powers specifically granted, is itself an express power. P. 300.

The fact that the above-cited provision of the National Prohibition Act entails peculiar hardship and loss to owners of breweries and manufactured beer by becoming effective immediately upon its passage, does not render it arbitrary and unreasonable. P. 301.

Such immediate prohibition did not amount to a taking of the non-intoxicating beer previously acquired, for which compensation must be made. P. 302.

The action of the President, under the Food Control Act, in at first permitting the production of malt liquors containing not more than 2.75 per cent. of alcohol, in next extending the prohibition to all malt liquors for beverage purposes irrespective of alcoholic content, and in afterwards limiting the prohibition to intoxicating malt liquors, *held*, not to import a finding that 2.75 per cent. beer is non-intoxicating or to raise any equity in favor of an owner of beer manufactured after the President's authority over the subject had ceased. P. 303.

Affirmed.

THE case is stated in the opinion.

Mr. Elihu Root and *Mr. William D. Guthrie*, with whom *Mr. William L. Marbury* was on the briefs, for appellant:

The war powers of the United States are complete and sufficient for all war purposes and comprehend the right to employ any appropriate means found necessary and proper for prosecuting a war and plainly adapted to that end. *Selective Draft Law Cases*, 245 U. S. 366, 377; *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 149; *Salamandra Ins. Co.* v. *N. Y. Life Insurance & Trust Co.*, 254 Fed. Rep. 852, 858. Those powers, however, are clearly divided between Congress and the President. All the executive power exercisable in connection with the waging or conducting of war is vested exclusively in the President by virtue, not only of his office as President, but of his powers as Commander-in-chief. *Ex parte Milligan*, 4 Wall. 2, 139.

It may be conceded that whilst war was being actually waged between April, 1917, and November, 1918, and whilst the country continued on a war-footing with the army and navy not yet demobilized, Congress could, if

necessary and proper for the prosecution of the war while raging, or the support of the army and maintenance of the navy pending demobilization, prohibit the use and consumption of food products in the manufacture of beverages, whether or not intoxicating, and prohibit the manufacture, sale and use of intoxicating liquors. But it is urged that any such incidental war power of prohibition, which would necessarily interfere with the liberties and property rights of the people of the United States and the governmental powers reserved to the several States, can be exercised only in cases of existing war emergency or military necessity. In other words, the rights of the States cannot be even temporarily violated unless a war emergency reasonably warrants such action. This follows from the very nature of our federal system and the duty of Congress and the President not to violate the express reservations of powers to the States, embodied in the Tenth Amendment to the Constitution of the United States, or the constitutional rights of the individual. *Hammer* v. *Dagenhart*, 247 U. S. 251, 273, 276; *Keller* v. *United States*, 213 U. S. 138, 144; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 444; *Kidd* v. *Pearson*, 128 U. S. 1, 24; *McCulloch* v. *Maryland*, 4 Wheat. 316, 405; *Houston* v. *Moore*, 5 Wheat. 1, 48.

The business of brewing beer is authorized, licensed and regulated in a number of the States, as in the State of New York, and any legislation of Congress prohibiting the manufacture and sale of beer must necessarily operate to override state policy and authority and state legislation, as well as to deprive many States of a present source of large revenue from taxation necessary for the support and maintenance of their respective state governments. In the State of New York alone, such annual revenue amounted in 1916 to over $21,000,000, in 1917 to over $20,700,000 and in 1918 to over $22,500,000.

Hundreds of millions of dollars are invested in the

brewing business and to many thousands of citizens it is their only means of livelihood. The rights of all engaged in such a business, heretofore always expressly authorized and licensed by both federal and state governments, ought not to be subject to selection for violation and destruction under the pretext of the exercise of the war powers of Congress at a time when no actual war emergency or military necessity calls for any such prohibition, and when no other class in the Nation is being subjected to any such prohibition or discrimination or called upon to make any such contribution or sacrifice to the common welfare on any plea whatever. On behalf of the brewers, whose property and business are now threatened with destruction long before the Eighteenth Amendment will become effective as the source of any additional power to Congress or as a limitation upon the reserved rights of the States and their peoples, it is submitted that the rights and liberties guaranteed by the Constitution are not suspended and do not cease to be effective guarantees during a period of war, and are not subject to denial or curtailment by war measures, whether by the Congress or the President, unless an actual war emergency or military necessity so requires, and then only during the period of such war emergency or military necessity. *Mitchell* v. *Harmony*, 13 How. 115, 149; *Ex parte Milligan*, 4 Wall. 2, 121; *Raymond* v. *Thomas*, 91 U. S. 712, 716.

It was undoubtedly the intention of the framers of the Constitution to vest in the President the broadest war powers, and to render him independent of Congress in respect of the exercise of those powers in the actual conduct of a war. Hamilton, The Federalist, No. 74, Ford's ed., p. 496; Kent's Comm., vol. 1, p. 282; Story on the Constitution, § 149; Pomeroy, Constitutional Law, §§ 703–714; Von Holst's Constitutional Law (Mason's translation), pp. 164, 192–195. His powers are here emphasized because he is peculiarly qualified under the Constitution

to determine such questions as the existence or continuance of a war emergency or military necessity, and his official declarations upon such a subject, in the absence of other criteria, furnish the best evidence which the nature of the case permits, and in the absence of all other evidence are conclusive.

The existence of a war emergency must be the basis and warrant for the exercise of an implied war power, which tends to deny the rights of an individual or a State, and the courts are not concluded by the mere declaration of Congress, whether express or implied, that such an emergency actually exists, or shall be presumed to continue for some indefinite period in the future. *Ex parte Milligan*, 4 Wall. 2; Willoughby, Constitutional Law, vol. 2, p. 1251.

The ruling and doctrine of the *Milligan Case* have never been questioned by the court. With entire uniformity the authorities have laid down and applied the rule of actual necessity or emergency as the test of the authority of the Congress or the President to exercise any incidental war power in derogation of the constitutional rights of the citizen. *Mitchell* v. *Harmony*, 13 How. 115, 135; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Milligan* v. *Hovey*, 3 Biss. 13; *In re Egan*, 5 Blatchf. 319; *McLaughlin* v. *Green*, 50 Mississippi, 453; *Johnson* v. *Jones*, 44 Illinois, 142, 154; *Griffin* v. *Wilcox*, 21 Indiana, 370; *Nance & Mays* v. *Brown*, 71 W. Va. 519, 524; *United States* v. *Hicks*, 256 Fed. Rep. 707; *Legal Tender Cases*, 12 Wall. 457, 540.

To argue that the war with Germany and Austria is not yet legally and formally terminated does not meet the point at all. The existence of actual war emergency and not mere *de jure* war is the controlling test of the right to deny the constitutional rights of citizens of the United States. That is clearly the doctrine of the *Milligan Case*. The mere fact that a *de jure* state of war still exists

would not warrant the subversion of state rights or constitutional immunities, if there be as matter of fact no actual war emergency.

The cases which hold that, strictly and legally speaking, the war will not be terminated until a treaty of peace is ratified, mostly deal with such matters as the statute of limitations or the rights of aliens. Of course, an alien enemy ordinarily cannot sue until peace has been formally restored, and, therefore, the running of the statute is suspended in the meanwhile; but such precedents have no bearing upon the question here under discussion.

The contention of the Government seems to be that the right of Congress to exert its war powers is absolute, that the question as to what particular measures are necessary is committed wholly to the discretion of Congress and that the judgment of Congress when expressed is not subject to review by the courts. It is submitted that this contention is clearly in conflict with the fundamental doctrine upon which this court has uniformly proceeded ever since the decision in *Marbury* v. *Madison*, 1 Cranch, 137, and that it has long been settled that Congress is never the sole judge of the extent of its powers or of the existence of jurisdictional facts authorizing its action. It must be borne in mind that practically all the war powers of Congress, such as to raise and support armies and to provide and maintain a navy, exist and must be exercised in times of peace as well as war. These powers are expressly delegated and not limited to war times. But the incidental or implied powers are *expressly* limited to those "which shall be necessary and proper for carrying into execution" the delegated powers, and Congress is never the sole judge of their appropriateness. The contention of the Government is fully refuted by the reasoning of Mr. Chief Justice Chase in *Hepburn* v. *Griswold*, 8 Wall. 603, 617.

The present contention on behalf of the Government

is, in final analysis, that the assumption by Congress of a power to prohibit intoxicating and non-intoxicating beverages during a technical state of war is absolutely conclusive and precludes any inquiry by the courts as to the conditions actually existing when the acts in question were passed as alleged war measures, or when they are sought to be enforced against the individual. If sound, this view would vest in Congress as well as in the President the broadest autocratic and despotic war powers, as soon as a technical state of war arose.

But it should be manifest that during the existence of a state of war neither Congress nor the President becomes vested *ipso facto* with unlimited and despotic power throughout the United States, where no actual hostilities are being conducted, and that neither branch of the Government becomes the sole judge of the appropriateness of any means it may determine to be necessary and proper as a war measure. Otherwise, the moment a nominal or legal state of war arose, although without actual hostilities or very limited hostilities (as in the case of the war at sea with France in 1798 or with Tripoli in 1801), the Congress and the President would at once become vested with unlimited despotic powers to determine arbitrarily what means were necessary and proper, which would mean that during the existence of any period of war (and even as the Government suggested on the oral argument below during the period of all aftermaths of the war) Congress and the President in their several departments would be vested with such autocratic and despotic powers that the people of the United States would be quite at their mercy.

Fortunately, no such doctrine has ever been tolerated by this court. On the contrary, ever since the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, the assumption of power by Congress or the Executive has never been held to be conclusive. The controlling judicial

inquiry always has been recognized to be whether the end in view is or is not legitimate at the time of the passage and enforcement of an act of Congress; whether it is or is not an appropriate means to such a legitimate end, and whether it is or is not then plainly adapted to that end.

Furthermore, the constitutionality of any statute, whether criminal or not, must be determined as of the time and in the light of the circumstances existing when it is sought to be enforced against the individual. *Castle* v. *Mason*, 91 Oh. St. 296, 303. The justiciable question always is whether or not a statute sought to be applied in a particular case against a person complaining or defending, does or does not violate the constitutional rights of that person at the time its terms and provisions are attempted to be enforced. The rate cases furnish a striking example and analogy. *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S. 256, 269; *Minnesota Rate Cases*, 230 U. S. 352, 473; *Missouri Rate Cases*, *ib.* 474, 508; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18; *Willcox* v. *Consolidated Gas Co.*, *ib.* 19, 54; and particularly *Municipal Gas Co.* v. *Public Service Comm.*, 225 N. Y. 89, 95, 97. This court recognized the principle now being urged in *Johnson* v. *Gearlds*, 234 U. S. 422, 446, and *Perrin* v. *United States*, 232 U. S. 478, 486.

The question before the court is, therefore, solely this: Is there *now* such actual war emergency or necessity in this country as would in any reasonable aspect warrant the enforcement of the new and extensive prohibitions contained in the Act of October 28, 1919? The President has emphatically and unequivocally answered this inquiry in the negative in his messages to Congress of May 20th and October 27th. And Congress itself in the very act now before the court has recognized that the war is practically concluded by referring thereto in § 38 of title II as "the recent war."

In all the cases heretofore cited in support of war legislation, the legislation was warranted as of the date when it was operative and sought to be enforced. But none of them intimated that a person might be deprived of his liberty or property at some future date under the exercise of the war power, notwithstanding the fact that no actual war necessity for the sacrifice or denial of his constitutional rights might as matter of fact then exist.

The cases of *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Central Telephone Co.* v. *South Dakota, ibid.* 163; *Burleson* v. *Dempcy, ibid.* 191; *MacLeod* v. *New England Telephone & Telegraph Co., ibid.* 195; and *Commercial Cable Co.* v. *Burleson*, 255 Fed. Rep. 99, *s. c.*, 250 U. S. 360, in no way sustain the proposition that any implied declaration by Congress would be conclusive as to the existence of a present necessity justifying the prohibitions in question.

The justiciable question as to the existence or continuance of a war emergency presents, it is true, a very high and delicate matter of public law and may as such involve grave difficulties of proof. In the absence of satisfactory evidence, the court might decline to hold that Congress had acted without authority in view of the continuance of a *de jure* state of war until a treaty of peace has been formally ratified. But the case at bar involves no such difficulty of proof because the President himself has in effect proclaimed in his veto message of October 27, 1919, and in other declarations that the war emergencies, which alone could uphold the prohibition legislation now in question, no longer exist.

In view of the war powers and responsibilities of the President and his express duty to inform Congress as to the state of the Union, it must be clear that it is especially fit and proper that he should determine officially as to the existence or continuance of a war emergency, and

that, in the absence of other proof, his declarations as to this question of fact of actual date and condition should be deemed the best evidence and the most certain criteria. It involves a matter peculiarly within his knowledge and jurisdiction, and in such a matter the decision of the President, as Executive and Commander-in-chief, ought to be accepted as conclusive in the absence of any other proof or criteria.

If it be urged again by the Government that the question whether a war emergency exists or continues is in great measure a political question, to be conclusively determined by the political branch of the Government, surely it is none the less political and conclusive when it is decided by the President, and *a fortiori* so when there is no evidence either before Congress or the courts to the contrary of, or in any way impeaching, his finding.

Some of the reasons for attributing the greatest weight to the declarations of the President as to the actual state of the country, in war as well as in peace, are stated by Mr. Justice Story in his Commentaries, § 1561. And see *Martin* v. *Mott*, 12 Wheat. 19; *Luther* v. *Borden*, 7 How. 144; *Prize Cases*, 2 Black, 635; *The Protector*, 12 Wall. 700, 702.

It would present a very strange anomaly if it were to be held that notwithstanding the solemn official declarations of the President, in respect of a matter peculiarly within his knowledge and jurisdiction, to the effect that a particular war emergency no longer existed calling for or justifying prohibition, the Congress could nevertheless disregard his findings and proceed to enact legislation based upon the assumption of a contrary state of facts.

The condition of the Act of November 21, 1918, has been satisfied.

The President has sufficiently proclaimed the conclusion of the war and demobilization.

The Act of November 21, 1918, had been judicially interpreted by ten United States District Courts to include only intoxicating beverages; the Act of October 28, 1919, provides that *hereafter* the prohibition shall be construed to mean such beverages which contain one-half of one percentum or more of alcohol. It cannot, of course, operate to overthrow the decisions of the courts as to the true construction of the prior act, or apply to alleged offenses committed before the passage of the new act. *Jaehne* v. *New York*, 128 U. S. 189.

Therefore, the controlling question in the case at bar is whether on October 28, 1919, such a war condition or emergency existed as would constitutionally warrant the exercise of the war powers of Congress in derogation or destruction of the constitutional and property rights of the complainant and other brewers of the United States. The act establishes a new and different rule for the future, and thus what has heretofore been wholly lawful is "hereafter" to be a crime. Harmless beverages which were freely and legally manufactured and sold while the war was at its height and while the Act of November 21, 1918, was alone in effect, are now declared to be prohibited and their value as property to be destroyed, and that too as a war measure! New and most drastic punishments are provided for the new offenses created.

The language of the Eighteenth Amendment presents a very grave question as to the power of Congress to enact prohibition legislation effective before the expiration of one year from the ratification of that Amendment.

Congress and the people of the United States, who proposed and adopted this Amendment in war time, clearly intended that the power to prohibit intoxicating liquors should not be exercised by Congress until the expiration of one year from ratification. They appreciated that the Amendment meant the destruction of large industries worth hundreds of millions of dollars without any com-

pensation at all and the means of livelihood of thousands of persons, as well as the withdrawal from the States of a source of large revenue. Accordingly, they decreed by express constitutional provision that there should be one year of grace in order to serve practically in lieu of compensation, and to give those engaged in the industries affected a fair and reasonable opportunity to wind up their businesses, adjust and liquidate their affairs, and find new occupations with a minimum of hardship and social dislocation, and to enable States and municipalities to accommodate and readjust their fiscal systems to the new order. Cong. Rec., December 17, 1917, p. 432.

Even if the war were still active and flagrant, the provision of the Amendment, adopted during war times, should limit and qualify any implied war power in derogation thereof, and certainly so as to emergencies which existed when the Amendment was proposed and adopted. No implied war power to ban both intoxicants and non-intoxicants should be held to exist at the present time in the very face of the fact that the constitutional amendment itself expressly deferred the prohibition for one year and impliedly guaranteed to all those engaged in the business of manufacturing and selling intoxicating liquors that they should meanwhile remain unmolested, so far as the exercise of federal power of prohibition was concerned, until the expiration of one year from the date of ratification. It is in effect proposed to add to the Amendment a proviso authorizing Congress to deny any time of grace if deemed necessary and proper as a war measure!

It does not follow that the Government would have been disabled from meeting new emergencies of war if they had arisen after the ratification of this Amendment. Congress could always authorize condemnation of whatever food products or other property might be needed for war purposes, or ration the food of the country, or, in the exercise of its powers to make rules for the army

and navy, forbid liquor to be sold to soldiers and sailors, etc. Only general federal prohibition was impliedly forbidden during the year of grace.

Even if Congress in the exercise of its war powers could prohibit the manufacture and sale of intoxicating liquors, it could not prohibit the manufacture and sale of beverages which are indisputably and concededly non-intoxicating. Any such stretch of legislation, if upheld as incidental to any incidental war power of Congress to prohibit intoxicating liquors, would carry the incidental power of Congress beyond anything yet approved or permitted by this court. The reasoning which is advanced to uphold this extension of power under the National Prohibition Act of October 28, 1919, would practically overthrow the doctrine of *Hammer* v. *Dagenhart*, 247 U. S. 251, 273, 276, and analogous cases, denying to Congress any such general police power in aid of its express powers.

The case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, presented for consideration solely the police powers of the States in so far as they were limited by the Fourteenth Amendment. The national government has no police power and may not, therefore, enact laws prohibiting the manufacture and sale of intoxicants simply because Congress deems that course advisable for the public welfare. The *Purity Extract Co. Case*, moreover, prohibited all malt liquors, whether intoxicating or not, because malt beverages might be used to conceal intoxicating malt liquors. No such object can be attributed to the Act of Congress of October 28, 1919, because it does not prohibit all malt liquors, but divides them by an arbitrary standard of percentage of alcohol.

It does not follow that because Congress may exercise the power of prohibiting intoxicants in war time, it can go further and ban non-intoxicants as an incident to this implied incidental power. The Constitution merely confers upon Congress the right to exercise powers incidental

to enumerated powers if necessary and proper, not the right to exercise powers incidental to implied incidental powers. Any other theory would strip the States of all their powers for, if each implied incidental power breeds new powers by added implication, there is no point at which the process can be halted, but the result must in time be one consolidated government in place of our present federal system. The fallacy of such a doctrine was early exposed by Jefferson in a letter to Livingston (Ford's Jefferson, vol. VII, p. 44). See, also, *McCulloch* v. *Maryland*, 4 Wheat. 316, 411; 3 Hamilton's Works (Lodge's ed.), p. 192; 1 Congressional Debates, p. 1899 (Madison, Feb., 1791); 22 Annals of Congress, p. 212 (Clay, Feb., 1811); Rept. No. 1143, House of Rep., Feb. 26, 1919, pp. 7, 9.

The Act of Congress of October 28, 1919, is particularly unjust and oppressive in respect of the brewers of the United States. These brewers were engaged in manufacturing and selling a beverage which is non-intoxicating, which was expressly authorized by the President in his proclamation of December 8, 1917, in force during a large part of the war period, and which was prohibited by him only in his proclamation of September 16, 1918, when the conservation of all the food products of the country became necessary. Millions of dollars worth of non-intoxicating beer have been manufactured in good faith in reliance upon the proclamations of the President of January 30 and March 4, 1919, and the value of all this product will in large measure be destroyed by the operation of the Act of October 28, 1919, if it be constitutional, without any compensation whatever, on the theory that this sacrifice of the property of a particular class at this time is necessary and proper for carrying into execution the war powers of the Nation!

As to the non-intoxicating beer on hand on October 28, 1919, which was manufactured under authority of the

President's proclamations of December 8, 1917, and January 30 and March 4, 1919, it is submitted that its sale could not be prohibited and its commercial value destroyed without the just compensation guaranteed to all by the Fifth Amendment. *Wynehamer* v. *People*, 13 N. Y. 378; *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 460; *Mugler* v. *Kansas*, 123 U. S. 623.

[A supplemental brief was submitted on the proposition that the Act of November 21, 1918, was not intended to include non-intoxicating beer or wine—as to which, see *United States* v. *Standard Brewery*, *ante*, 210.]

The Solicitor General and *Mr. Assistant Attorney General Frierson* for appellees.

Mr. Justice Brandeis delivered the opinion of the court.

By the Act of August 10, 1917, c. 53, § 15, 40 Stat. 276, 282, a war measure known as the Lever Act, Congress prohibited the use after September 9, 1917, of food materials or feeds in the production of distilled spirits for beverage purposes and authorized the President to limit or prohibit their use in the production of malt or vinous liquors for beverage purposes, so far as he might, from time to time, deem it essential to assure an adequate supply of food, or deem it helpful in promoting the national security or defense. Under the power so conferred the President, by proclamation of December 8, 1917, 40 Stat. 1728, prohibited the production after January 1, 1918, of any "malt liquor except ale and porter" containing more than 2.75 per centum of alcohol by weight. By proclamation of September 16, 1918, 40 Stat. 1848, the prohibition was extended to "malt liquors, including near beer, for

beverage purposes, whether or not such malt liquors contain alcohol"; and by proclamation of March 4, 1919, 40 Stat. 1937, the prohibition was limited "to intoxicating malt liquors." Under § 2 of the act the duty of enforcing the above provisions was assigned to the Commissioner of Internal Revenue. This act contained no provision prohibiting the sale of intoxicating or other liquors.

On November 21, 1918, the so-called War-Time Prohibition Act (c. 212, 40 Stat. 1045) was approved. It provided that:

"After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. . . ."

On February 6, 1919, the Commissioner of Internal Revenue ruled (Treasury Decision 2788) that a beverage containing as much as one-half of one per centum of alcohol by volume would be regarded as intoxicating within the intent of the Act of November 21, 1918; and that after May 1, 1919, persons would not be permitted to qualify as brewers, if the alcoholic content of their product equalled or exceeded that percentage. In so ruling the Commissioner adopted and applied to this prohibitory act the same classification of malt liquors which had been applied in administering the laws concerning the taxation of beer and other similar fermented liquors.

For since 1902 (Treasury Decision 514) fermented liquor containing as much as one-half of one per centum of alcohol had been treated as taxable under Rev. Stats. §§ 3339 and 3242; and this classification was expressly adopted in the War Revenue Act of October 3, 1917, c. 63, § 307, 40 Stat. 311. The correctness of this construction of the act was promptly and earnestly controverted by the brewers, who insisted that Congress had intended to prohibit the production only of such beer or other malt liquors as were in fact intoxicating. The attempt was then made to remove the doubt by new legislation before May 1, 1919, when the act would by its terms become operative. On February 26 the House Committee on the Judiciary reported favorably an amendment to H.R. 13581 providing: "The words 'beer, wine or other intoxicating malt or vinous liquors' in the war prohibition act shall be construed to mean any liquors which contain in excess of one-half of one per centum of alcohol." The Sixty-fifth Congress ended on March 4 without acting on this bill; and the Sixty-sixth Congress did not convene in Extra Session until May 19. On June 30, the House Committee on the Judiciary reported substantially the same provision as § 1 of Title I of H. R. 6810; but it was not enacted until October 28, 1919, when as the Volstead Act it was passed over the President's veto.[a]

NOTE (*a*):—

"The term 'War Prohibition Act' used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it con-

Immediately after the passage of the Volstead Act, this suit was brought in the District Court of the United States for the Southern District of New York by Jacob Ruppert against Caffey, United States Attorney, and McElligott, Acting Collector of Internal Revenue, to enjoin the enforcement as against the plaintiff of the penalties provided in the War-Time Prohibition Act as amended by the Volstead Act. It was heard below on plaintiff's motion for a preliminary injunction and defendants' motion to dismiss; and having been dismissed, was brought here by direct appeal under § 238 of the Judicial Code. The bill alleged that plaintiff, the owner of a brewery and appurtenances, was on October 28, 1919, engaged in the manufacture of a beer containing more than one-half of one per centum of alcohol by volume and less than 2.75 per centum by weight or 3.4 per centum by volume, and had then on hand a large quantity of such beer; and that this beer was not in fact intoxicating. Plaintiff contended (1) that the Act of November 21, 1918, had become void or had expired by its own terms before the bill was filed; (2) that its prohibition by its terms was limited to beer which was in fact intoxicating; (3) that the Act of October 28, 1919, Title I, § 1, which purported to extend the prohibition to the manufacture and sale of beer not in fact intoxicating, exceeded the war power of Congress; and that thereby violation of rights guaranteed to plaintiff by the Fifth Amendment was threatened.

This case was heard and decided below with *Dryfoos* v. *Edwards*, *ante*, 146; and it was argued here on the same day with that case and *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146. For the reasons set forth in

---

tains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of Title II of this Act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe."

the opinion in those cases, the Act of November 21, 1918, was and remained valid as against the plaintiff and had not expired. For the same reasons § 1 of Title I of the Act of October 28, 1919, was not invalid, merely because it was new legislation. But it is insisted that this legislation is nevertheless void as against the plaintiff, because Congress could not, even under its full war powers, prohibit the manufacture and sale of non-intoxicants, and, at all events, could not without making compensation, extend the prohibition to non-intoxicating liquor acquired before the passage of the act. These objections require consideration.

First: May the plaintiff show as a basis for relief that the beer manufactured by it with alcoholic content not greater than 2.75 per centum in weight and 3.4 per centum in volume is not in fact intoxicating? The Government insists that the fact alleged is immaterial since the passage of the Volstead Act by which the prohibition of the manufacture and sale is extended to all beer and other malt liquor containing as much as one-half of one per centum of alcohol by volume.

If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the Nation's efficiency in men, munitions and supplies is as full and complete as the police power of the States to effectively enforce such prohibition in order to promote the health, safety and morals of the community, it is clear that this provision of the Volstead Act is valid, and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation and decisions of the highest courts of nearly all the States establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly appears

that a liquor law, to be capable of effective enforcement must, in the opinion of the legislatures and courts of the several States, be made to apply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or if a more general description is used, such as distilled, rectified, spirituous, fermented, malt or brewed liquors, to all liquors within that general description regardless of alcoholic content;[b] or to such of these liquors as contain

---

NOTE (*b*):—

Cases to this effect are *Marks* v. *State*, 159 Alabama, 71; *Brown* v. *State*, 17 Arizona, 314; *Bradshaw* v. *State*, 76 Arkansas, 562; *Seibert* v. *State*, 121 Arkansas, 258; *In re Lockman*, 18 Idaho, 465; *Hansberg* v. *People*, 120 Illinois, 21, 23 (dictum); *Kurz* v. *State*, 79 Indiana, 488; *Sawyer* v. *Botti*, 147 Iowa, 453; *State* v. *Colvin*, 127 Iowa, 632; *State* v. *Miller*, 92 Kansas, 994; *State* v. *Trione*, 97 Kansas, 365; *Commonwealth* v. *McGrath*, 185 Massachusetts, 1; *Extract & Tonic Co.* v. *Lynch*, 100 Mississippi, 650; *State* v. *Centennial Brewing Co.*, 55 Montana, 500; *Luther* v. *State*, 83 Nebraska, 455; *State* v. *Thornton*, 63 N. H. 114; *People* v. *Cox*, 106 App. Div. (N. Y.) 299; *People* v. *O'Reilly*, 129 App. Div. (N. Y.) 522; *LaFollette* v. *Murray*, 81 Oh. St. 474; *State* v. *Walder*, 83 Oh. St. 68; *State* v. *Bottling Works*, 19 N. Dak. 397; *State* v. *Ely*, 22 S. Dak. 487; *State* v. *Oliver*, 26 W. Va. 422, 427 (dictum); *Pennell* v. *State*, 141 Wisconsin, 35; *United States* v. *Cohn*, 2 Ind. Ter. 474; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

Contra:—City of Bowling Green v. *McMullen*, 134 Kentucky, 742; *Reisenberg* v. *State*, 84 S. W. Rep. (Tex.) 585; *State* v. *Olsen*, 95 Minnesota, 104; *Intoxicating Liquor Cases*, 25 Kansas, 751; *State* v. *Virgo*, 14 N. Dak. 293; *State* v. *Maroun*, 128 Louisiana, 829; *Howard* v. *Acme Brewing Co.*, 143 Georgia, 1.

In Kansas, the legislature overruled this decision by Laws of 1909, c. 164, § 4, see *State* v. *Trione*, *supra;* in Minnesota, made the prohibition apply to all malt liquors containing as much as ½ of 1% of alcohol by volume, Laws of 1919, c. 455, p. 537; in North Dakota by Laws of 1909, c. 187, p. 277, see *State* v. *Bottling Works*, 19 N. Dak. 397, the prohibition applied to all liquors which retained "the alcoholic principle;" in Louisiana Acts of 1914, Nos. 146, 211, operated to cut down the per cent. of alcohol to 1.59, see *State* v. *George*, 136 Louisiana, 906. In Georgia Acts of 1919, p. 931, changed the rule of *Howard* v. *Acme Brewing Co.*, *supra*, see Note (*d*) 4, *infra*, 289.

a named percentage of alcohol; and often several such standards are combined so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol.

A test often used to determine whether a beverage is to be deemed intoxicating within the meaning of the liquor law is whether it contains one-half of one per cent. of alcohol by volume. A survey of the liquor laws of the States reveals that in seventeen States the test is either a list of enumerated beverages without regard to whether they contain any alcohol or the presence of any alcohol in a beverage, regardless of quantity; [c] in eighteen States it

---

NOTE (*c*):—

1. Alabama:—Gen. Laws Sp. Sess. 1907, No. 53, § 1, p. 71, made it unlawful to sell "any alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages, or other liquors or beverages . . which if drunk to excess will produce intoxication."

Marks v. *State*, 159 Alabama, 71, 78, stated that "or other liquors or beverages . . . which if drunk to excess will produce intoxication" did not modify or limit the prohibition of the liquors enumerated. Any unenumerated liquor, however, must be proved to be intoxicating if drunk to excess.

Gen. Laws, 1919, Act No. 7, p. 6, in terms prohibits all liquors containing any alcohol.

2. Arizona:—Constitution, Art. 23, § 1, prohibits "ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind."

Brown v. *State*, 17 Arizona, 314, held that "beer" was prohibited whether or not it was intoxicating.

3. Arkansas:—Acts of 1917, Act 13, p. 41, as amended by Acts of 1919, Act 87, p. 75, prohibits "any alcoholic, vinous, malt, spirituous or fermented liquors."

Seibert v. *State*, 121 Arkansas, 258, held that the enumerated liquors are prohibited whether they are intoxicating or not if they contained any alcohol.

An earlier act contained the words "or other intoxicating liquors" following "or fermented liquors." It was held in *Bradshaw* v. *State*, 76 Arkansas, 562, that this clause did not modify the enumerated liquors and that they were prohibited whether intoxicating or not.

4. Colorado:—Sess. Laws, 1915, c. 98, § 30—(Prohibition)—as

is the presence of as much as or more than one-half of one per cent. of alcohol;[d] in six States, one per cent. of alcohol;[e] in one State, the presence of the "alcoholic principle;" and in one State, two per cent. of alcohol.[g] Thus in

---

amended by Sess. Laws, 1919, c. 141, prohibits "intoxicating liquors . . . no matter how small the percentage of alcohol they may contain."

4½. Hawaii:—Rev. Laws, 1915, § 2101. (License Law) "'Intoxicating liquors' . . . shall be held to include spirituous liquors, and any beverage in which may be found any percentage of distilled spirits, spirits, alcohol and alcoholic spirit as defined by the laws of the United States, and any sake, beer, lager beer, ale, porter and malt or fermented or distilled liquors."

5. Idaho:—Sess. Laws, 1909, p. 18. (Local Option)—"spirituous, vinous, malt, and fermented liquors . . . and other drinks that may be used as a beverage and produce intoxication."

In re Lockman, 18 Idaho, 465, held that the enumerated liquors are within the act whether or not they are intoxicating.

Constitutional Amendment of Nov. 7, 1916 (Prohibition). (Sess. Laws, 1917, p. 528.) The Enforcement Laws are cumulative, including Sess. Laws, 1915, c. 28; Sess. Laws, 1915, c. 11 (see § 23); Sess. Laws, 1911, c. 15; and Sess. Laws, 1909, p. 18. Thus the definition and interpretation above are retained.

6. Iowa:—Rev. Code (1897–1915), § 2382. Prohibits "any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever."

State v. *Intoxicating Liquors*, 76 Iowa, 243 (1888); and *State* v. *Colvin*, 127 Iowa, 632 (1905); *Sawyer* v. *Botti*, 147 Iowa, 453 (1910), held that liquor containing any alcohol whatever is prohibited.

7. Kansas:—Laws of 1881, c. 128, § 1 (Gen. Stats. 1915, § 5498). Prohibits "any spirituous, malt, vinous, fermented or other intoxicating liquors."

Intoxicating Liquor Cases, 25 Kansas, 751, held that in every case the question of the intoxicating quality of the beverage must go to the jury.

Laws of 1909, c. 164, § 4 (Gen. Stats. 1915, § 5501), amended the Act of 1881 as follows: "All liquors mentioned in section 1 of this act shall be construed and held to be intoxicating liquors within the meaning of this act."

State v. *Miller*, 92 Kansas, 994; *State* v. *Trione*, 97 Kansas, 365, de-

forty-two of the forty-eight States—Maryland appears in two classes above—a malt liquor containing over two per cent. of alcohol by weight or volume is deemed, for the purpose of regulation or prohibition, intoxicating as a

---

clared that the former case is no longer the law and that the mere presence of the liquors mentioned makes the substance intoxicating for purposes of the prohibition statutes.

See also Laws of 1917, cc. 215, 216, "Bone Dry Prohibition Law."

8. Louisiana:—*Shreveport Ice Co.* v. *Brown*, 128 Louisiana, 408, held that a statute regulating the sale of "spirituous and intoxicating liquors" includes only intoxicating liquors.

Acts of Extra Session, 1910, No. 171, defines "Grog-Shop" as a place where "intoxicating, spirituous, vinous, or malt liquors are sold" (and forbids them in prohibition territory).

State v. *Maroun*, 128 Louisiana, 829, held that the malt liquors must be intoxicating to be within the meaning of the statute.

Acts of 1914, No. 146, repeats a similar definition of grog-shop or blind tiger. Acts of 1914, No. 211, forbids the manufacture of near-beer with more than 1.59% of alcohol by weight or 2% by volume; and prohibits the sale of the near-beer thus made under the same roof where any other beverage is sold.

State v. *George*, 136 Louisiana, 906, seems to hold that this near-beer may be sold in prohibition territory where the "grog-shops" are not allowed.

Acts of 1916, No. 14, prohibits the sale or keeping for sale of any "malt liquors, whether intoxicating or not, and whether containing alcohol or not, in any parish, ward, city, town or village of this State where the sale of intoxicating liquors is prohibited by law or ordinance. . . ."

9. Maryland:—Laws of 1914, c. 831, § 1, p. 1569 (Prohibition in Certain Counties), forbids "any spirituous, vinous, fermented, malt or intoxicating liquors, or any mixture thereof containing alcohol for beverage purposes. . . ."

Laws of 1916, c. 389, § 1, p. 786. Prohibits in a certain county "any kindred preparation or beverage, having the appearance and taste of Lager Beer . . . except those beverages that are labeled . . . stating that the beverage is free of alcohol."

See also Note *d* (8), *infra*, 290; and Note *h*, *infra*, 296. These citations are not exhaustive of the Maryland county prohibition statutes.

10. Michigan:—Public Acts, 1919, No. 53, § 3, p. 81. "'Intoxicating liquors' . . . include any vinous, malt, brewed, fermented or

matter of law. Only one State has adopted a test as high as 2.75 per cent. by weight or 3.4 per cent. by volume.[h] Only two States permit the question of the intoxicating character of an enumerated liquor to be put in issue.[i] In

---

spirituous liquors . . . and all liquids . . . which contain any alcohol and are capable of being used as a beverage."

11. Mississippi:—Code of 1906, § 1746, as amended by Laws of 1908, c. 115, p. 116 (Code, 1917, § 2086). Prohibits the sale of "any vinous, alcoholic, malt, intoxicating or spirituous liquors, or intoxicating bitters, or other drinks which if drank to excess will produce intoxication."

Fuller v. *City of Jackson*, 97 Mississippi, 237; *Extract & Tonic Co.* v. *Lynch*, 100 Mississippi, 650. All the enumerated drinks are prohibited whether they contain alcohol or are intoxicating or both or neither.

Laws of 1918, c. 189, § 1, p. 210. Prohibits "spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind."

12. New Mexico:—Stats. 1915, § 2874. "All persons who make for sale fermented liquors of any name or description, from malt, wholly or in part, or from any substitute therefor, shall be considered brewers." Section 2937. "The words 'intoxicating liquors' . . . include all malt, vinous, and spirituous liquors."

Constitutional Amendment, proposed by Legislature of 1917, Laws of 1917, p. 352, prohibits "ardent spirits, ale, beer, alcohol, wine or liquor of any kind whatsoever containing alcohol."

13. New York:—Laws of 1897, c. 312, § 2; and Laws of 1903, c. 486, § 2, as amended by Laws of 1905, c. 679, § 2, defining intoxicating liquors as "all distilled or rectified spirits, wine, fermented and malt liquors."

People v. *Cox*, 106 App. Div. 299, held that "Malt Rose containing .74% of alcohol and made from malt was within the meaning of the act.

People v. *O'Reilly*, 129 App. Div. 522 (affd. 194 N. Y. 592), holds that beer comes within the act whether intoxicating or not, and declares that an earlier line of cases holding that the intoxicating quality is always for the jury to decide are no longer applicable where liquors are named in the act.

Laws of 1917, c. 624, § 2, p. 1835. City Local Option Law. Continues the definition.

14. Ohio:—Rev. Stats. 1906, §§ 4364–9, laid a tax on the business of "trafficking in spirituous, vinous, malt, or any intoxicating liquors."

LaFollette v. *Murray*, 81 Ohio St. 474, held that "Friedon Beer" a

three other States the matter has not been made clear either by decision or legislation.[j] The decisions of the courts as well as the action of the legislatures make it clear—or, at least, furnish ground upon which Congress

---

malt liquor containing .47% of alcohol and not intoxicating was within the statute.

State v. *Walder*, 83 Ohio St. 68.

Laws of 1919, §§ 6212–15, p. 388. (Prohibition.) ". . . 'liquor' or . . . 'intoxicating liquors' . . . include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, and also any alcoholic liquid . . . which . . . is . . . capable of being used as a beverage."

15. South Dakota:—Sess. Laws of 1890, c. 101, § 6, p. 229 (Prohibition). Intoxicating liquors include "all spirituous, malt, vinous, fermented or other intoxicating liquors or mixtures . . . that will produce intoxication."

Rev. Pol. Code, 1903, § 2834, requires a license to sell "any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors."

State v. *Ely*, 22 S. Dak. 487, held that the liquors named come within the act whether or not they are intoxicating.

Rev. Code, 1919, § 10237. "'Intoxicating Liquors' . . . include whiskey, alcohol, brandy, gin, rum, wine, ale, beer, absinthe, cordials, hard or fermented cider, . . . and all distilled, spirituous, vinous, malt, brewed and fermented liquors, and every other liquid . . . containing alcohol, which . . . is capable of being used as a beverage."

15½. United States:—28 Stat. 697, § 8 (Indian Territory Prohibition), prohibits "any vinous, malt, or fermented liquors, or any other intoxicating drinks."

United States v. *Cohn*, 2 Ind. Ter. 474, held that the act prohibits all malt liquors whether or not they are intoxicating.

See also 39 Stat. 903 (Alaska Prohibition); and 39 Stat. 1123 (D. of C. Prohibition), both of which prohibit "all malt liquors."

16. Washington:—Code, 1912, Title 267, § 45 (Local Option). "'Intoxicating liquor' . . . shall . . . include whiskey, brandy, rum, wine, ale, beer, or any spirituous, vinous, fermented, malt or any other liquor containing intoxicating properties . . . except preparations compounded by a registered pharmacist, the sale of which would not subject him to the payment of the special liquor tax required by the laws of the United States."

Sess. Laws of 1915, c. 2, § 2 (Prohibition). "'Intoxicating liq-

reasonably might conclude—that a rigid classification of beverages is an essential of either effective regulation or effective prohibition of intoxicating liquors.[k]

Purity Extract Co. v. *Lynch*, 226 U. S. 192, determined that state legislation of this character is valid and set forth

---

uor' . . . shall . . . include whiskey, etc., [as above] and all liquids . . . which contain any alcohol, which are capable of being used as a beverage."

State v. *Hemrich*, 93 Washington, 439.

17. Wisconsin:—Gen. Stats., 1911, § 1565c (Local Option), "any spirituous, malt, ardent or intoxicating liquors or drinks."

Pennell v. *State*, 141 Wisconsin, 35, holds that the statute forbids fermented malt liquors containing alcohol whether intoxicating or not.

See also Montana, Note (*g*), *infra*, 295.

NOTE (*d*):—

1. Connecticut:—Public Acts, 1919, c. 241, p. 2917, defines intoxicating liquors, "all beer manufactured from hops and malt or from hops and barley, and all beer on the receptacle containing which the laws of the United States require a revenue stamp to be affixed [but it] shall not include beverages which contain no alcohol. . . ."

2. Delaware:—Laws of 1917, c. 10, p. 19 (Local Option Enforcement), defines as follows: "all liquid mixtures . . . containing so much as ½ of 1% of alcohol by volume shall be deemed liquors and shall be embraced in the word 'liquors' as hereinafter used in this Act."

3. Florida:—Acts of Sp. Sess. 1918, c. 7736, § 7, as amended by Acts of 1919, c. 7890, defines intoxicating liquor, which it prohibits, as all beverages containing "½ of 1% of alcohol, or more, by volume."

4. Georgia:—Acts of 1915, Sp. Sess., pp. 77, 79 [Park's Annotated Code, Supplement, 1917, Penal Code, § 448 (b)], defines "prohibited liquors" as ". . . beer, . . . near-beer, . . . and . . . beverages containing ½ of 1% of alcohol or more by volume."

5. Illinois:—Rev. Stats. 1874, c. 43, § 1 ("Dram Shop Act"), defines a dram shop as a place "where spirituous or vinous or malt liquors are retailed . . . and intoxicating liquors shall be deemed to include all such liquors."

Hansberg v. *People*, 120 Illinois, 21, 23. Indictment for selling "intoxicating liquors." Proof of selling "beer." The court said: "No evidence whatever was offered or admitted for the purpose of explaining or showing what beer was made of, or what its characteristics were, or whether it was malt, vinous, spirituous or intoxicating."

with clearness the constitutional ground upon which it rests: "When a State exerting its recognized authority undertakes to express what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make

Laws of 1919, p. 931 (Search and Seizure Law). "'Intoxicating liquor or liquors' shall include all distilled, spirituous, vinous, fermented or malt liquors which contain more than ½ of 1% by volume of alcohol."

6. Indiana:—Rev. Stats. 1881, § 2094, "whoever . . . sells . . . any spirituous, vinous, malt, or other intoxicating liquors."

Kurz v. *State*, 79 Indiana, 488, 490: "It devolves on the State, therefore, to prove that the beer sold was either a malt liquor or that it was, in fact, intoxicating liquor."

Laws of 1911, c. 119, § 29 (Saloon Regulation Act). "The words 'intoxicating liquors,' shall apply to any spirituous, vinous or malt liquor, or to any intoxicating liquor whatever, which is used . . . as a beverage and which contains more than ½ of 1% of alcohol by volume."

Laws of 1917, c. 4, § 2 (Prohibition Act). "The words 'intoxicating liquor,' as used in this act shall be construed to mean all malt, vinous, or spirituous liquor, containing so much as ½ of 1% of alcohol by volume."

7. Maine:—Rev. Stats. 1916, c. 127, § 21 (Prohibition Act), declares "wine, ale, porter, strong beer, lager beer and all other malt liquors, and cider when kept or deposited with intent to sell the same for tippling purposes, . . . are declared intoxicating within the meaning of this chapter."

State v. *Frederickson*, 101 Maine, 37, holds that cider comes within the act whether or not it is in fact intoxicating.

State v. *Piche*, 98 Maine, 348, holds that in case of a liquor not enumerated the jury must find the question of intoxicating quality.

Laws of 1919, c. 235, § 21, prohibits "as well as any beverage containing a percentage of alcohol which by federal enactment or by decision of the Supreme Court of the United States, now or hereafter declared, renders a beverage intoxicating."

8. Maryland:—Laws of 1917, Extra Session, c. 13, § 1 (Prohibition in Prince George's County). "Malt liquors shall be construed to embrace porter, ale, beer and all malt or brewed drinks whether intoxicating or not containing as much as ½ of 1% of alcohol by volume; and that the words 'intoxicating liquors' . . . shall . . . embrace

its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a

---

both spirituous liquors and malt liquors and . . . all liquid mixtures, . . . containing so much as ½ of 1% of alcohol by volume." See also Note *c* (9), *supra*, 286, and Note *h*, *infra*, 296.

9. Minnesota:—Gen. Stats. 1913, § 3188, and Gen. Stats., Suppl. 1917, § 3161, provide that "the terms 'intoxicating liquor' and 'liquor' . . . shall include distilled, fermented, spirituous, vinous, and malt liquor."

State v. *Gill*, 89 Minnesota, 502, held that only those malt liquors which were intoxicating were within the meaning of the act.

Laws of 1919, c. 455, p. 537 (Prohibition). "'Intoxicating liquor' and 'liquor' shall include and mean ethyl alcohol and any kind of distilled, fermented, spirituous, vinous, or malt liquor or liquid of any kind potable as a beverage, whenever any of said liquors or liquids contain ½ of 1% or more of alcohol by volume."

10. Missouri:—Rev. Stats., 1909, § 7243. "If a majority of the votes . . . shall be 'against the sale of intoxicating liquors,' it shall be unlawful for any person . . . [to sell] . . . any kind of intoxicating liquors or beverage containing alcohol in any quantity whatever."

State v. *Gamma*, 149 Mo. App. 694; *State* v. *Burk*, 151 Mo. App. 188; *State* v. *Wills*, 154 Mo. App. 605.

Laws of 1919, c. —, § 15. "The phrase 'intoxicating liquor' or 'intoxicating liquors' whenever used in this act shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented, or alcoholic liquors, all alcoholic liquids . . . which contain ½ of 1% of alcohol by volume . . . ; *Provided, however*, that when the above mentioned phrases . . . are defined in the laws of the United States, then such definition of Congress shall supersede and take the place of the definition . . . in this section."

11. Nebraska:—Cobbey's Compiled Stats. 1907, § 7161, forbids the sale of "malt, spirituous, or vinous liquors or any intoxicating drinks" without a license.

Luther v. *State*, 83 Nebraska, 455, holds that all malt liquors fall within the meaning of the statute whether or not they are intoxicating.

Laws of 1917, c. 187, § 1 (Prohibition). "'Intoxicating liquors' . . . embrace all malt, fermented, vinous, or spirituous liquors, wine, ale, porter, beer, or any intoxicating drink . . . and all

purpose within the admitted power of the Government." (P. 201.) "It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intox-

---

malt or brewed drinks and all mixtures . . . which will produce intoxication, and in addition thereto such liquors of a different character and not hereinbefore enumerated capable of use as a beverage containing over ½ of 1% of alcohol by volume."

12. Nevada:—Laws of 1919, c. 1, § 1 (Prohibition). "The words 'liquors' . . . shall embrace all malt, vinous, or spirituous liquors, wine, porter, ale, beer, or any other intoxicating drink . . . , and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act . . . and all beverages containing so much as ½ of 1% of alcohol by volume, shall be deemed spirituous liquors."

State v. *Reno Brewing Co.*, 42 Nevada, 397.

13. Oklahoma:—Sess. Laws of 1913, c. 26, § 6, and Sess. Laws of 1917, c. 186 (Prohibition), both define intoxicating liquors as "spirituous, vinous, fermented or malt liquors . . . or any liquors which contain as much as ½ of 1% of alcohol by volume."

Estes v. *State*, 13 Okla. Crim. Rep. 604, held that the State to secure conviction for violation of the act must prove either that the liquor contained more than ½ of 1% of alcohol or that it was in fact intoxicating.

14. Oregon:—Laws of 1905, c. 2 (Local Option), used only the term "intoxicating liquors."

State v. *Carmody*, 50 Oregon, 1, held that the court will judicially recognize that "beer" is intoxicating in an indictment for selling "intoxicating liquors."

Laws of 1915, c. 141, § 2, p. 151. "'Intoxicating liquors' . . . embrace all spirituous, malt, vinous, fermented, or other intoxicating liquors, and all mixtures . . . which contain in excess of ½ of 1% of alcohol by volume shall be deemed to be embraced within the term independently of any other test of their intoxicating character."

15. Tennessee:—Acts of 1917, c. 4, p. 6 (Ann. Code, 1918, § 6798a34). Clubs, etc., may not have on their premises any liquor "containing more than ½ of 1% of alcohol."

16. Utah:—Laws of 1911, c. 106, § 2; Laws of 1913, c. 81, § 2 (License Laws), "any spirituous, vinous, fermented or malt liquor that may be used as a beverage and produce intoxication."

Laws of 1917, c. 2, § 2 (Prohibition). "'Liquors' . . . em-

icants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the en-

---

brace all fermented, malt, vinous, or spirituous liquors, alcohol, wine, porter, ale, beer, absinthe or any other intoxicating drink . . . and all malt or brewed drinks; and all liquids . . . which will produce intoxication; . . . and all beverages containing in excess of ½ of 1% of alcohol by volume."

17. Virginia:—Code of 1887, § 587 (Local Option), "any wine, spirituous or malt liquors, or any mixture thereof."

Savage v. *Commonwealth*, 84 Virginia, 582, and 619, held that a sale of "ginger extract" in order to be illegal requires the proof that the extract is intoxicating.

Acts of 1916, c. 146, § 1, p. 216, "ardent spirits . . . embrace alcohol, brandy, whisky, rum, gin, wine, porter, ale, beer, all malt liquors, absinthe, and all compounds . . . ; and all beverages containing more than ½ of 1% of alcohol by volume."

18. West Virginia:—Code, c. 32, § 1, as amended by Acts of 1877, c. 107, prohibits the sale of "spirituous liquors, wine, porter, ale, beer, or any drink of a like nature . . . and all mixtures . . . known as 'bitters' . . . which will produce intoxication . . . shall be deemed intoxicating liquors." See *State* v. *Oliver*, 26 W. Va. 422, 427.

Code of 1906, c. 32, § 1, is substantially the same.

State v. *Henry*, 74 W. Va. 72, on indictment for selling "intoxicating liquors" held that evidence of sale of "bevo" containing 1.31% of alcohol sufficient to sustain a conviction.

Acts of 1913, c. 13, § 1. "'Liquors' . . . embrace all malt, vinous, or spirituous liquors, wine, porter, ale, beer, or any other intoxicating drink . . . ; and all malt or brewed drinks whether intoxicating or not shall be deemed malt liquors . . . and all beverages containing so much as ½ of 1% of alcohol by volume."

NOTE (*e*):—

1. California:—Stats. 1911, c. 351, § 21 (Local Option and License). "'Alcoholic liquors' . . . include spirituous, vinous and malt liquors, and any other liquor . . . which contains 1%" of alcohol or more.

People v. *Strickler*, 25 Cal. App. 60, held that the clause "and any other liquor which shall contain 1% of alcohol or more" modified the

deavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise." (P. 204.) "The State,

enumerated liquors, so that a malt liquor containing less than 1% of alcohol and not intoxicating did not fall within the act.

2. Massachusetts:—Rev. Laws, 1902, c. 100, § 2 (Local Option and License). "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than 1% of alcohol by volume . . . shall be deemed to be intoxicating."

Commonwealth v. *McGrath*, 185 Massachusetts, 1, held that cider fell within the act whether it contained 1% of alcohol or was intoxicating or neither.

Commonwealth v. *Blos*, 116 Massachusetts, 56, held that a liquor not enumerated in the statute is not prohibited unless it falls within the general definition which is a question for the jury.

Suppl. to Rev. Laws, 1908, c. 100, § 1, retains the same definition.

3. New Hampshire:—Gen. Laws, 1878, c. 109, § 15, restricted the sale of "lager beer or other malt liquors."

State v. *Thornton*, 63 N. H. 114; act includes all malt liquors.

Suppl. to Pub. Stat. and Sess. Laws, 1901–1913, p. 7, defines intoxicating liquors as "all distilled liquors or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage . . . containing more than 1% of alcohol by volume."

Laws of 1917, c. 147, § 60 (Prohibition). "By the words spirit, liquor, spirituous liquor, intoxicating liquor [is meant] all distilled liquors, or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage . . . containing more than 1% of alcohol, by volume."

4. South Carolina:—Rev. Stats. 1893, Crim. Stats., § 437; Code, 1902, Crim. Code, § 555; Code, 1912, Crim. Code, § 794, prohibit any spirituous, malt, vinous, fermented, brewed or other liquors and beverages, or any compound or mixture thereof which contain alcohol.

Acts of 1917, No. 94, prohibits "any spirituous, malt, vinous, fermented, brewed, or other liquors and beverages, or any compound or mixture thereof which contains alcohol in excess of 1%."

5. Vermont:—Rev. Laws, 1880, § 3800, prohibited the sale of cider at places of amusement. See *State* v. *Spaulding*, 61 Vt. 505.

Laws of 1902, No. 90, § 1, p. 94 (Gen. Laws, 1917, § 6452). "'Intoxicating liquors' . . . shall mean ale, porter, beer, lager beer,

within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent

---

cider, all wines, any beverage which contains more than 1% of alcohol by volume."

6. Wyoming:—Compiled Stats., 1910, § 2838. "Any person who shall sell . . . any liquors, either spirituous, vinous, fermented, or malt, without a license, etc."

Sess. Laws of 1919, c. 25, § 2 (Prohibition). "'Intoxicating liquor' . . . include any distilled, malt, spirituous, vinous, fermented, or alcoholic liquor and all alcoholic liquids . . . capable of being used as a beverage, which shall contain more than 1% of alcohol."

NOTE (*f*):—

North Dakota:—Rev. Code, 1895, § 7598, contains a proviso to the effect that fermented and alcoholic liquors containing less than 2% of alcohol by volume shall not be deemed to be intoxicating.

Laws of 1897, c. 65, § 10. "Courts will take judicial notice that beer is a malt liquor and intoxicating." See *State* v. *Currie*, 8 N. Dak. 545.

Rev. Code, 1899, § 7598, prohibits "all spirituous, malt, vinous, fermented, or other intoxicating liquors or mixtures thereof . . . that will produce intoxication, or any liquors . . . sold . . . as a beverage and which shall contain . . . methyl alcohol, . . . amyl alcohol, etc."

State v. *Virgo*, 14 N. Dak. 293 (1905), held that the act only applied to such liquors as were in fact intoxicating.

Laws of 1909, c. 187, p. 277. Intoxicating liquors include alcohol, brandy, rum, beer, ale, porter, wine, and hard cider, also all spirituous, malt, etc., liquors, which will produce intoxication in any degree; or any mixture of such or any kind of beverage whatsoever which while preserving the alcoholic principle or any other intoxicating quality may be used as a beverage and may become a substitute for the ordinary intoxicating beverages.

State v. *Fargo Bottling Works*, 19 N. Dak. 397, held that "Purity Malt" containing 1.75% of alcohol "preserved the alcoholic principle" and whether or not it was intoxicating it might not lawfully be sold.

NOTE (*g*):—

Montana:—Laws of 1917, c. 143, § 2. "'Intoxicating liquors'

beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power." (P. 205.)

. . . include whisky, brandy, gin, rum, wine, ale, and spirituous, vinous, fermented, or malt liquors or liquid . . . which contain as much as 2% of alcohol by volume and is capable of being used as a beverage."

State v. *Centennial Brewing Co.*, 55 Montana, 500, holds specifically mentioned liquors prohibited regardless of alcoholic content.

NOTE (*h*):—

Rhode Island:—Pub. Laws of 1887, c. 634, § 2. "'Intoxicating liquors' . . . include wine, rum or other strong, or malt liquors, or any liquor or mixture which shall contain more than 2% by weight of alcohol" and this is not to be construed to permit the sale of liquors containing less than 2% if intoxicating.

Public Laws, 1919, c. 1740, § 1 (amending Gen. Laws, c. 123, § 1). "'Non-intoxicating beverages' as used in this act, includes and means all rectified spirits, wines, fermented and malt liquors which contain one percentum and not more than four percentum by weight of alcohol.

"Sec. 2. No person shall manufacture or sell or suffer to be manufactured or sold, or keep or suffer to be kept on his premises or possession or under his charge for the purposes of sale and delivery, any non-intoxicating beverages, unless as hereinafter provided."

"Sec. 5. The electors of the several cities and towns . . . shall . . . cast their ballots for or against the granting of licenses for the sale of non-intoxicating beverages pursuant to this act. . . ."

Maryland:—Laws of 1918, c. 219, p. 580 (prohibiting at night the sale of intoxicating liquors to be carried away from the place of sale). Expressly excludes from the operation of the act "malt liquors containing less than 4% of alcohol by weight."

This provision, however, is not attempting to make a classification of intoxicating liquors. For laws of this State which do that see Note *c*, (9) *supra*, 286, and note *d*, (8) *supra*, 290.

NOTE (*i*):—

1. Kentucky:—Statutes of 1903, § 2554, as amended by Laws of 1906, c. 21, forbids the sale in dry territory of "spirituous, vinous or malt liquors."

City of Bowling Green v. *McMullen*, 134 Kentucky, 742, held that the liquors named must be intoxicating in fact to be forbidden by the act.

That the Federal Government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the States is obvious; and both this experience of the States and the need of the Federal Government of legislation defining intoxicating liquors as was done in the Volstead Act were clearly set forth in the reports of the House Committee on the Judiciary in reporting the bill to the 65th Congress, 3d session, Report 1143, February 26, 1919, and to the 66th Congress, 1st session, Report 91, June 30, 1919. Furthermore, recent experience of the military forces had shown the necessity

---

2. Texas:—Rev. Stats. 1895, Art. 5060a, taxes the selling of "spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication."

Ex parte Gray, 83 S. W. Rep. 828; *Reisenberg* v. *State*, 84 S. W. Rep. 585, held that non-intoxicating malt beverages may be sold without a license.

Gen. Laws, 1918, c. 24 (Prohibition), uses the same terms as the older statute and is cumulative, so presumably it has the same meaning.

3. Louisiana:—See Note *c* (8) *supra*, 286. The test of 2% applies only to near-beer. Presumably a vinous liquor must be proved intoxicating in fact under the decisions.

NOTE (*j*):—

1. New Jersey:—Laws of 1918, c. 2, § 1 (Local Option). "The term 'intoxicating liquor' . . . shall mean any spirituous, vinous, malt, brewed, or any other intoxicating liquor."

No interpretations.

2. North Carolina:—Sp. Sess. 1908, c. 71, § 1. Prohibits the sale of "any spirituous, vinous, fermented, or malt liquors, or intoxicating bitters."

Pub. Laws, 1909, c. 438, Schedule B, §§ 26 and 63, imposed a license tax on the sale of "near-beer or any drinks containing ½ of 1% alcohol or more."

Parker v. *Griffith*, 151 N. Car. 600; *State* v. *Danenberg*, 151 N. Car. 718, held that the sale of near-beer containing 1½% of alcohol was lawful.

3. Pennsylvania:—No definition.

NOTE (*k*):—

See Note *b*, *supra*, 283.

of fixing a definite alcoholic test for the purpose of administering the limited prohibitory law included in the Selective Service Act of May 18, 1917, c. 15, § 12, 40 Stat. 76, 82.[l] And the Attorney General, calling attention specifically to the claim made in respect to the 2.75 per cent. beer, had pointed out to Congress that definition of intoxicating liquor by fixed standards was essential to effective enforcement of the prohibition law.[m] It is there-

---

NOTE (*l*):—

That statute made it "unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform." The Judge Advocate General having been applied to for an opinion concerning its administration advised that: In matters of military inquiry, the War Department regards a beverage that contains 1.4% of alcohol as intoxicating liquor within the meaning of § 12 of the Selective Service Act of May 18, 1917, and the regulations of the President and the Secretary of War made thereunder; whether beverages are intoxicating liquors . . . in prosecution of civilians is a question for the civil courts. (Opinions of Judge Advocate General, 250. December 4, 1918—Digest of 1918, p. 360.) See also opinion of March 3, 1919—Digest of 1919, p. 289.

NOTE (*m*):—

Referring to the proposed definition: "I do not think the wisdom of such action on the part of Congress admits of doubt. It goes without saying, I think, that if a law merely prohibits intoxicating liquors and leaves to the jury in each case, from the evidence produced, to determine whether the liquor in question is, in fact, intoxicating or not, its efficient and uniform administration will be impossible. The term 'intoxicating' is too indefinite and uncertain to produce anything like uniform results in such trials. Of course, there are certain liquors so generally known to be intoxicating that any court would take judicial notice of this fact. But in the absence of a definition by Congress there will be innumerable beverages as to which the claim will be made that they do not contain enough alcohol to render them intoxicating. These contentions will produce endless confusion and uncertainty. These, I think, are substantially the reasons why Congress should itself provide a definition.

"The importance of this matter has been very much emphasized by our present efforts to enforce the war prohibition act. The claim is being made that beer containing as much as 2¾ per cent. of alcohol is

fore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition and also that the definition provided by the Volstead Act was not an arbitrary one.

Plaintiff's argument is equivalent to saying that the war power of Congress to prohibit the manufacture and sale of intoxicating liquors does not extend to the adoption of such means to this end as in its judgment are necessary to the effective administration of the law. The contention appears to be, that since the power to prohibit the manufacture and sale of intoxicating liquors is not expressly granted to Congress, but is a power implied under § 8 of Article I of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" powers expressly enumerated, the power to prohibit non-intoxicants would be merely an incident of the power to prohibit intoxicants; and that it cannot be held to exist, because one implied power may not be grafted upon another implied power. This argument is a mere matter of words. The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors. Likewise the im-

---

not intoxicating. And if this must be made a question of fact to be decided by each jury, but little in the way of practical results can be expected. I am, however, most earnestly insisting that, in view of the rulings for many years by the Internal Revenue Department, Congress meant when it used the word 'beer' a beverage of the class generally known as beer if it contained as much as one half of 1 per cent. of alcohol." Letter of Attorney General to Senator Morris Shepherd, July 29, 1919, read in Senate, September 5, 1919, 58 Cong. Rec. 5185.

plied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale. Furthermore, as stated in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 156, while discussing the implied power to prohibit the sale of intoxicating liquors: "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power . . ."

The distinction sought to be made by plaintiff between the scope or incidents of an express power and those of an implied power has no basis in reason or authority. Thus, the Constitution confers upon Congress the express power "to establish post offices and post roads" (Article I, § 8, clause 7). From this is implied the power to acquire land for post offices in the several States, *Battle* v. *United States*, 209 U. S. 36; and as an incident of this implied power to acquire land, the further power is implied to take it by right of eminent domain. *Kohl* v. *United States*, 91 U. S. 367. Likewise, the Constitution confers by clause 3 the express power "to regulate commerce . . . among the several States"; but there is implied for this purpose also the power to grant to individuals franchises to construct and operate railroads from State to State. *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 39. Incidental to this implied power to construct or authorize the construction of a railroad—is the further implied power to regulate the relations of the railroad with its employees, *Second Employers' Liability Cases*, 223 U. S. 1, 47; to require safety appliances upon cars, even when used in intrastate commerce, *Southern Ry. Co.* v. *United States*, 222 U. S. 20; and to regulate freight rates even to the extent of affecting intrastate rates, *American Express Co.* v. *Caldwell*, 244 U. S. 617. Whether it be for purposes of national defense, or for the purpose

of establishing post offices and post roads or for the purpose of regulating commerce among the several States Congress has the power "to make all laws which shall be necessary and proper for carrying into execution" the duty so reposed in the Federal Government. While this is a Government of enumerated powers it has full attributes of sovereignty within the limits of those powers. *In re Debs*, 158 U. S. 564. Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the terms express and implied, the terms specific and general had been used. For the power conferred by clause 18 of § 8 "to make all laws which shall be necessary and proper for carrying into execution" powers specifically enumerated is also an express power. Since Congress has power to increase war efficiency by prohibiting the liquor traffic, no reason appears why it should be denied the power to make its prohibition effective.

Second: Does the fact that Title I of the Volstead Act took effect upon its passage render § 1 invalid as against the plaintiff? Prohibition of the manufacture of malt liquors with alcoholic content of one-half of one per cent. or more is permissible only because, in the opinion of Congress, the war emergency demands it. If, in its opinion, the particular emergency demands the immediate discontinuance of the traffic Congress must have the power to require such discontinuance. To limit the power of Congress so that it may require discontinuance only after the lapse of a reasonable time from the passage of the act would seriously restrict it in the exercise of the war powers. Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the law-making body. That the prohibition of the manufacture of non-intoxicating beer, if permissible at all, may be made to take effect immediately follows necessarily from the principle acted upon in *Mugler* v. *Kansas*, 123

U. S. 623, 669, since the incidents attending the exercise by Congress of the war power to prohibit the liquor traffic are the same as those that attend the States' prohibition under the police power. In the *Mugler Case*, also, the breweries were erected at a time when the State did not forbid the manufacture of malt liquors; and there it was alleged that the prohibition, which became effective almost immediately, would reduce the value of one of the breweries by three-fourths and would render the other of little value. Here, as there, the loss resulting to the plaintiff from inability to use the property for brewery purposes, is an incident of the peculiar nature of the property and of the war need which, we must assume, demanded that the discontinuance of use be immediate. Plaintiff cannot complain because a discontinuance later would have caused him a smaller loss. This, indeed, appears to be conceded so far as concerns the brewery and appurtenances. The objection on the ground that the prohibition takes effect imdiately is confined to the prohibition of the sale of the beer on hand at the time of the passage of the act. But as to that also we cannot say that the action of Congress was unreasonable or arbitrary.

Plaintiff contends however that even if immediate prohibition of the sale of its non-intoxicating beer is within the war power, this can be legally effected, only provided compensation is made; and it calls attention to the fact that in *Barbour* v. *Georgia*, 249 U. S. 454, 459, following some earlier cases, the question was reserved whether, under the police power, the States could prohibit the sale of liquor acquired before the enactment of the statute. It should, however, be noted that, among the judgments affirmed in the *Mugler Case*, was one for violation of the act by selling beer acquired before its enactment (see pp. 625, 627); and that it was assumed without discussion that the same rule applied to the brewery and its product (p. 669). But we are not required to determine here the limits

in this respect of the police power of the States; nor whether the principle is applicable here under which the Federal Government has been declared to be free from liability to an owner, "for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary to their safety and efficiency," *United States* v. *Pacific Railroad*, 120 U. S. 227, 239; in analogy to that by which States are exempt from liability for the demolition of a house in the path of a conflagration, see *Lawton* v. *Steele*, 152 U. S. 133, 136; or for garbage of value taken, *Reduction Co.* v. *Sanitary Works*, 199 U. S. 306; *Gardner* v. *Michigan*, 199 U. S. 325; or for unwholesome food of value destroyed, *North American Storage Co.* v. *Chicago*, 211 U. S. 306; *Adams* v. *Milwaukee*, 228 U. S. 572, 584; for the preservation of the public health. Here, as in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *supra*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.

It is urged that the act is particularly oppressive in respect to the beer on hand, because the plaintiff was engaged in manufacturing and selling a non-intoxicating beverage expressly authorized by the President in his proclamation of December 8, 1917, and prohibited by him later, only when conservation of all the food products of the country became necessary. The facts afford no basis on which to rest the claim of an equity in the plaintiff's favor. The specific permission from the President to manufacture 2.75 per cent. beer was not on the ground that such beer was non-intoxicating; nor was it a declaration by him that this beer was in fact non-intoxicating. The permission extended to all "ale and porter" which, everyone knows, are intoxicating liquors." This permission to

NOTE (*n*):—

Webster defines ale as: "An intoxicating liquor made from an infusion of malt by fermentation and the addition of a bitter, usually

make 2.75 per cent. beer was withdrawn December 1, 1918, under proclamation of September 16, 1918; and no permission to manufacture specifically 2.75 per cent. beer was ever thereafter given by the President. His later proclamation (March 4, 1919) merely limited the prohibition of the use of foodstuffs to use in the production of "intoxicating liquors." Whether 2.75 per cent. beer was intoxicating was thus left by the President not only without a decision but without even an intimation. The statement of plaintiff that the 2.75 per cent. beer on hand was manufactured under permission of the President is wholly unfounded. It was not until July 1, 1919, when the War-Time Prohibition Act became operative in this respect, that there was any prohibition of the sale of any liquors. So far as appears, all the beer which the plaintiff had on hand at the time of the passage of the Volstead Act was manufactured by the plaintiff long after the President had ceased to have any authority to forbid or to permit.

Decree affirmed.

MR. JUSTICE McREYNOLDS, with whom concurred MR. JUSTICE DAY, and MR. JUSTICE VAN DEVANTER, dissenting.

I cannot accept either the conclusion announced by the court or the reasons advanced to uphold it. The importance of the principles involved impels a dissent.

We are not now primarily concerned with the wisdom or validity of general legislation concerning liquors, nor with the intoxicating qualities of beer, nor with measures taken by a State under its inherent and wide general powers to provide for public safety and welfare. Our problem concerns the power of Congress and rights of the citizen after a declaration of war, but when active

hops;" and porter as: "A malt liquor, of dark color and moderately bitter taste, possessing tonic and intoxicating qualities."

264. McREYNOLDS, DAY, and VAN DEVANTER, JJ., dissenting.

hostilities have ended and demobilization has been completed.

The Government freely admits, since the present cause stands upon motion to dismiss a bill which plainly alleges that the beer in question is non-intoxicating, we must accept that allegation as true and beyond controversy. In *United States* v. *Standard Brewery*, decided this day, *ante*, 210, we rule in effect that for many months prior to the Volstead Act, passed October 28, 1919, no law of the United States forbade the production or sale of non-intoxicating malt liquors. And so the question for decision here distinctly presented, is this—Did Congress have power on October 28, 1919, directly and instantly to prohibit the sale of a non-intoxicating beverage, theretofore lawfully produced and which until then could have been lawfully vended, without making any provision for compensation to the owner?

The Federal Government has only those powers granted by the Constitution. The Eighteenth Amendment not having become effective, it has no general power to prohibit the manufacture or sale of liquors. But by positive grant Congress has been empowered: "To declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of the land and naval forces," "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"; and to these it is attempted to trace the asserted power to prohibit sale of complainant's beer. (See concerning implied powers, Cooley's Principles of Constitutional Law, 105; Story on the Constitution, 4th ed., § 1243.)

The argument runs—This court has held in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146, that under a power implied because necessary and proper to carry into execution the above named powers relating to war, in October, 1919, Congress could prohibit the sale

of intoxicating liquors. In order to make such a prohibition effective the sale of non-intoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this non-intoxicant must be implied.

The query at once arises: If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc., etc.? The mischievous consequences of such reasoning were long ago pointed out in *Kidd* v. *Pearson*, 128 U. S. 1, 21, where, replying to a suggestion that under the expressly granted power to regulate commerce, Congress might control related matters, it was said:

"The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?"

For sixty years *Ex parte Milligan*, 4 Wall. 2, 120, 125, has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights. The doctrines then clearly—I may add, courageously—announced, conflict with the novel and hurtful theory now promulgated. A few pertinent quotations from the opinion will accentuate the gravity of the present ruling.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and

264. McREYNOLDS, DAY, and VAN DEVANTER, JJ., dissenting.

good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

* * * * * * * *

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged

at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*."

By considering the circumstances existing when the War-Time Prohibition Act was challenged, in order to reach the conclusion announced in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *supra*, this court asserted its right to determine the relationship between such an enactment and the conduct of war; the decision there really turned upon an appreciation of the facts. And that the implied power to enact such a prohibitive statute does not spring from a mere technical state of war but depends upon some existing necessity directly related to actual warfare, was recognized. Treating that opinion as though it asserted the existence of a general power delegated to Congress to prohibit intoxicants, certain cases which declare our inability to interfere with a State in the exercise of its police power (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Silz* v. *Hesterberg*, 211 U. S. 31, etc.) are now cited, and it is said they afford authority for upholding the challenged statute. But those cases are essentially different from the present one, both as to facts and applicable principles; the power exercised by the States was inherent, ever present, limited only by the Fourteenth Amendment, and there was no arbitrary application of it; the power of Congress recognized in the *Hamilton Case*, and here relied upon must be inferred from others expressly granted and should be restricted, as it always has been heretofore, to actual necessities consequent upon war. It can only support a measure directly relating to such necessities and only so long as the relationship continues. Whether these

264. McREYNOLDS, DAY, and VAN DEVANTER, JJ., dissenting.

essentials existed when a measure was enacted or challenged, presents a question for the courts; and, accordingly, we must come to this ultimate inquiry:—Can it be truthfully said, in view of the well-known facts existing on October 28, 1919, that general prohibition immediately after that day of the sale of non-intoxicating beer theretofore lawfully manufactured, could afford any direct and appreciable aid in respect of the war declared against Germany and Austria?

What were the outstanding circumstances? During the nineteen months—April, 1917, to November, 1918—when active hostilities were being carried on, and for almost a year thereafter, Congress found no exigency requiring it to prohibit sales of non-intoxicating beers. The armistice was signed and actual hostilities terminated November 11, 1918. Our military and naval forces, with very few exceptions, had returned and demobilization had been completed. The production of war material and supplies had ceased long before and huge quantities of those on hand had been sold. The President had solemnly declared, "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." Also—"That the object of the war is attained." "The quiet of peace and tranquility of settled hopes has descended upon us." July 10, 1919, he announced, "The war ended in November, eight months ago"; and in a message dated October 27, 1919, he declared that war emergencies which might have called for prohibition "have been satisfied in the demobilization of the army and navy." Food supplies were abundant, and there is no pretense that the enactment under consideration was intended to preserve them. Finally, the statute itself contains no declaration that prohibition of non-intoxicants was regarded as in any way essential to the proper conduct or conclusion of the war or to restoration of peace.

Giving consideration to this state of affairs, I can see no reasonable relationship between the war declared in 1917, or the demobilization following (both of which in essence if not by formal announcement terminated before October, 1919) or restoration of peace (whose quiet had already descended upon us) and destruction of the value of complainant's beverage, solemnly admitted in this record to be non-intoxicating and which it manufactured, held and desired to sell in strict compliance with the laws of New York. Nor can I discover any substantial ground for holding that such destruction could probably aid in an appreciable way the enforcement of any prohibition law then within the competency of Congress to enact. It is not enough merely to assert such a probability; it must arise from the facts.

Moreover, well settled rights of the individual in harmless property and powers carefully reserved to the States, ought not to be abridged or destroyed by mere argumentation based upon supposed analogies. The Constitution should be interpreted in view of the spirit which pervades it and always with a steadfast purpose to give complete effect to every part according to the true intendment—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore—"Nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

MR. JUSTICE CLARKE also dissents.

DUHNE *v.* STATE OF NEW JERSEY ET AL.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. —, Original. Argued January 5, 1920.—Decided January 12, 1920.

The federal courts have no jurisdiction of a suit brought by a citizen against his own State without its consent. P. 313.

In § 2 of Art. III of the Constitution, the second clause merely distributes the federal jurisdiction conferred by the preceding one into original and appellate jurisdiction, and does not itself confer any. *Id.*

Permission will not be granted to file an original bill if jurisdiction to entertain it is clearly lacking. P. 314.

Motion denied; rule discharged.

THE case is stated in the opinion.

Mr. Everett V. Abbot, with whom *Mr. Edward Hollander*, *Mr. George W. Tucker* and *Mr. Benjamin Tuska* were on the brief, for plaintiff, maintained that since, in Art. III, the Constitution declares that the judicial power shall extend to *all* cases arising under the Constitution, and vests in this court original jurisdiction in all cases in which a State shall be a party, it was the absolute duty of the court to entertain the bill. For the questions which the bill presented, as to the invalidity of the proposal and ratification of the so-called Eighteenth Amendment, indubitably made a case arising under the Constitution and so within the judicial power of the United States. A State was a party to it, and therefore, by the plain letter of the Constitution, this court had, and must take, jurisdiction. The words were so plain that they would not admit exceptions based on attempted interpretation. There were many conflicting *dicta* on the right of a citizen to sue his own State, but this, apparently, was the first time in which an application of this kind had been pre-

sented. He characterized the discussion of the question in *Hans* v. *Louisiana*, 134 U. S. 1, as *obiter*, the real situation there being that the Circuit Court had not jurisdiction because, by the act of Congress, its jurisdiction was concurrent only with that of the state courts.

By far the most elaborate and most comprehensive contribution to the discussion was made by Chief Justice Marshall in a unanimous opinion of this court in *Cohens* v. *Virginia*, 6 Wheat. 264. In that case he took a position exactly contrary to that which he had advanced before the Virginia Convention as quoted by this court in *Hans* v. *Louisiana*. Such a complete reversal of views in a jurist of his weight and authority was a striking tribute to the strength of the argument that the Constitution means what it says. His observations, though not necessary to the decision, were unanswerable—the only discussion of the question grounding itself frankly upon the language of the Constitution and examining its words to ascertain its meaning. Therefore, it was the only discussion relevant to the present purpose, making clear that the letter of the Constitution is also its spirit.

It was not true to say that this suit was without the consent of the State, for the State had given its continuing consent to such suits by accepting the Constitution.

Mr. Thomas F. McCran, Attorney General of the State of New Jersey, for the State of New Jersey.

The Solicitor General, with whom *Mr. Assistant Attorney General Frierson* was on the brief, for defendants other than the State of New Jersey.

Memorandum opinion by Mr. Chief Justice White, by direction of the court.

The complainant, a citizen of New Jersey, asked leave to file an original bill against the Attorney General of the

United States, the Commissioner of Internal Revenue thereof and the United States District Attorney for the District of New Jersey, as well as against the State of New Jersey. The bill sought an injunction restraining the United States officials named and the State of New Jersey, its officers and agents, from in any manner directly or indirectly enforcing the Eighteenth Amendment to the Constitution of the United States, any law of Congress or statute of the State to the contrary, on the ground that that Amendment was void from the beginning and formed no part of the Constitution.

Answering a rule to show cause why leave to file the bill should not be granted, if any there was, the defendants, including the State of New Jersey, denied the existence of jurisdiction to entertain the cause and this is the first question for consideration.

So far as the controversy concerns the officials of the United States, it is obvious that the bill presents no question within the original jurisdiction of this court and in effect that is not disputed since in substance it is conceded that the bill would not present a case within our original jurisdiction if it were not for the presence of the State of New Jersey as a defendant. But it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent. *Hans* v. *Louisiana*, 134 U. S. 1; *North Carolina* v. *Temple*, 134 U. S. 22; *California* v. *Southern Pacific Co.*, 157 U. S. 229; *Fitts* v. *McGhee*, 172 U. S. 516, 524.

It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of § 2, Article III, of the Constitution, confers original jurisdiction upon this court "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." In

other words, the argument is that the effect of the clause referred to is to divest every State of an essential attribute of its sovereignty by subjecting it without its consent to be sued in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as creative of jurisdiction instead of confining it to its merely distributive significance according to the rule long since announced as follows: "This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only." *Louisiana* v. *Texas*, 176 U. S. 1, 16. That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of federal jurisdiction previously conferred and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that the federal jurisdiction does not embrace the power to entertain a suit brought against a State without its consent, the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no federal judicial power is conferred.

As the want of jurisdiction to entertain the bill clearly results, it follows that the permission to file must be and it is denied and our order is,

Rule discharged.

WESTERN UNION TELEGRAPH COMPANY *v.* BOEGLI.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 83. Submitted December 19, 1919.—Decided January 12, 1920.

An act of Congress regulating a subject of interstate commerce is not to be narrowly construed for the purpose of preserving the state power over the same subject previously enjoyed in the absence of federal legislation. P. 316.

The Act of June 18, 1910, c. 309, 36 Stat. 545, brought telegraph companies under the Act to Regulate Commerce and under the administrative control of the Interstate Commerce Commission, and so subjected such companies to a uniform national rule, incompatible with a power in the States to inflict penalties for failure to make prompt delivery of interstate messages. *Id. Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co., ante*, 27.

187 Indiana, 238, reversed.

THE case is stated in the opinion.

Mr. Rush Taggart and *Mr. Francis Raymond Stark* for plaintiff in error.

Mr. Arthur W. Parry for defendant in error.

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

The Telegraph Company challenged the right to subject it to a penalty fixed by a law of Indiana for failure to deliver promptly in that State a telegram sent there from a point in Illinois, on the ground that the Act of Congress of June 18, 1910, amending the Act to Regulate Commerce (36 Stat. 539, 545), had deprived the State of all power in the premises. The court conceding that if the act of Con-

gress dealt with the subject the state statute would be inoperative, imposed the penalty on the ground that the Act of 1910 did not extend to that field. The correctness of this conclusion is the one controversy with which the arguments are concerned.

The proposition that the Act of 1910 must be narrowly construed so as to preserve the reserved power of the State over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the State only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.

As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce as well as placing them under the administrative control of the Interstate Commerce Commission so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several States of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the court below erred therefore in imposing the penalty fixed by the state statute.

We do not pursue the subject further since the effect of the Act of 1910 in taking possession of the field was recently determined in exact accordance with the conclusion we have just stated. *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co., ante,* 27. That case, indeed, was concerned only with the operation, after the passage of the Act of 1910, of a state statute rendering illegal a clause of a contract for sending an interstate telegram limiting the amount of recovery under the conditions stated in case of an unrepeated message; but the

ruling that the effect of the Act of 1910 was to exclude the possibility thereafter of applying the state law was rested, not alone upon the special provisions of the Act of 1910 relating to unrepeated messages, but upon the necessary effect of the general provisions of that act bringing telegraph companies under the control of the Interstate Commerce Act. The contention as to the continuance of state power here made is therefore adversely foreclosed. Indeed, in the previous case the principal authorities here relied upon to sustain the continued right to exert state power after the passage of the Act of 1910 were disapproved and various decisions of state courts of last resort to the contrary, one or more dealing with the subject now in hand, were approvingly cited.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.

BIRGE-FORBES COMPANY *v.* HEYE.

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

No. 76. Argued November 13, 14, 1919.—Decided January 12, 1920.

A judgment for an alien enemy is objectionable only in so far as it may give aid and comfort to the other side in the war. P. 323.

A judgment recovered in the District Court by an alien enemy before he became such, the satisfaction of which was delayed by the other party's appeal until the intervention of war, may properly be reviewed, during the war, and affirmed with directions that the money be paid to the clerk of the trial court to be turned over to the Alien Property Custodian; and a motion to dismiss or suspend the action is correctly denied. *Id.*

Where a broker who became liable for his principal on several arbitration awards sued for their aggregate amount and was given a directed verdict and a judgment against the principal for the part which he

had then paid, and, having paid the remainder, sued again to recover that also, *held*, that the former judgment was conclusive in the second action as to the validity of the awards, it appearing, not only from the petition and judgment, but from other parts of the record of the former case, including the answer, the judge's charge and the opinion of the Circuit Court of Appeals, that the validity of all the awards alike was there in issue and was sustained. P. 323.

In determining whether a former judgment, given upon a directed verdict, involved the same issues of fact as are presented in a second action before the same judge in which both parties submit the point by requests for a peremptory instruction, especial weight attaches to the judge's decision. P. 324.

The objection that the deposition of a plaintiff in the District Court cannot be taken on his own behalf is waived by a stipulation waiving time and notice and allowing the officer to proceed to take and return it on interrogatories. *Id.*

That in the return of foreign depositions the officer commissioned did not put them into the mail and certify to the fact on the envelopes, as required by a state law, is immaterial where the war made compliance impossible and where the officer transmitted them in the only practicable way, though an American consul to the State Department and thence by mail to the clerk. *Id.*

The six months' limitation of the German Civil Code, § 477, on claims for defect of quality in goods sold, does not apply to awards of arbitration based on such claims. P. 325.

In an action to recover amounts paid on defendant's account in Germany, it is not error to take the value of the German mark at par in the absence of evidence that it had depreciated when the plaintiff made the payments. *Id.*

248 Fed. Rep. 636, affirmed.

THE case is stated in the opinion.

Mr. Henry O. Head, with whom *Mr. Jesse F. Holt* was on the briefs, for petitioner, made the following points:

The court below should have sustained the motion to abate the suit, and postpone its consideration until the end of the war, the plaintiff being an alien enemy. The principle is illustrated by the discussion in *Hanger* v. *Abbott*, 6 Wall. 532; *Bishop* v. *Jones*, 28 Texas, 294, 316; *Plettenberg, Holthaus & Co.* v. *Kalmon & Co.*, 241 Fed. Rep.

605; *Howes* v. *Chester*, 33 Georgia, 89; and Corpus Juris, 117. In *Owens* v. *Hannay*, 9 Cranch, 180, nothing was said of this matter and the ruling was confined to a question concerning jurors. *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, is direct upon this point.

The acts of Congress do not authorize the taking of the deposition of a party to a law case in the District Court in advance of trial. By the Act of 1906, 34 Stat. 618, competency of witnesses is determined by the law of the State. By the Texas law, Art. 3688, a party is competent as a witness. Section 863, U. S. Rev. Stats., provides for taking depositions *de bene esse* within the United States; but it has been often decided that this does not authorize depositions abroad, and that authority for them must be by *dedimus* obtained from the court, under § 866, to be awarded or withheld in the court's discretion. *United States* v. *Parrott*, Fed. Cas. No. 15,999.

In this case, sole reliance was on the Act of 1892, 27 Stat. 7, which provides that depositions of witnesses in the federal courts may be taken "in the mode prescribed" by the state laws.

As to whether these federal statutes authorize the taking of depositions of parties before the trial, or are confined to ordinary witnesses, there is much difference of opinion. See *Blood* v. *Morrin*, 140 Fed. Rep. 918; *Hanks Dental Assn.* v. *International Tooth Crown Co.*, 194 U. S. 303; *Union Pacific Ry.* v. *Botsford*, 141 U. S. 250; *Ex parte Fisk*, 113 U. S. 724; *Frost* v. *Barber*, 173 Fed. Rep. 847; Simpkins' A Federal Equity Suit, 3d ed., 506 *et seq.* Conceding that this may be done within the United States, the authority could come only through a *dedimus*, or the Act of 1892, *supra*, and with regard to the latter there is an important question whether it gives the right or is restricted to the mode and manner of taking after authority to take has been secured from the court.

The Act of 1892 only admits a deposition, even in this

country, when it has been taken in the mode prescribed by the laws of the State. It is conceded that the depositions here in question were not returned in compliance with the Texas Statutes. Art. 3660 (2284) (2229). The decision in this case, in conflict with *Pullman Co.* v. *Jordan*, 218 Fed. Rep. 573, is to the effect that the court has the power to substitute another mode which it thinks just as good; notwithstanding the irregularities, the depositions are to be received unless the complaining party is able to show they have been tampered with. This is not in accord with the Texas decisions. *Garner* v. *Cutler*, 28 Texas, 175; *Laird* v. *Ivens*, 45 Texas, 621; *Barber* v. *Geer*, 94 Texas, 581, 584. The construction of the state statute is for the state court. *Smiley* v. *Kansas*, 196 U. S. 447, 455; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 551.

All that the stipulation waived was the taking of the deposition upon the original instead of copies of the interrogatories, together with a waiver of the time, notice and copy of the interrogatories, which would have been necessary had they been served upon the defendant in the usual way. Nothing was waived as to the manner of taking and returning the depositions; and to give the agreement the construction given it by the trial judge would absolutely preclude attorneys from making any waiver of any kind with reference to the taking of depositions, as it would subject them to the peril of having evidence used against them which had been taken and returned in the most informal and unreliable way.

All of the authorities agree that a judgment is *res judicata* in a second suit only as to matters that were directly presented and decided in the first, and is not *res judicata* as to matters which might have been decided, but were not in fact passed upon, no matter how conclusive the evidence may have been. *Russell* v. *Place*, 94 U. S. 606; *Landon* v. *Clark*, 221 Fed. Rep. 841; *In re William S. Butler & Co.*, 207 Fed. Rep. 705; *Smith* v. *Mosier*, 169

Fed. Rep. 430, 446; *McAnally* v. *Haynie*, 17 Tex. Civ. App. 521. Here it must be conceded that all that was decided in the first suit was that enough valid awards were made to require the payment by plaintiff of $36,610.96. There was no decision as to any particular awards, or that any awards over that amount were made. Had there been only a single award and various sums depending on this award, the suing for and recovery of a single one of these sums, to which the adjudication of the existence of the award was necessary, would have been an adjudication of its existence in a suit brought for recovery of any or all of the other sums. *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638. In the instant case, however, there was no single award. On the contrary, there were 160 original awards and 34 appeal awards, making 194 in all. The awards were made in behalf of different persons; on different shipments, arriving at different times; on different claims, where there were different claimants, and by different arbitrators.

Plaintiff's claim was barred by § 477 of the German Code.[1] This was made certain by expert testimony and, if the court is not bound by that, is correct on the face of the statute.

There is no legal presumption that the value of German marks in Texas was their par value. The burden is on him who sues upon an obligation payable in a foreign currency to allege and prove as a part of his case the value of the foreign currency in the currency of the country where the trial is being had. *Kermott* v. *Ayer*, 11 Michigan, 181; *Modawell* v. *Holmes*, 40 Alabama, 391, 405; *Feemster*

[1] "The claim of the buyer for rescission of sale or for reduction of purchase price, as well as the claim for damages on account of defects in a guaranteed quality is outlawed in so far as the seller has not fraudulently concealed the defect, in the case of movable things, in six months from the delivery of the goods; in the case of real estate in one year from the transfer of possession. This limitation period can be extended by agreement."

v. *Ringo*, 5 T. B. Mon. 336; *Hogue* v. *Williamson*, 85 Texas, 553; 2 Wharton on Evidence, 3d ed., § 335; 13 Encyc. of Evidence, 425; 23 Cyc. 791, 792.

Mr. Robert M. Rowland, with whom *Mr. Newton Hance Hassiter* was on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit by Heye, a cotton broker in Bremen, against the petitioner, a cotton exporter in Texas, to recover sums that Heye had to pay on its account. The payments were made upon cotton sold by Heye as the petitioner's agent, to different buyers, for alleged failure of the cotton to correspond to the description upon which the price was based. In pursuance of the contracts and the rules of the Bremen Cotton Exchange the claims of the buyers were submitted to arbitration, which resulted in awards against the plaintiff for a total of 312,749.30 German marks, alleged to be equal to about $74,820.52. Before the present suit was brought another one had been carried to judgment in the same district, in which that amount was claimed. At that time Heye had paid only $36,610.96 of the awards. The judge directed a verdict for the sum that the plaintiff had paid and another item not now in issue. Heye now has paid the whole and brings this suit to recover the amount of the later payment not embraced in the former judgment. He prevailed in the District Court, and the judgment was affirmed with a modification as to payment by the Circuit Court of Appeals. 248 Fed. Rep. 636. 160 C. C. A. 536. The main question on the merits is whether the former judgment was conclusive as to the validity of the awards, but that upon which the certiorari was granted was a preliminary one, as is shown by the fact that certiorari was denied in the former suit. 234 U. S. 759. After the case had been

taken to the Circuit Court of Appeals a motion was made to dismiss or suspend the suit on the ground that Heye had become an alien enemy by reason of the declaration of war between Germany and the United States. The Circuit Court of Appeals, however, affirmed the judgment with the modification that it should be paid to the clerk of the trial court and by him turned over to the Alien Property Custodian, with further details not material here.

Upon the last-mentioned question, although it seemed proper that it should be set at rest, we can feel no doubt. The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. Such a case was disposed of without discussion by Chief Justice Marshall speaking for the Court in *Owens* v. *Hannay*, 9 Cranch, 180. *Kershaw* v. *Kelsey*, 100 Massachusetts, 561, 564. There is nothing "mysteriously noxious" (*Coolidge* v. *Inglee*, 13 Massachusetts, 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger* v. *Abbott*, 6 Wall. 532, 536. *M'Connell* v. *Hector*, 3 B. & P. 113, 114. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct. When the alien enemy is defendant justice to him may require the suspension of the case. *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 22.

On the merits the first question is whether the former judgment was conclusive as to the validity of the awards, assuming them to have been identified as the same that were sued upon in the former case. Taking merely the former declaration and judgment it could not be said with certainty that some of the awards might not have been held invalid and that the defendant had not satisfied the

whole obligation found to exist. But we have before us the fact that the Court directed a verdict and the charge. From the latter, as also from the answer, apart from a general denial, it appears that the awards were dealt with as a whole and that the objections to them were general. The objections were overruled, and the Court assumed that the awards were obligatory, but cut down the amount to be recovered to the sum that had been paid. The case went to the Circuit Court of Appeals and the same things appear in the report of the case there. 212 Fed. Rep. 112. 128 C. C. A. 628. (Certiorari denied. 234 U. S. 759.) In the present case both parties moved the Court to direct a verdict. *Beuttell* v. *Magone*, 157 U. S. 154, 157. *Empire State Cattle Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1, 8. Taking that and the fact that the same judge seems to have presided in both suits into account we should be slow to disturb his decision that the issue was determined in the former one if we felt more doubt than we do. But we are satisfied the decision of the two Courts below was right.

We shall deal summarily with two or three highly technical arguments urged against the affirmation of the judgment. One is that the depositions of Heye and a witness were not returned as required by the Texas statute providing for taking them, with a suggestion that, as Heye was a party, his deposition could not be taken at all. As to the latter point it is to be noticed that it did not present an attempt to fish for information from the opposite party and that an agreement was made that "time, notice and copy are hereby waived," and that the "officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived." Whatever may be the general rule, (as to which see *Blood* v. *Morrin*, 140 Fed. Rep. 918,) we think that this objection is not fairly open. As to the mode of return not having followed strictly the Texas

statute, because the officer to whom the commission was directed did not put the depositions into the mail and certify on the envelopes that he had done so, a sufficient answer is that that course was impossible owing to the war, and that the officer did transmit the depositions in the only practicable way. He gave them to an American consul and had them transmitted to the Department of State and then through the mail to the clerk. The integrity of the depositions is not questioned, the statute was complied with in substance, and justice is not to be defeated now by a matter of the barest form.

We see no error in the finding that § 477 of the German Civil Code did not bar the claim. Assuming the question to be open the Court was warranted in finding that a six months' limitation to claims for defect of quality did not apply where the claims had been submitted to arbitration and passed upon. The same is true with regard to the taking the value of the German mark at par in the absence of evidence that it had depreciated at the time of the plaintiff's payments. On the whole case our conclusion is that the judgment should be affirmed.

Judgment affirmed.

THE MAIL DIVISOR CASES.[1]

APPEALS FROM THE COURT OF CLAIMS.

Nos. 109, 132, 133, 232. Argued December 17, 18, 19, 1919.—Decided January 12, 1920.

The Act of March 3, 1873, c. 231, 17 Stat. 558, in appropriating "for increase of compensation for the transportation of mails on railroad routes," directed the Postmaster General to readjust such compensation thereafter to be paid "upon the conditions and at the rates hereinafter mentioned," thereupon providing that the pay per mile per annum "shall not exceed" certain specified sums graded according to average weights of mails carried per day, and further that "the average weight . . . be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty [by Act of March 3, 1905, c. 1480, 33 Stat. 1082, 1088, increased to ninety], at such times . . . not less frequently than once in every four years, and the result . . . be stated and verified in such form and manner, as the Postmaster-General may direct."

Held: (1) The rates specified are the *maxima;* and the act leaves it discretionary with the Postmaster General, to fix lower rates in contracting with railroads. Holmes, J., p. 329; Pitney, J., p. 335.

(2) The aim of the weighing provision is to obtain the daily average for the year; the "working-days" and the weighing-days (whether including Sundays or not,) are identical; and inasmuch as the mileage of seven-day routes now greatly exceeds that of six-day routes, the Postmaster General, in the exercise of his discretion over rates, may adopt a general rule, to use in all cases the whole number of days of the weighing period, Sundays included, as a divisor for obtaining the average weight, instead of omitting Sundays from the

---

[1] The docket titles of these cases are: *Northern Pacific Railway Company* v. *United States,* No. 109; *Seaboard Air Line Railway* v. *United States,* No. 132; *New York Central & Hudson River Railroad Company* v. *United States,* No. 133; and *Kansas City, Mexico and Orient Railway Company of Texas* v. *United States,* No. 232.

divisor as was done when the six-day routes predominated. Holmes, J., p. 331.

The statute prescribes that the aggregate weight for the weighing period shall be divided by the number of "working-days"—meaning week-days—included in the period; but this is directory only, so that a failure of the Postmaster General to follow this method strictly in fixing rates will not render his action void. Pitney, J., pp. 335–337.

The provision of the Act of July 12, 1876, c. 179, 19 Stat. 79, reducing the compensation "ten per centum per annum from the rates fixed and allowed," and the similar provision of the Act of March 2, 1907, c. 2513, 34 Stat. 1212, refer to the statutory maximum rates, and did not impair the discretion of the Postmaster General to fix lower rates. Holmes, J., pp. 330, 333; Pitney, J., p. 338.

So also of the like provision in the Act of June 17, 1878, c. 259, 20 Stat. 142. Pitney, J., p. 338.

The former practice of the Postmaster General of allowing the railroads the full statutory rates and average weights derived through a divisor excluding Sundays, was an exercise of his discretion in determining the pay, and not an interpretation of the statutes as requiring that the pay be so determined. Holmes, J., p. 332.

Rejection by Congress of amendments requiring the divisor to be the number of weighing days is not an interpretation of the existing law as forbidding that method. Holmes, J., p. 333.

Prior to the Act of July 28, 1916, c. 261, 39 Stat. 429, railroad companies which had not been aided by grants, or otherwise, were free to refuse to carry the mails at rates offered. Pitney, J., p. 339.

Railroad companies which receive and transport the mails and accept the compensation with knowledge that it is readjusted under a rule insisted upon by the Postmaster General, whereby the whole number of days in the weighing period, including Sundays, is used as a divisor in obtaining the average weights, cannot afterwards repudiate their contracts and claim a larger compensation because the week-day divisor was not employed, as directed by the statute. Pitney, J., p. 339.

The same considerations apply to land-grant railroads, under duty to carry the mail at the prices fixed by law, and which by statute are to receive a certain percentage of the pay authorized in other cases; it not appearing that the Postmaster General acted arbitrarily or discriminated against them, or fixed the pay at non-compensatory amounts. Pitney, J., p. 340.

53 Ct. Clms. 258, affirmed.

THE cases are stated in the opinions.

Mr. Alexander Britton, with whom *Mr. C. W. Bunn* and *Mr. Evans Browne* were on the brief, for appellant in No. 109.

Mr. Benjamin Carter, with whom *Mr. James F. Wright* was on the brief, for appellant in No. 132.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the brief, for appellant in No. 133.

Mr. F. Carter Pope for appellant in No. 232.

The Solicitor General and *Mr. La Rue Brown*, Special Assistant to the Attorney General, with whom *Mr. Joseph Stewart*, Special Assistant to the Attorney General, was on the briefs, for the United States.

Mr. William R. Harr and *Mr. Charles H. Bates*, by leave of court, filed a brief as *amici curiæ*, in No. 109.

Mr. Abram R. Serven and *Mr. Burt E. Barlow*, by leave of court, filed a brief as *amici curiæ*, in No. 109.

Mr. L. T. Michener, by leave of court, filed a brief as *amicus curiæ*, in No. 132.

Mr. R. Stuart Knapp, by leave of court, filed a brief as *amicus curiæ*, in No. 132.

MR. JUSTICE HOLMES announced the judgment of the court and delivered the following opinion, concurred in by the CHIEF JUSTICE and JUSTICES BRANDEIS and CLARKE.

These are claims for compensation for carrying the mails above the amounts allowed and paid by the Postmaster General. The four cases are independent of one another,

but as the claims all depend for their validity upon a denial of the Postmaster General's power to pass a certain order they may be considered together. They were rejected by the Court of Claims. The question shortly stated is this. The pay for carrying the mails is determined by the average weight carried. To ascertain this average the mails are weighed for a certain number of consecutive days, and for some time before 1907 the total weight was divided by the number of working days—if the number of days was thirty-five it was divided by thirty, if one hundred and five by ninety. But on June 7, 1907, the Postmaster General issued an order, No. 412, "that when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." This of course diminishes the average weight and therefore the pay of the railroads. They deny the authority of the Postmaster General to make the change and sue for the additional sum that under the old practice they would have received.

The texts to be discussed begin with an Act of 1873, but it should be observed as furnishing a background for that and the following statutes that from the beginning of the Government the Postmaster General, as the head of a great business enterprise, always has been entrusted, as he must be, with a wide discretion concerning what contracts he should make, with whom and upon what terms. It is needless to go into the early statutes or to do more than to refer to Rev. Stats., § 3999, which authorizes him to make other arrangements if he cannot contract for the carriage of the mail upon a railway route at a compensation not exceeding the maximum rates then established, or for what he deems reasonable and fair. The limitations upon the power were in the interest of the business, the principal one being that the pay per mile per annum should not exceed certain rates. Act of June 8, 1872, c. 335, § 211,

17 Stat. 283, 309; Rev. Stats., §§ 3998, 4002. The language plainly showed and the decisions have established that the Postmaster General, if it seemed to him reasonable, could refuse to pay the maximum and insist upon some lesser rate as a condition of dealing with a road. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 649.

The Act of March 3, 1873, c. 231, 17 Stat. 556, 558, appropriates five hundred thousand dollars, or so much thereof as may be necessary, "for increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned." Then, after providing for due frequency and speed and suitable accommodations for route agents—matters on which obviously the Postmaster General is the person to be satisfied—it enacts that "the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars," &c., &c. So far it will be seen that although the object is to permit an increase of compensation still the discretion of the Postmaster General under the earlier acts remains and that he could decline to pay the maximum rates, however ascertained, or any sum greater that he should deem reasonable. It is argued, to be sure, that the rates were fixed at the maximum, and the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, reducing the compensation "ten per centum per annum from the rates fixed and allowed" is thought to help the conclusion. But no argument can obscure the meaning of the words "shall not exceed." The rates were fixed and reduced in their maxima but that was all that was done with regard to them. *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 249 U. S. 451, 454. The question is whether for any reason the control over the compensation thus undeniably given to him

without imposing any downward limit as to the money rates, is wholly withdrawn from his judgment in the preliminary stage of determining the basis to which the money rates are to be applied.

The next words of the statute are: "The average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty, at such times" &c., "and the result to be stated and verified in such form and manner, as the Postmaster-General may direct." The pay it will be remembered was to be per mile per annum, and as it was not practicable to weigh all the mails throughout the year and so to find out the total actual weight of the mails and the exact number of miles that they were carried in the year, the result had to be arrived at approximately by finding the average weight carried on days assumed to resemble the other days of the 365. The average to be reached was not an average for the thirty days but an average weight per day for the year. This interpretation is shown to be the understanding of Congress by the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, which reduces the compensation ten per centum per annum from the rates fixed and allowed by the Act of 1873 "for the transportation of mails on the basis of the average weight." This must mean the average weight for the year concerned. Again by the Act of March 3, 1905, c. 1480, 33 Stat. 1082, 1088, "the average weight [i. e., of course, the average weight for the year] shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety" &c., the increase in the number of days manifestly being for the purpose of more nearly hitting the average for the whole time. The statutes do not mention the divisor to be used in order to get the average desired. In 1873 mails were not carried on Sundays except over a comparatively small proportion of routes and therefore six was the fairest single divisor.

Now, on the other hand, it is said that the mileage of the seven-day routes is much greater than that of the six days. Therefore now to weigh for Sundays as well as other days and to divide by seven, is the fairest single rule that can be found.

But it is said that when an average is directed to be reached by weighing for say thirty working days it is implied that you are to get the average by using the number of working days on which the mails were weighed as a divisor, that working days mean week days, and that if in fact Sundays are used as working days, the divisor is not affected because the statute only contemplated six for a week. But the supposed implication of the statute disappears when it is remembered that the average wanted is not the average for the weighing days only but the average for the year. It is plain too that, whether " working-days " be read to mean week days or the days on which work was done in fact, the statute contemplates the working days and the weighing days as identical and therefore affords no ground for demanding the advantage of a dividend of seven and a divisor of six, which is what the railroads want.

Various make-weights are thrown in to help the construction desired by the roads but they seem to us insufficient to change the result that is reached by reading the words. It is said that down to 1907 the Post Office Department construed the Acts of 1873 and after as entitling the railroads to the maximum rates for full service as defined and to the minimum divisors and that this construction must be taken to have been adopted in silence, by the later statutes. But the exercise of power in the way deemed just while the conditions stated to have existed in and after 1873 continued was not a construction but the exercise of discretion in determining the amount of pay—a discretion which, as we have seen, undeniably was given in the form of a right to regulate

rates, and which therefore there could be no reason for withholding, beyond the express words of the act, at the other end. It is true that in 1884 an Assistant Attorney General gave an opinion that any departure from the practice would defeat the intention of the law and cause no little embarrassment and that thereafter an order made by a previous Postmaster General for taking the number of weighing days as the divisor was revoked. But the letter of the Postmaster General thus answered merely stated what had been the practice as to the divisor and asked whether it was in violation of law. It did not state that the Post Office considered itself bound to follow that way. The order that was revoked only purported to affect seven-day routes and is of little or no importance to the question before us now.

It is said that the rate was fixed by the Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, if not before, by a reduction to "five per centum less than the present rates" on certain routes. But as we have stated we understand this to mean a reduction of the rates fixed by statute, that is the maximum rates. We do not understand it to refer to rates specifically allowed. It is not likely that Congress considered the latter in detail.

Finally much is made of the fact that before the passage of the Act of March 3, 1905, and again before the passage of the Act of March 2, 1907, provisos were stricken out that in effect required the divisor to be the number of the weighing days. A similar thing happened before the passage of the act making appropriations for the fiscal year ending June 30, 1909. We do not go into the particulars of these matters because whatever may have been said by individuals the provisos might as well have been rejected for the purpose of leaving the choice between the two divisors to the judgment of the Postmaster General as for any other reason. On the other hand we are not disposed to lay much stress on the fact

that the appropriations by Congress accepted the Postmaster General's estimates even when it had been notified that the railroads were dissatisfied with Order No. 412. The Act of March 3, 1875, c. 128, 18 Stat. 340, 341, ordered the Postmaster General to have the weighing done thereafter by the employees of the Post Office Department, and to "have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post-Office Department and the railroad-companies." Possibly this might be construed to recognize the power now in dispute but this suggestion also we are content to leave on one side. We also leave unconsidered the great difficulties that the railroads encounter in the effort to show that their conduct did not amount to an acceptance of the Postmaster General's terms within the decision in *New York, New Haven & Hartford R. R. Co.* v. *United States*, *ante*, 123. The construction of the statutes disposes of all the cases without the need of going into further details.

Judgments affirmed.

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent. MR. JUSTICE MCREYNOLDS took no part in the decision of the cases.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE MCKENNA.

I concur in the affirmance of the judgments of the Court of Claims in these cases, but upon grounds somewhat different from those expressed in the opinion of Mr. Justice Holmes.

All the claims arose under the law as it stood after the Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, and before that of July 28, 1916, c. 261, 39 Stat. 412, 429, by which the carriage of mail matter by the railways was made compulsory. The act about which the prin-

cipal controversy turns is that of March 3, 1873, c. 231, 17 Stat. 556, 558, the disputed portion of which was carried into § 4002, Rev. Stats. By it the Postmaster General was "authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad-routes upon the conditions and at the rates hereinafter mentioned: . . . Second, That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; . . . five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty, at such times . . . and not less frequently than once in every four years, and the result to be stated and verified in such form and manner, as the Postmaster-General may direct."

In my opinion, the rates of pay per mile per annum were maximum rates, and the Postmaster-General had a discretion to contract at less if the railroads agreed; but under § 210 of the Act of June 8, 1872, c. 335, 17 Stat. 283, 309; Rev. Stats., § 3997, he was under a duty to arrange the routes into classes according to the size of the mail, and the speed, frequency, and importance of the service, "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed."

But I think that in the clause "the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty," etc., the words "*successive working-days*," by proper interpretation, mean successive week days; and since the aggregate weight for the weighing period must be subjected to division in order to ascertain the

average weight per day, it naturally follows that the divisor should be the same number of "working-days" (that is, week days) that are included in the period. The previous history of the mail service shows abundant reason for this, and for more than thirty years thereafter the provision was uniformly so construed by the Department. Upon a large number of the railway routes, mails were carried six days each week, none being carried on Sunday; while on other routes they were carried on every day in the week. The aggregate weight of mails carried was not affected by the frequency of the service, since the six-day routes carried the Sunday accumulations on Mondays. This explains why a certain number of "working-days" (week days) was made the measure of the weighing period, and at the same time shows that the week-day divisor was necessary in order to deal equitably with both the six-day and the seven-day routes. From the passage of the Act of 1873 down to the promulgation of Order No. 412 in the year 1907, the practice of the Department was in accord with the above interpretation. It was explained in a communication from the Postmaster General to the Senate January 21, 1885, Senate Ex. Doc. No. 40, 48th Cong., 2d sess., p. 68: "The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay. It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we should commit the absurdity of putting a

premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered. The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily, including Sunday."

The Act of March 3, 1905, c. 1480, 33 Stat. 1082, 1088, changed the minimum weighing period so as to require the inclusion of at least ninety, instead of thirty, successive working days, but made no other change. Under this act one hundred and five calendar days necessarily were included in the weighing period in order to take in ninety successive working days. In my opinion, this act, like that of 1873, by fair construction, required that the week-day divisor be employed. And so it was officially construed, until 1907.

But while I regard this method of determining the average weight to have been prescribed, and not left to the discretion of the Postmaster General, still I think the statute in this respect was only directory, and not mandatory. Considering the provision in its relation to the context and subject-matter, it will be seen to be but an aid to the making of fair contracts within the maximum rates allowed, and an aid to the Postmaster General in fixing the rate of compensation upon land-grant routes, and in so arranging routes that each railway company shall receive a proportionate and just rate of compensation according to the service performed. Hence, it seems to me that a failure strictly to comply with the prescribed method of ascertaining the average weight did not of itself render the action of the Postmaster General *ultra vires* and void.

The principal controversy in the present cases is over his Order No. 412 (June 7, 1907), which provided "That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." While I regard it as embodying an erroneous view of the statute, this is not sufficient, in my opinion, to vitiate a contract voluntarily made by a railway mail carrier based upon a calculation of average weight made and known to have been made in conformity with the order. All the present claims originated after the promulgation of the order, and arose out of the carriage of mails under arrangements made with the Postmaster General after express notice of its provisions.

It is contended that although the Act of 1873 (Rev. Stats., § 4002), in providing that the pay per mile per annum should "not exceed" the specified rates, conferred upon the Postmaster General a discretion to pay less rates, this was modified by the language of the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, which reduced the compensation ten per centum from "*the rates fixed and allowed* [by the Act of 1873] for the transportation of mails on the basis of the average weight"; by that of the Act of June 17, 1878, c. 259, 20 Stat. 140, 142, where, however, the expression is: "by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, *on the basis of the average weight fixed and allowed*," etc.; or by the provision of the Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, readjusting compensation on railroad routes carrying an average weight per day exceeding five thousand pounds, "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," etc. I am not convinced that these amendments, or any of them, had

the effect of impliedly repealing that part of the Act of 1873 (Rev. Stats., § 4002)—"shall not exceed," etc.—from which alone, in my view, the Postmaster General derived any serviceable discretion about readjusting the compensation.

Therefore, he still had liberty of action within the maximum rates prescribed. And the railroad companies, other than such as had been aided by grants of lands or otherwise, were free to carry the mails at rates offered, or refuse them, as they chose. *Eastern R. R. Co.* v. *United States*, 129 U. S. 391, 396; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385, 388; *New York, New Haven & Hartford R. R. Co.* v. *United States, ante*, 123.

Furthermore, by § 212 of the Act of June 8, 1872, c. 335, 17 Stat. 283, 309; Rev. Stats., § 3999, if, because of the refusal of the railway companies, the Postmaster General was unable to make contracts at a compensation "not exceeding the maximum rates," or for what he deemed a reasonable and fair compensation, he was at liberty to use other means of carriage.

From the findings of the Court of Claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Clms. 258, 308, 315, 318, 319) that the contracts arose not out of the Distance Circular, in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order; but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad company excepting it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No.

412, as all the claimants had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. Had they refused to carry the mails on the terms proposed, he might have exercised his discretion as to the rate of pay per mile, so that instead of agreeing to give them, as he did, the maximum pay based on the average weight ascertained under Order No. 412, he might have acceded to their contention by employing the week-day divisor, but have carried into effect his own view as to the amount that ought to be allowed by reducing the rate of pay per mile. Or, as already shown, he might have refused to make the contracts and have proceeded under § 3999.

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the Court of Claims held (53 Ct. Clms. 258, 308, 313, 315, 318, 319).

Some of the routes of the Seaboard Air Line and of the Northern Pacific Railway Company were over lines that had been aided by government land grants, and hence

were subject to provisions of law summed up in § 214 of the Act of June 8, 1872; Rev. Stats., § 4001, by which they were obliged to "carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster-General may fix the rate of compensation." The Seaboard Air Line makes no point of this; but in behalf of the Northern Pacific it is contended that claimant, not being in the position of a free agent, ought not to be regarded as having voluntarily accepted the terms proposed by the Postmaster General. But the effect of the findings is that it did so accept; and this result can not be overturned by raising an argument about the circumstances that went to make up the evidence upon which the findings were based; and the present contention amounts to no more than this.

Were it otherwise, nevertheless it appears that Congress had not provided the compensation for the land-grant routes, except that it had authorized and directed the Postmaster General to readjust all railway mail pay in the manner set forth in § 4002 and within the maxima prescribed therein and in the amendatory Acts of 1876, 1878 and 1907, above mentioned, and had provided by § 13 of the Act of July 12, 1876, c. 179, 19 Stat. 78, 82, "That rail-road-companies whose railroad was constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act," besides other legislation concerning the land-grant routes that may be referred to but need not be recited. Acts of March 2, 1907, c. 2513, 34 Stat. 1205, 1212; May 12, 1910, c. 230, 36 Stat. 355, 362; July 28, 1916, c. 261, 39 Stat. 412, 426. Assuming, therefore, that there was no contract affecting the land-grant lines of the Northern Pacific, their compensation must be at the rate fixed by the Postmaster General in the exercise

of the power and discretion conferred upon him by this legislation; and so long as he exercised this power and discretion reasonably, not fixing a non-compensatory rate or otherwise acting arbitrarily, the carrier was concluded by his action. There is no finding that he acted arbitrarily; on the contrary, he had in support of Order No. 412 a considered opinion of the Attorney General under date September 27, 1907 (26 Ops. Atty. Gen. 390); and, so far as appears, he treated the land-grant routes like others, not reducing them below the eighty per centum contemplated by § 13 of the Act of 1876, or otherwise violating the statutes. There is no finding nor any contention that the amounts allowed them were not compensatory; and, upon the whole, it seems to me that although he erred in failing to apply the week-day divisor to the weighings, this did not render the readjustment based thereon wholly void, or permit the carrier, after transporting the mails and accepting the stated compensation without further objection, afterwards to treat the readjustment orders as nullities.

MR. JUSTICE MCKENNA concurs in this opinion.

MARYLAND CASUALTY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 73. Argued November 13, 1919.—Decided January 12, 1920.

Under the Income Tax Act of 1913, § G, (a), (b), as under the Corporation Excise Tax Act of 1909, the income taxable to a domestic corporation is limited to income "received" during the year. P. 345.

Under these statutes premiums collected in any year by the agents of an insurance company but not paid over to the treasurer of the company, are part of its income "received" in that year. *Id.*

Where the Government imposed and collected the tax on all premiums written during the year, the company, claiming refund of part as erroneously assessed on premiums not received, must show what premiums were received during the year. P. 347.

Reserves which are required by state insurance departments in the exercise of statutory authority, are "required by law" within the meaning of the Excise and Income Tax Acts, *supra*, where they provide that net additions, required by law to be made within the year to reserve funds, may be deducted from gross, in determining net income. P. 348.

The term "reserve funds," as used in these acts, *held* to include an "unearned premium reserve," to meet future liabilities on policies; a "liability reserve," to satisfy claims indefinite in amount and as to time of payment, but accrued, on liability and workmen's compensation policies; and a "reserve for loss claims," accrued on other policies; but not to include funds required by state authority to be maintained to meet ordinary running expenses, such as taxes, salaries, re-insurance and unpaid brokerage. P. 349.

If an insurance company in one year makes an over-estimate of reserve requirements and so an excessive deduction from gross income, *semble*, that such excess may be treated, under these tax acts, as income of the year in which it is subsequently released to the general uses of the company. P. 351.

But amounts once deducted from gross income and added to reserves, under these acts, can be treated by the Government as income of a subsequent year for the purpose of computing the tax, only where it can be clearly shown that subsequent business conditions have released them to the free beneficial use of the company in a real, and not in a mere bookkeeping, sense. P. 352.

A claim for refund of money paid with original returns made under the above-mentioned tax acts, is barred if not presented to the Commissioner, as directed by Rev. Stats., § 3226, and sued on in the Court of Claims within the two-year limitation of § 3227; and these requirements are not postponed or superseded as to such payments by the facts that the original returns were amended and the assessments increased and the original payments credited upon the increased assessments, by the action of the Commissioner. *Cheatham* v. *United States*, 92 U. S. 85, distinguished. Act of September 8, 1916, c. 463, § 14, 39 Stat. 772, *held* inapplicable. P. 353.

52 Ct. Clms. 201, 288; 53 *id.* 81, modified and affirmed.

THE case is stated in the opinion.

Mr. Burt E. Barlow, with whom *Mr. Abram R. Serven* was on the brief, for appellant.

Mr. Assistant Attorney General Frierson for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

Under warrant of the Act of Congress, approved August 5, 1909, c. 6, 36 Stat. 11, 113, the Government collected from the claimant, a corporation organized as an insurance company under the laws of Maryland, an excise tax for the years 1909, 1910, 1911 and 1912, and, under warrant of the Act of Congress of October 3, 1913, c. 16, 38 Stat. 114, 166, it likewise collected an excise tax for the first two months of 1913, and an income tax for the remaining months of that year.

This suit, instituted in the Court of Claims, to recover portions of such payments claimed to have been unlawfully collected, is here for review upon appeal from the judgment of that court.

The claimant was engaged in casualty, liability, fidelity, guaranty and surety insurance, but the larger part of its business was employers' liability, accident, and, in the later of the years under consideration in this case, workmen's compensation insurance.

By process of elimination the essential questions of difference between the parties ultimately became three, viz:

(1) Should claimant be charged, as a part of its gross income each year, with premiums collected by agents, but not transmitted by them to its treasurer within the year?

(2) May the amount of gross income of the claimant be reduced by the aggregate amount of the taxes, salaries, brokerage and re-insurance unpaid at the end of each year, under the provisions in both the excise and income

tax laws allowing deductions of "net addition, if any, required by law to be made within the year to reserve funds"?

(3) Should the decrease in the amount of reserve funds required by law for the year 1913 from the amount required for 1912 be treated as "released reserve" and charged to the company as income for 1913?

Of these in the order stated.

First: Section 38 of the Excise Tax Act (36 Stat. 112) provides that every corporation, organized under the laws of any State as an insurance company "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business . . . equivalent to one per centum upon the entire net income . . . *received by it* from all sources during such year."

The Income Tax Act (38 Stat. 172) provides [§ G, paragraph (a)] that the tax shall be levied upon the entire "net income *arising or accruing* from all sources during the preceding calendar year." But in paragraph (b), providing for deductions, gross income is described as that "*received* within the year from all sources." So that, with respect to domestic corporations, it is clear enough that no change was intended by the use of the expression "arising or accruing" in the Income Tax Act, and that the tax should be levied under both acts upon the income "received" during the year. *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 335.

The claimant did business in many States, through many agents, with whom it had uniform written contracts which allowed them to extend the time for payment of the premiums on policies, not to exceed thirty days from the date of policy, and required that on the fifth day of each calendar month they should pay or remit, in cash or its equivalent, the balance due claimant as shown by the last preceding monthly statement rendered to it.

Under the provisions of such contracts obviously the agents were not required to remit premiums on policies written in November until the fifth of January of the next year and on policies written in December not until the following February.

Much the largest item of the gross income of the company was premiums collected on policies of various kinds. Omitting reference to earlier and tentative returns by the claimant and amendments by the Government, it came about that claimant took the final position that the only premiums with which it could properly be charged as net income "received by it . . . during each year" were such as were collected and actually paid to its treasurer within the year. This involved omitting from gross income each year "premiums in course of collection by agents, not reported on December 31st," which varied in amount from $584,000 in one year to $1,020,000 in another. The amount, if deducted one year, might appear in the return of the claimant for the next year, but the rate might be different.

The Government, on the other hand, contended that the claimant should return the full amount of premiums on policies written in each year, whether actually collected or not.

The Court of Claims refused to accept the construction of either of the parties and held that the claimant should have returned, not all premiums written by it, but all which were actually received by it during the year and that receipt by its agents was receipt by the company, within the meaning of the act of Congress.

The claimant contends that premiums paid to its agents but not remitted to its treasurer were not "received by it during the year," chiefly for the reason that while in possession of the agents the money could not be attached as the company's property (*Maxwell* v. *McGee*, 66 Massachusetts, 137), and because money, while thus in

the possession of agents was not subject to beneficial use by the claimant and therefore cannot, with propriety, be said to have been received by it, within the meaning of the act.

On the other hand it is conclusively argued: That payment of the premium to the agent discharged the obligation of the insured and called into effect the obligation of the insurer as fully as payment to the treasurer of the claimant could have done; that in the popular or generally accepted meaning of the words "received by it" (which must be given to them, *Maillard* v. *Lawrence*, 16 How. 251), receipt by an agent is regarded as receipt by his principal; that under their contract collected premiums in possession of the agents of the claimant were subject to use by it in an important respect before they were transmitted to the treasurer of the company, for the agency contract provided that "the agent will pay on demand, out of any funds collected by him for account of premiums and not remitted to the company, such drafts as may be drawn upon him by the company . . . for the purpose of settling claims, deducting same from his next succeeding monthly remittance;" and that only imperative language in the statute would justify a construction which would place it in the power of the claimant, by private contract with its agents, to shift payment of taxes from one taxing year into another.

The claimant withheld from its returns collections in the custody of its agents at the end of each year, and because in its amendments the Government had included all premiums written in each year whether or not collected, the Court of Claims, having reached the conclusion thus approved by us, allowed the claimant ninety days in which to show the amount of premiums received by it and its agents within each of the years in controversy, but the claimant failed to make such a showing, and thereupon the court treated the return of premiums

written as the correct one and very properly, so far as this item is concerned, dismissed claimant's petition.

Second: In the same words the Excise and Income Tax Acts provide that "the net addition, if any, required by law to be made within the year to reserve funds" may be deducted from gross, in determining the amount of net, income to be taxed.

Finding its authority in this provision of the law the claimant in all of its returns treated as "reserves," for the purpose of determining whether the aggregate amount of them each year was greater or less than in the preceding year, and of thereby arriving at the "net addition to reserve funds" which it was authorized to deduct from the gross income, the following, among others, viz: "Reserve for unearned premiums," "Special reserve for unpaid liability losses," and "Loss claims reserve." Unearned premium reserve and special reserve for unpaid liability losses are familiar types of insurance reserves, and the Government, in its amended returns, allowed these two items, but rejected the third, "Loss claims reserve."

The Court of Claims, somewhat obscurely, held that the third item should also be allowed. This "Loss claims reserve" was intended to provide for the liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed. The finding that the Insurance Department of Pennsylvania, pursuant to statute, has at all times since and including 1909 required claimant to keep on hand, as a condition of doing business in that State, "assets as reserves sufficient to cover outstanding losses," justifies the deduction of this reserve as one required by law to be maintained, and the holding that it should have been allowed for all of the years involved is approved.

But the Court of Claims approved the action of the Government in rejecting other claimed deductions of reserves for "unpaid taxes, salaries, brokerage and reinsurance due other companies." The court gave as its reason for this conclusion that the "net addition if any, required by law to be made within the year to reserve funds" which the act of Congress permitted to be deducted from gross income was limited to reserves required by express statutory provision and did not apply to reserves required by the rules and regulations of State Insurance Departments, when promulgated in the exercise of an appropriate power conferred by statute.

In this the Court of Claims fell into error. It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. *United States* v. *Grimaud,* 220 U. S. 506; *United States* v. *Birdsall,* 233 U. S. 223, 231; *United States* v. *Smull,* 236 U. S. 405, 409, 411; *United States* v. *Morehead,* 243 U. S. 607. The law is not different with respect to the rules and regulations of a department of a state government.

But it is contended by the claimant that it was required to provide "reserves" for the payment of the rejected items of liability: because the Court of Claims found that pursuant to statutes the Insurance Department of Pennsylvania required the company, as a condition of doing business in that State, to keep on hand "assets as reserves" sufficient to cover all claims against the company "whether due or accrued"; because the department of New York required it to maintain "reserves sufficient to meet all of its accrued but unpaid indebtedness in each year"; and because the department of Wisconsin required it to carry "sufficient reserves to cover all of its outstanding liabilities."

Whether this contention of the claimant can be justified or not depends upon the meaning which is to be given to the words "reserve funds" in the two acts of Congress we are considering.

The term "reserve" or "reserves" has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which with accretions from interest, is set aside, "reserved," as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

In this case, as we have seen, the term includes "unearned premium reserve" to meet future liabilities on policies, "liability reserve" to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and "reserve for loss claims" accrued on policies other than those provided for in the "liability reserve," but it has nowhere been held that "reserve," in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance and unpaid brokerage.

The requirements relied upon, of the Insurance Departments of New York, Pennsylvania and Wisconsin that "assets as reserves" must be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," in terms might include the rejected items we are considering, but plainly the departments, in these expressions used the word "reserves" in a non-technical sense as equivalent to "assets," as is illustrated by the Massachusetts requirement that each company shall "hold or reserve assets" for the payment of all claims and obliga-

tions. The distinction between the "reserves" and general assets of a company is obvious and familiar and runs through the statements of claimant and every other insurance company. That provision for the payment of ordinary expenses such as we are considering was not intended to be provided for and included in "reserve funds" as the term is used in the acts of Congress is plain from the fact that the acts permit deductions for such charges from income if paid within the year, and the claimant was permitted in this case to deduct large sums for such ordinary expenses of the business—specifically, large sums for taxes. The claimant did not regard any such charges as properly covered by "reserves" and did not so include them in its statement for 1909. In its 1910 return "unpaid taxes" and "salaries" first appear as "reserves," and in 1911 "brokerage" and "re-insurance" are added. This earlier, though it is now claimed to have been an uninstructed or inexpert, interpretation of the language of the acts, was nevertheless the candid and correct interpretation of it, and the judgment of the Court of Claims in this respect is approved.

Third: The year 1913 was the only one of those under consideration in which the aggregate amount of reserves which the claimant was required by law to keep fell below the amount so required for the preceding year. The Government allowed only "unearned premium" and "unpaid liability loss," reserves to be considered in determining deductions. In 1913 the "unpaid liability loss reserve" decrease, exceeded the "unearned premium reserve" increase, by over $270,000, and this amount the Government added to the gross income of the claimant for the year, calling it "released reserve," on the theory that the difference in the amount of the reserves for the two years released the decrease to the claimant so that it could use it for its general purposes, and therefore constituted free income for the year 1913, in which the decrease occurred.

This theory of the Government was accepted by the Court of Claims and the addition to the gross income was approved.

The statute does not in terms dispose of the question thus presented.

Reserves, as we have seen, are funds set apart as a liability in the accounts of a company to provide for the payment or reinsurance of specific, contingent liabilities. They are held not only as security for the payment of claims but also as funds from which payments are to be made. The amount "reserved" in any given year may be greater than is necessary for the required purposes, or it may be less than is necessary, but the fact that it is less in one year than in the preceding year does not necessarily show either that too much or too little was reserved for the former year,—it simply shows that the aggregate reserve requirement for the second year is less than for the first, and this may be due to various causes. If, in this case, it were due to an over-estimate of reserves for 1912 with a resulting excessive deduction for that year from gross income and if such excess was released to the general uses of the company and increased its free assets in 1913, to that extent it should very properly be treated as income in the year in which it became so available, for the reason that in that year, for the first time, it became free income, under the system for determining net income provided by the statute, and the fact that it came into the possession of the company in an earlier year in which it could be used only in a special manner, which permitted it to become non-taxable would not prevent its being considered as received in 1913 for the purposes of taxation, within the meaning of the act.

The findings of fact in this case, however, do not show that the diminution in the amount of required reserves was due to excessive reserves in prior years or to any other cause by which the free assets of the company were in-

creased in the year 1913, and the following finding of fact makes strongly against such a conclusion:

"The decrease in employers' liability loss reserve for 1913, designated as 'released reserve' did not in any respect affect or change claimant's gross income or disbursements, as shown by the State Insurance Reports."

It would not be difficult to suggest conditions under which the statutory permit to deduct net additions to reserve funds would result in double deduction in favor of an insurance company, but such deductions can be restored to income again only where it is clearly shown that subsequent business conditions have released the amount of them to the free beneficial use of the company in a real, and not in a mere bookkeeping sense. If this seemingly favorable treatment of insurance companies is to be otherwise corrected or changed, it is for Congress, and not for the courts, to amend the law.

Since the findings of fact before us do not make the clear showing, which must be required, that the statutory deduction of net reserves in prior years was restored to the free use of the claimant in 1913, it should not have been charged as income with the decrease in that year, and, on the record before us, the holding of the Court of Claims must be reversed.

There remains the question as to the statute of limitations.

The Government concedes that the case is in time with respect to the amended returns but claims that it is barred by Rev. Stats., §§ 3226, 3227 and 3228, with respect to taxes paid on the original returns for all of the years but 1913. The claimant made its original returns without protest except for the year 1909 and, without appeal to the Commissioner of Internal Revenue, voluntarily paid the taxes computed on them for each of the years. Payment was made for 1909 in June, 1910; for 1910 in June, 1911; for 1911 in June, 1912; for 1912 in June, 1913. No

claim for a refund of any of these payments was made until April 30, 1915, and then the claim was in general terms,

"For . . . amounts paid by it as taxes which, through lack of information as to the requirements of the law or by error in computation, it may have paid in excess of the amounts legally due."

This claim was rejected subsequent to the institution of this suit, which was commenced on February 8, 1916.

This statement shows the right of the claimant plainly barred by its failure to appeal to the Commissioner of Internal Revenue, Rev. Stats., § 3226 [this is fundamental, *King's County Savings Institution* v. *Blair*, 116 U. S. 200], and also by its failure to institute suit within two years after the cause of action accrued, Rev. Stats., § 3227.

The claimant contends that the amended returns filed by the Commissioner of Internal Revenue were not amendments or modifications of the original returns, but were based upon a different principle and, within the scope of *Cheatham* v. *United States*, 92 U. S. 85, constituted new assessments from which appeals were taken in time.

But they are denominated "amended returns" and while in dealing with the same items the basis of computation was in some cases varied, in each case the purpose and effect of them was to increase the payment which the claimant was required to make under the law and the payments made on the original returns were credited on the amounts computed as due on the returns as amended.

The inapplicability of *Cheatham* v. *United States*, 92 U. S. 85, is obvious, and the contention that the filing of the amended returns constituted the beginning of new proceedings which so superseded the original returns as to release the claimant from its entire failure to observe the statutory requirement for review of the latter is so un-

founded that we cannot consent to enter upon a detailed discussion of it. This conclusion renders § 14 of the Act of Congress of September 8, 1916, c. 463, 39 Stat. 772, inapplicable.

It results that the judgment of the Court of Claims is modified, and as so modified affirmed, and the case is remanded to that court for proceedings in accordance with this opinion.

Affirmed with Modifications and Remanded.

EASTERN EXTENSION, AUSTRALASIA & CHINA TELEGRAPH COMPANY, LIMITED, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 357. Argued December 15, 1919.—Decided January 12, 1920.

The Court of Claims is without jurisdiction of a claim based on an obligation of the United States growing directly out of the treaty with Spain ceding the Philippine Islands or on one imposed by principles of international law as a consequence of the cession. Pp. 357, 362. *Eastern Extension Tel. Co.* v. *United States*, 231 U. S. 326; Jud. Code, § 153.

To create an express or, (in a strict sense,) an implied contract binding the United States, some officer with express or implied power to commit the Government must have intended that result. P. 363.

A cable company holding Spanish concessions in the Philippines obliging it to transmit government messages, in part free and in part at reduced rates, and to pay certain taxes, and entitling it to a subsidy, claimed the subsidy from the United States, upon the ground that the Government, by accepting the benefits, had assumed the burdens of the concessions. *Held*, that no such contract could be derived from the facts as found. *Id.*

Such a contract could not be implied from the use of the cable service in transmitting government messages, when the Government paid

the rates, in part reduced but all as fixed and charged by the company, and, through the Secretary of War, expressly declined free service. P. 363.

Nor did any liability of the United States arise from expenditures made by the company in voluntarily extending its lines with approval of the Government given without prejudice to the Government's rights. P. 364.

The acceptance by subordinate executive officials of the Insular Government of payments tendered by the cable company in connection with statements of account assuming a recognition of its concessions and right to subsidy, *held* no basis for implying an obligation of the United States to pay the subsidy. *Id.*

54 Ct. Clms. 108, affirmed.

THE case is stated in the opinion.

Mr. Louis Marshall for appellant.

Mr. Assistant Attorney General Davis, with whom *Mr. W. F. Norris* was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, claimant, is the grantee from the Government of Spain of three concessions to lay down and operate submarine cables. The first one, in 1879, was for the exclusive privilege, for forty years, of constructing and operating a cable between the Island of Luzon and Hongkong. It was landed at Bolinao, on the northerly coast of Luzon, and dispatches were transmitted to Manila and other places by government owned land lines, which were subject to interruption. This concession required that official messages be transmitted free and be given precedence. In 1898 a second concession, supplemental to the first, empowered the claimant to extend its cable to Manila and the term of the prior exclusive grant was extended twenty years, with the same priority for official dispatches, but with the provision that they were to be

transmitted free, only for the first ten years from the date of this second grant.

In 1897 a third concession, the one with which this case is chiefly concerned, authorized the claimant to lay down and operate three submarine cables, connecting the Island of Luzon with three Visayas Islands,—Panay, Negros and Cebu. This grant required the claimant: to operate the cables for twenty years; to give precedence to official dispatches and to charge for them at one-half the rates charged for private messages; to pay a tax of ten per cent. on receipts in excess of expenses not to exceed £6,000 per annum, an additional tax of "fifty centimes of a franc" per word on telegrams transmitted, and a surtax of "five centimes of a franc" per word on telegrams between the four islands named in the grant and others of the Archipelago.

The Government of Spain, on its part, agreed to pay the claimant, in equal monthly instalments, an annual subsidy of £4,500 during the term of the grant.

All of the cables were promptly laid down and put in use and those of the third grant are designated in the record as the "Visayas cables," and the grant as the "Visayas concession." This suit is to recover the amount of the subsidy provided for in the third concession, which had accrued when the petition was filed.

The United States denied all liability, and the judgment of the Court of Claims, dismissing the petition, is before us for review.

The case was here before on appeal and this court held (231 U. S. 326) that the case as then stated in the petition, was not within the jurisdiction of the Court of Claims, whether viewed as asserting an obligation growing directly out of the treaty with Spain or one imposed by principles of international law upon the United States as a consequence of the cession of the Islands by the Treaty. The court, however, referring to certain general and indefinite

allegations in the petition, suggested that the implication might be drawn from them that there may have been action on the part of officials of the Government of the United States since it had assumed sovereignty over the Islands, which, if properly pleaded and proved, would give rise to an implied contract with the claimant outside the Treaty, which would be within the jurisdiction of the Court of Claims, and, to the end that the right to have such a claim adjudicated might be saved, if it really existed, the case was remanded for further proceedings in conformity with the opinion.

Doubtless inspired by the suggestion from the court, an amended petition was filed, in which claimant alleged with much detail; that the Government of the United States had used the cables extensively for official messages, which had been given precedence and had been transmitted, as required by the terms of the two concesssions, over the Hongkong cable free until 1908 and thereafter at one-fourth of the regular rate, and over the Visayas cables at one-half the rate charged for private dispatches; that the claimant had paid and the Government accepted the ten per cent. tax on receipts from messages, computed as required by the third concession; that since the American occupation the service over the Visayas cables had been extended and improved at large expense by arrangements with duly authorized officers of the Government; and that in August, 1905, the claimant had paid and the Government had accepted a balance due on an account stated in a form indicating an adoption of the terms of the concessions. By this course of conduct, it was averred, the United States "assumed and adopted" all of the obligations imposed on the Government of Spain by the concessions, and agreed with the claimant to discharge and perform all of them and especially agreed to pay the annual subsidy of £4,500, as required by Art. 10 of the third concession.

Trial by the Court of Claims resulted in findings of fact, as follows: That the concessions were made to claimant as alleged and that all of the cables were completed and in use when the Treaty with Spain was signed, December 10, 1898; that the Government used the cables extensively for official dispatches which were given priority in transmission, but that this was in accordance with the International Telegraph Convention, as well as in compliance with the terms of the concessions; that the claimant charged the Government for messages over the Visayas cables at one-half the rate charged for private dispatches, which is the rate prescribed by the third concession, but that it "has paid the full rates charged by the claimant for messages over any of the lines" and claimant had authority to make its own rates; and that it is not true that the claimant transmitted messages over the Hongkong cable free of charge—"The United States Government has paid full established rates on the Hongkong-Manila cable."

It is further found that since December, 1901, the claimant has made claim to the subsidy in annual statements to the authorities of the Philippine Government, in which the terms of the concession granting it were referred to and in which the United States was charged with the amount of it then accrued. With respect to these, except as hereinafter noted, the court finds that whether any reply was made to them "does not appear from the record."

Much significance is attached by the claimant to the statement presented on June 11, 1905. The finding with respect to this is that on that date the claimant's representative forwarded to "The Secretary of Finance and Justice," an officer of the Philippine Government at Manila, a communication, with an attached statement, purporting to show the amount "due to the United States Government in the Philippines on account of the transmission

of all United States Government traffic over the Manila-Hongkong cable, as per the concession granted us for the laying of the same, up to and including December 31, 1904."

In this statement the Government is credited (as if the amount had not been paid) with what it had paid for service over the Hongkong-Manila cable, laid under the first and second concessions, from August 21, 1898, to December 31, 1904, and it is charged with "Visayas subsidy," under the third concession, £4,500 per annum to December, 1904. Thus a balance was arrived at of £4,712.10.6 in favor of the United States, as to the disposal of which "I shall be glad to receive your instructions," wrote the representative of the claimant.

In reply to this the Auditor of the Government of the Philippine Islands, to whom it had been referred, wrote to claimant's representative at Manila, acknowledging receipt of his letter in which it was stated "there is due the *Insular Government* under your concession the sum of £4,712.10.6" and the Auditor added "It is respectfully requested that said amount be deposited with the Insular Treasurer as miscellaneous revenue." Payment was made and receipt given by the Treasurer of the Government of the Philippine Islands for the amount as "due Government as per statement of account rendered by Eastern Extension, etc., Telegraph Co. to Secretary, Finance & Justice June 11, 1905."

Each year after 1905 the claimant sent a statement to the "Secretary of Finance and Justice" at Manila in the form following: "The United States Government at Manila in account with the Eastern Extension, Australasia and China Telegraph Co., Limited. . . . Free transmission of American Government Telegrams over Hongkong-Manila Section." Then follow credits for messages passing over the Hongkong-Manila cable, as if they had not been paid for, and a debit of the "Visayas

subsidy" accrued to the date of the statement. To these no reply appears to have been made.

It is expressly found that:

"Except the payment above referred to in 1905, the claimant has never paid anything into the treasury of the Philippine Government. It does not appear that any part of said sum was paid into the Treasury of the United States. Nor has the claimant paid any sum to the United States Government."

The only payment of the ten per cent. tax under the third concession was that made in 1905, £184.17.2, and the statement showing this balance in favor of the United States concluded:

"I therefore have the honor to request that the necessary permission be given to the Treasurer to receive these amounts, now standing to the credit of the United States Government in the Philippines."

Of its own motion the claimant, in 1899, made extensions of the Visayas cables at a considerable expense. But the finding with respect to this is:

"These extensions were carried out with the approval of the military authorities in control of the Philippines at that time, and by the sanction of the United States Government, but without prejudice to, and with the reservation of, all rights of the Government of the United States."

The following is from the court's finding of fact No. IX:

"Between the 10th day of December, 1898, and March, 1899, considerable correspondence was exchanged between the Government of the United States and the claimant regarding the transmission of official telegrams over the Hongkong-Manila cable at reduced rates.

"On the 1st of March, 1899, the Secretary of War transmitted to the chairman of the claimant company a telegram, stating that the War Department 'accepts the courteous offer of your company to transmit messages

free between Hongkong and Manila, providing that this acceptance leaves in abeyance Spanish concession which is now under consideration.' On the following day the claimant's reply was transmitted to the War Department, stating that the foregoing telegram had been received and the reservation therein noted, and that 'the company have pleasure in affording all possible facilities to the United States Government in connection with the transmission of their telegrams.' On the 28th of March, 1899, a written communication was transmitted by the War Department to the duly authorized representative of the claimant company, to the effect that 'upon careful reconsideration of the subject it is deemed inadvisible for the department to avail itself of your company's offer. I beg to state, therefore, that the department will pay the established rates on official cable messages, and all accounts of this character presented to the United States will be paid.' This communication concluded with a renewal of thanks 'for the voluntary reduction in rates which your company has so courteously tendered.' The United States Government has paid full established rates on the Hongkong-Manila cable, and has paid the established rates on the Visayas cables on its messages."

Upon these findings of fact and upon principles and analogies derived from the law of private contract, the court must proceed to judgment. For it was determined by this court on the former appeal, that any right in the defendant derived directly from the Treaty with Spain, or any obligation imposed upon the United States by principles of international law as a consequence of the cession of the Islands, would not be within the jurisdiction of the Court of Claims, and counsel for claimant, expressly disclaiming the assertion of any right under the Treaty of Paris, urge that the case be treated exactly as it would be if it arose between two private citizens.

So regarding the case. It is obvious that no express contract by the United States to adopt and be bound by the third or any of the concessions can be made out from the findings of fact, and it is equally clear that such an implied contract, using the words in any strict sense, cannot be derived from the findings, for it is plain that there is nothing in them tending to show that any official with power, express or implied, to commit that Government to such a contract ever intended to so commit it.

The contention of the claimant must be sustained, if at all, as a quasi-contract,—as an obligation imposed by law independent of intention on the part of any officials to bind the Government,—one which in equity and good conscience the Government should discharge because of the conduct of its representatives in dealing with the subject-matter.

It is argued that the United States should be held to have assumed the burden of the concession because it derived benefits and advantages from the use of the cables.

These cables were in operation when the United States Government assumed jurisdiction over the Islands. It extended a much more efficient governmental protection over the lines than they had before, but left the claimant in full ownership and control over them with the power to determine rates for service. The Government, to be sure, availed itself of the advantages of communication which the cables afforded, but for such service it paid the rates which the claimant demanded and which it must be assumed were adequate. From such circumstances as these, very clearly, the law will not raise an obligation on the part of the Government to assume the burden of the subsidy on the principle of undue enrichment or of advantage obtained. It used the cables as other customers used them and from such a use, paid

for at the full rate demanded, no obligation can be derived by implication.

It is further contended that the terms and conditions of the concession should be imposed on the Government because the officials of the Philippine Government accepted taxes computed as provided for by the third grant.

The finding of the Court of Claims is not that the Philippine Government demanded or exacted the small amount of taxes that was paid, but that the claimant itself computed the amount in the manner which it thought was provided for in the concession and tendered payment, which, after repeated urging, was accepted by local officers of the Philippine Government, so subordinate in character that it is impossible to consider them as empowered to commit the Government of the United States to the large responsibilities now claimed to spring from their conduct.

The finding with respect to extension of the cables in 1899 excludes all suggestion of the assumption of any liability by the United States on account of the expenditure involved.

The form of the statement of account of December 31, 1904, showing a balance favorable to the United States, which was paid to and accepted by the Treasurer of the Philippine Government, and from which so much is claimed, is not impressive as creating the asserted liability.

Here again the claimant, without suggestion of demand from the Government of the United States or even from the Philippine Government, prepared a statement and, in order to give it the form of an account, was obliged to treat as unpaid, charges for tolls over the Hongkong-Manila cable all of which had been paid by the United States Government and accepted by the claimant.

A separate government, sustained by its own revenues, has been maintained for the Philippine Islands ever since they were ceded to the United States. At first military,

it became a civil government in 1902, organized as provided for by an act of Congress (32 Stat. 691, c. 1369), with a Governor General, and executive, legislative and judicial departments, all subject to the supervision of the Secretary of War of the United States.

It is surprising that the claimant, when it desired to have these important concessions, with their large obligations, adopted by the Government of the United States, did not make application for that purpose directly to that Government or to its Secretary of War, or at least to the Governor General or legislative department of the Philippine Government, instead of relying for its adoption by implication, as it has done, chiefly upon the form in which the accounts were presented to the Secretary of Finance and Justice of the Philippine Government.

The action of a department head of the Philippine Government, (inconsistent with the position taken by the Secretary of War in 1899, with respect to the subject-matter) in accepting a voluntary payment of $23,000 cannot be made the sufficient basis for implying an obligation on the part of the Government of the United States to pay a bonus of a total aggregate of almost $440,000.

If doubt could be entertained as to the correctness of this conclusion it would be disposed of by the fact that when the claimant, in March, 1899, tendered to the Secretary of War, so far as appears the only official of the United States with large powers, who considered the subject, the privilege of free transmission of messages over its Hongkong-Manila cable, as was provided for in the first concession, the offer was politely but firmly declined, with the statement that "the department will pay the established rates on official cable messages, and all accounts of this character presented to the United States will be paid,"—a promise which the findings show that he and his successors in office have faithfully kept.

In the jurisdiction given to the Court of Claims Con-

gress has consented that contracts, express or implied, may be judicially enforced against the Government of the United States. But such a liability can be created only by some officer of the Government lawfully invested with power to make such contracts or to perform acts from which they may be lawfully implied. *Langford* v. *United States*, 101 U. S. 341, 345; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228; *Tempel* v. *United States*, 248 U. S. 121; *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 55.

The foregoing discussion makes it palpably plain that no contract, express or implied, to pay the disputed subsidy, was made by any officer of the United States, and the judgment of the Court of Claims is therefore

Affirmed.

NAPA VALLEY ELECTRIC COMPANY *v.* RAILROAD COMMISSION OF THE STATE OF CALIFORNIA ET AL.

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

No. 401. Argued December 12, 1919.—Decided January 19, 1920.

Under § 67 of the Public Utilities Act of California, as construed by the Supreme Court of the State, a petition to that court for a writ of review to bring up proceedings of the Board of Railroad Commissioners in which rates for electric power were fixed in alleged violation of constitutional rights and excess of the Board's jurisdiction, may be disposed of upon the merits, by an order simply refusing the writ, if the facts are fully stated in the petition, the provisions for issuing such writ and for subsequent decision upon the record from the Board not being mandatory in such cases. P. 370.

In a suit brought in the District Court to enjoin enforcement of rates fixed by such Board, it will be presumed that a petition, not in the record, upon which the state Supreme Court refused a writ of review,

exhibited the Board's proceedings and presented the questions which that court was empowered to decide, viz., whether the Board pursued its authority and whether any constitutional right, state or federal, was violated; and the order refusing the writ will be deemed conclusive of such questions, although not accompanied by an opinion of the state court. P. 372.

257 Fed. Rep. 197, affirmed.

THE case is stated in the opinion.

Mr. D. L. Beard, with whom *Mr. Milton T. U'Ren* was on the brief, for appellant.

Mr. Douglas Brookman for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from decree of the District Court dismissing bill of appellant, herein called the Electric Company, upon motion of appellees, herein called the Commission.

The ground of the motion and the decree sustaining it was that it appeared from the averments of the bill that the controversy it stated was *res judicata*. The bill is long but the grounds of it can be stated with fair brevity. The Electric Company is a California corporation and has been engaged for more than ten years in supplying electricity (called in the bill electric energy) for domestic use in the town of St. Helena and vicinity and the Calistoga Electric Company, also a California corporation, has been for seven years a distributing agency of the Electric Company and the latter is not as to the Calistoga Company a public utility. By virtue of certain circumstances the Electric Company entered into a contract with one E. L. Armstrong by which it agreed not to extend its lines into Calistoga territory, and Armstrong agreed to buy from it all of the electricity to be sold by him for 18 years. At that time the Electric Company under the

laws of California had a right to extend its lines and become a competitor of other companies or individuals.

September 14, 1911, the Calistoga Company became the successor in interest of Armstrong and to his rights and obligations under the contract with the Electric Company, and the Calistoga Company acknowledged the fact of such succession and continued to buy its electricity from the Electric Company at the rates set forth in the contract, until November 18, 1913, when it petitioned the Commission to set aside the contract and compel the Electric Company to accept other rates than those mentioned in the contract.

The Electric Company answered the petition, set up the contract and alleged that any change in its rates would be a violation of § 10, Article I, of the Constitution of the United States and the Fourteenth Amendment thereto.

January 24, 1914, the Commission instituted an investigation on its own motion which with the petition of the Calistoga Company was consolidated. The petitions were heard together upon evidence and submitted.

The Commission subsequently made an order fixing rates much less than those of the contract.

June 20, 1914, the Electric Company filed a petition for rehearing, setting up its rights under the Constitution of the United States. A rehearing was denied.

May 1, 1914, the Electric Company and the Calistoga Company entered into an agreement fixing rates subject to the approval of the Commission which the Calistoga Company agreed to secure. It did secure an informal approval of them and paid them until June 27, 1916.

The rates fixed by the Commission never became effective and therefore the Electric Company did not petition for a review of them by the Supreme Court of the State nor commence proceedings in any court of the United States to enjoin the order establishing them or to have it set aside as null and void.

June 27, 1916, the Calistoga Company again petitioned the Commission to establish other rates than those fixed in the agreement of that company with the Electric Company. The latter company filed a counter petition to have established the rates fixed in the contract of May 1, 1914 (reduced to writing September 15, 1914), and the petition and that of the Calistoga Company came on to be heard and after evidence adduced the Commission, November 15, 1916, reduced the rates fixed in the written contract of September 15, 1914, and made the reduced rates effective December 20, 1916.

A rehearing was denied May 24, 1917, and on June 20, 1917, the Electric Company duly filed a petition in the Supreme Court of the State of California praying that a writ of review issue commanding the Commission on a day named to certify to the court a full and complete record of the proceedings before the Commission, and that upon a return of the writ the orders and decisions of the Commission be reversed, vacated and annulled upon the ground that they violated the company's rights under the Constitution of the United States, particularly under § 10, Article I, and under § 1 of Article XIV of the Amendments thereto. The Supreme Court of California denied the "Petition for a Writ of Review and refused to issue a Writ of Review, as prayed for in said Petition."

On or about January 27, 1918, the California Light & Telephone Company became a party to the contracts between the Electric Company and the Calistoga Company by reason of conveyances from the latter company.

In the present bill it is alleged that the orders and decisions of the Commission were illegal, were in excess of its jurisdiction and that the Electric Company has no adequate remedy at law; and it prays a decree declaring the orders and decisions null and void, that they be enjoined of enforcement or of being made the basis of suits against the company to enforce them.

The Commission and other defendants moved to dismiss on the ground that it appeared from the allegations of the bill that "the subject matter thereof is *res judicata*" and that there was no ground stated entitling the company to the relief prayed. The motion was granted and to the decree adjudging a dismissal of the bill this writ of error is directed.

The District Court (Judge Van Fleet) based its ruling upon the allegations of the bill that the Electric Company filed in the Supreme Court a petition for a review of the decision and order of the Commission and for their annulment, and that the Supreme Court denied the petition.

The Electric Company to the ruling of the court opposes the contention that the Supreme Court denied the company's "petition for a preliminary writ and refused to even cause the record in the case certified by the Commission to be brought up," and therefore "simply refused to entertain jurisdiction of the controversy." And, it is the further contention, that the court could neither affirm nor set aside the orders of the Commission until the record was certified to it and the parties were before it and after formal hearing in the matter.

The contention is based on § 67 of the Public Utilities Act of the State. The section is too long to quote. It is part of the procedure provided by the State for the execution of its policy in regard to the public utilities of the State, and affords a review of the action of the Commission regulating them. It is quite circumstantial and explicit. It provides for a review of the action of the Commission by writ of certiorari or review from the Supreme Court of the State which "shall direct the commission to certify its record in the case to the court," the cause to "be heard on the record of the commission as certified to by it." No other evidence is to be received and the review is confined to an inquiry "whether the commission has regularly pursued its authority" or

whether its order or decision "violates any right of the petitioner under the constitution of the United States or of the State of California." The findings and conclusions of the Commission on questions of fact are to be final. The Commission and the parties have the right of appearance and upon the hearing the court "shall enter judgment either affirming or setting aside the order or decision of the commission." The Civil Code of the State is made applicable so far as it is not inconsistent with the prescribed proceedings and no court of the State except the Supreme Court to the extent specified shall have jurisdiction over any order or decision of the Commission except "that the writ of mandamus shall lie from the supreme court to the commission in all proper cases."

These provisions, counsel insist were not observed and that therefore there was not and could not have been "an adjudication of the controversy" by the Supreme Court. There was nothing, it is insisted, but the Electric Company's petition before the court, and that none of the essential requirements of § 67 were observed. No writ of review was issued—none certified by the Commission or returned, no return day fixed or hearing had on a certified record, no appearance of the parties, no order of the court affirming or setting aside the Commission's order. In other words, the substance of the contention is that the court instead of hearing refused to hear, instead of adjudicating refused to adjudicate, and that from this negation of action or decision there cannot be an assertion of action or decision with the estopping force of *res judicata* assigned to it by the District Court.

Counsel to sustain the position that he has assumed and contends for insists upon a literal reading of the statute and a discussion of the elements of *res judicata*. We need not follow counsel into the latter. They are

familiar and necessarily cannot be put out of mind, and the insistence upon the literalism of the statute meets in resistance the common and, at times, necessary practice, of courts to determine upon the face of a pleading what action should be taken upon it. The petition is not in the record. We may presume it was circumstantial in its exposition of the proceedings before the Commission and of the latter's decisions and orders, and exhibited and submitted to the court the questions it was authorized to entertain—whether the Commission "pursued its authority, including a determination of whether the order or decision" violated "any right" of the company "under the constitution of the United States or of the State of California."

Whether upon such an exhibition of the proceedings and questions the court was required to pursue the details of the section or decide upon the petition was a matter of the construction of the section and the procedure under it. And the Supreme Court has so decided. *Ghriest* v. *Railroad Commission*, 170 California, 63; *Mt. Konocti Light & Power Co.* v. *Thelen*, 170 California, 468; *E. Clemens Horst Co.* v. *Railroad Commission*, 175 California, 660; *Hooper & Co.* v. *Railroad Commission*, *Id.* 811. In those cases the applications for writs of certiorari were denied, which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California. And so with the denial of the petition of the Electric Company—it had like effect and was the exercise of the judicial powers of the court. And we repeat, to enable the invocation of such powers was the purpose of § 67, and they could be exercised upon the display in the petition of the proceedings before the Commission and of the grounds upon which they were assailed. And

we agree with the District Court that "the denial of the petition was necessarily a final judicial determination, . . . based on the identical rights" asserted in that court and repeated here. *Williams* v. *Bruffy*, 102 U. S. 248, 255. And further, to quote the District Court, "Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact." *Calaf* v. *Calaf*, 232 U. S. 371; *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 299.

The court held, and we concur, that absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore the decree of the District Court is

Affirmed.

CHIPMAN, LIMITED, *v.* THOMAS B. JEFFERY COMPANY.

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

No. 516. Submitted December 8, 1919.—Decided January 19, 1920.

By the law of New York, when a foreign corporation, as a condition to doing local business, appoints an agent upon whom process may be served and subsequently removes from the State, service on such agent, though his appointment stand unrevoked, will not confer jurisdiction in an action by a local corporation upon a contract between it and such foreign corporation but made and to be performed in another State, when it is not shown that anything was done in New York in the way either of performance or breach of the contract; and it is not material that the foreign corporation was there doing business during a period when the contract was made and should have been performed. P. 378.

Such a case must be dismissed for want of jurisdiction upon removal to the District Court from the Supreme Court of New York. *Id.* 260 Fed. Rep. 856, affirmed.

THE case is stated in the opinion.

Mr. Daniel P. Hays for plaintiff in error. *Mr. Ralph Wolf* was on the brief.

The defendant having filed an express consent that made service upon its designated agent the equivalent of personal service, no constitutional question is involved. *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93; *Gibbs* v. *Queen Ins. Co.*, 63 N. Y. 114, 128. The offer of the State and the acceptance thereof by the defendant constituted a contract. The agreement was, among other things, that service could be made upon the statutory agent until his designation was revoked. In its acceptance of the offer of the State, the defendant became entitled to the same right to transact business as a domestic corporation, *Lancaster* v. *Amsterdam Improvement Co.*, 140 N. Y. 576, 588; and to invoke the statute of limitations, as if it were a domestic corporation, *Wehrenberg* v. *New York, New Haven & Hartford R. R. Co.*, 124 App. Div. 205; *cf. Olcott* v. *Tioga R. R. Co.*, 20 N. Y. 210. The case is entirely different from *Old Wayne Mutual Life Assn.* v. *McDonough*, 204 U. S. 8, and *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, for the reason that in them the foreign corporations had not designated an agent upon whom process could be served.

The Supreme Court of New York has jurisdiction of an action by plaintiff, a domestic corporation, against the defendant, a foreign corporation, for a cause of action based on contract. New York Code Civ. Proc., § 1780. Jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business in New York. *Tauza* v. *Susquehanna Coal Co.*,

220 N. Y. 259, 268; *Grant* v. *Cananea Consol. Copper Co.*, 189 N. Y. 241.

It is equally clear that the service of the summons upon the designated agent gave to the court jurisdiction over the person of the defendant. New York Code Civ. Proc., § 432. In the case of a designated agent no limitation of any kind is imposed. *Bagdon* v. *Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432, 436. There is only one possible distinction. In the *Bagdon Case* the defendant was doing business within the State of New York at the time of service of the summons. In the case at hand, it is conceded that when the contracts in question were made and when the alleged breaches thereof occurred the defendant was doing business within the State. But § 432, *supra*, does not require, in the case of a designated agent, that the corporation should be doing business within the State at the time of the service of the summons. The designation remains in effect, *Woodward* v. *Mutual Reserve Life Ins. Co.*, 178 N. Y. 485; *Johnston* v. *Mutual Reserve Life Ins. Co.*, 104 App. Div. 550, 557. See *Mutual Reserve Life Assn.* v. *Phelps*, 190 U. S. 147; *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573, 586; *Chehalis River Lumber Co.* v. *Empire State Surety Co.*, 206 Fed. Rep. 559; and many state cases. There is no possible distinction between this and the *Bagdon Case, supra*, because here, at and during the time the contracts between the plaintiff and the defendant were made and were in full force and effect, and at the times when the alleged breaches thereof occurred, the defendant was doing business within the State of New York. See *Grant* v. *Cananea Consol. Copper Co.*, 189 N. Y. 241, 247. The real question at issue is, can the defendant surreptitiously withdraw from the State and, without even cancelling the statutory designation, force the citizens of the State of New York to go to some far western State to enforce their claims?

At the time of the service of the summons, the defendant was doing business within the State of New York, so as to make it amenable to process. By reason of its failure to revoke its certificate, it had a principal place of business, as well as an agent within the State. This was sufficient to bring the corporation within the State, so as to render it amenable to process. *Tauza* v. *Susquehanna Coal Co., supra; Washington-Virginia Ry. Co.* v. *Real Estate Trust Co.*, 238 U. S. 185.

Mr. Philip B. Adams and *Mr. Thomas M. Kearney* for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error was plaintiff in the courts below; defendant in error was defendant, and we shall refer to them respectively as plaintiff and defendant.

The action was brought in the Supreme Court of the State of New York and removed upon motion of the defendant to the District Court of the United States for the Southern District of New York. In the latter court defendant made a motion for an order vacating and setting aside the service of summons, and dismissing the complaint for lack of jurisdiction of the person of the defendant. The motion was granted and the case is here on the jurisdictional question only.

A brief summary of the grounds of action and the proceedings upon the motion to dismiss is all that is necessary. Plaintiff is a New York corporation, defendant one under the laws of Wisconsin, and a manufacturer and seller of motor cars known as the "Jeffery" and "Rambler" and parts thereof, and motor trucks and parts thereof. By contracts, in writing, made in Wisconsin by the plaintiff and defendant it was agreed that the former should have the sole right to sell the motor cars and parts

thereof (first cause of action) and the motor trucks and parts thereof (second cause of action) of defendant in Europe and certain other foreign places and to receive certain designated percentages. The contracts as to motor cars and their parts and the trucks and their parts, provided that they (cars, trucks, and parts) should be sold and delivered to plaintiff (called in the contracts the "Distributor") at Kenosha, Wisconsin, for sale at the designated places by plaintiff, defendant reserving the right to fill the orders of plaintiff (Distributor) for the cars, trucks and parts, from any of defendant's depots in New York City. Cars and trucks purchased under the contracts to be paid for at Kenosha. Both contracts continued in effect to July 31, 1915.

There are allegations of performance of the contracts by plaintiff, their non-performance by defendant whereby plaintiff on one cause of action was entitled, it is alleged, to $280,000 and upon the other $600,000. Judgment is prayed for their sum, to wit, $880,000.

The District Court has certified three questions, but as the first includes the other two we give it only as it sufficiently presents the question at issue: "Whether in the service of the summons, as shown by the record herein, upon Philip B. Adams, this court acquired jurisdiction of the person of the defendant."

Plaintiff contends for an affirmative answer and adduces the New York statute which requires of corporations not organized under the laws of New York as a condition of doing business in the State to file in the office of the secretary of state a stipulation designating "a place within the State which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the State," and the person designated must consent and the designation "shall continue in force until revoked by an instrument in writing" designating some other person.

Defendant complied with the requirements of the statute July 6, 1914, designating 21 Park Row, New York, as its place of business and Philip B. Adams as its agent upon whom process might be served. The designation and appointment have not been revoked.

It is not denied, however, that defendant had removed from the State before service on Adams, and, as we have stated, the contracts sued on made the place of their performance Kenosha, Wisconsin. But, in emphasis of the requirement of the statute, it is urged, that at all of the times of the duration of the contracts sued on and their breaches defendant was doing business in the State, and at any time had the right to transact business in the State. It is further urged, that the contracts contemplated they might be performed within the State. There is no allegation of such performance nor that the present causes of action arose out of acts or transactions within the State. The other circumstances of emphasis may be disregarded, as the validity of the service depends upon the statute assuming it to be controlling, that is, whether under its requirements the unrevoked designation of Adams as an agent of defendant gave the latter constructive presence in the State. And making that assumption of the control of the statute, which we do in deference to counsel's contention, for light we must turn to New York decisions, and there is scarcely ambiguity in them though the facts in none of them included an actual absence from the State of the corporation with which the cases were concerned.

Bagdon v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, passed upon the effect of a cause of action arising out of the State, the corporation, however, doing business within the State, and having complied with the statute in regard to its place of business and the designation of an agent upon whom process could be served. But the court throughout the opinion with conscious so-

licitude of the necessity of making the ground of its decision the fact that the corporation was doing business in the State, dwelt upon the fact and distinguished thereby, *Old Wayne Mutual Life Assn.* v. *McDonough*, 204 U. S. 8, and *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, in both of which the causes of action were based on transactions done outside of the States in which the suits were brought.

Tauza v. *Susquehanna Coal Co.*, 220 N. Y. 259, is nearer in principle of decision than the case just commented upon. The question of the doing of business within the State by the coal company was in the case and was discussed. But the question was unconnected with a statutory designation of a place of business or of an agent to receive service of process. However, there was an implication of agency in the coal company's sales agent under other provisions of the Code of Civil Procedure of the State and it was considered that the principle of *Bagdon* v. *Philadelphia & Reading C. & I. Co.*, *supra*, applied. But the court went further and left no doubt of the ground of its decision. It said, "Unless a foreign corporation is engaged in business within the State, it is not brought within the State by the presence of its agents," citing and deferring to *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218. And further said, "The essential thing is that the corporation shall have come into the State." If prior cases have a different bent they must be considered as overruled, as was recognized in *Dollar Co.* v. *Canadian Car & Foundary Co.*, 220 N. Y. 270, 277.

In resting the case on New York decisions we do not wish to be understood that the validity of such service as here involved would not be of federal cognizance whatever the decision of a state court, and refer to *Pennoyer* v. *Neff*, 95 U. S. 714; *St Louis Southwestern Ry. Co.* v. *Alexander*, *supra*; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *Meisukas* v. *Greenough Red*

Ash Coal Co., 244 U. S. 54; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79.

It follows that the District Court did not have jurisdiction of defendant and its order and judgment dismissing the complaint is

Affirmed.

STROUD *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 276. Petition for rehearing. Decided January 19, 1920.

Possible error in overruling a challenge for cause in this case was not prejudicial, in view of the number of peremptory challenges allowed to, and their use by, the accused, and the absence of any indication that the jury was not impartial. The former decision, *ante*, 15, re-examined on this point and approved.

Rehearing denied.

Mr. Martin J. O'Donnell and *Mr. Isaac B. Kimbrell*, for plaintiff in error, in support of the petition.

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

In this proceeding on November 24, 1919, this court affirmed the judgment of the United States District Court for the District of Kansas rendered upon a verdict convicting the plaintiff in error of murder in the first degree. *Ante*, 15.

A petition for rehearing has been presented. It has been considered, and we find occasion to notice only so

much thereof as refers to the refusal of the court below to sustain the plaintiff in error's challenge for cause as to the juror Williamson. The other grounds urged have been examined and found to be without merit.

Williamson was called as a juror, and, as we said in our former opinion, was challenged for cause by the plaintiff in error. This challenge was overruled, and the juror was then challenged peremptorily by the accused. The testimony of Williamson made it reasonably certain that in the event of conviction for murder in the first degree he would render no other verdict than one which required capital punishment. Granting that this challenge for cause should have been sustained, and that this ruling required the plaintiff in error to use one of his peremptory challenges to remove the juror from the panel, we held that the refusal to sustain the challenge was not prejudicial error as the record disclosed that the defendant was allowed twenty-two peremptory challenges, when the law allowed but twenty.

In the petition for rehearing it is alleged that the record discloses that in fact the accused was allowed twenty peremptory challenges and no more, and this allegation is accompanied by an affidavit of counsel giving the names of twenty persons challenged peremptorily by the plaintiff in error, and stating that no other peremptory challenges were allowed to him at the trial. In this statement the counsel is mistaken. An examination of the original transcript, as also the printed transcript, shows that a juror, H. A. Shearer, was called and examined upon his *voir dire*, (printed transcript, p. 79) and later was peremptorily challenged by the plaintiff in error, (printed transcript, p. 143) and excused from the panel. H. A. Shearer's name does not appear upon the list of those as to whom peremptory challenges were made and sustained in plaintiff in error's behalf as given in the petition and affidavit for

a rehearing. It does appear in the transcript that plaintiff in error was allowed twenty-one peremptory challenges, and it follows that his right to exercise such challenges was not abridged to his prejudice by the failure to allow the single challenge for cause which in our opinion should have been sustained by the trial judge. Furthermore, the record shows that after the ruling and challenge as to Williamson, the plaintiff in error had other peremptory challenges which he might have used; and the record does not disclose that other than an impartial jury sat on the trial. See *Spies* v. *Illinois*, 123 U. S. 131, 168, and cases cited.

It follows that the petition for rehearing must be denied.

So ordered.

REX, ADMINISTRATRIX OF IVIE, *v.* UNITED STATES AND UTE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 126. Argued January 13, 1920.—Decided January 26, 1920.

The primary intent of the Act of January 11, 1915, c. 7, 38 Stat. 791, amending the Indian Depredation Act, was to remove the defense of alienage, and it is only cases dismissed on that ground that it provides for reinstating. P. 384.

Assuming that, by omitting the word "band" from § 1 of the original act, the amendment recognized claims for depredations by hostile bands of friendly tribes, a claim of a citizen previously dismissed because the depredating band was hostile, though the tribe was not, is not subject to reinstatement under the amendment; and, treated as a new claim, it is barred by the three years' limitation of the original act. *Id.*

53 Ct. Clms. 320, affirmed.

THE case is stated in the opinion.

Mr Harry Peyton for appellant.

Mr. Assistant Attorney General Davis, with whom *Mr. Geo. T. Stormont* was on the brief, for appellees.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims dismissing the appellant's petition upon demurrer. The claim is for depredations committed on June 10, 1866, by a band of the Ute tribe of Indians, known as Black Hawk's band. The Act of March 3, 1891, c. 538, § 1, 26 Stat. 851, gave jurisdiction to the Court of Claims over all claims for property of citizens taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States. See Rev. Stats. § 2156, Act of June 30, 1834, c. 161, § 17, 4 Stat. 729, 731. The appellant's intestate filed his claim, but on June 13, 1898, the Court of Claims held that the Black Hawk band of Utes was not in amity with the United States and dismissed the petition. The present petition relies upon the Act of January 11, 1915, c. 7, 38 Stat. 791, amending the first section of the Act of 1891 so that in all claims for property of citizens or inhabitants of the United States taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States, &c., the alienage of the claimant shall not be a defence to said claims, with provisos to be mentioned. The present petition, filed September 21, 1917, alleges that the tribe of Utes was in amity with the United States.

The claimant contends that the amendment had two purposes—not merely to give inhabitants the same rights as citizens, but also to admit claims for damage done by hostile bands from a tribe that maintained its amity, subject to a proviso that suit had been brought upon them

theretofore in the Court of Claims. It is said that claims of that nature that still were pending in the Court have been awarded judgment under the new jurisdiction. Another proviso in the act is that claims that have been dismissed by the Court for want of proof of citizenship or alienage shall be reinstated, and the petition prays that the former claim be consolidated with this suit, and that judgment be awarded upon the evidence filed in the former case. It is pointed out as an anomaly that the case of a neighbor of the intestate who suffered damage from the same band on the same day was reinstated and passed to judgment, his claim having been dismissed at an earlier date because he was not a citizen at the time.

But we are of opinion that the judgment of the Court of Claims was plainly right. The emphasis and primary intent, at least, of the Act of 1915 was to remove the defence of alienage. When it goes on by an express proviso to reinstate claims dismissed upon that ground and says nothing as to the other class it is impossible to extend the words. According to the claimant's necessary argument Congress had claims for damage by hostile bands before its eyes. On the face of the act it had before them also the matter of reinstatement. Yet it did not purport to reinstate claims of the present class. According to the claimant's account there was something for the act to operate on in the way of damage by hostile bands and the words cannot be carried further than they go. The Court of Claims rightly held that the old claim was not reinstated and that considered as a new claim the present suit was barred by the three years' limitation in the original act.

Judgment affirmed.

SILVERTHORNE LUMBER COMPANY, INC., ET AL. *v.* UNITED STATES.

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

No. 358. Argued December 12, 1919.—Decided January 26, 1920.

The Fourth Amendment protects a corporation and its officers from compulsory production of the corporate books and papers for use in a criminal proceeding against them, when the information upon which the subpœnas were framed was derived by the Government through a previous unconstitutional search and seizure, planned and executed by its officials under color of a void writ; provided the defense of the Amendment be seasonably interposed, and not first raised as a collateral issue at the trial of the indictment. P. 391. *Weeks* v. *United States*, 232 U. S. 383, followed. *Adams* v. *New York*, 192 U. S. 585, distinguished.

The rights of a corporation against unlawful search and seizure are to be protected even if it be not protected by the Fifth Amendment from compulsory production of incriminating documents. P. 392.

Reversed.

THE case is stated in the opinion.

Mr. William D. Guthrie, with whom *Mr. Henry W. Killeen*, *Mr. James O. Moore*, *Mr. Frederic D. McKenney* and *Mr. Myer Cohen* were on the briefs, for plaintiffs in error.

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

The question whether the subpœnas authorized an unreasonable search and seizure is separate from the question whether obedience would unconstitutionally compel self-incrimination. The Fourth and Fifth Amendments are distinct. *Hale* v. *Henkel*, 201 U. S. 43, 71, 72; *Wilson* v. *United States*, 221 U. S. 361, 371.

The subpœnas are as specific as was reasonably possible. A subpœna *duces tecum*, like a search warrant, must necessarily be, to some extent, a demand for discovery. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 553, 554; *Wilson* v. *United States*, *supra*, 376; *Wheeler* v. *United States*, 226 U. S. 478. Whether the terms of a subpœna violate the requirements of the Fourth Amendment can not be determined by its effect upon business convenience of the corporation.

The validity of an arrest or seizure is to be determined by the condition obtaining when objection is made. If then valid, the fact that a prior arrest or seizure, effective in bringing about the valid action, was entirely or partially illegal is immaterial and tenders a collateral issue. This rule is firmly established. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310; *Wood* v. *United States*, 16 Pet. 342, 359; *Mahon* v. *Justice*, 127 U. S. 700, 708; *Pettibone* v. *Nichols*, 203 U. S. 192, 216, 217; *Kelly* v. *Griffin*, 241 U. S. 6, 12, 13.

Where liberty of the person is involved, a valid detention is not affected by prior illegal arrests even though the present detention is made possible solely through them. Papers and books are not entitled to any greater immunity. *Adams* v. *New York*, 176 N. Y. 351, 358; *s. c.* 192 U. S. 585, 594–598; *Perlman Rim Corporation* v. *Firestone Tire Co.*, 244 Fed. Rep. 304; affd. 247 U. S. 7, 15; *United States* v. *Hart*, 214 Fed. Rep. 655; *Stroud* v. *United States*, 251 U. S. 15; *Kerrch* v. *United States*, 171 Fed. Rep. 366; *Johnson* v. *United States*, 228 U. S. 457; *United States* v. *Wilson*, 163 Fed. Rep. 338; *New York Central R. R. Co.* v. *United States*, 165 Fed. Rep. 833; *United States* v. *McHie*, 196 Fed. Rep. 586; *In re Rosenwasser Bros.*, 254 Fed. Rep. 171.

Certain decisions, where a motion to return papers was granted or an impounding order refused, can all, with one exception, be explained upon the ground that the

papers would not have been admissible in evidence as against a claim of immunity under the Fifth Amendment, and, hence, to bring in or retain them would have been idle. *United States* v. *Mills*, 185 Fed. Rep. 318; *United States* v. *McHie*, 194 Fed. Rep. 894; *United States* v. *Mounday*, 208 Fed. Rep. 186; *United States* v. *Jones*, 230 Fed. Rep. 262; *United States* v. *Abrams*, 230 U. S. 313; *United States* v. *Friedberg*, 233 Fed. Rep. 313; *Veeder* v. *United States*, 252 Fed. Rep. 414; *In re Marx*, 255 Fed. Rep. 344. The one exception is the case of *In re Tri-State Coal & Coke Co.*, 253 Fed. Rep. 605, where the court clearly overlooked the rule that a corporation can not plead immunity from self-incrimination and that therefore the books, etc., in question, in so far as relevant, should have been retained by the court, irrespective of the invalidity of the search warrant.

Weeks v. *United States*, 232 U. S. 383, is, in so far as the Fourth Amendment is concerned, a case where the trial court should have refused to retain custody of the papers, not because of anything connected with the original unlawful seizure, but because of the defendant's claim of immunity under the Fifth Amendment, the papers being the private papers of an individual seized at his residence. We respectfully submit, therefore, that according to the settled principles of the law the subsequent valid subpœnas issued by the court in the case at bar were not in any way vitiated or weakened in authority or effect by reason of the prior illegal seizure.

A corporation, either state or federal, can not plead immunity from self-incriminating testimony under the Fifth Amendment as to its books and papers. *Hale* v. *Henkel*, *supra*, 74, 75; *Nelson* v. *United States*, 201 U. S. 92; *Alexander* v. *United States*, 201 U. S. 117; *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 347–349; *Wilson* v. *United States*, *supra*, 382, 383; *American Lithographic*

Co. v. *Werckmeister*, 221 U. S. 603, 611; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Comm.*, 221 U. S. 612, 622, 623; *Wheeler* v. *United States, supra*, 489.

This has been the uniform rule of the lower federal courts, so far as we have been able to discover. *International Mining Co.* v. *Pennsylvania R. R. Co.*, 152 Fed. Rep. 557; *United States* v. *Philadelphia & Reading Ry. Co.*, 225 Fed. Rep. 301; *Orvig* v. *New York & Bermudez Co.*, 229 Fed. Rep. 293; *In re Rosenwasser Bros., supra; New York Central R. R. Co.* v. *United States*, 165 Fed. Rep. 833. The decisions were not rested on the special right of the State to inquire into the abuse of franchises granted by itself, through proceedings in the nature of *quo warranto*. The United States is not foreign to the several States in the sense that it cannot effectively execute its laws as to corporations doing business under state charters.

The Fifth Amendment is coextensive with the common law. What the latter granted or grants, the Amendment secures, no more, no less. *State* v. *Quarles*, 13 Arkansas, 307, 311; *State* v. *Fuller*, 34 Montana, 12, 19. Therefore, when this court decided that a corporation has no constitutional immunity from self-incrimination, it necessarily decided that it had no common-law immunity. This is clearly brought out in the *Wilson Case*, 221 U. S. 386, where the court cited the English cases and held them not controlling.

In *Twining* v. *New Jersey*, 211 U. S. 78, the question whether the privilege against self-incrimination is included in the legal content of the term "due process of law," mooted in *Adams* v. *New York* and the *Consolidated Rendering Co. Case*, was fully considered, and it was held that it was not.

If a corporation is not entitled at any time or under any circumstances to plead compulsory self-incrimination as to the books and papers,—if it is not entitled as to

such books and papers to the privileges guaranteed by the Fifth Amendment,—then it can not indirectly obtain the benefit of this Amendment by objecting to the manner in which the Government got its information resulting in perfectly lawful compulsory production. The case does not differ from one where the witness does not plead self-incrimination, as to which see *Blair* v. *United States*, 250 U. S. 273. Such a witness could be compelled to produce relevant testimony, though the knowledge that he had it and of its precise extent had been derived from illegal acts of public officials.

Illegal action of subordinate public officials can not forever prevent the United States from securing by legal process relevant evidence of a violation of its laws where no right under the Fifth Amendment can be successfully set up. *Flagg* v. *United States*, 233 Fed. Rep. 481, 487; *Adams* v. *New York*, *supra*, 597, 598. In *Weeks* v. *United States*, *supra*, there was a denial by the court of a petition for the return of the papers. This amounted to the issuance by the court of a subpœna *duces tecum* for them (see *Kelly* v. *Griffin*, *supra*,) or to an impounding order, and hence to compulsory process for their production as evidence. It was for this reason that this court reversed the judgment, and not because of their reception as evidence. And this seems to be the view taken by all the lower federal courts who have had occasion to consider the matter, except the Court of Appeals for the Second Circuit. See, *e. g.*, *Lyman* v. *United States*, 241 Fed. Rep. 945; *Rice* v. *United States*, 251 Fed. Rep. 778; *Laughter* v. *United States*, 259 Fed. Rep. 94; *Flagg* v. *United States*, 233 Fed. Rep. 481; *Fitter* v. *United States*, 258 Fed. Rep. 567. Cf. *Linn* v. *United States*, 251 Fed. Rep. 476, 480; *New York Central R. R. Co.* v. *United States*, 165 Fed. Rep. 833. The Lumber Company, not being entitled to object under the Fifth Amendment to the use as evidence

of the papers in question, can not object to lawful, sufficiently definite subpœnas to produce them because the knowledge of their existence and of their contents was derived from a prior illegal seizure. To sanction such objection would be to offer a premium to a witness who could successfully conceal from the State the possession of relevant evidence of the violation of its criminal laws.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error brought to reverse a judgment of the District Court fining the Silverthorne Lumber Company two hundred and fifty dollars for contempt of court and ordering Frederick W. Silverthorne to be imprisoned until he should purge himself of a similar contempt. The contempt in question was a refusal to obey subpœnas and an order of Court to produce books and documents of the company before the grand jury to be used in regard to alleged violation of the statutes of the United States by the said Silverthorne and his father. One ground of the refusal was that the order of the Court infringed the rights of the parties under the Fourth Amendment of the Constitution of the United States.

The facts are smple. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, 1919, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books, &c., were taken at once. An application was made as soon as might be to the District

Court for a return of what thus had been taken unlawfully. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by the District Attorney to the approach of those concerned in the act by an invalid subpœna for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. Photographs and copies of material papers were made and a new indictment was framed based upon the knowledge thus obtained. The District Court ordered a return of the originals but impounded the photographs and copies. Subpœnas to produce the originals then were served and on the refusal of the plaintiffs in error to produce them the Court made an order that the subpœnas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged. The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States*, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was

unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. The numerous decisions, like *Adams* v. *New York*, 192 U. S. 585, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in *Weeks* v. *United States*, 232 U. S. 383, 394, 395. Whether some of those decisions have gone too far or have given wrong reasons it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactorily in *Flagg* v. *United States*, 233 Fed. Rep. 481, 483. In *Linn* v. *United States*, 251 Fed. Rep. 476, 480, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.

Judgment reversed.

THE CHIEF JUSTICE and MR. JUSTICE PITNEY dissent.

HENRY, EXECUTOR OF HENDRICKS, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 162. Argued January 21, 1920.—Decided February 2, 1920.

A legacy paid over by the executor to the legatee, or to himself as trustee under the will for an ascertained beneficiary, is vested in possession, within the meaning of the tax-refunding Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, although the payments are made before expiration of the time for proving claims against the estate.

53 Ct. Clms. 641, affirmed.

THE case is stated in the opinion.

Mr. Simon Lyon, with whom *Mr. R. B. H. Lyon* was on the briefs, for appellant.

The Solicitor General, with whom *Mr. A. F. Myers* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover taxes paid under the Spanish War Revenue Act of June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 448, 464, 465, repealed by the Act of April 12, 1902, c. 500, § 7, 32 Stat. 96, 97, the repeal to take effect on July 1, 1902. By the Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, the Secretary of the Treasury was directed to refund taxes upon legacies collected upon contingent beneficial interests that should not have become vested before July 1, 1902, and this claim is made under the last mentioned act. The claim was held by the Court of

Claims to be barred by the statute of limitations. In view of the decision in *Sage* v. *United States*, 250 U. S. 33, it is admitted by the Government that the judgment cannot be sustained on that ground, and therefore that matter need not be discussed, but it is contended that the judgment was right because the legacies taxed had become vested before July 1, 1902. Whether they had become vested within the meaning of the refunding act is the only question in the case.

The facts are these: Arthur Hendricks died domiciled in New York on March 5, 1902, and his will was proved on March 17, 1902. The claimant was executor and trustee under the will. By that instrument the sum of $50,000 was left to the claimant in trust for Florence Lester for life, the remainder to go to the residue. The residue was left to the testator's five sisters. On July 1, 1902, the time for proving claims against the estate had not expired, but before that date the executor, having correctly estimated that a large sum would be left after all debts, paid over $135,780 to the five sisters in equal shares and "established the trust fund" for Florence Lester, that is, as we understand the finding, transferred the sum of $50,000 to his separate account as trustee. The taxes in question were levied on these two amounts.

There is no doubt that if the claimant had retained the funds in his hands, as he had a legal right to do, the interest of the legatees would not have been vested in possession within the meaning of the statute, whatever the probabilities and however solvent the estate. *United States* v. *Jones*, 236 U. S. 106. *McCoach* v. *Pratt*, 236 U. S. 562. He contends that the same is true if he saw fit to pay over legacies before the time came when they could be demanded as of right.—We will assume that, if the estate had proved insufficient, the executor not only would have been responsible but could have recovered such portion of his payments as was needed to pay debts.

Still the consequence asserted does not follow. There can be no question that the interest of the sisters was held in possession, and so was that of the trustee, although he happened to be the same person as the executor. The interest was vested also in each case. The law uses familiar legal expressions in their familiar legal sense, and the distinction between a contingent interest and a vested interest subject to be divested is familiar to the law. Gray, Rule Against Perpetuities, § 108. The remote possibility that the funds in the hands of the legatees might have to be returned no more prevented their being vested in possession and taxable than the possibility that a life estate might end at any moment prevented one that began before July 1, 1902, being taxed at its full value as fixed by the mortuary tables. *United States* v. *Fidelity Trust Co.*, 222 U. S. 158, 160. In that case it was contended that the life estate was contingent so far as not actually enjoyed.

It is argued with regard to the trust for Florence Lester that the case stands differently because the life tenant received no income from it before July 1, 1902. But for the purposes of this act the interest in a fund transferred from an estate to a trustee for ascertained persons is vested in possession no less than when it is conveyed directly to them. See *United States* v. *Fidelity Trust Co., supra.*

Judgment affirmed.

BROOKS-SCANLON COMPANY *v.* RAILROAD COMMISSION OF LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 386. Argued January 6, 1920.—Decided February 2, 1920.

A common carrier cannot, under the Fourteenth Amendment, be compelled by a State to continue operation of its railroad at a loss. P. 399.

Where a railroad serving the public is owned and operated by a lumber company in connection with its lumber business, it is the business of the railroad and not the entire business of the company which determines whether the railroad may be abandoned as unprofitable. *Id.*

A mere suggestion in the opinion of a state court unsupported by evidence, cannot be taken as a finding of fact in determining the scope and ground of its decision. *Id.*

Nor can a statement that the court has not jurisdiction to consider relief claimed under the Federal Constitution, because the plaintiff has not complied with formalities under the state law, be taken as placing the decision on a state ground, when the court actually passes upon and denies the merits of plaintiff's claim, gives relief against plaintiff, and devotes its opinion almost entirely to explaining and justifying such course. P. 400.

Forms imposed by local law cannot enable courts and commissions to do what the Federal Constitution forbids. *Id.*

144 Louisiana, 1086, reversed.

THE case is stated in the opinion.

Mr. J. Blanc Monroe and *Mr. Robert R. Reid*, with whom *Mr. Monte M. Lemann* was on the briefs, for petitioner.

Mr. W. M. Barrow, Assistant Attorney General of the State of Louisiana, with whom *Mr. A. V. Coco*,

Attorney General of the State of Louisiana, was on the briefs, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the Brooks-Scanlon Company, a Minnesota corporation organized to manufacture and deal in lumber and to carry on other incidental business, against the Railroad Commission of Louisiana. It seeks to set aside an order (Number 2228) of the Commission requiring the plaintiff either directly or through arrangements made with the Kentwood and Eastern Railway Company, to operate its narrow gauge railroad between Kentwood and Hackley, in Louisiana, upon schedules and days to be approved by the Commission. The plaintiff alleges that the order cannot be complied with except at a loss of more than $1500 a month, and that to compel compliance would deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, with other objections not necessary to be mentioned here. The defendant denies the plaintiff's allegations and in reconvention prays for an injunction against the tearing up or abandoning of the road and for a mandate upholding the order. In the Court of first instance a preliminary injunction was issued in favor of the Commission, but was dissolved upon bond. Subsequently a judgment was entered denying a motion of the Commission to set aside the order dissolving the injunction, and after a trial on the merits judgment was entered for the plaintiff, declaring the order void. The defendant appealed from both judgments to the Supreme Court of the State. That Court reversed the decision below and reinstated the injunction granted on the defendant's prayer.

It seems that the Banner Lumber Company, a Louisiana corporation, formerly owned timber lands, sawmills and this narrow gauge railroad. The road was primarily a logging road but it may be assumed to have done business for third persons as a common carrier. The Banner Lumber Company sold the whole property to the Brooks-Scanlon Lumber Company on November 1, 1905, the stockholders of which obtained a charter for the railroad as the Kentwood and Eastern Railway Company on December 5 of the same year. In the interim it was managed by them with separate accounts. An oral lease of the road was made to the new company and soon afterwards the Brooks-Scanlon Lumber Company transferred its property to the Brooks-Scanlon Company, the petitioner. On the first of July, 1906, the Brooks-Scanlon Company made a written lease of the road to the Railway Company and sold to it all the rolling stock and personal property used in connection with the road. Thereafter the road was run as before, doing a small business as a common carrier but depending upon the carrying of logs and lumber to make it a profitable rather than a losing concern. In course of time the timber of the Brooks-Scanlon Company was cut and it terminated the lease to the Railway Company, which discontinued business on April 22, 1918, with the assent of the Railroad Commission, and sold its rolling stock. At that time the Commission being advised that it had no power did nothing more. But later, subsequent to a decision by the Supreme Court in May, it issued notice to the Brooks-Scanlon Company and the Railway to show cause why the road should not be operated, gave a hearing, and issued the order complained of here. The Supreme Court, after saying that the two corporations were one under different names, stated that the only question left for determination was whether the plaintiff could be compelled by the Commission to operate

its railroad, and concluded that although the railroad showed a loss, the test of the plaintiff's rights was the net result of the whole enterprise—the entire business of the corporation—and on that ground made its decree.

We are of opinion that the test applied was wrong under the decisions of this Court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595, 599, 600, 604, and *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, 609, 614. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfil an obligation imposed by the charter even though fulfilment in that particular may cause a loss. *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 276, 278. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn* v. *Illinois*, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.

While the decision below goes upon the ground that we have stated, it is thrown in at the end as a makeweight that the order of the Commission calls upon the plaintiff "'to submit a new schedule for transportation which may be operated at much less expense to it than

the former schedule cost, and at a profit for plaintiff." This is merely the language of hope. We cannot take it to be a finding of fact, for we perceive nothing in the evidence that would warrant such a finding. The assumption upon which the Court made its ruling was that the plaintiff's other business was successful enough to stand a loss on the road.

Finally a suggestion is made in argument that the decision rested also upon another ground that cannot be reconsidered here. At the end of the opinion it is stated that the plaintiff has not petitioned the Railroad Commission for leave to discontinue this business and that until it has done so the Courts are without jurisdiction of the matter. It is not impossible that this is an oversight since it seems unlikely that after the Commission has called the plaintiff before it on the question and against its strenuous objection has required it to go on, such an empty form can be required. But in any case it cannot be meant that the previous discussion which occupies the whole body of the opinion is superfluous and irrelevant to the result reached; nor can the words be taken literally, since the court proceeded to take jurisdiction and reinstated an injunction in favor of the defendant. Whatever may be the forms required by the local law it cannot give the Court or Commission power to do what the Constitution of the United States forbids, which is what the order and injunction attempt. *Pennsylvania R. R. Co.* v. *Public Service Commission,* 250 U. S. 566.

Decree reversed.

Counsel for Parties.

BOARD OF PUBLIC UTILITY COMMISSIONERS *v.* YNCHAUSTI & COMPANY ET AL.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 190. Argued January 27, 1920.—Decided March 1, 1920.

Acceptance of a license from the Philippine Government to engage in the coastwise trade does not oblige the licensee to fulfill a condition imposed contrary to the Philippine Bill of Rights. P. 404.

In licensing vessels to engage in the Philippine coastwise trade, the Philippine Government is authorized to require, as a condition, free transportation of mails. P. 405.

Such authority is found in its continuous exercise by the local military and civil governments without interference by Congress; in failure of Congress to disapprove local legislation, giving it effect, which under the Act of July 1, 1902, must be reported to Congress; and in its recognition by the Act of April 15, 1904, which authorizes the local government to regulate transportation between local ports and places until American registry of Philippine-owned vessels shall have been authorized by Congress. *Id.*

The Philippine Government having thus authority from Congress to impose the duty to carry the mails free as a condition to engaging in coastwise trade, its law imposing such condition does not deprive the licensee of rights without due process, or take property for public use without just compensation, in violation of the Philippine Bill of Rights. *Id.*

The Constitution does not limit the power of Congress when legislating for the Philippines as when legislating for the United States. P. 406.

Reversed.

THE case is stated in the opinion.

Mr. Chester J. Gerkin and *Mr. Edward S. Bailey* for petitioner.

Mr. Alex. Britton, with whom *Mr. Evans Browne* was on the brief, for respondents.

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

Was error committed by the court below in deciding that the Philippine law which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch, was void for repugnancy to the Philippine Bill of Rights—is the question which comes before us for decision as the result of the allowance of a writ of certiorari.

The issue will be clarified by a brief reference to the antecedents of the controversy. Under the Spanish law as enforced in the Philippine Islands before the American domination the duty of free carriage as stated existed. Upon the cession of the Islands to the United States and the establishment there of a military government the existing condition of the subject was continued in force. It thus continued until the government passed into the hands of the Philippine Commission and was by that body specifically recognized and its further enforcement directed. Thus it prevailed without interruption until 1902, when the first act of Congress providing a general system of civil government for the Islands was passed, and it further remained operative until 1904, when Congress passed the act of that year specifically dealing with the authority of the Philippine Government to provide for the coastwise trade, as follows (33 Stat. 181):

"Until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Archipelago the government of the Philippine Islands is hereby authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago."

In fact the continued operation of the obligation to

carry the mails free which arose from engaging in the coastwise trade, it may be taken for granted, remained in force until 1916, since the obligation was recognized as being yet in existence and the duty to enforce it for the future was directed by § 309 of the Administrative Code of that year, in which code were also stated the existing provisions as to the registry, licensing, etc., of Philippine vessels. That the requirement continued operative thereafter results from the further fact that it was re-expressed in § 568 of the Administrative Code of 1917, which code was adopted to meet the exigencies created by the later Organic Act of the Philippine Islands enacted by Congress in August, 1916 (39 Stat. 545).

We have not stopped to refer to the Spanish law, to the military orders, to the reports of civilian officials, and to the action of the Philippine Commission on the subject, as above stated, because the references to them were made below in Marginal Note A, which Mr. Justice Carson made a part of his dissenting opinion.

It is undoubted that during all this period vessels were permitted to engage in the coastwise trade only upon the issuance to and the acceptance by them of licenses, the enjoyment of which depended upon the performance of the legal duty of the free carriage of the mails.

The respondents were in 1916 the owners of steam vessels of Philippine registry, licensed to engage in the coastwise trade upon the condition stated, and the controversy before us arose in consequence of a notice given by them to the Philippine Director of Posts that after a date designated they would no longer comply with the duty to carry the mails free. That official sought its enforcement at the hands of the Board of Public Utility Commissioners. Before that Board the respondents, the licensees, relied upon the assertion that the section of the Administrative Code imposing the duty of free mail carriage was in conflict with the provisions of the Philippine Bill of Rights,

guaranteeing due process and prohibiting the taking of private property for public use without just compensation. The Board overruled the defense and awarded an order directing compliance with the law and therefore prohibited the carrying out of the intention to discontinue. In reaching this conclusion the Board held that its sole duty was to ascertain whether the law imposed the obligation to carry the mails free, and if it did, to enforce it without regard to the defense as to the repugnancy of the statute to the Bill of Rights, since that question was proper only to be disposed of by judicial action.

The Supreme Court to which the controversy was taken, not differing as to the existence of the statutory duty, reversed the order on the ground that such duty could not be exacted consistently with the clauses of the Bill of Rights relied upon. No opinion stating the reasons for this conclusion was expressed, but a member of the court dissented and stated his reasons in an elaborate opinion.

It is impossible to conceive how either the guaranty by the Bill of Rights of due process or its prohibition against the taking of private property for public use without compensation can have the slightest application to the case if the Philippine Government possessed the plenary power, under the sanction of Congress, to limit the right to engage in the coastwise trade to those who agree to carry the mails free. It must follow that the existence of such power is the real question which is required to be decided. In saying this we put out of view as obviously erroneous the contention that, even though the Bill of Rights applied and limited the authority of the Government so as to prevent the exaction by law of the free carriage of the mails, that result is not applicable here because by accepting a license the ship-owners voluntarily assumed the obligation of free carriage. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27–30; *Pullman Co.*

v. *Kansas*, 216 U. S. 56, 70; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 300, 301; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227, 233–234; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114.

To what extent the Bill of Rights limits the authority of the Government of the Philippine Islands over the subject of the free carriage of the mails is, then, the determinative factor. Beyond doubt Congress, in providing a Bill of Rights for those Islands, intended its provisions to have there the settled construction they have received in the United States. But it must be and is indisputable that when the provisions of such Bill come to be applied to governmental powers in the Philippine Islands, the result of their application must depend upon the nature and character of the powers conferred by Congress upon the Government of the Islands. To illustrate, where a particular activity in the Philippine Islands is, as the result of power conferred by Congress, under governmental control to such an extent that the right to engage in it can be made by the Philippine Government dependent upon the performance of a particular duty, it is obvious that the exaction of such a duty, as such prerequisite condition, can be neither a denial of due process or a taking of property without compensation.

Coming to the proposition to which the case is therefore ultimately reduced, we see no reason to doubt that the Philippine Government had the power to deal with the coastwise trade so as to permit its enjoyment only by those who were willing to comply with the condition as to free mail carriage and therefore that no violation of individual right could have resulted from giving effect to such condition. We reach this conclusion because the possession and exercise of such power in the Islands before their cession to the United States, its exertion under the military government of the United States which followed the cession, and its continuance by every form of civil

government created by Congress for the Islands, compels to that view in the absence of any law expressly providing to the contrary or which by reasonable implication leads to that result.

Indeed, the conclusion that the power was possessed does not rest alone upon the general consideration stated, since it is additionally sustained by recalling the express provision of the Act of Congress of 1904, to which we have previously referred, giving authority for the registry of Philippine vessels and recognizing the power of the Government of the Philippine Islands to deal with the coastwise trade, an authority which, as it contains no provision tending to the contrary, must be construed as applicable to and sanctioning the power which had been exerted from the very inception of the American domination, to provide as to that trade for the free carriage of the mails. In other words, in view of the power to impose the burden in question, exerted in the Philippine Islands from the beginning and which was then being exerted under the authority of Congress, the conferring by Congress upon the Philippine Government by the Act of 1904 of the authority to make regulations concerning such trade was a recognition of the right to make the regulation theretofore made, which was then in force, and which continued to be in force up to the time of the bringing of this suit, without disapproval or change by Congress.

When the authority which the Act of 1904 gave is borne in mind it makes it clear that the mistake which underlies the entire argument as to the non-existence of power here relied upon arises from the erroneous assumption that the constitutional limitations of power which operate upon the authority of Congress when legislating for the United States are applicable and are controlling upon Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power over territory not forming part of the United States because not

incorporated therein. *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197, 220; *Dorr* v. *United States*, 195 U. S. 138; *Dowdell* v. *United States*, 221 U. S. 325, 332; *Ocampo* v. *United States*, 234 U. S. 91, 98.

The error which thus underlies the whole argument becomes more conspicuously manifest by recalling that Congress in the Act of 1904 expressly provided that the authority which that act gave should exist only until Congress should otherwise provide, and, besides, that before the passage of that act, the Act of July 1, 1902, c. 1369, § 86, 32 Stat. 691, 712, provided "that all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same."

Judgment reversed.

UNITED STATES *v.* THOMPSON.

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

No. 250. Argued January 27, 28, 1920.—Decided March 1, 1920.

A judgment of the District Court sustaining a so-called motion to quash, which in effect bars the United States from further prosecuting the alleged offense under the same or any other indictment, depriving the district attorney and the grand jury of their lawful powers over the subject, is subject to review by this court under the Criminal Appeals Act as a "judgment sustaining a special plea in bar." P. 412.

The grand jury has power to inquire into and indict upon a charge which has previously been examined and ignored by another grand jury; the United States attorney has power to invoke such a re-examination; and the exercise of these powers is not subject to be denied at the discretion of the District Court. P. 413.

Hence, a judgment quashing an indictment because the United States attorney did not obtain permission from the court to make the re-

submission to the grand jury upon which the indictment was obtained is erroneous, as invading the functions of the United States attorney and those of the grand jury. P. 413.

The rule governing this subject is general, based on the common law and the decisions of this court, and is not subject to the decisions or statutes of the State in which the offense is committed and prosecuted. P. 415.

Section 722 of the Revised Statutes, in the criminal cases to which it relates, adopts the state practice only in the absence of a federal rule governing the matter in question. *Id.*

Applications for writs of mandamus and prohibition to control the District Court are disallowed when the relief sought is afforded through a writ of error. P. 417.

Reversed.

THE case is stated in the opinion.

Mr. W. C. Herron, with whom *The Solicitor General* and *Mr. Assistant Attorney General Stewart* were on the brief, for the United States.

Mr. J. E. B. Cunningham, with whom *Mr. R. M. Gibson* and *Mr. W. C. McKean* were on the brief, for defendant in error.

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

The Comptroller of the Currency, in January, 1915, closed the doors of the First National Bank of Uniontown, Pennsylvania. At the opening of the November term, 1915, of the court below, sitting at Pittsburgh, the attention of the grand jury was called by the court to alleged criminal acts connected with the administration of the affairs of the bank, and, following an investigation, the district attorney submitted to the grand jury a proposed indictment charging Thompson, the president of the bank, in forty-seven counts with violations of the Na-

tional Bank Act. The grand jury having concluded to indict only for the first seventeen of said counts, the district attorney prepared an indictment embracing them and withdrew the other thirty from consideration. The bill thus drawn was submitted to the grand jury, by it presented as a true bill, and was ordered filed.

On March 17, 1916, the Attorney General of the United States, pursuant to the Act of June 30, 1906, c. 3935, 34 Stat. 816, appointed a special assistant for the purpose of coöperating with the district attorney in the matter of the steps to be taken to procure the indictment of Thompson. The next session of the court was held in March, 1916, at Erie, and the district attorney and the assistant to the Attorney General, without asking authority of the court, directed the attention of the grand jury to the charges against Thompson covered by the counts as to which the grand jury at Pittsburgh had failed to make a presentment, and, after hearing witnesses called by the district attorney, the Erie grand jury, on the 24th day of March, found a true bill containing thirty counts covering such charges. When this indictment was presented the court expressed doubt, in view of the fact that the charges had been submitted to a previous grand jury and no presentment had been made, whether there was any authority in the Erie grand jury, at the instance of the district attorney, to consider such charges without previously obtaining the consent of the court. However, the court observed that, as the grand jury had reported a true bill, it would be placed on file, with the reservation of a right to take such future action regarding it as might be deemed appropriate.

Both indictments went upon the calendar for hearing, but that result was postponed from time to time in order to afford the accused an opportunity to prepare his defense. Finally in May, 1918, when both indictments were set for trial, a motion was made to quash both, based, as

far as concerned the Erie indictment, upon the ground that the grand jury had considered the subject of that indictment, not of its own motion, but upon the suggestion of the district attorney without any previous authority given him by the court. The motion was further supported by the assertion that the presentment of a true bill by the Erie grand jury was not made "from the personal knowledge of any of the grand jurors, nor from the testimony of witnesses sent before the said grand jury by leave of, or by order of the court"; that "the knowledge upon which said presentment was so made, came to said grand jury 'through the evidence of certain witnesses' called before said grand jury by the United States attorney without the order or permission of the court and the subject matter of said presentment was not called to the attention of, or given in charge or submitted to, the grand jury by the court." In addition, the motion averred that the thirty counts included in the Erie indictment covered the same offenses which were embraced by the thirty counts as to which the Pittsburgh grand jury had failed to find a true bill, and that the witnesses introduced by the district attorney at Erie were virtually the same witnesses previously by him introduced as to the same charges before the Pittsburgh grand jury.

The motion as to the Pittsburgh indictment was rejected and we put it out of view. That as to the Erie indictment was granted on the ground that the district attorney had no authority, after the action of the Pittsburgh grand jury, to resubmit the same matters to the Erie grand jury without the approval of the court, and that the Erie grand jury, for the same reason, had no authority to consider the subject. The court said:

"The resubmission of those matters to the later grand jury at the Erie term was without the knowledge or approval of the court. The resubmission of the offenses against the Government to a new grand jury is a matter of

highest prerogative, and is always subject to the control of the court, and, in proper cases, always granted by the court. . . . Again, it appears . . . that there was a special designation by the Attorney General, of some one, to attend the sessions of the grand jury at Erie and proceed with the investigation.

"We have, then, a subsequent introduction of the same matters to a later grand jury, with the pressure, perhaps, of a specially designated representative of the highest officer in the Department of Justice, without the approval or without the permission of the court, and perhaps to the prejudice of the defendant. . . .

"I am satisfied that the matters in connection with the finding of the indictment at Erie were more than irregularities, and, therefore, I must sustain the motion to quash the indictment found at Erie, and note an exception to the Government.

"The court further wishes to state that the control of the grand jury by common law and by statute law is under the court and the proceedings are under the control of the court.

"Mr. Rush [the district attorney]. May it please the court, the holding, then, of the court, as I understand it, is that the presentation of the case to the grand jury, which has been formerly ignored, would be a bar to a subsequent presentation, unless leave of court were granted.

"By the Court. Without the permission of the court, yes. I think that is the law, and that is what I have stated."

A rehearing was asked on the ground, among others, that if the allowance of the motion to quash were adhered to, the result would be to bar the right of the Government to further prosecute for the offenses charged, as in consequence of the continuances which had been granted and the delay in making the motion to quash, the statute of

limitations would be operative. The rehearing was denied, the court reiterating its previous rulings and pointing out that, as the Pittsburgh indictment had not been quashed, there was opportunity for the Government to prosecute for the offenses therein charged, although its right to further prosecute the offenses charged in the Erie indictment would be lost.

This direct writ of error was then prosecuted under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, both parties agreeing, for the purposes of a motion to dismiss for want of jurisdiction, which we now consider, that under the circumstances here disclosed the authority to review must depend upon whether the quashing of the indictment was a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

As it is settled that this question is to be determined, not by form but by substance (*United States* v. *Barber*, 219 U. S. 72, 78; *United States* v. *Oppenheimer*, 242 U. S. 85), it follows that the fact that the ruling took the form of granting a motion to quash is negligible. Testing, then, the existence of jurisdiction by the substantial operation of the judgment, and assuming for the purpose of that test that the United States possessed the right to submit the indictment to the second grand jury without leave of court, which right was denied by the judgment below, we are of opinion that the power to review the judgment is conferred by the provision of the statute quoted, (a) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based; and (b) because a like consequence resulted as to the authority of the district attorney and the powers of the grand jury, since the exercise in

both cases of lawful authority was barred by the application of unauthorized judicial discretion.

It is true it is argued that, as the rights which the United States asserted were not possessed, the judgment did not bar the United States or the district attorney or the grand jury from the exercise of any lawful power. But this can only rest upon the assumption, that as there was no error in the judgment there is no power to review it, which, if its premise has any force, will be disposed of by the decision of the merits to which we now proceed.

The Government urges that in the absence of statute of the United States giving such authority, the want of power in the court to quash the indictment for the reasons by it stated is clearly established by the following propositions, which in an elaborate argument it is insisted are made certain by a consideration of the common law, of the statutory law of the United States, of the practices from the beginning, and of the adjudications of this court which settle the question. The propositions are these:

(1) That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.

(2) That the United States district attorney, in virtue of his official duty and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court; and that by the same token the duty of the district attorney to direct the attention of a

grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges.

We do not stop to review or even cite the extensive array of authorities from which the Government deduces these propositions, but content ourselves with referring to the following cases and the authorities therein cited by which the propositions are sustained. *Hale* v. *Henkel*, 201 U. S. 43, 59–66; *Blair* v. *United States*, 250 U. S. 273; and see, with particular reference to the second proposition, *Weeks* v. *United States*, 216 Fed. Rep. 292, 297, 298; *Creekmore* v. *United States*, 237 Fed. Rep. 743; *Abbott Bros. Co.* v. *United States*, 242 Fed. Rep. 751; *Kelly* v. *United States*, 250 Fed. Rep. 947. To do more than to make this reference is unnecessary as in argument the abstract correctness of the propositions advanced by the Government is conceded and the only controversy is as to their application, based upon the insistence that the present case is governed by an exception which exacts the necessity of procuring the prior approval of the court wherever a district attorney presents to one grand jury charges which a previous grand jury has ignored. The existence of this particular exception was expressly declared by the court below to be the basis for its decision. But we think the ruling, although it rested upon the assumption stated, cannot be sustained, since the assumed exception is so incompatible with the general principles governing the subject as to cause it to be, in substance, not an exception at all, but, under the guise of an exception, a mere disregard or repudiation of the principles themselves, for the following reasons: In the first place, because, while admitting the power of the grand jury, it yet denies such power, since it limits the right of that body to inquire by causing it to be unlawful for it to listen, without the approval of the court, to a suggestion of the district attorney under the circumstances stated, and

therefore causes any finding made to depend upon an inquiry as to the particular source of information which led to the investigation from which the finding resulted. In the second place, because, while conceding that the power of the grand jury is continuous, so that unfavorable action does not exhaust the authority of that or of another grand jury to examine, it limits or restrains thereafter the power of both to do so. In the third place, because, while the general rule which is stated establishes the authority of the district attorney as official prosecutor, and makes it, as we have seen, coterminous with the right of the grand jury to consider, the exception subjects that authority to the exercise of a judicial discretion, which, as well illustrated by the case under consideration, destroys it. In the fourth place, because, comprehensively considering the subject, the assertion of the judicial discretion which was the basis of the judgment below is incompatible with the spirit and purpose underlying the admitted principles as to the power of grand juries, and the right of the Government to initiate prosecutions for crime, since in the case stated such powers are controlled, not by a rule of law, but depend upon a mere exercise of judicial discretion.

From the point of view of authority, the argument seeks to establish the existence of the exception upheld by the court below by a reference to a number of cases decided in Pennsylvania and in other States.[1] As to the Pennsylvania cases, they undoubtedly support the existence of the exception, not in virtue of any statutory provision to

[1] *Rowand* v. *Commonwealth*, 82 Pa. St. 405; *Commonwealth* v. *Stoner*, 70 Pa. Super. Ct. 365; *Commonwealth* v. *Allen*, 14 Pa. Co. Ct. 546; *Commonwealth* v. *Whitaker*, 25 Pa. Co. Ct. 42; *Commonwealth* v. *Priestly*, 24 Pa. Co. Ct. 543; *People* v. *Neidhart*, 71 N. Y. S. 591; *People* v. *Clements*, 5 N. Y. Crim. 288; *People* v. *Dillon*, 197 N. Y. 254; *State* v. *Collis*, 73 Ia. 542; *Sutton* v. *Commonwealth*, 97 Ky. 308; *People* v. *Warren*, 109 N. Y. 615; *Rea* v. *State*, 3 Okla. Crim. 269.

that effect, but solely in contemplation of the common law of the State. But, in view of what we have just said concerning the error upon which the exception rests, its departure from the common law, its conflict with the settled rule applicable in the courts of the United States, as sustained by the decisions of this court, we are unable to accept the doctrine of the Pennsylvania cases as being even persuasively controlling.

As to the cases from other States which are relied upon as sustaining the exception, they are inapplicable because, with one or two exceptions, they rest exclusively upon the provisions of state statutes which on their face show an intention to deviate from the general rule which otherwise would prevail at the common law.[1]

It remains only to consider the contention that, irrespective of the want of persuasive power of the Pennsylvania cases, as the case in hand concerns the prosecution for a crime committed in Pennsylvania, even though it be a crime against the United States, the state rule, in virtue of the provisions of § 722 of the Revised Statutes of the United States, was authoritatively controlling on the court below and is so controlling here. But the section relied upon provides for applying a state rule only where that course is required by an absence of federal rule on the subject. In view of the existence of a controlling federal rule which would be overthrown by applying the state law, the want of merit in the contention is so self-evident that we leave it without further notice.

The difference between calling into play a discretion for the purpose of prohibiting the performance of duties authorized by law, lest if their performance be permitted, they may be abused, and the exertion of a sound discre-

[1] *People* v. *Warren*, 109 N. Y. 615; *People* v. *Dillon*, 197 N. Y. 254; *Sutton* v. *Commonwealth*, 97 Ky. 308; *State* v. *Collis*, 73 Iowa, 542; *Rea* v. *State*, 3 Okla. Crim. 281.

tion possessed, for the purpose of reasonably regulating the performance of duties by law imposed, serves, in the last analysis, to dispose of the arguments concerning the dangers of abuse of power which may result from a failure to uphold the existence of the discretion which the court below deemed it possessed and upon which its action was based.

As we have exercised jurisdiction to review on the writ of error, the prayer of the United States for the granting of a rule to show cause why mandamus and prohibition should not issue if jurisdiction of the writ of error was not maintained, has nothing now to rest upon and it is denied. It further follows from what we have said on the merits that the judgment below must be and it is

Reversed and the cause remanded for further proceedings in conformity with this opinion.

UNITED STATES *v.* UNITED STATES STEEL CORPORATION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 6. Argued March 9, 12–14, 1917; restored to docket for reargument May 21, 1917; reargued October 7–10, 1919.—Decided March 1, 1920.

That an industrial combination is formed with the expectation of achieving a monopoly is not enough to make it a monopoly within the meaning of the Anti-Trust Act. P. 444.

Held, that the power attained by the United States Steel Corporation, much greater than that of any one competitor, but not greater than that possessed by them all, did not constitute it a monopoly. *Id.*

The fact that a corporation, alleged to be an illegal combination, during a long period after its formation persuaded and joined with its com-

petitors in efforts, at times successful and at times not, to fix and maintain prices in violation of the Anti-Trust Act, does not warrant present relief against it, if the illegal practices were transient in purpose and effect, were abandoned before the suit was begun because of their futility and not for fear of prosecution, and have not since been resumed; and if no intention to resume them or dangerous probability of their resumption is shown by the evidence. Pp. 444 *et seq.*

Purpose and effect of the Steel Corporation's acquisition of control of the Tennessee Coal & Iron Company, considered, in the light of President Roosevelt's prior approval of the transaction and his testimony concerning it. P. 446.

Upon the question whether the power possessed by the Steel Corporation operated *per se* as an illegal restraint, *held* that testimony of its officers, its competitors, and hundreds of its customers, to the effect that competition was not restrained and that prices varied or remained constant according to natural conditions, must be accepted as clearly outweighing a generalization advanced by government experts that constancy of prices during certain periods evinced an artificial interference. P. 447.

An industrial combination, short of a monopoly, is not objectionable under the act merely because of its size—its capital and power of production—or merely because of a power to restrain competition, if not exerted. Pp. 447, 450 *et seq.*

The act prohibits overt acts, and trusts to their repression and punishment. P. 451.

The fact that competitors of a combination voluntarily follow its prices does not establish an unlawful restraint; the act does not compel competition. Pp. 449–451.

In commanding the courts to "prevent and restrain violations" of it, the Anti-Trust Law has regard to conditions as they may exist when relief is invoked and to the usual powers of a court of equity to adapt its remedies to those conditions. P. 452.

The act does not expect the courts to enforce abstractions to the subversion of its own purposes, but leaves to them to determine, in each instance, the relief appropriate for the execution of its policy. *Id.*

Therefore, admitting that the Steel Corporation was in origin a combination of competing companies actuated by an unlawful purpose, yet it being proved and found in this case that that purpose, and illegal practices which followed the combination, were abandoned as futile months before this suit was begun, and that the combination, viewed as of today, is not in itself or by its conduct offensive to the statute, the policy of the statute, which respects the public interest

as paramount, would be defeated rather than subserved were the court, for retrospective reasons merely, to destroy the combination, or separate some of its subsidiaries as suggested, and thereby destroy or impair the investments invited of the public, and the foreign trade and other large developments made during the ten years that intervened before the Government began any legal attack. Pp. 452 *et seq.* *Standard Oil Co.* v. *United States*, 221 U. S. 1; and *United States* v. *American Tobacco Co.*, 221 U. S. 106, distinguished.

No feasible way of dissolving the combination and yet protecting its foreign trade, under the Webb Act, c. 50, § 2, 40 Stat. 516, or otherwise, has been suggested. P. 453.

223 Fed. Rep. 55, affirmed.

THE case is stated in the opinion.

Mr. Assistant to the Attorney General Ames and *Mr. Henry E. Colton*, Special Assistant to the Attorney General, for the United States:[1]

In comprehensive terms the substance of the charge is: (1) That between 1898 and 1900 combinations were formed in various branches of the iron and steel trade, not as an incident of normal growth, but with the purpose and effect of unduly restricting competition, and that they still exist, contrary to the Anti-Trust Act of July 2, 1890. (2) That in 1901, by means of a holding company, these several illegal combinations, each dominant in its respective field, and other powerful units, were all brought together in one super-combination of overwhelming power, which, augmented by further acquisitions, still exists, unduly restricting competition in the iron and steel trade as a whole and in practically every important branch thereof, contrary to the same act of Congress.

[1] At the former hearing the case was argued by *Mr. Solicitor General Davis*, *Mr. Assistant to the Attorney General Todd* and *Mr. Henry E. Colton*, Special Assistant to the Attorney General. *Mr. Attorney General Gregory* and *Mr. Robert Szold* also were on the brief, from which the argument is abstracted.

The several combinations formed during the period 1898–1900 greatly increased prices in almost every instance, especially the combinations affecting the lighter finished products, such as tubes, wire nails, tin plates, etc. Prices of pig iron, semi-finished products and rails also were increased. But notwithstanding the concentration of control in particular lines resulting from these combinations, competition was still able to make itself felt, taking the industry as a whole, and as the year 1900 drew to a close was threatening to become very active, and, with the revival of active competition, prices, which had been enormously increased, underwent substantial declines. Then was formed the present corporation—a holding company, which controls the important acts and policies of the constituent combinations, and, among other things, generally determines the prices which they may charge for their finished products. As the proposal for the super-combination began to take form, prices, which had receded with the revival of competition in the latter half of 1900, began to rise again. The upward movement became marked as the organization of the combination was perfected. While some have since fallen, these prices have nevertheless been maintained by the combination at a substantially higher level than prevailed during competitive periods prior to its formation.

Except for the internal alterations and further acquisitions, which increased the control, the several combinations above described and the super-combination in which they were all united have continued down to the present time without change of substance. Their proportion of the trade, whilst not quite so great as at first, is still overwhelmingly preponderant.

Congress was moved to pass the Anti-Trust Act by two main considerations: (1) The desire to preserve the competitve system of industry. (2) The conviction that

that system was threatened by the undue concentration of commercial power resulting chiefly from the unrestricted exercise of the right of combination.

Every combination which by its necessary effect or because of the character of the means employed threatens the normal operation of the law of competition, in other words, unduly restricts competition, is therefore within the purview of the act.

It was not intended, however, to set a limit to the enlargement of a business by normal growth, the competitive system being in no danger from that quarter.

The purpose of the parties is important in determining the question of normal growth, but, that out of the way, it is of no further consequence where the necessary effect of the combination is unduly to restrict competition.

Except as throwing light on the purpose of the parties, it is immaterial how the combination is created, whether through simple agreement, through the old form of trust, through a holding company, or through the actual purchase and consolidation of plants.

Competition may be unduly restricted through voluntary combinations of competitive traders and trade units no less than by combinations to exclude one or more such from their right to trade.

Whether restriction of competition through voluntary combinations is undue depends primarily upon the extent of the restriction. Without attempting to draw the exact line, the restriction is certainly undue where the combination embraces units which together occupy a preponderant position in a given industry.

What constitutes a preponderant position must be determined in the light of conditions in the particular branch of trade affected. The principal factors to be considered are (1) the portion of the trade engrossed by the combination as compared with the portion possessed by each of its competitors as well as with the whole, and

(2) the extent of the control, if any, acquired by the combination over raw materials or over the agencies of transportation and of distribution or over the reserve supply where the article of trade is one the supply of which is limited by nature.

At the time they were combined under the control of the United States Steel Corporation the American Steel & Wire Company, the American Tin Plate Company, the American Sheet Steel Company, the American Steel Hoop Company, the National Tube Company and the American Bridge Company were severally combinations in restraint of trade, each being a combination of formerly competitive units together occupying an overwhelmingly preponderant position in a distinct branch of the iron and steel trade and each having been organized for the purpose of suppressing competition and increasing prices.

It has never been doubted that combinations of this type, embracing a dominant proportion of those engaged in a particular industry and formed for the express purpose of suppressing competition between them, are combinations in restraint of trade. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Swift & Co.* v. *United States*, 196 U. S. 375, 394; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 273, 408. Nor is it material, their purpose and effect being what they were, that the combinations here assailed were created in corporate form instead of by loose agreement. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 176, 181. Indeed, where, as here, corporations simply exchange their plants and businesses for stock in a consolidated corporation, the resulting combination is in no respect different in principle from a combination in the form of trust which the statute specifically prohibits. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 326, 327; *United States* v. *Reading Co.*, 226 U. S. 324, 352–363; *s. c.* 183 Fed. Rep. 427, 470; *Patterson* v. *United States*, 222 Fed. Rep. 599, 619, 620; Noyes, Intercorporate Rela-

tions, § 354; Eddy, Combinations, § 622. Wherefore we submit that the illegality of these combinations is not merely debatable, as the defendants themselves admit as to some, but is conclusive as to all. They were still occupying the illegal position thus acquired in various branches of the steel trade when united under the control of the United States Steel Corporation in 1901.

The Steel Corporation is a combination in restraint of trade, because it is not the result of natural trade growth but is a mere instrumentality for combining competing corporations which together occupy an overwhelmingly preponderant position in trade and commerce in iron and steel products generally. The group of independent plants and businesses combined under one control through the corporation included the largest and most powerful competitors in practically every branch of the iron and steel industry in rails; plates; structural shapes; wire rods and wire products; hoops, bands, and cotton ties; skelp; wrought pipe and tubular goods; seamless tubes; bars; billets and sheet bars. And not only were the competitors united under the control of the Corporation the largest and most powerful units in practically every branch of the iron and steel industry, but generally speaking they were splendidly grounded as regards the production of the basic products—ore, pig iron, ingots. This is sustained by the findings of Woolley and Hunt, JJ., in the court below and by the investigation made by the Bureau of Corporations.

The preponderant position and the dominance of this combination is manifested by its capital as compared with that of competitors; its proportion of the total production; its proportion of the total production as compared with that of each of its principal competitors; its proportion of ore reserves; its control over transportation of ore; its effect upon prices; concerted maintenance of prices under its leadership; and opinion evidence as to its power.

Whilst in our view of the law a combination of able competitors occupying an overwhelmingly preponderant position in a given trade, such as the combination embodied in the Corporation, unduly restricts competition by its necessary effect, and therefore is unlawful regardless of purpose, nevertheless it is appropriate to show a wrongful purpose as a matter of aggravation. It is elementary, of course, that the purposes of illegal combinations are seldom capable of proof by direct testimony, but must be inferred from circumstances. *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 612; *Reilley* v. *United States*, 106 Fed. Rep. 896; *United States* v. *Sacia*, 2 Fed. Rep. 754, 757; *Regina* v. *Murphy*, 8 C. & P. 397, 404. The considerations going to show that the controlling purpose of this super-combination was not the legitimate development of trade, but suppression of competition and exploitation of the public, are: the form of the combination—a holding company not itself engaged in trade at all; the union of so many competitors controlling so large a proportion of the trade; the general competitive situation, falling prices, etc., immediately before the formation of the combination; increase in prices immediately following formation of the combination; gross overcapitalization of the combination in anticipation of excessive profits; enormous promoters' profits; cancellation by the combination of contracts for extensions, etc., previously entered into by constituent companies; and subsequent acquisitions. (See the findings of Woolley and Hunt, JJ., and of the Bureau of Corporations.)

We are dealing here with a combination of competitors in the truest sense and not with the mere purchase by one competitor of the business of another as an incident of normal development. The distinction between a mere purchase of a competing business and a combination of competing businesses clothed in the form of purchases is sharply drawn in *Shawnee Compress Co.* v. *Anderson*, 209

U. S. 423. See Noyes, Intercorporate Relations, § 354. If the vast aggregation of competing businesses here involved occupying an overwhelmingly preponderant position in practically every branch of the iron and steel industry had been combined by executory agreement or in the old form of trust there would be none to dispute the illegality of the transaction. The legal situation is not changed by substituting a holding company as the instrument of combination. The vesting in such a company of the capital stocks of a group of able competitors for the purpose of centralizing control is no more lawful, is no more a normal method of business development, than the similar centralization of control in common trustees under the old form of trust. In such case, indeed, the holding company is but the old trust in corporate form. *Northern Securities Co.* v. *United States, supra; Standard Oil Co.* v. *United States*, 221 U. S. 1; *Temple Iron Co.* v. *United States*, 226 U. S. 324; *s. c.* 183 Fed. Rep. 427. It is literally a case, therefore, of the stockholders of a group of competing corporations transferring the control of each into the hands of a committee of trustees—a form of combination in restraint of trade which has ever been regarded as peculiarly obnoxious. If competitors controlling half the trade not alone in one product or in two but in an entire series of products constituting one of the grand divisions of industry may thus combine through a holding company, to what lengths can the process go without offending the law? If one-half of the steel industry may be thus combined through one holding company, certainly those controlling the other half would have the right to combine through another holding company. And of course if it be lawful to centralize control of the steel industry in two holding companies it would be equally lawful to centralize control of every other industry in two holding companies. Such undue concentration of control over industry was the very evil which the act was in-

tended to prevent. *United States* v. *Reading Co.*, 226 Fed. Rep. 229, 272.

The Corporation is also an instrumentality for uniting and enlarging the power of a group of combinations of competitive units in particular branches of the iron and steel trade, each in and of itself unlawful. There is no likeness between this case and *United States* v. *Winslow*, 227 U. S. 202, 217. This case presents a parallel to the *American Tobacco Case, supra*, where there was a combination in restraint of trade not in cigarettes alone, nor in smoking tobacco alone, nor in chewing tobacco alone, but in the whole tobacco industry.

This is not a case where the purpose was "integration." Integration consists in combining supplementary, non-competitive trade units. An illustrative case is *United States* v. *Winslow, supra.* If, therefore, we were successful in showing that the corporations combined in this case through the holding company are either competitors themselves or illegal combinations of competitive businesses, the idea of integration is at once excluded. You can not centralize control of an entire industry by first separately combining competitors in the various branches thereof and then uniting them in one super-combination and hope to escape the prohibitions of the law by calling what was done "integration." Moreover, the units combined in 1901 through the Corporation were already, for the most part, highly integrated. No one, of course, denies the advantage of concentrating under one management the various stages of steel manufacture from the ore mine to the finishing mill. This can be done, however, and can be best done, just as economical size can be attained, without setting up in every branch of trade a combination of competitors with power to exercise substantial dominance over the rest.

The contention that a combination of such size and power was a necessary means to attain efficiency and to

promote foreign trade is irrelevant in law. It is but another way of saying that good intentions can save the combination from illegality. *Thomsen* v. *Cayser*, 243 U. S. 66; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 341; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 234, 243; *Swift & Co.* v. *United States*, 196 U. S. 375, 396. The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. Bishop, New Criminal Law, § 343; Holmes, The Common Law, p. 52. Applying this principle, this court from the very beginning has held that a contract or combination by its own "inherent nature or effect," without more may "restrain trade within the purview of the statute." Any other construction would require courts to decide not only whether a given combination prevents the existence of effective competition or constitutes a virtual monopoly, but whether in their opinion monopoly would not be, on the whole, a better policy than competition—i. e., would compel them to act on frankly legislative grounds. *Park & Sons Co.* v. *Hartman*, 153 Fed. Rep. 24, 46. Congress rightly believed that the advantages of large business units, in so far as they are real and substantial, would inevitably assert themselves by normal growth. It closed the short cut to those advantages—monopolistic combination—because danger lies that way. "If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives." *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129. "Competition is worth more to society than it costs." *Vegelahn* v. *Guntner*, 167 Massachusetts, 92, 106. Furthermore, even if it would have been lawful for the many independent businesses combined through this holding company to unite to some extent to develop foreign trade—by joint selling agencies, for example—that can not justify the complete and permanent suppression of

competition between them in domestic trade. *United States* v. *Corn Products Refining Co.*, 234 Fed. Rep. 964, 1016; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 93.

The contention that such was the purpose is also unfounded in fact.

As for the contention that competition has increased while the combination's proportion of the trade has decreased, it is true that as regards the proportion of the trade in steel products possessed by the combination there has been some decline from the highwater mark reached shortly after its formation, but there has been no such decline as to curtail the power of the combination.

It is rather the usual thing in such cases for the combination to be able to show some relative decline in its proportion of the trade. It was so held with the Standard Oil Company and with the American Tobacco Company. In fact, it is so uniformly the case as to excite the suspicion that combinations of this character, having found they can dominate the trade with a smaller proportion of it than they started with, voluntarily yield a part in the belief that they thereby put themselves in a better position to face the law. But be this as it may, where, as here, the decline still leaves the combination in an overwhelmingly preponderant position, it is of no legal consequence whatever. In such a case the original vice persists and the combination is a "continually operating force," restraining trade within the meaning of the first section of the act, *Standard Oil Co.* v. *United States, supra; United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 96; *United States* v. *Kissel*, 218 U. S. 601; and a "perennial violation of the second section" prohibiting monopoly, *Standard Oil Co.* v. *United States, supra*, 74; *Patterson* v. *United States*, 222 Fed. Rep. 599, 625; *United States* v. *Corn Products Refining Co.*, 234 Fed. Rep. 964, 1018.

The present bill charges a combination to suppress

competition between the parties to the combination themselves. In such a case the only question is whether the combination embraces competitors in sufficient number and of sufficient importance to make the resulting restriction of competition a substantial or undue restriction. Whether such a combination is also attempting to hinder the competition of those outside the combination is of no weight except as a matter of aggravation.

The contention that the combination is not unlawful because its power though great is yet not great enough to enable it alone to fix and maintain prices would require a combination of competitors to amount to a monopoly to fall within the prohibition. This theory was rejected by this court in the first case under the Anti-Trust Act which came before it. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16. To the same effect is the language of Mr. Justice Day, then a circuit judge, in *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 610, 624.

Furthermore, neither the circumstance that the Corporation combined with competitors to maintain the higher prices established by the combinations whose stocks it acquired, nor that in ten years while increasing its trade enormously its relative proportion suffered a small decline, justifies the inference that the Corporation could not have maintained the higher prices by the exertion of its own power alone. It would be a strange result if the combination of competitors embodied in the Corporation should escape condemnation because of their illegal conduct in agreeing upon prices with outside manufacturers.

The contention that the case must fail because the combinations have not increased prices, or limited production, or degraded the quality of product, or decreased wages, or decreased the price of raw materials, or oppressed competitors, loses sight of the broader policy of the act, which was, not to wait until the evils enumerated are

already upon us, but to prevent their occurrence by striking at their underlying cause—undue concentration of commercial power through the process of combination. The test of the legality of a combination, therefore, is not its present effect upon prices, wages, etc., nor its present conduct toward the remaining competitors, but its effect upon competition. If its effect is unduly to restrict competition, then it is immaterial that for the time being the combination may exercise its power benevolently. This defense of good conduct has been interposed in many cases of this character, and as many times rejected. Nor is forbearance by a combination from the exercise of its power to drive the remaining competitors from the field, or to prevent new ones from entering, on any different footing from good conduct of any other sort. The cases make no such distinction. Obviously, where a combination takes in so large a proportion of the competitors or competitive units that effective competition no longer exists, it can be no defense to say that the combination is doing nothing to prevent the restoration of competitive conditions.

This contention is based on a construction of the law impracticable in execution.

Mr. Richard V. Lindabury, *Mr. David A. Reed* and *Mr. Cordenio A. Severance*, with whom *Mr. Raynal C. Bolling* was on the brief, for United States Steel Corporation *et al.*, appellees, cited and discussed the following, as revealing what the Anti-Trust Act means by "restraint of trade": Senator Hoar, Autobiography of Seventy Years, vol. II, p. 364; *United States* v. *Du Pont De Nemours & Co.*, 188 Fed. Rep. 127, 150; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 408; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337, 361; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 58, 60, 61; *United States*

v. *American Tobacco Co.*, 221 U. S. 106, 179; *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, 394; *Nash* v. *United States*, 229 U. S. 373, 376.

Whether, or to what extent, the *Standard Oil* and *Tobacco Cases* modify the rule laid down by Mr. Justice Peckham in the *Freight Association Case* as applicable to public service corporations is not of account in the present case. That they do make a distinction between restraint of competition and restraint of trade in the case of private trading and manufacturing companies, and do hold that as to such companies the restraint of competition in order to amount to restraint of trade must be undue or unreasonable, is entirely clear, and is recognized in the subsequent cases. These cases also hold, as pointed out by Judge Lanning in the *Du Pont Case*, that whether the restraint of competition in the case of such companies amounts to restraint of trade must be determined upon the facts and circumstances of each particular case.

Applying these principles, the direct and necessary effect of the organization of the Steel Corporation was neither to restrain trade nor create a monopoly, viewed either from the standpoint of competition suppressed or from that of the extent of control acquired over production or raw materials. *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177, 183; *United States* v. *American Tobacco Co.*, 164 Fed. Rep. 700, 719; 221 U. S. 157, 182; *United States* v. *Reading Co.*, 226 U. S. 324, 370.

Notwithstanding the foregoing cases, the Government insists that, as a matter of law, the suppression of competition is undue whenever the combination controls units which together occupy a preponderant position in a given industry, and this without regard to the intentions of those who form it or the after conduct of the combination. We submit that no such test is warranted either by the language of the Anti-Trust Act or by the decisions of

this court. Whether restraint is unreasonable, and therefore undue, is declared in *United States* v. *Terminal Railroad Assn.*, *supra*, to depend upon three things: (1) the extent of such control; (2) the method by which such control was brought about; and (3) the manner in which such control has been exercised. This is but a formulation of the rule laid down in the *Tobacco Case.* But we submit that *a priori* reasoning as to the direct or necessary effect of the organization of the Steel Corporation or as to the result produced by its preponderant position in the industry, if it has such a position, is uncalled for in the present case. When the evidence in the case was closed, thirteen years of the active life of the Corporation had passed. If restraint of trade or monopoly necessarily resulted from its formation or from its so-called preponderant position in the industry, evidence of such restraint or monopoly would appear somewhere in its history; and if such evidence does not appear, it is reasonably safe to conclude that no such result inhered in its organization or position. That the organization did not so result at any time or as to any article of steel production, is, we submit, conclusively shown by the testimony in the case, as pointed out in both opinions of the court below. And not only is this shown by the testimony, but it is also shown that the Corporation never acquired the power either to monopolize or to restrain trade. And this too was found by all the judges of the court below.

No intent to monopolize or to restrain trade is shown by the circumstances which led up to and surrounded the organization of the Corporation. The organization was but a natural and normal development from existing trade and manufacturing conditions and was only notable because of the largeness of the conception which underlay it and the courage exhibited in undertaking to carry it out. But ability to think large and courage to execute the thought are not condemned by the law. Indeed, the

future prosperity of our country must depend in large measure upon the encouragement given to these attributes of the American business man.

Nor is an intent to monopolize or restrain trade evinced by the after-conduct of the Corporation. Throughout its whole career the Corporation has pursued the objects declared by its founders at the time of its formation, decreasing the cost of production, increasing wages, decreasing prices, and greatly extending trade in steel products both at home and abroad. Its treatment of both competitors and consumers has been fair and just; it has neither attempted to oppress the one nor to coerce the other. The few plants which it has purchased were offered to it, and with a single exception they were purchased only because they were needed in the development of the Corporation's business. That exception was the plant of the Tennessee Company, and this was purchased with the approval of the Government for the purpose of preventing the spread of a dangerous financial panic. Instead of promoting pools and combinations, the Corporation destroyed them as early as 1904. Although the manufacturers met together from time to time after the breaking up of the pools, they went no further at their meetings than to mutually exchange information and make declarations of purpose which the petition admits they had a lawful right to do. The Gary dinner movement amounted to nothing more than an endeavor to prevent reckless price-cutting and general demoralization at a time of great industrial peril, and this was sought to be accomplished simply by an appeal to reason and the establishment of a relation of mutual respect and confidence, by which it was hoped to secure open and fair dealing and prevent the misunderstandings out of which nearly all the trade wars of the past had grown. Instead of monopolizing the manufacture of steel, the Corporation's percentage of the country's production has steadily

decreased; instead of monopolizing the supply of ore, the Corporation has confined its purchases to two or three localities, and in the locality where its holdings are largest it has relatively less than many of its competitors and less than its own experts and the experts of its competitors testify that it ought to have. We respectfully submit that by this record the Corporation has proved the *bona fides* of the claim made for it at the time of its organization, that its purpose was the development of a great business along legitimate and permissible lines, and not monopoly or restraint of trade. If, however, the circumstances surrounding the organization left the matter of intent in doubt to be established by the after-conduct of the parties, we now have such after-conduct extending over the long period of thirteen years, and we submit that it completely rebuts any presumption (if any there was) of intent to restrain trade or to acquire a monopoly, and as completely establishes the contrary intent.

Whatever, therefore, may have been the purpose or immediate effect of the organization of the Steel Corporation, it goes for nothing unless it be found that at the time the petition was filed the Corporation was offending or threatening to offend against the Anti-Trust Act. This results from the fact that the action is brought under the third section of that act which authorizes the Attorney General to institute proceedings in equity to prevent or restrain violations of the act. The appeal is to the injunctive power of the court which is never exercised to redress alleged wrongs which have been committed already, but only to restrain those which are still existing or are threatened. High on Injunctions, § 23; Pomeroy's Equitable Remedies, vol. I, § 262.

The Corporation had no monopoly and was not restraining trade when the petition was filed, nor was it threatening to acquire a monopoly or to restrain trade. It has not the power to do either.

We insist that the acquisition of a preponderant position in a trade or manufacture (whether this means size or power) without unlawful intent and without excluding practices, does not constitute restraint of trade or monopoly either at common law or under the Federal Anti-Trust Act when no actual monopoly or actual restraint of trade results therefrom. How could it? Size in itself is nothing as we have already shown. And power to do wrong cannot be confounded with wrongdoing itself without leading to hopeless confusion. We are dealing with a criminal statute. If the acquisition of power to violate a statute is the equivalent of its violation, then all men are guilty, for all have acquired the power to violate not one but many statutes. In the opinions in some of the railroad cases (*United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 334; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 373; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 88) are to be found expressions to the effect that it is the scope of combinations of the kind there under consideration and the power to suppress competition and create monopoly which results therefrom that determines the applicability of the Anti-Trust Act. In those cases, however, the corporations combining were under a duty to compete, and any substantial suppression of competition between them was, therefore, illegal—the scope of the combinations (i. e., what they embraced) alone determining their illegality. No such rule has ever been applied to private trading or manufacturing companies, and this for the obvious reason that such companies are under no duty to compete. *Meredith* v. *N. J. Zinc & Iron Co.*, 55 N. J. Eq. 212, 221. In the *Tobacco Case* the combination was condemned because the court thought the conclusion of wrongful purposes and illegal combination was overwhelmingly established by the circumstances surrounding the organization and the after-conduct of the company, showing an ever present intent to drive compet-

itors out of the field and to monopolize the tobacco trade. Nothing, we submit, could be more unreasonable than to condemn every corporation, without regard to its purposes or practices, which happens to exceed in size or trade power any other competitor in the field. A rule which would lead to that result, instead of protecting commerce—which was the object of the Anti-Trust Act—would tend to throttle and destroy it by driving or keeping out of the competitive field all but the incompetents and inefficients.

International Harvester Co. v. *Missouri*, 234 U. S. 199, was decided under the Missouri statute which prohibited any combination that lessened or tended to lessen competition.

The elimination of competition between the units combined by the Steel Corporation did not amount to an undue restriction of competition in the steel trade and so produce a restraint thereof.

Mr. George Welwood Murray for John D. Rockefeller and John D. Rockefeller, Jr., appellees.

Mr. Justice McKenna delivered the opinion of the court.

Suit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-Trust Act.

It is prayed that it and they be dissolved because engaged in illegal restraint of trade and the exercise of monopoly.

Special charges of illegality and monopoly are made and special redresses and remedies are prayed, among others, that there be a prohibition of stock ownership and exer-

cise of rights under such ownership, and that there shall be such orders and distribution of the stock and other properties as shall be in accordance with equity and good conscience and "shall effectuate the purpose of the Anti-Trust Act." General relief is also prayed.

The Steel Corporation is a holding company only; the other companies are the operating ones, manufacturers in the iron and steel industry, twelve in number. There are, besides, other corporations and individuals more or less connected with the activities of the other defendants that are alleged to be instruments or accomplices in their activities and offendings; and that these activities and offendings (speaking in general terms) extend from 1901 to 1911, when the bill was filed, and have illustrative periods of significant and demonstrated illegality.

Issue is taken upon all these charges, and we see at a glance what detail of circumstances may be demanded, and we may find ourselves puzzled to compress them into an opinion that will not be of fatiguing prolixity.

The case was heard in the District Court by four judges. They agreed that the bill should be dismissed; they disagreed as to the reasons for it. 223 Fed. Rep. 55. One opinion (written by Judge Buffington and concurred in by Judge McPherson) expressed the view that the Steel Corporation was not formed with the intention or purpose to monopolize or restrain trade, and did not have the motive or effect "to prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." The corporation, in the view of the opinion, was an evolution, a natural consummation of the tendencies of the industry on account of changing conditions, practically a compulsion from "the metallurgical method of making steel and the physical method of handling it," this method, and the conditions consequent upon it, tending to combinations of capital and energies rather than diffusion in independent action. And the

concentration of powers (we are still representing the opinion) was only such as was deemed necessary, and immediately manifested itself in improved methods and products and in an increase of domestic and foreign trade. Indeed an important purpose of the organization of the corporation was the building up of the export trade in steel and iron which at that time was sporadic, the mere dumping of the products upon foreign markets.

Not monopoly, therefore, was the purpose of the organization of the corporation but concentration of efforts with resultant economies and benefits.

The tendency of the industry and the purpose of the corporation in yielding to it were expressed in comprehensive condensation by the word "integration," which signifies continuity in the processes of the industry from ore mines to the finished product.

All considerations deemed pertinent were expressed and their influence was attempted to be assigned and, while conceding that the Steel Corporation, after its formation in times of financial disturbance, entered into informal agreements or understandings with its competitors to maintain prices, they terminated with their occasions, and, as they had ceased to exist, the court was not justified in dissolving the corporation.

The other opinion (by Judge Woolley and concurred in by Judge Hunt, 223 Fed. Rep. 161) was in some particulars, in antithesis to Judge Buffington's. The view was expressed that neither the Steel Corporation nor the preceding combinations, which were in a sense its antetypes, had the justification of industrial conditions, nor were they or it impelled by the necessity for integration, or compelled to unite in comprehensive enterprise because such had become a condition of success under the new order of things. On the contrary, that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning, and the corporation

became "a combination of combinations, by which, directly or indirectly, approximately 180 independent concerns were brought under one business control," which, measured by the amount of production, extended to 80% or 90% of the entire output of the country, and that its purpose was to secure great profits which were thought possible in the light of the history of its constituent combinations, and to accomplish permanently what those combinations had demonstrated could be accomplished temporarily, and thereby monopolize and restrain trade.[1]

---

[1] As bearing upon the power obtained and what the Corporation did we give other citations from Judge Woolley's opinion as follows:

"The ore reserves acquired by the corporation at and subsequent to its organization, the relation which such reserves bear to ore bodies then existing and subsequently discovered, and their bearing upon the question of monopoly of raw materials, are matters which have been discussed in the preceding opinion, and with the reasoning as well as with the conclusion that the corporation has not a monopoly of the raw materials of the steel industry, I am in entire accord."

"Further inquiring whether the corporation inherently possesses monopolistic power attention is next given to its proportion of the manufacture and sale of finished iron and steel products of the industry. Upon this subject there is a great volume of testimony, a detailed consideration of which in an opinion would be quite inexcusable. As a last analysis of this testimony, it is sufficient to say it shows that, large as was the corporation, and substantial as was its proportion of the business of the industry, the corporation was not able in the first ten years of its history to maintain its position in the increase of trade. During that period, its proportion of the domestic business decreased from 50.1 per cent. to 40.9 per cent. and its increase of business during that period was but 40.6 per cent. of its original volume. Its increase of business, measured by percentage, was exceeded by eight of its competitors, whose increase of business, likewise measured by percentage, ranged from 63 to 3779. This disparity in the increase of production indicates that the power of the corporation is not commensurate with its size, and that the size and the consequent power of the corporation are not sufficient to retard prosperous growth of efficient competitors.

"From the vast amount of testimony, it is conclusively shown that the Steel Corporation did not attempt to exert a power, if such it

The organizers, however (we are still representing the opinion), underestimated the opposing conditions and at the very beginning the Corporation instead of relying upon its own power sought and obtained the assistance and the coöperation of its competitors (the independent companies). In other words the view was expressed that the testimony did "not show that the corporation in and of itself ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry." Its power was efficient only when in coöperation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called "the Gary Dinners." The dinners were congregations of producers and "were nothing but trade meetings," successors of the other means of associated action and control through such action. They were instituted first in "stress of panic," but, their potency being demonstrated, they were afterwards called to control prices "in periods of industrial calm." "They were pools without penalties" and more efficient in stabilizing prices. But it was the further declaration that "when joint action was either refused or withdrawn the Corporation's prices were controlled by competition."

The Corporation, it was said, did not at any time abuse the power or ascendency it possessed. It resorted to none of the brutalities or tyrannies that the cases illustrate of

---

possessed, to oppress and destroy its competitors, and it is likewise disclosed by the history of the industry subsequent to the organization of the corporation that if it had made such an attempt it would have failed. It is also shown by the testimony that, acting independently and relying alone upon its power and wealth, great as they were, the corporation has never been able to dominate the steel industry by controlling the supply of raw materials, restraining production of finished products, or enhancing and maintaining the prices of either."

other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employees—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors—its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below those maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors. Indeed it is said in many ways and illustrated that "instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning sought and obtained the assistance of others." It combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not different from theirs and was distinguished from theirs "only in the leadership it assumed in promulgating and perfecting the policy." This leadership it gave up, and it had ceased to offend against the law before this suit was brought. It was hence concluded that it should be distinguished from its organizers and that their intent and unsuccessful attempt should not be attributed to it, that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

This summary of the opinions, given necessarily in paraphrase, does not adequately represent their ability

and strength, but it has value as indicating the contentions of the parties, and the ultimate propositions to which the contentions are addressed. The opinions indicate that the evidence admits of different deductions as to the genesis of the Corporation and the purpose of its organizers, but only of a single deduction as to the power it attained and could exercise. Both opinions were clear and confident that the power of the Corporation never did and does not now reach to monopoly, and their review of the evidence, and our independent examination of it, enable us to elect between their respective estimates of it, and we concur in the main with that of Judges Woolley and Hunt. And we add no comment except, it may be, that they underestimated the influence of the tendency and movement to integration, the appreciation of the necessity or value of the continuity of manufacture from the ore to the finished product. And there was such a tendency; and though it cannot be asserted it had become a necessity, it had certainly become a facility of industrial progress. There was, therefore, much to urge it and give incentive to conduct that could accomplish it. From the nature and properties of the industry, the processes of production were something more than the stage and setting of the human activities. They determined to an extent those activities, furnished their motives, and gave test of their quality—not, of course, that the activities could get any immunity from size, or resources, or energies, whether exerted in integrated plants or diversified ones.

The contentions of the case, therefore, must be judged by the requirements of the law, not by accidental or adventitious circumstances. But what are such circumstances? We have seen that it was the view of the District Court that size was such a circumstance and had no accusing or excusing influence. The contention of the Government is to the contrary. Its assertion is that the size of the Corporation being the result of a "combination

of powerful and able competitors" had become "substantially dominant" in the industry and illegal. And that this was determined. The companies combined, is the further assertion, had already reached a high degree of efficiency, and in their independence were factors in production and competition, but ceased to be such when brought under the regulating control of the Corporation, which by uniting them offended the law; and that the organizers of the Corporation "had in mind the specific purposes of the restraint of trade and the enormous profits resulting from that restraint."

It is the contention of the Corporation opposing those of the Government and denying the illegal purposes charged against it, that the industry demanded qualities and an enterprise that lesser industries do not demand and must have a corresponding latitude and facility. Indeed, it is insisted that the industry had practically, (to quote the words of Judge Buffington, he quoting those of a witness,) "reached the limit, or very nearly so, at which economies from a metallurgical or mechanical standpoint could be made effective," and "that instead, as was then the practice, of having one mill to make 10 or 20 or 50 products, the greatest economy would result from having one mill make one product, and make that product continuously." In other words, that there was a necessity for integration, and rescue from the old conditions—from their improvidence and waste of effort; and that, in redress of the conditions, the Corporation was formed, its purpose and effect being "salvage not monopoly," to quote the words of counsel. It was, is the insistence, the conception of ability, "a vision of a great business which should embrace all lines of steel and all processes of manufacture from the ore to the finished product and which by reason of the economies thus to be effected and the diversity of products it would be able to offer, could successfully compete in all the markets of the world."

It is urged further that to the discernment of that great possibility was added a courage that dared attempt its accomplishment, and the conception and the courage made the formation of the Corporation notable but did not make it illegal.

We state the contentions, we do not have to discuss them, or review the arguments advanced for their acceptance or repulsion. That is done in the opinions of the district judges, and we may well despair to supplement the force of their representation of the conditions antecedent to the formation of the Corporation and in what respect and extent its formation changed them. Of course in that representation and its details there is guidance to decision, but they must be rightly estimated to judge of what they persuade. Our present purpose is not retrospect for itself, however instructive, but practical decision upon existing conditions, that we may not by their disturbance produce, or even risk, consequences of a concern that cannot now be computed. In other words, our consideration should be of not what the Corporation had power to do or did, but what it has now power to do and is doing, and what judgment shall be now pronounced—whether its dissolution, as the Government prays, or the dismissal of the suit, as the Corporation insists?

The alternatives are perplexing—involve conflicting considerations, which, regarded in isolation, have diverse tendencies. We have seen that the judges of the District Court unanimously concurred in the view that the Corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed, not against an expectation of it, but against its realization, and it is certain that it was not realized. The opposing conditions were underestimated. The power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved, and

competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect. They were scattered through the years from 1901 (the year of the formation of the Corporation), until 1911, but, after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no "dangerous probability" of their resumption, the test for which *Swift & Co.* v. *United States*, 196 U. S. 375, 396, is cited. It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood or were underestimated, and the case is not peculiar. And we may say in passing that the Government cannot fear their resumption for it did not avail itself of the offer of the District Court to retain jurisdiction of the cause in order that if illegal acts should be attempted they could be restrained.

What then can now be urged against the Corporation? Can comparisons in other regards be made with its competitors and by such comparisons guilty or innocent existence be assigned it? It is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce.

It is true there is some testimony tending to show that the Corporation had such power, but there was also testimony and a course of action tending strongly to the contrary. The conflict was by the judges of the District Court unanimously resolved against the existence of that power, and in doing so they but gave effect to the greater weight of the evidence. It is certain that no such power

was exerted. On the contrary, the only attempt at a fixation of prices was, as already said, through an appeal to and confederation with competitors, and the record shows besides that when competition occurred it was not in pretence, and the Corporation declined in productive powers—the competitors growing either against or in consequence of the competition. If against the competition we have an instance of movement against what the Government insists was an irresistible force; if in consequence of competition, we have an illustration of the adage that "competition is the life of trade" and is not easily repressed. The power of monopoly in the Corporation under either illustration is an untenable accusation.

We may pause here for a moment to notice illustrations of the Government of the purpose of the Corporation, instancing its acquisition after its formation of control over the Shelby Steel Tube Company, the Union Steel Company, and, subsequently, the Tennessee Company. There is dispute over the reasons for these acquisitions which we shall not detail. There is, however, an important circumstance in connection with that of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment. And he testified he was not deceived and that he believed that "the Tennessee Coal and Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it

would be a guarantee that there was value to it." Such being the emergency it seems like an extreme accusation to say that the Corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did illegality attach afterwards and how? And what was the Corporation to do with the property? Let it decay in desuetude or develop its capabilities and resources? In the development, of course, there would be profit to the Corporation, but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard them as violations of law.

From this digression we return to the consideration of the conduct of the Corporation towards its competitors. Besides the circumstances which we have mentioned there are others of probative strength. The company's officers and, as well, its competitors and customers, testified that its competition was genuine, direct and vigorous, and was reflected in prices and production. No practical witness was produced by the Government in opposition. Its contention is based on the size and asserted dominance of the Corporation—alleged power for evil, not the exertion of the power in evil. Or as counsel put it, "a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors." Such composition and its resulting power constitute, in the view of the Government, the offence against the law, and yet it is admitted "no competitor came forward and said he had to accept the Steel Corporation's prices." But this absence of complaint counsel urge against the Corporation. Competitors, it is said, followed the Corporation's prices because they made money by the imitation. Indeed the imitation is urged as

an evidence of the Corporation's power. "Universal imitation," counsel assert, is "an evidence of power." In this concord of action, the contention is, there is the sinister dominance of the Corporation—"its extensive control of the industry is such that the others [independent companies] follow." Counsel, however, admit that there was "occasionally" some competition, but reject the suggestion that it extended practically to a war between the Corporation and the independents. Counsel say, "They [the Corporation is made a plural] called a few—they called 200 witnesses out of some forty thousand customers, and they expect with that customer evidence to overcome the whole train of price movement shown since the Corporation was formed." And "movement of prices" counsel explained "as shown by the published prices . . . they were the ones that the competitors were maintaining all during the interval."

It would seem that "200 witnesses" would be fairly representative. Besides the balance of the "forty thousand customers" was open to the Government to draw upon. Not having done so, is it not permissible to infer that none would testify to the existence of the influence that the Government asserts? At any rate, not one was called, but instead the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employee in the Bureau of Corporations. His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself even though the

facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution. Of course competition affects prices but it is only one among other influences and does not more than they, register itself in definite and legible effect.

We magnify the testimony by its consideration. Against it competitors, dealers and customers of the Corporation testify in multitude that no adventitious interference was employed to either fix or maintain prices and that they were constant or varied according to natural conditions. Can this testimony be minimized or dismissed by inferring that, as intimated, it is an evidence of power not of weakness; and power exerted not only to suppress competition but to compel testimony, is the necessary inference, shading into perjury to deny its exertion? The situation is indeed singular, and we may wonder at it, wonder that the despotism of the Corporation, so baneful to the world in the representation of the Government, did not produce protesting victims.

But there are other paradoxes. The Government does not hesitate to present contradictions, though only one can be true, such being we were told in our school books the "principle of contradiction." In one competitors (the independents) are represented as oppressed by the superior power of the Corporation; in the other they are represented as ascending to opulence by imitating that power's prices which they could not do if at disadvantage from the other conditions of competition; and yet confederated action is not asserted. If it were this suit would take on another cast. The competitors would cease to be the victims of the Corporation and would become its accomplices. And there is no other alternative. The sug-

gestion that lurks in the Government's contention that the acceptance of the Corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind. The Government, therefore, is reduced to the assertion that the size of the Corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or as the Government says, "the combination embodied in the Corporation unduly restrains competition by its *necessary effect*, [the italics are the emphasis of the Government] and therefore is unlawful regardless of purpose." "A wrongful purpose," the Government adds, is "matter of aggravation." The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendency of a competitor, for in ascendency there is the menace of monopoly.

We have pointed out that there are several of the Government's contentions which are difficult to represent or measure, and, the one we are now considering, that is the power is "unlawful regardless of purpose," is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. The regression is extreme, but

short of it the Government cannot stop. The fallacy it conveys is manifest.

The Corporation was formed in 1901, no act of aggression upon its competitors is charged against it, it confederated with them at times in offence against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted—though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade nor complaints by customers—how can it be worked out of the situation and through what proposition of law? Of course it calls for nothing other than a right application of the law and to repeat what we have said above, shall we declare the law to be that size is an offence even though it minds its own business because what it does is imitated? The Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law and the law does not make mere size an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible.

Admitting, however, that there is pertinent strength in the propositions of the Government, and in connection with them, we recall the distinction we made in the *Standard Oil Case* (221 U. S. 1, 77) between acts done in violation of the statute and a condition brought about which "in and of itself, is not only a continued attempt to monopolize, but also a monopolization." In such case, we declared, "the duty to enforce the statute" required "the application of broader and more controlling" remedies

than in the other. And the remedies applied conformed to the declaration; there was prohibition of future acts and there was dissolution of "the combination found to exist in violation of the statute" in order to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained" had "brought" and would "continue to bring about."

Are the case and its precepts applicable here? The Steel Corporation by its formation united under one control competing companies and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal and became a "continually operating force" with the "possession of power unlawfully obtained."

But there are countervailing considerations. We have seen whatever there was of wrong intent could not be executed, whatever there was of evil effect, was discontinued before this suit was brought; and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies and equally clear in its direction that the courts of the Nation shall prevent and restrain them (its language is "to prevent and restrain violations of" the act), but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions and do injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion—indeed essential function—that makes its value in our jurisprudence—value in this case as in others. We do not mean to say that the law is not its own measure and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine, not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both. And it is certainly a

matter for consideration that there was no legal attack on the Corporation until 1911, ten years after its formation and the commencement of its career. We do not, however speak of the delay simply as to its time—that there is estoppel in it because of its time—but on account of what was done during that time—the many millions of dollars spent, the development made, and the enterprises undertaken, the investments by the public that have been invited and are not to be ignored. And what of the foreign trade that has been developed and exists? The Government, with some inconsistency, it seems to us, would remove this from the decree of dissolution. Indeed, it is pointed out that under congressional legislation in the Webb Act the foreign trade of the Corporation is reserved to it. And further, it is said, that the Corporation has constructed a company called the Products Company which can be "very easily preserved as a medium through which the steel business might reach the balance of the world," and that in the decree of "dissolution that could be provided." This is supplemented by the suggestion that not only the Steel Corporation, "but other steel makers of the country, could function through an instrumentality created under the Webb Act." [C. 50, § 2, 40 Stat. 516.]

The propositions and suggestions do not commend themselves. We do not see how the Steel Corporation can be such a beneficial instrumentality in the trade of the world and its beneficence be preserved, and yet be such an evil instrumentality in the trade of the United States that it must be destroyed. And by whom and how shall all the adjustments of preservation or destruction be made? How can the Corporation be sustained and its power of control over its subsidiary companies be retained and exercised in the foreign trade and given up in the domestic trade? The Government presents no solution of the problem. Counsel realize the difficulty and seem to think that its solution or its evasion is in the suggestion

that the Steel Corporation and "other steel makers could function through an instrumentality created under the Webb Act." But we are confronted with the necessity of immediate judicial action under existing laws, not action under conceptions which may never be capable of legal execution. We must now decide and we see no guide to decision in the propositions of the Government.

The Government, however, tentatively presents a proposition which has some tangibility. It submits that certain of the subsidiary companies are so mechanically equipped and so officially directed as to be released and remitted to independent action and individual interests and the competition to which such interests prompt, without any disturbance to business. The companies are enumerated. They are the Carnegie Steel Company (a combination of the old Carnegie Company, the National Steel Company, and the American Steel Company), the Federal Steel Company, the Tennessee Company and the Union Steel Company (a combination of the Union Steel Company of Donora, Pa., Sharon Steel Company of Sharon, Pa., and Sharon Tin Plate Company). They are fully integrated, it is said, possess their own supplies, facilities of transportation and distribution. They are subject only to the Steel Corporation is, in effect, the declaration, in nothing but its control of their prices. We may say parenthetically that they are defendants in the suit and charged as offenders, and we have the strange circumstance of violators of the law being urged to be used as expedients of the law.

But let us see what guide to a procedure of dissolution of the Corporation and the dispersion as well of its subsidiary companies, for they are asserted to be illegal combinations, is prayed. And the fact must not be overlooked or underestimated. The prayer of the Government calls for not only a disruption of present conditions but the restoration of the conditions of twenty years ago, if

not literally, substantially. Is there guidance to this in the *Standard Oil Case* and the *Tobacco Case* [221 U. S. 1, 106]? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

The Standard Oil Company had its origin in 1882 and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that Judge Woolley described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. We have enumerated them and this reference to them is enough. And of the practices this court said no disinterested mind could doubt that the purpose was "to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view." It was further said that what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existence of the intent . . . and . . . impelled the expansion of the New Jersey corporation." It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that case with this. The contrast is further emphasized by pointing out how in the case of the New Jersey corporation the original wrong was reflected in and manifested by the acts which followed the organization, as described by the court. It said: "The exercise of the power which resulted from that organization fortifies the foregoing conclusions [as to monopoly, etc.], since the

development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

The *Tobacco Case* has the same bad distinctions as the *Standard Oil Case*. The illegality in which it was formed (there were two American Tobacco Companies, but we use the name as designating the new company as representing the combinations of the suit) continued, indeed progressed in intensity and defiance to the moment of decree. And it is the intimation of the opinion if not its direct assertion that the formation of the company (the word "combination" is used) was preceded by the intimidation of a trade war "inspired by one or more of the minds which brought about and became parties to that combination." In other words the purpose of the combination was signalled to competitors and the choice presented to them was submission or ruin, to become parties to the illegal enterprise or be driven "out of the business." This was the purpose and the achievement, and the processes by which achieved this court enumerated to be the formation of new companies, taking stock in others to obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants not to utilize them but to close them; by con-

stantly recurring stipulations by which numbers of persons, whether manufacturers, stockholders or employees, were required to bind themselves, generally for long periods, not to compete in the future. In the *Tobacco Case*, therefore, as in the *Standard Oil Case*, the court had to deal with a persistent and systematic lawbreaker masquerading under legal forms, and which not only had to be stripped of its disguises but arrested in its illegality. A decree of dissolution was the manifest instrumentality and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the *Standard Oil Case* furnishes no example for a decree in this.

In conclusion we are unable to see that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

We think, therefore, that the decree of the District Court should be affirmed.

So ordered.

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

MR. JUSTICE DAY dissenting.

This record seems to me to leave no fair room for a doubt that the defendants, the United States Steel Corporation and the several subsidiary corporations which make up that organization, were formed in violation of the Sherman Act. I am unable to accept the conclusion

which directs a dismissal of the bill instead of following the well-settled practice, sanctioned by previous decisions of this court, requiring the dissolution of combinations made in direct violation of the law.

It appears to be thoroughly established that the formation of the corporations, here under consideration, constituted combinations between competitors, in violation of law, and intended to remove competition and to directly restrain trade. I agree with the conclusions of Judges Woolley and Hunt, expressed in the court below (223 Fed. Rep. 161, *et seq.*), that the combinations were not submissions to business conditions but were designed to control them for illegal purposes, regardless of other consequences, and "were made upon a scale that was huge and in a manner that was wild," and "properties were assembled and combined with less regard to their importance as integral parts of an integrated whole than to the advantages expected from the elimination of the competition which theretofore existed between them." Those judges found that the constituent companies of the United States Steel Corporation, nine in number, were themselves combinations of steel manufacturers, and the effect of the organization of these combinations was to give a control over the industry at least equal to that theretofore possessed by the constituent companies and their subsidiaries; that the Steel Corporation was a combination of combinations by which directly or indirectly 180 independent concerns were brought under one control, and in the language of Judge Woolley (p. 167):

"Without referring to the great mass of figures which bears upon this aspect of the case, it is clear to me that combinations were created by acquiring competing producing concerns at figures not based upon their physical or their business values, as independent and separate producers, but upon their values in combination; that is, upon their values as manufacturing plants and business

concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combinations particularly related, measured by the amount of production, extended in some instances from 80 per cent. to 95 per cent. of the entire output of the country, resulting in the immediate increase in prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital.

"The immediate, as well as the normal effect of such combinations, was in all instances a complete elimination of competition between the concerns absorbed, and a corresponding restraint of trade."

The enormous overcapitalization of companies and the appropriation of $100,000,000 in stock to promotion expenses were represented in the stock issues of the new organizations thus formed, and were the basis upon which large dividends have been declared from the profits of the business. This record shows that the power obtained by the corporation brought under its control large competing companies which were of themselves illegal combinations, and succeeded to their power; that some of the organizers of the Steel Corporation were parties to the preceding combinations, participated in their illegality, and by uniting them under a common direction intended to augment and perpetuate their power. It is the irresistible conclusion from these premises that great profits to be derived from unified control were the object of these organizations.

The contention must be rejected that the combination was an inevitable evolution of industrial tendencies compelling union of endeavor. Nothing could add to the vivid accuracy with which Judge Woolley, speaking for himself

and Judge Hunt, has stated the illegality of the organization, and its purpose to combine in one great corporation the previous combinations by a direct violation of the purposes and terms of the Sherman Act.

For many years, as the record discloses, this unlawful organization exerted its power to control and maintain prices by pools, associations, trade meetings, and as the result of discussion and agreements at the so-called "Gary Dinners," where the assembled trade opponents secured coöperation and joint action through the machinery of special committees of competing concerns, and by prudent prevision took into account the possibility of defection, and the means of controlling and perpetuating that industrial harmony which arose from the control and maintenance of prices.

It inevitably follows that the corporation violated the law in its formation and by its immediate practices. The power, thus obtained from the combination of resources almost unlimited in the aggregation of competing organizations, had within its control the domination of the trade, and the ability to fix prices and restrain the free flow of commerce upon a scale heretofore unapproached in the history of corporate organization in this country.

These facts established, as it seems to me they are by the record, it follows that, if the Sherman Act is to be given efficacy, there must be a decree undoing so far as is possible that which has been achieved in open, notorious, and continued violation of its provisions.

I agree that the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legitimately goes with it, pro-

vided no law has been transgressed in obtaining it. But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. To permit this would be to practically annul the Sherman Law by judicial decree. This principle has been so often declared by the decisions that it is only necessary to refer to some of them. It is the scope of such combinations, and their power to suppress and stifle competition and create or tend to create monopolies, which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade in the channels of interstate commerce. *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 676, 677; *Trans-Missouri Freight Assn. Case*, 166 U. S. 290, 324; *Northern Securities Case*, 193 U. S. 197; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 238; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291; *Union Pacific Case*, 226 U. S. 61, 88. While it was not the purpose of the act to condemn normal and usual contracts to lawfully expand business and further legitimate trade, it did intend to effectively reach and control all conspiracies and combinations or contracts of whatever form which unduly restrain competition and unduly obstruct the natural course of trade, or which from their nature, or effect, have proved effectual to restrain interstate commerce. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Reading Co.*, 226 U. S. 324; *Straus* v. *American Publishers' Assn.*, 231 U. S. 222; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600.

This statute has been in force for nearly thirty years. It has been frequently before this court for consideration, and the nature and character of the relief to be granted

against combinations found guilty of violations of it have been the subject of much consideration. Its interpretation has become a part of the law itself, and, if changes are to be made now in its construction or operation, it seems to me that the exertion of such authority rests with Congress and not with the courts.

The fourth section is intended to give to courts of equity of the United States the power to effectively control and restrain violations of the act. In none of the cases which have been before the courts was the character of the relief to be granted, where organizations were found to be within the condemnation of the act, more thoroughly considered than in the *Standard Oil* and *Tobacco Company Cases*, reported in 221 U. S. In the former case, considering the measure of relief to be granted in the case of a combination, certainly not more obnoxious to the Sherman Act than the court now finds the one under consideration to be, this court declared that it must be twofold in character (221 U. S. 78): "1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In the *American Tobacco Company Case* the nature of the relief to be granted was again given consideration, and it was there concluded that the only effectual remedy was to dissolve the combination and the companies comprising it, and for that purpose the cause was remanded to the District Court to hear the parties and determine a method of dissolution and of recreating from the elements composing it "a new condition which shall be honestly in harmony with and not repugnant to the law." In that

case the corporations dissolved had long been in existence, and the offending companies were organized years before the suit was brought and before the decree of dissolution was finally made. Such facts were considered no valid objection to the dissolution of these powerful organizations as the only effective means of enforcing the purposes of the Sherman Anti-Trust Act. These cases have been frequently followed in this court, and in the lower federal courts, in determining the nature of the relief to be granted, and I see no occasion to depart from them now.

As I understand the conclusions of the court, affirming the decree directing dismissal of the bill, they amount to this: that these combinations, both the holding company and the subsidiaries which comprise it, although organized in plain violation and bold defiance of the provisions of the act, nevertheless are immune from a decree effectually ending the combinations and putting it out of their power to attain the unlawful purposes sought, because of some reasons of public policy requiring such conclusion. I know of no public policy which sanctions a violation of the law, nor of any inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, which have been able thus to organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combinations. Such a conclusion does violence to the policy which the law was intended to enforce, runs counter to the decisions of the court, and necessarily results in a practical nullification of the act itself.

There is no mistaking the terms of the act as they have hitherto been interpreted by this court. It was not intended to merely suppress unfair practices, but, as its history and terms amply show, it was intended to make it criminal to form combinations or engage in conspiracies or contracts in restraint of interstate trade. The remedy by injunction, at the instance of the Attorney General, was

given for the purpose of enabling the courts, as the statute states, to prohibit such conspiracies, combinations and contracts, and this court interpreting its provisions has held that the proper enforcement of the act requires decrees to end combinations by dissolving them and restoring as far as possible the competitive conditions which the combinations have destroyed. I am unable to see force in the suggestion that public policy, or the assumed disastrous effect upon foreign trade of dissolving the unlawful combination, is sufficient to entitle it to immunity from the enforcement of the statute.

Nor can I yield assent to the proposition that this combination has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power. Its total assets on December 31, 1913, were in excess of $1,800,000,000; its outstanding capital stock was $868,583,600; its surplus $151,798,428. Its cash on hand ordinarily was $75,000,000; this sum alone exceeded the total capitalization of any of its competitors, and with a single exception, the total capitalization and surplus of any one of them. That such an organization thus fortified and equipped could if it saw fit dominate the trade and control competition would seem to be a business proposition too plain to require extended argument to support it. Its resources, strength and comprehensive ownership of the means of production enable it to adopt measures to do again as it has done in the past, that is, to effectually dominate and control the steel business of the country. From the earliest decisions of this court it has been declared that it was the effective power of such organizations to control and restrain competition and the freedom of trade that Congress intended to limit and control. That the exercise of the power may be withheld, or exerted with forbearing benevolence, does not place such combinations beyond the authority of the statute which was intended to prohibit their formation,

and when formed to deprive them of the power unlawfully attained.

It is said that a complete monopolization of the steel business was never attained by the offending combinations. To insist upon such result would be beyond the requirements of the statute and in most cases practicably impossible. As we said in dealing with the Packers' combination in *Swift & Co.* v. *United States*, 196 U. S. 375, 396: "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute [Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

It is affirmed that to grant the Government's request for a remand to the District Court for a decree of dissolution would not result in a change in the conditions of the steel trade. Such is not the theory of the Sherman Act. That act was framed in the belief that attempted or accomplished monopolization, or combinations which suppress free competition, were hurtful to the public interest, and that a restoration of competitive conditions would benefit the public. We have here a combination in control of one-half of the steel business of the country. If the plan were followed, as in the *American Tobacco Case*, of remanding the case to the District Court, a decree might be framed restoring competitive conditions as far as practicable. See *United States* v. *American Tobacco Co.*, 191 Fed. Rep. 371. In that case the subject of reconstruction so as to restore such conditions was elaborated and care-

fully considered. In my judgment the principles there laid down if followed now would make a very material difference in the steel industry. Instead of one dominating corporation, with scattered competitors, there would be competitive conditions throughout the whole trade which would carry into effect the policy of the law.

It seems to me that if this act is to be given effect, the bill, under the findings of fact made by the court, should not be dismissed, and the cause should be remanded to the District Court, where a plan of effective and final dissolution of the corporations should be enforced by a decree framed for that purpose.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in this dissent.

SCHAEFER *v.* UNITED STATES.

VOGEL *v.* UNITED STATES.

WERNER *v.* UNITED STATES.

DARKOW *v.* UNITED STATES.

LEMKE *v.* UNITED STATES.

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

Nos. 270–274. Argued October 21, 1919.—Decided March 1, 1920.

The Espionage Act is constitutional. P. 470. *Sugarman* v. *United States*, 249 U. S. 182.

As applied to any of several defendants in a criminal case, the provision of Jud. Code, § 287, that all shall be deemed a single party for the

purpose of peremptory challenges, is constitutional. P. 470. *Stilson* v. *United States*, 250 U. S. 583.

In a prosecution of several under the Espionage Act, *held* that the evidence was sufficient to warrant conviction as to some but not as to the others. Pp. 470, 478.

In a prosecution under the Espionage Act for wilfully making and conveying false reports and statements with intent to promote the success of Germany and obstruct the recruiting and enlistment service of the United States to the injury of the United States in the war with Germany, where there was evidence that persons conducting a German-language newspaper systematically took news despatches from other papers and published them with omissions, additions, and changes, *held*, that the falsity of such publications, within the meaning of the statute, depended on the fact and purpose of the alterations and the resulting tendency of the articles to weaken zeal and patriotism and thus hamper the United States in raising armies and conducting the war; that the determination of such falsity, the evidence being sufficient, was clearly for the jury and not for the court; and that the court rightly allowed the jury to have recourse to their general knowledge of the war and war conditions in making such determination. P. 471.

The constitutional provision as to liberty of speech and press does not require or authorize the court, wherever criminal abuse of those rights is charged, to override a verdict of guilty by substituting its own opinion of the evidence for that of the jury. P. 474.

Evidence sufficient to sustain any one of several counts will sustain a conviction and sentence upon all, if the sentence does not exceed that which might lawfully have been imposed under any one of them. P. 482. *Abrams* v. *United States*, 250 U. S. 616.

254 Fed. Rep. 135, affirmed in part and reversed in part.

THE case is stated in the opinion.

Mr. William A. Gray and *Mr. Henry John Nelson* for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *The Solicitor General* and *Mr. W. C. Herron* were on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment in nine counts under the Espionage Act. Preliminary to indicating the special offenses we may say that the indictment charges that at the dates mentioned therein the Philadelphia Tageblatt and the Philadelphia Sonntagsblatt were newspapers printed and published in the German language in Philadelphia by the Philadelphia Tageblatt Association, a Pennsylvania corporation of which defendants were officers; Peter Schaefer being president, Vogel treasurer, Werner chief editor, Darkow managing editor, and Lemke business manager.

That on the dates mentioned in the indictment the United States was at war with the Imperial German Government and the defendants "knowingly, wilfully and unlawfully" "caused to be printed, published and circulated in and through" one or other of those newspapers, false reports and statements of certain news items or despatches purporting to be from foreign places, or otherwise violated the Espionage Act through editorials or other published matter.

In count one the charge is that the intent was "to promote the success of the enemies of the United States, to wit, the said Imperial German Government."

In counts two, three and four the charge is the obstruction of the "recruiting and enlistment service of the United States, to the injury of the United States."

In count five the purpose of publication is charged to be the making of false reports and statements with intent to promote the success of the enemies of the United States.

In counts six, seven and eight there are charges of intent to like purpose.

Count nine charges a conspiracy entered into by defendants to be executed through the agency of the two

newspapers for the purpose (a) to make false reports and statements with intent to interfere with the military and naval operations and success of the United States and to promote the success of its enemies; (b) to cause insubordination, disloyalty and mutiny in the military and naval forces of the United States; (c) to obstruct the recruiting and enlistment service of the United States. And there were specifications in support of the charges.

Demurrers were opposed to the indictment which stated in detail the insufficiency of the indictment to constitute offenses. The demurrers were overruled, the court considering that the grounds of attack upon the indictment could be raised at the trial.

The defendants were then arraigned and pleaded not guilty and when called for trial moved for a severance urging as the reason that the courts had ruled that defendants when tried jointly must join in "their challenge to jurors." Counsel in effect said they contested the ruling and considered the statute upon which it was based to be "in derogation of the individual's rights, guaranteed to him by the Constitution."

Other grounds for severance were urged but the court denied the motion and to the ruling each of the defendants excepted. In fortification of the motion for severance, at the selection of the jury, counsel, in succession for each defendant, challenged particular jurors peremptorily, expressing at the same time the acceptance by the other defendants of the challenged jurors. After ten such challenges had been made counsel interposed a peremptory challenge to other jurors in behalf of all of the defendants, stating as reasons that they "collectively" were not "bound by what their co-defendants may have done with respect to any particular juror, and that, therefore, they are still within their rights." The court denied the challenge, ruling that under the provisions of the act of Congress "all the defendants will be deemed a single party,

and ten challenges having been exercised in the aggregate, the right of challenge is exhausted."

Defendants excepted and the trial proceeded resulting in a verdict as follows: Schaefer and Vogel guilty on count nine only; Werner on counts one, two, four and nine; Darkow on one, three, five, six and nine; Lemke on count nine only.

Motions for arrest of judgment and for a new trial were made and overruled and defendants were sentenced to various terms of imprisonment.

The case is here upon writ of error directly to the District Court as involving constitutional questions.

It is conceded that the constitutionality of the Espionage Act has been sustained (*Sugarman* v. *United States*, 249 U. S. 182), but the constitutionality of the Act of March 3, 1911, c. 231, 36 Stat. 1166, § 287, by which several defendants may be treated as one party for the purpose of peremptory challenges, is attacked. Its constitutionality is established by *Stilson* v. *United States*, 250 U. S. 583.

The other assignments of error are: (1) The Government failed to prove the charge of making false statements as the same was made in the indictment and that therefore the court erred in refusing to instruct the jury to acquit upon the counts charging the offense. (2) "In passing upon the question of falsity of the despatches as published by the appellants and in passing upon any other questions which are a matter of public knowledge and general information" the court erred in instructing the jury that they had "the right to call upon the fund of general information which" was in their "keeping." (3) The court erred in refusing to instruct the jury to render a verdict of not guilty upon all of the counts in case of each of the defendants.

Assignments one and three may be considered together. They both depend upon an appreciation of the evidence

although assignment one is more particular as to the offense charged. But neither can be discussed without a review of the evidence and a detailed estimation of its strength, direct and inferential. That, however, is impossible as the evidence occupies over three hundred pages of the record and counsel have not given us an analysis or compendium of it, but have thrust upon us a transcript of the stenographer's notes of the trial which, counsel for the Government aptly says "presents" of the case "a picture of a certain sort, but it is a picture which is constantly out of focus, being either larger than the reality or smaller." However, we have accepted the labor it imposed and have considered the parts of the evidence in their proper proportions and relation and brought them to an intelligible focus, and are of opinion that the court rightfully refused the requested instructions except as to the defendants Schaefer and Vogel. As to them we do not think that there was substantial evidence to sustain the conviction. They were acquitted, we have seen, of all the individual and active offenses, and found guilty only on the ninth count—the charge of conspiracy.

The second assignment of error is somewhat confusedly expressed. It, however, presents an exception to the charge of the court as to what the jurors were entitled to consider as matters of public knowledge and general information. Counsel apparently urge against the charge that it submitted all the accusations of the indictment to the proof of the public knowledge and general information that the jurors possessed. The charge is not open to the contention, and, as discussion is precluded except through a consideration of the instructions in their entirety, we answer the contention by a simple declaration of dissent from it based, however, we may say, on a consideration of the instructions as a whole not in fragments detached and isolated from their explanations and qualifications. Counsel at the trial attempted

to assign to the charge the generality they now assert and it was rejected.

It is difficult to reach or consider the particulars of counsels' contention, the foundation of which seems to be that the indictment charged the falsification of the "despatches," and that, therefore, the Government must prove the falsification of them. What counsel mean by "falsification," is not easy to represent, they conceding there was proof that "the articles which were published differed from the articles in the papers from which they were copied," but contending no evidence was offered of what was contained in the original despatches of which the publications purported to be copies. And again counsel say "the falsity, as it has been called, which was proven against the defendants was that the articles which were published differed from the articles in the papers from which they were copied." The charge and proof, therefore, were of alterations—giving the "despatches" by a change or characterization a meaning that they did not originally bear—a meaning that weakened the spirit of recruiting and destroyed or lessened that zeal and animation necessary or helpful to raise and operate our armies in the then pending war. And there could be no more powerful or effective instruments of evil than two German newspapers organized and conducted as these papers were organized and conducted.

Such being the situation and the defendants having testified in their own behalf, and having opportunity of explanation of the changes they made of the articles which they copied, the court instructed the jury as follows: "In passing upon this question of falsity and in passing upon this question of intent and in passing upon, of course, the question of whether or not we are at war, you are permitted to use your general knowledge. I will withdraw the reference to 'intent,' but in passing upon the question of the falsity of these publications, in passing upon the ques-

tion whether we are at war, and in passing upon any other questions which are in like manner a matter of public knowledge and of general information, you have the right to call upon the fund of general information which is in your keeping."

The criticism counsel make of the charge is that "without any proof whatsoever, he [the judge] permitted them [the jury] to apply their general knowledge in determining whether the despatches published by the defendants contained false statements." Indeed counsel go further, and insist that the charge "gave to the jury an unlimited right to use any general information at their disposal in reaching their verdict." The charge itself refutes such sweeping characterization. Nor is it justified. The court said, "The real offense with which these defendants are charged is in putting out these false statements. They received them from a source. That source purported to be the report of a despatch, and the evidence in this case would seem to direct your minds in at least some of these instances, perhaps in many of them, to just where the report of the despatch appeared. They took that report as it came to them, and the charge is, in plain words, that they garbled it, sometimes by adding something to it and sometimes by leaving things out and sometimes by a change of the words. But the substantial thing which you are to pass upon is, was the report or statement that they put out false? Was it wilfully and knowingly false? Was it put out thus falsified with the intent to promote the success of the enemies of the United States." In other words the minds of the jurors were directed to the gist of the case which was despatches received and then changed to express falsehood to the detriment of the success of the United States, and the fact and effect of change the jurors might judge of from the testimony as presented and "from the fund of general information which" was in their "keeping." That is, from the fact of the source

from which the despatches were received, from the fact of war and what was necessary for its spirited and effective conduct and how far a false cast to the despatches received was depressing or detrimental to patriotic ardor. See *Stilson* v. *United States, supra.*

This disposes of the case on the exceptions which are argued. Exceptions one and two are specific and we have discussed them. Exception three is general and involves not only the points we have discussed and selected by counsel for discussion, but involves besides every other objection to the instructions and the sufficiency of the evidence, in all the aspects they can be viewed and estimated.

And as being within its comprehension we are confronted with a contention that the indictment and conviction are violative of the freedom of speech and of the press protected by the Constitution of the United States. The contention is a serious one and, in its justification, it is urged that the power of Congress to interfere with the freedom of speech and of the press must be judged by an exercise of reason on the circumstances. Therefore, in justice to the tribunal below, indeed to ourselves, we must give attention to the contention.

It is not very susceptible of measurement. It is difficult to separate in view of the contentions that are made a judgment of the law from a judgment of conviction under the law and keep free from confusing considerations. Free speech is not an absolute right and when it or any right becomes wrong by excess is somewhat elusive of definition. However, some admissions may be made. That freedom of speech and of the press are elements of liberty all will acclaim. Indeed they are so intimate to liberty in every one's convictions—we may say feelings—that there is an instinctive and instant revolt from any limitation of them either by law or a charge under the law, and judgment must be summoned against the impulse that might con-

demn a limitation without consideration of its propriety. But notwithstanding this instant jealousy of any limitation of speech or of the press there is adduced an instance of oppression by the Government, and, it is said, to hold that publications such as those in this case "can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the Postal Authorities."

If there be such practice this case is not concerned with it. The assertion of its existence, therefore, we are not called upon to consider, as there is nothing before us to justify it. Therefore, putting it aside and keeping free from exaggerations, and alarms prompted by an imagination of improbable conditions, we bring this case, as it should be brought, like other criminal cases, to no other scrutiny or submission than to the sedate and guiding principles of criminal justice. And this was the effort of the trial court and was impressed on the jury.

The court drew the attention of the jury to "the features which gave importance" to the case but admonished it that they brought a challenge to a sense of duty and a sense of justice and that while the enforcement of any law made a "strong call" upon court and jury it could not "override the obligation of the other call, which is to make sure that no man is found guilty of a crime unless the evidence points to his guilt with the degree of certainty which the law requires."

Again, and we quote the words of the court, "No people is fit to be self-governed whose juries, chosen from among the great body of the people, cannot give due consideration to cases of this kind, and who cannot give to any defendant a fair and impartial trial, and render a just verdict. I know of no greater service an American citizen can perform for his country than to manifest by his attitude in cases of this kind that we are a people who

are governed by law, and who follow unswervingly that sense of justice which we should follow. Calling up just that spirit of justice, and breathing its very atmosphere, let us go to a consideration of the real merits of this case."

Did the admonition fulfill the duty of the court or should the court, as it is intimated, have taken the case from the jury? To do so is sometimes the duty of a court, but it is to be remembered a jury is a tribunal constituted by law as the court is, its function has as definite sanction as that of the court, and it alone is charged with the consideration and decision of the facts of a case. And the duty is of such value as to have been considered worthy of constitutional provision and safeguard. See *Capital Traction Co.* v. *Hof*, 174 U. S. 1.

If it be said this comment is but the expression of commonplaces, we reply that commonplaces are sometimes necessary to be brought forward lest earnestness or interest disregard them and urge too far the supervising power of the court, which, we repeat, is subordinate to that of the jury on questions of fact and certainly "a rule of reason" cannot be asserted for it upon a mere difference in judgment. All the principles and practices of the law are the other way. May such rule be urged in an appellate court against the concurrence of court and jury in the trial court; or, if there be division in the appellate court, for which view may a satisfaction of the rule be asserted? Passing by presumptions that may be challenged, an answer in this case may be left to the facts. But first as to the law.

The indictment is based on the Espionage Act and that was addressed to the condition of war and its restraints are not excessive nor ambiguous.[1] We need not enumerate

[1] "Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever,

them. They were directed against conduct—speech or writings—that was designed to obstruct the recruitment or enlistment service or to weaken or debase the spirit of our armies causing them, it might be, to operate to defeat and the immeasurable horror and calamity of it.

But simple as the law is, perilous to the country as disobedience to it was, offenders developed and when it was exerted against them challenged it to decision as a violation of the right of free speech assured by the Constitution of the United States. A curious spectacle was presented: that great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered Congress to declare war and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime—that it was an impregnable attribute of free speech upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it including that in the case at bar. *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616. That, however, though in some respects retrospect,

---

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, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished. . . ." [Act June 15, 1917, c. 30, 40 Stat. 217.]

is a pertinent introduction to the facts of the pending case.

The charges of the indictment were against certain articles or editorials in the newspapers published by defendants in German and intended to be circulated in families and read by persons who understood that language. The articles were adapted to the situation and, we may say, allusion and innuendo could be as effective as direct charge and "coarse or heavy humor" when accompanied by sneering headlines and derision of America's efforts could have evil influence. And such was the character of the article upon which count three of the indictment was based. It had the following headlines:

"Yankee Bluff.

"Professor Jenny Does Not Take the American Preparations for War Seriously.

"Ambassador Paige Assures England That We Will Send Ten Million Men."

The following, with some other comments, was in the body of the article: "The army of ten million and the hundred thousand airships which were to annihilate Germany, have proved to be American boasts, which will not stand washing. It is worthy of note how much the Yankees can yell their throats out without spraining their mouths. This is in accord with their spiritual quality. They enjoy a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words." Coarse indeed, this was, and vulgar to us, but it was expected to produce, and, it may be, did produce a different effect upon its readers. To them its derisive contempt may have been truly descriptive of American feebleness and inability to combat Germany's prowess, and thereby chill and check the ardency of patriotism and make it despair of success and in hopelessness relax energy both in preparation and action. If it and the other articles, which we shall presently refer to,

had not that purpose what purpose had they? Were they the mere expression of peevish discontent, aimless, vapid and innocuous? We cannot so conclude. We must take them at their word, as the jury did, and ascribe to them a more active and sinister purpose. They were the publications of a newspaper, deliberately prepared, systematic, always of the same trend, more specific in some instances, it may be, than in others. Their effect or the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offense—their "intent" and "attempt," for those are the words of the law, and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny.

The article was preceded by one July 4, 1917, headed "For the Fourth of July," in which it was declared that "The Fourth of July celebration, which has long been an empty formality, will this year become a miserable farce." England was represented as the enemy of the United States, carrying a hostility watchful of opportunity from the time of the Revolution through all crises until the United States "had become so strong that nothing could be undertaken against them." And further, "The ruling classes of England have always despised and hated the United States, and today while they flatter them, they still cherish the same feeling toward them." The emphasis of a paragraph was given to the statement that "under Wilson's regime the United States" had "sprung to the side of England as its savior in time of need. They provided it with the means to carry on the war and when that wasn't enough, they sprang into the war themselves. History will sometime pronounce its judgment upon this."

The aid so asserted to have been rendered to England by President Wilson was represented to have been in

opposition to the wishes of the people expressed, "by the unwillingness of their [the United States'] young men to offer themselves as volunteers for the war. But it will not rest there. The call for peace will come from the masses and will demand to be heard. And the sooner the better. No blood has been shed yet, no hate or bitterness has yet arisen against Germany, who has never done this country any harm, but has sent millions of her sons for its upbuilding. The sooner the American people come to their senses and demand peace, the better and more honorable it will be for this country."

The animus of the article and the effect expected of it need no comment to display. It was followed, supplemented, we may say, and reinforced by another article July 7, 1917. It (the latter) had for headlines the words "The Failure of Recruiting," and recruiting failed, was its representation, notwithstanding an "advertising campaign was worked at high pressure" and "all sorts of means were tried to stir up patriotism." Its further declaration was that "Germany was represented as a violator of all human rights and all international law, yet all in vain. Neither the resounding praises nor the obviously false accusations against Germany were of any avail. The recruits did not materialize." The cause was represented to be "that the American, who certainly cannot be called a coward" did "not care to allow himself to be shot to satisfy British lust for the mastery of the world." And "the people instinctively recognize and feel" that "the pro-British policy of the Government,—is an error, which can bring nothing but injury upon this country." It was then added that "the nation therefore" was doing the only thing it could still do, "since its desires were not consulted at first." It refused "to take part."

The purpose is manifest, however the statements of the article may be estimated, whether as criminal means—violations of law, or the exercise of free speech and of the

press. And its statements were deliberate and wilfully false, the purpose being to represent that the war was not demanded by the people but was the result of the machinations of executive power, and thus to arouse resentment to it and what it would demand of ardor and effort. In final comment we may say that the article in effect justified the German aggressions.

We do not deem it necessary to adduce the other charges of the indictment. We may, however, refer to the plausibility of the excuse of the alteration of Senator LaFollette's speech and remark that it disappears when the speech is considered in connection with the articles that preceded and followed it. The alterations were, it is true, of two words only, but words of different import than those the Senator used. The Senator urged that the burden of taxation made necessary by the war be imposed upon those who might profit by the war in order to relieve those who might suffer by it and be brought to "bread lines." The article changed the words to "bread riots," that is changed the expression of acceptance of what might come as a consequence of the war, to turbulent resistance to it and thus giving the article the character of the others with a definite illustration of the opposition to the war by a Senator and his prophecy of a riotous protest by the people. It will be recalled that in other articles the antagonism of the people to the war was declared and in one of them it was said that the war was commenced "under Wilson's regime" and "without their [the people's] consent."

In conclusion we may add that there are in the record what are called "intent" articles which supplement and emphasize the charges of the indictment, and, it is to be remembered, that defendants were witnesses and had the opportunity of explanation, and to preclude any misapprehension of the German originals or defect in their translation. And the jury could judge of the defendants by their presence.

We have not deemed it necessary to consider the articles commented on with reference to the verdicts; the *Abrams Case* has made it unnecessary. On any count of which any defendant was convicted he could have been sentenced to twenty years' imprisonment. The highest sentence on any defendant was five years.

Further comment is unnecessary and our conclusion is that the judgment must be affirmed as to Werner, Darkow and Lemke but reversed as to Schaefer and Vogel, as to them the case is remanded for further proceedings in accordance with this opinion.

So ordered.

MR. JUSTICE BRANDEIS delivered the following opinion in which MR. JUSTICE HOLMES concurred.

With the opinion and decision of this court reversing the judgment against Schaefer and Vogel on the ground that there was no evidence legally connecting them with the publication I concur fully. But I am of opinion that the judgments against the other three defendants should also be reversed because either the demurrers to the several counts should have been sustained, or a verdict should have been directed for each defendant on all of the counts.

The extent to which Congress may, under the Constitution, interfere with free speech was in *Schenck* v. *United States*, 249 U. S. 47, 52, declared by a unanimous court to be this:—"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."

This is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the

exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this court, one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited. The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error. In my opinion, no jury acting in calmness could reasonably say that any of the publications set forth in the indictment was of such a character or was made under such circumstances as to create a clear and present danger either that they would obstruct recruiting or that they would promote the success of the enemies of the United States. That they could have interfered with the military or naval forces of the United States or have caused insubordination, disloyalty, mutiny, or refusal of duty in its military or naval services was not even suggested; and there was no evidence of conspiracy except the coöperation of editors and business manager in issuing the publications complained of.

The nature and possible effect of a writing cannot be properly determined by culling here and there a sentence and presenting it separated from the context. In making such determination, it should be read as a whole; at least if it is short like these news items and editorials. Some-

times it is necessary to consider, in connection with it, other evidence which may enlarge or otherwise control its meaning or which may show that it was circulated under circumstances which gave it a peculiar significance or effect. But no such evidence was introduced by the Government. The writings here in question must speak for themselves. Fifteen publications were set forth in the indictment; and others were introduced in evidence. To reproduce all of them would unduly prolong this opinion. Four are selected which will illustrate the several contentions of the Government. That at least three of these four were deemed by it of special importance is shown by the fact that each of the three was made the subject of a separate count.

First: There were convictions on three counts of wilfully obstructing the recruiting and enlistment service. The conviction of the news editor of so obstructing rested wholly upon his having inserted the following reprint from a Berlin paper in the Tageblatt:

"Yankee Bluff.

"Professor Jenny Does Not Take the American Preparations for War Seriously.

"Ambassador Paige Assures England That We Will Send Ten Million Men.

"London, Aug. 5.—Ambassador Paige followed Lloyd George at Guild Hall in Plymouth, with a great speech. He declares there that the differences between England and the United States in former times were only of a superficial nature, and that both peoples are now united inseparably, to fight for freedom and against the Hydra of militarism. He assures his hearers that the United States is ready for all sacrifices in order to end the war victoriously, and that if necessary it will send ten million men to France."

"Berlin, Aug. 5.—In the 'Täglishe Rundschau,' Professor Jenny writes under the title 'Americanism' as

follows:—Americans think in exaggerations and talk in superlatives. Even Ambassador Andrew White in his Memoirs falls into superlatives in comparatively insignificant cases. He speaks of them as the most important events of his life and maintains that certain people have made an indelible impression on him, whom others consider to be ordinary average men.

"The army of ten million men has dwindled to a voluntary army of 120,000; while the new conscripted army of 565,000 will not even be ready to begin drilling for the front in six months. The hundred thousand air ships were reduced to 20,000 and then to 3,000, which the Americans hope to have ready for next summer if they find the right model for them. As for the thousands of ships that were to be sent across the ocean, America, six months after the declaration of war, has not yet decided whether they are to be wood or steel ships; so far not even the keel of one ship has been laid. It amounts to this that now when the Americans can scrape some tonnage together, the troops are not ready, and when they have the troops ready, the tonnage will not be available.

"The army of ten million and the hundred thousand airships which were to annihilate Germany, have proved to be American boasts which will not stand washing. It is worthy to note how much the Yankees can yell their throats out without spraining their mouths. This is in accord with their spiritual quality. They enjoy a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words.

"But some fine day, if they do not stop their boasting and bluffing, it might happen to them that they get the lockjaw, for which there is no better relief than a good box on the ear. Moreover it is not to be assumed that the Americans are really in earnest with the war. No one would be surprised if they found a thousand and one excuses for taking no active part in the European War."

It is not apparent on a reading of this article—which is not unlike many reprints from the press of Germany to which our patriotic societies gave circulation in order to arouse the American fighting spirit—how it could rationally be held to tend even remotely or indirectly to obstruct recruiting. But as this court has declared and as Professor Chafee has shown in his "Freedom of Speech in War Time," 32 Harvard Law Review, 932, 963, the test to be applied—as in the case of criminal attempts and incitements—is not the remote or possible effect. There must be the clear and present danger. Certainly men judging in calmness and with this test presented to them could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting. Compare *United States* v. *Hall*, 248 Fed. Rep. 150; *United States* v. *Schutte*, 252 Fed. Rep. 212; *Von Bank* v. *United States*, 253 Fed. Rep. 641; *Balbas* v. *United States*, 257 Fed. Rep. 17; *Sandberg* v. *United States*, 257 Fed. Rep. 643; *Kammann* v. *United States*, 259 Fed. Rep. 192; *Wolf* v. *United States*, 259 Fed. Rep. 388, 391–2.

Second: There were convictions on three counts of wilfully conveying false reports and statements with intent to promote the success of the enemies of the United States. The Tageblatt, like many of the smaller newspapers, was without a foreign or a national news service of any kind and did not purport to have any. It took such news usually from items appearing in some other paper theretofore published in the German or the English language. It did not in any way indicate the source of its news. The item, if taken from the English press, was of course translated. Sometimes it was copied in full; sometimes in part only; and sometimes it was rewritten; or editorial comment was added. The Government did not attempt to prove that any statement made in any of the news items published in the Tageblatt was false in fact. Its evidence,

under each count, was limited to showing that the item as published therein varied in some particular from the item as it appeared in the paper from which it had been copied; and no attempt was made to prove the original despatch to the latter paper. The Government contended that solely because of variation from the item copied it was a false report, although the item in the Tageblatt did not purport to reproduce an item from another paper, and in no way indicated the source of the news. Each of the three items following illustrates a different method by which the variation was effected:

1. The publication for which the news editor was convicted on the fifth count by reason of an addition to the item copied:

(The translation of the Tageblatt item as set forth in the indictment.)

"Further Economies.

"Amsterdam, September 2.—It has been reported here that permission to export the wheat and flour on the ships held in New York has been refused. Information to this effect is contained in an official proclamation of the latest cut in bread rations and of the need for economy which has reached the civil authorities: This document says: 'We know now with certainty that we cannot count upon the import of breadstuffs from America and that we must strive to make our own provisions suffice. In initiated circles it is said that under no conditions can the new American proposal be accepted, and that the foodstuffs may rot before the ships will be unloaded.'"

(The original Tageblatt item as set forth in the indictment.)

Weitere Einſchränkungen.

Amſterdam, 2. Sept. Es wird hier gemeldet, daß der Export von Weizen und Mehl auf den in New York zurückgehaltenen Schiffen verweigert wurde. Eine diesbezügliche Mittheilung iſt in einer amtlichen Erklärung der jüngſten Brotrationen-Verringerung und der Aufforderung zur Einſchränkung enthalten, welche den Gemeindebehörden zuging. In derſelben heißt es: „Wir wiſſen nun beſtimmt, daß wir auf die Einfuhr von Brotgetreide aus Amerika nicht rechnen können, und daß wir uns bemühen müſſen, mit den eigenen Vorräthen auszukommen." — In eingeweihten Kreiſen heißt es, daß man auf den neuen Vorſchlag Amerikas unter keinen Umſtänden eingehen und das Getreide eher verfaulen laſſen wird, als die Schiffe auszuladen.

The falsification charged is said to consist in having added to the despatch which was copied from the Staatszeitung the words: "In initiated circles it is said that under no conditions can the new American proposal be accepted, and that the foodstuffs may rot before the ships will be unloaded." But it is obvious, upon comparing the English translation with the German original, that the defendant did no such thing. What occurred was this: The sentence referred to was not made a part of the despatch in the Tageblatt. It followed the despatch; it was not within the quotation marks; and was separated from it by a dash,—a usual method of indicating that what follows is comment or an addition made by the editor. In the English translation, as set forth in the indictment, this sentence, through some inadvertence of the Government's translator or draftsman, was included as part of the despatch and brought with the quotation therein. Evidently both the jury and the trial judge failed to examine the German original.

2. One of the publications for which the news editor was convicted on the first count because of an omission from the item copied:

"Ready for the Fray?

"St. Petersburg, September 7th.—The Russian Baltic Fleet will defend Kronstadt and Reval, and through them the Russian capital itself. The commanders of the two fortresses have made this report to the provisional government. A large part of the Baltic fleet was under control of the Maximalists, who hitherto have opposed Kerensky. The commanders of Sveaborg and Helsingfors have also telegraphed their assurance to the government that the Baltic fleet has expressed its willingness to offer desperate resistance, in case the Germans should make a naval attack upon the strongholds between Riga and the capital.

"Investigation of the Fall of Riga.

"The Russians devastated the land through which

they retreated from Riga, in order to impede the German advance. Roads were broken up, bridges destroyed and provisions burned. A special commission has been set up by Premier Kerensky to investigate the fall of Riga. As far as reports have so far been permitted to appear, it is established that only two regiments gave up their positions without fighting, and the others offered the attacking Germans bold resistance. The retreat was carried out in an orderly manner, in spite of pursuit by the German armies. The first of these, advancing along the coast in the region of Dunaburg, is apparently endeavoring to reach Berna, on the Gulf of Riga. The second German army is pressing along the Pskoff road to execute a turning movement, while the third is energetically pushing in a northeasterly direction against Ostroff. The Germans are showing signs of nervousness in advancing through this marshy lake-strewn country, which are increased by the Russian resistance."

The falsification here is said to consist in the omission from the end of the first paragraph of the following sentence which appeared in the paper from which the item was taken: "From this it can be concluded that the fall of Riga has united the opposing political factions in Russia."

3. The publication for which the news editor was convicted on the sixth count because of the change of a word in the item copied:

"War of the Rich.

"Senator La Follette Thinks They Ought Not to Make a Cent of Profit.

"Hot Fight in the Senate Over Increased Taxation of War Profits.

"Washington, August 21.—Taxation of riches in such a measure that the burdens of the cost of the war will be taken from the shoulders of the poor man was recommended today in the Senate by Senator La Follette in a long speech. He declared that the proposed two billion

dollar bill as drawn up in the Senate's Committee on Financial Affairs is impractical because it covers less than seventeen per cent. of the war expenses of the first year and from this would result the necessity of issuing bonds for billions of dollars. Bonds, however, mean the same as an increased cost of living, and one of the consequences would be that next winter bread riots could be expected in the big cities. He recommended the acceptance of amendments by which further taxation of large incomes and big war profits would be effected, which would bring the total amount of the bill to about $3,500,000,000.

"Senator La Follette declared that wealth had never, in any war, offered itself on the altar of patriotism. He attacked the proposed issue of bonds and prophesied that the Liberty Bonds would eventually find their way into the hands of the rich, if they had not already done so. 'But,' he continued, 'this is not all, for war, and principally the sale of bonds, leads inevitably to inflation. This raises prices and through that the cost of living for the great mass of people is raised. Reason and experience teach us that the policy of financing a war for the most part by borrowing the necessary money, is in itself one of the worst financial burdens that war imposes upon men. But wealth is always a powerful factor in the Government. It fattens on war loans and war contracts as well as on speculation, which is not wanting in time of war. Upon these grounds the rich are always in favor of war, and when they have succeeded in bringing on a war, they are often powerful enough with ministers of war and parliaments and congresses to force the maximum of loans and to reduce taxation to a minimum by every possible intrigue and argument.

"'And that is the case with us in this war. Within thirty days after the declaration of war wealth had precipitated us into bond issues of unheard of size. Morgan came to the city, the press urged it, the administration

commanded it, and Congress authorized the issue of five billions of untaxable Government bonds and two billions of interest bearing Treasury notes.'

"Senator La Follette attacked the program of the administration under which a new tax measure will be introduced next winter. 'Of what use is the postponement?' he asked, 'Whose interest is served if taxes on incomes and war profits are kept down and the masses are delivered over to the money lenders as security for an enormous and wickedly disproportionate issue of bonds?' He insisted that the policy of financing the war should at once be decided upon.

"'To-day the way is clear,' he explained, 'hesitation to provide now for heavy taxes would not be a mistake, it would be something worse.'

"Senator La Follette reviewed the financial history of previous American wars. 'We must not repeat such mistakes,' he said, 'it would be blind madness if we did not learn from the mistakes that were made in previous wars. A mistake that we make now may be fatal. It would certainly cost us untold millions of dollars and thousands upon thousands of lives, as by it we would prolong the war unnecessarily.

"'As long as one man can be found who makes war profits, I am in favor of taking away in taxes such part of those profits as the Government requires, and the Government needs the whole of such profits before adding a penny to the taxation of people who are already staggering under heavy burdens by reason of the higher prices occasioned by the war. This may be a new principle in war financing, but it is the least that one can do for the mass of the people, and it is considerably less than simple justice would demand for them.

"'The great mass of the people bear the costs of war, although they may not be directly taxed one dollar. The great mass of the people pay in higher prices and pro-

longed hours of labor. They pay in service, not alone on the battle field, but wherever men and women work hard all day long. But more than all this, they pay the cost of war with their blood, and their lives, and what is the greatest sacrifice of all, with the blood and lives of their loved ones.

"'If bread lines are a familiar sight in every city in the land, as they undoubtedly will be if the present prices of the most necessary supplies for living hold firm during the coming winter, if cold and hunger become daily guests with thousands of families, who, until now, have only known comfort, a condition which is certain to come about during the coming winter months, if no help against the present level of prices can be found, then it is my opinion that the members of this Congress will do little enough if they come to realize that they are adding to the privations and pains of the mass of the people if they hesitate to place even a fairly moderate portion of the financial burden upon the rich.'"

Falsification is charged solely because the word "Brotriots" (translated as "bread-riots") was used in the twelfth line of the article instead of the word "Brotreihen" (translated as "breadlines").

The act punishes the wilful making and conveying of "false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." Congress sought thereby to protect the American people from being wilfully misled to the detriment of their cause by one actuated by the intention to further the cause of the enemy. Wilfully untrue statements which might mislead the people as to the financial condition of the Government and thereby embarrass it; as to the adequacy of the preparations for war or the support of the forces; as to the sufficiency of the food supply; or wilfully untrue statements or reports of military operations

which might mislead public opinion as to the competency of the army or navy or its leaders (See "The Relation Between the Army and the Press in War Time," War College Publication, 1916); or wilfully untrue statements or reports which might mislead officials in the execution of the law, or military authorities in the disposition of the forces. Such is the kind of false statement and the only kind which, under any rational construction, is made criminal by the act. Could the military and naval forces of the United States conceivably have been interfered with or the success of the enemy conceivably have been promoted by any of the three publications set forth above? Surely, neither the addition to the first, nor the omission from the second constituted the making of a false statement or report. The mistranslation of "breadlines" in one passage of the third, if it can be deemed a false report, obviously could not have promoted the success of our enemies. The other publications set out in the indictment were likewise impotent to produce the evil against which the statute aimed.

Darkow, the news editor, and Werner, the editor, were each sentenced to five years in the penitentiary; Lemke, the business manager, to two years. The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance. To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive treason.[1] To hold that such harmless addi-

[1] The presiding judge in charging the jury said of the act: " . . . its general purpose is to protect . . . our military strength and efficiency, to protect ourselves against anything which would promote

tions to or omissions from news items, and such impotent expressions of editorial opinion, as were shown here, can afford the basis even of a prosecution will doubtless discourage criticism of the policies of the Government. To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities. Nor will this grave danger end with the pass-

---

the success of our enemies by undermining our morale, lessening our will to win, or, as it is commonly expressed, our will to conquer . . . creating divisions among our people. . . .

"These acts which are prohibited are treasonable in the sense in which that word is used, in the common speech of the people. Indeed, they may constitute legal treason as defined in some jurisdictions, but they are not treason against the United States, for the simple reason that there is a provision in our Constitution, (which, of course, the Acts of Congress follow), that treason against the United States,—you will observe that it does not say 'treason generally,' but treason against the United States shall consist only in making war upon them, or in adhering to their enemies, giving them aid and comfort, and there is another provision to the effect that no person can be convicted of the crime of treason unless there are two witnesses to the same overt act, making, as you will see, it perfectly clear that mere words, whether published or not, as long as they are mere words, do not constitute the crime of treason, but they must be words uttered and published under such circumstances as to become deeds or acts in themselves, as 'words' may be. So that words, unless there is something to which they may attach and unless the direct, natural, and reasonably to be expected consequences of them would be to give aid and comfort to the enemy, do not constitute the crime of treason. Every man will observe, however, that even mere words may be fraught with consequences which, although too remote to constitute the crime of treason, may nevertheless be words which are fraught with most awful consequences . . . and, therefore, it is properly within the province of the law to prohibit . . . and make it a crime even to utter them. In substance, that is what this law does. Congress could not call some mere words treason, because the Constitution prohibits it, but there is no constitutional limitation on the power of Congress to declare those things a crime against the law which Congress has done in this act. . . ."

ing of the war. The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.

MR. JUSTICE CLARKE, dissenting.

On a single indictment, containing nine counts, five men, Peter Schaefer, Paul Vogel, Louis Werner, Martin Darkow and Herman Lemke, were convicted and sentenced to the penitentiary for printing seventeen articles in a German language newspaper, published at Philadelphia, between June 24 and September 17, 1917.

Schaefer was president and Vogel was treasurer of the company which published the paper, but their entire time was given to the service of labor unions, which had loaned money to the company, and they were given these official positions for the purpose of enabling them to keep informed as to its business progress and the disposition of its earnings.

All the members of the court agree that there was no substantial evidence that Schaefer or Vogel were in any respect responsible for the publications complained of, and that as to them the judgment must be reversed.

In this conclusion I cordially concur, but I go further and am clear that a similar reversal should be entered as to Herman Lemke, who was convicted, as Schaefer and Vogel were, on only one of the nine counts of the indictment.

Lemke was given the sounding title of "business manager," but, as a matter of fact, he was a mere bookkeeper,

of a small business, with very limited authority. The newspaper led a precarious financial existence and Lemke's duties were restricted to making out and collecting bills for advertising and circulation, to paying some bills and to turning over the remainder of the money, if any remained, to the treasurer, Vogel. Lemke himself and two or three other witnesses testified that he had nothing whatever to do with deciding what should be published in the newspaper, and that he never wrote for it excepting that when a reporter was ill he occasionally reported a concert. There was no evidence to the contrary.

On such a record it is very clear that a man holding such a position as Lemke held, could not, and did not, have anything to do with determining what should be published in the paper. He had no more to do with the policy of the paper than a porter would have with determining the policy of a railroad company. In my judgment the failure of proof as to Lemke was as complete as it was as to Schaefer and Vogel and I cannot share in permitting him to be imprisoned in the penitentiary for a year for publications which he was powerless either to authorize or prevent.

A different case is made against Werner and Darkow. Werner was a writer of political editorials for the paper, and Darkow was the news editor. Werner was found guilty on four counts and not guilty on five. Darkow was found guilty on five counts and not guilty on four.

Two of the articles written, or caused to be published, by Werner, and one, or perhaps two, of those caused to be published by Darkow, were of a character such that they might have been fairly convicted of violating the act under which they were indicted, but none of these articles was included in count one, and only one of them was included in count nine, and with respect to this one article in count nine Werner was found not guilty when charged with its publication in count three. The charge of the court did

not distinguish between these really offending publications and the many innocent ones the publication of which was charged to be criminal, with the result, that it failed to give such direction to the deliberations of the jury as I think every person accused of crime is entitled to have given.

The denial of separate motions to instruct the jury to render a verdict of not guilty as to Werner and Darkow on the first and ninth counts seems to me to constitute error so fundamental and pervasive as to render the entire trial unfair and unjust, to a degree which requires the granting of a new trial to each of them.

I shall state my reasons for this conclusion as briefly as I may.

The first count charges that the defendants did "knowingly, wilfully and unlawfully make and convey false reports and statements, with intent to promote the success of the enemies of the United States, to wit, the said Imperial German Government."

The indictment and the record in general make it very plain that the District Attorney, in framing the indictment, and during the trial, believed that the statute prohibiting the making and conveying of a false report and statement would be violated by the publication of any article which had been published elsewhere if, in the publication, it was changed, either by addition or omission, and this without any proof that the original publication was true and the second publication false, and seemingly without regard to whether or not the publication had any tendency to promote the success of the enemy. The trial court accepted this construction of the statute and submitted the first count to the jury on this theory of the law.

I cannot doubt that this was gravely erroneous, for the real purpose of the statute is to punish, published, not suppressed, reports and statements, whether original or

copies, made with the intent to promote the success, and which were of a nature reasonably likely to promote the success, of the enemy of the United States—by discouraging our own people or encouraging the enemy.

The first of the thirteen false reports which it is charged in the first count were published, is typical of the others and will sufficiently explain my position.

It purported to be a despatch from London and translated reads as follows:

"The Crisis.

"Is Advancing in Russia with Rapid Strides. The Coalition Government Will Probably Not Last Long.

"Its Position in Foreign Affairs Is Condemned.

"London, June 23.—The Petrograd correspondent of the Chronicle telegraphs today that a great crisis is in progress in Russia. (By that he means apparently that the unstable and weak coalition government will soon be got rid of. It seems to obey unwillingly the instructions of the Workmen's and Soldiers' Council to request the allies to revise their war aims. The workmen will not stand for this much longer. It is highly significant too that not a word has been reported for four days about the great general congress of the Workmen's and Soldiers' delegates; apparently because its behavior does not please the allies.)

"The correspondent of the Chronicle quotes an extract from Maxim Gorky's newspaper 'New Life' which says that people all over the world are to understand that Russia rejects the aggressive war aims of the allies. The correspondent sees a sign in this that the socialists of Russia will not wait much longer."

Obviously there is nothing in this, as published, which could either discourage Americans or encourage the German enemy, and the indictment does not claim that there is. That which the indictment charges makes the publication criminally false is that there was omitted from it "a

proposal by Maxim Gorky that Russia wage a separate war against Germany." Thus the charge is that the crime consisted not in publishing something which tended to encourage German enemies, but in omitting to publish something which it is conceived might have discouraged them. It is not charged that what was printed was harmful but that something which was unfavorable to Germany was not published.

This is characteristic of all but two of the thirteen articles in the first count, and to these, additions were made so inconsequential as in my judgment not to deserve notice.

It seems to me very clear that the statute could not be violated by publishing reports and statements harmless in themselves and which were not shown to be false, merely because they had been published in a different form in another paper,—and this is the extent to which the proof in this case goes as to all of the publications complained of in the first count. Without more discussion, I am so clear that the requested instruction for the defendants Werner and Darkow as to the first count should have been granted, that I think the refusal of it entitles them to a new trial.

The ninth count consists of a charge of conspiracy on the part of the entire five defendants to wilfully make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States; with wilfully causing and attempting to cause insubordination, disloyalty and mutiny in the military and naval forces of the United States, and with wilfully obstructing the recruiting and enlisting service of the United States by the publication of various articles referred to, but not quoted, in the indictment. With a single exception these articles are the same as those incorporated in the first count and this exception purported to be a despatch from the Hague, giving the

reasons for the unrest in Germany, from which it is charged there was omitted a statement that one of the reasons for such unrest was the failure of the submarine campaign carried on by the German Government. Even in this ninth count it is not charged that the publications as actually made were harmful but it proceeds, as does the first count, upon the implication that they might have been more discouraging than they were to the German enemy if the omitted statements had been incorporated into them, and that for this reason they violated the statute. In other words, it comes to this, that the ninth count charges as criminal, not a conspiracy to publish the articles complained of, which were innocent, but a conspiracy to suppress certain statements which were published in other newspapers in connection with or as a part of the published articles and which it is argued might have been harmful to the German cause if they had been published. It is impossible for me to think that the statute could be violated in any such manner.

It was clearly proved that the newspaper was so poor financially that it was not able to have telegraphic service of any character and, morning paper that it was, it filled its news columns with clippings from the evening papers of the night before and from early editions of the morning papers when it could procure them before its hour for going to press. It did not print nearly as many columns as the newspapers from which it obtained its news, and for this reason it was necessarily obliged to cut and condense, both headlines and the body of the articles. In several of the instances complained of these exigencies of publication plainly caused the omissions complained of.

Convinced as I am that the requested instructions to the jury that Werner and Darkow could not be found guilty on the first and ninth counts should have been given and that the charge of the court was so utterly unadapted to the case as it would have been if they had been

given, as to be valueless or worse as a direction to the jury, I think that the least that can be done, in the interest of the orderly administration of justice, is to grant a new trial and let a new jury, properly instructed, pass upon the case.

I cannot see, as my associates seem to see, that the disposition of this case involves a great peril either to the maintenance of law and order and governmental authority on the one hand, or to the freedom of the press on the other. To me it seems simply a case of flagrant mistrial, likely to result in disgrace and great injustice, probably in life imprisonment for two old men, because this court hesitates to exercise the power, which it undoubtedly possesses, to correct, in this calmer time, errors of law which would not have been committed but for the stress and strain of feeling prevailing in the early months of the late deplorable war.

CARBON STEEL COMPANY *v.* LEWELLYN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA.

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

No. 535. Argued January 12, 1920.—Decided March 1, 1920.

The rule of strict construction will not be pressed so far as to reduce a taxing statute to a practical nullity by permitting easy evasion. P. 505.

The Munitions Manufacturer's Tax payable under the Act of September 8, 1916, c. 463, § 301, 39 Stat. 780, by persons "manufacturing" shells, etc., and computed as an excise of 12½ per cent. upon the net profits from the sale or disposition of such articles "manufactured"

within the United States, applies to the profits derived from sales of shells under contract to the British Government by one who performed the manufacture in its early stages only and had the subsequent operations performed by subcontractors, furnishing them the steel so partly manufactured, with some of the other materials, retaining ownership of materials when furnished, and control of the operations, and owning the shells when completed. P. 503.

This liability is not affected by the fact that the subcontractors paid a similar tax on their profits. P. 506.

258 Fed. Rep. 533, affirmed.

THE case is stated in the opinion.

Mr. H. V. Blaxter, with whom *Mr. Frederick DeC. Faust* and *Mr. Henry O'Neill* were on the brief, for petitioner.

Mr. Assistant Attorney General Frierson for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petitioner brought this action against Lewellyn who is Collector of Internal Revenue for the 23rd District of Pennsylvania, to recover the sum of $271,062.62 with interest from December 29, 1917, paid to him, under a demand made by him, as Collector, for an excise tax assessed under § 301 of Title III of the Act of September 8, 1916, c. 463, 39 Stat. 780, known as Munitions Manufacturer's Tax.

Petitioner made a verified return under protest, reciting its belief that the tax should be abated for the following reasons: (1) Petitioner did not manufacture munitions; (2) the munitions taxed were manufactured by certain independent contractors; (3) the profit derived by petitioner was from the sale of the munitions, not from their manufacture.

The tax was not abated and petitioner paid it under protest.

The facts are stipulated. Petitioner, through its president, who went to England, entered into three contracts with the British Government dated, respectively, January 26, September 29, and October 7, 1915, for the manufacture and delivery f. a. s. New York, of a certain number of high explosive shells.

The work to complete the shells consisted of the following operations: (1) Obtaining suitable steel in bar form; (2) cutting or breaking the bars to proper length; (3) converting the bars or slugs into a hollow shell forging by means of a hydraulic press; (4) turning the shell upon a lathe to exact dimensions; (5) closing in one end of the forging to form the nose of the shell; (6) drilling out the case of the shell and inserting a base plate; (7) threading the nose of the shell and inserting the nose bushing and inserting in the nose bushing a wooden plug to protect the thread thereof; (8) cutting a groove around the circumference of the shell and inserting therein a copper driving band and turning the band to required dimensions; (9) varnishing, greasing and crating the completed shell.

Petitioner was not equipped, nor did it have facilities, for doing any of the described work except the manufacture of steel suitable for the shells in bar form, and, therefore, to procure the manufacture of the shells it did certain work and entered into numerous contracts in relation to the various steps in making a completed shell.

These steps are not necessary to give. The question in the case is not a broad one and all of the details of the stipulation are not necessary to its decision. The essential elements of fact we have given and whether they bring petitioner within the Munitions Tax Act we shall proceed to consider.

The act is as follows: "Sec. 301. (1) That every person manufacturing . . . ; (c) projectiles, shells, or torpedoes of any kind . . . ; or (f) any part of any of the articles mentioned in . . . (c) . . . ; shall pay

for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: . . ."

The act is explicit in its declaration; perplexity and controversy come over its application. One must be a "person manufacturing" to incur the tax, but who is to be regarded as such person in the sense of the act? or to put it another way, when is "manufacturing" (the word of the act) done, and when is "manufactured" (the word of the act) attained? In elucidation of the words, the specifications enumerate nine operations to produce a shell, that is a completed shell (except for explosive charge and detonating device), such as petitioner contracted to deliver to the British Government. And all of the operations are asserted to be necessary and all must be performed seemingly by the same person in order that he may be designated as a "person manufacturing." We put aside for the purpose of testing the contention the provision of the act making a person manufacturing "any part of any of the articles mentioned" subject to "a tax."

The contention reduces the act to a practical nullity on account of the ease of its evasion. Besides, petitioner minimizes what it did. It was the contractor for the delivery of shells, made the profits on them and the profits necessarily reimbursed all expenditures on account of the shells. It was such profits that the act was intended to reach—profits made out of the war and taxed to defray the expense of the war. Or, as expressed by the Court of Appeals, Congress "felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation." Petitioner, it is true, used the services of others, but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. And petitioner kept control

throughout—never took its hands off, was at pains to express the fact, and retained its ownership of all of the materials furnished by it, and the completed shell belonged to it until delivered to the British Government. And further, the steel furnished by it was advanced above a crude state—advanced to slugs. The nicking by an outside company we consider of no consequence, for after nicking they were re-delivered to petitioner and by it "broken or separated" into slugs.

And petitioner supplies its respective subcontractors with other materials—"transit plugs," "fixing screws," and "copper tubing." It is, of course, the contention of petitioner that this was furnishing, not *manufacturing*, and that the literal meaning of words can be insisted on in resistance to a taxing statute. We recognize the rule of construction but it cannot be carried to reduce the statute to empty declarations. And, as we have already said, petitioner's contention would so reduce it. How universal must the manufacturing be? Will the purchase of an elemental part destroy it? And how subsidiary must the work of the subcontractor be not to relieve the contractor—take from him the character of a "person manufacturing"? And such is the tangle of inquiries we encounter when we undertake to distinguish between what a contractor to deliver a thing does himself and what he does through others as subsidiary to his obligation.

It is after all but a question of the kind or degree of agency—the difference, to use counsel's words, between "servants and general agents" and "brokers, dealers, middlemen or factors." And this distinction between the agents counsel deems important and expresses it another way as follows: "'Every person manufacturing' means the person doing the actual work individually, or through servants or general agents, and that the ownership of the material worked upon does not alter this meaning of the word."

We are unable to assent to this meaning of the word. It takes from the act a great deal of utility and makes it miss its purpose. Of course it did not contemplate that a "person manufacturing" should use his own hands—it contemplated the use of other aid and instrumentalities, machinery, servants, and general agents, availing thereby of the world's division of labor; but it contemplated also the world's division of occupations, and, in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and, when availed of for profits, the latter could not thereby escape being taxed. And where, indeed, was the hardship of it? The tax was on profits and measured by them.

It is, however, alleged, and the stipulation shows, that the subcontracting companies paid a tax on their profits and profits were testified to be the difference between what was paid the subcontracting companies for the work and their cost in doing it. And it thus appears, it is urged, that petitioner has been taxed upon the theory that it manufactured the shells and the contracting companies "have been taxed for actually performing all the manufacturing necessary to complete the same shells."

But it is a sufficient answer to say that the tax here in issue is the tax on the profits of the petitioner, not on the profits of the subcontractors. The question whether such subcontractors were correctly assessed concerns them and not the petitioner who is resisting a tax on the profits actually made by it and none other.

We consider further discussion unnecessary.

Judgment affirmed.

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent.

WORTH BROTHERS COMPANY *v.* LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

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

No. 525. Argued January 8, 9, 1920.—Decided March 1, 1920.

Rough shell forgings, sold by their manufacturer to another having a contract to deliver completed shells to the French Government, are "parts" of shells, within the meaning of the Munitions Tax Act of September 8, 1916, c. 463, § 301, 39 Stat. 780, the profits from which are taxable under the act to the manufacturer of the forgings. P. 509.

258 Fed. Rep. 533, affirmed.

THE case is stated in the opinion.

Mr. A. H. Wintersteen, with whom *Mr. William Wallace, Jr.*, was on the brief, for petitioner.

Mr. Assistant Attorney General Frierson for respondent.

Mr. E. G. Curtis, by leave of court, filed a brief as *amicus curiæ*.

Mr. J. Sprigg McMahon, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ is directed to the judgment of the Circuit Court of Appeals affirming a judgment of the District Court for Lederer, to whom we shall refer as the Collector,

in an action by petitioner to recover from him the sum of $74,857.07 exacted as a tax under § 301 of the Munitions Manufactures Tax Act of September 8, 1916, 39 Stat. 780, and paid by petitioner under protest.

A detail of the imposition of the tax and the protest of its payment are unnecessary to give. The other facts were stipulated and it appears from the stipulation that during the taxable year 1916 petitioner made the steel for and did the forging on certain shell bodies under an order from the Midvale Steel Company, to enable the latter company to carry out a contract which it had with the Government of France for certain explosive shells. The steel was made and the forging done by petitioner in accordance with specifications required by the French Government, which specifications were attached to the order from the Midvale Steel Company to petitioner.

Inspectors employed by the French Government inspected the work done by petitioner, testing the steel and examining the forgings as they passed through petitioner's hands. "Up to the time when the blooms of steel were sliced partly through into billets, the right of inspection was exercised by the French Inspector-in-Chief, only whenever he desired to exercise it." Some forgings were rejected and those that were passed were so marked by the inspector. This was done in accordance with an understanding between petitioner and the Midvale Steel Company.

The profits, upon which the tax as claimed in this case was imposed, were derived solely from the sale of the above mentioned forgings.

The Munitions Tax Act provides (§ 301, c. 463, 39 Stat. 781) "that every person manufacturing" certain articles and "shells" "or any part of the articles mentioned . . . shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net

profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

The question is the simple and direct one whether a shell forging under the stipulation and evidence is "any part" of a shell within the meaning of the law. The argument of petitioner, in support of a negative answer, is very diffuse, pressing considerations which we do not think are relevant.

A shell is a definite article, constituted of materials of a certain kind and quality, assembled and fitted and finished so as to be adequate for its destructive purposes. Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is), of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part? We use the negative as an antithetic word does not occur to us to express that something necessary to constitute a thing is not a part of it. Petitioner surmounts the difficulty by contending that the law by its words "any part" of any of the "shells," implies a substantially finished part, as related to the whole structure and to the purpose it is intended to subserve. "Otherwise," counsel say, "the word [part] loses all precision, and becomes equivalent to the words 'ingredient' or 'material composing or making up.'" And to sustain this view they take us to the dictionaries and to an enumeration of the processes to which the material must be subjected to make a forging, and those afterwards to prepare it for a shell. In this enumeration letters of the alphabet are used of which "A, B, C and H represent stages of development of the material prior to delivery" to the Midvale Company, and "D, E, F, G, I and K represent stages of development by Midvale after delivery to it." It is quite obvious of course, as counsel declare, that the forgings were "not *shells;* since a shell is a composite structure of several parts." But

counsel go farther and say that the forgings were "not *parts of shells* in any practical or legal sense, because their development was so far short—80%—of the point where they could be related to or combined with any other component of the shell structure, that they could not satisfy any fair meaning of the shell body unit as entering into the composite shell as a whole." We give counsel's words because we fear that by paraphrasing them we might not correctly represent their meaning and contention.

We reject the contention. Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law. Besides petitioner understates its work. It did not deliver raw material to the Midvale Company. Certain processes had been performed on the material giving it a shape adapted to its destination. It was made cylindrical, hollow, with one end closed. It was rough, it is true, but an advance upon the raw material.

The progressive processes need not be enumerated. The lower courts have enumerated them, and the Court of Appeals describing them said that the "steps" six in all, were "progressive advances toward the chemical constituents, the shape, and the dimension required by, and essential to, the manufacture of shells in compliance with the contract." And the court distinguished the effect of the steps. With the fourth, it was said, the inspection by the French Government began; the fifth took the fluid metal (the result of the second step) from the possibility of use for general commercial purposes and by a forging process restricted the steel to the field of use for shells. By the sixth step this forging "was drawn to a length, and to an inside and outside diameter, which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps, which, with the six" of

petitioner "were required . . . to complete the manufactured shell of the contract."

"Manifestly," as counsel for the Collector says, "the shell body was not completely manufactured by either of the companies which were engaged in its production" but "by the two acting together." And each therefore is liable for the profit it made, and judgment is

Affirmed.

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent.

FORGED STEEL WHEEL COMPANY *v.* LEWELLYN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA.

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

No. 526. Argued January 8, 9, 1920.—Decided March 1, 1920.

A rough shell forging is a "part" of a shell in the sense of the Munitions Tax Act. P. 512. *Worth Bros. Co.* v. *Lederer*, *ante*, 507; and *Carbon Steel Co.* v. *Lewellyn*, *ante*, 501, followed.

258 Fed. Rep. 533, affirmed.

THE case is stated in the opinion.

Mr. George B. Gordon and *Mr. George Sutherland*, with whom *Mr. William Watson Smith*, *Mr. James McKirdy* and *Mr. S. G. Nolin* were on the brief, for petitioner.

Mr. Assistant Attorney General Frierson for respondent.

Mr. E. G. Curtis, by leave of court, filed a brief as *amicus curiæ*.

Mr. J. Sprigg McMahon, by leave of court, filed a brief as *amicus curiæ*.

Mr. Justice McKenna delivered the opinion of the court.

Action brought by petitioner against Lewellyn, Collector of Internal Revenue, in the District Court for the Western District of Pennsylvania, to recover the sum of $246,920.18 exacted from petitioner as a tax under the Munitions Tax Act and paid under protest. Interest was also prayed from November 27, 1917.

The tax was exacted upon the ground (and it was so alleged) that that sum was the tax on the amount of the net profits received by petitioner from the manufacture and sale of certain steel forgings used in the manufacture of shells.

The circumstances said to show the tax to have been illegally exacted were detailed, of which there was denial by the Collector; and, upon issues thus formed, the case was tried to a jury which, in submission to the instructions of the court, returned a verdict for petitioner for the amount prayed. Judgment upon the verdict for the sum of $263,258.06 was reversed by the Circuit Court of Appeals.

The Court of Appeals considered in one opinion this case and *Carbon Steel Co.* v. *Lewellyn*, *ante*, 501, and *Worth Bros. Co.* v. *Lederer*, *ante*, 507. The last two cases we have just decided, and we can immediately say, that if this case does not differ from them in its facts, it does not in principle. It will turn as they did upon the construction of § 301 of the Munitions Tax Act (39 Stat. 756, 780) which imposes upon "every person manufacturing . . . shells . . . ,

or any part" [italics ours] of them, a tax of 12½% for each taxable year "upon the entire net profits actually received or accrued" for such years from the sale or disposition of the shells manufactured in the United States. The contention in the *Worth Case* was explicitly as it is in this case, that the words "any part" as used in the act "means a substantially finished part;" a part, as there said, which has relation "to the whole structure and to the purpose it is intended to subserve." Here, it is said, "The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed."

The reasoning of the *Worth Case* covers, therefore, the contention here and rejects it, if, as we have said, the facts be the same, and, we think, they are. There are some circumstances of complexity but they are easily resolved and do not disturb the principle of decision. Of the facts the Court of Appeals said:

"From the proofs it appears the British Government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement, and inspection of the said government. To fulfill such shell contract the contractor made subcontracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor rough steel shell forgings of the character provided in the contract, as to chemical constituents, tensile strength, size, shape, etc. To fulfill its contract, the Forged Steel Wheel Company either made, had made, or bought in the market the grade of steel required. This steel was of a common commercial type known as rounds. These rounds it nicked and broke into 18-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within two inches of the other; by the second, the round was lengthened by draw-

ing it through three successive rings of a hydraulic press. The output of the Forged Steel Wheel Company's work was a hollow steel body or shell form, of suitable composition, shape, and length, from which to make, to the British Government standards, the high explosive projectiles contracted for. The weight of such shell forms was about 170 pounds. To make this shell form suitable for use as a shell, the contractor to whom the Forged Steel Wheel Company then delivered it was required to dress, bore, and machine it down to 77 pounds. This required some 27 distinct and separate processes."

The court after further comment on the facts, and consideration of the opinion of the District Court and its reasoning, and distinguishing the cases that influenced the District Court, said: "But in the excise law in question Congress is dealing with the imposing of taxes as the main object, and with the work done as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial." And again, "the crucial question is not the quantum of the manufacture measured by steps, but the fact of manufacture resulting in profits."

Replying to the contention that the purpose of Congress was not to tax anyone but the manufacturer of a completed shell or the maker of a completed part of a shell, and that the forging of the Wheel Company was not a completed part of a shell, the Court of Appeals said, "It is manifest that, standing alone, the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words 'any part' to the restricted, specific, qualified term 'any completed part.'"

The Court of Appeals also considered the rule of construction that statutes levying taxes should not be extended by implication beyond the clear import of their language and the cases from which the rule was deduced. The rule was conceded, its application to the present controversy was denied.

For the sake of brevity we consider only the cited decisions of this court. They are *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, 218; *Worthington* v. *Robbins*, 139 U. S. 337; *Anheuser-Busch Association* v. *United States*, 207 U. S. 556. These were customs cases and the statutes were given an interpretation on account of their purpose. They are besides not in point. In the first one the statute had the words "wholly manufactured," and, giving effect to them, it was decided that boxes made from shooks imported from Canada, though nailed together and the sides of the boxes thus formed trimmed in the United States, were not boxes "wholly manufactured" in the United States and entitled, upon being exported, to a drawback under a statute which allowed a drawback on articles "wholly manufactured of materials imported." The *Worthington Case* was cited. In that case a duty was exacted upon "white hard enamel" under a statute which imposed a duty of 25% upon "watches, watch cases, watch movements, parts of watches and watch materials." This on the contention of the Government that the enamel fell under the head of "watch materials." The contention was rejected it being conceded that the enamel was used for many other purposes than for watch faces. In the *Anheuser-Busch Case* a claim of drawback upon corks exported with bottled beer was rejected. The ground of the claim was that the corks were subjected to a special treatment to be fit for use and hence it was contended that they should be regarded as "imported materials . . . used in the manufacture of articles manufactured or produced in the United States," that is the bottled beer. We replied "a cork put through the claimant's process is still a cork." The cases, therefore, do not sustain the contention for which they are cited.

Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court and not remanding the case for a new trial. There

was no objection made to that action and no request for a remand of the case. And besides there was nothing to retry. The case involves only propositions of law.

Judgment affirmed.

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent.

DUNBAR *v.* CITY OF NEW YORK.

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

No. 160. Argued January 21, 1920.—Decided March 1, 1920.

The owner of a building in New York City demised it to tenants who in breach of their covenant failed to pay the city's water-charge based on the measured amount of water they consumed. *Held*, that the imposing of a lien for the charge thus incurred by the tenants, under charter provisions operative when the lease was made, did not deprive the owner of property without due process of law. P. 517.

Constitutional rights cannot be based on error in prior court decisions. P. 518.

177 App. Div. 647, affirmed.

THE case is stated in the opinion.

Mr. Harold G. Aron, with whom *Mr. Henry M. Wise* was on the brief, for plaintiff in error.

Mr. William Herbert King, with whom *Mr. William P. Burr* and *Mr. Charles E. Lalanne* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error, to whom we shall refer as plaintiff, is the owner of certain real property and a building thereon

in the City of New York which she leased to William Hills and William Hills, Jr., copartners doing business under the style of William Hills, Jr. The lessee covenanted to pay the charges for water which should be assessed against or imposed upon the building during the lease, and if not so paid it should be added to the rent then due or to become due.

The copartnership was subsequently adjudged bankrupt and at the time of the petition was indebted to the city in the sum of $379.89 for water supplied as measured by two meters which had been installed in the property.

The city proved no claim in bankruptcy and a motion by plaintiff for an order directing the trustee to pay the water charges as a tax entitled to preference under the Bankruptcy Act was denied on the ground that they were not a tax.

The plaintiff then brought this action to cancel the charge as a lien upon the property and prayed an injunction against its enforcement.

The contention against the charge of the city and the lien it asserts is that they are in violation of § 1 of the Fourteenth Amendment of the Constitution of the United States and because they deprive plaintiff of property without due process of law.

Plaintiff's argument is somewhat difficult to state briefly. It commences by declaring that the question presented was left open in *Provident Institution* v. *Jersey City*, 113 U. S. 506, which sustained the postponement of mortgages to the lien of water rents because it was said in that case that the complainant in the case knew what the law was when the mortgages were taken, and therefore "its own voluntary act, its own consent," was "an element in the transaction."

Counsel assumes that the case presented an instance of an express consent. In that counsel is mistaken. The consent was implied from the fact that the law imposing

the water rents preceded the mortgages. And so in the water charge in controversy, it was imposed and made a lien on plaintiff's property by the charter of the city and therefore the Supreme Court at the first instance and afterwards in Appellate Division, and we may assume the Court of Appeals, decided that the consent of plaintiff could be implied, and any other conclusion would have been impossible. A city without water would be a desolate place and if plaintiff's property was in such situation it would partake of the desolation. And as a supply of water is necessary it is only an ordinary and legal exertion of government to provide means for its compulsory compensation.

It is of no consequence, therefore, at whose request the meters were installed in the property. The meters as observed by the Appellate Division were "not the instrumentalities for furnishing the water," they only registered its consumption. And besides, the lease made by plaintiff contemplated the use of water by the lessees and provided, as far as the lessor (plaintiff) could, for the payment of the charges for it. That her tenants defaulted in their obligation by reason of their bankruptcy was her misfortune but it did not relieve the property, which, we may say, would be unfit for human habitancy if it could not get water.

Counsel appear to rely on prior decisions of the court for relief of plaintiff, one in the Supreme Court, in which, it is said, a doubt was intimated whether a statute making a lessor liable for the personal debt of a lessee for water would be constitutional; and one in the Court of Appeals which, to quote counsel, "having decided in 1910, three years prior to the inception of the charges for which the lien is claimed, that the statute meant what the earlier case had suggested, the lien became unconstitutional" and plaintiff cannot be charged with an "implication of assent" to it. Without attempting an estimate of the

contention it is enough to say that the decision in this case and other cases are opposed to the contention, and that besides no constitutional rights can be based on the error of prior decisions.

Judgment affirmed.

THE SOUTH COAST.[1]

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

No. 68. Submitted November 10, 1919.—Decided March 1, 1920.

In purchasing necessary supplies, the master of a demised vessel, appointed by the owner but under the orders of the charterer, is the charterer's agent. P. 523.

A charter-party, demising a vessel, required the charterer to pay all expenses and save the owner harmless from liens, allowed the owner to retake the vessel should the charterer fail to discharge any liens within a stated period after they were imposed, and placed the master, appointed by the owner, under the charterer's orders. Applying the Act of June 23, 1910, *held* that the charter-party, if it did not grant, at least assumed authority in the charterer to bind the vessel for necessary supplies purchased by the master in a domestic port, and that the statutory presumption of such authority could not be dispelled by denials and warnings from the owner to the supply man. *Id.*

247 Fed. Rep. 84, affirmed.

THE case is stated in the opinion.

Mr. Oliver Dibble for petitioner. *Mr. Marcel E. Cerf* and *Mr. C. H. Sooy* were on the briefs.

They relied largely on the following authorities, decided

[1] The docket title of this case is: *South Coast Steamship Company, claimant of the steamer "South Coast," etc.*, v. *J. C. Rudbach.*

before and since the Act of June 23, 1910, as sustaining the proposition that a charter-party which requires the charterer to furnish supplies to the ship withdraws from the master the power to order supplies for which the materialman, with knowledge of the terms of the charter-party, may assert a lien. *The Underwriter*, 119 Fed. Rep. 713; *The Francis J. O'Hara, Jr.*, 229 Fed. Rep. 312; *The Columbus* (1879), 5 Sawy. 487; *The William Cook* (1882), 12 Fed. Rep. 919; *The S. M. Whipple* (1881), 14 Fed. Rep. 354; *The Secret* (1879), 15 Fed. Rep. 480; *Stephenson* v. *The Francis* (1884), 21 Fed. Rep. 715; *The Cumberland* (1886), 30 Fed. Rep. 449; *The Ellen Holgate* (1887), 30 Fed. Rep. 125; *The International* (1887), 30 Fed. Rep. 375; *The Samuel Marshall* (1892), 49 Fed. Rep. 754; *The Samuel Marshall* (1893), 54 Fed. Rep. 396; *The Kate* (1896), 164 U. S. 458; *The Valencia* (1897), 165 U. S. 264; *The Alvira* (1894), 63 Fed. Rep. 144; *The Rosalie* (1895), 75 Fed. Rep. 29; *The H. C. Grady* (1898), 87 Fed. Rep. 232; *The Robert Dollar* (1902), 115 Fed. Rep. 218; *The North Pacific* (1900), 100 Fed. Rep. 490; *The George Farwell* (1900), 103 Fed. Rep. 882; *The Vigilant* (1907), 151 Fed. Rep. 747; *Northwestern Fuel Co.* v. *Dunkley-Williams Co.* (1909), 174 Fed. Rep. 121; *The City of Milford* (1912), 199 Fed. Rep. 956; *The Thomas W. Rodgers* (1912), 197 Fed. Rep. 772; *The Ha Ha* (1912), 195 Fed. Rep. 1013; *The J. Doherty* (1913), 207 Fed. Rep. 997; *The Malola* (1914), 214 Fed. Rep. 308; *The Oceana* (1916), 233 Fed. Rep. 139; *The Yankee* (1916), 233 Fed. Rep. 919; *The Oceana* (1917), 244 Fed. Rep. 80.

A shipowner's immunity from the necessity of paying the ship's bills relieves his ship from a like necessity. *The Sarah Cullen*, 45 Fed. Rep. 511; *The Iris*, 100 Fed. Rep. 104.

The provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted for supplies furnished the ship is not tantamount to a declara-

tion by the owner that such liens may be asserted. *The Oceana*, 244 Fed. Rep. 80; *Northwestern Fuel Co.* v. *Dunkley-Williams Co., supra; The City of Milford, supra; The Gen. J. A. Dumont*, 158 Fed. Rep. 312; *The Golden Rod*, 151 Fed. Rep. 6; *The Surprise*, 129 Fed. Rep. 873, 880.

By the terms of the charter-party and by virtue of the notice given libellant, the charterer and his masters and his agent were without authority to bind the vessel for the supplies. *The Sarah Cullen, supra; The Francis J. O'Hara, Jr., supra; The Surprise, supra; The New Brunswick*, 129 Fed. Rep. 893; *The J. Doherty, supra.*

The law applicable to this case was not altered by the Act of June 23, 1910. See opinion of the court below. Also *The Sinaloa*, 209 Fed. Rep. 287; *The Dredge A*, 217 Fed. Rep. 617; *The Yankee, supra.* There is a presumption that the legislature does not intend changes not clearly evinced.

"It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris*, and cannot be extended by construction, analogy or inference." *The James T. Furber*, 157 Fed. Rep. 126, 129; *Pratt* v. *Reed*, 19 How. 359; *The Lottawanna*, 21 Wall. 558; *The Aurora*, 194 Fed. Rep. 559; *The Yankee Blade*, 19 How. 82; *The Dixie*, 236 Fed. Rep. 607.

The statute specifically provides that there shall be no lien if the furnisher knew or could have ascertained by the exercise of reasonable diligence that, for any reason, the person ordering the supplies had no authority to bind the vessel therefor. The furnisher in the instant case had been warned that the owner and the charterer had agreed, either by the terms of the written charter-party or by some other contract, that the vessel should not be held. Before he furnished the goods he had been informed of this fact by the owner, the charterer and the charterer's agent. Notwithstanding the words "or for any other

reason," appearing in the statute, the learned District Judge limited the application of the statute to the terms of the charter-party.

Mr. S. Hasket Derby for respondent. *Mr. Ira S. Lillick* was on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel against the Steamer South Coast, belonging to the claimant, a California corporation, and registered in San Francisco, for necessary supplies furnished in San Pedro, California. The answer denies the authority of the master to bind the steamer. The bare vessel at the time was under charter to one Levick, the contract stipulating that Levick was to pay all charges and to save the owner harmless from all liens or expenses that it might be put to in consequence of such liens. There was also a provision that the owner might retake the vessel in case of failure of Levick to discharge within thirty days any debts which were liens upon it, and another for surrender of the vessel free of all liens upon Levick's failure to make certain payments. When the supplies were ordered representatives of the owner in San Pedro warned the libellant that the steamer was under charter and that he must not furnish the supplies on the credit of the vessel. He replied that he would not furnish them in any other way, but the reply does not affect the case because by the terms of the charter the master who ordered them, although appointed by the owner, was under the orders of Levick. It is agreed by both courts below that if the owner had power to prevent the attaching of a lien by its warning it had done so. Both courts however held that the charter gave the master power to create the lien. 233 Fed. Rep. 327. 247 Fed. Rep. 84. *S. C.* 159 C. C. A. 302.

519. Dissent.

By the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604, a maritime lien is given for such supplies and by § 3 a presumption is declared that a master appointed by a charterer has authority from the owner to procure them. It is true that the act goes on that nothing in it shall be considered to give a lien where the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, or for any other reason, the person ordering the necessaries was without authority to bind the vessel. But the authority of the owner to prohibit or to speak was displaced, so far as the charter went, by that conferred upon the charterers, who became owners *pro hac vice*, and therefore, unless the charter excluded the master's power, the owner could not forbid its use. The charter-party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

Decree affirmed.

Mr. Justice McKenna, Mr. Justice Pitney and Mr. Justice Clarke dissent.

BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASSACHUSETTS, *v.* DRESSER, ADMINISTRATOR OF DRESSER.

DRESSER, ADMINISTRATOR OF DRESSER, *v.* BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASSACHUSETTS.

BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASSACHUSETTS, *v.* DEAN, EXECUTOR OF GALE, ET AL.

BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASSACHUSETTS, *v.* BUNKER ET AL., ADMINISTRATORS, ETC., OF RICHARDSON.

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

Nos. 155–158. Argued January 19, 20, 1920.—Decided March 1, 1920.

The degree of care required of directors of a national bank depends upon the subject to which it is to be applied, and each case is to be determined in view of all the circumstances. P. 529. *Briggs* v. *Spaulding*, 141 U. S. 132.

The bookkeeper of a national bank during a series of years defrauded it of an amount aggregating more than its capital and more than the normal average amount of its deposits, by a novel scheme involving exchanges of his personal checks on the bank for checks of an outsider on another bank, cashing of the checks outside, abstraction by the bookkeeper of his own checks when returned to his bank with clearing-house statements which were settled by the cashier, and falsification of the deposit ledger, kept by the bookkeeper, so as to conceal the transactions by false charges against deposits and false additions of the totals, diminishing the apparent liability to depositors. The fraud could have been discovered by the cashier if he had

himself taken and examined checks as they came from the clearing house or had carefully examined the multitudinous figures of the deposit ledger or called in and compared with it the depositors' pass-books, but he negligently over-trusted the bookkeeper and made his statements to the directors accordingly. Semi-annual examinations by national bank examiners revealed nothing wrong, and wrong was not suspected, the seeming shrinkage of deposits being attributed to innocent causes.

Held: (1) That directors, serving gratuitously, who were without knowledge of the cashier's negligence or of the possibility of such a fraud, and who had assurance from the president, as from the bank examiners' reports, were not negligent in accepting the cashier's statements of liabilities, like his statements of assets, which always were correct, and were not bound to inspect the depositors' ledger or call in the pass-books and compare them with it; although there was a by-law, nearly obsolete, calling for examinations by a committee semi-annually. P. 529.

(2) That the president, who, besides being a large depositor, was habitually at the bank, in control of its affairs, with immediate access to the depositors' ledger, and who had received certain warnings that the bookkeeper was living fast and dealing in stocks, was guilty of negligence in failing to make an examination. P. 530.

One who accepts the presidency of a national bank accepts responsibility for any losses the bank may suffer through his fault. P. 531.

Interest upon the amount of a decree for such damages may be awarded as a matter of discretion, not of right. *Id.*

Interest allowed in this case, from the date of the decree in the District Court until the date when the judgment creditor (receiver of the bank) interposed delay by appealing to this court. *Id.*

250 Fed. Rep. 525, modified and affirmed.

THE case is stated in the opinion.

Mr. Frank N. Nay, with whom *Mr. William A. Kneeland* was on the brief, for appellant in Nos. 155, 157, 158, and appellee in No. 156.

Mr. Robert G. Dodge, with whom *Mr. Robert M. Morse*, *Mr. Paul Dudley Dean*, *Mr. John B. Sullivan, Jr.*, and *Mr. Harold S. Davis* were on the brief, for appellant in No. 156 and appellees in Nos. 155, 157.

Mr. Clarence Alfred Bunker for appellees in No. 158.

Mr. Albert E. Pillsbury, with whom *Mr. Arthur P. French* was on the brief, for Barber, appellee in No. 157.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by the receiver of a national bank to charge its former president and directors with the loss of a great part of its assets through the thefts of an employee of the bank while they were in power. The case was sent to a master who found for the defendants; but the District Court entered a decree against all of them. 229 Fed. Rep. 772. The Circuit Court of Appeals reversed this decree, dismissed the bill as against all except the administrator of Edwin Dresser, the president, cut down the amount with which he was charged and refused to add interest from the date of the decree of the District Court. 250 Fed. Rep. 525. 162 C. C. A. 541. Dresser's administrator and the receiver both appeal, the latter contending that the decree of the District Court should be affirmed with interest and costs.

The bank was a little bank at Cambridge with a capital of $100,000 and average deposits of somewhere about $300,000. It had a cashier, a bookkeeper, a teller and a messenger. Before and during the time of the losses Dresser was its president and executive officer, a large stockholder, with an inactive deposit of from $35,000 to $50,000. From July, 1903, to the end, Frank L. Earl was cashier. Coleman, who made the trouble, entered the service of the bank as messenger in September, 1903. In January, 1904, he was promoted to be bookkeeper, being then not quite eighteen but having studied bookkeeping. In the previous August an auditor employed on the retirement of a cashier had reported that the daily balance book was very much behind, that it was impossible to

prove the deposits, and that a competent bookkeeper should be employed upon the work immediately. Coleman kept the deposit ledger and this was the work that fell into his hands. There was no cage in the bank, and in 1904 and 1905 there were some small shortages in the accounts of three successive tellers that were not accounted for, and the last of them, Cutting, was asked by Dresser to resign on that ground. Before doing so he told Dresser that someone had taken the money and that if he might be allowed to stay he would set a trap and catch the man, but Dresser did not care to do that and thought that there was nothing wrong. From Cutting's resignation on October 7, 1905, Coleman acted as paying and receiving teller, in addition to his other duty, until November, 1907. During this time there were no shortages disclosed in the teller's accounts. In May, 1906, Coleman took $2,000 cash from the vaults of the bank, but restored it the next morning. In November of the same year he began the thefts that come into question here. Perhaps in the beginning he took the money directly. But as he ceased to have charge of the cash in November, 1907, he invented another way. Having a small account at the bank, he would draw checks for the amount he wanted, exchange checks with a Boston broker, get cash for the broker's check, and, when his own check came to the bank through the clearing house, would abstract it from the envelope, enter the others on his book and conceal the difference by a charge to some other account or a false addition in the column of drafts or deposits in the depositors' ledger. He handed to the cashier only the slip from the clearing house that showed the totals. The cashier paid whatever appeared to be due and thus Coleman's checks were honored. So far as Coleman thought it necessary, in view of the absolute trust in him on the part of all concerned, he took care that his balances should agree with those in the cashier's book.

By May 1, 1907, Coleman had abstracted $17,000, concealing the fact by false additions in the column of total checks, and false balances in the deposit ledger. Then for the moment a safer concealment was effected by charging the whole to Dresser's account. Coleman adopted this method when a bank examiner was expected. Of course when the fraud was disguised by overcharging a depositor it could not be discovered except by calling in the pass-books, or taking all the deposit slips and comparing them with the depositors' ledger in detail. By November, 1907, the amount taken by Coleman was $30,100, and the charge on Dresser's account was $20,000. In 1908 the sum was raised from $33,000 to $49,671. In 1909 Coleman's activity began to increase. In January he took $6,829.26; in March, $10,833.73; in June, his previous stealings amounting to $83,390.94, he took $5,152.06; in July, $18,050; in August, $6,250; in September, $17,350; in October, $47,277.08; in November, $51,847; in December, $46,956.44; in January, 1910, $27,395.53; in February, $6,473.97; making a total of $310,143.02, when the bank closed on February 21, 1910. As a result of this the amount of the monthly deposits seemed to decline noticeably and the directors considered the matter in September, 1909, but concluded that the falling off was due in part to the springing up of rivals, whose deposits were increasing, but was parallel to a similar decrease in New York. An examination by a bank examiner in December, 1909, disclosed nothing wrong to him.

In this connection it should be mentioned that in the previous semi-annual examinations by national bank examiners nothing was discovered pointing to malfeasance. The cashier was honest and everybody believed that they could rely upon him, although in fact he relied too much upon Coleman, who also was unsuspected by all. If Earl had opened the envelopes from the clearing house, and had seen the checks, or had examined the deposit

ledger with any care he would have found out what was going on. The scrutiny of anyone accustomed to such details would have discovered the false additions and other indicia of fraud that were on the face of the book. But it may be doubted whether anything less than a continuous pursuit of the figures through pages would have done so except by a lucky chance.

The question of the liability of the directors in this case is the question whether they neglected their duty by accepting the cashier's statement of liabilities and failing to inspect the depositors' ledger. The statements of assets always were correct. A by-law that had been allowed to become obsolete or nearly so is invoked as establishing their own standard of conduct. By that a committee was to be appointed every six months "to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank is in a sound and solvent condition." Of course liabilities as well as assets must be known to know the condition and, as this case shows, peculations may be concealed as well by a false understatement of liabilities as by a false show of assets. But the former is not the direction in which fraud would have been looked for, especially on the part of one who at the time of his principal abstractions was not in contact with the funds. A debtor hardly expects to have his liability understated. Some animals must have given at least one exhibition of dangerous propensities before the owner can be held. This fraud was a novelty in the way of swindling a bank so far as the knowledge of any experience had reached Cambridge before 1910. We are not prepared to reverse the finding of the master and the Circuit Court of Appeals that the directors should not be held answerable for taking the cashier's statement of liabilities to be as correct as the

statement of assets always was. If he had not been negligent without their knowledge it would have been. Their confidence seemed warranted by the semi-annual examinations by the government examiner and they were encouraged in their belief that all was well by the president, whose responsibility, as executive officer; interest, as large stockholder and depositor; and knowledge, from long daily presence in the bank, were greater than theirs. They were not bound by virtue of the office gratuitously assumed by them to call in the pass-books and compare them with the ledger, and until the event showed the possibility they hardly could have seen that their failure to look at the ledger opened a way to fraud. See *Briggs* v. *Spaulding*, 141 U. S. 132; *Warner* v. *Penoyer*, 91 Fed. Rep. 587. We are not laying down general principles, however, but confine our decision to the circumstances of the particular case.

The position of the president is different. Practically he was the master of the situation. He was daily at the bank for hours, he had the deposit ledger in his hands at times and might have had it at any time. He had had hints and warnings in addition to those that we have mentioned, warnings that should not be magnified unduly, but still that taken with the auditor's report of 1903, the unexplained shortages, the suggestion of the teller, Cutting, in 1905, and the final seeming rapid decline in deposits, would have induced scrutiny but for an invincible repose upon the *status quo*. In 1908 one Fillmore learned that a package containing $150 left with the bank for safe keeping was not to be found, told Dresser of the loss, wrote to him that he could but conclude that the package had been destroyed or removed by someone connected with the bank, and in later conversation said that it was evident that there was a thief in the bank. He added that he would advise the president to look after Coleman, that he believed he was living at a pretty fast pace, and that he

had pretty good authority for thinking that he was supporting a woman. In the same year or the year before, Coleman, whose pay was never more than twelve dollars a week, set up an automobile, as was known to Dresser and commented on unfavorably, to him. There was also some evidence of notice to Dresser that Coleman was dealing in copper stocks. In 1909 came the great and inadequately explained seeming shrinkage in the deposits. No doubt plausible explanations of his conduct came from Coleman and the notice as to speculations may have been slight, but taking the whole story of the relations of the parties, we are not ready to say that the two courts below erred in finding that Dresser had been put upon his guard. However little the warnings may have pointed to the specific facts, had they been accepted they would have led to an examination of the depositors' ledger, a discovery of past and a prevention of future thefts.

We do not perceive any ground for applying to this case the limitations of liability *ex contractu* adverted to in *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540. In accepting the presidency Dresser must be taken to have contemplated responsibility for losses to the bank, whatever they were, if chargeable to his fault. Those that happened were chargeable to his fault, after he had warnings that should have led to steps that would have made fraud impossible, even though the precise form that the fraud would take hardly could have been foreseen. We accept with hesitation the date of December 1, 1908, as the beginning of Dresser's liability, but think it reasonable that interest should be charged against his estate upon the sum found by the Circuit Court of Appeals to be due. It is a question of discretion, not of right, *Lincoln* v. *Claflin*, 7 Wall. 132; *Drumm-Flato Commission Co.* v. *Edmisson*, 208 U. S. 534, 539, but to the extent that the decree of the District Court was affirmed, *Kneeland* v. *American Loan & Trust Co.*, 138 U. S. 509; *De La Rama*

v. *De La Rama*, 241 U. S. 154, 159, it seems to us just upon all the circumstances that it should run until the receiver interposed a delay by his appeal to this Court. *The Scotland*, 118 U. S. 507, 520. Upon this as upon the other points our decision is confined to the specific facts.

Decree modified by charging the estate of Dresser with interest from February 1, 1916, to June 1, 1918, upon the sum found to be due, and affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent, upon the ground that not only the administrator of the president of the bank but the other directors ought to be held liable to the extent to which they were held by the District Court, 229 Fed. Rep. 772.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE BRANDEIS took no part in the decision.

FORT SMITH LUMBER COMPANY *v.* STATE OF ARKANSAS EX REL. ARBUCKLE, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 394. Submitted January 5, 1920.—Decided March 1, 1920.

Double taxation is not forbidden by the Fourteenth Amendment. P. 533.

A State may use its taxing power to carry out a policy respecting corporations. *Id.*

It may discriminate between local corporations and individuals by making the former liable to be taxed on shares held in other local corporations, themselves fully taxed, and to be sued for the back taxes, while leaving individuals free from such liabilities. *Id.*

211 S. W. Rep. 662, affirmed.

THE case is stated in the opinion.

Mr. Joseph M. Hill and *Mr. Henry L. Fitzhugh* for plaintiff in error.

Mr. John D. Arbuckle, Attorney General of the State of Arkansas, and *Mr. George Vaughan* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the State of Arkansas against the plaintiff in error, a corporation of the State, to recover back taxes alleged to be due upon a proper valuation of its capital stock. The corporation owned stock in two other corporations of the State each of which paid full taxes and it contended that it was entitled to omit the value of such stock from the valuation of its own. This omission is the matter in dispute. The corporation defends on the ground that individuals are not taxed for such stock or subject to suit for back taxes, and that the taxation is double, setting up the Fourteenth Amendment. The case was heard on demurrer to the answer and agreed facts, and the statute levying the tax was sustained by the Supreme Court of the State.

The objection to the taxation as double may be laid on one side. That is a matter of state law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Tennessee* v. *Whitworth*, 117 U. S. 129, 136, 137; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 367, 368. We are of opinion that it also is within the power of a State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by them

in other domestic corporations, although unincorporated stockholders are exempt. A State may have a policy in taxation. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63. If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law.

The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State. See *New York State* v. *Barker*, 179 U. S. 279, 283. We have nothing to do with the supposed limitations upon the power of the state legislature in the constitution of the State. Those must be taken to be disposed of by the decisions of the State Court. As this case properly comes here by writ of error, an application for a writ of certiorari that was presented as a precaution will be denied.

Judgment affirmed.

MR. JUSTICE MCKENNA, MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.

DECISIONS PER CURIAM, FROM NOVEMBER 17, 1919, TO AND INCLUDING MARCH 1, 1920, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 182. WILLIAM J. GEARY *v.* ALICE GEARY. Error to the Supreme Court of the State of Nebraska. Motion to dismiss submitted November 10, 1919. Decided November 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, § 2, 39 Stat. 726. *Mr. T. M. Zink* for plaintiff in error. *Mr. R. E. Evans* for defendant in error.

No. 183. JOSLIN MANUFACTURING COMPANY *v.* CITY OF PROVIDENCE ET AL.;

No. 184. SCITUATE LIGHT & POWER COMPANY *v.* CITY OF PROVIDENCE ET AL.; and

No. 185. THERESA B. JOSLIN *v.* CITY OF PROVIDENCE ET AL. Error to the Supreme Court of the State of Rhode Island. Motions to dismiss and petitions for writs of certiorari submitted November 10, 1919. Decided November 17, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Haseltine* v. *Central Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418; *Bruce* v. *Tobin*, 245 U. S. 18, 19; and see *Collard* v. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, 246 U. S. 653. Petitions for certiorari denied. *Mr. Robert H. McCarter, Mr. J. Jerome Hahn, Mr. Francis I. McCanna* and *Mr. Alfred G. Chaffee* for plaintiffs in error. *Mr. Albert A. Baker* and *Mr. Elmer S. Chace* for defendants in error.

No. 286. J. W. THOMPSON *v.* R. B. DAY, SHERIFF AND TAX COLLECTOR, ET AL. Error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted November 10, 1919. Decided November 17, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216, 218; *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. William C. Marshall* and *Mr. T. Jones Cross* for plaintiff in error. *Mr. Harry P. Sneed* and *Mr. A. V. Coco* for defendants in error.

No. 354. NATIONAL COUNCIL JUNIOR ORDER UNITED AMERICAN MECHANICS *v.* CATHERINE A. NICODEMUS. Error to the Supreme Court of the State of Colorado. Motion to dismiss or affirm submitted November 11, 1919. Decided November 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, § 2, 39 Stat. 726. *Mr. George P. Steele* for plaintiff in error. *Mr. Fred Herrington*, *Mr. William D. Wright* and *Mr. William D. Wright, Jr.*, for defendant in error.

No. 438. RUDOLPH ERNEST TIEDEMANN *v.* GERTRUDE ELEANOR TIEDEMANN. Error to the Supreme Court of the State of New York. Motion to dismiss or affirm submitted November 10, 1919. Decided November 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, § 2, 39 Stat. 726. *Mr. Homer S. Cummings* and *Mr. Nash Rockwood* for plaintiff in error. *Mr. Elijah N. Zoline* and *Mr. Louis J. Vorhaus* for defendant in error.

No. 59. BERT RUCKER *v.* MARION A. TATLOW. Error to the Supreme Court of the State of Kansas. Submitted November 10, 1919. Decided November 17, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216, 218; *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. Joseph G. Waters* and *Mr. Joseph M. Stark* for plaintiff in error. *Mr. Lee Monroe* for defendant in error.

No. 69. EDWARD E. O'BRIEN ET AL. *v.* PUBLIC SERVICE COMMISSION OF THE FIRST DISTRICT OF THE STATE OF NEW YORK, ETC. Error to the Supreme Court of the State of New York. Argued November 12, 1919. Decided November 17, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Sayward* v. *Denny*, 158 U. S. 180, 183; *Harding* v. *Illinois*, 196 U. S. 78, 86. (2) *Thomas* v. *Iowa*, 209 U. S. 258, 263; *Bowe* v. *Scott*, 233 U. S. 658, 664; and see *El Paso Sash & Door Co.* v. *Carraway*, 245 U. S. 643. *Mr. Robert H. Elder* for plaintiffs in error. *Mr. William P. Burr* and *Mr. John F. O'Brien* for defendant in error, submitted.

No. 75. MARGARET H. SANGER *v.* PEOPLE OF THE STATE OF NEW YORK. Error to the Court of Special Sessions of the City of New York for County of Kings, State of New York. Argued November 13, 1919. Decided November 17, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Sayward* v.

Denny, 158 U. S. 180, 183; *Harding* v. *Illinois*, 196 U. S. 78, 86. (2) *Thomas* v. *Iowa*, 209 U. S. 258, 263; *Bowe* v. *Scott*, 233 U. S. 658, 664; and see *El Paso Sash & Door Co.* v. *Carraway*, 245 U. S. 643. *Mr. Jonah J. Goldstein* for plaintiff in error. *Mr. Harry G. Anderson*, with whom *Mr. Harry E. Lewis* was on the brief, for defendant in error.

No. 78. Gulf, Colorado & Santa Fe Railway Company et al. *v.* George H. Bowles. Error to the District Court of the United States for the Southern District of Texas. Submitted November 12, 1919. Decided November 17, 1919. *Per Curiam.* Reversed upon the authority of *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201. *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. J. W. Terry* and *Mr. John G. Gregg* for plaintiffs in error. No appearance for defendant in error.

No. 188. Georgia M. Houston, Administratrix, etc., *v.* Seaboard Air Line Railway Company. Error to the Supreme Court of Appeals of the State of Virginia. Motion to dismiss submitted November 17, 1919. Decided November 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, § 2, 39 Stat. 726. *Mr. R. Randolph Hicks* for plaintiff in error. *Mr. G. Hatton* for defendant in error.

No. 544. Missouri Pacific Railroad Company *v.* G. W. Bollis. Error to the Supreme Court of the State of Tennessee. Motion to dismiss and petition for a writ

of certiorari submitted November 10, 1919. Decided November 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, § 2, 39 Stat. 726. Petition for writ of certiorari herein denied. *Mr. J. W. Canada* and *Mr. Edward J. White* for plaintiff in error. *Mr. Julian C. Wilson* and *Mr. Walter P. Armstrong* for defendant in error.

No. 334. Southern Pacific Company *v.* Leo L. D'Utassy. Error to the Supreme Court of the State of New York. Motion to dismiss submitted November 17, 1919. Decided November 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, § 2, 39 Stat. 726. See writ of certiorari denied, 1918 Term, 250 U. S. 639. *Mr. Fred H. Wood* for plaintiff in error. *Mr. Arthur W. Clement* and *Mr. Wilson E. Tipple* for defendant in error.

No. 115. Jefferson C. Powers et al. *v.* City of Richmond. Error to the Supreme Court of Appeals of the State of Virginia. Submitted November 19, 1919. Decided December 8, 1919. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Castillo* v. *McConnico,* 168 U. S. 674. *Mr. Robert H. Talley* for plaintiffs in error. *Mr. H. R. Pollard* for defendant in error.

No. 103. United States *v.* Mill Creek & Mine Hill Navigation & Railroad Company to use of Philadelphia & Reading Railway Company, lessee;

No. 104. UNITED STATES *v.* NORTH PENNSYLVANIA RAILROAD COMPANY TO USE OF PHILADELPHIA & READING RAILWAY COMPANY, LESSEE; and

No. 105. UNITED STATES *v.* DELAWARE & BOUND BROOK RAILROAD COMPANY TO USE OF PHILADELPHIA & READING RAILWAY COMPANY, LESSEE. Error to the District Court of the United States for the Eastern District of Pennsylvania. Argued November 18, 1919. Decided December 8, 1919. *Per Curiam.* Affirmed upon the authority of *United States* v. *Larkin*, 208 U. S. 333. (Mr. Justice Pitney took no part in the decision of these cases.) *Mr. Assistant Attorney General Frierson* for the United States. *Mr. William Clarke Mason*, with whom *Mr. Charles Heebner* was on the briefs, for defendants in error.

No. 116. SARAH J. BRIGGS, ADMINISTRATRIX, ETC., *v.* UNION PACIFIC RAILROAD COMPANY. Error to the Supreme Court of the State of Kansas. Submitted November 20, 1919. Decided December 8, 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, § 2, 39 Stat. 726. *Mr. Joseph G. Waters* for plaintiff in error. *Mr. N. H. Loomis, Mr. T. M. Lillard, Mr. Edson Rich, Mr. R. W. Blair* and *Mr. H. W. Clarke* for defendant in error.

No. ——. ALEXANDER BERKMAN *v.* A. CAMINETTI, COMMISSIONER OF IMMIGRATION, ETC. Application for writ of error or appeal, for admission to bail and for a stay order submitted December 10, 1919. Denied December 11, 1919. *Mr. Harry Weinberger* for Berkman. *Mr. Assistant Attorney General Stewart* for Caminetti.

No. 251. GEORGE J. TWOHY, EXECUTOR, ETC., *v.* E. J. DORAN, COMMISSIONER OF THE REVENUE, ET AL. Error to the Supreme Court of Appeals of the State of Virginia. Motion to dismiss submitted December 22, 1919. Decided January 5, 1920. *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, § 2, 39 Stat. 726. *Mr. George Mason Dillard* for plaintiff in error. *Mr. J. D. Hank, Jr.*, and *John R. Saunders* for defendants in error.

No. 239. W. W. HARRIS *v.* STATE OF KANSAS. Error to the Supreme Court of the State of Kansas. Motion to dismiss submitted January 5, 1920. Decided January 12, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Consolidated Turnpike Co.* v. *Norfolk, etc., 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. Joseph G. Waters* for plaintiff in error. *Mr. Richard J. Hopkins* for defendant in error.

No. 591. MATTY MCLAUGHLIN *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of Ohio. Submitted January 5, 1920. Decided January 12, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 410–411; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328–337; *O'Neal* v. *United States*, 190 U. S. 36, 37–38. (2) *Carey* v. *Houston & Texas Central Ry. Co.*, 150 U. S. 171; *Maynard* v. *Hecht*, 151 U. S. 324; *Courtney* v. *Pradt*, 196 U. S. 89. (3) *In re Lennon*, 150 U. S. 393, 399–401. (4) *Itow* v. *United States*, 233 U. S. 581; *Sugarman* v. *United States*,

249 U. S. 182, 184. *Mr. Daniel L. Cruice* and *Mr. Rob V. Phillips* for plaintiff in error. *The Solicitor General* and *Mr. A. F. Myers* for the United States. *Mr. Thos. H. Tracy* and *Mr. George D. Welles*, by leave of court, filed a brief as *amici curiæ*.

No. 128. Ohio Valley Water Company *v.* Ben Avon Borough et al. Error to the Supreme Court of the State of Pennsylvania. *Per Curiam.* Argued October 15, 1919. Restored to the docket for reargument, January 12, 1920. The attention of counsel is directed to the question of whether under the state law the right to review the action of the commission was limited by the state statutes to the particular remedy which was here resorted to, or whether such statutes left open the right to invoke judicial power by way of independent suit for the purpose of redressing wrongs deemed to have resulted from action taken by the commission. *Mr. William Watson Smith* and *Mr. George B. Gordon*, with whom *Mr. John G. Buchanan* was on the briefs, for plaintiff in error. *Mr. Berne H. Evans* and *Mr. Leonard K. Guiler*, with whom *Mr. David L. Starr* and *Mr. Albert G. Liddell* were on the briefs, for defendants in error.

No. 136. E. Gouge et al. *v.* John M. Hart, Collector of Internal Revenue, et al. Appeal from the District Court of the United States for the Western District of Virginia. Argued January 15, 1920. Decided January 19, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Courtney* v. *Pradt*, 196 U. S. 89, 91; *Farrugia* v. *Philadelphia & Reading Ry. Co.*, 233 U. S. 352, 353; *Louisville & Nashville R. R. Co.* v.

Western Union Telegraph Co., 234 U. S. 369, 371–372; *Male* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 240 U. S. 97, 99. *Mr. J. S. Ashworth*, with whom *Mr. H. G. Peters* was on the brief, for appellants. *Mr. Assistant Attorney General Frierson*, with whom *The Solicitor General* was on the brief, for appellees.

No. —, Original. *Ex parte:* In the Matter of James F. Bishop, Administrator, etc., Petitioner. Submitted January 12, 1920. Decided January 19, 1920. Motion for leave to file petition for a writ of prohibition or mandamus herein denied. *Mr. Harry W. Standidge* for petitioner.

No. —. Harmon P. McKnight *v.* United States. Application for leave to proceed *in forma pauperis* for the purposes of a petition for certiorari to and an appeal from the District Court of the United States for the District of Massachusetts. Decided January 20, 1920. *Per Curiam.* The prayer to be allowed to proceed *in forma pauperis* for the purpose of an application for certiorari to review the judgment below, as well as for the purpose of an appeal asked to review a refusal to release on *habeas corpus*, made to the Chief Justice and by him submitted to the court for its action is hereby denied.

No. 152. Evansville & Bowling Green Packet Company *v.* M. M. Logan et al., etc. Error to the Court of Appeals of the State of Kentucky. Argued January 19, 1920. Decided January 26, 1920. *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, § 2, 39 Stat. 726. *Mr. J. P. Hobson*, with whom *Mr. Malcolm Yeaman* was on the brief, for plaintiff in error. *Mr. W. T. Fowler*, with whom *Mr. Charles I. Dawson* and *Mr. C. H. Morris* were on the brief, for defendants in error.

No. 176. V. & S. Bottle Company *v.* Mountain Gas Company. Error to the Supreme Court of the State of Pennsylvania. Argued January 23, 1920. Decided January 26, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Sayward* v. *Denny*, 158 U. S. 180, 183; *Harding* v. *Illinois*, 196 U. S. 78, 80; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477, 481, 487; *Cleveland & Pittsburgh R. R. Co.* v. *Cleveland*, 235 U. S. 50, 53. *Mr. C. La Rue Munson* and *Mr. W. K. Swetland*, with whom *Mr. Edgar Munson* was on the briefs, for plaintiff in error. *Mr. Churchill Mehard*, with whom *Mr. Samuel S. Mehard, Mr. W. F. Dubois* and *Mr. Cornelius D. Scully* were on the brief, for defendant in error. *Mr. Ralph J. Baker*, by leave of court, filed a brief as *amicus curiæ.*

No. 180. Superior & Pittsburgh Copper Company *v.* Steve Davidovich, Sometimes Known as Steve Davis. Error to the Supreme Court of the State of Arizona. Submitted January 23, 1920. Decided January 26, 1920. *Per Curiam.* Affirmed upon the authority of *Arizona Employers' Liability Cases*, 250 U. S. 400. *Mr. Cleon T. Knapp* for plaintiff in error. *Mr. Samuel Herrick* for defendant in error.

No. 181. GERTRUDE MINNIE JONES *v.* MAX HILTSCHER. Error to the Supreme Court of the State of New Mexico. Argued January 23, 1920. Decided January 26, 1920. *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, § 2, 39 Stat. 726. *Mr. W. Martin Jones, Jr.*, with whom *Mr. Harry P. Owen* was on the brief, for plaintiff in error. *Mr. Edward D. Tittmann* and *Mr. Charles T. Tittmann*, for defendant in error, submitted.

No. 189. BALTIMORE & OHIO RAILROAD COMPANY *v.* JOHN S. COFFLAND. Error to the Court of Appeals, Harrison County, Seventh Appellate District, of the State of Ohio. Submitted January 23, 1920. Decided January 26, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Schlosser* v. *Hemphill*, 198 U. S. 173, 175; *Louisiana Nav. Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 101; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 255; *Bruce* v. *Tobin*, 245 U. S. 18, 19. (2) Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. D. A. Hollingsworth* for plaintiff in error. *Mr. Ernest Sidney McNamee* for defendant in error.

No. 596. MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY ET AL. *v.* CITY AND COUNTY OF DENVER. Error to the Supreme Court of the State of Colorado. Motion to dismiss or affirm submitted January 26, 1920. Decided February 2, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394. See *Chicago* v. *Dempcy*, 250 U. S. 651. *Mr. Milton Smith* and *Mr. Charles R.*

Brock for plaintiffs in error. *Mr. J. A. Marsh* and *Mr. Norton Montgomery* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF J. E. BROUSSARD ET AL., PETITIONERS. Submitted January 26, 1920. Decided February 2, 1920. Motion for leave to file petition for writ of mandamus herein denied. *Mr. Frederick S. Tyler* and *Mr. A. D. Lipscomb*, for petitioners, in support of the motion. *Mr. Horace Chilton* in opposition to the motion.

No. —, Original. *Ex parte:* IN THE MATTER OF THE UNITED STATES, PETITIONER. Submitted October 6, 1919. Decided March 1, 1920. Motion for leave to file petition for writs of mandamus and prohibition denied. *The Solicitor General* for the United States.

No. 163. ATLANTIC COAST LINE RAILROAD COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. Argued January 22, 1920. Decided March 1, 1920. *Per Curiam.* Affirmed upon the authority of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640. *Mr. F. Carter Pope* and *Mr. Benjamin Carter* for appellant. *Mr. Assistant Attorney General Davis*, with whom *Mr. J. Robert Anderson*, Special Assistant to the Attorney General, was on the brief, for the United States. *Mr. F. Carter Pope*, by leave of court, filed a brief as *amicus curiæ*.

No. 218. CITY OF FULTON *v.* PUBLIC SERVICE COMMISSION OF MISSOURI, ETC., ET AL. Error to the Supreme

Court of the State of Missouri. Submitted January 30, 1920. Decided March 1, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394. See *Chicago* v. *Dempcy*, 250 U. S. 651. *Mr. Eugene C. Brockmeyer* and *Mr. John Robison Baker* for plaintiff in error. *Mr. James D. Lindsay* for defendants in error.

No. 215. STATE OF MISSOURI AT THE RELATION OF CITY OF SEDALIA *v.* PUBLIC SERVICE COMMISSION OF MISSOURI, ETC., ET AL. Error to the Supreme Court of the State of Missouri. Submitted January 30, 1920. Decided March 1, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394. See *Chicago* v. *Dempcy*, 250 U. S. 651. *Mr. Eugene C. Brockmeyer* for plaintiff in error. *Mr. James D. Lindsay* for defendants in error.

No. 277. LAFOREST L. SIMMONS *v.* JOE DUART. Error to the Superior Court of the State of Massachusetts. Motion to dismiss submitted February 2, 1920. Decided March 1, 1920. *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, § 2, 39 Stat. 726. *Mr. Edward C. Stone* for plaintiff in error. *Mr. David R. Radovsky* for defendant in error.

No. —. KOSTA KISIN *v.* STATE OF CALIFORNIA. On petition for a writ of certiorari to the Superior Court of the State of California in and for the County of Contra Costa.

March 1, 1920. *Per Curiam.* The motion for leave to proceed *in forma pauperis* in this case and that the clerk of this court be directed to file the petition for a writ of certiorari herein is denied. *Mr. Kosta Kisin* pro se.

No. 125. KATE C. ARCHER, ADMINISTRATRIX OF GEORGE F. ARCHER, DECEASED, ET AL. *v.* UNITED STATES; and

No. 220. UNITED STATES *v.* KATE C. ARCHER, ADMINISTRATRIX OF GEORGE F. ARCHER, DECEASED, ET AL. Appeals from the Court of Claims. Argued January 13, 1920. Decided March 1, 1920. *Per Curiam.* Judgment affirmed by an equally divided court. *Mr. T. M. Miller* and *Mr. Percy Bell* for appellants in No. 125 and appellees in No. 220. *The Solicitor General,* with whom *Mr. A. F. Myers* was on the brief, for the United States.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM NOVEMBER 17, 1919, TO AND INCLUDING MARCH 1, 1920.

(A.) PETITIONS GRANTED.[1]

No. 568. UNION PACIFIC RAILROAD COMPANY *v.* JAMES J. E. BURKE. November 17, 1919. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Oscar R. Houston* and *Mr. D. Roger Englar* for petitioner. *Mr. Arthur W. Clement* and *Mr. Wilson E. Tipple* for respondent.

---

[1] For petitions denied, see *post,* 550.

No. 592. Missouri, Kansas & Texas Railway Company et al. *v.* Hannah L. Zuber. Error to the Supreme Court of the State of Oklahoma. December 15, 1919. Petition for a writ of certiorari herein granted. *Mr. Joseph M. Bryson, Mr. Clifford L. Jackson, Mr. Gardiner Lathrop, Mr. J. R. Cottingham, Mr. Samuel W. Hayes, Mr. Alex. Britton* and *Mr. C. S. Burg*, for plaintiffs in error, in support of the petition. *Mr. Charles W. Smith* for defendant in error.

No. 625. Lillian B. Pembleton *v.* Illinois Commercial Men's Association. January 5, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Illinois granted. *Mr. Harrison Musgrave* and *Mr. William S. Oppenheim* for petitioner. *Mr. James G. Condon* for respondent.

No. 634. Yee Won *v.* Edward White, as Commissioner of Immigration, Port of San Francisco. January 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. W. E. Harvey* and *Mr. M. Walton Hendry* for petitioner. No brief filed for respondent.

No. 628. Chicago, Milwaukee & St. Paul Railway Company *v.* McCaull-Dinsmore Company. January 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. H. H. Field, Mr. O. W. Dynes* and *Mr. F. W. Root* for petitioner. No appearance for respondent.

No. 638. Western Union Telegraph Company *v.* Eugene E. Southwick. January 26, 1920. Petition for a

writ of certiorari to the Court of Civil Appeals, Seventh Supreme Judicial District, of the State of Texas granted. *Mr. Rush Taggart* and *Mr. Francis Raymond Stark* for petitioner. No appearance for respondent.

No. 655. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* NICHOLS & COMPANY. January 26, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi granted. *Mr. Charles N. Burch, Mr. H. D. Minor* and *Mr. Blewett Lee* for petitioners. *Mr. John W. Cutrer* and *Mr. Frederick S. Tyler* for respondent.

No. 674. NORFOLK-SOUTHERN RAILROAD COMPANY *v.* M. R. OWENS. March 1, 1920. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. W. B. Rodman, Jr.*, and *Mr. W. B. Rodman* for petitioner. No appearance for respondent.

(B.) PETITIONS DENIED.

No. 183. JOSLIN MANUFACTURING COMPANY *v.* CITY OF PROVIDENCE ET AL.;

No. 184. SCITUATE LIGHT & POWER COMPANY *v.* CITY OF PROVIDENCE ET AL.; and

No. 185. THERESA B. JOSLIN *v.* CITY OF PROVIDENCE ET AL. See *ante*, 535.

No. 410. BIRMINGHAM TRUST & SAVINGS COMPANY, AS TRUSTEE, ETC., *v.* UNITED STATES. November 17, 1919.

Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John P. Tillman* for petitioner. *Mr. Assistant Attorney General Brown* for the United States.

No. 427. MICHAEL TOMASCO *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY. November 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Clinton* for petitioner. *Mr. Maurice C. Spratt* for respondent.

No. 466. ARMOUR & COMPANY ET AL. *v.* TEXAS & PACIFIC RAILWAY COMPANY ET AL. November 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James Manson McCormick* and *Mr. Francis Marion Etheridge* for petitioners. *Mr. Thomas J. Freeman* for respondents.

No. 572. FREY & SON, INCORPORATED, *v.* WELCH GRAPE JUICE COMPANY. November 17, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Horace T. Smith* and *Mr. Charles Markell* for petitioner. No appearance for respondent.

No. 561. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY *v.* GRACE F. FULLER, AS ADMINISTRATRIX, ETC. November 17, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Oregon denied.

Mr. Arthur C. Spencer for petitioner. No appearance for respondent.

No. 530. W. L. BRUCE, AS ADMINISTRATOR, ETC., ET AL. *v.* WILLIAM TOBIN. November 17, 1919. Petition for a writ of certiorari to the Supreme Court of the State of South Dakota denied. *Mr. L. H. Salinger* for petitioners. *Mr. Constant R. Marks* for respondent.

No. 557. KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* ROBERT W. SMITH. November 17, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Samuel W. Moore* and *Mr. Cyrus Crane* for petitioner. *Mr. Alfred N. Gossett* for respondent.

No. 544. MISSOURI PACIFIC RAILROAD COMPANY *v.* G. W. BOLLIS. See *ante*, 538.

No. 449. FRANK SHAFFER *v.* UNITED STATES. November 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. David A. Baer* and *Mr. John J. Sullivan* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 563. INTER-URBAN RAILWAY COMPANY ET AL. *v.* MRS. FRED SMITH. November 24, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied. *Mr. Frank J. Hogan* and *Mr. James L. Parrish* for petitioners. *Mr. R. M. Haines* for respondent.

No. 598. BASCOM C. THOMPSON *v.* UNITED STATES. November 24, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. P. H. Cullen* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 594. CHICAGO, DULUTH & GEORGIAN BAY TRANSIT COMPANY, OWNER OF STEAMSHIP "SOUTH AMERICA," *v.* CHARLES T. MOORE ET AL. December 8, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles E. Kremer* for petitioner. *Mr. George E. Brand* for respondents.

No. 595. TOLEDO & CINCINNATI RAILROAD COMPANY ET AL. *v.* EQUITABLE TRUST COMPANY OF NEW YORK ET AL. December 8, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Morison R. Waite* and *Mr. John Randolph Schindel* for petitioners. *Mr. Murray Seasongood* for respondents.

No. 583. LOUIS DRAGO *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY. December 15, 1919. Petition for a writ of certiorari to the Circuit Court of Hudson County, State of New Jersey, denied. *Mr. Alexander Simpson* for petitioner. *Mr. James D. Carpenter, Jr.*, for respondent.

No. 590. STATE OF WASHINGTON *v.* ISAAC BELKNAP. December 15, 1919. Petition for a writ of certiorari to the

Supreme Court of the State of Washington denied. *Mr. L. L. Thompson* and *Mr. W. V. Tanner* for petitioner. No appearance for respondent.

No. 605. HOWARD BROWN *v.* UNITED STATES. December 15, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. R. P. Henshall* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 606. REWARD OIL COMPANY *v.* PETROLEUM RECTIFYING COMPANY OF CALIFORNIA. December 15, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William K. White* for petitioner. *Mr. Frederick P. Fish, Mr. John H. Miller* and *Mr. J. H. Brickenstein* for respondent.

No. 611. J. R. SMITH ET AL. *v.* THE STEAMER J. J. Hill, etc., PITTSBURGH STEAMSHIP COMPANY, CLAIMANT. December 15, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harvey D. Goulder, Mr. Charles E. Kremer* and *Mr. Frank S. Bright* for petitioners. *Mr. Hermon A. Kelley* and *Mr. G. W. Cottrell* for respondent.

No. 616. EMMA PELL FETTERS *v.* UNITED STATES. December 15, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Mr. Marshall B. Woodworth for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 624. WILL MAYNARD ET AL. *v.* UNITED THACKER COAL COMPANY. December 15, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Ed. Noonchester* and *Mr. W. W. Scott* for petitioners. No appearance for respondent.

No. 505. ARTHUR C. GILSON ET AL. *v.* UNITED STATES. December 22, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William A. Smith* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 613. CHARLES F. GOODSPEED *v.* HERBERT E. LAW. December 22, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Peter F. Dunne* for petitioner. *Mr. Frank D. Madison, Mr. E. S. Pillsbury, Mr. Alfred Sutro, Mr. H. D. Pillsbury* and *Mr. Oscar Sutro* for respondent.

No. 617. ELLSWORTH J. TRADER *v.* UNITED STATES. December 22, 1919. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Blaine Mallan* and *Mr. H. Ralph Burton* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 604. Carlos L. Byron *v.* United States. January 5, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward M. Comyns* and *Mr. P. V. Davis* for petitioner. *Mr. Assistant Attorney General Nebeker* and *Mr. H. L. Underwood* for the United States.

No. 626. Baltimore Dry Dock & Ship Building Company *v.* New York & Porto Rico Steamship Company, Owner and Claimant of the Steamship Isabella et al. January 5, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George Weems Williams* for petitioner. *Mr. Assistant Attorney General Spellacy, Mr. J. Frank Staley, Mr. George Forbes* and *Mr. Ray Rood Allen* for respondents.

No. 608. Hurni Packing Company *v.* Mutual Life Insurance Company of New York. January 12, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Deloss C. Shull* for petitioner. *Mr. Frederick L. Allen* and *Mr. Frederic D. McKenney* for respondent.

No. 619. Norma Mining Company *v.* Hugh Mackay. January 12, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George Lull* for petitioner. *Mr. Frederick A. Williams* for respondent.

No. 623. Wade C. Kilmer, Trustee, etc., *v.* First Savings and Banking Company. January 12, 1920.

Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Conrad H. Syme* and *Mr. F. H. Stephens* for petitioner. *Mr. Clarence E. Martin* for respondent.

No. 629. VIRGINIA-WESTERN POWER COMPANY *v.* COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE CITY OF CLIFTON FORGE;

No. 630. VIRGINIA-WESTERN POWER COMPANY *v.* COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE CITY OF BUENA VISTA;

No. 631. VIRGINIA-WESTERN POWER COMPANY *v.* COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE TOWN OF COVINGTON; and

No. 632. VIRGINIA-WESTERN POWER COMPANY *v.* COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE TOWN OF LEXINGTON. January 12, 1920. Petition for writs of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. F. W. King* and *Mr. J. M. Perry* for petitioner. *Mr. O. B. Harvey* for respondent in No. 629. *Mr. William A. Anderson, Mr. Frank Moore* and *Mr. O. C. Jackson* for respondent in No. 632. No appearance for respondents in Nos. 630 and 631.

No. 635. ERIE RAILROAD COMPANY *v.* JAMES B. CONNORS. January 12, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. D. Hine* and *Mr. Paul J. Jones* for petitioner. *Mr. W. J. Kenealy* for respondent.

No. 637. EDWARD HINES LUMBER COMPANY *v.* AMERICAN CAR & FOUNDRY COMPANY. January 12, 1920. Peti-

tion for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jacob Newman, Mr. Conrad H. Poppenhusen, Mr. Henry L. Stern* and *Mr. Edward R. Johnston* for petitioner. *Mr. William D. McKenzie* for respondent.

No. 639. Emil Herman *v.* United States. January 12, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. C. E. S. Wood* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

Nos. 641, 642. Consolidated Window Glass Company *v.* Window Glass Machine Company et al.;

Nos. 643, 644. Pennsylvania Window Glass Company *v.* Window Glass Machine Company et al.; and

Nos. 645, 646. Kane Glass Company *v.* Window Glass Machine Company et al. January 12, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Marshall A. Christy* and *Mr. Charles Neave* for petitioners. *Mr. George H. Parmelee, Mr. Clarence P. Byrnes* and *Mr. Livingston Gifford* for respondents.

No. 648. Arctic Iron Company *v.* Cleveland-Cliffs Iron Company et al. January 12, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Otto C. Sommerich* and *Mr. Edwin M. Borchard* for petitioner. *Mr. A. C. Dustin, Mr. Horace Andrews* and *Mr. W. P. Belden* for respondents.

No. 600. W. F. HALLOWELL *v.* UNITED STATES. January 19, 1920. 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 Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 660. AMERICAN GUARANTY COMPANY *v.* AMERICAN FIDELITY COMPANY. January 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Smith W. Bennett, Mr. Ralph E. Westfall* and *Mr. Hugh M. Bennett* for petitioner. *Mr. H. B. Arnold* for respondent.

No. 663. MORRIS & CUMINGS DREDGING COMPANY *v.* CORNELL STEAMBOAT COMPANY. January 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* and *Mr. George Noyes Slayton* for petitioner. *Mr. J. Parker Kirlin* and *Mr. Robert S. Erskine* for respondent.

No. 664. JEONG QUEY HOW *v.* EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION AT THE PORT OF SAN FRANCISCO. January 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jackson H. Ralston* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for respondent.

No. 647. ATLANTA TERMINAL COMPANY *v.* UNITED STATES. January 26, 1920. Petition for a writ of cer-

tiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Mark Bolding* and *Mr. Arthur Heyman* for petitioner. *Mr. Assistant Attorney General Frierson* for the United States.

No. 658. JAMES G. WILSON, TRUSTEE, ETC., *v.* A. J. BENHAM ET AL. January 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James G. Wilson* for petitioner. No appearance for respondents.

No. 666. MARIE EQUI *v.* UNITED STATES. January 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. C. E. S. Wood* and *Mr. James E. Fenton* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 675. EDWIN REITZ *v.* UNITED STATES. January 26, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Louis W. Crofoot* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 640. J. E. BROUSSARD ET AL. *v.* WALTER J. CRAWFORD, TRUSTEE. February 2, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick S. Tyler* and *Mr. A. D. Lipscomb* for petitioners. *Mr. Horace Chilton* for respondent.

No. 662. CONTINENTAL BANK OF NEW YORK *v.* EZRA P. PRENTICE, TRUSTEE, ETC. February 2, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Myron L. Lesser* for petitioner. *Mr. James N. Rosenberg* for respondent.

No. 665. LUCIAN C. LAUGHTER *v.* UNITED STATES. February 2, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack* for petitioner. *Mr. Assistant Attorney General Frierson* for the United States.

No. 669. GULF & SHIP ISLAND RAILROAD COMPANY ET AL. *v.* CARL BOONE ET AL., ETC. Error to the Supreme Court of the State of Mississippi. February 2, 1920. Petition for a writ of certiorari herein denied. *Mr. B. E. Easton* and *Mr. T. J. Wills*, for plaintiffs in error, in support of the petition. *Mr. George Anderson*, for defendants in error, in opposition to the petition.

No. 670. A. J. PARTAN ET AL. *v.* UNITED STATES. February 2, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas Mannix* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 659. CLARENCE E. REED *v.* HUGHES TOOL COMPANY. March 1, 1920. Petition for a writ of certiorari to

the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William F. Hall, Mr. Melville Church* and *Mr. Edwin T. Merrick* for petitioner. *Mr. Frank Andrews* for respondent.

No. 661. GUTIERREZ HERMANOS *v.* INSULAR COLLECTOR OF CUSTOMS. March 1, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. David A. Baer* and *Mr. S. W. O'Brien* for petitioner. *Mr. Dana T. Gallup, Mr. Lawrence H. Hedrick* and *Mr. Charles Marvin* for respondent.

No. 673. WABASH RAILWAY COMPANY *v.* CHARLOTTE SHEEHAN, ADMINISTRATRIX, ETC. March 1, 1920. Petition for a writ of certiorari to the Appellate Court, Third District, of the State of Illinois denied. *Mr. Frederic D. McKenney* for petitioner. *Mr. Charles C. Le Forgee* for respondent.

No. 687. POSTAL TELEGRAPH-CABLE COMPANY *v.* BOWMAN & BULL COMPANY. March 1, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. Jacob E. Dittus, Mr. Leon A. Bereznіak* and *Mr. W. W. Millan* for petitioner. *Mr. Edwin H. Cassels* for respondent.

No. 688. MALLEABLE IRON RANGE COMPANY *v.* FRED E. LEE, AS ADMINISTRATOR, ETC. March 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas A. Banning*

and *Mr. Samuel Walker Banning* for petitioner. *Mr. Harry C. Howard* and *Mr. Fred L. Chappell* for respondent.

No. 695. ROBERT L. FINK *v.* OKMULGEE WINDOW GLASS COMPANY. March 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. N. Higgins* and *Mr. F. O. Berge* for petitioner. *Mr. William M. Matthews* for respondent.

No. 700. HERMAN M. WARTELL *v.* RALPH S. MOORE, TRUSTEE, ETC. March 1, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James McNamara* for petitioner. *Mr. Benjamin Vosper* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM NOVEMBER 17, 1919, TO AND INCLUDING MARCH 1, 1920.

No. 120. A. A. AUSPLUND *v.* STATE OF OREGON. Error to the Supreme Court of the State of Oregon. November 18, 1919. Dismissed, per stipulation, on motion of *Mr. Walter H. Evans* for defendant in error. *Mr. John F. Logan* for plaintiff in error. *Mr. Walter H. Evans* and *Mr. George M. Brown* for defendant in error.

No. 113. E. VIEGELMANN & COMPANY *v.* INSULAR COLLECTOR OF CUSTOMS. On petition for a writ of cer-

tiorari to the Supreme Court of the Philippine Islands. November 19, 1919. Dismissed for want of prosecution. *Mr. Timothy T. Ansberry* for petitioner. No appearance for respondent.

No. 149. HARTFORD POSTER ADVERTISING COMPANY *v.* THOMAS E. EGAN, CHIEF OF THE STATE POLICE, ETC. Appeal from the District Court of the United States for the District of Connecticut. November 21, 1919. Dismissed without costs to either party, per stipulation. *Mr. Edward F. McClennen* for appellant. *Mr. Lucius F. Robinson* for appellee.

No. 245. AGNES SMEDLEY ET AL. *v.* THOMAS D. MCCARTHY, UNITED STATES MARSHAL, ETC. Appeal from the District Court of the United States for the Southern District of New York. December 11, 1919. Dismissed with costs, on motion of counsel for appellants. *Mr. Gilbert E. Roe* and *Mr. Charles Recht* for appellants. *The Solicitor General* and *Mr. John Lord O'Brian*, Special Assistant to the Attorney General, for appellee.

No. 121. CHARLES A. HITCHCOCK *v.* ALFRED G. SCATTERGOOD ET AL. On writ of certiorari to the Circuit Court of Appeals for the Third Circuit. December 15, 1919. Dismissed without costs to either party, per stipulation. *Mr. Horace L. Cheyney* for petitioner. *Mr. Francis B. Bracken* for respondents.

No. 407. BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY *v.* JOSEPH F. BAILEY. Error to the Su-

preme Court of the State of Ohio. December 15, 1919. Dismissed on motion of counsel for plaintiff in error. *Mr. Judson Harmon* and *Mr. George Hoadly* for plaintiff in error. No appearance for defendant in error.

No. —. EMMA GOLDMAN *v.* A. CAMINETTI, COMMISSIONER OF IMMIGRATION, ETC. Application for appeal, etc., submitted December 10, 1919. December 11, 1919, assigned for hearing on December 18, 1919. December 18, 1919. Leave granted to withdraw application for writ of error or appeal and for stay order and bail pending appeal, on motion of *Mr. Harry Weinberger* for Emma Goldman. *Mr. Assistant Attorney General Stewart* for Caminetti.

No. 64. GREAT NORTHERN RAILWAY COMPANY *v.* STATE OF WASHINGTON. Error to the Supreme Court of the State of Washington. January 5, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. E. C. Lindley*, *Mr. F. V. Brown* and *Mr. F. G. Dorety* for plaintiff in error. *Mr. W. V. Tanner* for defendant in error.

No. 148. MAGMA COPPER COMPANY *v.* CHARLES RISSALA. Error to the District Court of the United States for the District of Arizona. January 5, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Alex. Britton* and *Mr. Evans Browne* for plaintiff in error. *Mr. J. J. Cox* for defendant in error.

No. 130. WILLIAM H. GARANFLO *v.* UNITED STATES; and

No. 131. ROBERT D. DUNCAN *v.* UNITED STATES. On petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit. January 9, 1920. Dismissed for want of prosecution, on motion of *Mr. Assistant Attorney General Frierson* for the United States. *Mr. Chester H. Krum* for petitioners.

No. 235. UNITED STATES, AS TRUSTEE AND GUARDIAN OF, AND EX REL., SAM WILLIAMS *v.* SEUFERT BROTHERS COMPANY ET AL. Error to the Circuit Court of Appeals for the Ninth Circuit. January 12, 1920. Dismissed on motion of *The Solicitor General* for the United States. *Mr. H. S. Wilson* for defendants in error.

No. 135. JOSEPH GORDON *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. January 12, 1920. Dismissed with costs, pursuant to the tenth rule. *Mr. Louis Greenberg* for plaintiff in error. No appearance for defendant in error.

No. 174. SEABOARD AIR LINE RAILWAY COMPANY *v.* MRS. LESSIE HORTON, ADMINISTRATRIX, ETC. On writ of certiorari to the Supreme Court of the State of North Carolina. January 21, 1920. Dismissed with costs, on motion of counsel for petitioner. *Mr. Thaddeus A. Adams, Mr. John M. Robinson* and *Mr. E. Marvin Underwood* for petitioner. *Mr. Robert W. Winston, Mr. A. M. Stack* and *Mr. J. J. Parker* for respondent.

No. 193. SEABOARD AIR LINE RAILWAY COMPANY *v.* J. J. GRAY. On writ of certiorari to the Supreme Court of

the State of South Carolina. January 26, 1920. Dismissed, per stipulation. *Mr. Jo-Berry S. Lyles* for petitioner. *Mr. Fred H. Dominick* and *Mr. Wallace D. Conner* for respondent.

No. 194. James A. Keown *v.* Mary E. Keown et al. On writ of certiorari to the Superior Court of the State of Massachusetts. January 26, 1920. Dismissed for want of prosecution. *Mr. James A. Keown* pro se. No appearance for respondents.

No. 195. Ohio State Telephone Company *v.* City of Columbus, Ohio. Error to the Supreme Court of the State of Ohio. January 26, 1920. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Frederick S. Tyler* in behalf of counsel for defendant in error. *Mr. Clarence Brown* and *Mr. Earl H. Turner* for plaintiff in error. *Mr. Henry L. Scarlett* for defendant in error.

No. 216. Everglades Drainage League et al. *v.* Napoleon B. Broward Drainage District et al. Appeal from the District Court of the United States for the Southern District of Florida. January 30, 1920. Dismissed with costs, on motion of counsel for appellants. *Mr. Clair D. Vallette* for appellants. *Mr. William Glenn Terrell* for appellees.

No. 223. Jose Lopez Garcia *v.* Orval P. Townshend, Commanding Officer, Camp Las Casas. Appeal from the District Court of the United States for Porto Rico.

January 30, 1920. Dismissed with costs, on motion of counsel for appellant. *Mr. Francis H. Dexter* for appellant. *The Attorney General* for appellee.

No. 14, Original. STATE OF NEW YORK *v.* INTERNATIONAL NICKEL COMPANY. In Equity. March 1, 1920. Dismissed, without costs to either party, per stipulation. *Mr. F. La Guardia, Mr. Edgar Bromberger, Mr. Merton E. Lewis* and *Mr. Cortland A. Johnson* for plaintiff. *Mr. W. J. Curtis* and *Mr. Ligon Johnson* for defendant.

No. 15, Original. STATE OF NEW YORK *v.* STANDARD OIL COMPANY. In Equity. March 1, 1920. Dismissed, without costs to either party, per stipulation. *Mr. F. La Guardia, Mr. Edgar Bromberger, Mr. Merton E. Lewis* and *Mr. Cortland A. Johnson* for plaintiff. *Mr. Chester O. Swain* for defendant.

No. 477. WYSONG & MILES COMPANY ET AL. *v.* PLANTERS NATIONAL BANK OF RICHMOND, VA. Error to the Supreme Court of the State of North Carolina. March 1, 1920. Dismissed, per stipulation. *Mr. Thomas J. Jerome* for plaintiffs in error. *Mr. Garland S. Ferguson, Jr.*, and *Mr. Ashbel B. Kimball* for defendant in error.

No. 478. WYSONG & MILES COMPANY ET AL. *v.* BANK OF NORTH AMERICA, PHILADELPHIA, PA. Error to the Supreme Court of the State of North Carolina. March 1, 1920. Dismissed, per stipulation. *Mr. Thomas J.*

Jerome for plaintiffs in error. *Mr. Garland S. Ferguson, Jr.*, and *Mr. Ashbel B. Kimball* for defendant in error.

No. 612. FRED S. THOMPSON *v.* ALEXANDER H. NICHOLS. Appeal from the District Court of the United States for the District of Maine. March 1, 1920. Dismissed, per stipulation. *Mr. Franklin H. Hough* for appellant. *Mr. Charles Henry Butler* for appellee.

INDEX.

PAGE

ABANDONMENT. See **Carriers,** 6.

ACCEPTANCE. See **Mails,** 8, 14.

ACTIONS AND DEFENSES. See particular titles.

ACTS OF CONGRESS. See Table at front of volume; **Congress.**

ADEQUATE REMEDY. See **Equity,** 3.

ADMINISTRATION. See **Trusts and Trustees.**
Inheritance taxes; refund. See **Taxation,** I.

ADMINISTRATIVE DECISIONS. See **Intoxicating Liquors,** 8, 9; **Taxation,** III, 8.

ADMIRALTY.

1. *Collision; Limitation of Liability.* Where steam tug, propelling, lashed to its sides, other vessels of same owner brought one of them bearing the cargo into collision with libelant's vessel, under Rev. Stats., §§ 4283–4285, value of tug, and not value of flotilla, is limit of owner's liability. *Liverpool &c. Nav. Co.* v. *Brooklyn Terminal*. 48

2. *Supplies.* Master of demised vessel *held* charterer's agent. *The South Coast*. 519

3. *Id. Charter-Party.* Applying Act of 1910, construed to authorize charterer to bind vessel for necessary supplies purchased by master in domestic port. *Id.*

4. *Id. Presumption,* of such authority, not dispelled by denials and warnings from owner to supply-man. *Id.*

5. *State Workmen's Compensation Law.* Prior to Act of 1917, amending Jud. Code, state law had no application to case of

ADMIRALTY—*Continued.* PAGE
personal injuries sustained by one in maritime employment. *Peters* v. *Veasey*. 121

6. *Id.* Act of 1917 not retroactive. *Id.*

7. *Coastwise Trade.* Duty of vessels engaged in Philippine coastwise trade to carry mails free. *Public Utility Commrs.* v. *Ynchausti & Co.* 401

AGENCY. See **Admiralty**, 2–4.
Foreign corporations; service of process. See **Jurisdiction**, III.

ALASKA. See **Public Lands**, I.

ALCOHOLIC LIQUORS. See **Constitutional Law**, II; IV; IX, 5–7; **Intoxicating Liquors.**

ALIEN PROPERTY CUSTODIAN. See **Judgments**, 6.

ALIENS.
Alien enemies. See **Judgments**, 4–6.
Defense of alienage. See **Claims**, 1.

ALLOTMENTS. See **Indians.**

ANSWER. See **Equity**, 1.

ANTICIPATION. See **Patents for Inventions.**

ANTI-TRUST ACT.
1. *Monopoly; Intent.* Formation of combination with expectation of achieving monopoly. *United States* v. *U. S. Steel Corp.* 417

2. *Id.* Power attained by U. S. Steel Corporation, *held* not to constitute it a monopoly. *Id.*

3. *Illegal Practices.* Present relief not warranted where practices abandoned before suit because of futility and where evidence fails to show intention or probability of resuming them. *Id.*

4. *Combination.* Acquisition of Tennessee Coal & Iron Co. considered. *Id.*

ANTI-TRUST ACT—*Continued.* PAGE

5. *Id. Size.* Power to restrain competition, when not objectionable. *Id.*

6. *Competition; Evidence.* Testimony of officers, competitors and customers that competition was not restrained and that prices varied or not according to natural conditions, accepted as against expert testimony based on constant price levels. *Id.*

7. *Id. Overt Acts*, importance of. *Id.*

8. *Id.* That competitors followed prices does not establish unlawful restraint; act does not compel competition. *Id.*

9. *Duty of Courts; Remedies.* In commanding courts to " prevent and restrain " violations, act has regard to conditions as they may exist when relief is invoked and to usual powers of court of equity to adapt its remedies to those conditions. *Id.*

10. *Id.* Act does not expect courts to enforce abstractions to the subversion of its own purposes, but leaves them to determine, in each instance, the relief appropriate for execution of its policy. *Id.*

11. *Id. Webb Act; Foreign Trade.* No feasible way of dissolving combination and protecting its foreign trade, under Webb Act, or otherwise, has been suggested. *Id.*

APPEAL AND ERROR. See **Jurisdiction; Procedure.**

APPEARANCE. See **Jurisdiction**, III.

ARBITRATION. See **Judgments**, 2.
Six months' limitation of German Civil Code, on claims for defect of quality in goods sold, does not apply to awards of arbitration based on such claims. *Birge-Forbes Co.* v. *Heye.* . 317

ARMY. See **Constitutional Law**, IV; **Intoxicating Liquors**, 3–5, 7.
Obstructing recruiting service. See **Criminal Law**, 10–12.

ASSESSMENTS. See **Eminent Domain**, 1; **Franchises; Taxation.**

ATTORNEY GENERAL. See **Parties,** 1. PAGE

Suit to enforce trusts in New Mexico Enabling Act respecting lands. *Ervien* v. *United States* 41

ATTORNEY, UNITED STATES. See **Criminal Law,** 15–18; **Parties,** 1.

BANKRUPTCY ACT.

1. *Provable Debts; Torts.* Claim for unliquidated damages, arising out of pure tort, not within § 63a. *Schall* v. *Camors* . . 239

2. *Id.* Such claim is not within class subject to be liquidated and proved under § 63b. *Id.*

3. *Id.* Section 17, amended, refers to § 63 for definition of provable debts, and excepting clause does not add other classes but merely limits effect of discharge. *Id.*

4. *Id. Partnership and Individual Debts.* One defrauded by partnership may not prove claim for damages as a *quasi* contract or equitable debt of partnership which profited, and also of individual partners who did not profit, by the fraud. *Id.*

BANKS AND BANKING. See **National Banks.**

BEER. See **Intoxicating Liquors,** 6–12.

BENEFITS. See **Taxation,** IV, 3, 4.

BILL OF RIGHTS. See **Philippine Islands,** 2–5.

BONA FIDE PURCHASER. See **Public Lands,** IV.

CALIFORNIA.

1. *Constitution.* Franchise rights of lighting company, acquired under. *Los Angeles* v. *Los Angeles Gas Corp.* 32

2. *Public Utilities Act,* § 67. Petition to Supreme Court for writ of review to bring up proceedings of Railroad Commission fixing rates for electric power, may be disposed of on merits by an order simply refusing the writ. *Napa Valley Co.* v. *Railroad Comm.* 366

CANCELLATION. See **Equity,** 4–6.

CARRIERS. See **Employers' Liability Act.** PAGE

Railroads; duty to carry mails; discretion of Postmaster General in fixing compensation. See **Mails.**

1. *Vessels; Coastwise Trade.* Duty to carry mails free, in Philippines. *Public Utility Commrs.* v. *Ynchausti & Co.* 401

2. *Pipe Lines.* Owner who devotes lines to use of public in transporting oil for hire is a common carrier; rates are subject to state regulation. *Producers Transp. Co.* v. *Railroad Comm.* 228

3. *Id. Public Service.* Articles of incorporation; acquisition of right of way through eminent domain; and transportation in effect for all seeking service; *held* to sustain finding of devotion to public use. *Id.*

4. *Id. Rates.* Contracts for future transportation cannot prevent state regulation of rates and practices. *Id.*

5. *State Regulation.* State cannot compel operation at a loss. *Brooks-Scanlon Co.* v. *Railroad Comm.* 396

6. *Railroad and Lumber Business.* Where railroad owned and operated by lumber company in connection with lumber business, the business of railroad alone determines whether it may be abandoned as unprofitable. *Id.*

7. *Rates; Penalties,* for exceeding prescribed rates may be imposed if not excessive, and collected in action by aggrieved passenger for his use irrespective of damages actually suffered. *St. Louis, I. Mt. & So. Ry.* v. *Williams.* 63

See **Constitutional Law,** XI, 8, 16, 17.

CERTIORARI. See **Jurisdiction,** IV, 10, 11.

CHALLENGES. See **Criminal Law,** 6, 8, 9.

CHARTER-PARTY. See **Admiralty,** 3.

CIRCUIT COURT OF APPEALS. See **Jurisdiction,** V.

CITIES. See **Franchises,** 2; **Municipalities; Ordinances.**

CLAIMS. See **Contracts,** 2–6; **Jurisdiction,** VII, 2; **Taxation,** I; II.

For mail transportation. See **Mails.**

Of patent. See **Patents for Inventions.**

CLAIMS—*Continued.* PAGE

1. *Indian Depredation Acts; Alienage.* Reinstatement, under Act of 1915, of cases dismissed on ground of alienage. *Rex* v. *United States* 382

2. *Id. Limitations.* Claim of citizen previously dismissed because depredating band was hostile, though tribe was not, is not subject to reinstatement under amendment of 1915; and, treated as a new claim, it is barred by 3 years' limitation of original act. *Id.*

COLLISION. See **Admiralty,** 1.

COMBINATIONS. See **Anti-Trust Act.**

COMMERCE. See **Constitutional Law,** V; **Interstate Commerce; Interstate Commerce Acts.**

COMMISSIONER OF INTERNAL REVENUE. See **Taxation,** III, 8, 9.

COMMON CARRIERS. See **Carriers; Employers' Liability Act; Interstate Commerce Acts.**

COMMON LAW. See **Criminal Law,** 17.

COMPENSATION. See **Constitutional Law,** IV, 1, 2, 10; IX, 5–7; XI, 4–6, (3); **Eminent Domain; Philippine Islands,** 2–5.

COMPETITION. See **Anti-Trust Act.**

CONDEMNATION. See **Eminent Domain.**

CONDITIONS:

Illegal condition attached to governmental license, void. See **Philippine Islands,** 2–5.

CONGRESS:

For acts cited. See Table at front of volume.

For powers. See **Constitutional Law; Intoxicating Liquors.**

1. *Departmental Practice. Held* not an interpretation of statutes as requiring fixing of compensation for transporta-

CONGRESS—*Continued.* PAGE

tion of mails in a certain way, but an exercise of the department's discretion under such statutes. *Mail Divisor Cases.* . 326

2. *Congressional Action.* Rejection of amendments, *held* not an interpretation of existing law as forbidding what the amendments would have expressly required. *Id.*

CONSTITUTIONAL LAW:

I. Judiciary, p. 577.

II. Express and Implied Powers, p. 578.

III. Insular Possessions; Philippine Islands, p. 578.

IV. War Power, p. 578.

V. Commerce Clause, p. 579.

VI. Contract Clause, p. 579.

VII. First Amendment; Freedom of Speech, p. 580.

VIII. Fourth Amendment, p. 580.

IX. Fifth Amendment, p. 580.

X. Sixth Amendment; Jury, p. 581.

XI. Fourteenth Amendment:
- (1) General, p. 581.
- (2) Notice and Hearing, p. 582.
- (3) Liberty and Property; Police Power; Taking; Taxation, p. 582.
- (4) Equal Protection of the Laws, p. 583.

XII. Eighteenth Amendment, p. 584.

XIII. Testing Constitutionality, p. 584.

See **Admiralty,** 5; **Jurisdiction; National Banks,** 16; **Procedure.**

Reserved powers. See XI, 1, *infra.*

State constitutions. See **California,** 1; **Oklahoma.**

Philippine Bill of Rights. See **Philippine Islands,** 2-5.

I. **Judiciary.**

1. Art. III, § 2, cl. 2. Merely distributes federal jurisdiction conferred by clause 1 into original and appellate jurisdiction, and does not itself confer any. *Duhne* v. *New Jersey*..... 311

2. Court cannot inquire into motives of Congress, in determining validity of its acts, or into wisdom of legislation; nor

CONSTITUTIONAL LAW—*Continued.* PAGE

pass upon necessity for exercise of power possessed. *Hamilton* v. *Kentucky Distilleries Co.* 146

3. Constitutional rights cannot be based on error in prior court decisions. *Dunbar* v. *City of New York.* 516

II. **Express and Implied Powers.**

1. Power to make all laws necessary for carrying into execution powers specifically granted, is an express power. *Jacob Ruppert* v. *Caffey.* 264

2. *War Power.* Implied power to prohibit intoxicating liquors, includes not only power to prohibit but also to prevent the liquor traffic by prohibiting non-intoxicating liquors. *Id.*

III. **Insular Possessions; Philippine Islands.**

Constitution does not limit power of Congress when legislating for the Islands as when legislating for the United States. *Public Utility Commrs.* v. *Ynchausti & Co.* 401

IV. **War Power.** See **Intoxicating Liquors;** XII, *infra.*

1. *Intoxicating Liquors.* Power of Congress to prohibit traffic; exercise of power, without providing compensation, not limited by Fifth Amendment. *Hamilton* v. *Kentucky Distilleries Co.* 146

2. *War-Time Prohibition Act.* As to liquors in bond made before passage, is not an appropriation for public purposes; time allowed for their disposition, *held* not unreasonable. *Id.*

3. *Id.* Though passed after cessation of hostilities, act was within war power. *Id.*

4. *Id.* War power includes power to guard against renewal of conflict and to remedy evils arising from its rise and progress. *Id.*

5. *Id. War Emergency.* Continuing validity of act after actual war emergency has passed; necessity for prohibition had not ceased when suits were begun. *Id.*

6. *Id.* Act within war power when passed, and neither became invalid by change of circumstances nor had expired by its own terms when this suit was begun. *Jacob Ruppert* v. *Caffey.* 264

CONSTITUTIONAL LAW—*Continued.* PAGE

7. *Id. National Prohibition Act.* Congress had power to enact new prohibitions at time when act was passed. *Id.*

8. *Id.* Power to define intoxicating liquors by fixing maximum of alcoholic content. *Id.*

9. *Id.* To make prohibition effective, Congress may prohibit liquors containing ½ of 1% alcohol, even though they be not in fact intoxicating. *Id.*

10. *Id.* Immediate prohibition does not render act arbitrary; nor does it amount to taking of non-intoxicating beer previously acquired. *Id.*

11. *Non-intoxicating Beverages.* Power of Congress to prohibit manufacture and sale. *United States* v. *Standard Brewery*. 210

V. **Commerce Clause.**

1. *Federal Legislation.* Not narrowly construed to preserve state power over same subject previously enjoyed in absence of federal action. *Western Union Tel. Co.* v. *Boegli*. 315

2. *Id. Telegraph Companies.* Interstate Commerce Act, 1910, supersedes power of States to inflict penalties for failure to make prompt delivery of interstate messages. *Id.*

3. *Id. Interstate Messages.* Under Act of 1910, may stipulate to limit liability for negligence, unless message repeated at higher rate; state control superseded. *Postal Tel.-Cable Co.* v. *Warren-Godwin Co*. 27

4. *Peddling; State License Tax.* Where manufacturer has customers in another State to whom he habitually carries goods on his vehicles, selling them such as they desire each time in original packages, the business is peddling and subject to state license tax. *Wagner* v. *Covington*. 95

VI. **Contract Clause.**

1. *State Contract.* Distinction between statute that repudiates contract made by State and one that impairs its obligation. *Hays* v. *Port of Seattle*. 233

2. *Id. Harbor Improvements.* Contract not impaired by legislation abandoning project, passed after long delays without performance by contractor. *Id.*

CONSTITUTIONAL LAW—*Continued.* PAGE

3. *Carriers; Contracts for Future Transportation.* Cannot prevent state regulation of rates and practices. *Producers Transp. Co.* v. *Railroad Comm.* 228

4. *Franchise; Electric Lighting Companies.* Franchise to use streets not impaired where, after passage of law requiring consent of municipality to erect poles and wires, company removed and could not replace them under the law without consent of authorities. *Hardin-Wyandot Co.* v. *Upper Sandusky.* 173

5. *Id.* Franchise right to maintain poles, etc., in streets without interference cannot be disturbed by city, without compensation, to make room for municipal lighting plant. *Los Angeles* v. *Los Angeles Gas Corp.* 32

6. *Street Railway Franchise.* Not impaired by assessment for paving roadways, on central strip acquired in fee by company under a dedication and occupied by its tracks before inclusion in city limits. *Oklahoma Ry.* v. *Severns Pav. Co.* 104

7. *Not Involved,* by ordinance based on police power requiring car company to sprinkle streets. *Pacific Gas Co.* v. *Police Court.* 22

VII. **First Amendment; Freedom of Speech.**

1. *Espionage Act, held* constitutional. *Schaefer* v. *United States.* 466

2. *Id.* Amendment does not authorize court, wherever criminal abuse is charged, to override verdict of guilty by substituting its own opinion of evidence for that of jury. *Id.*

VIII. **Fourth Amendment.** See IX, *infra.*

Unlawful Search; Corporations. Protection against compulsory production of books and papers, when information upon which subpœnas were framed was derived by Government through previous unconstitutional search and seizure, under color of a void writ. *Silverthorne Lumber Co.* v. *United States.* 385

IX. **Fifth Amendment.** See VIII, *supra.*

1. *Self-incrimination; Corporations.* Rights of corporations against unlawful search and seizure protected even if corpo-

CONSTITUTIONAL LAW—*Continued.* PAGE

rations not protected by Fifth Amendment from compulsory production of incriminating documents. *Silverthorne Lumber Co.* v. *United States*. 385

2. *Double Jeopardy.* None where accused obtains reversal of conviction without capital punishment and on retrial is convicted without qualification and sentenced to death. *Stroud* v. *United States*. 15

3. *Incriminating Letters.* Written by accused in prison and turned over to warden may be used by prosecution. *Id.*

4. *Change of Venue and Quashing Panel.* Motions for change of venue and to quash panel based on local prejudice and remarks of judge and counsel, addressed to District Judge's discretion. *Id.*

5. *Intoxicating Liquors.* Amendment does not limit war power of Congress to prohibit traffic. *Hamilton* v. *Kentucky Distilleries Co*. 146

6. *Id. War-Time Prohibition Act.* As to liquors in bond made before passage, act is not an appropriation for public purposes. *Id.*

7. *Non-intoxicating Liquors.* Immediate prohibition in § 1 of National Prohibition Act, did not amount to taking of non-intoxicating beer previously acquired. *Jacob Ruppert* v. *Caffey*. 264

8. *Insular Possessions.* Constitution does not limit power of Congress when legislating for the Philippine Islands as when legislating for the United States. *Public Utility Commrs.* v. *Ynchausti & Co*. 401

X. **Sixth Amendment; Jury.**

Peremptory Challenges; Jud. Code, § 287. As applied to any of several defendants, provision that all shall be deemed a single party is constitutional. *Schaefer* v. *United States*. 466

XI. **Fourteenth Amendment.**

Similarity to state police power of war power of Congress over intoxicants. See IV, 1, *supra*.

(1) *General.*

1. *States; Reserved Powers.* Right to abolish defense of contributory negligence, or to leave question, whether of law or fact, to jury. *Chicago, R. I. & Pac. Ry.* v. *Cole*. 54

CONSTITUTIONAL LAW—*Continued.* PAGE

2. *Id. Taxation.* Use of state taxing power to carry out policy respecting corporations. *Ft. Smith Lumber Co.* v. *Arkansas*. . 532

3. *Court Decisions.* Constitutional rights cannot be based on error in prior decisions. *Dunbar* v. *City of New York*. . . . 516

(2) *Notice and Hearing.*

4. *Eminent Domain.* No hearing required on necessity and expediency of taking, these being legislative questions. *Bragg* v. *Weaver* 57

5. *Id.* Compensation fixed by viewers; notice and hearing before them not essential if provision made for notice of their determination and trial *de novo* in court. *Id.*

6. *Id.* Taking may precede ascertainment of compensation, if advance provision made for payment. *Id.*

7. *Assessment.* Right of property owner to be heard on amount of assessment for public improvement. *Oklahoma Ry.* v. *Severns Pav. Co.* 104

8. *Penalties.* Right to suspension pending judicial test of railroad rates fixed by State. *St. Louis, I. Mt. & So. Ry.* v. *Williams.* 63

(3) *Liberty and Property; Police Power; Taking; Taxation.* See **Philippine Islands,** 2–5.

9. *Taking for Public Purpose,* by act of state legislature, does not violate Amendment where owner given right to sue State under general law. *Hays* v. *Port of Seattle.* 233

10. *Taxation.* Amendment does not forbid double taxation. *Ft. Smith Lumber Co.* v. *Arkansas* 532

11. *Id. Corporations.* State may discriminate between local corporations and individuals, by making former liable to tax on shares held in other local corporations, themselves fully taxed, while leaving individuals free from such liabilities. *Id.*

12. *Improvement Taxes; Benefits.* Legislative determination that lands will be benefited is conclusive unless arbitrary; declaration that railroad lands will be benefited by road improvement is not arbitrary where traffic will thereby be increased. *Branson* v. *Bush* 182

CONSTITUTIONAL LAW—*Continued.* PAGE

13. *Lien for Water Taxes,* imposed by municipality on house-owner for water consumed by tenant, under charter provisions operative when lease was made. *Dunbar* v. *City of New York*. 516

14. *Carriers.* State cannot compel continuance of operation at a loss. *Brooks-Scanlon Co.* v. *Railroad Comm*. 396

15. *Id.* Where railroad owned and operated by lumber company in connection with lumber business, the business of railroad alone determines whether it may be abandoned as unprofitable. *Id.*

16. *Rates; Penalties,* inflicted on railroad for exceeding rates fixed by State; enforcement in action by aggrieved passenger. *St. Louis, I. Mt. & So. Ry.* v. *Williams*. 63

17. *Id.* Reasonableness of amount, how tested. *Id.*

18. *Pipe Lines; Rates.* When subject to state regulation. *Producers Transp. Co.* v. *Railroad Comm*. 228

19. *Street Railway,* requiring to sprinkle street near track. *Pacific Gas Co.* v. *Police Court*. 22

20. *Id. Paving Tax.* Right of municipality to impose on strip of land acquired by company under dedication and occupied by its tracks before inclusion in city limits. *Oklahoma Ry.* v. *Severns Pav. Co*. 104

21. *Street Cars.* Enforcement of ordinance requiring operation by two men, as against company seeking afterwards to substitute improved cars, operated by one man with aid of automatic safety devices. *Sullivan* v. *Shreveport*. 169

22. *Electric Light Companies.* Poles, etc., cannot be interfered with by city without compensation to establish municipal lighting plant. *Los Angeles* v. *Los Angeles Gas Corp*. . . 32

23. *Id.* Law requiring consent of municipality to erect poles and wires in streets within police power; does not deprive company, which used streets under franchise and after passage of law removed poles, of due process. *Hardin-Wynadot Co.* v. *Upper Sandusky*. 173

(4) *Equal Protection of the Laws.*

24. *Improvement Tax; Railroads.* Assessment of railroad, *held* not invalid, as compared with assessments on other

CONSTITUTIONAL LAW—*Continued.* PAGE

real estate, because of inclusion of franchise value. *Branson* v. *Bush*. 182

25. *Street Railway*, requiring to sprinkle street near track. *Pacific Gas Co.* v. *Police Court*. 22

XII. **Eighteenth Amendment.** See IV, 7, *supra*.

Did not repeal War-Time Prohibition Act. *Hamilton* v. *Kentucky Distilleries Co*. 146

XIII. **Testing Constitutionality.**

1. *Substance and Effect*, and not name, of state tax determinative. *Wagner* v. *Covington*. 95

2. *Constitutional Right.* Invasion of not obscured by forms of state law. *Brooks-Scanlon Co.* v. *Railroad Comm*. 396

3. *Railroads; Penalties; Exceeding Passenger Rates.* Cannot claim penalties unconstitutional because severity prevents resort to courts to test adequacy, when opportunity for test in suit against state railroad commission not availed of. *St. Louis, I. Mt. & So. Ry.* v. *Williams*. 63

CONSTRUCTION:

See **Admiralty; Anti-Trust Act; Bankruptcy Act; California; Claims; Constitutional Law; Contracts; Criminal Law; Employers' Liability Act; Germany; Indians; Interstate Commerce Acts; Intoxicating Liquors; Jurisdiction; Kentucky; Limitations; Mails; National Banks; Patents for Inventions; Philippine Islands; Public Lands; Statutes; Taxation; Virginia.**

CONTRACTS. See **Carriers,** 4.

Charter-party. See **Admiralty,** 3.

Impairment of obligation. See **Constitutional Law,** VI.

Mail transportation. See **Mails.**

Joint contracts. See **National Banks,** 7 *et seq.*

Limiting liability for negligence in transmitting messages. See **Telegraph Companies.**

1. *United States; Implied Contract.* When railroad contracts to carry mails for pay determined on the basis of quadrennial weighings, it cannot claim more from the

CONTRACTS—*Continued.* PAGE

Government as upon an implied contract, upon the ground that the basis was illegal and insufficient and resulted in taking its property. *New York, N. H. & H. R. R.* v. *United States*. 123

2. *Id.* To create an express or (in the strict sense) an implied contract, some officer with express or implied power to commit the Government must have intended that result. *Eastern Extension Tel. Co.* v. *United States* 355

3. *Subsidy; Philippine Islands.* Cable company holding Spanish concessions obliging it to transmit government messages at reduced rates and entitling it to a subsidy, claimed subsidy on ground that by accepting benefits United States had assumed burdens of the concession. *Held* that no contract could be derived from facts. *Id.*

4. *Id. Implied Contracts.* Such contract not implied from use of service when Government paid rates charged, though reduced, and through Secretary of War expressly declined free service. *Id.*

5. *Id.* No liability from expenditures made by company in extending its lines with approval of Government given without prejudice to Government's rights. *Id.*

6. *Id.* Acceptance by Philippine officials of payments tendered by company in connection with statements of account assuming a recognition of its concessions and right to subsidy, no basis for implying obligation of United States to pay subsidy. *Id.*

See **Jurisdiction,** VII, 2.

7. *States; Public Works.* Contract with State for harbor improvements, giving contractor lien for compensation, etc., not impaired where State passes act to abandon project, after long delays without performance by contractor. *Hays* v. *Port of Seattle*. 233

CONTRIBUTORY NEGLIGENCE. See **Negligence.**

CONVICTION. See **Criminal Law,** 3, 4, 10, 14.

CORPORATION EXCISE TAX ACT. See **Taxation,** III.

CORPORATIONS. See **Anti-Trust Act; Carriers,** 3, 6; **Interstate Commerce Acts; Municipalities; National Banks; Telegraph Companies.** PAGE

Protection from compulsory production of books and papers for use in criminal case. See **Constitutional Law,** VIII; IX, 1.

Foreign corporations; service of process. See **Jurisdiction,** III.

Insurance companies; taxable income and reserves. See **Taxation,** III.

State power over. *Id.*, IV.

Distinctness of two corporations having identical officers, directors and shareholders may be recognized while treating the shareholders' interest in both as single. *Corsicana Natl. Bank* v. *Johnson*. 68

COURT OF CLAIMS. See **Claims; Jurisdiction,** VII.

Refund; income taxes; limitations. See **Taxation,** III.

COURTS. See **Equity; Judicial Discretion; Jurisdiction; Procedure.**

CREDITORS. See **Bankruptcy Act; Judgments,** 9.

CRIMINAL APPEALS ACT. See **Jurisdiction,** IV, 4.

CRIMINAL CODE. See **Criminal Law,** 3.

CRIMINAL LAW. See **Anti-Trust Act; Intoxicating Liquors.**

Expert testimony. See **Anti-Trust Act,** 6.

Protection of corporation from compulsory production of books and papers for use in criminal case. See **Constitutional Law,** VIII; IX, 1.

Jeopardy. *Id.*, IX, 2.

1. *Indictment.* Must charge each and every element of offense. *United States* v. *Standard Brewery*. 210

2. *Act of Congress; Construction.* By executive department, cannot enlarge statute so as to make conduct criminal under it. *Id.*

3. *Murder; Indictment and Verdict.* Verdict of guilty as charged, under indictment charging murder in first degree,

CRIMINAL LAW—*Continued.* PAGE

is a conviction of murder in the first degree, and no less so because jury adds " without capital punishment," as permitted by § 330, Crim. Code. *Stroud* v. *United States*. 15

4. *Id. Double Jeopardy.* None where accused obtains reversal of conviction without capital punishment and on retrial is convicted without qualification and sentenced to death. *Id.*

5. *Id. Change of Venue and Quashing Panel.* Motions based on local prejudice and remarks of counsel and judge, are addressed to judge's discretion. *Id.*

6. *Id. Challenges.* When error in overruling challenge for cause, followed by peremptory challenge, is harmless. *Id.*

7. *Id. Incriminatory Letters.* Written by accused in prison and turned over to warden, admissible. *Id.*

8. *Challenges.* Error in overruling challenge for cause not prejudicial, in view of number of peremptory challenges allowed and absence of indication that jury was not impartial. *Stroud* v. *United States*. 380

9. *Peremptory Challenges.* Jud. Code, § 287, as applied to any of several defendants; provision that all shall be deemed single party is constitutional. *Schaefer* v. *United States*. . . . 466

10. *Espionage Act.* In prosecution of several defendants, evidence *held* sufficient to warrant conviction as to some but not as to others. *Id.*

11. *Id. False Reports; Newspapers.* Where purpose of reprinting press dispatches with alterations is to obstruct recruiting and war activities, the altered publications are false in the sense of the statute. *Id.*

12. *Id. Jury; General Knowledge.* Falsity is question for jury; in determining which jury may have recourse to general knowledge of war and war conditions. *Id.*

13. *Id. Freedom of Press.* Constitution does not authorize court, wherever criminal abuse is charged, to override verdict of guilty and substitute its own opinion of the evidence for that of jury. *Id.*

14. *Id. Sentence; Several Counts.* Evidence sufficient to sustain one of several counts will sustain conviction and sen-

CRIMINAL LAW—*Continued.* PAGE

tence upon all, if sentence does not exceed that which may lawfully have been imposed under any one of them. *Id.*

15. *Grand Jury.* Power to reëxamine and indict on charge previously examined and ignored by another grand jury; functions of United States attorney; powers not subject to discretion of District Court. *United States* v. *Thompson* 407

16. *Id.* Quashing indictment for failure to obtain permission from court erroneous. *Id.*

17. *Id. State Practice.* Common law and decisions of this court are controlling. *Id.*

18. *Id. Rev. Stats.*, § 722. Adopts state practice only in absence of federal rule. *Id.*

19. *Motion to Quash.* When amounts to plea in bar under Criminal Appeals Act. *Id.*

DAMAGES. See **Admiralty**, 1; **Bankruptcy Act**; **Eminent Domain.**

Relation to penalties sued for by aggrieved passenger. See **Carriers, 7.**

Penalties; telegraph companies; failure to deliver interstate messages. See **Constitutional Law**, V, 2.

Against national bank director for making excessive loan; interest. See **National Banks**, 5, 6, 13.

DEBTS. See **Bankruptcy Act**; **Judgments**, 9.

DECREES. See **Equity**, 7, 8; **Judgments.**

DEDICATION. See **Franchises**, 2.

DEMOBILIZATION. See **Intoxicating Liquors**, 3–5.

DEMURRER. See **Pleading**, 2.

DEPOSITIONS:

1. Objection that deposition of plaintiff in District Court cannot be taken on his own behalf is waived by stipulation waiving time and notice and allowing officer to proceed to take and return it on interrogatories. *Birge-Forbes Co.* v. *Heye*..... 317

DEPOSITIONS—*Continued.* PAGE
2. Immaterial that, in return of foreign depositions, officer did not put them into mail and certify to fact on envelope as required by state law, where war made compliance impossible and where officer transmitted them through American consul to State Department and thence by mail to the clerk. *Id.*

DEPRECIATED CURRENCY. See **Evidence**, 2.

DESCENT AND DISTRIBUTION. See **Taxation**, I.

DIRECTORS. See **Corporations**; **National Banks**, 1, 2, 10–15.

DISCHARGE. See **Bankruptcy Act**, 3.

DISCOUNT. See **National Banks**, 18, 19.

DISCRETION. See **Criminal Law**, 5.
District Court; grand jury. See **Criminal Law**, 15.
Judgments; interest. See **Judgments**, 8.
Of Postmaster General. See **Mails.**

DISTRICT COURT. See **Criminal Law**, 5, 13, 15; **Judgments**, 1; **Jurisdiction**, III, 2; IV (2); V; VI; **Procedure**, III, 1; IV.

DIVISOR CASES. See **Mails**, 1–9.

DOUBLE JEOPARDY. See **Constitutional Law**, IX, 2.

DOUBLE TAXATION. See **Taxation**, II, 2; IV, 2.

DUE PROCESS. See **Constitutional Law**, IV; IX; XI; **Philippine Islands**, 2–5.

EIGHTEENTH AMENDMENT. See **Constitutional Law**, XII.

ELECTRICITY. See **Employers' Liability Act.**

ELECTRIC LIGHT COMPANIES. See **Judgments**, 1; **Municipalities**, 2–6.

EMINENT DOMAIN. See **Carriers,** 3; **Philippine Islands,** 2–5. PAGE

What does not amount to a taking. See **Constitutional Law,** IV, 1, 2, 10, 11; IX, 5–7; XI (3).
As to notice and hearing. *Id.*, XI, 4–7.

1. Right of owner of earth taken for repair of highways to notice and trial *de novo* on amount of compensation, under Virginia law. *Bragg* v. *Weaver*. 57

2. Fixtures maintained in streets by private lighting company, pursuant to franchise right, cannot be disturbed by a city, without compensation, to make room for municipal lighting system. *Los Angeles* v. *Los Angeles Gas Corp*. 32

EMPLOYER AND EMPLOYEE. See **Admiralty,** 5, 6; **Employers' Liability Act; Jurisdiction,** IV, 11; **Negligence.**

EMPLOYERS' LIABILITY ACT. See **Jurisdiction,** IV, 11.
Employment in Interstate Commerce. Lineman wiping insulators supporting main wire, in use as conductor of electricity which moved cars in interstate and intrastate commerce. *Southern Pac. Co.* v. *Industrial Accident Comm*. 259

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** XI (4).

EQUITABLE DEBT. See **Bankruptcy Act,** 4.

EQUITY. See **Bankruptcy Act,** 4; **Trusts and Trustees.**
1. *Laches; Federal Practice.* Defense need not be set up by plea or answer but may be taken advantage of either by demurrer or upon final hearing. *Hays* v. *Port of Seattle*. 233

2. *Multiplicity of Suits.* United States may maintain suit to protect Indian allottees as a class against arbitrary and discriminatory state taxation. *United States* v. *Osage County* 128

3. *Id. Inadequate Remedy.* Government need not resort to procedure of state statutes for correcting mistakes in tax proceedings. *Id.*

4. *Cancellation of Patent; Fraud.* Bill alleging false representation in affidavit filed with land officers not sustainable

EQUITY—*Continued.* PAGE

where affidavit shows representation was not as alleged and that fact in question was clearly disclosed by entry papers. *United States* v. *Poland*. 221

5. *Id. Mistake.* Where allegations show patent was issued in violation of law, bill states a case for cancellation. *Id.*

6. *Id. Bona Fide Purchaser.* Defense of, must be set up and established by defendant, in suit to set aside patent. *Id.*

7. *Dissolution of Monopolies; Anti-Trust Act,* has regard to conditions as they exist when relief invoked and to powers of court of equity to adapt its remedies to those conditions. *United States* v. *U. S. Steel Corp*. 417

8. *Id. Policy of Act.* Courts may determine in each instance relief appropriate for execution of policy of act. *Id.*

ERROR, HARMLESS. See **Criminal Law,** 6.

ERROR AND APPEAL. See **Jurisdiction; Procedure.**

ESPIONAGE ACT. See **Constitutional Law,** VII; **Criminal Law,** 10–13.

ESTATES OF DECEDENTS. See **Taxation,** I.

ESTOPPEL. See **Judgments,** 1.

EVIDENCE. See **Anti-Trust Act,** 3, 6–8; **Contracts,** 2–6; **Criminal Law,** 10–14; **Depositions; Equity,** 6; **Judicial Notice.**

Presumption. See **Admiralty,** 4; **Presumption.**

Protection of corporation from compulsory production of books and papers for use in criminal case. See **Constitutional Law,** VIII; IX, 1.

1. *Incriminatory Letters.* Written by accused in prison and turned over to warden, admissible. *Stroud* v. *United States*. 15

2. *Foreign Currency.* In action to recover amounts paid on defendant's account in Germany, it is not error to take value of German mark at par in absence of evidence that it had depreciated when plaintiff made the payments. *Birge-Forbes Co.* v. *Heye*. 317

EVIDENCE—*Continued.* PAGE

3. *Carriers; Serving Public; Pipe Lines.* Articles of incorporation; acquisition of right of way through eminent domain; and transportation for all seeking service; *held* to sustain finding of devotion to public use. *Producers Transp. Co.* v. *Railroad Comm.* 228

4. *Official Report.* Weight to be attached to report of inexperienced special agent of General Land Office on question of oil value. *United States* v. *Southern Pac. Co.* 1

EXECUTIVE DEPARTMENTS. See **Mails,** 5, 6.
Administrative decisions. See **Intoxicating Liquors,** 8, 9. **Taxation,** III, 8.

EXECUTIVE OFFICERS. See **Officers.**

EXECUTORS AND ADMINISTRATORS. See **Taxation,** I.

EXPERT TESTIMONY. See **Anti-Trust Act,** 6; **Evidence,** 4.

EXPRESS POWERS. See **Constitutional Law,** II.

FACTS. See **Intoxicating Liquors,** 5, 12; **Judgments,** 1–3; **Judicial Notice; Negligence; Procedure,** III, 2; **Public Lands,** II, 2.
Administrative decisions. See **Intoxicating Liquors,** 8, 9; **Taxation,** III, 8.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act,** VI, 2, 3.

FEDERAL QUESTION. See **Jurisdiction,** IV, 6, 9–14; VI, 2, 3.

FEES. See **Public Lands,** I, 3.

FIFTH AMENDMENT. See **Constitutional Law,** IX.

FINAL JUDGMENT. See **Jurisdiction,** IV, 7, 8.

FOREIGN CORPORATIONS. See **Jurisdiction,** III.

FOREIGN CURRENCY. See **Evidence,** 2.

FOREIGN DEPOSITIONS. See **Depositions.**

PAGE

FOREIGN TRADE. See **Anti-Trust Act,** 11.

FOURTEENTH AMENDMENT. See **Constitutional Law,** XI.

FOURTH AMENDMENT. See **Constitutional Law,** VIII.

FRANCHISES. See **Constitutional Law,** VI, 4–6; **Municipalities.**

1. *What is,* and consideration of, in assessing railroad for local improvement. *Branson* v. *Bush*. 182

2. *Street Railway.* Franchise defining obligation to pave portions of streets, *held* not to affect city's right to assess tax for paving roadways on central strip acquired by company in fee though dedicated and occupied by its tracks before inclusion in city limits. *Oklahoma Ry.* v. *Severns Pav. Co.* . . . 104

FRAUD. See **Bankruptcy Act,** 4; **Equity,** 4; **National Banks,** 2, *et seq.;* **Public Lands,** II, 1.

Rescission. See **National Banks,** 14, 15.

Liability of director for knowingly participating in making of loan in excess of limit prescribed by National Bank Act. *Corsicana Natl. Bank* v. *Johnson*. 68

GERMANY:

Value of German mark. See **Evidence,** 2.

Six months' limitation of Civil Code, on claims for defect of quality in goods sold, does not apply to awards of arbitration based on such claims. *Birge-Forbes Co.* v. *Heye*. 317

GRAND JURY. See **Criminal Law,** 15–18.

HEARING. See **Constitutional Law,** XI (2); **Eminent Domain,** 1.

HEIRS. See **Taxation,** I.

HIGHWAYS. See **Constitutional Law,** VI, 4–7; XI, 19–23, 25.

Taking earth to repair. See **Eminent Domain,** 1.

HOMESTEADS. See **Public Lands,** I.

IMPAIRMENT OF CONTRACT OBLIGATION. See **Constitutional Law,** VI. PAGE

IMPLIED POWERS. See **Constitutional Law,** II.

IMPROVEMENT DISTRICTS. See **Taxation,** IV, 3, 4.

INCOME TAX. See **Taxation,** III.

INDIANS:

Claims under Indian Depredation Acts. See **Claims.**

1. *Osage Lands; State Taxation.* United States may sue to protect non-competent allottees as a class against arbitrary, excessive and discriminatory state taxation of taxable allotments. *United States* v. *Osage County*. 128

2. *Id.* United States Attorney by direction of Attorney General has implied authority to institute and conduct such suit. *Id.*

3. *Id. Multiplicity of Suits.* United States not obliged to resort to remedies afforded individuals by state law, but may invoke equity jurisdiction to avoid multiplicity of suits and secure adequate remedy for Indians as a class. *Id.*

INDICTMENT. See **Criminal Law,** 1, 3, 14–19.

INDORSER. See **National Banks,** 8.

INHERITANCE TAXES. See **Taxation,** I.

INJUNCTION:

To restrain collection of illegal taxes. See **Equity,** 2, 3.

INSTRUCTIONS. See **Criminal Law,** 12.

INSURANCE COMPANIES:

Taxable income and reserves. See **Taxation,** III.

INTENT. See **Anti-Trust Act,** 1; **Contracts,** 2; **Criminal Law,** 11.

INTEREST. See **Judgments,** 8, 9; **National Banks,** 5, 6, 13, 16–19.

PAGE

INTERNAL REVENUE. See **Taxation,** I–III.

INTERNAL REVENUE DEPARTMENT. See **Intoxicating Liquors,** 9; **Taxation,** III, 8, 9.

INTERNATIONAL LAW. See **Limitations,** 1.

1. War power of Congress, how far dependent on technical state of war, terminable only with ratification of treaty of peace, or by declaration of peace, and on actual war emergency or necessity. *Hamilton* v. *Kentucky Distilleries Co.* .. 146
See also *Jacob Ruppert* v. *Caffey*..... 264

2. Judgments for alien enemies during war, and presumed value of foreign money. *Birge-Forbes Co.* v. *Heye*..... 317

3. Court of Claims without jurisdiction of claim based on obligation of United States growing out of treaty with Spain ceding Philippine Islands or on one imposed by international law as consequence of cession. *Eastern Extension Tel. Co.* v. *United States*..... 355

INTERSTATE COMMERCE. See **Constitutional Law,** V; **Interstate Commerce Acts; Jurisdiction,** IV, 10.
Employment in. See **Employers' Liability Act; Jurisdiction,** IV, 11.

INTERSTATE COMMERCE ACTS. See **Anti-Trust Act; Employers' Liability Act.**

1. *Telegraph Companies; Interstate Messages.* Act of 1910 bringing companies under control of Interstate Commerce Commission, precludes power of States to inflict penalties for failure to make prompt delivery of interstate messages. *Western Union Tel. Co.* v. *Boegli*..... 316

2. *Id. Negligence.* Under Act of 1910, may stipulate to limit liability, unless message repeated at higher rate; state control superseded. *Postal Tel.-Cable Co.* v. *Warren-Godwin Co.*..... 27

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Acts,** 1.

INTOXICATING LIQUORS. See **Constitutional Law,** II; IV; IX, 5–7.

1. *War-Time Prohibition Act. Held* within war power and

INTOXICATING LIQUORS—*Continued.* PAGE

not an appropriation for public purposes of liquors in bond, made before act was passed. *Hamilton* v. *Kentucky Distilleries Co* 146

2. *Id. Eighteenth Amendment.* Did not repeal War-Time Prohibition Act. *Id.*

3. *Id. Period of Prohibition.* Congress intended it should continue until date of termination of demobilization proclaimed by President. *Id.*

4. *Id.* Reference to demobilization in veto message on National Prohibition Act is not proclamation required by War-Time Prohibition Act. *Id.*

5. *Id.* Facts showing demobilization not completed. *Id.*

6. *Id. Beer.* Act does not apply to beer which is not in fact intoxicating. *United States* v. *Standard Brewery* 210

7. *Id.* Intended to prevent manufacture of intoxicants as means of conserving man-power, etc. *Id.*

8. *Id. Rulings of Treasury Department,* under revenue laws, irrelevant in construction of act. *Id.*

9. *Id.* Act does not leave question of what percentage of alcohol constitutes beverage intoxicating to determination of Internal Revenue Department, and its decisions in that regard cannot enlarge statute so as to make conduct criminal under it. *Id.*

10. *Id.* Beverage containing not more than ½ of 1% alcohol is not, as matter of law, intoxicating. *Id.*

11. *National Prohibition Act; War Power.* Power of Congress to define intoxicating liquors and to prohibit those containing ½ of 1% of alcohol, even though they be not in fact intoxicating, in order to make prohibition effective. *Jacob Ruppert* v. *Caffey* 264

12. *Id. Presidential Proclamations,* under Food Control Act, *held* not to import finding that 2.75% beer is non-intoxicating or raise equity in favor of owner of beer manufactured after President's authority over subject had ceased. *Id.*

INVENTIONS. See **Patents for Inventions.**

PAGE

JEOPARDY. See **Constitutional Law,** IX, 2.

JOINT CONTRACTS. See **National Banks,** 7 *et seq.*

JUDGMENTS. See **Equity,** 7, 8.
Finality. See **Jurisdiction,** IV, 7, 8.
Double jeopardy. See **Constitutional Law,** IX, 2.
Administrative decisions. See **Intoxicating Liquors,** 8, 9; **Taxation,** III, 8.

1. *Res Judicata.* The California Supreme Court having jurisdiction by writ of review to determine whether Railroad Commission fixed rates for electric power in violation of Federal Constitution, its bare action in refusing a petition for such a writ, though not explained by any opinion, will be taken as a determination of such constitutional question preventing reëxamination of it in an injunction suit in the federal District Court, there being a presumption that all the facts were set up in the petition, when the petition itself is not adduced in the injunction suit. *Napa Valley Co.* v. *Railroad Comm.* 366

2. *Id.* Where broker became liable for his principal on several arbitration awards and obtained judgment only for part he had then paid, and, having paid remainder, sued again, *held* that former judgment was conclusive as to validity of awards. *Birge-Forbes Co.* v. *Heye* 317

3. *Id.* In determining whether former judgment involved same issues of fact as are presented in second action before same judge, especial weight attaches to the judge's decision. *Id.*

4. *Alien Enemies.* Judgment for, objectionable only in so far as it may give aid and comfort to other side in the war. *Birge-Forbes Co.* v. *Heye* 317

5. *Id.* Right to review during war, where judgment obtained before declaration of war and satisfaction delayed by other party's appeal. *Id.*

6. *Id. Form of Judgment.* Money to be paid to clerk and turned over to Alien Property Custodian. *Id.*

7. *Id.* Directing assessment of land for public improvement; right of property owner to be heard on amount. *Oklahoma Ry.* v. *Severns Pav. Co.* 104

JUDGMENTS—*Continued.* PAGE

8. *Interest; Damages for Negligence of National Bank Director.* Awarded as matter of discretion, not of right. *Bates* v. *Dresser*. 524

9. *Id.* Allowed from date of decree in District Court until date when judgment creditor interposed delay by appeal. *Id.*

JUDICIAL CODE. See **Criminal Law,** 3; **Jurisdiction.**
§ 287, constitutionality. See **Constitutional Law,** X.

JUDICIAL DISCRETION. See **Criminal Law,** 5.
District Court; grand jury. See **Criminal Law,** 15.
Judgments; interest. See **Judgments,** 8.

JUDICIAL NOTICE:

1. Of state of demobilization of armed forces, as shown by report of Secretary of War. *Hamilton* v. *Kentucky Distilleries Co*. 146

2. Court cannot say as matter of law that beer containing only ½ of 1% of alcohol is intoxicating. *United States* v. *Standard Brewery* 210

JUDICIARY. See **Constitutional Law,** I.

JURISDICTION:

I. In General, p. 599.

II. Of Federal Courts; In General, p. 599.

III. Over the Person, p. 599.

IV. Jurisdiction of this Court:
(1) Original, p. 599.
(2) Over District Court, p. 599.
(3) Over State Courts, p. 600.

V. Jurisdiction of Circuit Court of Appeals, p. 601.

VI. Jurisdiction of District Court, p. 601.

VII. Jurisdiction of Court of Claims, p. 601.

VIII. Jurisdiction of State Courts, p. 601.
See **Constitutional Law; Equity; Procedure.**
Federal question. See IV, 6, 9–14; VI, 2, 3, *infra.*
Local question. See IV, 14, *infra.*

JURISDICTION—*Continued.* PAGE

I. In General.

1. Forms imposed by local law cannot enable courts and commissions to do what Constitution forbids. *Brooks-Scanlon Co.* v. *Railroad Comm.* 396

2. Court cannot inquire into motives of Congress, in determining validity of its acts, or into wisdom of legislation; nor pass upon necessity for exercise of power possessed. *Hamilton* v. *Kentucky Distilleries Co.* 146

3. Constitutional rights cannot be based on error in prior court decisions. *Dunbar* v. *City of New York.* 516

II. Of Federal Courts; In General.

1. *Admiralty.* Prior to Act of 1917, amending Jud. Code, state workmen's compensation law had no application to case of personal injuries sustained in maritime employment. *Peters* v. *Veasey.* 121

2. *Suit against State.* No jurisdiction of suit brought by citizen against his own State without its consent. *Duhne* v. *New Jersey.* 311

III. Over the Person.

1. *Foreign Corporations; Service on Agent,* appointed under New York law. Unimportance of failure to revoke appointment where corporation has ceased doing local business. *Chipman, Ltd.,* v. *Jeffery Co.* 373

2. *Id. Removal.* District Court must dismiss in such case, for want of jurisdiction, upon removal from state court. *Id.*

IV. Jurisdiction of this Court.

(1) *Original.*

1. *Art. III, § 2, cl. 2, of Constitution.* Merely distributed federal jurisdiction conferred by clause 1 into original and appellate jurisdiction, and does not itself confer any. *Duhne* v. *New Jersey.* 311

2. *Original Bill.* Leave to file denied if jurisdiction to entertain is lacking. *Id.*

3. *Suit against State.* No jurisdiction of suit brought by citizen against his own State without its consent. *Id.*

(2) *Over District Court.* See VI, *infra.*

JURISDICTION—*Continued.* PAGE

4. *Criminal Appeals Act.* Judgment sustaining motion to quash indictment, which in effect bars further prosecution, reviewable as judgment sustaining special plea in bar. *United States* v. *Thompson*..... 407

5. *Mandamus and Prohibition*, to control action of District Court, not allowed when relief afforded by writ of error. *United States* v. *Thompson*..... 407

6. *Contract with State.* Bill alleging impairment by subsequent legislation presents constitutional question, directly reviewable under Jud. Code, § 238. *Hays* v. *Port of Seattle*..... 233

(3) *Over State Courts.* See VIII, *infra.*

7. *Intermediate Court.* Writ runs to, if State Supreme Court declines to review. *Pacific Gas Co.* v. *Police Court.*. 22

8. *Id.* When judgment of intermediate state court directly reviewable under Jud. Code, § 237. *Mergenthaler Linotype Co.* v. *Davis*..... 256

9. *Federal Question on Rehearing.* No review where first raised by petition for rehearing in state court. *Id.*

10. *Id. Error or Certiorari.* Claim that lease contract was made in interstate commerce and was therefore not subject to state statutes, does not sufficiently challenge their validity, but asserts at most a title, right, privilege or immunity under Constitution. *Id.*

11. *Id.* Certiorari to review state judgment affirming award under workmen's compensation law, where federal question upon which applicability, as distinct from validity, of that law depends, is whether employee was engaged in interstate commerce. *Southern Pac. Co.* v. *Industrial Accident Comm.*..... 259

12. *Id.* Validity of ordinance purporting to repeal earlier franchise ordinance not considered under contract clause where state court decided case independently of later ordinance. *Hardin-Wyandot Co.* v. *Upper Sandusky*..... 173

13. *Id. On Rehearing.* No review where federal right first drawn in question by petition for rehearing which was not entertained. *Godchaux Co.* v. *Estopinal*..... 179

JURISDICTION—*Continued.* PAGE

14. *Id. Local Question.* Statement that court has not jurisdiction to consider relief claimed under Federal Constitution, because plaintiff has not complied with formalities under state law, cannot be taken as placing decision on state ground, when court actually passes upon and denies merits of plaintiff's claim. *Brooks-Scanlon Co.* v. *Railroad Comm.* . . 396

V. Jurisdiction of Circuit Court of Appeals.

Judgment for Alien Enemy. May review judgment of District Court during war, where judgment obtained before war and satisfaction delayed by other party's appeal, and affirm with directions that money be paid to clerk and turned over to Alien Property Custodian. *Birge-Forbes Co.* v. *Heye*. 317

VI. Jurisdiction of District Court. See IV (2), *supra;* Removal, III, 2, *supra.*

1. *Foreign Corporation.* No jurisdiction of action in New York by local against foreign corporation, on contract to be performed in another State, where service made upon agent appointed under New York law and corporation, without revoking appointment, removed from State. *Chipman, Ltd.*, v. *Jeffery Co.*. 373

2. *Contract with State.* Bill alleging impairment by subsequent legislation presents constitutional question. *Hays* v. *Port of Seattle*. 233

3. *Estoppel; State Court Judgment.* Effect as estoppel on question of constitutional right. *Napa Valley Co.* v. *Railroad Comm*. 366

VII. Jurisdiction of Court of Claims.

1. *Indian Depredation Acts.* Reinstatement, under Act of 1915, of cases dismissed on ground of alienage. *Rex* v. *United States*. 382

2. *Treaty with Spain.* Obligation of United States growing out of treaty ceding Philippine Islands or imposed by international law as consequence of cession. *Eastern Extension Tel. Co.* v. *United States*. 355

VIII. Jurisdiction of State Courts. See IV (3), *supra.*

1. *Workmen's Compensation Laws.* Prior to Act of 1917, amending Jud. Code, state law had no application to case of

JURISDICTION—*Continued.* PAGE
personal injuries sustained by one in maritime employment. *Peters* v. *Veasey*. 121

2. *California.* Petition to Supreme Court for writ of review to bring up proceedings of Railroad Commission fixing rates for electric power, may be disposed of on merits by an order simply refusing the writ. *Napa Valley Co.* v. *Railroad Comm.* 366

JURY. See **Constitutional Law,** X; XI, 1; **Criminal Law,** 3–5, 13.
Challenges. See **Criminal Law,** 6, 8–9.
Instructions. *Id.*, 12.
Grand jury. *Id.*, 15–18.

KENTUCKY:
Municipalities. Power to regulate water rates under § 3490, Ky. Stats. *Winchester* v. *Winchester Waterworks Co.* 192

LACHES. See **Equity,** 1.

LAND DEPARTMENT. See **Public Lands.**

LANDS. See **Eminent Domain; Indians; Landlord and Tenant; Public Lands; Taxation,** IV, 3–7.

LANDLORD AND TENANT:
Water Taxes; Covenant of Tenant to Pay. Lien imposed under city charter provisions operative when lease was made. *Dunbar* v. *City of New York*. 516

LEASE. See **Landlord and Tenant.**

LEGACIES. See **Taxation,** I.

LETTERS. See **Evidence,** 1.

LICENSE:
Taxes. See **Constitutional Law,** V, 4.
For Philippine coastwise trade; illegal condition void. See **Philippine Islands,** 2–5.

LIENS. See **Admiralty,** 3; **Municipalities,** 9.

LIGHT AND POWER COMPANIES. See **Judgments,** 1; **Municipalities,** 2–6. PAGE

LIMITATIONS. See **National Banks,** 11.
In Court of Claims; Indian Depredation Cases. See **Claims,** 2.

1. *German Civil Code.* Six months' limitation of, on claims for defect of quality in goods sold, does not apply to awards of arbitration based on such claims. *Birge-Forbes Co.* v. *Heye*. 317

2. *Court of Claims.* Claim for refund of money paid with original return under Income Tax Act barred if not presented to Commissioner and sued on within two years. *Maryland Casualty Co.* v. *United States*. 342

LIMITED LIABILITY. See **Admiralty,** 1.
For negligence. See **Telegraph Companies.**

LIQUORS. See **Constitutional Law,** II; IV; IX, 5–7; **Intoxicating Liquors.**

LOCAL QUESTION. See **Jurisdiction,** IV, 14.

MAILS:

1. *Transportation; Pay; Act of 1873.* Maximum rates; discretion of Postmaster General to fix lower rates in contracting with railroads. *Mail Divisor Cases*. 326

2. *Id. Weighing; Daily Average.* Rule of Postmaster General fixing whole number of days of weighing period as a divisor, for both 6 and 7-day routes. *Id.*

3. *Id. Working Days.* Failure to divide aggregate weight by number of working days will not render action of Postmaster General void. *Id.*

4. *Id. Acts Reducing Compensation.* Refer to statutory maximum rates; do not impair discretion of Postmaster General to fix lower rates. *Id.*

5. *Id. Departmental Practice,* allowing full statutory rates and average weights derived through divisor excluding Sundays, was in exercise of discretion, not an interpretation of statutes as requiring that pay be so determined. *Id.*

MAILS—*Continued.* PAGE

6. *Id. Congressional Action.* Rejection of amendments requiring divisor to be number of weighing days, not an interpretation of existing law as forbidding that method. *Id.*

7. *Id. Non-land-grant Roads.* Prior to Act of 1916, could refuse to carry mails at rates offered. *Id.*

8. *Id. Performance; Acceptance of Compensation.* Railroads cannot repudiate contracts, made with knowledge of rule of Postmaster General as to divisor, and claim larger compensation because week-day divisor was not employed, as directed by statute. *Id.*

9. *Id. Land-grant Roads.* Same rules apply to roads under duty to carry mail at prices fixed by law, in absence of arbitrary or discriminatory action by Postmaster General. *Id.*

10. *Id. Empty Bags.* Railroad which contracted to carry for compensation fixed by test weighings made after withdrawing empty bags, cannot complain that they were withdrawn to diminish compensation. *St. Louis, I. Mt. & So. Ry.* v. *United States* 198

11. *Id. Land-Grant Road.* Empty bags withdrawn from mails, *held* property of United States within free transportation provisions and not part of mail within acts fixing compensation of land-aided roads. *Id.*

12. *Id.* Power of Postmaster General to fix compensation of railroads on basis of weights taken at beginning of 4-year term of contract. *New York, N. H. & H. R. R.* v. *United States.* 123

13. *Id. Implied Contract.* None to pay more, where railroad contracts on this basis and receives less than on basis of annual weighings. *Id.*

14. *Id. Non-land-grant Road.* Not required to carry mails prior to Act of 1916; and cannot complain when it voluntarily accepted and performed service with knowledge of what United States intended to pay. *Id.*

15. *Id. Coastwise Trade.* Duty of vessels engaged in Philippine coastwise trade to carry mails free. *Public Utility Commrs.* v. *Ynchausti & Co.* 401

MANDAMUS. See **Jurisdiction, IV, 5.** PAGE

MANUFACTURERS:
Of shells. See **Taxation, II.**

MARITIME LAW. See **Admiralty.**

MASTER. See **Admiralty,** 2–4.

MASTER AND SERVANT. See **Admiralty,** 5, 6; **Employers' Liability Act; Negligence.**

MINERALS AND MINERAL LANDS:
As to test of oil value. See **Public Lands, II.**

MISTAKE:
Return of fees, etc., paid under. See **Public Lands, I, 3.**
Bill to set aside patent. See **Equity,** 5.

MONEY:
Value of German mark. See **Evidence,** 2.
Paid under mistake. **Public Lands,** I, 3.

MONOPOLIES. See **Anti-Trust Act.**

MULTIPLICITY OF SUITS. See **Equity,** 2, 3.

MUNICIPALITIES. See **Franchises; Ordinances.**
Paving tax on central strip owned and occupied by street railway. See **Taxation,** IV, 5–7.

1. *Powers.* Distinction between governmental and quasi-private powers. *Los Angeles* v. *Los Angeles Gas Corp.* 32

2. *Municipal Light System.* Adoption does not justify interference with poles, etc., of private companies without compensation. *Id.*

3. *Id. Declarations of Ordinance.* As to public interests involved, ineffectual to evoke police power to disturb private rights. *Id.*

4. *Light Companies.* Franchise rights acquired under California constitution. *Id.*

5. *Id.* Law requiring consent of municipality to erect

MUNICIPALITIES—*Continued.* PAGE

poles and wires in streets within police power; company, which used streets under franchise and after passage of law removed poles, cannot complain that its franchise is impaired and that it is deprived of property because poles and wires could not be replaced without consent of authorities. *Hardin-Wyandot Co.* v. *Upper Sandusky* 173

6. *Id.* Ohio laws construed. *Id.*

7. *Water Companies; Rates.* No power in city to regulate unless clearly authorized by legislature. *Winchester* v. *Winchester Waterworks Co.* 192

8. *Id.* Not implied from power to grant rights of way in streets. *Id.*

9. *Water Taxes.* Lien for charges incurred by tenants. *Dunbar* v. *City of New York* 516

10. *Street Cars.* Ordinance requiring operation by two men valid against company seeking to substitute cars operated by one man with aid of automatic safety devices. *Sullivan* v. *Shreveport* 169

MUNITIONS TAX ACT. See **Taxation, II.**

MURDER. See **Criminal Law,** 3, 4.

NATIONAL BANKS:

1. *Directors; Negligence.* Degree of care depends upon subject to which it is applied; each case determined in view of all the circumstances. *Bates* v. *Dresser* 524

2. *Id.* Directors, serving gratuitously, *held* not liable for negligence of cashier, resulting in loss to bank through fraud by bookkeeper. *Id.*

3. *Id.* President, in control of affairs, who had been warned, etc., *held* guilty of negligence in failing to make examination. *Id.*

4. *Id.* President liable for losses suffered through his fault. *Id.*

5. *Id. Damages; Interest.* Awarding of interest upon amount of decree is matter of discretion. *Id.*

NATIONAL BANKS—*Continued.* PAGE

6. *Id.* Not allowed during period of delay caused by unsuccessful appeal of judgment creditor. *Id.*

7. *Excessive Loans; Rev. Stats., §§ 5200, 5239.* When loan is in form to two persons severally but in substance single and joint. *Corsicana Natl. Bank* v. *Johnson*..... 68

8. *Id. Contingent Liabilities,* as surety or indorser, not "liabilities for money borrowed." *Id.*

9. *Id.* Where borrower signs as joint maker but is really surety. *Id.*

10. *Id.* Circumstances affecting director's liability. *Id.*

11. *Id. Action against Director; Limitations.* When barred by Texas statute. *Id.*

12. *Id.* Cause of action complete when money is loaned, and bank not obliged to proceed primarily against borrowers. *Id.*

13. *Id.* Measure of damages; interest. *Id.*

14. *Id. Rescission.* Right of bank to sue director after transfer of borrower's paper to affiliated loan company later rescinded, the bank having identical shareholders, directors and officers. *Id.*

15. *Id.* Effect on such right of change of share ownership and use of dummy directors. *Id.*

16. *Usury.* Whether transaction is usurious, and penalties therefor, ascertained from National Bank Act. *Evans* v. *National Bank of Savannah*..... 108

17. *Id.* The act adopts usury laws of States only in so far as they fix rate of interest. *Id.*

18. *Id. Discount; Short-time Notes.* May retain an advance charge at highest interest rate allowed for interest by state law, even though usurious under state law. *Id.*

19. *Id.* To discount, *ex vi termini,* implies reservation of interest in advance. *Id.*

NATIONAL PROHIBITION ACT. See **Constitutional Law,** IV, 7–10; IX, 7; **Intoxicating Liquors,** 4, 11.

NAVIGABLE WATERS. See **Admiralty; Public Lands,** I, 2. PAGE
Harbor Improvements. See **Contracts,** 7.

NAVY. See **Constitutional Law,** IV; **Intoxicating Liquors,** 3–5, 7.

NEGLIGENCE. See **Employers' Liability Act; National Banks,** 1–6.
Limitation of liability. See **Admiralty,** 1.
Contracts limiting liability for negligence in transmitting messages. See **Telegraph Companies.**
Contributory Negligence. State may abolish defense or leave question in all cases—law or fact—to jury. *Chicago, R. I. & Pac. Ry.* v. *Cole*..... 54

NEGOTIABLE PAPER. See **National Banks,** 8, 9, 14, 18, 19.

NEW MEXICO:
Enabling Act. See **Public Lands,** III.

NEWSPAPERS. See **Criminal Law,** 11–13.

NOTES. See **National Banks,** 8, 9, 14, 18, 19.

NOTICE. See **Admiralty,** 4; **Constitutional Law,** XI (2); **Eminent Domain,** 1; **Judicial Notice; National Banks,** 3.

OFFICERS. See **Contracts,** 2, 4; **Corporations; Depositions; Intoxicating Liquors; Parties,** 1; **Philippine Islands,** 1; **Taxation,** III, 9.
Administrative decisions. See **Intoxicating Liquors,** 8, 9; **Taxation,** III, 8.
Alien Property Custodian. See **Judgments,** 6.
Postmaster General, discretion of, in fixing rates for mail transportation. See **Mails.**
National bank directors; negligence. See **National Banks,** 1, 2, 10–15.
United States Attorney; grand jury. See **Criminal Law,** 15.
Attorney General. Suit to enforce trusts in New Mexico Enabling Act respecting lands. *Ervien* v. *United States*..... 41

OIL LANDS. See **Public Lands,** II.

OKLAHOMA: PAGE

Constitution, providing that defense of contributory negligence shall in all cases be question of fact, and be left to jury, sustained. *Chicago, R. I. & Pac. Ry.* v. *Cole*..... 54

ORDINANCES. See **Franchises; Municipalities.**

Requiring street railway to sprinkle street near track. *Pacific Gas Co.* v. *Police Court*..... 22

ORIGINAL JURISDICTION. See **Jurisdiction,** IV (1).

ORIGINAL PACKAGE. See **Constitutional Law,** V, 4.

OSAGE INDIANS. See **Indians.**

PARTIES:

Suit against State. See **Jurisdiction,** II, 2; IV, 3.
Service of process. *Id.*, III.

1. *United States.* Proper party to sue to protect non-competent Indians as a class against arbitrary and discriminatory state taxation; and United States attorney by direction of Attorney General has implied authority to institute and conduct such suit. *United States* v. *Osage County*..... 128

2. *Passengers.* When penalties incurred by railroad for exceeding prescribed rates may be collected by aggrieved passenger. *St. Louis, I. Mt. & So. Ry.* v. *Williams*..... 63

PARTNERS. See **Bankruptcy Act,** 4; **National Banks,** 7.

PASSENGERS:

Right to collect penalties. See **Carriers,** 7.

PATENTS FOR INVENTIONS:

1. *Anticipation.* Patent No. 705,732, for a retaining wall, *held,* as to certain claims, anticipated in principle by other patents and publications. *Bone* v. *Marion County*..... 134

2. *Foreign Publications.* Patentable novelty or originality cannot be asserted of device previously described in printed publications in foreign countries although unknown in this one and to the patentee. *Id.*

PATENTS FOR LANDS. See **Public Lands.** PAGE

PEACE. See **International Law, 1.**

PEDDLERS. See **Constitutional Law, V, 4.**

PENALTIES:
Railroads; exceeding passenger rates. See **Constitutional Law, XI, 8, 16.**
Telegraph companies; failure to deliver messages. *Id.*, V, 2.

PEREMPTORY CHALLENGES. See **Criminal Law, 6, 8, 9.**

PERSONAL INJURY. See **Admiralty, 5, 6; Employers' Liability Act; Negligence.**

PETROLEUM LANDS. See **Public Lands, II.**

PHILIPPINE ISLANDS. See **International Law, 3.**
1. *Officers.* Acceptance by subordinate officials of Insular Government of payments tendered by cable company in connection with statements of account assuming a recognition of its Spanish concessions and right to subsidy, *held* no basis for implying an obligation of the United States to pay the subsidy. *Eastern Extension Tel. Co.* v. *United States.* .. 355

2. *Bill of Rights; Due Process; Compensation.* Authority of Philippine Government, in licensing vessels to engage in coastwise trade, to impose duty to carry mails free as a condition. *Public Utility Commrs.* v. *Ynchausti & Co.* 401

3. *Id.* Authority is found in continuous exercise by local military and civil governments and in legislation of Congress. *Id.*

4. *Id.* Acceptance of license does not oblige licensee to fulfill condition imposed contrary to Bill of Rights. *Id.*

5. *Federal Constitution.* Does not limit power of Congress when legislating for the Islands as when legislating for the United States. *Id.*

PIPE LINES. See **Carriers, 2–4.**

PLEADING. See **Equity,** 4, 5. PAGE

Motion to quash or plea in bar; Criminal Appeals Act. See **Jurisdiction,** IV, 4.

1. *Bona Fide Purchaser.* Defense of, must be set up and established by defendant in suit to set aside patent. *United States* v. *Foland* 221

2. *Laches; Federal Practice.* Defense need not be set up by plea or answer but may be taken advantage of either by demurrer or upon final hearing. *Hays* v. *Port of Seattle.* ... 233

3. *Indictment.* Must charge each and every element of offense. *United States* v. *Standard Brewery.* 210

4. *Descriptive Matter.* Where loan in form to two severally but in substance joint, is made in violation of National Bank Act, designation of borrowers as a firm is descriptive merely and not essential. *Corsicana Natl. Bank* v. *Johnson.* 68

POLICE POWER. See **Constitutional Law.**

POSSESSION:

Vested, of legacy. See **Taxation,** I.

POSTMASTER GENERAL.

Discretion in fixing rates for mail transportation. See **Mails.**

POST-ROADS. See **Mails.**

PRESIDENT. See **Intoxicating Liquors,** 3-5, 12.

PRESUMPTION. See **Admiralty,** 4; **Evidence,** 2.

In suit in District Court to enjoin rates fixed by state commission, presumed that petition, not in the record, upon which state Supreme Court refused writ of review, exhibited commission's proceedings and presented questions which that court was empowered to decide. *Napa Valley Co.* v. *Railroad Comm.* 366

PRINCIPAL AND AGENT. See **Admiralty,** 2–4.

PRISON:

Admissibility of letters written in. See **Evidence,** 1.

PROCEDURE. See **Admiralty; Bankruptcy Act; Criminal Law; Depositions; Eminent Domain; Equity; Evidence; Judgments; Judicial Notice; Jurisdiction; Limitations; Negligence; Parties; Pleading; Statutes.** PAGE

Alien enemy; form of judgment. See **Judgments,** 4–6.

California; review by Supreme Court of proceedings of Railroad Commission. See **California,** 2.

Certiorari. See **Jurisdiction,** IV, 10, 11.

Challenges. See **Criminal Law,** 6, 8, 9.

Claims; reinstatement. See **Claims.**

Claims; time for presenting. See **Taxation,** III, 8, 9.

Conviction and heavier penalty after reversal. See **Criminal Law,** 3, 4.

Damages. See **Admiralty,** 1; **Bankruptcy Act; Carriers,** 7; **Eminent Domain; National Banks,** 5, 6, 13.

Discretion. See **Criminal Law,** 5, 15; **Judgments,** 8.

Estoppel. See **Judgments,** 1.

Federal question. See **Jurisdiction,** IV, 6, 9–14; VI, 2, 3.

Final judgment. *Id.*, 7, 8.

Grand jury. See **Criminal Law,** 15–18.

Harmless error. *Id.*, 6.

Interest. See **Judgments,** 8, 9.

Jeopardy. See **Constitutional Law,** IX, 2.

Laches; how availed of under federal practice. See **Equity,** 1.

Limitations. See **Limitations.**

Local question. See **Jurisdiction,** IV, 14.

Motion to quash, or plea in bar—Criminal Appeals Act. See **Jurisdiction,** IV, 4.

Opinion, absence of, explaining judgment of state court. See **Judgments,** 1.

Penalties. See **Carriers,** 7; **Constitutional Law,** V 2.

Process; service of. See **Jurisdiction,** III.

Removal. *Id.*, III, 2.

Res judicata. See **Judgments,** 1–3.

Satisfaction. *Id.*, III, 2.

Sentence. See **Criminal Law,** 4, 14.

Unlawful seizure; manner of objecting to use of documents. See *Silverthorne Lumber Co.* v. *United States*. 385

Venue. See **Criminal Law,** 5.

Waiver. See **Depositions,** 1.

Witnesses; self-incrimination. See **Constitutional Law,** VIII; IX, 1, 3.

Writ of review, when refusal amounts to decision of merits. See **Judgments,** 1.

PROCEDURE—*Continued.* PAGE

I. Original Bills.

Leave to file will be denied if jurisdiction to entertain is lacking. *Duhne* v. *New Jersey*..... 311

II. Mandamus and Prohibition.

Applications for, to control District Court, disallowed when relief afforded by writ of error. *United States* v. *Thompson*.. 407

III. Scope of Review.

1. In suit in District Court to enjoin rates fixed by state commission, presumed that petition, not in the record, upon which state Supreme Court refused writ of review, exhibited commission's proceedings and presented constitutional question which that court was empowered to decide. *Napa Valley Co.* v. *Railroad Comm*..... 366

2. *State Courts.* Suggestion in opinion unsupported by evidence, cannot be.taken as finding of fact in determining scope and ground of decision. *Brooks-Scanlon Co.* v. *Railroad Comm*..... 396

3. *Id.* Nor can statement that court has not jurisdiction to consider relief claimed under Federal Constitution, because plaintiff has not complied with formalities under state law, be taken as placing decision on state ground, when court actually passes upon and denies merits of plaintiff's claim. *Id.*

IV. State Practice.

1. *Grand Jury.* Functions not subject to discretion of District Court or decisions and statutes in State in which offense committed. *United States* v. *Thompson*..... 407

2. *Id.* Rev. Stats., § 722, adopts state practice only in absence of federal rule. *Id.*

IV. Disposition of Case.

Combinations; Anti-Trust Act. Court will regard conditions as they exist when relief invoked, and determine in each instance relief appropriate for execution of policy of act. *Id.*

PROCESS, SERVICE OF. See **Jurisdiction**, III.

PROCLAMATION. See **Intoxicating Liquors,** 3–5, 12. PAGE

PROFITS. See **Taxation,** II.

PROHIBITION. See **Jurisdiction,** IV, 5.
National Prohibition Act. See **Constitutional Law,** IV, 7–10; XI, 7; **Intoxicating Liquors,** 4, 11.
War-Time Prohibition Act. See **Constitutional Law,** IV; IX, 6; **Intoxicating Liquors.**

PUBLICATION. See **Criminal Law,** 11–13.

PUBLIC CONTRACTS. See **Contracts.**

PUBLIC LANDS:
Land-grant and non-land-grant railroads; compensation for transportation of mails. See **Mails.**

I. Homesteads.

1. *Soldiers' Additional Rights; Alaska.* Under Act of 1903, holder may not enter and acquire more than 160 acres in single body. *United States* v. *Poland*. 221

2. *Id.* Reservations between claims along shores of navigable waters. *Id.*

3. *Id. Fees.* Repayment, under Act of 1880, upon cancellation of patent. *Id.*

II. Railroad Grants.

1. *Oil Lands; Railroad Grant.* Test of known value for oil which will exclude from selection by railroad and render patent voidable for fraud in representing land non-mineral. *United States* v. *Southern Pac. Co.* 1

2. *Id. Report of Special Agent.* Weight to be attached to, on question of oil value. *Id.*

III. State Donations.

Use of Funds, derived from public lands, for advertising resources of State, violates trust provisions of New Mexico Enabling Act, and may be enjoined in suit by United States. *Ervien* v. *United States* 41

IV. Cancellation of Patent. See **Equity,** 4, 5; I, 3, *supra.*

Bona Fide Purchaser. Defense of, must be set up and established by defendant, in suit to set aside patent. *United States* v. *Poland* 221

PAGE

PUBLIC OFFICERS. See **Officers.**

PUBLIC SERVICE COMMISSIONS. See **California, 2.**

PUNISHMENT. See **Criminal Law,** 3, 4, 14.

RAILROADS. See **Carriers; Employers' Liability Act.**
Land grants. See **Public Lands,** II.
Land-grant and non-land-grant roads; compensation for transporting mails. See **Mails.**
Passenger fares; penalties for exceeding rates. See **Carriers,** 7.
Road improvements; assessment. See **Taxation,** IV, 3, 4.
Street railways; operation of cars. See **Municipalities,** 10.
Id. Paving assessments. See **Taxation,** IV, 5–7.
Id. Duty to sprinkle street near tracks. See **Constitutional Law,** VI, 7; XI, 19.

RATES:
Electricity, in California. See **Califonia,** 2.
Mail transportation. See **Mails.**
Penalties for exceeding. See **Carriers,** 7; **Constitutional Law,** XI, 8, 16, 17.
Pipe lines. See **Carriers,** 2–4.
Telegraph rates. See **Telegraph Companies.**
Water rates. See **Municipalities,** 7, 8.

REAL PROPERTY. See **Eminent Domain; Indians; Landlord and Tenant; Public Lands; Taxation,** IV, 3–7.

RECRUITING. See **Criminal Law,** 10–12.

REFUND. See **Taxation,** I; III, 3.

REHEARING. See **Jurisdiction,** IV, 9, 13.

REMOVAL. See **Jurisdiction,** III, 2.

RESCISSION. See **National Banks,** 14.

RESERVE FUNDS:
Of insurance companies. See **Taxation,** III.

RES JUDICATA. See **Judgments,** 1–3. PAGE

RESTRAINT OF TRADE. See **Anti-Trust Act.**

REVENUE. See **Taxation.**

REVIEW, WRIT OF. See **Jurisdiction,** VIII, 2.

RIGHTS OF WAY. See **Carriers,** 3; **Eminent Domain,** 2; **Municipalities,** 2, 5, 8.

ROADS. See **Constitutional Law,** VI, 4–7; XI, 19–23, 25; **Eminent Domain,** 1.

SALES. See **Constitutional Law,** V, 4.
Six months' limitation of German Civil Code, on claims for defect of quality in goods sold, does not apply to awards of arbitration based on such claims. *Birge-Forbes Co.* v. *Heye.* . 317

SATISFACTION. See **Judgments,** 5.

SEARCH AND SEIZURE. See **Constitutional Law,** VIII; IX, 1.

SELF-INCRIMINATION. See **Constitutional Law,** IX, 1, 3.

SENTENCE. See **Criminal Law,** 4, 14.

SERVICE OF PROCESS. See **Jurisdiction,** III.

SHAREHOLDERS. See **Corporations; National Banks,** 14, 15; **Taxation,** IV, 2.

SHERMAN ACT. See **Anti-Trust Act.**

SHIPPING. See **Admiralty.**

SIXTH AMENDMENT. See **Constitutional Law,** X.

SOLDIERS' HOMESTEAD. See **Public Lands,** I.

SPAIN:
Treaty with. See **International Law,** 3; **Philippine Islands,** 1.

STATES. See **Constitutional Law; Jurisdiction; Public Lands,** III; **Taxation,** IV. PAGE
Suit against. See **Constitutional Law,** XI, 9; **Jurisdiction,** II, 2; IV, 3.
Contracts; impairment. See **Constitutional Law,** VI, 1, 2.
Reserved powers. *Id.*, XI, 1.
State courts. See **Jurisdiction; Procedure,** III.
State practice. See **Procedure,** IV.
Control over telegraph companies. See **Interstate Commerce Acts.**
Regulation of water rates. See **Municipalities,** 7, 8.
Construing federal acts to preserve state powers touching interstate commerce. See **Interstate Commerce Acts,** 1.
Defense of contributory negligence; abolition. See **Negligence.**

STATUTE OF LIMITATIONS. See **Equity,** 1; **Limitations.**

STATUTES. See **Admiralty; Anti-Trust Act; Bankruptcy Act; California; Claims; Constitutional Law; Criminal Law; Employers' Liability Act; Germany; Indians; Interstate Commerce Acts; Intoxicating Liquors; Jurisdiction; Kentucky; Limitations; Mails; National Banks; Patents for Inventions; Philippine Islands; Public Lands; Taxation; Virginia.** See also Table of Statutes Cited, at front of volume.

1. *Strict Construction.* Not applied to reduce taxing statute to practical nullity by permitting easy evasion. *Carbon Steel Co.* v. *Lewellyn* 501

2. *Construction* of act of Congress which might render it unconstitutional avoided, if possible. *United States* v. *Standard Brewery* 210

3. *Construction* by executive department cannot enlarge statute so as to make conduct criminal under it. *Id.*

4. *Departmental Practice. Held* not an interpretation of statutes as requiring fixing of compensation for transportation of mails in a certain way, but an exercise of the department's discretion under such statutes. *Mail Divisor Cases.* . 326

5. *Congressional Action.* Rejection of amendments *held* not an interpretation of existing law as forbidding what the amendments would have expressly required. *Id.*

STATUTES—*Continued.* PAGE

6. *Substance and effect*, and not name, of a state taxing statute, are determinative in testing constitutionality. *Wagner* v. *Covington*. 95

7. *Distinction* between statute that repudiates contract made by State and one that impairs its obligation. *Hays* v. *Port of Seattle*. 233

8. *Paramount Federal Authority; Interstate Commerce* Act of Congress not to be narrowly construed to preserve state power over same subject. *Western Union Tel. Co.* v. *Boegli*. 315

9. *Legislation of Congress* examined and *held* to recognize authority of Philippine Government to impose duty to carry mails free as condition to granting license to engage in coastwise trade. *Public Utility Commrs.* v. *Ynchausti & Co*. 401

10. *A condition* violating Philippine Bill of Rights, void, if attached to such license. *Id.*

11. *Act of Oct. 6, 1917*, amending Jud. Code, *held* not retroactive. *Peters* v. *Veasey*. 121

STOCKHOLDERS. See **Corporations; National Banks,** 14, 15; **Taxation,** IV, 2.

STREETS AND HIGHWAYS. See **Constitutional Law,** VI, 4–7; XI, 19–23, 25; **Eminent Domain,** 1.

SUBSIDY. See **Contracts,** 3–6; **Philippine Islands,** 1.

SURETY. See **National Banks,** 8, 9.

TAXATION:

State license tax; commerce clause. See **Constitutional Law,** V, 4.

Water taxes; lien. See **Municipalities,** 9.

Right of United States to sue in equity to protect non-competent Indian allottees against arbitrary and discriminatory state taxation of taxable allotments. See **Indians.**

I. War Revenue Act, 1898; Refunding Acts.

Legacies, paid by executor to legatee, or to himself as trustee under will for ascertained beneficiary, is vested in possession

TAXATION—*Continued.* PAGE

within Act of 1902, although payments made before expiration of time for proving claims against estate. *Henry* v. *United States*. 393

II. Munitions Tax Act, 1916.

1. *Partial Manufacture; Shells.* Tax applies to profits from manufacture and sale under contract with foreign government by one who manufactured in part and had subsequent operations performed by subcontractors. *Carbon Steel Co.* v. *Lewellyn*. 501

2. *Id.* Liability not affected by fact that subcontractors paid similar tax on their profits. *Id.*

3. *Parts; Shell Forgings*, sold by manufacturer to another having contract to deliver completed shells to foreign government, are "parts" of shells, within act. *Worth Bros. Co.* v. *Lederer* 507
See *Forged Steel Wheel Co.* v. *Lewellyn*. 511

III. Income Tax, 1913; Corporation Tax.

1. *Domestic Corporations.* Income taxable limited to income "received" during year. *Maryland Casualty Co.* v. *United States*. 342

2. *Insurance Companies; Premiums*, collected by agents but not paid over to company, are part of income "received." *Id.*

3. *Refund; Tax on Premiums not Received.* Company must show what premiums were received during year. *Id.*

4. *Deductions; Reserves Required by State Law.* Net additions to, may be deducted from gross, in determining net income. *Id.*

5. *Reserve Funds.* What are included in. *Id.*

6. *Id. Over-estimate of Reserve Requirements.* Excess is income of year in which it is subsequently released to general uses of company. *Id.*

7. *Id.* Amounts deducted from gross income and added to reserves may be treated as income for subsequent year only when released to free and beneficial use of company in a real, and not in a mere bookkeeping, sense. *Id.*

TAXATION—*Continued.* PAGE

8. *Limitations in Court of Claims.* Claim for refund barred if not presented to Commissioner and sued on within two years. *Id.*

9. *Id.* These requirements are not superseded as to payments made with original returns by facts that original returns were amended and assessments increased and original payments credited upon the increased assessments, by action of Commissioner. *Id.*

IV. State Taxation. See **Constitutional Law,** XI, 10; **Indians.**

1. *Corporations.* State may use taxing power to carry out policy respecting corporations. *Ft. Smith Lumber Co.* v. *Arkansas*. 532

2. *Id.* It may discriminate between local corporations and individuals by making former liable to tax on shares held in other local corporations, themselves fully taxed, and leaving individuals free from such liabilities. *Id.*

3. *Improvement Districts; Benefits.* Assessment of railroad property for road improvement, *held* not invalid because of inclusion of franchise value. *Branson* v. *Bush*. 182

4. *Id.* Declaration of legislature that lands will be benefited by road improvement is not arbitrary as applied to railroad if the improvement will increase its traffic. *Id.*

5. *Assessment for Paving Roadways.* May be laid on central strip acquired in fee through dedication by street railway company and occupied by its tracks before inclusion in city limits. *Oklahoma Ry.* v. *Severns Pav. Co.* 104

6. *Id. Franchise,* defining company's obligation to pave certain portions, *held* not inconsistent with such assessment. *Id.*

7. *Id. Notice.* Decree directing assessment must provide for hearing as to amount. *Id.*

TELEGRAPH COMPANIES:

Penalties for failure to deliver messages. See **Interstate Commerce Acts,** 1.

Interstate Messages. Under Act of 1910, may stipulate to limit liability for negligence, unless message repeated at higher rate; state control superseded. *Postal Tel.-Cable Co.* v. *Warren-Godwin Co.* 27

TENANTS. See **Landlord and Tenant.** PAGE

TIME. See **Laches; Limitations.**

TORTS. See **Bankruptcy Act.**

TRACKS:
Duty of railway to sprinkle street near track. See **Constitutional Law,** VI, 7; XI, 19.

TREASURY DEPARTMENT. See **Intoxicating Liquors,** 8, 9.

TREATIES. See **International Law,** 1, 3; **Philippine Islands,** 1.

TRIAL. See **Criminal Law,** 3–14.

TRUSTS AND TRUSTEES:
Taxation of legacies. See **Taxation, I.**
Use of Funds, derived from public lands, for advertising resources of State, violates trust provisions of New Mexico Enabling Act, and may be enjoined in suit by United States. *Ervien* v. *United States* 41

UNFAIR COMPETITION. See **Anti-Trust Act.**

UNITED STATES. See **Claims; Contracts,** 1–6; **Indians; Mails; Parties,** 1; **Public Lands; Taxation,** I–III.
Alien Property Custodian. See **Judgments,** 6.
Army. See **Constitutional Law,** IV; **Intoxicating Liquors,** 3–5, 7.
Id. Obstructing recruiting. See **Criminal Law,** 10–12.
Insular possessions. See **Constitutional Law,** III.
Suit to enforce trusts in New Mexico Enabling Act respecting lands. *Ervien* v. *United States* 41

UNITED STATES ATTORNEY. See **Criminal Law,** 15–18; **Parties,** 1.

USURY. See **National Banks,** 16–19.

VENUE. See **Criminal Law,** 5.

VERDICT. See **Criminal Law,** 3, 4, 13. PAGE

VESSELS. See **Admiralty.**

VIRGINIA:
Right of owner of earth taken for repair of highways to notice and trial *de novo* on amount of compensation, under Virginia law. *Bragg* v. *Weaver*. 57

WAIVER. See **Depositions,** 1.

WAR:
War power of Congress. See **Constitutional Law,** II; IV; IX, 5–7; **Intoxicating Liquors.**
Treaty or proclamation of peace. See **International Law,** 1.
Alien enemies; judgments for. See **Judgments,** 4–6.
Depositions; transmission during war. See **Depositions,** 2.
Espionage Act; convictions. See **Criminal Law,** 10–13.

WAR REVENUE ACT, 1898. See **Taxation,** I.

WAR-TIME PROHIBITION ACT. See **Constitutional Law,** IV; IX, 6; **Intoxicating Liquors.**

WATERS. See **Admiralty; Public Lands,** I, 2.
Harbor improvements. See **Contracts,** 7.

WATER COMPANIES. See **Municipalities,** 7, 8.

WATER TAXES. See **Municipalities,** 9.

WEBB ACT. See **Anti-Trust Act,** 11.

WITNESSES:
Self-incrimination. See **Constitutional Law,** VIII; IX, 1, 3.
Expert testimony. See **Anti-Trust Act,** 6; **Evidence,** 4.

WORDS AND PHRASES:
1. To "discount" *ex vi termini* implies reservation of interest in advance. *Evans* v. *National Bank of Savannah.* 108
2. "Franchises . . . shall be considered" in assessing railroad for local improvement. *Branson* v. *Bush*. 182

WORDS AND PHRASES—*Continued.* PAGE
3. "Income." *Maryland Casualty Co.* v. *United States*... 342
4. "Manufacturer." *Carbon Steel Co.* v. *Lewellyn*..... 501
5. "Parts." *Worth Bros. Co.* v. *Lederer*..... 507
6. "Reserve funds." *Maryland Casualty Co.* v. *United States*..... 342
7. "Vested in possession." *Henry* v. *United States*..... 393
8. "Working-days." *Mail Divisor Cases*..... 326

WORKMEN'S COMPENSATION LAWS. See **Admiralty**, 5, 6; **Jurisdiction**, IV, 11.

WRITINGS. See **Evidence**, 1.

WRIT OF ERROR. See **Jurisdiction; Procedure.**