# UNITED STATES REPORTS

VOLUME 254

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1920

FROM OCTOBER 4, 1920, TO JANUARY 24, 1921

ERNEST KNAEBEL

REPORTER

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

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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.
WILLIAM L. FRIERSON, Solicitor General.[2]
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.

[2] Mr. Frierson was nominated May 31, 1920; the confirmation was on June 1, 1920; and he took the oath on June 11, 1920, the same day on which his predecessor, Mr. Alexander C. King, qualified as a Circuit Judge of the Fifth Circuit. Mr. Frierson is from Tennessee.

## SUPREME COURT OF THE UNITED STATES.

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

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

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

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

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

For the Third Circuit, MAHLON PITNEY, Associate Justice.

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

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

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

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

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

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

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 1920.

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## PIEDMONT & GEORGES CREEK COAL COMPANY *v.* SEABOARD FISHERIES COMPANY, CLAIMANT, &c.

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

No. 58. Argued March 16, 17, 1920.—Decided October 11, 1920.

An oil company, owner of a fleet of fishing steamers and also of oil factories where the catch was delivered and the vessels coaled, having mortgaged this property and being without money or credit, made an agreement with a coal dealer to furnish the coal necessary for the season's operations, both parties understanding that the coal would be used by the factories as well as by the vessels, that the greater part would be used by the vessels, that the law would afford a lien on the vessels for the purchase price and that the coal dealer would thus have security. The coal was billed and delivered directly to the oil company, title passing with delivery; it was then stored by that company in its factories, and afterwards appropriated by it mainly to the vessels but partly to the factories, as occasion arose; and there was no understanding when the contract was made or at times of delivery that any part of it was for any particular vessel or for the vessels then composing the fleet. In libels of some of the vessels involving the coal dealer's rights as against a purchaser under the prior mortgage, *held:* (1) That the coal dealer had no maritime

lien for furnishing supplies "to a vessel . . . upon the order of the owner," under the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604, because the coal furnished the vessels was furnished by their owner and not by the coal dealer, p. 6, *et seq.;* (2) That the fact that such maritime use had been contemplated did not render the subsequent appropriation by the owner a furnishing by the coal dealer to the several vessels, p. 8; nor (3) was the understanding of the owner and the dealer that the law would afford a lien of any legal significance as against the purchaser under the mortgage. P. 10.

To hold that a maritime lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of a vessel, subsequently appropriates the supplies to her use, would involve abandonment of the principle upon which maritime liens rest and the substitution therefor of the very different principle which underlies mechanics' and materialmen's liens on houses and other structures. P. 8.

253 Fed. Rep. 20, affirmed.

THE case is stated in the opinion.

*Mr. John M. Woolsey*, with whom *Mr. Frank Healy*, *Mr. F. C. Nicodemus, Jr.*, and *Mr. H. Brua Campbell* were on the brief, for petitioner:

Is the petitioner to be deprived of its lien and its decrees undermined for the benefit of the purchaser of the vessels at foreclosure sale, who acquired the vessels with full knowledge of the facts, merely for the reason that the petitioner did not do the impossible and indicate in advance of the delivery of the coal at the oil corporation's bins the name of each vessel to be supplied with coal and the amount to be appropriated to her?

It is urged that such a construction is out of line with previous well-considered judicial decisions and so limits the act of Congress that it is wholly unavailable as a source of credit to ship owners operating fleets of vessels.

The Act of June 23, 1910, affords a maritime lien for supplies furnished to a vessel, and where coal is delivered to the owner of a fleet of vessels for distribution among them, upon an express stipulation that the delivery is

made upon the credit of the vessels and not upon the credit of the owner, a lien attaches to each vessel for the coal actually distributed to and used by it.

The case of the petitioner is one of unusual hardship. It parted with its coal solely upon the security of the lien given by the act of Congress. The coal was actually delivered to and used by the libeled vessels to the amount for which the lien was allowed against each of them. By the use of the petitioner's coal the vessels were kept in operation, contributing earnings to the oil corporation and its creditors, including the claimant herein, which under foreclosure proceedings, purchased the libeled vessels with knowledge that the petitioner asserted a maritime lien against them for coal unpaid for although actually delivered to, and used by, the vessels.

A maritime lien under such conditions is sustained by the weight of authority both prior to and subsequent to the passage of the Act of June 23, 1910. *The Yankee,* 233 Fed. Rep. 919; *Berwind-White Coal Co.* v. *Metropolitan S. S. Co.,* 166 Fed. Rep. 782; 173 Fed. Rep. 471 (materialman's lien); *The Kiersage,* 2 Curtis, 421 (materialman's lien); *The Cora P. White,* 243 Fed. Rep. 246 (where the claim of maritime lien was denied only because the coal was furnished the owner without mentioning that it was intended for use on a vessel); *The Murphy Tugs,* 28 Fed. Rep. 429 (maritime lien); *McRae* v. *Bowers Dredging Co.,* 86 Fed. Rep. 344 (maritime lien); *The Grapeshot,* 9 Wall. 129, 145; *The Lulu,* 10 Wall. 192, 204.

While it is true that certain of the above decisions were rendered under state statutes, we fail to perceive, in view of the wording of the lien act, any substantial basis for distinguishing them or questioning their authority.

Especial reliance is placed upon the decision in *The Kiersage,* 2 Curtis, 421. The Maine statute involved in that case allowed a lien for supplies "furnished to or for account of a vessel."

The lien act was intended to increase the security of persons furnishing supplies to vessels, not to narrow or circumscribe it, and hence should have an enlightened construction to meet modern needs.

It is not necessary in order to impress a maritime lien on a vessel that the supplies be actually delivered on board the vessel by the person who supplies them. *Ammon* v. *The Vigilancia*, 58 Fed. Rep. 698; *Delaware & Hudson Canal Co.* v. *The Alida*, 7 Fed. Cas. 399; *The James H. Prentice*, 36 Fed. Rep. 777.

It is settled that an owner may by agreement, express or implied, create a maritime lien on his vessel for supplies furnished. *The Kalorama*, 10 Wall. 208; *The Cimbria*, 214 Fed. Rep. 128; *The Alaskan*, 227 Fed. Rep. 594; *The George Dumois*, 68 Fed. Rep. 926; *The Fortuna*, 213 Fed. Rep. 284; *The South Coast*, 247 Fed. Rep. 84.

Agreements for a general lien such as was here shown have frequently had judicial approval, and the fact that the supplies have been first charged to the owner on the supplier's books has been held immaterial. *The Patapsco*, 1871, 13 Wall. 329; *Lower Coast Transportation Co.* v. *Gulf Refining Co.*, 211 Fed. Rep. 336; *Freights of The Kate*, 63 Fed. Rep. 707; *The Advance*, 72 Fed. Rep. 793; *Astor Trust Co.* v. *White & Co.*, 241 Fed. Rep. 57.

As between the owner of a vessel, who agrees to give a maritime lien for money or supplies, and the person furnishing the money or supplies on the credit of the vessel, the owner is estopped to deny that the money or supplies were actually used for the vessel. *The Worthington*, 133 Fed. Rep. 725; *The Schooner Mary Chilton*, 4 Fed. Rep. 847; *The Robert Dollar*, 115 Fed. Rep. 218; *United Hydraulic Cotton Press* v. *Alexander McNeil*, Fed. Cas. 14,404; *The Mary*, 1 Paine, 671.

*Mr. Philip L. Miller*, with whom *Mr. Royall Victor* was on the brief, for respondent.

1. Opinion of the Court.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Atlantic Phosphate and Oil Corporation owned a fleet of nineteen fishing steamers. It owned also factories at Promised Land, Long Island, and Tiverton, Rhode Island, to which the fish caught were delivered and at which its vessels coaled. When the fishing season of 1914 opened the company was financially embarrassed. Its steamers and factories had been mortgaged to secure an issue of bonds. Bills for supplies theretofore furnished remained unpaid. The company had neither money nor credit. It could not enter upon the season's operations unless some arrangement should be made to supply its vessels and factories with coal. After some negotiations, the Piedmont and Georges Creek Coal Company, then a creditor for coal delivered during the year 1913, agreed to furnish the Oil Corporation such coal as it would require during the season of 1914—the understanding of the parties being that the coal to be delivered would be used by the factories as well as by the vessels, that the greater part would be used by the vessels, that the law would afford a lien on the vessels for the purchase price of the coal and that the Coal Company would thus have security. Shipments of coal were made under this agreement from time to time during the spring and summer as ordered by the Oil Corporation. In the autumn receivers for the corporation were appointed by the District Court of the United States for the District of Rhode Island, and later a suit was brought to foreclose the mortgage upon the vessels and factories. At the time the receivers were appointed five cargoes of coal shipped under the above agreement had not been paid for. The Coal Company libeled twelve of the steamers asserting maritime liens for the price and value of either all the coal or of such parts as had been used by the libeled vessels respectively.

Meanwhile, the vessels were sold under the decree of foreclosure. The Seaboard Fisheries Company became the purchaser and, intervening as claimant in the lien proceedings, denied liability. The District Court held that the Coal Company had a maritime lien on each vessel for the coal received by it. *The William B. Murray*, 240 Fed. Rep. 147. The Circuit Court of Appeals reversed these decrees with costs and directed that the libels be dismissed. *The Walter Adams*, 253 Fed. Rep. 20. Then this court granted the Coal Company's petition for a writ of certiorari. 248 U. S. 556.

As to the facts proved there is no disagreement between the two lower courts. The substantial question presented is whether these facts constitute a furnishing of supplies by the Coal Company to the vessels upon order of the owner within the provisions of the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604.[1] That coal was furnished to the vessels to the extent to which they severally received it on board, is clear. The precise question, therefore, is: Was the coal furnished by the libelant, the Coal Company, or was it furnished by the Oil Corporation, the owner of the fleet? In determining this question additional facts must be considered:

No coal was delivered by the Coal Company directly to any vessel; and it had no dealings of any kind concerning the coal directly with the officers of any vessel. All the coal was billed by the Coal Company to the Oil Corporation and there was no reference on any invoice, or on its books, either to the fleet or to any vessel. There

[1] Act of June 23, 1910, c. 373, § 1: Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

was no understanding between the companies when the agreement to supply the coal was made or when the coal was delivered that any part of it was specifically for any one of the several vessels libeled, or that it was for any particular vessel of the fleet, or even for the vessels then composing the fleet. Indeed, the first shipment was stated on the invoice to be "coal for factory." The negotiations of the Oil Corporation with the Coal Company did not relate to coal required at that time by the particular vessels subsequently libeled as distinguished from other vessels of the fleet.

The coal was sold f. o. b. at the Coal Company's piers which were at St. George, Staten Island, and Port Reading, New Jersey. At these piers it was loaded on barges which were towed either to the Oil Corporation's plant at Promised Land or to that at Tiverton. Some of these barges were supplied by the Oil Corporation, some by the Coal Company. If supplied by the latter, trimming and towing charges were added to the agreed price of the coal. Upon arrival of the coal at the factories it was placed in the Oil Corporation's bins. At Promised Land—which received four of the five shipments—the bins already contained other coal (1068 tons) which had been theretofore purchased by the Oil Corporation and had been paid for. With this coal on hand that delivered by libelant was commingled. At each plant both the vessels and the factory were from time to time supplied with coal from the same bins; but the greater part of the coal supplied from each plant was used by the vessels. Weeks, and in some instances months, elapsed between placing the coal in the bins and the delivery of it by the Corporation to the several vessels. When it made such deliveries it furnished coal to the vessels, as it did to the factories, not under direction of the Coal Company but in its discretion as owner of the coal and of the business.

The quantity of coal delivered to each vessel was

proved; but to what extent the coal supplied to the several vessels which bunkered at Promised Land came from the 1068 tons previously purchased, and to what extent it came from the lots purchased from the Coal Company, it was impossible to determine. In making the computations which formed the basis of the decrees in the District Court, it was assumed that, of the coal supplied to the several vessels which bunkered at Promised Land, a proportionate part of that received by each had come from the coal purchased from libelant.

The Coal Company contends on these facts that it furnished necessary supplies to the several vessels within the meaning of § 1 of the Act of June 23, 1910. But the facts show that no coal was furnished by that company to any vessel "upon the order of the owner." The title to the coal had passed to the Oil Corporation when it was loaded on board the barges at the Coal Company's piers. It was delivered to Promised Land and Tiverton as the Oil Corporation's coal and placed in its bins. As its coal the later distribution was made in its discretion to vessels and factories. A large part of the coal so acquired by the Oil Corporation for use in its business was subsequently appropriated by it specifically to the use of the several vessels of the fleet and this use of the coal by vessels of the fleet was a use which had been contemplated by the parties when it was purchased. But the fact that such a use had been contemplated does not render the subsequent appropriation by the owner a furnishing by the coal dealer to the several vessels.

To hold that a lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of a vessel, subsequently appropriates the supplies to her use would involve abandonment of the principle upon which maritime liens rest and the substitution therefor of the very different prin-

ciple which underlies mechanics' and materialmen's liens on houses and other structures. The former had its origin in desire to protect the ship; the latter mainly in desire to protect those who furnish work and materials. The maritime lien developed as a necessary incident of the operation of vessels. The ship's function is to move from place to place. She is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners and without any large amount of money, it is essential that she should be self-reliant—that she should be able to obtain upon her own account needed repairs and supplies. The recognition by the law of such inherent power did not involve any new legal conception, since the ship had been treated in other connections as an entity capable of entering into relations with others, of acting independently and of becoming responsible for her acts. Because the ship's need was the source of the maritime lien it could arise only if the repairs or supplies were necessary; if the pledge of her credit was necessary to the obtaining of them; if they were actually obtained; and if they were furnished upon her credit. The mechanic's and materialman's lien, on the other hand, attaches ordinarily although the labor and material cannot be said to have been necessary; although at the time they were furnished there was no thought of obtaining security upon the building; and although the credit of the owner or of others had in fact been relied upon. The principle upon which the mechanic's lien rests is, in a sense, that of unjust enrichment. Ordinarily, it is the equity arising from assumed enhancement in value resulting from work or materials expended upon the property without payment therefor which is laid hold of to protect workmen and others who, it is assumed, are especially deserving, would ordinarily fail

to provide by agreement for their own protection and would often be unable to do so.[1]

The fact found by the lower courts that the parties understood the law would afford a lien on the vessels for the coal is, in this controversy, without legal significance. If the coal had been furnished to the several vessels by the libelant, maritime liens would have arisen and could have been established under the statute without proof that credit was given to the vessels. Since the libelant did *not* furnish any coal to the vessels, the erroneous belief of the parties that the law would afford a lien either for all the coal furnished to the Oil Corporation or for that delivered by it to the several vessels could not create a lien under the statute. Clearly no maritime lien could arise therefrom valid as against the claimant which had acquired title to the vessels under a mortgage antedating the purchase. *Astor Trust Co.* v. *E. V. White & Co.*, 241 Fed. Rep. 57.

The difficulty which confronts the Coal Company does not lie in the fact that the contract for the coal was made with the Oil Corporation. A vessel may be made liable *in rem* for supplies, although the owner can be made liable therefor *in personam;* since the dealer may rely upon the credit of both. *The Bronx*, 246 Fed. Rep. 809. Likewise, the fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract, *The Columbus*, 65 Fed. Rep. 430; 67 Fed. Rep. 553; *The*

[1] Compare *Van Stone* v. *Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 136. See *O'Conner* v. *Warner*, 4 Watts & S. 223, 226; *Bolton* v. *Johns*, 5 Pa. St. 145, 150; *Taggard* v. *Buckmore*, 42 Maine, 77, 81; *Buck* v. *Brian*, 2 How. (Miss.) 874, 881; *Montandon & Co.* v. *Deas*, 14 Alabama, 33, 44; *Mochon* v. *Sullivan*, 1 Mont. 470, 473.

*Newport*, 114 Fed. Rep. 713; *The Alligator*, 161 Fed. Rep. 37; *Astor Trust Co.* v. *E. V. White & Co.*, 241 Fed. Rep. 57, 61; each vessel so receiving supplies may be made liable for the supplies furnished to it. *The Murphy Tugs*, 28 Fed. Rep. 429. The difficulty which, under the general maritime law, would have blocked recovery by the Coal Company is solely that it did not furnish coal to the vessels upon which it asserts a maritime lien; and there is nothing in the Act of June 23, 1910, which removes that obstacle.

It is urged by the Coal Company that it was the intention of Congress in passing the act to broaden the scope of the maritime lien and that the construction of the act adopted by the Circuit Court of Appeals renders the statute inoperative in an important class of cases which it was intended to reach. The language of the statute affords no basis for the latter assertion, and the Reports of the Committees of Congress (Senate Report, No. 831, 61st Cong., 2d sess.) show that it is unfounded. Those reports state that the purpose of the act was this: *First*, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. *The General Smith*, 4 Wheat. 438. *Second*, to do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises. *The St. Jago de Cuba*, 9 Wheat. 409. *Third*, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. *Peyroux* v. *Howard*, 7 Pet. 324. The reports expressly declare that the bill makes "no change in the general principles of the present law of maritime liens, but merely substitutes a single

statute for the conflicting state statutes." The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but it in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority. The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is therefore *stricti juris* and will not be extended by construction, analogy or inference. *The Yankee Blade*, 19 How. 82, 89; *The Cora P. White*, 243 Fed. Rep. 246, 248.

The Coal Company relies strongly upon *The Kiersage*, 2 Curtis, 421, and *Berwind-White Coal Mining Co.* v. *Metropolitan Steamship Co.*, 166 Fed. Rep. 782; 173 Fed. Rep. 471. The language of the state statutes there under consideration differs from that of the federal act. Furthermore, the state legislation creating liens for work and materials furnished in the repair and supply, as well as in the construction of vessels, are largely extensions of the local mechanic's lien laws applicable to buildings.[1]

The Coal Company also urges upon our attention *The Yankee*, 233 Fed. Rep. 919, 925, 927. There the court in sustaining a maritime lien declared that the supplies were delivered not to the charterer but to the vessel, holding that "a materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel

[1] See "Confusion in the Law Relating to Materialmen's Liens on Vessels," 21 Harvard Law Review, 332, and "The New Federal Statute Relating to Liens on Vessels," 24 Harvard Law Review, 182, both by Fitz-Henry Smith, Jr.

consistent with the instructions of the order and the intentions of the parties giving and accepting it." And in respect to the coal supplied the court there found specifically that "the quantity to be supplied to and daily consumed by the Yankee, was mentioned and considered by the parties." In the case at bar there was no understanding when the contract was made, or when the coal was delivered by the libelant, that any part of it was for any particular vessel or even for the vessels then composing the fleet. And it was clearly understood that the purchasing corporation would apply part of the coal to a non-maritime use. The difficulty here (unlike that presented in *The Vigilancia*, 58 Fed. Rep. 698; *The Cimbria*, 156 Fed. Rep. 378, 382; and *The Curtin*, 165 Fed. Rep. 271) is not in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libelant.

It was also argued that the parties made an express agreement that the Coal Company should have a lien; that is, that they created by agreement a non-statutory lien. The concurrent findings of fact by the lower courts, which we accept (*Baker* v. *Schofield*, 243 U. S. 114, 118; *La Bourgogne*, 210 U. S. 95, 114; *The Germanic*, 196 U. S. 589, 595;) are to the contrary.

*Affirmed.*

# STATE OF MINNESOTA *v.* STATE OF WISCONSIN.

IN EQUITY.

No. 13, Original. Motion for appointment of commission submitted October 5, 1920.—Decree entered October 11, 1920.

Interlocutory decree defining boundary and appointing commissioners to locate and designate it, etc. See *Minnesota* v. *Wisconsin*, 252 U. S. 273.

THIS cause came on to be heard by this court, on the motions and suggestions of counsel for the respective parties, for the appointment of a commission to run, locate and designate the boundary line between the State of Minnesota and the State of Wisconsin, as indicated in the opinion of this court, delivered on the 8th day of March A. D. 1920, [252 U. S. 273], and thereupon and on consideration thereof—

It is ordered, adjudged, and decreed as follows:

1. That the true boundary line between the complainant and the defendant in and through Lower St. Louis Bay, Upper St. Louis Bay, and the St. Louis River, from Upper St. Louis Bay to the "Falls" in the said river, is as hereinafter specified.

2. That said boundary line must be ascertained upon a consideration of the situation existing in 1846 and accurately described by the Meade chart, more specifically hereinafter referred to.

3. That said boundary line runs from a point midway between Rice's Point and Connor's Point through the middle of Lower St. Louis Bay to and with the deep channel leading to Upper St. Louis Bay and to a point therein immediately south of the southern extremity of Grassy Point, thence westward along the most direct

course through water not less than eight feet deep eastward of Fisherman's Island, as indicated by the red trace A-B-C on Minnesota's Exhibit No. 1 (said Exhibit 1 being the Meade chart offered and received in evidence in this suit and now a part of the record), approximately one mile to the deep channel and immediately west of the bar therein, thence with such channel north and west of Big Island up stream to the "Falls."

4. A commission, consisting of Samuel S. Gannett, of Washington, D. C.; William B. Patton, of Duluth, Minnesota; and John G. D. Mack, of Madison, Wisconsin, competent persons, is here and now appointed by the court to run, locate, and designate the boundary line between said States along that portion of said bay and river heretofore described in this decree, and to locate said boundary line by proper monuments, courses, and distances, as fixed by the court in this decree.

5. Before entering upon the discharge of their duties each of said commissioners shall be duly sworn to perform faithfully, impartially, and without prejudice or bias, the duties herein imposed, said oaths to be taken before the clerk of this court or before the clerk of any district court of the United States or before an officer authorized by law to administer an oath in the State of Minnesota or the State of Wisconsin, and returned with their report. Said commission is authorized and empowered to make examination of the territory in question and to adopt all ordinary and legitimate methods of survey in the designation of the true location of said boundary line fixed by the decree, to examine and consider carefully the opinion of this court delivered on March 8, 1920, the said Minnesota's Exhibit 1, being the Meade chart, or a certified copy thereof; and said commission shall do all other matters necessary to enable it to discharge its duties and to obtain the end to be accomplished conformably to this decree.

6. It is further ordered that should any vacancy or vacancies occur in said board of commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this court is thereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies, the Chief Justice acting upon such information in the premises as may be satisfactory to him.

7. It is further ordered that said commissioners proceed with all convenient dispatch to discharge their duties conformably to this decree.

8. It is further ordered that the clerk of this court shall forward at once to the governor of each of said States of Minnesota and Wisconsin and to each of the commissioners hereby appointed a copy of this decree and of the opinion of this court delivered herein March 8, 1920, duly authenticated.

9. Said commissioners shall make a report of their proceedings under this decree as soon as practicable on or before the 1st day of May, 1921, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

10. All other matters are reserved until the coming in of said report or until such time as matters pertaining to this cause shall be properly presented to this court for its consideration.

# WESTERN UNION TELEGRAPH COMPANY *v.* SPEIGHT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 241. Argued October 12, 1920.—Decided October 25, 1920.

The transmission of a telegram between two States is interstate commerce as a matter of fact, and the fact must be tested by the actual transaction. P. 18.

In transmitting a message from one point to another in the same State, a telegraph company, following its habitual practice and employing its established system of wires, relays, etc., sent it into another State and back to the point of destination, this being in the circumstances quicker, and more convenient and economical for the company, than to send over wires wholly within the first State. In an action to recover for mental anguish caused by a mistake in the message, wherein the right of recovery hung on the alleged intrastate character of the message, *held:* (1) That the message was interstate, irrespective of the motive of the defendant company in routing it outside the first State or of the necessity for so doing, and (2), if a motive to evade the jurisdiction of that State were material, it was error to lay the burden on the defendant company of disproving it.

178 N. Car. 146, reversed.

THE case is stated in the opinion.

*Mr. Rush Taggart,* with whom *Mr. Francis R. Stark, Mr. Walter E. Daniel, Mr. Charles W. Tillett* and *Mr. Thomas C. Guthrie* were on the brief, for petitioner.

No brief filed for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought in a state court by the respondent against the petitioner, the Telegraph Company, to re-

cover for mental suffering caused by a mistake in delivering a telegraphic message. The message handed to the defendant was "Father died this morning. Funeral tomorrow, 10:10 a. m.," and was dated January 24. As delivered to the plaintiff on January 24 it was dated January 23 and thus caused her to fail to attend the funeral which otherwise she would have done. The message was from Greenville, North Carolina, to Rosemary in the same State, and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary. This seems to have been the route ordinarily used by the Company for years, and the Company defends on the ground that the message was sent in interstate commerce, and that therefore a suit could not be maintained for mental suffering alone. *Southern Express Co.* v. *Byers*, 240 U. S. 612. The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the law of North Carolina and gave the plaintiff a verdict. The presiding judge then set the verdict aside "as a matter of law" and ordered a non-suit. But on appeal the Supreme Court of the State set aside the non-suit and directed that a judgment be entered on the verdict.

We are of opinion that the judge presiding at the trial was right and that the Supreme Court was wrong. Even if there had been any duty on the part of the Telegraph Company to confine the transmission to North Carolina, it did not do so. The transmission of a message through two States is interstate commerce as a matter of fact. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. The fact must be tested by the actual transaction. *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572.

As the line was arranged and had been arranged for many years, ever since Roanoke Rapids had been an independent office, Richmond was the relay point from

Greenville to the latter place. The message went through Weldon, North Carolina, and was telegraphed back from Richmond, as Weldon business also was. It would have been possible, physically, to send direct from Weldon but would have required a rearrangement of the wires and more operators. The course adopted was more convenient and less expensive for the Company and there was nothing to show motives except the facts. As things were, the message was sent in the quickest way. The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when as here the termini were in the same State the business was intrastate unless it was necessary to cross the territory of another State in order to reach the final point. This, as we have said, is not the law. It did however lay down that the burden was on the Company to show that what was done "was not done to evade the jurisdiction of the State." If the motive were material, as to which we express no opinion, this again is a mistake. The burden was on the plaintiff to make out her case. Moreover the motive would not have made the business intrastate. If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed, would not be a liability for an intrastate transaction that never took place but for the unwarranted conduct and the resulting loss.

*Judgment reversed.*

MR. JUSTICE PITNEY concurs in the result.

# HEALD ET AL., COMMITTEE OF THE PERSON AND ESTATE OF PETERS, *v.* DISTRICT OF COLUMBIA.

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

No. 300. Argued October 18, 1920.—Decided November 8, 1920.

The Court of Appeals of the District of Columbia has not power to certify questions to this court under Jud. Code, § 251, nor has this court power to entertain such certificate, in a case wherein the judgment or decree of the Court of Appeals would be reviewable here by error or appeal under § 250. P. 21. *Arant* v. *Lane*, 245 U. S. 166.

A judgment or decree of that court is so reviewable here, under the third paragraph of Jud. Code, § 250, when it involves the constitutionality as well as the construction of an act of Congress, though the act be local to the District of Columbia. P. 22. *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, distinguished.

The power to construe a statute is a necessary incident of the power to determine its constitutionality. P. 23.

Paragraphs third and sixth of Jud. Code, § 250, being reënactments of preëxisting law, must retain the settled meaning attached to them before reënactment, in the absence of plain implication to the contrary. *Id.*

Dismissed.

THE case is stated in the opinion.

*Mr. Vernon E. West* and *Mr. A. S. Worthington* for Heald *et al.*

*Mr. F. H. Stephens* for the District of Columbia.

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

The certificate made by the Court of Appeals of the District of Columbia as the basis for the questions which

are propounded shows that they relate to a pending suit to recover taxes, assessed by the District of Columbia upon intangible property, pursuant to an act of Congress, and paid under protest on the ground that the assessment was "illegal and void in whole and in its several parts." It suffices to say that the questions, which are stated in the margin,[1] express the purpose of the court below to ask our instructions as to the constitutionality of the act of Congress in the light of the construction of that act which was the basis of the assessment of which complaint is made.

At bar the subject is discussed as if the case were here on error or appeal and, on the other hand, it is prayed that the power conferred in a case where a certificate is pending to order up the whole record be exerted. But as the want of power in the court below to make the certificate has been suggested, and as that naturally arises on the face of the record and will, if well founded, preclude present inquiry into other questions, we come to consider that subject.

It is indisputable that the court below had no power to certify questions to this court in any case where its judgment or decree would be susceptible of review in this court on error or appeal. *Arant* v. *Lane*, 245 U. S. 166, 168.

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[1] "1. Does Section 9 of an act of Congress approved March 3, 1917 (39 Stat. L. 1004, 1046), under which said assessment was made, require that 'moneys and credits, including moneys loaned and invested, bonds and shares of stock . . . of any person, firm, association, or corporation . . . engaged in business within said District,' but residing outside of said District, shall be assessed by the District of Columbia for the purpose of taxation?

"2. If it does, is it invalid? And if invalid, does that fact render void the entire section?

"3. Does the section require the District of Columbia to assess the bonds and other securities of the States and their municipal corporations held by residents of the District of Columbia; and if it does, does its invalidity on that account render the entire section void?"

Whether the power to certify exists therefore must be decided by a consideration of § 250 of the Judicial Code which deals with the right to review by error or appeal. As, when that section is considered, it appears that its third paragraph in express terms confers power on this court to review on error or appeal judgments or decrees of the court below "in cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority," it is at once demonstrated that the court below was devoid of any authority to make the certificate and hence that this court has no jurisdiction to answer the questions.

But it is suggested that, as it was held in *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, that the power conferred upon this court by paragraph sixth of § 250, to review on error or appeal judgments or decrees of the court below "in cases in which the construction of any law of the United States is drawn in question by the defendant," embraced only the construction of laws of general operation as distinguished from those which were local to the District of Columbia, therefore the grant of power to determine the constitutionality of acts of Congress must be treated as applying only to such acts as are general in character, of which it is insisted the act involved in this case is not one.

But the contention disregards the suggestion of a difference between the two subjects which was made in the *American Security Case*, and overlooks the implication resulting from a subsequent case directly dealing with the same matter. *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140.

In addition, as the paragraphs of § 250 in question but reënact provisions of prior statutes which had been construed as conveying authority to review controversies

concerning the constitutional power of Congress to enact local statutes (*Parsons* v. *District of Columbia*, 170 U. S. 45; *Smoot* v. *Heyl*, 227 U. S. 518), the proposition conflicts with the settled rule that, where provisions of a statute had previous to their reënactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary. *Latimer* v. *United States*, 223 U. S. 501, 504; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 644.

That a decision below which merely deals with and interprets a local statute is not subject to review by error or appeal, affords no basis for saying that the exertion of the infinitely greater power to determine whether Congress had constitutional authority to pass a statute local in character should be necessarily subjected to a like limitation. To the contrary, the elementary principle is that the right to pass upon the greater question, the constitutional power of Congress, draws to it the authority to also decide all the essential incidents, even though otherwise there might not be a right to consider them. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 620; *Williamson* v. *United States*, 207 U. S. 425, 432; *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 64; *Wilson* v. *United States*, 232 U. S. 563, 565; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 313.

It follows that the certificate must be and it is

*Dismissed for want of jurisdiction.*

# NEW YORK SCAFFOLDING COMPANY *v.* LIEBEL-BINNEY CONSTRUCTION COMPANY.

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

No. 22. Argued October 7, 8, 1920.—Decided November 8, 1920.

The court notices the earlier forms of scaffolding used in the construction of buildings. P. 26.

The fact that certain advantages over the prior art asserted for the patented device here in question were not asserted in the patent itself, *held* not to deprive the patent of their benefit in determining whether the device was an invention. P. 31.

Patent No. 959,008, claims 1 and 3, to Elias H. Henderson, for improvements in scaffold-supporting means, does not involve any invention over the prior art as displayed in the earlier patent to William J. Murray, but merely mechanical changes, easy to discern and to make, and incidental to the main idea of the Murray patent. Pp. 27–31.

243 Fed. Rep. 577, affirmed.

THE case is stated in the opinion.

*Mr. Frederick P. Fish*, with whom *Mr. C. P. Goepel*, *Mr. R. W. Hardie* and *Mr. F. C. Somes* were on the briefs, for petitioner.

*Mr. Wallace R. Lane* and *Mr. Robert H. Parkinson* for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit for infringement by the Construction Company of a patent dated May 24, 1910, and numbered 959,008, for new and useful improvements in "Scaffold-Supporting

Means," granted to Elias H. Henderson. Petitioner is assignee of the patent.

An injunction was prayed, accounting of profits and damages.

The patent is in the usual form, but a special manner of use of the invention is alleged. It is alleged that, since the acquisition of the patent, petitioner has been largely engaged in different cities of the United States in putting the invention into practice, and the manner thereof has been to construct and lease for use to builders and others at a specified royalty or price per week, the scaffolds embodying the invention, petitioner retaining the ownership of and title to the scaffolds, they being returned to petitioner upon the completion by the lessees of the work for which the scaffolds had been required.

The answer of the Construction Company directly put in issue certain of the allegations of the petition. It admitted, however, the use of scaffolds which it purchased from the Eclipse Scaffolding Company of Omaha, Nebraska, but alleged that such scaffolds did not contain or embody the invention protected by patent No. 959,008, in any way or manner.

It is also alleged that petitioner, sometime prior to February 21, 1914, brought suit in equity in the United States District Court for the District of Nebraska, against one Egbert Whitney, predecessor in the title of the Eclipse Scaffolding Company to the scaffolds sold by the latter company to the Construction Company, in which suit infringement of patent No. 959,008 was alleged.

In that suit a patent of one William J. Murray was pleaded, but the Scaffolding Company withdrew its case as to that patent and relied on claims 1 and 3 of the patent to Henderson, and the court decreed that the claims were void for want of invention, and it is alleged that the Construction Company "is entitled to the protection of said decree."

On the issues thus made by bill and answer proofs were taken and the court decreed against the patent, saying, in its opinion, that "the Henderson patent has not supplanted others, nor has the influence of its owner been exerted to that end. It barely represents a step in the art. It does not disclose invention." And further, "In view of the conclusion reached by this court that claims 1 and 3 of the patent in said suit are invalid, it is unnecessary to do more than touch upon the matter of infringement. The evidence of infringement is meagre, and yet, if the claims of patent in suit were to be held valid with a range of equivalents, infringement would be found." The decree was affirmed by the Circuit Court of Appeals. 243 Fed. Rep. 577.

The Construction Company pleaded in defense, as we have said, the decree of the District Court of Nebraska in the suit of petitioner against Egbert Whitney, but that decree was reversed by the Circuit Court of Appeals, 224 Fed. Rep. 452. The reversal and the opinion of the Circuit Court of Appeals thereon are much relied on in this suit, and we may say constituted the inducement to issue certiorari. It is seemingly antithetical to the opinion and judgment under review, and the Circuit Court of Appeals for the Third Circuit felt and expressed the embarrassment of "disturbing the force of a decision of a court of coördinate jurisdiction," formed "upon precisely the same issues and upon substantially the same facts." The court, however, felt constrained to an "opposite judgment" and decided that Henderson made but "formal changes" in the prior art which involved no invention, and affirmed the decree of the District Court.

Necessarily, for an estimate of Henderson's patent we must consider the prior art. It is detailed by witnesses, explained by counsel, and illustrated. Specific descriptions are not necessary. We may refer to our own observation of the first forms of scaffolding. To quote

District Judge Orr, "Originally, scaffolding was made to rest upon the ground and was increased in height as the building of the structure demanded." The first forms of scaffolding which constituted the prior art are described by a witness as "the thrust out scaffold, the pull scaffold, the timber scaffold; that they were built right up to the front of the building." In 1900, he testified, "a new device came on the market, or a new structure, and, in place of building up from the ground, they hung a rigid iron frame from the upper stories of the building. That could be used on three or four stories sometimes. It was heavy, inconvenient to handle, and did not meet with very great success, although it did seem to be an improvement over the old poles. Then there came another form of scaffolding, which was a suspended wire platform scaffold, suspending the wires from the top of the building. . . . Then there came the Cavanagh overhead scaffolding machine. . . . That machine became fairly well used, after being introduced, and was apparently a great improvement over any other. Then Murray came in the market with his platform machine; a machine operated from the platform, the fastening of the wire that supported the platform being from above, the wire being secured to the out-riggers from the upper part of the building. Then the Henderson machine, supported by cables from the upper part of the building, and similar in a great many respects, except that the machines were placed in the opposite position, enabling you to make a scaffold of any width, which would seem to be the latest."

The Murray patent, therefore, is the step in the prior art preceding that made by Henderson and a comparison of the latter's patent with it, the Murray patent, is immediately indicated.

Murray describes his invention to be of "new and useful Improvements in Adjustable Scaffolds." The object of it, he said, was to provide such a scaffold as would

"permit of adjustment at any height during the construction of a building or the repair thereof." And he claimed, "The combination with two bars having means for detachably securing them to a building, of a platform, frames on said platform carrying means operable from the platform and having connections adapted to be connected to one of said bars for raising the platform, and supporting means on said frames extending above the said bar when the platform has been fully raised and adapted to detachably engage said bar and rigidly support the platform therefrom, whereby, the platform may be connected to one bar by the raising means and raised to a level to engage the supporting means with said bar and may then remain supported by said bar while the other bar is placed at a higher level and the raising means secured to the latter, the bars thus becoming alternately points of raising support and of rigid support for the platforms."

On page 29 is the illustrative diagram of the claim.

Henderson describes his invention as "certain new and Improved Scaffold-Supporting Means," and further says it relates "to an improved means for supporting scaffolds used in connection with the construction of buildings and their repair." In other words, the patent is, as the Murray patent is, for improvement of scaffold supporting means. And the details given by Murray, or necessarily implied by him, and the inevitable adjuncts "of cross beam and floor piece" are made elements in the combinations claimed in three claims. There is a change from the Murray hoisting device and it is described to consist "of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, . . ." The continuity of metal is the novel element asserted. Counsel emphasize it, not so much for itself as for what it permits. It permits according to counsel, a "hinged or loose jointed connection between the putlog [called in the claims "cross beams"] and the

frames that support the putlog and the hoisting mechanism," and counsel say that this is a "separate and distinct entity from the elements of the Murray patent, differing in structure, function and result produced." And of this it is insisted there was no suggestion in the Murray patent, it containing but a single claim and a

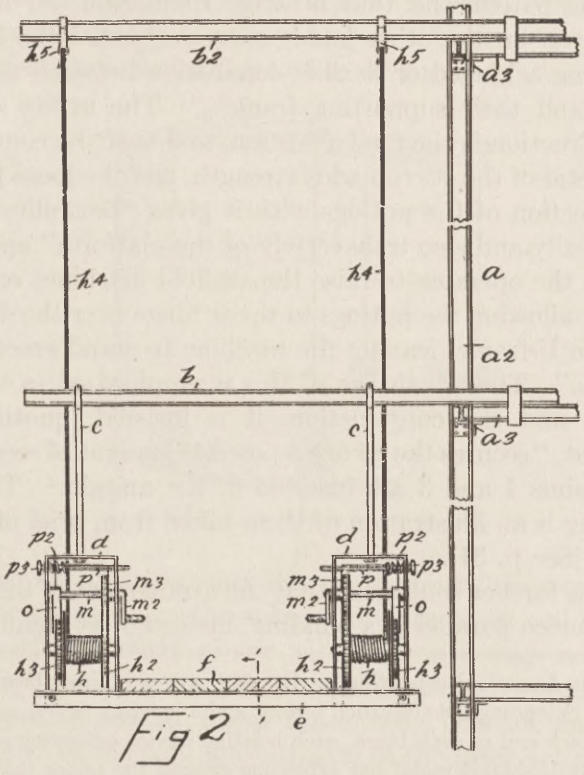



Fig 2

single idea, "the idea of supporting the scaffold to outriggers by means of auxiliary bars or rods," so that the platform or scaffold by the lengthening of the cables can be raised to a greater height than before. In other words, the assertion is that Murray invented nothing and saw nothing in his device but means of raising the scaffold, and, to use counsel's word, all other "functions" were

beyond his vision. Or again, and to bring out clearly counsel's contention, "Henderson did not do what Murray did. Murray provided means for supporting a platform temporarily on one set of outriggers while the cables were being adjusted to a higher set of outriggers. That is all Murray did, and that was embodied in the one claim of the patent and that is what Henderson did not do. Murray, on the other hand, never suggested the idea of making a hinged or flexible connection between the putlogs and their supporting frames." The utility of this construction is the final assertion, and that the continuity of metal of the stirrup adds strength, and the loose jointed connection of the putlogs with it gives "flexibility longitudinally and also transversely of the platform" and "enables the operator to raise the scaffold machines one at a time, allowing the putlogs to tip or hinge over the support of the U-frame, leaving the machine to stand erect at all times." The advantage of this is emphasized in various ways and the construction, it is insisted, quoting the patent, "secures the greatest possible amount of security."

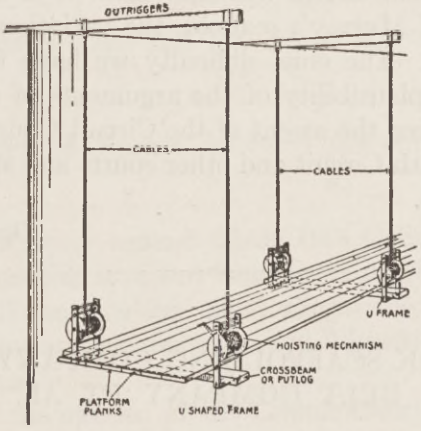
Claims 1 and 3 are inserted in the margin.[1] The following is an illustration of them taken from brief of counsel. [See p. 31].

It is further contended that the arrangment of the hoisting device parallel to a building, instead of at right angles

[1] "1. A scaffold consisting in the combination of cross beams, floor pieces extending between such beams, and a hoisting device associated with each end of each beam, each hoisting device consisting of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, and a hoisting drum rotatably supported by the side members of such bar."

"3. A scaffold consisting of a plurality of U-shaped bars arranged in pairs, a cross beam laid in and extending between each pair of such U-shaped bars, a floor laid upon said cross beam, a drum rotatably supported between the upwardly extending side members of each of said U-shaped bars, and means for controlling the rotation of said drum."

to it as in the Murray patent, gives more room to the working masons and mechanics, and contributes therefore to their security. This advantage was asserted in the patent, the others were not, nor displayed or counted on. They, however, may be conceded. The fact of non-display in the patent, while it does not militate against his claims for the advantages, causes surprise at least, considering the emphasis that is now put upon them and the assertion that they distinguish and make superior his mechan-




isms to all that preceded them. However, we may concede to counsel, for the sake of the argument, all of the uses and excellences of the patent, even though not discerned by Henderson, but his pretensions, whether at first hand or second, his or those of his counsel, must be subjected to the test and estimate of the prior art and so subjecting them we can discern no exercise of invention. The changes were simply mechanical, easy to discern, and as easy to make, incidental entirely to the main idea of Murray which was, as was declared by him, to provide a scaffold that would "permit of adjustment at any height during the construction of a building or the repair thereof" —a scaffold which might "be readily moved from one

position to another by the workmen thereon without interfering materially with the work being performed," and one "in which different supports are employed," and "in which the shifting from one set of supports to another set," might "be accomplished without interfering, in any degree, with the workmen thereon or their work." A glance at the diagram which we have given will show that he accomplished his purpose and the way he accomplished it; a glance at the diagram we have given of the Henderson device will show that it is a substantial imitation of Murray's scaffold, the variations being only mechanical. The chief difficulty we have found in the case is the plausibility of the arguments of counsel, and that it secured the assent of the Circuit Court of Appeals for the Eighth Circuit and other courts and strength from such assent.

*Decree affirmed.*

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## NEW YORK SCAFFOLDING COMPANY *v.* CHAIN BELT COMPANY ET AL.

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

No. 23. Argued October 7, 8, 1920.—Decided November 8, 1920.

Patent No. 959,008, claims 1 and 3, to Elias H. Henderson, for improvements in scaffold-supporting means, exhibits no invention over the prior art. Pp. 34, *et seq.* *New York Scaffolding Co.* v. *Liebel-Binney Construction Co.*, *ante*, 24.

The fact that a change in a composite instrumentality was readily made may be evidence that the change was the result of mere mechanical facility as opposed to invention. P. 36.

Advantages found in a patented device may count in favor of the patentee though he did not discern them when he secured his patent; but if the device is only an alteration of an earlier patented device,

involving no invention, they redound to the benefit of the earlier patentee though he also was unaware of them and did not attribute them to his invention. P. 37.

245 Fed. Rep. 747, reversed.

THE case is stated in the opinion.

*Mr. Frederick P. Fish*, with whom *Mr. C. P. Goepel*, *Mr. R. W. Hardie* and *Mr. F. C. Somes* were on the briefs, for petitioner.

*Mr. Wallace R. Lane* and *Mr. Robert H. Parkinson* for respondents.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit by petitioner against Chain Belt Company et al., for infringement of a patent considered in No. 22, *ante*, 24. The bill contains the usual allegations, and prays for an accounting, for damages, and injunctions, preliminary and final.

A copy of the opinion of the Circuit Court of Appeals for the Eighth Circuit in the suit of the Scaffold Company against Egbert Whitney, expressing the judgment of the court sustaining the validity of the patent and adjudging Whitney to be an infringer of it, is attached to the bill.

The answer denied invention and set forth a number of patents as anticipations, among others, a patent to William Murray. A dismissal of the suit was prayed.

A trial was had upon the issues thus made, which resulted in an interlocutory decree awarding an injunction, adjudging infringement, and an accounting.

The injunction decreed is as follows: "That an injunction be issued under the seal of this court, unto the said Chain Belt Company, and the said Egbert Whitney,

enjoining them, and each of them, their several agents, officers, employees and all persons in privity with them, and each of them, from making or selling, or causing to be made or sold, the machine known as 'Whitney Scaffold Hoist Machines,' and 'Little Wonder' machines, to be used in the combinations of claims 1 and 3 of said U. S. Patent No. 959,008, or from using or causing said machines to be used in the combinations of said claims, or from infringing upon said claims in any manner whatsoever."

The Circuit Court of Appeals agreed with the District Court that the Henderson patent exhibited invention, expressing the view, however, that, while its advance was slight, it was "not so wholly wanting in invention or novelty as to justify a finding contrary to the presumptive validity of the grant to him." The court fortified its views by the decision of the Circuit Court of Appeals of the Eighth Circuit in *New York Scaffolding Co.* v. *Whitney*, 224 Fed. Rep. 452, citing, however, to the contrary, the decision of the Circuit Court of Appeals of the Third Circuit, in *New York Scaffolding Co.* v. *Liebel-Binney Construction Co.*, 243 Fed. Rep. 577, the decision we have just affirmed. *Ante*, 24.

The court, however, decided that the decree was "erroneous in finding infringement in the manufacture or sale or in any use of the Little Wonder machine." The decree of the District Court was reversed with directions to enter a decree in accordance with the views expressed.

The Henderson patent was made the basis of recovery in *New York Scaffolding Co.* v. *Liebel-Binney Construction Co.*, No. 22, just decided, and there we estimated its inventive quality as tested by the prior art, and as representative of that we took the patent of William Murray, accepting it as an advance upon the prior art.

We need only add to what was there said that our conclusion is confirmed by Henderson's testimony, which

we insert in the margin somewhat fully, as it cannot be adequately represented in condensation or by paraphrase.[1]

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[1] After stating the schools and colleges he had attended, and that he was admitted to the bar in 1910, he testified as follows:

"Q. Will you state when you first acquired any knowledge of the scaffolding business and how it came about?

A. The first time I had any occasion to consider scaffolding on buildings was about in February, 1910—February, 1909. I was having dinner with Mr. Merrill, then president of the Noel Construction Company, and I explained to Mr. Merrill a certain gas engine I was designing attempting to get a patent at that time, and Mr. Merrill, whom I had known while I was at the academy at Annapolis, put up to me a proposition of scaffolding on the city hall, which the Noel Construction Company was then building in Chicago, and explained to me the great expense of building up a scaffold from the ground, and stated that it was much more convenient and cheaper to scaffold by swinging the scaffold from an overhead outrigger. He said there was such a scaffold in use and being put up by a New York concern, but that the rental charged by the New York concern was prohibitory of its use on the city hall, and said with my mechanical training I ought to be able to devise a means of swinging a scaffold, and instructed me to go ahead and see what I could do.

* * * * * * * *

A. It was in February, 1909."

He further testified that Mr. Merrill called his attention to devices that were then in use in Chicago at the Blackstone Hotel, and that shortly after he went down to the hotel.

He further testified:

"A. On the north side of the building there was a scaffold suspended by overhead outriggers, cables led down to a drum, the cable passed over a little pulley wheel on the top cross member of the scaffold down to a drum, and the drums were in pairs opposite at right angles to the building. These drums were supported above a U-frame which was held in place, bolted, with two angle irons, the bolts passed thro' the U-frame, and then the planking were laid along the scaffold on top of the angle irons which was bolted to the U-frames and the drums were operated by means of the ratchet lever, to which the men put a pipe, making an extension, and pumped it up and down.

Q. Just how were the putlogs supported relative to the U-frame concerning which you have testified?

From his testimony, it is certain that his scaffold did not cause him sleepless nights or laborious days. He was not experienced in the art of which it is an example. It may be that the conceptions of invention cannot be tested by such experience or by moments of time, and that originality

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A. The putlogs were bolted alongside of the U-frame and the bolts passed through the U-frame.

Q. Did you see the machines operate?

A. Yes, the men were laying brick along the scaffold, a couple of laborers hoisted one end of the scaffold.

Q. So you saw it raised during the time you were there?

A. Yes, sir.

Q. At that time had you done any work on what later developed into your patent in suit?

A. I had not."

And further:

"A. I didn't do anything further until about the middle of May. Mr. Merrill called me up and asked to come down to the office. I went down and he asked me if I had a scaffold ready for him, or had any ideas. I told him no, that I had not. He said, 'I have been depending upon you to design something, and I have got to have something.' So he called in Mr. Peterson, the superintendent, took me over to the city hall and showed me the wall he wanted to scaffold in the court there, and I then went over to Carpenter & Company and inspected some winches he had there to see if it was practicable to bolt the winches to wooden putlogs. And owing to the fact that Carpenter & Company wanted more money than Merrill could pay, for scaffold, didn't make a deal with him. Then I went home and made up the design for the scaffold that I subsequently applied for a patent on, and took it down to Brown & Williams' attorneys, and asked them if I could get a patent on it. They thought I could. Mr. Merrill said he would have Parker & Carter investigate if there would be no infringement on the winch and instead of bolting the windlass to the putlog, I found I could utilize pieces of 2x10 around the building for putlogs and place them in the U-frame, and would make the scaffold easier to put into the building and much simpler to dismantle—take off.

Q. Where did you get your knowledge of the U-frames being used in this line of work?

A. I saw U-frames on the Blackstone Hotel. It is just an ordinary stirrup."

does not need the aid or delay of drudgery; but one is forced to think that where a change is readily made in any composite instrumentality the change is not the prompting or product of invention. Indeed, it is a common experience in patent cases that mere mechanical facility can alter or change the form in which originality and merit expressed themselves and assert for it the claim of invention. This case is an example of such pretension. We may repeat counsels' question and ask, What did Henderson do that Murray did not do? He made the U-frame which supported the hoisting device of continuous metal instead, as Murray did, of several pieces riveted together, and in the stirrup which it formed he rested the putlogs or beams loosely making a hinged joint connection between the stirrup and the hoisting machines with a resulting flexibility. This consequence and its advantage, if it have such,[1] it is admitted, he did not discern, and naturally. His purpose was evasion. To evasion he was prompted. Beyond what was necessary to that, he exerted no vision or conception. He had had no experience in the art, and what knowledge of the Murray scaffolding he had was obtained by a thirty minutes' observation of it in operation. We yield to the assertion of counsel that he cannot be deprived of an advantage because he did not discern it, but the same concession must be given to Murray. He was entitled to all of the benefit that he claimed for his device, or that can be given to it by formal changes.

It will be observed that the Circuit Court of Appeals and the District Court disagreed in their views of the re-

[1] There is a denial of advantage, and it was admitted at the argument that rigidity of the putlog and frame was sometimes resorted to. Counsel tried to minimize the necessity or practice by saying that it was accomplished by a ten-penny nail. Manifestly it was the effect and its necessity or advantage which were important, not the means of their accomplishment, and the necessity or advantage cannot be estimated by the size of the nail.

lation of the Little Wonder machine to the Henderson device, the latter considering it an infringement, the former determining otherwise, and to that extent reversing the decree of the District Court. Both courts, however, concurred in ascribing invention to the Henderson device. In this both courts erred, and the decree of the District Court is therefore reversed and the case remanded to that court with directions to dismiss the bill of complaint on the ground that the Henderson patent is invalid, it exhibiting no invention.

*Reversed.*

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## UNITED STATES *v.* BUTT, ALIAS WONG SING.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 275. Submitted October 18, 1920.—Decided November 8, 1920.

An indictment for unlawfully bringing Chinese aliens into the United States will lie under § 8 of the Immigration Act of February 5, 1917, where the acts charged do not go far enough to amount to a landing in violation of § 11 of the Chinese Exclusion Act of July 5, 1884. P. 41.

Reversed.

WRIT of error under the Criminal Appeals Act (c. 2564, 34 Stat. 1246), to review a judgment sustaining a motion to quash an indictment charging defendant with bringing certain Chinese aliens into the United States, viz., into the bay and port of San Francisco by vessel, in violation of § 8 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 880, which reads as follows: "That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States,

by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in." The Chinese Exclusion Act of July 5, 1884, c. 220, § 11, 23 Stat. 117, provides: "That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year."

*Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States:

Chinese aliens are embraced within the scope of § 8 of the Immigration Act. *United States* v. *Wong You*, 223 U. S. 67; *United States* v. *Woo Jan*, 245 U. S. 552, 557. These decisions established the following propositions:

1. That the Chinese exclusion laws and the immigration laws each stand in their own integrity.

2. That Chinese persons are aliens within the meaning of the immigration laws.

3. That if Chinese aliens offend against the immigration

laws they may be dealt with under those laws even though they might also be dealt with under the Chinese exclusion laws.

It therefore follows that one who brings Chinese aliens into the United States does not escape amenability to the applicable criminal provisions of the immigration laws merely because the aliens are of Chinese origin. Obviously, if the immigration laws embrace Chinese aliens, as ruled by this court, *supra*, it would be difficult to find a legal theory which would except from the reach of those laws one who aids the entry of Chinese aliens, as here charged.

The contrary theory necessarily asserts that while Wong You, to use that case as an illustration, violated the immigration act by the surreptitious manner in which he entered, and could be dealt with under those laws, yet if the facts had further shown that he had been brought in by another, e. g., Butt, the defendant here, the party bringing him in would escape prosecution solely because the alien was of Chinese origin, although that mere fact did not protect the Chinaman himself from the penalties of the immigration act. Such an illogical result furnishes additional demonstration of the error into which the court below fell.

*Stoneberg* v. *Morgan*, 246 Fed. Rep. 98, manifests the view that the Chinese exclusion laws furnish the sole guide for dealing with cases involving Chinese aliens, and the immigration laws are a similar guide for all other aliens. Obviously, as above pointed out, that view must fail when tested by the principles of construction announced by this court in *United States* v. *Wong You*, *supra*. Cf. *Ex parte Li Dick*, 176 Fed. Rep. 998; *In re Lee Sher Wing*, 164 Fed. Rep. 506; *Looe Shee* v. *North*, 170 Fed. Rep. 566.

No brief filed for defendant in error.

38. Opinion of the Court.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of the District Court quashing an indictment against defendant in error, Butt, which charged him with feloniously bringing four Chinese aliens into the United States, in violation of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 880.

The legality of the ruling depends upon the coexistence of that act with the Chinese Exclusion Act of July 5, 1884, c. 220, 23 Stat. 115, 117.

We may use in exposition of the case the memorandum of the District Court (Judge Rudkin). It appears therefrom that an earlier indictment was presented against Butt charging him in three counts with having brought the same four Chinese aliens into the United States. The first two counts were based on § 8 of the Immigration Act of February, 1917, and the third count on § 11 of the Chinese Exclusion Act. All of the counts were based on the unlawful landing of four Chinese laborers into the United States. A motion to quash the first and second counts on the ground of misjoinder, and on the further ground that the several acts did not state facts sufficient to constitute a crime, was granted. The ruling was based on a decision of the Circuit Court of Appeals for the Eighth Circuit, 246 Fed. Rep. 98.

Upon the trial of the third count a verdict of not guilty was directed by the court (Judge Farrington), the Government having failed to prove that the Chinese were actually landed in the United States.

On June 11, 1919, the indictment in controversy was found. As we have said, it charged Butt with bringing the same Chinese aliens into the United States, and all of its counts were based on the Immigration Act. A motion to quash was made, accompanied by the record in the former case, in the nature of a plea of former jeopardy.

To this procedure the Government consented, but contended that inasmuch as defendant did not proceed far enough to violate § 11 of the Exclusion Act, he was subject to prosecution under § 8 of the Immigration Act, it being broader and more comprehensive in its terms. To this contention the court replied, and we quote its language, "In my opinion Congress did not intend that the courts should indulge in any such refinement as this. In other words, Congress either intended that persons bringing Chinese laborers into the United States should be prosecuted under the immigration act or that they should not. Such was manifestly the view of the Circuit Court of Appeals for the Eighth Circuit in the case already cited." The court considered that it was its duty to follow that decision until the question should be decided by the Circuit Court of Appeals for the Ninth Circuit or by this court. The motion to quash was sustained.

This ruling is attacked and that of the case adduced in its support, by the citation of *United States* v. *Wong You*, 223 U. S. 67, and *United States* v. *Woo Jan*, 245 U. S. 552, 557.

The cases support the contention for which they are cited, and it follows therefore that the ruling of the District Court in the case at bar sustaining the motion to quash the indictment was error, and it is reversed.

*So ordered.*

# PRYOR ET AL., RECEIVERS OF THE WABASH RAILROAD COMPANY, *v.* WILLIAMS.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 26. Argued October 8, 1920.—Decided November 8, 1920.

Assumption of risk is a bar to the action, in a case governed by the Federal Employers' Liability Act, and does not, like contributory negligence, operate merely in reduction of damages. P. 45.

In an action governed by the Federal Act, where the injuries resulted from plaintiff's being furnished, and using, an obviously defective claw bar for drawing bolts, the Supreme Court of Missouri, applying a local construction of the common law, decided that, as the risk was attributable to his master's negligence, the plaintiff did not assume it, but was guilty of contributory negligence, which went only to the damages under the Federal Act. *Held*, erroneous under repeated decisions of this court defining the nature and effect of assumption of risk and adjudging that the Act prevails over state law. *Id.*

272 Missouri, 613, reversed.

THE case is stated in the opinion.

*Mr. Frederic D. McKenney*, with whom *Mr. James L. Minnis* and *Mr. N. S. Brown* were on the brief, for petitioners.

*Mr. Roy W. Rucker* for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for personal injuries based on Employers' Liability Act. Negligence is charged against petitioners as Receivers of the Wabash Railroad Company.

Respondent Williams, plaintiff in the action, was engaged in tearing down a bridge on the line of the railroad,

and a defect in a claw bar, which he was directed to use, caused the bar to slip while he was attempting to draw a bolt; in consequence, he lost his balance and fell to the ground, a distance of twelve feet. The defect, it is alleged, Williams did not know.

Negligence, however, was charged against him, and assumption of risk and contributory negligence.

He recovered a verdict in the sum of $5,000. Motions for new trial and arrest of judgment were denied, and the case was appealed to the Kansas City Court of Appeals.

The facts, as recited by the court, are that Williams was twenty-one years old, and had been reared on a farm. He entered the service of the railroad as a common laborer in August, 1915, and worked for it until his injury in November of that year, his work being that of "helping build steel bridges and taking down old ones." He was ordered by the foreman in charge of the work to use a claw bar which was defective, in that the claws "had become so rounded and dulled by long usage that they could not be made to grip the shank securely, and slipped from their hold when plaintiff [Williams] pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground."

The plaintiff stated that to discover the defect required an inspection of the underside of the tool, and that, in obeying the order of the foreman, he did not pause to make such inspection, but used the tool without any but casual inspection of its top surface, which did not reveal the defect.

The railroad was engaged in interstate commerce and the cause of action, under the case as made, fell within the purview of the Federal Employers' Liability Act.

The conclusion of the court was that "The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff." And further, "The risk was just as obvious as the

defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

The court reversed the judgment. It denied a motion for rehearing, but considered and adjudged "that on account of one of the Judges deeming the decision to be in conflict with *Fish* v. *Railway*, 236 Missouri, 106, 123, it is without jurisdiction, and therefore orders said cause certified to the Supreme Court for its determination."

The Supreme Court, upon considering *Fish* v. *Railway* and other cases, decided that "it was the duty of the master to furnish the servant a reasonably safe clawbar with which to do the work. The failure to furnish that character of a clawbar was negligence upon the part of the master. If the defects were so glaring, and the clawbar so patently defective that an ordinary prudent servant would not have used it, then its use under such circumstances was negligence upon the part of the servant, which negligence under the rule in Missouri would bar him from a recovery. But not so under the Federal statute." In other words, the court held that Williams' assumption of the risk did not have the consequence assigned to it by the Kansas City Court of Appeals, but, if it existed, amounted in legal effect only to contributory negligence, and that such negligence under the federal statute worked a reduction of damages and not a defeat of the action, and applying these elements of decision, adjudged that the "case was well tried by the court *nisi*, and its judgment should be affirmed." It was so ordered.

In its view of the federal statute and the defence under it, the court erred. *Seaboard Air Line Railway* v. *Horton*, 223 U. S. 492; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229; *Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310; *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320; *Boldt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441.

And the requirement of the act prevails over any state law. *Seaboard Air Line Railway* v. *Horton, supra; Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold*, 241 U. S. 371; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367.

Counsel for respondent, however, insists that the views of the Supreme Court upon the ruling of the assumption of risk is "of purely academic interest and of no practical importance" in the consideration of the legality of the verdict and judgment in the trial court. That court, it is said, submitted the fact to the jury and also submitted the relative contribution of Williams' negligence and the negligence of defendants to his injury. But this is an underestimate of the action of the trial court. The court was requested to instruct the jury that the effect of the assumption of risk by Williams incident to the use of the claw bar, and the circumstances under which it was used, was to relieve defendants from liability "for the injury resulting therefrom." The court refused the instruction as it was requested and amended it by adding thereto "and such fact [the assumption of risk] will be considered by you in determining the amount of plaintiff's recovery, if any, under all of the instructions."

The refusal and modification were assigned as error and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance and, if it existed, only constituted contributory negligence and could operate only in reduction of the amount of recovery, not defeat recovery. This was error as we have seen.

*Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.*

Counsel for Parties.

# PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF THE TROY UNION RAILROAD COMPANY *v.* MEALY ET AL., AS ASSESSORS, ET AL.

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

No. 63. Submitted October 21, 1920.—Decided November 8, 1920.

In determining whether an exemption from taxes granted by a State to a local corporation was merely a privilege or amounted to a contract right protected against impairment by the Federal Constitution, this court inclines to follow the decision of the state tribunals. P. 49.

A city joined with certain railroad corporations in forming and financing a city terminal corporation and covenanted with them all that it would apply with them for an act exempting the terminal company from taxation upon an amount exceeding its then capital stock, and that, failing such legislation, it would refund the amount of city taxes upon any greater valuation. *Held*, that a law passed on such application, granting the exemption as to both city and county taxes, and reciting that this was in accord with the city's agreement, might properly be construed by the state courts as creating a repealable privilege rather than a contract right to the exemption—in view of the general attitude of the courts against tax exemptions, the parties' own opinion that the grant was not irrevocable, as shown in a later contract, and a power reserved by the state constitution to alter or repeal general or special laws for the formation of corporations. P. 50. N. Y. Laws, 1853, c. 462; 1909, c. 201; Const. 1846, Art. VIII, § 1.

224 N. Y. 187, affirmed.

THE case is stated in the opinion.

*Mr. William L. Visscher* and *Mr. Lewis E. Carr* for plaintiff in error.

*Mr. G. B. Wellington* for defendants in error. *Mr. Thomas H. Guy* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a proceeding in the Supreme Court of New York seeking by certiorari to review and set aside an assessment of city taxes upon the relator's property at a valuation of one million dollars; the relator contending that it had a contract by virtue of which the City of Troy and the State were limited to a valuation of $30,000 for the purposes of the tax. A referee, a single judge, the Appellate Division of the Supreme Court and the Court of Appeals successively have decided against the relator's claim, but it brings the case here on the ground that an attempt to repeal the statute upon which it bases its immunity impairs the obligation of contracts and is void. 88 Misc. (N. Y.) 649. 179 App. Div. 951. 224 N. Y. 187.

The case is this. In 1851 it was desired to establish a common terminal station and common tracks passing through a portion of the City for four railroads then having termini in Troy. An act of that year, c. 255, authorized the City and the four roads to subscribe for the stock of a new corporation to be formed for that purpose, and the City to issue bonds when secured by a mortgage of the new road to be built and by contract of the four subscribing roads. In July, 1851, the contemplated corporation was formed with a stock of $30,000; it is the relator in this suit. Then on December 3, 1852, an agreement was made by the City of Troy, the Troy Union Railroad Company, and the four other railroads, providing for carrying out the plan, and therein the City covenanted to join in an application to the Legislature of New York that the new road should be exempt from taxation upon an amount exceeding the present amount of its capital stock, and, if such law should not be passed, to refund the amount of the city taxes for any valuation exceeding said present stock. The above mentioned mortgage was executed, the four roads gave the City their covenant of indemnity and

thereafter on June 24, 1853, the desired act of the legislature was passed. Laws of 1853, c. 462. It provided that "for the purposes of taxation in the city of Troy, and in the county of Rensselaer, the property of the Troy Union Railroad Company shall be estimated and assessed (as the common council of said city of Troy, by its contract with said company, . . . agreed that the same should be) at the amount of the capital stock of said company, and no more." The above mentioned covenant of the City and this provision of the statute are the grounds upon which the relator founds its claim.

After 1853 there was a default in the payment of the interest on the bonds that had been issued by the City under the agreement and the City began an action to foreclose the mortgage given by the road to secure it. Thereupon in 1858 a new contract was made between the parties concerned in which they "for the purpose of reforming the contract [made in 1852] adopt this instead of and in place of the said contract, which is hereby annulled." The City of Troy agreed that if the Act of 1853 should be repealed at any time it would join in an application to the Legislature, as in the former contract, and covenanted again that if the desired law should not be passed it would refund as before. The other arrangements do not need mention here.

In 1886 and 1887 the Assessors of Troy assessed the Troy Union Railroad Company for $783,984 instead of the agreed $30,000, but it was held that the Company's property above $30,000 was exempt. *People ex. rel. Troy Union R. R. Co.* v. *Carter*, 52 Hun, 458. 117 N. Y. 625. In 1909, however, the Act of 1853 was repealed. Acts of 1909, c. 201. The assessment complained of in this case was made since this repeal.

The Court of Appeals held that the concession in the Act of 1853 was spontaneous and belonged to the class of *privilegia favorabilia*, as it is put in *Christ Church* v. *County*

*of Philadelphia*, 24 How. 300, and therefore was subject to repeal. This is a question upon which we should be slow to differ with a decision of the New York courts with regard to a New York corporation. It may be that too much stress was laid upon the absence of a consideration for the exemption; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 385–387; and that a fairly strong argument could be made for interpreting the grant of 1853 as purporting to be coextensive with the contract recited in that grant, whether correctly recited or not. It may be, if it were material, that the contract of 1858 should be construed as a continuance of that of 1852 as reformed notwithstanding the habitually inaccurately used word "annulled." *United States* v. *McMullen*, 222 U. S. 460, 471. But taking into consideration the general attitude of the Courts toward claims of exemption, adverted to by the Court of Appeals, the fact that the agreement of 1858 shows that the parties concerned did not suppose that they had an irrevocable grant, and especially the fact that the constitution of New York in force in 1853, provided in Article VIII, § 1, that all general laws and special acts passed pursuant to that section might be altered or repealed, we are not prepared to say that the decision below was wrong. We are dealing, of course, only with the contract supposed to be embodied in the Act of 1853. The liability of the City on its covenant to refund taxes upon an assessment exceeding $30,000 was not passed upon below and is not before us in this case.

*Judgment affirmed.*

# JOHNSON *v.* STATE OF MARYLAND.

ERROR TO THE CIRCUIT COURT OF FREDERICK COUNTY, STATE OF MARYLAND.

No. 289. Argued October 18, 1920.—Decided November 8, 1920.

A law of a State penalizing those who operate motor trucks on highways without having obtained licenses based on examination of competency and payment of a fee, can not constitutionally apply to an employee of the Post Office Department while engaged in driving a government motor-truck over a post-road in the performance of his official duty. P. 55.

Reversed.

THIS was a prosecution based on § 143 of Art. 56 of the Code of Public General Laws of Maryland, as amended by c. 85, Acts of 1918. The opinion states the case.

*Mr. W. C. Herron*, with whom *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* were on the brief, for plaintiff in error:

To assert that there may be reasonable regulation of a federal operation or agency by a State acting under its police power, is to deny the complete sovereignty of the Federal Government in the discharge of its constitutional functions. *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, 431, 432, 436; *Tennessee* v. *Davis*, 100 U. S. 257, 263; *Henderson* v. *Mayor*, 92 U. S. 259, 271, 272; *Weston* v. *Charleston*, 2 Pet. 448, 467; *Society of Savings* v. *Coite*, 6 Wall. 594, 604; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 867.

If the taxing power of the State may not be exerted over federal operations and instrumentalities because of the supremacy of the Federal Government in the field of its constitutional authority, then obviously and for the same

reason is the State forbidden to exert any regulative control. *Ohio* v. *Thomas*, 173 U. S. 276, 283; *Flaherty* v. *Hanson*, 215 U. S. 515; *In re Neagle*, 135 U. S. 1; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 186; *In re Waite*, 81 Fed. Rep. 359; *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516, 526; *Boske* v. *Comingore*, 177 U. S. 459; *Williams* v. *Talladega*, 226 U. S. 404; *United States* v. *Ansonia Co.*, 218 U. S. 452; *Holmes* v. *Jennison*, 14 Pet. 540; *In re Loney*, 134 U. S. 372; *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542.

If the State possesses power to determine qualifications of plaintiff in error, then it likewise possesses power to levy a tax upon him for revenue or other purposes. *McCulloch* v. *Maryland, supra*, 429; *Shaffer* v. *Carter*, 252 U. S. 37, 50; *Mugler* v. *Kansas*, 123 U. S. 623, 659; *In re Rahrer*, 140 U. S. 545, 554. The power of taxation is coextensive with sovereignty, and as the police power can not be more extensive than sovereignty, the police and taxation powers must be coequal. From this it necessarily follows that the absence of power to levy a tax upon a federal employee or agency as such equally forbids the exercise of the police power to control the official operations of such employee or agency. *Dobbins* v. *Erie County*, 16 Pet. 435, 447–448; *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 279, 283.

The Maryland statute is open to the objection that it seeks to determine the fitness of, with reserved power to deny, a means adopted by Congress in executing its constitutional power to establish post offices and post roads. *McCulloch* v. *Maryland, supra*, 413, 414; *Fairbank* v. *United States*, 181 U. S. 283, 287, 288.

While the State possesses the right to make a charge for the road facilities which it furnishes, its power to regulate and control the use of such roads can not, by virtue of its ownership of such roads, be more extensive than its police power, for such latter power is as broad as its sovereignty.

*Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160, 168. It follows that if the State's ownership of its roads does not deprive Congress of the power to supplant state regulative laws with respect to the use of those roads as instruments of interstate commerce, then upon the same principle the state power must be subordinate to the exercise of any other constitutional power. *In re Rahrer, supra*, 555, 556; *Second Employers' Liability Cases*, 223 U. S. 1, 54. Were the rule otherwise the constitutional power to establish post offices and post roads, which of course embraces provisions for the transportation of the mails, would, to a considerable degree, depend for its efficient exercise upon the will of the State; for while its highways are post roads (*Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 165; *Essex* v. *New England Telegraph Co.*, 239 U. S. 313, 321), nevertheless the State could dictate the terms upon which the mails could be transported over them. The federal constitutional power recognizes no such dependence.

Plaintiff in error possessed the right secured to him by the Constitution and laws of the United States to engage in the employment here drawn in issue without compliance with the laws of Maryland. *Slaughter-House Cases*, 16 Wall. 36, 79. In *Hawker* v. *New York*, 170 U. S. 189, this court recognized the right of a State to require, as a condition precedent to the practice of medicine, a demonstration of the qualifications of the applicant. Will it be contended that a physician may not enter, e. g., the service of the Federal Army as a physician on duty within the boundaries of a State until he has first met the requirements of the state law?

The judicial decisions upholding state exertions of police power affecting interstate commerce can not be used as authority for the assertion that the State may exert a like power with respect to the establishment of post offices and post roads.

*Mr. Alexander Armstrong*, Attorney General of the State of Maryland, and *Mr. J. Purdon Wright*, with whom *Mr. Lindsay C. Spencer*, Assistant Attorney General of the State of Maryland, was on the brief, for defendant in error:

The regulation in question is enacted in pursuance of the police power and its object is to protect the life and property of persons using the highways of the State by preventing the operation of automobiles by incompetent persons.

A person employed by the United States to perform the service authorized by its laws and in connection with its property is subject to state control as to the method by which he shall perform such service in a State. If he is guilty of wilful misconduct or negligence, while performing such duty, he is liable in damages, for the laws of the United States do not authorize him to perform his duties in a negligent manner, and he is liable for all damages that may result from an unauthorized act. *Little* v. *Barreme*, 2 Cranch, 170; *Mitchell* v. *Harmony*, 13 How. 115; *Commonwealth* v. *Closson*, 229 Massachusetts, 329.

It would seem to follow that, if a State may insure against the improper use upon its highways of a vehicle of the United States Government, by a prosecution of the person improperly using it thereon, it may accomplish the same object by requiring proof of the competence of such person to use such vehicle properly upon those highways as a condition precedent to his being permitted to operate it thereon. 28 Ops. Atty. Gen. 604.

The State can constitutionally exact the payment of a license fee such as is required by the law under discussion, whether such fee is considered as a reasonable fee for the services of the state officials charged with the issuance of licenses or as compensation exacted by the State for the use of its road facilities. 28 Ops. Atty. Gen. 604; *Hendrick* v. *Maryland*, 235 U. S. 610; *Searight* v. *Stokes*, 3 How. 151;

*Dickey* v. *Maysville, etc., Co.*, 7 Dana, 113. [Counsel also referred to an unreported opinion of the Attorney General, rendered after the decision in *Hendrick* v. *Maryland*, in disagreement with the view expressed in 28 Ops. Atty. Gen. 604, upon the power to exact a license fee.]

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was an employee of the Post Office Department of the United States and while driving a government motor truck in the transportation of mail over a post road from Mt. Airy, Maryland, to Washington, was arrested in Maryland, and was tried, convicted and fined for so driving without having obtained a license from the State. He saved his constitutional rights by motion to quash, by special pleas which were overruled upon demurrer and by motion in arrest of judgment. The facts were admitted and the naked question is whether the State has power to require such an employee to obtain a license by submitting to an examination concerning his competence and paying three dollars, before performing his official duty in obedience to superior command.

The cases upon the regulation of interstate commerce can not be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the States as well as the general government have an interest and which would be wholly under the control of the States but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the State can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch* v. *Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the

States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516, 525, 526. A little later the scope of the proposition as then understood was indicated in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 867. "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority." *Ohio* v. *Thomas*, 173 U. S. 276, 283. It seems to us that the foregoing decisions establish the law governing this case.

Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States* v. *Hart*, Pet. C. C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth* v. *Closson*, 229 Massachusetts, 329. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concern-

ing murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States. *In re Neagle*, 135 U. S. 1.

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. *Keim* v. *United States*, 177 U. S. 290, 293.

*Judgment reversed.*

MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissent.

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## SEABOARD AIR LINE RAILWAY COMPANY ET AL. *v.* UNITED STATES ET AL.

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

No. 27. Argued October 8, 11, 1920.—Decided November 8, 1920.

A discrimination between shippers, in charges for transportation, otherwise violative of § 2 of the Act to Regulate Commerce, cannot be justified by the exigencies of competition between carriers. P. 62. *Wight* v. *United States*, 167 U. S. 512.

In a case of alleged discrimination, findings of fact made by the Interstate Commerce Commission as to the likeness of contemporary transportation services rendered by carriers to different shippers and as to the substantial similarity of the circumstances and conditions in which they were rendered, cannot be disturbed by the courts, where the action of the Commission is neither arbitrary nor in excess of its authority. P. 62.

Each of certain railroads, in transporting carload freight to and from Richmond, made a practice of absorbing the charges for switching between its line and industries on the lines of the other railroads in that city, if the freight moved over its line to or from points served also by the railroads over which it must be switched in Richmond, but refused to absorb such switching charges where this switching service was to be performed by a non-competitive railroad. *Held:* (1) That a ruling of the Interstate Commerce Commission finding the practice discriminatory between shippers and unlawful under § 2 of the Commerce Act, and requiring the carriers to abstain from it and to maintain and apply uniform regulations and practices for the absorption of such switching charges and to collect no higher charges from shippers or receivers of such freight at Richmond than they contemporaneously collected from any other shipper or receiver of such freight there for a like service under substantially similar circumstances and conditions, was not arbitrary or beyond the authority of the Commission; (2) that the order was not too vague and uncertain to be enforced. P. 63.

249 Fed. Rep. 368, affirmed.

THE case is stated in the opinion.

*Mr. Claudian B. Northrop* and *Mr. Frank W. Gwathmey* for appellants.

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

*Mr. Charles W. Needham*, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE DAY delivered the opinion of the court.

In this case a petition was filed in the District Court of the United States for the Eastern District of Virginia to enjoin an order of the Interstate Commerce Commission concerning the absorption of switching charges on the lines of the Seaboard Air Line Railway Company, the Seaboard Air Line Railway, Southern Railway Company, and Atlantic Coast Line Railway Company within the switching limits of these roads as established at Richmond, Virginia.

The Commission's order was made upon a petition of the Richmond Chamber of Commerce averring that the practice of the railroads was discriminatory and unlawful and violative of § 2 of the Act to Regulate Commerce. From the facts found by the Commission it appears that the appellant railroad companies bring freight from the south to Richmond, Virginia, where the same is delivered to industries in the switching limits of that city. If the freight is received at a point served by any two or more of the carriers, the switching charge is absorbed if the freight be delivered on the line of either. But if the delivery is to an industry served only by a non-competitive carrier the switching charge is not absorbed. The Commission illustrated the point by an example: "Oxford, N. C., is a point reached both by the Southern and the Seaboard, but not by the Chesapeake & Ohio. Norlina, N. C., is a local point on the Seaboard. Assume that industries A, B, and C [referring to a diagram] on the Seaboard, the Southern, and the Chesapeake & Ohio, respectively, are similarly located with regard to the interchange tracks of the three carriers at Richmond. On traffic from Oxford to industry B on the Southern, the Seaboard will absorb the Southern's switching charges. But on traffic from Oxford to industry C, on the Chesapeake & Ohio, the Seaboard refuses to absorb the Chesapeake & Ohio's switching

charges. On traffic from and to Norlina, a local point, however, the Seaboard refuses to absorb all switching charges whatsoever to any off-line industry."

The order complained of directed the three carriers to cease and desist on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interstate carload freight at Richmond, Virginia, while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions, such practices having been found in a supplemental report to be unjustly discriminatory and unlawful within § 2 of the Act to Regulate Commerce; and "to establish, on or before August 1, 1917, . . . and thereafter to maintain and apply uniform regulations and practices for the absorption of charges for the switching of interstate carload freight at Richmond, Va., and to collect no higher rates or charges from shippers and receivers of such carload freight at Richmond, Va., than they contemporaneously collect from any other shipper or receiver of such carload freight at Richmond, Va., for a like and contemporaneous service under substantially similar circumstances and conditions." 44 I. C. C. 455.

The District Court denied the application for an injunction, and ordered that the petition be dismissed. 249 Fed. Rep. 368.

The contention of the appellants is that the carriage is not a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Section 2 of the Act to Regulate Commerce provides:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered,

in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." (24 Stat. 379.)

Upon this controversy the Commission in its report said:

"Complainant insists that when the line-haul carrier reaches the common point and competes for the traffic to or from Richmond proper, the absorption of the switching charges should not be confined to that traffic for which the switching line competes for the entire haul. That is, if the Seaboard absorbs the switching charges for the shipper on the terminal tracks of the Southern, it should also absorb the switching charges for the shipper on the terminal tracks of the Chesapeake & Ohio. Unless this is done, complainant contends that the two shippers are not upon an equality, since the Seaboard pays for a delivery service to shippers on the terminal tracks of the Southern and declines to pay for a similar delivery service to shippers on the terminal tracks of the Chesapeake & Ohio. . . .

"Section 2 is primarily directed against discrimination between shippers located in the same community. It is aimed to put all shippers within a switching district upon a substantial equality. It provides that where a carrier receives from any person a greater compensation for any service rendered in the transportation of passengers or property than it receives from any other person for doing for him a 'like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination,' a discrimination which is prohibited and declared to be unlaw-

ful. Under this section it is settled that the competition of rival carriers as such does not constitute substantially dissimilar circumstances to justify a difference in treatment."

We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-Cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.

The Commission did not hold that switching charges must be always the same. But it did hold that they must be alike where the service was rendered under substantially similar circumstances and conditions. The Commission's report says:

"We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails.

The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions. To take a concrete example and referring again to the diagram. Suppose industry C were 5 miles distant from the interchange tracks of the Seaboard, while industry B were only 2 miles distant. Suppose the Chesapeake & Ohio's switching charge amounted to $5, while that of the Southern was $2. If the Seaboard absorbed the Southern's $2 switching charge on traffic to industry B, we do not consider that it must absorb the entire $5 switching charge of the Chesapeake & Ohio on traffic to industry C, but only to the extent to which the service is similar. In other words, it would probably be necessary for the Seaboard to absorb $2 of the $5 charge of the Chesapeake & Ohio."

The practice condemned by the Commission, as its report and order show, was that of absorbing switching charges only when the line-haul carrier competes with the switching line; and refusing to absorb such charges when the switching line does not compete with the line-haul carrier; this the Commission held was discrimination within the meaning of § 2 of the Act to Regulate Commerce. We find no occasion to disturb this ruling as arbitrary in character or beyond the authority of the Commission.

We find no merit in the contention that the order of the Commission was too vague and uncertain to be enforced.

*Affirmed.*

# TURNER ET AL., EXECUTORS OF MORTON, *v.* WADE, SHERIFF OF BROOKS COUNTY, GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 29. Argued November 14, 1919; restored to docket for reargument January 5, 1920; reargued October 11, 1920.—Decided November 8, 1920.

The Georgia Tax Equalization Act (Laws, 1913, p. 123, §§ 6–7), empowers the Board of County Tax Assessors to assess property for taxation and requires it to notify the taxpayer of changes made in his returns; it gives him, if dissatisfied, the right to demand an arbitration, and provides that a majority of three arbitrators, one appointed by him, one by the Board and the third by the two so selected, shall fix the assessment; but the arbitrators must render their decision within ten days from the naming of the arbitrator by the Board, otherwise the Board's decision—*i. e.*, its assessment—stands affirmed; and no notice is afforded the taxpayer before the making of the Board's assessment, nor any opportunity to be heard concerning it save that before the arbitrators. *Held*, that an assessment so made by the Board of County Tax Assessors, increasing the valuation returned by a property owner, without notice or hearing, was without due process of law, where his remedy by arbitration proved abortive because the arbitrators, though agreeing that the assessment was excessive, could no two of them unite on a new assessment before the ten day limitation expired. P. 70.

147 Georgia, 666, reversed.

THE case is stated in the opinion.

*Mr. Arthur G. Powell*, with whom *Mr. John D. Little*, *Mr. Marion Smith* and *Mr. Max F. Goldstein* were on the brief, for plaintiffs in error.

*Mr. Graham Wright*, Assistant Attorney General of the State of Georgia, with whom *Mr. R. A. Denny*, Attorney General, was on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the constitutional validity under the due process clause of the Fourteenth Amendment of certain provisions of the Georgia Tax Equalization Act. Georgia Laws, 1913, p. 123.

The facts stated in the petition and amended petition are not disputed, and show that plaintiffs in error returned property for taxation at the value of $44,225. The County Board of Tax Assessors without hearing raised the assessment to $80,650. Notice was then given to the plaintiffs in error of the increase. Following the statute, plaintiffs in error demanded arbitration, and named an arbitrator, the Board selected an arbitrator, and the two selected a third. Upon meeting of the arbitrators all agreed that the value assessed by the Board was excessive. The arbitrator named by the plaintiffs in error fixed the valuation at $50,000. The arbitrator named by the Board fixed the valuation at $66,000. The third arbitrator fixed the valuation at $63,000. The arbitrators could not agree, each adhering to his own view. All the arbitrators believed the assessment too high, but for lack of agreement the arbitration failed, and after ten days from the date of naming of the arbitrator designated by the Board had expired, the statutory requirement that the valuation of the Board of Assessors should stand affirmed was followed, and the Collector demanded payment of the taxes on the sum of $80,650, the valuation fixed by the Assessors. The Tax Collector issued execution for the taxes upon this valuation, and plaintiffs in error filed a petition in equity to prevent the enforcement of the execution, setting up the constitutional objection to which we have referred.

The Superior Court of Georgia on interlocutory hearing granted an *ad interim* injunction. This action was reversed by the Supreme Court of Georgia. Upon a second

writ of error from the Supreme Court of Georgia the act was again held constitutional.

The assessment by the Board of Assessors was made under § 6 of the act, which provides that the Board of County Assessors shall meet each year within ten days of the date of the closing of the tax returns to receive and inspect the same. It is made the duty of the Board to examine the returns of both real and personal property, and if at any time, in the opinion of the Board, any taxpayer has omitted from his return any property which should be returned, or has failed to return property at its fair valuation, the Board is authorized to correct such returns and assess and fix the fair valuation upon the property. When the corrections, changes, and equalizations have been made by the Board, it is then its duty to give notice to any taxpayer of any changes made in his return, either personally or by leaving the same at his residence or place of business, or, in case of non-residents by mail. The section further provides that if the taxpayer is dissatisfied with the action of the Board, he may within ten days from the giving of said notice give notice to the Board that he demands an arbitration, giving at the same time the name of his arbitrator. Whereupon the Board shall name its arbitrator within three days thereafter and the two shall select a third, a majority of whom shall fix the assessment upon the property upon which the taxpayer shall pay taxes except so far as the same may be affected by the findings and orders of the State Tax Commissioner as in the act provided. Provision is made for qualification of arbitrators, and that they shall render their decision within ten days from the date of naming of the arbitrator by the Board of Assessors, otherwise the decision of the Board of Assessors shall stand and be binding in the premises. (The pertinent part of § 6 is given in the margin.[1])

[1] "Sec. 6. Be it further enacted by the authority aforesaid, That the said Board of County Tax Assessors in each county shall meet each

In considering certain sections of the Georgia tax laws this court held in *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127, that due process of law requires that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the validity of a tax and the

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year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the Tax Receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax payer, and if in the opinion of the board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax payers are fairly and justly equalized so that each tax payer shall pay as near as may be, only his proportionate share of taxes. When any such corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or, in case of non-residents of the county, by sending said notice through the United States mails to his last known place of address.

"If any tax payer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of non-residents of the county, give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator: the board shall name its arbitrator within three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said tax payer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the State Tax Commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises."

amount thereof by giving him the right to appear for that purpose at some stage of the proceedings. This case, with others, was cited with approval in *Londoner* v. *Denver*, 210 U. S. 373, 385, wherein we said that if the legislature of the State, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom, the tax shall be levied,—due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of the hearing. (See 210 U. S. 385, and previous cases in this court cited on page 386.) See also *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 425.

As we have understood the argument of the Attorney General, it is admitted that the provision for arbitration, under the facts herein shown, does not of itself afford due process of law. But, it is now contended that § 7 saves the statute and provides for notice and hearing. Section 7 provides:

"That it shall be the duty of the County Board of Tax Assessors to diligently investigate and inquire into the property owned in the county for the purpose of ascertaining what property, real and personal, is subject to taxation in the county and to require its proper returns for taxation.

"The said Board shall have authority to issue subpœnas for the attendance of witnesses and to require the production by any person of all his books, papers and documents which may throw any light upon the question of the existence or liability of property of any class for taxation. If any witness, so subpœnaed, shall fail or refuse to answer questions propounded or shall fail or refuse to produce any such books, papers or documents, such person shall be cited by said board to appear before the ordinary of the county," etc. (Punishment as for a contempt is provided.)

64. Opinion of the Court.

This case was twice before the Supreme Court of Georgia. In 146 Georgia, 600, the court held that when any change is made in the valuation of the property the taxpayer must be given notice of such change and, if dissatisfied, may demand an arbitration, and have a hearing before arbitrators as provided for in the act, and that such hearing gave due process of law. In 147 Georgia, 666, the previous decision was affirmed, and it was again held that, where any change is made in the valuation of the property of a taxpayer, he must be given notice of the change and, if dissatisfied, demand arbitration and a hearing before arbitrators as provided in the act, and the opinion refers to *Vestel* v. *Edwards*, 143 Georgia, 368, wherein it was said that § 6 of the act was attacked as violative of the due process of law clause of the Constitution for the reason, among others, that the act requires the arbitration to be made within ten days from the date of selection of the arbitrator by the Tax Assessors and without making allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of property and the ascertainment of its value, or for any other cause which might render the arbitration impossible within the time specified in the act. The court said that this part of the act was not obnoxious to the State or Federal Constitutions.

In *Vestel* v. *Edwards*, the court held that the appointment of a brother of one of the assessors as arbitrator disqualified him from acting as arbitrator, and in considering the statute we find no suggestion from the Georgia Supreme Court that a hearing was provided before the Board of Assessors. The court said that the provisions of a previous act (1910) read in connection with the statute of 1913, provided that the Ordinary might appoint the third arbitrator in event of inability to agree to such arbitrator by the two already selected. But this case presents no such situation. The arbitrators were agreed

upon. The arbitration failed because within the ten-day period fixed neither of the three arbitrators would recede from the valuation fixed by himself upon the property, and hence no majority award could be made. We are, therefore, unable to find in the decisions of the Supreme Court of Georgia that that court understood § 7 to provide for the notice and hearing required by due process of law. Therefore, looking to the sections of the statute for ourselves, we are forced to the conclusion that reading the provisions together, being parts of one and the same act, they clearly show that the Board of Assessors was not required to give any notice to the taxpayer, nor was opportunity given him to be heard as of right before the assessment was finally made against him. But provision was made for notice of the assessment to the taxpayer after it was made, and in event of his dissatisfaction the arbitration was to afford a hearing to him. Such hearing was all that the statute contemplated that the taxpayer should have.

In the present case, as the facts already stated show, the taxpayer is subject to an assessment made without notice and hearing. In that situation we are clear that the case comes within the decision of this court in *Central of Georgia Ry. Co.* v. *Wright*, *supra*, and kindred cases, and not within that line of cases wherein the statute has fixed the time and place of hearing with opportunity to the taxpayer to appear and be heard upon the extent and validity of the assessment against him.

Entertaining this view, it follows that the assessment of the Board of Assessors ought to have been enjoined, because § 6 of the act, as construed and applied in this case, denies to the complaining taxpayer due process of law. It follows that the judgment of the Supreme Court of Georgia must be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

*Reversed.*

# ARNDSTEIN *v.* McCARTHY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

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

No. 575. Argued October 21, 22, 1920.—Decided November 8, 1920.

Under direction of the bankruptcy court, but without objection, an involuntary bankrupt filed schedules of assets and liabilities, which, standing alone, did not amount to an admission of guilt or furnish clear proof of crime; and, later in the proceeding, he declined to answer certain questions concerning them on the ground that to do so might incriminate him. *Held*, that by filing the schedules he did not waive his privilege under the Fifth Amendment. P. 72.

The privilege of the Amendment applies if it cannot be said that the questions propounded, considered in the light of the circumstances disclosed, may be answered with entire impunity. *Id.*

The provision of § 7 of the Bankruptcy Act that no testimony given by a bankrupt shall be offered in evidence against him in any criminal proceeding, is not a substitute for the protection of the Fifth Amendment, since it does not prevent the use of his testimony to search out other evidence to be used in evidence against him or his property. P. 73.

Reversed.

THE case is stated in the opinion. See also, *post*, 379.

*Mr. Rufus S. Day* and *Mr. William J. Fallon*, with whom *Mr. George L. Boyle* was on the brief, for appellant.

*The Solicitor General* for appellee.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Holding that the petition failed to disclose adequate grounds therefor, the court below denied appellant's

application for a writ of habeas corpus, through which he sought release from confinement for contempt. The cause is here by reason of the constitutional question involved.

The petition alleges:

That having been adjudged an involuntary bankrupt, Arndstein was called before Special Commissioners for examination under § 21-a, Bankruptcy Act. He refused to answer a long list of questions, claiming that to do so might tend to degrade and incriminate him. The District Judge upheld this contention and denied a motion to punish for contempt.

That subsequent to such examination and under the direction of the court the bankrupt filed schedules under oath which purported to show his assets and liabilities. When interrogated concerning these he set up his constitutional privilege and refused to answer many questions which are set out. Thereupon he was committed to jail.

The writ was refused upon the theory that by filing schedules without objection the bankrupt waived his constitutional privilege and could not thereafter refuse to reply when questioned in respect of them. This view of the law we think is erroneous. The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. See *Brown* v. *Walker*, 161 U. S. 591, 597; *Foster* v. *People*, 18 Michigan, 266, 274; *People* v. *Forbes*, 143 N. Y. 219, 230; *Regina* v. *Garbett*, 2 C. & K. 474, 495. It is impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity. The writ should have issued.

"No person . . . shall be compelled in any criminal case to be a witness against himself,"—Fifth Amendment. "This provision must have a broad construction

in favor of the right which it was intended to secure." "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562.

The protection of the Constitution was not removed by the provision in § 7 of the Bankruptcy Act,—"No testimony given by him shall be offered in evidence against him in any criminal proceeding." "It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property." *Counselman* v. *Hitchcock*, p. 564.

*The judgment below must be reversed, and the cause remanded for further proceedings in conformity with this opinion.*

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

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## UNITED STATES *v.* NATIONAL SURETY COMPANY.

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

Nos. 271, 272. Submitted October 13, 1920.—Decided November 8, 1920.

Revised Statutes, § 3468, which gives a surety, who pays to the United States the amount due on a bond of an insolvent debtor, the priority enjoyed by the United States over other creditors under Rev. Stats., § 3466, does not entitle the surety to share equally with the United States when the estate is insufficient to satisfy the claim of the

United States; and this construction is in harmony with a familiar rule of subrogation under which a surety liable only for part of a debt does not become subrogated to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied. P. 75.

262 Fed. Rep. 62, reversed.

THE case is stated in the opinion.

*Mr. Assistant Attorney General Spellacy* and *Mr. Leonard B. Zeisler*, Special Assistant to the Attorney General, for the United States.

*Mr. Samuel W. Fordyce* and *Mr. Thomas W. White* for respondent. *Mr. John H. Holliday* was also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The National Surety Company executed as surety two bonds given to secure contracts entered into with the United States. The contractor defaulted and was later adjudicated a bankrupt. The loss to the Government was about $13,000. The Surety Company paid to it on account of this loss $3,150, the full amount of the liability on the bonds. Thereupon the Government proved its claim in bankruptcy for the balance, claiming, under Revised Statutes, § 3466,[1] priority therefor over all other

[1] Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

creditors. The Surety Company proved for the $3,150, and claimed that under Revised Statutes, § 3468,[1] it was entitled to a share in the distribution of the estate *pro rata* on an equality with the Government. The net assets of the estate were less than the amount of the Government's claim. The referee sustained the contention of the Surety Company, and his order was affirmed both by the District Judge and by the Circuit Court of Appeals for the Eighth Circuit. 262 Fed. Rep. 62. The case comes here on writ of certiorari, 252 U. S. 577. The single question presented is whether in the distribution of the bankrupt's estate the United States has priority over the Surety Company.

Section 3468, applying an established rule of the law of subrogation, *Lidderdale* v. *Robinson*, 12 Wheat. 594, 596, declares that when a "surety pays to the United States the money due upon . . .[a] bond, such surety . . . shall have the like priority for the recovery . . . of the moneys . . . as is secured to the United States." Section 3466, embodying the common-law rule by which the sovereign has priority over other creditors of an insolvent, *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35, declares that "the debts due to the United States shall be first satisfied." There is no conflict between the two sections which are substantially a reënactment and extension of the provisions of § 65 of the Act of March 2,

[1] Sec. 3468. Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

1799, c. 22, 1 Stat. 627, 676. The priority secured to the United States by § 3466 is priority over all other creditors; that is, private persons and other public bodies. This priority the surety obtains upon discharging its obligation. But what the surety asks here is not to enjoy like priority over such other creditors, but equality with the United States, a creditor whose debt it partly secured. To accord such equality would abridge the priority expressly conferred upon the Government. While the priority given the surety by the statute attaches as soon as the obligation upon the bond is discharged, it cannot ripen into enjoyment unless or until the whole debt due the United States is satisfied. This result is in harmony with a familiar rule of the law of subrogation under which a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied.[1]

The judgment of the Circuit Court of Appeals is

*Reversed.*

[1] Sheldon on Subrogation (2nd ed.), § 127; Pomeroy Equity Jurisprudence (4th ed.) § 2350; 25 R. C. L. 1318; *Peoples* v. *Peoples Bros.*, 254 Fed. Rep. 489, 491, 492; *United States Fidelity & Guaranty Co.* v. *Union Bank & Trust Co.*, 228 Fed. Rep. 448, 455; *National Bank of Commerce* v. *Rockefeller*, 174 Fed. Rep. 22, 28.

Counsel for Parties.

## NILES-BEMENT-POND COMPANY *v.* IRON MOULDERS UNION LOCAL NO. 68 ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 69. Argued October 22, 1920.—Decided November 8, 1920.

In a suit by a corporation, a citizen of one State, against another corporation, of another State, and its former employees and their labor unions, wherein the plaintiff, praying no relief against the defendant corporation, sought to enjoin the other defendants from molesting the workmen employed by that corporation and thereby delaying or preventing the performance of contracts with the Government for war supplies entered into by the plaintiff and by it turned over to the defendant corporation for manufacture and delivery, and wherein it appeared that the defendant corporation was subject to the control of the plaintiff through majority stock ownership and through the identity of some of their officers and directors,—

*Held:* (1) That the plaintiff's right, if any, was a right to protect the contract between the defendant corporation and its workmen from the interference complained of; that the defendant corporation was an indispensable party to the controversy, and that, having no interest in conflict with the plaintiff's, it must be aligned as a plaintiff in determining whether the District Court had jurisdiction through diverse citizenship (p. 80); (2) that certain allegations of the bill that the Government contracts had priority under the National Defense Act, and involved interstate commerce, were insufficient to render the suit one arising under the laws of the United States. P. 82.

258 Fed. Rep. 408, affirmed.

THE case is stated in the opinion.

*Mr. Lawrence Maxwell* and *Mr. Murray Seasongood* for appellant and petitioner.

*Mr. W. B. Rubin* and *Mr. Robert J. Shank* for appellees and respondents.

MR. JUSTICE CLARKE delivered the opinion of the court.

The controversy involved in this suit originated in a strike by employees of the defendant The Niles Tool Works Company, hereinafter designated the Tool Company, and the sole question presented for decision is one of jurisdiction.

The petitioner, a corporation of New Jersey, filed its bill in the District Court for the Southern District of Ohio, making the Tool Company, an Ohio corporation, several local labor unions and many of the striking employees of the Tool Company (in the bill and hereinafter designated "former employees") parties defendant, it being averred that all of the defendants were citizens of Ohio and residents of the Southern District. The jurisdiction of the court was thus invoked on the ground of diverse citizenship.

The relief prayed for was an injunction, restraining the striking former employees of the Tool Company from molesting workmen employed by that company to take their places, upon the ground that petitioner had contracts with the Tool Company the performance of which was being delayed by such interference. No case was stated, or relief asked for, against the Tool Company.

The District Court overruled a motion to dismiss for want of jurisdiction and granted a preliminary injunction as prayed for, but, on appeal, the Circuit Court of Appeals found: that the Tool Company was so essentially a subsidiary of the petitioner, and its interest in the controversy was so certainly on the same side, that it should be treated as a plaintiff; that any decision of the case must necessarily so involve rights of the Tool Company as to render it an indispensable party to the case; and that giving that company its proper classification as a plaintiff resulted in the disappearance of the jurisdictional diversity of citizenship and required the dismissal of the bill, which was

ordered. The case was brought here for review by writ of certiorari.

The facts essential to be considered, which were stipulated or sufficiently proved on the hearing of the application for an injunction, may be epitomized as follows:

The petitioner was a corporation of New Jersey, the defendant Tool Company a corporation of Ohio, the petitioner owned a controlling interest in the capital stock of the Tool Company, and the same men were president and vice president, respectively, of both companies. The president was invested with authority to fix prices for the two companies, three of the five directors of the Tool Company were directors of the petitioner, and more than ninety-five per cent. of the business of that company was obtained through the petitioner, acting as its general sales agent. The customary mode of transacting business between the two companies was for the petitioner to make contracts for machinery, which it passed to the Tool Company for manufacture and delivery.

Before the filing of the bill the petitioner had entered into many contracts with the United States Government to furnish it, as quickly as possible, with machinery, tools and equipment for arsenals and for navy and ship yards, all of which contracts were necessary for the successful prosecution of the war and were to be given priority over other work. These contracts had been passed to the Tool Company for manufacture, the petitioner remaining liable for their performance. It was averred and sufficiently proved, that the defendants other than the Tool Company had conspired together, for the purpose of hindering, delaying and preventing the petitioner from performing, through the Tool Company, the contracts thus obtained by it from the Government and for the purpose of intimidating workmen in the employ of the Tool Company by threats, violence and coercion, when going to and from their places of work and when at their homes.

Such defendants, assembled about the plant of the Tool Company, had at times by threats and violence prevented employees from entering its factory to work, and had threatened to prevent, and unless restrained would have prevented that company from freely carrying forward its business and thereby the petitioner from fulfilling its contracts with the Government and with others.

On this record the questions presented for decision are, Was the Tool Company an indispensable party to the suit, and, properly classified, should it be treated as a plaintiff? If these questions are both answered in the affirmative the decree of the Circuit Court of Appeals must be affirmed, otherwise it must be reversed.

There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not, but a rule early announced and often applied by this court is sharply applicable to the case at bar. In *Shields* v. *Barrow*, 17 How. 130, 139, this language,—quoted with approval in *Barney* v. *Baltimore City*, 6 Wall. 280, 284, and again in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 48,—was used to describe parties so indispensable that a court of equity will not proceed to final decision without them, viz:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The case we are considering is essentially one on the part of the petitioner to protect from interference by striking former employees of the Tool Company, the contract which that company had with the men employed by it to take their places. Petitioner's claim of right, the validity of which we are not called upon to determine, is rested wholly upon the contract of the Tool Company with its

employees, and the character and construction of that contract of employment must inevitably be passed upon in any decision of the case, and, obviously, if the petitioner should fail in such a suit as this, with the Tool Company not a party, any decree rendered would not prevent a re-litigating of the same questions in the same or in any other proper court, and it would settle nothing.

Thus if the Tool Company be considered as having any corporate existence whatever separate from that of the petitioner, it must have an interest in the controversy, involved in such a case as we have here, of a nature such that a final decree could not be made without affecting that interest and perhaps not without leaving the controversy in a condition wholly inconsistent with that equity which seeks to put an end to litigation by doing complete and final justice, and therefore it must be concluded that it was an indispensable party, within the quoted long established rule.

Plainly, the appellant was not mistaken when it made the Tool Company a party to the suit. But making it a party defendant could not give to the District Court jurisdiction against the objection of another party or over the court's own scrutiny of the record, unless there existed a genuine controversy between it and the plaintiff, the petitioner. Judicial Code, § 24. That there was not, and could not be any substantial controversy, any "collision of interest," between the petitioner and the Tool Company is, of course, obvious from the potential control which the ownership of stock by the former gave it over the latter company, and from the actual control effected by the membership of the boards of directors and by the selection of executive officers of the two companies, which have been described.

Looking, as the court must, beyond the pleadings, and arranging the parties according to their real interest in the dispute involved in the case, *Dawson* v. *Columbia Trust*

*Co.*, 197 U. S. 178, 180, *Steele* v. *Culver*, 211 U. S. 26, 29, it is clear that the identity of interest of the Tool Company with the petitioner required that the two be aligned as plaintiffs, and that with them so classified, the case did not present a controversy wholly between citizens of different States, within the jurisdiction of the District Court. *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Hooe* v. *Jamieson*, 166 U. S. 395.

The allegations of the bill that the contracts which the petitioner had with the United States Government were of a character which must be given priority under § 120 of the National Defense Act, approved June 3, 1916 (39 Stat. 166, 213), and that they involved interstate commerce, are much too casual and meager to give serious color to the claim now made that the cause of action asserted is one arising under the laws of the United States. The contention is an afterthought and plainly was not in the mind of the writer of the bill of complaint.

It results that the decree of the Circuit Court of Appeals must be affirmed.

*Appeal dismissed, petition for writ of certiorari granted, and decree of the Circuit Court of Appeals affirmed.*

MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissent.

# WELLS BROTHERS COMPANY OF NEW YORK *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 75. Submitted April 30, 1920.—Decided November 8, 1920.

Where a contract for the construction of a public building, giving the United States a broad power to suspend operations where necessary in the opinion of its architects for the purpose or advantage of the work, permitted the United States to make changes of materials, and, besides providing against claims for damages on account of such changes, declared generally that no claim should be made or allowed to the contractor for any damages arising out of any delay caused by the United States, *held*, that a delay ordered to await an appropriation by Congress for substituted materials and another in anticipation of the passage of a postal law because of which the plans were altered, would not support claims for damages under the contract. P. 85.

54 Ct. Clms. 206, affirmed.

THE case is stated in the opinion.

*Mr. Abram R. Serven* and *Mr. Burt E. Barlow* for appellant.

*Mr. Assistant Attorney General Davis* for the United States. *Mr. Jno. W. Trainer* was also on the brief.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims, sustaining a general demurrer to and dismissing the amended petition.

The allegations of this amended petition, admitted by the demurrer and essential to be considered, are:

The appellant, a corporation organized under the laws of New York, and engaged in the general building and construction business, entered into a written contract with the United States for the construction of a post office and court house building in New Orleans, dated September 30, 1909, for which it was to be paid $817,000, but its bond for performance was not approved until nine days later, on October 9; on the day after the contract was signed the United States "ordered and directed" appellant to delay ordering limestone (as specified in the contract) for the exterior of the street fronts of the building "for the reason, as stated, that a change was contemplated in said exterior face stonework which would require an additional appropriation by Congress"; the appellant assented to a delay of two weeks only, but, although protesting that further delay would result in its damage, it refrained from purchasing limestone until August 19, 1910, when, the required appropriation by Congress having been obtained, a supplemental agreement was entered into by the parties to the contract by which marble was substituted for limestone for the street fronts of the building, the compensation of the appellant was increased $210,500, and the time for completion of the building was extended from April 1, 1911, to February 5, 1912; during this delay the contractor proceeded with other work under the contract and prior to August 19, 1910, it had completed all the required excavation, foundation and structural steel work; after the "modification and addition of August 19, 1910, to the contract work" the appellant so proceeded with the performance of the contract that by February 1st, 1912, the building was substantially completed except the interior partitions, and thereupon the United States, again over the protest of appellant, "ordered and directed" a delay, which continued to Au-

gust 24, 1912, until congressional legislation was obtained authorizing the Parcel Post, whereupon the plans for the interior arrangements of the building were adapted to that service and the building was completed.

The claim is wholly for damages occasioned by the two delays thus described, and the question for decision is, whether the terms of the contract authorized the Government to require such delays without becoming liable to the contractor for damages which may have been caused to it thereby.

The contract involved contains this provision:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the Supervising Architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise, and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work; the same to be ascertained by the Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

The contract further declares that the contractor:

"Will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever

required by said party of the first part; . . . and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed."

It would be difficult to select language giving larger discretion to the United States to suspend the performance of the "whole or any part of the work" contracted for, or to change the work or materials, than that here used. The provision for the protection of the work shows that long interruptions were contemplated with a compensating extension of time for performance provided for, and it is admitted that, eight days before its bond was approved and it became bound, the appellant received its first order to delay, for the reason that "a change was contemplated in said exterior face stonework which would require an additional appropriation by Congress."

Such a delay as was thus ordered was certain to be an infidenite and very probably a long-continued one, but the appellant, experienced contractor that it was, did not hesitate to submit to it by permitting the approval of its bond, which rendered its obligation under the contract complete, more than a week after notice had been received of the order. Thus, with much the longest delay complained of ordered and actually entered upon, the appellant consented to be bound by the language quoted, which vested such comprehensive discretion over the work in the Government. That this confidence of the contractor was not misplaced is shown by the fact that this first delay resulted in the substitution of marble for limestone for the street fronts of the building and in a supplemental agreement by which it received additional payments, aggregating $210,500, and an extension of ten months for the completion of the work.

In addition to all this it must be noted that the first paragraph, above quoted, concludes with this independent proviso:

"Provided, further, that *no claim shall be made or allowed*

*to the contractor* for any damages which may arise out of any delay caused by the United States."

Here is a plain and unrestricted covenant on the part of the contractor, comprehensive as words can make it, that it will not make any claim against the Government "for *any damages* which may arise out of *any delay* caused by the United States" in the performance of the contract, and this is emphasized by being immediately coupled with a declaration by the Government that if such a claim should be made it would not be allowed.

Such language, disassociated as it is from provisions relating to "omissions from," the making of "additions to, or changes in," the work to be done, or "materials" to be used, can not be treated as meaningless and futile and read out of the contract. Given its plain meaning it is fatal to the appellant's claim.

Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work.

We are dealing with a written contract, plain and comprehensive in its terms, and the case is clearly ruled in principle by *Day* v. *United States*, 245 U. S. 159, 161; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164, 165; *Dermott* v. *Jones*, 2 Wall. 1, 7, and *Chouteau* v. *United States*, 95 U. S. 61, 67, 68. The judgment of the Court of Claims dismissing the petition must be

*Affirmed.*

# STREET *v.* LINCOLN SAFE DEPOSIT COMPANY ET AL.

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

No. 278. Argued April 26, 1920.—Decided November 8, 1920.

The owner of intoxicating liquors, lawfully acquired, stored them prior to the effective date of the National Prohibition Act in a room leased in a public warehouse and so kept them thereafter with the intention of using them only for consumption by himself and his family or *bona fide* guests. It was admitted that they were in his "exclusive possession and control," and the functions of the warehouse owner were merely to protect against fire, theft, etc., and to afford access for lawful purposes. *Held:* (1) That the warehouse owner might lawfully permit such storage of the liquors to continue after the National Prohibition Act became effective; (2) that the warehouse owner did not "possess" the liquors, within the meaning of § 3 of the act, nor would it "deliver" them, in the sense of that section, if it permitted their owner to have access to them to take them to his dwelling for lawful use; (3) nor would it be unlawful under that section to transport the liquors from the place of storage to the home of their owner, under permit from the Bureau of Internal Revenue. Pp. 90 *et seq.*

The act must be interpreted in the light of the Eighteenth Amendment, which indicates no purpose to confiscate liquors lawfully owned when it became effective and which the owner intended to use in a lawful manner. P. 90.

The declaration of § 25 of the act that it shall be unlawful "to have or possess any liquor intended for use in violating this title," does not apply to liquors held in storage by their lawful owner solely and in good faith for the purpose of preserving and protecting them until they shall be consumed by the owner and his family or *bona fide* guests; for that use is declared lawful by § 33. P. 91.

In § 21, denouncing as a nuisance, "any room, house, building, . . . or place where intoxicating liquor is manufactured, sold, kept," etc., the word "kept" means kept for sale or barter or other commercial purposes. *Noscitur a sociis.* P. 92.

An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared. P. 95.

267 Fed. Rep. 706, reversed.

THE case is stated in the opinion.

*Mr. Joseph S. Auerbach* and *Mr. Charles H. Tuttle*, with whom *Mr. Martin A. Schenck* was on the brief, for appellant.

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

MR. JUSTICE CLARKE delivered the opinion of the court.

By the motion to dismiss the bill filed in this suit it is admitted: that the defendant Lincoln Safe Deposit Company is a corporation, organized under the laws of the State of New York, and authorized to engage in the warehousing business; that prior to the effective date of the National Prohibition (Volstead) Act [41 Stat. 305] the appellant was the lessee of a room in the warehouse of the defendant Deposit Company, in which he had stored wines and liquors lawfully acquired by him, which "are in his exclusive possession and control, and are intended, and will be used only for personal consumption by himself and the members of his family or his bona fide guests;" that the defendant Daniel L. Porter is an agent of the Commissioner of Internal Revenue, charged with the duty of enforcing the Volstead Act, who in his official capacity has publicly declared and threatened that such storage of liquor by the defendant Deposit Company would be unlawful after the Volstead Act became effective and would expose plaintiff and the Deposit Company to the penalties of that act, which would be enforced against them; that

the appellant desired to continue to store his liquors in said rented room after the Volstead Act should become effective and intended to report the same to the Commissioner of Internal Revenue, as therein required; and that the Deposit Company, moved wholly by the notices and threats of defendant Porter, had notified plaintiff that he must remove his liquors from its warehouse or that it would remove and deliver them to Porter as outlawed property, to be dealt with under the Volstead Act after it became effective.

Averring as a matter of law that such possession of liquors in a warehouse is not forbidden by the Eighteenth Amendment or the Volstead Act, the appellant prayed that an injunction should issue, restraining the defendants from interfering with his possession of the room in the warehouse and from removing or disposing of his liquors.

The motion to dismiss was sustained, and a constitutional question being involved, appellant brought the case by direct appeal to this court.

Thus is presented for decision the question:

May a warehousing corporation lawfully permit to be stored in its warehouse, after the effective date of the Volstead Act, liquors admitted to have been lawfully acquired before that date and which are so stored, solely and in good faith, for the purpose of preserving and protecting them until they shall be consumed by the owner and his family or bona fide guests?

Since the Volstead Act has been held by this court to be a valid law, the answer to this question must be found in its provisions, and the sections of it which it is argued sustain the negative answer to the question given by the court below, are 3, 21 and 25 of Title II.

Since here, as always, the purpose of Congress in enacting a law is of importance in determining the meaning of it, it is noteworthy that Title II of the Volstead Act was passed under the grant of power to enforce the first section

of the Eighteenth Amendment to the Constitution of the United States, which prohibits the manufacture, sale and transportation of intoxicating liquors for beverage purposes, but does not indicate any purpose to confiscate liquors lawfully owned at the time the Amendment should become effective and which the owner intended to use in a lawful manner.

Section 33 of the act is the only one which deals specifically with liquors lawfully acquired before it should take effect, and it is therefore of first importance in the consideration of the case before us. That section declares:

"It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein."

The admissions of fact under which this case is considered bring the liquors here involved precisely within these immunity provisions of § 33, except that they are stored in a public warehouse instead of in a private dwelling. They were lawfully acquired and were intended for a lawful use, and thus the question is narrowed to whether such custody by the warehouse company as is shown by the admissions was forbidden by the act.

Coming now to the sections relied upon as rendering the custody or possession of the liquors by the warehouse company unlawful:

Section 25 declares that "It shall be unlawful to have or possess any liquor . . . intended for use in violating this title . . ."

But since § 33 declares that the uses to which it is admitted the plaintiff intends to devote his liquors are not unlawful, obviously this section does not apply to the case,

for the unlawfulness declared by it is conditioned upon the intended use in violating the act.

Section 21 declares that "Any room, house, building, . . . or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance," and for the maintaining of such a place penalties are provided.

The word "kept" in this section is the only one of possible application to the case at bar, and the words with which it is immediately associated are such that as here used it plainly means kept for sale or barter or other commercial purpose. Its inapplicability to this case is apparent. *Noscitur a sociis. United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 334.

Section 3, which is the omnibus section of the act, provides that, "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

It is argued that the declaration herein that no person shall "possess," "transport" or "deliver" intoxicating liquors is applicable to this case, because the warehouse company is not "authorized" by the act to "possess" them and because they cannot be used, even lawfully, by the plaintiff unless delivered and taken away from the warehouse.

By the admissions the appellant is lessee of the room in which the liquors are stored and he "is in the exclusive possession and control of them." Thereby the relation of the warehouse company to the liquors is restricted to the

public function of furnishing such police, fire, and other protection to its buildings and their contents as the law or its lease requires on the part of such company and to allowing the plaintiff to have access to his property in order that he may remove it for an admittedly lawful purpose. The company could not sell, give away or otherwise transfer the liquors to anyone other than in this limited way to the plaintiff owner.

The purpose of the Eighteenth Amendment and of this act considered, we cannot bring ourselves to the conclusion that such a relation to the liquors on the part of the storage company as is here disclosed constitutes a possession of them within the meaning of this section of the act.

It is equally clear that to permit the owner to have access to the liquors to take them to his dwelling for lawful use is not a delivery of them within the meaning of this third section.

That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section is too apparent to justify detailed consideration of the many provisions of the act inconsistent with a construction which would render such removal unlawful, and that the act is understood by the officers charged with its execution as permitting such transportation is shown by the provision of the regulations of the Bureau of Internal Revenue authorizing permits for the transportation of liquors from one permanent residence of an owner to another in case of his removal, although no such transfer is in terms provided for by the act.

Clearly there is like administrative power under the act to so regulate the transfer of such stored liquors from a warehouse to the dwelling of the owner as to prevent their being used to evade the prohibitions of the act or to substantially interfere with its effective enforcement.

Thus it is plain that in the sections of the act relied upon

there is no specific prohibition against the storage of liquors, under the circumstances admitted to exist in this case, and we find no other provisions by which such a custody is rendered unlawful.

The implication from another provision of § 33, than the one quoted above, confirms this conclusion. It reads:

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."

Assuming that the unexplained presence of the liquors in the Company's warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admissions) that the liquor to which it is applied is not being kept for the purpose of sale, barter, exchange, furnishing or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be considered not unlawful, even though it be by a person "not legally permitted,"—that is by a person not holding a technical permit to possess it, such as is provided for in the act.

Without saying that there may not be other cases, the one at bar seems to be fairly within the scope of this obvious implication of § 33.

It may be that the custody of liquors by a warehouse company was thus not declared to be unlawful because the writers of the act did not have such a case in mind, but it was more probably because Congress would not consent to allow lawful possession and use of liquors in dwellings having storage facilities for them, while denying the only possible means of preserving and protecting such liquors to persons with less commodious homes. The Congress was concerned with the great problem of preventing the manu-

facture and sale of intoxicating liquors for beverage purposes in the future, and it seems to have given but slight attention to the consumption of such relatively small amounts of such liquors as might be in existence in private ownership and intended for consumption by the owner, his family or his guests, when the Amendment and the act should take effect.

An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared.

It results that the decree of the District Court must be

*Reversed.*

Mr. Justice McReynolds concurring.

I concur in the judgment of the court, but do not assent to the reasoning advanced to support it. I think the Volstead Act was properly interpreted by the court below; but to enforce it as thus construed would result in virtual confiscation of lawfully acquired liquors by preventing or unduly interfering with their consumption by the owner. The Eighteenth Amendment gave no such power to Congress. Manufacture, sale and transportation are the things prohibited,—not personal use.

# NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY *v.* JOHNSON.

# NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, *v.* MILLER, ADMINISTRATOR OF JOHNSON.

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

Nos. 70, 71. Submitted October 22, 1920.—Decided November 15, 1920.

A provision in a life insurance policy declaring that the policy shall be void if within a certain time the insured, while sane or insane, shall die by his own hand, and a provision making the policy incontestable after a certain time, are both to be interpreted as implying that suicide of the insured, sane or insane, after the time specified, shall not be a defense. P. 102.

The validity of such agreements to pay life insurance, even when death is due to suicide, if it occur after the lapse of a certain time, depends upon the state public policy. Where it did not appear in what State the contracts in question were made, the court upheld them, which, *semble*, is in accord with the rule generally prevailing. P. 100.

THE cases are stated in the opinion.

*Mr. George Lines* for Northwestern Mutual Life Insurance Company. *Mr. Sam T. Swansen* was also on the brief:

It is undoubtedly the rule of the federal courts, as assumed in the question certified, that, where a policy of life insurance is silent respecting liability of the company in case of suicide by the insured, death of the insured by his own hand, he being sane, is not one of the risks insured against. *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139; *Hopkins* v. *Northwestern Life Assurance Co.*, 94 Fed. Rep.

729; *Mutual Life Ins. Co.* v. *Kelly*, 114 Fed. Rep. 268; *Royal Arcanum* v. *Wishart*, 192 Fed. Rep. 453.

So, death at the hands of the law as a punishment for crime is not one of the risks insured against, whether so stipulated in the policy or not. *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362; *Northwestern Mutual Life Ins. Co.* v. *McCue*, 223 U. S. 234. Nor is death at the hands of the beneficiary, assignee or other person entitled to the proceeds. *New York Mutual Life Ins. Co.* v. *Armstrong*, 117 U. S. 591.

The decisions in these cases affirm and are based upon two fundamental principles: (1) That it is a condition of every policy of life insurance, implied if not expressed, that neither the insured nor the beneficiary shall do anything to wrongfully accelerate the maturity of the policy; and (2) that a contract by which an insurance company agreed to pay the sum stipulated in its policy upon the happening of either of the contingencies involved in the cases above cited would be contrary to public policy and void for that reason. Well-reasoned decisions of state courts are in harmony with the conclusions reached in the cases above cited. *Supreme Commandery* v. *Ainsworth*, 71 Alabama, 436, 445–447; *Hartman* v. *Keystone Ins. Co.*, 21 Pa. St. 466, 479; *Security Life Ins. Co.* v. *Dillard*, 117 Virginia, 401; *Davis* v. *Supreme Council*, 195 Massachusetts, 402; *Scarborough* v. *American National Life Ins. Co.*, 171 N. Car. 353; *Hatch* v. *Mutual Life Ins. Co.*, 120 Massachusetts, 550, 552; *Bloom* v. *Franklin Ins. Co.*, 97 Indiana, 478; *American National Ins. Co.* v. *Munson*, 202 S. W. Rep. 987.

These authorities establish not only the doctrine that death of the insured, directly and intentionally caused by himself when in sound mind, is not a risk intended to be covered by a policy of insurance which is silent respecting suicide, but the further doctrine that such risk is one which, on grounds of public policy, cannot lawfully be included by express stipulation.

But if, as held in the cases above cited, death of the insured, directly and intentionally caused by himself when in sound mind, is a risk which could not legally have been covered during the whole life of the policy, even by express stipulation to that effect, it is clear that such risk could not have been so covered during a portion of its life; and it necessarily follows that a contract to insure against such risk after two years from the date of the policy cannot be implied from the language quoted in Question One.

Under all the authorities, the doctrine that death of the insured by his own hand is not a risk insured against applies only in case the insured was sane at the time of taking his life. The object and effect of the quoted clause is to extend during the first two years of the policy's life exclusion of the risk of suicide to cases where the insured is insane, as well as to those where he is sane at the time of taking his life. *Royal Arcanum* v. *Wishart*, 192 Fed. Rep. 453, 456; *Scarborough* v. *American National Life Ins. Co., supra; Collins* v. *Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. Rep. 356; *American National Life Ins. Co.* v. *Munson, supra; Bromley* v. *Washington Life Ins. Co.*, 122 Kentucky, 407.

It is immaterial that the beneficiary named in the policy in suit was the wife of the insured, instead of his executors or administrators, as in the *Ritter Case.*

In discussing the first question certified, we have argued that intentional self-destruction while sane is a risk not covered by a policy "which makes no provision for death resulting from suicide," *i. e.*, is silent concerning the same. If this contention be sound, it necessarily follows that such a policy is not void, for, in such case, death by suicide being excluded from the risks covered by the policy, its validity as a contract respecting the risks included therein is not in any way affected. This conclusion is not affected by the fact that the policy contains a provision, that "if within two years from the date hereof, the said insured

shall . . . while sane or insane, die by his own hand, . . . this policy shall be void." This provision cannot by implication make suicide of the insured while sane one of the risks insured against, after the expiration of the two-year period, when an express stipulation to that effect, being contrary to public policy, would be void. As the authorities hereinbefore cited show, the purpose and effect of the two-year provision above quoted is to further limit, not to enlarge, the risk assumed. We submit, therefore, that Question Two should be answered in the negative.

If, however, it is deemed that from the provision in the policy just quoted it is to be implied that death of the insured by suicide, while sane, after the expiration of two years from the date of the policy, is one of the risks covered by it, then we say that under the decisions of this court and the weight of well-considered authorities elsewhere the policy is void to that extent.

*Mr. George B. Young* for National Life Insurance Company. *Mr. E. D. Perry* and *Mr. Guy B. Horton* were also on the brief.

*Mr. S. F. Prouty* for Johnson and Miller.

Mr. Justice Holmes delivered the opinion of the court.

These are suits upon policies issued to George P. Johnson upon his life, payable in the first case to his wife, in the second to his executors or administrators. The wife and the administrator respectively recovered in the District Court and the cases having gone to the Circuit Court of Appeals the latter has certified certain questions to this Court. The policy payable to the wife contained a provision that "if within two years from the date hereof, the said insured shall . . . die in consequence of a

duel, or shall, while sane or insane, die by his own hand, then, and in every such case, this policy shall be void." Johnson, the insured, died by his own hand more than two years after the date of the policy. The first question put in the wife's suit is whether the above provision, there being no other in the policy as to suicide, makes the insurance company liable in the event that happened. The second is in substance whether the contract if construed to make the company liable is against public policy and void.

The policy payable to the administrator had no provision as to suicide but did agree that "This contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid." Johnson's suicide was more than a year after the date of the policy. The first question propounded is whether the above provision prevents the insurer from denying liability in this case, it not appearing that Johnson was insane when he killed himself. The second is whether such a contract which makes no exception for death resulting from suicide is against public policy, and therefore void. There is a third as to a possible distinction between insurance payable to the wife and that payable to the estate of the insured which will not need to be discussed.

The public policy with regard to such contracts is a matter for the States to decide. *Whitfield* v. *Ætna Life Insurance Co.*, 205 U. S. 489, 495. This case qualifies the statement in *Ritter* v. *Mutual Life Insurance Co.*, 169 U. S. 139, 154, to the effect that insurance on a man's own life payable to his estate and expressly covering suicide committed by him when sane would be against public policy. The point decided was only that when the contract was silent there was an implied exception of such a death. There was evidence that the insurance was taken out with intent to commit suicide, and it plainly appeared

that the act was done by the insured for the purpose of enabling his estate to pay his debts. The application, although excluded below, warranted against suicide within two years, within which time the death took place. So that all the circumstances gave moral support to the construction of the policy adopted by the Court in accordance with the view that has prevailed in some jurisdictions as to the general rule. In *Burt* v. *Union Central Life Insurance Co.*, 187 U. S. 362, it was held that there was a similar tacit exclusion from the risk assumed of the death of the insured by execution for murder, and the same decision was reached in *Northwestern Mutual Life Insurance Co.* v. *McCue*, 223 U. S. 234. But the question here does not concern implied exceptions, it concerns the effect of express undertakings which as we have said depends upon the policy of the State.

The certificates do not disclose in what States these contracts were made but it is not necessary to postpone our answer on that account. It appears from *Whitfield* v. *Ætna Life Insurance Co.*, *supra*, that some legislatures have thought it best to insist that life insurance should cover suicide unless taken out in contemplation of the deed. But the case is much stronger when a considerable time is to elapse before the fact that the death was by the insured's own hand ceases to be a defence. The danger is less sinister and probably a good deal smaller than the danger of murder when the insurance is held by a third person having no interest in the continuance of the life insured, yet insurance on the life of a third person does not become void by assignment to one who has no interest in the life. *Grigsby* v. *Russell*, 222 U. S. 149. When a clause makes a policy indisputable after one or two years, the mere evocation of a possible motive for self-slaughter is at least not more objectionable than the creation of a possible motive for murder. The object of the clause is plain and laudable—to create an absolute assurance of the benefit,

as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done. It is said that the insurance companies now generally issue policies with such a clause. The state decisions, so far as we know, have upheld it. Unless it appears that the State concerned adopts a different attitude we should uphold it here. *Simpson* v. *Life Insurance Co. of Virginia*, 115 N. Car. 393; *Mareck* v. *Mutual Reserve Fund Life Association*, 62 Minnesota, 39; *Goodwin* v. *Provident Savings Life Assurance Association*, 97 Iowa, 226; *Patterson* v. *Natural Premium Mutual Life Insurance Co.*, 100 Wisconsin, 118.

We are of opinion that the provision in the first mentioned document avoiding the policy if the insured should die by his own hand within two years from the date is an inverted expression of the same general intent as that of the clause in the second making the policy incontestable after one year, and that both equally mean that suicide of the insured, insane or sane, after the specified time shall not be a defence. It seems to us that that would be the natural interpretation of the words by the people to whom they are addressed, and that the language of each policy makes the company issuing it liable in the event that happened. We answer the first question in each certificate, yes. The other questions are disposed of by our answer to the first.

*Answer to question 1 in No. 70, Yes.*
*Answer to question 1 in No. 71, Yes.*

Mr. Justice Day took no part in the decision of these cases.

# HARRIS, FORMERLY FRANCIS, ET AL. *v.* BELL ET AL.

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

No. 51. Argued January 26, 1920.—Decided November 15, 1920.

1. Lands representing the distributive share of a Creek Indian who died after his enrollment and before their selection or allotment and which thereafter were selected, allotted and deeded in his name, pursuant to the Act of April 26, 1906, c. 1876, § 5, 34 Stat. 137, and earlier statutes, are to be considered as going to his heirs, not as a direct allotment to them but as an inheritance, the alienability of which by full bloods is determined, not by § 19 of the Act of 1906 or § 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, respecting allotments to living allottees, but by the provisions governing alienability by heirs. P. 108.
2. In this regard it is not the usual distinctions between title by purchase and title by descent that must control, but the letter and spirit of the acts of Congress. *Id.*
3. The power vested in the Secretary of the Interior by the Act of April 26, 1906, *supra*, to approve or disapprove conveyances of inherited allotments when made by adult full-blood Indian heirs, was not recalled by the Act of May 27, 1908, *supra*, as to conveyances made, though not approved, before its enactment, nor does the lapse of 2½ years between the deed and its approval affect the validity of the conveyance in the absence of any lawful intervening disposal. P. 109.
4. The provision in § 9 of the Act of May 27, 1908, *supra*, that no conveyance of any interest of any full-blood Indian heir shall be valid "unless approved by the court having jurisdiction of the settlement of the estate" of the deceased allottee, prescribes a rule for future conveyances. P. 110.
5. Section 6 of the Act of May 27, 1908, *supra*, which subjects the persons and property of minor allottees to the jurisdiction of the probate courts of the State of Oklahoma, does not include or affect inherited lands, in its provision that "no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise." *Id.*

6. Section 6 of the Act of May 27, 1908, *supra*, and other acts of Congress, explicitly subject the persons and property of Indian minors of the Five Civilized Tribes to the jurisdiction of the probate (county) courts of Oklahoma; § 9 of that act declares that the death of any allottee shall remove all restrictions upon the alienation of his land, with the proviso that no conveyance of any interest of any full-blood Indian heir in such land shall be valid "unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." *Held*, harmonizing the sections, that the proviso of § 9 is to be taken as referring only to adult full-blood heirs, and that a probate court having jurisdiction over the persons and property of minor full-blood heirs, but not of the settlement of the estate of the deceased allottee from whom they inherited, was the proper court to sanction a conveyance of the allotment made by their guardian. P. 111.
7. The general rule giving to the court of guardianship exclusive power to direct the guardian and supervise the management and disposal of the ward's property, obtains in Oklahoma, and an intention to depart from it in an act of Congress respecting the lands of minor full-blood Indians should not be accepted unless very clearly and explicitly evinced. P. 112.

250 Fed. Rep. 209, affirmed.

THE case is stated in the opinion.

*Mr. James C. Davis* for appellants.

*The Solicitor General* and *Mr. Assistant Attorney General Nebeker* also filed a brief on behalf of appellants.

*Mr. William M. Matthews*, with whom *Mr. George S. Ramsey* was on the brief, for appellees.

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

By this suit certain conveyances of lands allotted in the name and right of a Creek Indian after his death were assailed, and their cancellation sought, by the heirs who

made them. On the final hearing the District Court upheld two of the conveyances, 235 Fed. Rep. 626, and that decree was affirmed by the Circuit Court of Appeals. 250 Fed. Rep. 209. The present appeal is by the heirs.

The circumstances to be considered are as follows: By the Act of March 1, 1901, c. 676, 31 Stat. 861, as modified by the Act of June 30, 1902, c. 1323, 32 Stat. 500, provision was made for the allotment and distribution of the Creek tribal lands and funds among the members of the tribe. An enrollment was to be made of (a) all members living on April 1, 1899, (b) all children born to members after that date up to and including July 1, 1900, and living on the latter date, and (c) all children born to members after July 1, 1900, up to and including May 25, 1901, and living on the latter date. All who were so enrolled were to share in the allotment and distribution. If any of these died before receiving his allotment and distributive share, the lands and moneys to which he "would be entitled if living" were to "descend to his heirs" and be "allotted and distributed to them accordingly." A provision in the Act of March 3, 1905, plainly intended to amend and supplement the earlier acts, authorized the inclusion of all children born between May 25, 1901, and March 4, 1905, and living on the latter date, c. 1479, 33 Stat. 1071.

Originally all lands allotted to living members in their own right were subjected to specified restrictions on alienation; but those allotted in the right of deceased members were left unrestricted up to the passage of the Act of April 26, 1906, c. 1876, 34 Stat. 137. *Skelton* v. *Dill*, 235 U. S. 206; *Adkins* v. *Arnold*, 235 U. S. 417, 420; *Mullen* v. *United States*, 224 U. S. 448; *Brader* v. *James*, 246 U. S. 88, 94; *Talley* v. *Burgess*, 246 U. S. 104, 107. Section 19 of that act materially revised the restrictions respecting lands of living allottees, and § 22 dealt with the alienation of inherited lands, including, as this court has

held, lands allotted in the name and right of a member after his death. *Talley* v. *Burgess*, *supra*, p. 108. Section 22 read as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Section 5 of the same act directed that all patents or tribal deeds for allotments should issue "in the name of the allottee"—meaning the member in whose right the allotment was made—and provided that if he were then dead the title should inure to and vest in "his heirs," as if the patent or deed "had issued to the allottee during his life." A like provision is found in § 32 of the Act of June 25, 1910, c. 431, 36 Stat. 855.

Further provisions bearing on the alienation of lands of living allottees and also inherited lands were embodied in the Act of May 27, 1908, c. 199, 35 Stat. 312, to be noticed presently.

The lands in question were allotted in the name and right of Freeland Francis, a Creek child who was born in 1903, was lawfully enrolled June 10, 1905, and died twelve days later. After his death the allotment was

duly selected and made by the Commission to the Five Civilized Tribes, and in regular course a patent or deed was issued in his name. His heirs, to whom the title passed under the statutes already noticed, were his mother, Annie Francis (now Harris), his half-brother, Mack Francis, his brother, Amos, and his sister, Elizabeth. These were all enrolled Creeks,—three being full-blood Indians and one a half-blood.

January 15, 1908, after the allotment was perfected, the mother, who was an adult, sold and conveyed her interest, and that conveyance was approved by the Secretary of the Interior, July 6, 1910, the approval as endorsed on the deed reading:

"The conveyance by Annie Francis of her interest as full-blood Indian heir in and to the within described lands allotted to Freeland Francis, a new born Creek citizen, Roll No. 1070, who died prior to May 27, 1908, is hereby approved, in accordance with the provisions of the Act of Congress approved April 26, 1906."

The half-brother, Mack, sold and conveyed his interest in 1910, after he attained his majority, but the validity of that transaction is not questioned. He was not a full-blood Indian, but a half-blood.

January 15, 1912, the interest of Amos and Elizabeth, who were minors, was sold and conveyed by their guardian under the direction and approving order of the county court wherein the guardianship of their persons and property was pending.

At the time of Freeland's death the family was residing in that part of the Indian Territory which on the advent of statehood (November 16, 1907) became Wagoner County, and shortly after his death they removed to and ever since have resided in what became Okmulgee County. The lands are in the latter county and it was in the county court thereof that the guardian's sale and conveyance were directed and approved.

The conveyance by the mother, who was a full-blood Indian, and that by the guardian of Amos and Elizabeth, who were full-bloods, are the ones to be considered on this appeal. All rights under them are held by parties who were defendants in the District Court and are appellees here.

The grounds on which the conveyances are assailed are four in number,—one directed at both conveyances, one at that of the mother alone and two solely at that of the guardian. They will be taken up in this order.

1. It is urged that the heirs took the lands as allottees and not as heirs of Freeland,—in other words, that they received the lands as a direct allotment to them and not as an inheritance,—and therefore that such of them as were full-blood Indians were restrained and disabled from disposing of the lands by reason of the restrictions applicable to living allottees of the full-blood. If the premise were right, the conclusion would be unavoidable. See § 19, Act of 1906, *supra*, and § 1, Act of 1908, *supra*. But the premise is not right, as is shown by statutes already mentioned, such as § 28 of the Act of 1901, § 7 of the Act of 1902 and § 5 of the Act of 1906. The allotment was made in virtue of the right of Freeland, who was one of those among whom the tribal property was to be distributed. Under the statutes that right was not extinguished by his death but was preserved for his heirs; and it was preserved for them because they were his heirs, and not because their relation to it was otherwise different from that of other members of the tribe. Such individual claims as they had to the tribal lands were to be satisfied by their individual allotments. What they were to receive in the right of Freeland was the lands and moneys to which "he would be entitled if living"; and these were to "descend" to and vest in them as "his heirs," as if he had received the same "during his life." Putting aside the distinctions between title by purchase and title by descent

which prevail in the absence of controlling statutes, and giving effect to the letter and spirit of what Congress has enacted, we think it is manifest that these heirs must be regarded as having received these lands as an inheritance from Freeland, and not as a direct allotment to them. *Perryman* v. *Woodward*, 238 U. S. 148, 150; *Talley* v. *Burgess*, *supra*.

2. The first restrictions applicable to Creek lands such as these were embodied in § 22 of the Act of 1906, hereinbefore set forth. As respects the mother's conveyance, which was executed January 15, 1908, all that was necessary under that section to make the conveyance effective—the mother being an adult full-blood Indian—was that it be approved by the Secretary of the Interior. As before shown, it was approved by that officer July 6, 1910. But it is urged that before his approval was given all power to approve had been taken from him and lodged elsewhere by the Act of May 27, 1908. Evidently the Secretary did not so construe that act when his approval was given, else he would have withheld it. Not only so, but his action in this instance was in accord with the practice of his office for a considerable period and also with an opinion rendered to him by the Attorney General. 27 Ops. A. G. 530. This administrative view is, of course, entitled to respect, and those who have relied thereon ought not lightly to be put in peril. But it is not controlling. We have examined the act, including § 9, upon which reliance is had, and are of opinion that as to conveyances made prior to the act the power of the Secretary to examine and approve or disapprove under § 22 of the prior enactment was not taken away. The act contains no express revocation of that power, nor any provision inconsistent with its continued exercise as to prior conveyances. The provision in § 9, that no conveyance of any interest of any full-blood Indian heir shall be valid "unless approved by the court having jurisdiction of the settlement of the

estate" of the deceased allottee, taken according to its natural import, prescribes a rule for future rather than prior conveyances; and no reason is perceived for rejecting its natural import. Had there been a purpose to cut off action by the Secretary as to conveyances already made, some of which were before him at the time, it is but reasonable to believe that other words aptly expressing that purpose would have been used. The matter hardly would have been left to conjecture or uncertain implication. Besides, the absence of such a purpose is measurably reflected by the declaration in § 1 that "the Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore." The lapse of two and one-half years between the execution of the conveyance and its approval is not material, there being no lawful intervening disposal. *Pickering* v. *Lomax*, 145 U. S. 310; *Lykins* v. *McGrath*, 184 U. S. 169.

3. Section 6 of the Act of 1908 subjects the persons and property of minor allottees to the jurisdiction of the probate courts of the State, and in a proviso says, "no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise." One ground on which the guardian's sale on behalf of the minor heirs, Amos and Elizabeth, is assailed is that it was in violation of this proviso. But in our opinion the proviso does not include or affect inherited lands. It refers, as a survey of the act shows, to lands of living minor allottees and not to lands inherited from deceased allottees. Section 9 expressly recognizes that the latter may be sold, and this proviso cannot be taken as prescribing the contrary. The word "living" evidently is intended to mark the distinction. What is intended is to make sure that minor allottees receive the benefit of the restrictions prescribed in § 1, and not to impose others. Apparently it was apprehended that the general language of § 6 might be taken as enabling probate

courts and guardians to sell without regard to those restrictions, and the office of the proviso is to prevent this. So understood, it is in accord with the general scheme of the act and not in conflict with any other provision.

4. The remaining objection to the guardian's conveyance is that it was not approved by the court having jurisdiction of the settlement of the estate of Freeland, the deceased allottee.

The situation out of which the objection arises is at least novel. Freeland died June 22, 1905, and the conveyance was made January 15, 1912. Statehood had intervened and counties had been organized where there were none before. He resided and died in what afterwards became Wagoner County, and under the local law the county court of that county is the one which at the time of the conveyance would have had jurisdiction of the settlement of his estate. The court in the Indian Territory which would have had such jurisdiction prior to statehood was no longer in existence. The conveyance was not approved by the county court of Wagoner County, but was approved by the county court of Okmulgee County, which under the local law was the only court having jurisdiction of the guardianship of the persons and property of the minors, Amos and Elizabeth. The lands were in that county and the minors, as also the other heirs, were residing there.

Section 6 of the Act of 1908 and other congressional enactments explicitly subject the persons and property of Indian minors of the Five Civilized Tribes to the jurisdiction of the probate courts of Oklahoma. In that State the county courts are the probate courts.

Section 9 of the same act declares:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in

such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

If in this instance the same court had had jurisdiction of the guardianship of the minor heirs and of the settlement of the estate of the deceased allottee, no embarrassment would have ensued; but as that was not the case, the question arises, whether it was essential that the guardian's conveyance, directed and approved, as it was, by the court having control of the guardianship, should also be approved by the court having jurisdiction of the settlement of the deceased allottee's estate? The Circuit Court of Appeals answered in the negative; and, while the question is not free from difficulty, we think that solution of it is right.

Of course, the purpose in requiring any approval is to safeguard the interests of the full-blood Indian heir. Where he is a minor he can convey only through a guardian, and no court is in a better situation to appreciate and safeguard his interests than the one wherein the guardianship is pending. Besides, as a general rule, a guardianship carries with it exclusive power to direct the guardian and to supervise the management and disposal of the ward's property. It is so in Oklahoma. This rule is so widely recognized and so well grounded in reason that a purpose to depart from it ought not to be assumed unless manifested by some very clear or explicit provision. The Act of 1908 contains no manifestation of such a purpose outside the proviso in § 9. That proviso seems broad, but so is the provision in § 6 subjecting the persons and property of minor Indians to local guardianship. As both are in the same act, they evidently were intended to operate harmoniously and should be construed accordingly. The proviso does not mention minors under guardianship; and to regard its general words as including them will either take all supervision of the sale of their interest in

inherited lands from the court in which the guardianship is pending, or subject that court's action to the approval of another court of the same rank. In either event conflict and confusion will almost certainly ensue and be detrimental to the minor heirs. But, if the proviso be regarded, as well it may, as referring to heirs not under guardianship—in other words, to adult heirs—the two provisions will operate in entire harmony and all full-blood heirs will receive the measure of protection intended. We think this is the true construction.

*Decree affirmed.*

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## UNDERWOOD TYPEWRITER COMPANY *v.* CHAMBERLAIN, TREASURER OF THE STATE OF CONNECTICUT.

ERROR TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT.

No. 215. Argued October 13, 14, 1920.—Decided November 15, 1920.

1. A state tax upon the proportion of the net profits of a sister-state corporation earned by operations conducted within the taxing State, the enforcement of which is left to the ordinary means of collecting taxes, does not violate Art. I, § 8, of the Federal Constitution by imposing a burden upon interstate commerce. P. 119.
2. In considering whether a state tax, purporting to be on the net income of a sister-state corporation earned within the taxing State, violates the Fourteenth Amendment by reaching income earned outside, it is not necessary to decide whether it is a direct tax on income or an excise measured by income. P. 120.
3. A state tax upon the income of a sister-state corporation manufacturing its product within the State but deriving the greater part of its receipts from sales outside the State, which attributes to processes conducted within the State the proportion of the total net income which the value of real and tangible personal property

owned by the corporation within the State bears to the value of all its real and tangible personal property, is not inherently unreasonable and calculated to tax income earned beyond the borders of the State; and, unless it be shown to be so in its application to the particular case, cannot be held to violate the due process clause of the Fourteenth Amendment. P. 120.

4. *Held*, that the fact that the amount of net income so allocated to the taxing State greatly exceeded in this case the portion actually received there, does not prove that income earned outside was included in the assessment.
5. The principle discussed in *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 414, respecting the right of a State under the Fourteenth Amendment to impose discriminatory taxes on a sister-state corporation which had made large permanent investments in railroad property in the State before the tax law was enacted, is inapplicable to this case, involving a non-discriminatory tax on the locally earned income of a manufacturing corporation. P. 122.

94 Connecticut, 47, affirmed.

THE case is stated in the opinion.

*Mr. Arthur M. Marsh* and *Mr. Arthur L. Shipman*, with whom *Mr. Charles Strauss* and *Mr. Eugene D. Boyer* were on the brief, for plaintiff in error:

Assuming the tax to be what the statute itself says that it is, namely, a tax on net income:

Taxation upon net income is either (a) a direct tax upon the property out of which the income issues, which is another way of saying that it is upon the tangible and intangible assets of the corporation, or (b) it is a tax upon net income, as such, as a species of property disconnected from all other assets of the corporation.

If this tax falls under (a), it is clearly invalid, since, under the Connecticut allocation, that State takes 47 per cent. of all the property and, accordingly, is taxing assets outside of Connecticut, no allowance for intangibles being made.

If this tax falls under (b), then the situs of the net income, which is the property that is taxed, is all important,

and whether such situs is exclusively in Delaware as the domicile of the corporation, or is localized in part in various States, it certainly is not lawfully allocated by a division among the States upon a comparison of tangible assets only.

If the tax is a property tax upon the assets of the corporation in Connecticut, it is invalid because it is not dependent in fact on the value of such assets, no appraisal being provided, no recourse to the courts for ascertainment or correction of the valuation except as to the relative value of tangible assets in Connecticut to tangible assets everywhere, and there being no provision for ascertainment of their value unless by an arbitrary form of application of the so-called unit rule. This fundamental error is emphasized by the fact that there is no allowance or deduction for stocks, bonds, accounts receivable, bank deposits or other intangible assets of that character located outside of Connecticut.

If the tax could possibly be considered as a tax on property of the corporation in Connecticut measured by part of the net income, it is invalid because it is based upon the false assumption that net income is produced, and has a local situs, in proportion to the relative location of tangible assets only.

If the tax is regarded as an excise for the privilege of doing business in Connecticut, to be valid it should have been confined to the subject-matter which Connecticut is entitled to control; that is, the manufacturing and the business purely intrastate, consisting of sales and shipments from Hartford to Connecticut customers, also leases, repairs, etc., in Connecticut for Connecticut customers, and probably if it is such an excise, it must have a suitable maximum. At all events, it must have some logical or reasonable relation to the exercise or value of these privileges.

If not described and intended as such an excise, it

should, at the very least, operate in effect as such. But the measure adopted having no relation whatever to intrastate sales, leases and repairs, etc., and only the most arbitrary relation to manufacturing carried on in Connecticut, and having no maximum, cannot be regarded as satisfying the law. Forty-seven per cent. of the net income is arrogated to itself by Connecticut purely on the basis of tangible assets in Connecticut on a given day of the year, without any consideration of the volume of manufacturing at the factory or the ratio of income which might be said to issue out of the manufacturing operations, and the allocation is without allowance or opportunity for adjustment on account of varying ratios of net income produced by the various operations of the corporation, and without deduction on account of income issuing entirely and wholly out of business having no connection with Connecticut.

We submit that it was not intended by the legislature as an excise and, whether it was or not, its operation and effect render it invalid because it is unreasonable, arbitrary and has not even a remote relation to the business privileges which Connecticut can control. Furthermore, even regarding net income as a measure only, it is not open to Connecticut to assess foreign corporations upon data so irrelevant, so inadequate and so remotely related, both commercially and logically, to the exercise of local business privileges.

Upon every one of the above alternative theories of this tax, it either transgresses the commerce clause, or the due process clause, or it discriminates unlawfully against the foreign corporation, principally engaged in interstate commerce and established in the State prior to this legislation.

*Mr. James E. Cooper* and *Mr. Hugh M. Alcorn*, with whom *Mr. Frank E. Healy*, Attorney General of the State of Connecticut, was on the brief, for defendant in error.

*Mr. Louis H. Porter*, by leave of court, filed a brief as *amicus curiæ*.

Mr. Justice Brandeis delivered the opinion of the court.

This action was brought by the Underwood Typewriter Company, a Delaware corporation, in the Superior Court for the County of Hartford, Connecticut, to recover the amount of a tax assessed upon it by the latter State and paid under protest. The company contended that as applied to it the taxing act violated rights guaranteed by the Federal Constitution. The constitutional questions involved were reserved by that court for consideration and advice by the Supreme Court of Errors. The answers to these questions being favorable to the State, 94 Connecticut, 47, judgment was entered by the Superior Court confirming the validity of the tax. The case comes here on writ of error to that court.

Connecticut established in 1915 a comprehensive system of taxation applicable alike to all foreign and domestic corporations carrying on business within the State. This system prescribes practically the only method by which such corporations are taxed, other than the general property tax to which all property located within the State, whether the owner be a resident or a nonresident, an individual or corporation, is subject. The act divides business corporations into four classes and the several classes are taxed by somewhat different methods. The fourth class, "Miscellaneous Corporations," includes, among others, manufacturing and trading companies, and with these alone are we concerned here. Upon their net income earned during the preceding year from business carried on within the State a tax of two per cent. is imposed annually. The amount of the net income is ascertained by reference to the income upon which the corpora-

tion is required to pay a tax to the United States. If the company carries on business also outside the State of Connecticut, the proportion of its net income earned from business carried on within the State is ascertained by apportionment in the following manner: The corporation is required to state in its annual return to the tax commissioner from what general source its profits are principally derived. If the company's net profits are derived principally from ownership, sale or rental of real property, or from the sale or use of tangible personal property, the tax is imposed on such proportion of the whole net income, as the fair cash value of the real and the tangible personal property within the State bears to the fair cash value of all the real and tangible personal property of the company. If the net profits of the company are derived principally from intangible property the tax is imposed upon such proportion of the whole net income as the gross receipts within the State bear to the total gross receipts of the company. A corporation aggrieved because of a tax assessed upon it may after paying the tax apply for relief to the Superior Court for the County of Hartford. There it may show cause why it is not subject to the tax or why the tax should have been less. If the whole tax assessed is found by the court to be proper, it enters judgment confirming the same. If the tax is found to be for any reason unauthorized in whole or in part, the court enters judgment for the company in the amount with interest which it is entitled to recover; and the state treasurer is directed to pay the same. The decision of the superior court is subject to review by the Supreme Court of Errors as in other cases. Laws of 1915, c. 292, part IV, §§ 19–29; *Underwood Typewriter Co.* v. *Chamberlain*, 92 Connecticut, 199.

The Underwood Typewriter Company is engaged in the business of manufacturing typewriters and kindred articles; in selling its product and also certain accessories and supplies which it purchases; and in repairing and

renting such machines. Its main office is in New York City. All its manufacturing is done in Connecticut. It has branch offices in other States for the sale, lease and repair of machines and the sale of supplies; and it has one such branch office in Connecticut. All articles made by it—and some which it purchases—are stored in Connecticut until shipped direct to the branch offices, purchasers or lessees. In its return to the tax commissioner of Connecticut, made in 1916 under the above law, the company declared that its net profits during the preceding year had been derived principally from tangible personal property; that these profits amounted to $1,336,586.13; that the fair cash value of the real estate and tangible personal property in Connecticut was $2,977,827.67, and the fair cash value of the real estate and tangible personal property outside that State was $3,343,155.11. The proportion of the real estate and tangible personal property within the State was thus 47 per cent. The tax commissioner apportioned that percentage of the net profits, namely $629,668.50, as having been earned from the business done within the State, and assessed thereon a tax of $12,593.37, being at the rate of two per cent. The company having paid the tax under protest, brought this action in the Superior Court for the County of Hartford to recover the whole amount.

*First.* It is contended that the tax burdens interstate commerce and hence is void under § 8 of Article I of the Federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 364; *Atlantic & Pacific Telegraph Co.* v. *Philadelphia,* 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A

tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37, 57. Compare *Peck & Co.* v. *Lowe*, 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause.

*Second.* It is contended that the tax violates the Fourteenth Amendment because, directly or indirectly, it is imposed on income arising from business conducted beyond the boundaries of the State. In considering this objection we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income; for the "argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution." *Shaffer* v. *Carter*, 252 U. S. 37, 55. In support of its objection that business outside the State is taxed plaintiff rests solely upon the showing that of its net profits $1,293,643.95 was received in other States and $42,942.18 in Connecticut, while under the method of apportionment of net income required by the statute 47 per cent. of its net income is attributable to operations in Connecticut. But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in

attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State. "The plaintiff's argument on this branch of the case," as stated by the Supreme Court of Errors, "carries the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs." The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary,[1] or that its application to this corporation produced an unreasonable result.

We have no occasion to consider whether the rule prescribed if applied under different conditions might be obnoxious to the Constitution. *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 222. Nor need we consider the contention made on behalf of the State, that the statute is necessarily valid, because the prescribed rule of apportionment is not rigid, and provision is made for rectifying by proceedings in the Superior Court any injustice resulting from its application.

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[1] Compare *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, 552; *Pittsburg, etc., Ry. Co.* v. *Backus*, 154 U. S. 421, 430; *Cleveland, etc., Ry. Co.* v. *Backus*, 154 U. S. 439, 445; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 14; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 221; 166 U. S. 185; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 75; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149, 152; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 365.

*Third.* It is stated in the brief, doubtless inadvertently, that the assignment of errors includes the objection that the tax was void under the Fourteenth Amendment also on the ground that the company, a foreign corporation, had made large permanent investments in Connecticut before the statute of 1915 was enacted. No such error appears to have been specifically assigned and the objection was not pressed in brief or oral argument. It is clearly unsound. To the facts presented here the principle discussed in *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 414, has no application.

*Affirmed.*

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## WATSON ET AL., EXECUTORS OF WATSON, *v.* STATE COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

No. 266. Argued October 13, 1920.—Decided November 15, 1920.

In imposing transfer or inheritance taxes, a State may distinguish between property which has borne its fair share of tax burden in the decedent's lifetime and property of the same kind and passing to the same class of transferees, which has not. P. 124.

The additional tax imposed in New York (Cons. Laws, c. 60; Laws 1917, c. 700), on the transfer of certain kinds of securities held by a decedent at his death on which neither the general property tax nor the alternative stamp tax has been paid during a fixed period prior thereto, is based upon a reasonable classification of property and does not violate the equal protection clause of the Fourteenth Amendment. *Id.*

This tax is neither a property tax nor a penalty. P. 125.

226 N. Y. 384, affirmed.

THE case is stated in the opinion.

*Mr. Harold W. Bissell*, with whom *Mr. Wm. C. Cannon* and *Mr. Edward R. Greene* were on the brief, for plaintiffs in error.

*Mr. John B. Gleason* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The New York Tax Law (Consolidated Laws, c. 60) provides (Article 1, § 9) that personal property shall be assessed and taxed to the owner at the place where he resides, but exempts (Article 15) from such taxation certain bonds and other obligations, called in the act investments, on which there has been paid an optional tax at a lower rate, which payment is evidenced by a stamp affixed. The Tax Law also provides (Article 10) for an inheritance or transfer tax which varies, among other things, according to the relationship of the beneficiary to the decedent. By § 221-b, Laws of 1917, c. 700, § 2, an additional tax equal to 5 per cent. of the appraised value of the investment is imposed on the transfer of investments held by the decedent at his death on which neither the general property tax nor the stamp tax above described has been paid during a fixed period prior thereto, provided that the estate is larger than the exemptions to relatives and charities.

Watson, a resident of New York City, held, at his death in 1917, certain bonds on which neither the general property tax nor the stamp tax had been paid. The transfer tax appraiser, appointed by the Surrogate's Court, reported that there was payable by the executors in respect to those bonds the additional transfer tax prescribed by the Act of 1917. The Surrogate disallowed the tax on the ground that the statute violated the state constitution; and his decision was affirmed by the Appel-

late Division of the Supreme Court, 186 App. Div. 48. The Court of Appeals of New York held that the act violated neither the state nor the Federal Constitution, 226 N. Y. 384; and the case comes here on writ of error. The contention is that the tax imposed denies to Watson's estate equal protection of the laws.

The occasion and the purpose of the statute are shown by the Court of Appeals. An owner of investments is not required either to list them for assessment locally under the general property tax law or to present them for stamping under the investment tax law. Whether the investments of a resident are taxed during his life depends either upon his own will or upon the vigilance and discretion of the local assessors. This condition led to loss of revenue by the State and to inequality in taxation among its citizens. To remedy both evils this additional transfer tax was imposed upon investments of a decedent which had wholly escaped taxation. It is insisted that the tax is discriminatory because under it other property of the same kind bequeathed to persons standing in the same relationship to the decedent will not be taxed. But the power to classify for purposes of taxation is fully established. The executors admit, as they must, that a classification is reasonable if made with respect to the kind of property transferred; or, to the amount or value of property transferred; or, to the relationship of the transferees; or, to the character of the transferee, for instance as engaged in charity. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 300; *Billings* v. *Illinois*, 188 U. S. 97; *Campbell* v. *California*, 200 U. S. 87. But their list does not exhaust the possibilities of legal classification. See *Beers* v. *Glynn*, 211 U. S. 477, 484; *Keeney* v. *New York*, 222 U. S. 525; *Maxwell* v. *Bugbee*, 250 U. S. 525. Compare *Hatch* v. *Reardon*, 204 U. S. 152. Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It

is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from the nature of the things classified,—here the right to receive property by devolution. It is enough, for instance, if the classification is reasonably founded in "the purposes and policy of taxation." *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 354; *Kidd* v. *Alabama*, 188 U. S. 730, 732; *Clement National Bank* v. *Vermont*, 231 U. S. 120, 136–137; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 529–530. And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent's life borne its fair share of the tax burden and that which had not? [1]

It does not follow, as is also argued, that the act in question imposes a property tax, merely because its existence may induce owners of investments to present them for taxation under the Investment Tax Law. Nor is it to be deemed a law imposing a penalty merely because the decedent's estate may under it be required to pay more in taxes than the deceased would have paid if he had presented his property for taxation under the Investment Tax Law. Whether this additional transfer tax would be obnoxious to the Fourteenth Amendment if it could be deemed a property tax or a penalty, we have no occasion to consider.

The judgment of the Surrogate's Court entered on the remittitur from the Court of Appeals of New York is

*Affirmed.*

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[1] Connecticut (Gen. Stats. 1918, § 1190) and Louisiana (Constitution, 1898, Arts. 235, 236; Act 45 of 1904) also impose a special inheritance tax on the transfer of property which has not borne its share of taxation during a period prior to the owner's death. The latter statute has been frequently before the courts, *Succession of Mathias Levy*, 115 La. 377, 385; aff'd *Cahen* v. *Brewster*, 203 U. S. 543; *Succession of Pritchard*, 118 La. 883; *Succession of Westfeldt*, 122 La. 836.

# INTERNATIONAL BRIDGE COMPANY *v.* PEOPLE OF THE STATE OF NEW YORK.

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

No. 46. Argued December 16, 1919; restored to docket for reargument January 26, 1920; reargued October 11, 12, 1920.—Decided November 22, 1920.

1. In an action to recover penalties from a bridge company for failure to build foot and carriage ways upon its railway bridge as required by an act amending its charter, it is premature to inquire whether a distinct and independent provision, reducing the tolls chargeable for vehicles and pedestrians below the limits fixed in the charter, impairs the obligation of the charter contract, since the invalidity of the toll reductions would not affect the requirement to build the additions. P. 130.
2. Under acts of New York and Canada consolidating a New York with a like Canadian corporation, the new company constructed a bridge over the Niagara River for railroad uses only. The original charters provided for constructing foot and carriage ways also, that of New York in permissive but that of Canada in mandatory language, and the acts of consolidation bound the new company to all the duties of each of its constituents. *Held:* (1) That the new company had no charter contract immunity from being required to add the foot and carriage ways in New York under power reserved by the State to amend the charter, and that such requirement was not inconsistent with the contract clause of the Constitution; nor, in the absence of anything to show that the additions would not yield a reasonable return, could it be held to violate the Fourteenth Amendment. *Id.*
3. The Act of June 30, 1870, c. 176, 16 Stat. 173, in recognizing as a lawful structure any bridge constructed across the Niagara River in pursuance of New York Laws, 1857, c. 753, and amendments (Laws 1869, c. 550), subject to the supervision of the Secretary of War and his approval of the plans, recognized that the existence of the bridge company and its right to build on New York land came from New York; and the facts that the bridge when built, as a railroad bridge

only, was devoted wholly to international commerce and that Congress by the Act of June 23, 1874, c. 475, 18 Stat. 275, declared it a lawful structure and an established post route for mail of the United States, did not supplant the authority of the State to require the company to equip the bridge with ways for foot passengers and vehicles as contemplated by its charter. P. 131.

4. The Act of 1874, *supra*, by declaring the bridge lawful as built, did not repeal the authority given by the Act of 1870, *supra*, to build subject to the approval of the Secretary of War, and the fact that this bridge was twice rebuilt without foot and carriage ways with the Secretary's consent, but under plans approved by him and providing for such additions in future, supports rather than negatives the view that the power of the State to require them was contemplated throughout and that Congress did not seek to divest it. *Id.*
5. The mere fact that a bridge is international, crossing an international stream, does not of itself divest the State of power over its part of the structure, in the silence of Congress. P. 133.
6. The Act of March 3, 1899, § 9, c. 425, 30 Stat. 1151, in requiring the assent of Congress to the erection of bridges over navigable waters not wholly within a State, does not make Congress the source of the right to build but assumes that the right comes from the State. *Id.*
7. The conveyance of a part of the land under the bridge to the United States for a public purpose not connected with the administration of the Government did not affect the authority of New York over the residue within the State, and taken in connection with the acts of the Government before and after the grant does not invalidate, even in part, the New York act requiring the additional construction. P. 134.

223 N. Y. 137, affirmed.

THE case is stated in the opinion.

*Mr. Adelbert Moot* and *Mrs. Helen Z. M. Rodgers*, with whom *Mr. Henry W. Sprague* and *Mr. William L. Marcy* were on the briefs, for plaintiff in error.

*Mr. James S. Y. Ivins*, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, *Mr. Ralph A. Kellogg* and *Mr. E. C. Aiken* were on the briefs, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the State of New York to recover penalties from the Bridge Company for failure to place upon its bridge a roadway for vehicles and a pathway for pedestrians between Squaw Island in Niagara River and the mainland of New York State as required by c. 666 of the Laws of 1915 of the State of New York. The defendant set up that the act was contrary to the Constitution of the United States in specified respects, but the plaintiff got judgment in the Supreme Court, which was affirmed by the Court of Appeals. 223 N. Y. 137.

The Bridge Company originally was incorporated by a special charter from the State of New York. Laws of 1857, c. 753. As the bridge was to cross the Niagara River from Buffalo to Canada, a similar corporation was created under the laws of Canada, 20 Vict. c. 227, and subsequently the two corporations were consolidated, pursuant to Laws of New York, 1869, c. 550, and a Canadian Act, 32 and 33 Vict. c. 65, subject to all the duties of each of the consolidated companies. By the Act of Congress of June 30, 1870, c. 176, 16 Stat. 173, any bridge constructed across the Niagara River in pursuance of the New York Act of 1857 and any acts of the New York legislature then in force amending the same was authorized as a lawful structure subject to the supervision of the Secretary of War and his approval of the plans. By the New York Act of 1857, "Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains," § 15. And "whenever the said bridge shall be complete for the passage of ordinary teams and carriages" the company may erect toll gates and charge tolls not exceeding certain rates for foot passengers, carriages, &c. The original Canadian Act had words similar to those just quoted from

§ 15, except that it said "shall be constructed" instead of "may be," a fact to which we shall advert again.

Between 1870 and 1874 the bridge was built as required by the charter with one draw across Black Rock Harbor and one across the main channel of the river. It crossed Squaw Island on a trestle, afterwards filled in, but was built as a railroad bridge exclusively without any provision for footpaths or roadways. By the Act of Congress of June 23, 1874, c. 475, 18 Stat. 275, it was declared a lawful structure and an established post route for the mail of the United States. In the year 1899 a plan for rebuilding the bridge with wings for roadways and footpaths was approved by the Secretary of War subject to changes at the expense of the Company if the Secretary should deem them advisable. The rebuilding took place in 1899–1901, but omitted the wings, and this modification was assented to by the Secretary of War.

The Niagara River is navigable at this point. In pursuance of plans for improvement adopted by the United States, in 1906 it acquired from the State of New York the land under Black Rock Harbor, lying on the New York side of Squaw Island, and the adjacent portions of the Erie Canal, both being within the limits of the State and crossed by the bridge. Thereafter the improvements were carried out.

In 1907 the Secretary of War gave notice to the Company that the bridge over Black Rock Harbor and Erie Canal obstructed navigation and that changes were required. The Company submitted plans again showing in dotted lines wings for roadways and footpaths, noting that they were not to be put in at present but that provision was made in the design for their future construction. The plans were approved and the bridge was built without the wings, the completion being reported by his resident representative to the Secretary of War.

By c. 666 of the laws of New York for 1915, the charter

of the Company was amended so as to require the construction of a roadway for vehicles and a pathway for pedestrians upon the draw across Black Rock Harbor, the Company being allowed to charge tolls not exceeding specified sums. The Company failed to comply with the requirement and the time limit had expired before this suit was brought to recover penalties imposed by the act. It is found that the construction was necessary for the public interest and convenience; that the cost of the changes is insignificant in comparison with the assets and net earnings of the Company, and that it does not appear that the investment would not yield a reasonable return.

The first objections to the new requirement made by the State are that it impairs the obligation of the contract in the original charter and takes the Company's property without due process of law. The argument is based partly upon a reduction of the tolls from those mentioned in the charter of 1857, made by the Act of 1915. Concerning this it is enough to say that the objection is premature. The clause relating to the construction of the roadway and pathway is distinct from and independent of that which fixes the maximum rates to be charged. The latter might be invalid and the former good. If the rates are too low they can be changed at any time. The only question now before us is whether the additions shall be built. As to that it would be going very far in the way of limiting the reserved right to amend such charters, if it should be held that the State had not power to require what originally was contemplated in permissive words as part of the scheme. But however that might be, the New York Act authorizing consolidation subjected this consolidated corporation to the duties of the Canadian as well as of the New York charter, and the Canadian Act made the arrangement for foot passengers and carriages a duty. The words that we have quoted plainly impose one. The

opinion in *Attorney-General* v. *International Bridge Co.*, 6 Ont. App. 537, 543, implies that they do so by speaking of the abandonment of a portion of the work as probably an abuse of the Act of Parliament, and the same is clearly stated in *Canada Southern Ry. Co.* v. *International Bridge Co.*, 8 App. Cases, 723, 729.

It is argued that, the Canadian Act governing only the Canadian side, its adoption by New York carried the obligation no farther. But it appears to us that it would be quibbling with the rational understanding of the duty assumed to say that the Company could have supposed that it had a contract or property right to confine its building of the footpath and carriage-way to the Canada side of the boundary line.

The New York legislature of course confined its command to the half of the bridge within its jurisdiction. It may be presumed that if that command is obeyed either Canada or the Company will see the propriety of carrying the way and path across to the other shore. At all events the power of New York to insist upon its rights is not limited by speculation upon that point. As we agree with the Court of Appeals that this amendment to the charter was within the power reserved to the State the objection under the contract clause of the Constitution of course must fail, and, it would seem, that under the Fourteenth Amendment also. But as to the latter we may add, as the Court of Appeals added, that there is nothing to show that the addition to the structure will not yield a reasonable return; if that be essential in view of the charter. *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262. *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission*, 242 U. S. 603.

The only argument that impresses us and the one that was most pressed is that this is an international bridge, and that Congress has assumed such control of it as to exclude any intermeddling by the State. It is said that

the bridge as constructed was and is devoted wholly to international commerce and that when Congress authorized it in that form in 1874 that authority must be regarded as the charter under which it was maintained. Without repeating the considerations urged in support of this conclusion we will state the reasons that prevail with us.—The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by state law. Not only the existence of the Company but its right to build upon New York land came from New York, as was recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built "in pursuance of" the New York statutes. It did not, as perhaps the New York Consolidation Act did, refer to those statutes simply as documents and incorporate them, it referred to them as the source of the Company's power.

From an early date the State has been recognized as the source of authority in the absence of action by Congress. *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245. *Escanaba Co.* v. *Chicago*, 107 U. S. 678. And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises. In a case of navigable waters wholly within a State, over which a right of way had been conveyed to the United States and which the United States was spending con-

siderable sums to improve, it was held that, whether or not Congress had power to authorize private persons to build in such waters without the consent of the State, an act making comprehensive regulations of work within them did not manifest a purpose to exclude the previously existing authority of the State over such work. *Cummings* v. *Chicago*, 188 U. S. 410, 413, 428, *et seq.*

But it is said that a different rule applies to an international stream and that Congress has recognized the distinction by the Act of March 3, 1899, c. 425, § 9, 30 Stat. 1151. It is true that that statute makes a distinction, but the distinction is that bridges may be built across navigable waters wholly within the State if approved by the Chief of Engineers and the Secretary of War, but, with regard to waters not wholly within the State, only after the consent of Congress has been obtained. The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant.

No doubt in the case of an international bridge the action of a State will be scrutinized in order to avoid any possible ground for international complaint, but the mere fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure if Congress were silent, any more than the fact that it was a passageway for interstate commerce or crossed a navigable stream. When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw state control, but on the contrary an assumption that the control is to remain. We have adverted to the implications of the general law of 1899 and have mentioned the statutes that deal specifically with

this bridge. The Act of 1874 declaring the existing bridge lawful was a confirmation which it was natural to seek but was not a repeal of the authority given to the Company in 1870 to build subject to the approval of the Secretary of War. The superstructure has been rebuilt since 1874 and the Secretary of War twice has approved plans showing the carriage and footways. It is true that the Company never has sought to execute that part of the plan, but on the facts that we have stated it appears to us a strange contention that it has contract or property rights not to be required to build the bridge or that Congress by implication has forbidden the State to demand that the plan recognized by everyone from the beginning should at last be carried out.

The conveyance of a part of the land under the bridge to the United States for a public purpose not connected with the administration of the Government did not affect the authority of New York over the residue within the State, and taken in connection with the acts of the Government before and after the grant does not invalidate the statute of 1915 even in part. See *Cummings* v. *Chicago*, 188 U. S. 410, 413. *Fort Leavenworth R. R. Co.* v. *Loue*, 114 U. S. 525. *Omaechevarria* v. *Idaho*, 246 U. S. 343, 346.

*Judgment affirmed.*

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE MCREYNOLDS, dissent.

Counsel for Parties.

# HORNING *v.* DISTRICT OF COLUMBIA.

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

No. 77. Argued November 8, 9, 1920.—Decided November 22, 1920.

One whose intentional conduct violates the prohibitions of a penal statute is not excused by his purpose to keep within the law and his belief that he did so. P. 137.

The offense of engaging without license in the business of lending money on security at more than 6 per cent. interest, in the District of Columbia (Act of February 4, 1913, c. 26, 37 Stat. 657), is committed by a pawnbroker who receives applications, examines pledges and decides upon loans only at a place just beyond the District line, but who maintains an establishment in the District where the pledges are kept and returned, and where intending borrowers may find a free automobile service to take them to him in person, or a paid messenger service, not belonging to the pawnbroker, by which their applications and pledges may be taken to him and the money and pawn tickets brought back and delivered to them. *Id.*

In a criminal case, when undisputed facts, including the testimony of the defendant, clearly establish the offense charged, the judge may say so to the jury, tell them that there is no issue of fact for their determination and instruct them that, while they cannot be constrained to return a verdict of guilty, it is their duty to do so under their obligation as jurors. *Id.*

*Held*, that if the defendant suffered any wrong from the manner in which such instructions were given in the present case, it was purely formal, since there could be no doubt of his guilt on the facts admitted; and the error, if any, was cured by § 269, Jud. Code, as amended February 26, 1919. P. 138.

48 App. D. C. 380, affirmed.

THE case is stated in the opinion.

*Mr. Henry E. Davis* for petitioner.

*Mr. Robert L. Williams*, with whom *Mr. F. H. Stephens* and *Mr. P. H. Marshall* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here upon a writ of certiorari granted to review a judgment of the Court of Appeals that affirmed a conviction of the petitioner of doing business as a pawnbroker and charging more than six per cent. interest, without a license, which is forbidden by the Act of Congress of February 4, 1913, c. 26, 37 Stat. 657. 48 App. D. C. 380.

The external facts are not disputed. The defendant had been in business as a pawnbroker in Washington but anticipating the enactment of the present law removed his headquarters to a place in Virginia at the other end of a bridge leading from the city. He continued to use his former building as a storehouse for his pledges but posted notices on his office there that no applications for loans would be received or examination of pledges made there. He did, however, maintain a free automobile service from there to Virginia and offered to intending borrowers the choice of calling upon him in person or sending their application and security by a dime messenger service not belonging to him but established in his Washington building. If the loan was made, in the latter case the money and pawn ticket were brought back and handed to the borrower in Washington. When a loan was paid off the borrower received a redemption certificate, presented it in Washington and got back his pledge. The defendant estimated the number of persons applying to the Washington office for loans or redemption at fifty to seventy-five a day. His Washington clerk, a witness in his behalf, put it at from seventy-five to one hundred. We may take it that there was a fairly steady stream of callers, as is implied by the automobile service being maintained. It is said with reference to the charge of the judge to which we shall advert that there was a question

for the jury as to the defendant's intent. But we perceive none. There is no question that the defendant intentionally maintained his storehouse and managed his business in the way described. It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law.

As to whether the conduct described did contravene the law, it is urged that a pledgee has a right to keep the pledged property where he likes and as he likes provided he returns it in proper condition when redeemed. But that hardly helps the defendant. To keep for return, whatever latitude there may be as to place and mode, is part of the duty of a pledgee, and in the case of one who makes a business of lending on pledges is as much a part of his business as making the loan. As we read the statute its prohibition is not confined to cases where the whole business is done in Washington. If an essential part of it is done there and a Washington office is used as a collecting centre, it does not matter that care is taken to complete every legal transaction on the other side of the Potomac. We cannot suppose that it was intended to allow benefits so similar to those coming from business done wholly in the city to be derived from acts done there and yet go free. We are of opinion that upon the undisputed evidence the defendant was guilty of a breach of the law and turn at once to the question which seemed to warrant allowing the case to be brought to this Court.

The question relates to the charge of the judge. The judge said to the jury that the only question for them to determine was whether they believed the concurrent testimony of the witnesses for the Government and the defendant describing the course of business that we have stated and as to which there was no dispute. Those facts,

he correctly instructed them, constituted an engaging in business in the District of Columbia. This was excepted to and the jury retired. The next day they were recalled to Court and were told that there really was no issue of fact for them to decide; that they were not warranted in capriciously saying that the witnesses for the Government and the defendant were not telling the truth; that the course of dealing constituted a breach of the law; that it was their duty to accept this exposition of the law; that in a criminal case the Court could not peremptorily instruct them to find the defendant guilty but that if the law permitted he would. The Court added that a failure to bring in a verdict could only arise from a flagrant disregard of the evidence, the law, and their obligation as jurors. On an exception being taken the judge repeated that he could not tell them in so many words to find the defendant guilty but that what he said amounted to that; that the facts proved were in accord with the information and that the Court of Appeals had said that that showed a violation of law.

This was not a case of the judge's expressing an opinion upon the evidence, as he would have had a right to do. *Graham* v. *United States*, 231 U. S. 474, 480. The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed the judge may state that fact also, and when there is no dispute he may say so although there has been no formal agreement. Perhaps there was a regrettable peremptoriness of tone—

but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt. Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code; Act of March 3, 1911, c. 231, 36 Stat. 1087.

*Judgment affirmed.*

MR. JUSTICE MCREYNOLDS dissents.

MR. JUSTICE BRANDEIS, dissenting.

It has long been the established practice of the federal courts that, even in criminal cases, the presiding judge may comment freely on the evidence and express his opinion whether facts alleged have been proved. Since *Sparf* v. *United States*, 156 U. S. 51, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute. *United States* v. *Taylor*, 11 Fed. Rep. 470; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 172 Fed. Rep. 194. What the judge is forbidden to do directly, he may not do by indirection. *Peterson* v. *United States*, 213 Fed. Rep. 920. The judge may enlighten the understanding of the jury and thereby influence their judgment; but he may not use undue influence. He may advise; he may persuade; but he may not command or coerce. He does coerce when without convincing the judgment he overcomes the will by the weight of his authority. Compare *Hall* v. *Hall*, L. R. 1, P. & D. 481, 482.

The character of the charge in this case is illustrated by the following paragraph:

"In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. . . . Of course, gentlemen of the jury, I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that."

In my opinion, such a charge is a moral command, and being yielded to, substitutes the will of the judge for the conviction of the jury. The law which in a criminal case forbids a verdict directed "in so many words," forbids such a statement as the above.[1]

It is said that if the defendant suffered any wrong it was purely formal; and that the error is of such a character as not to afford, since the Act of February 26, 1919, c. 48, 40 Stat. 1181, a basis for reversing the judgment of the lower court. Whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the Federal Constitution, a mere formality. *Blair* v. *United States*, 241 Fed. Rep. 217, 230. The offence here in question is punishable by imprisonment. Congress would have been powerless to provide for imposing the punishment except upon the verdict of the jury. *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343. I find nothing in the act to indicate that it sought to do so.

Because the presiding judge usurped the province of the jury, I am unable to concur in the judgment of the court.

THE CHIEF JUSTICE and MR. JUSTICE DAY concur in this dissent.

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[1] Compare *People* v. *Sheldon*, 156 N. Y. 268; *State* v. *Bybee*, 17 Kan. 462; *Meadows* v. *State*, 182 Ala. 51; *Randolph* v. *Lampkin*, 90 Ky. 551; *McPeak* v. *Missouri Pacific Ry. Co.*, 128 Mo. 617; *State* v. *Tulip*, 9 Kan. App. 454; *Lively* v. *Sexton*, 35 Ill. App. 417. See *Starr* v. *United States*, 153 U. S. 614, 626.

# ROCK ISLAND, ARKANSAS & LOUISIANA RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 82. Submitted November 8, 1920.—Decided November 22, 1920.

The right to sue for the recovery of an internal revenue tax illegally assessed is conditioned upon prior appeal to and decision by the Commissioner of Internal Revenue, which means an appeal, after payment, for a refund, and is not satisfied by an appeal or application for abatement of the tax before it was paid. Rev. Stats., §§ 3226 (as amended), 3220, 3228, construed. P. 142.

54 Ct. Clms. 22, affirmed.

THE case is stated in the opinion.

*Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* for appellant.

*The Solicitor General* for the United States. *Mr. W. Marvin Smith* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for a sum paid as an internal revenue tax under the Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112. It is alleged that the claimant was not engaged in or doing business in the year for which the tax was collected and that therefore it was not due. The Court of Claims dismissed the petition on the ground that the claimant had not complied with the conditions imposed by statute and the claimant appealed to this Court.

The facts are simple. After the tax was assessed a claim for an abatement was sent to the Commissioner of Internal Revenue in July, 1913. On December 18 of the

same year the Commissioner rejected the application, whereupon on December 26 the claimant paid the tax with interest and a penalty. So far as appears there was no protest at the time of payment and it is found that after it nothing was done to secure repayment of the tax. By Rev. Stats., § 3226, amended by Act of February 27, 1877, c. 69, § 1, 19 Stat. 248, no suit shall be maintained in any Court for the recovery of any tax alleged to have been illegally assessed "until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided,*" etc. Regulations of the Secretary established a procedure and a form to be used in applications for abatement of taxes and distinct ones for claims for refunding them. The claimant took the first step but not the last.

By Rev. Stats., § 3220, the Commissioner of Internal Revenue is authorized "on appeal to him made, to remit, refund, and pay back" taxes illegally assessed. It is urged that the "appeal" to him to remit made a second appeal to him to refund an idle act and satisfied the requirement of § 3226. Decisions to that effect in suits against a collector are cited, the latest being *Loomis* v. *Wattles*, 266 Fed. Rep. 876.—But the words "on appeal to him made" mean, of course, on appeal in respect of the relief sought on appeal—to refund if refunding is what he is asked to do. The words of § 3226 also must be taken to mean an appeal after payment, especially in view of § 3228 requiring claims of this sort to be presented to the Commissioner within two years after the cause of action accrued. So that the question is of reading an implied exception into the rule as expressed, when substantially the same objection to the assessment has been urged at an earlier stage.

Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. *Lex non præcipit inutilia* (Co. Lit. 127*b*) expresses rather an ideal than an accomplished fact. But in this case we cannot pronounce the second appeal a mere form. On appeal a judge sometimes concurs in a reversal of his decision below. It is possible as suggested by the Court of Claims that the second appeal may be heard by a different person. At all events the words are there in the statute and the regulations, and the Court is of opinion that they mark the conditions of the claimant's right. See *Kings County Savings Institution* v. *Blair*, 116 U. S. 200. It is unnecessary to consider other objections that the claimant would have to meet before it could recover upon this claim.

*Judgment affirmed.*

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## THE COCA-COLA COMPANY *v.* THE KOKE COMPANY OF AMERICA ET AL.

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

No. 101. Argued November 18, 19, 1920.—Decided December 6, 1920.

The defense that the plaintiff's trade-mark and advertisements convey fraudulent representations to the public affords but a narrow ground for refusing injunctive relief against an infringer who seeks to reap the advantages of the plaintiff's good will; and the defense must be carefully scrutinized. P. 145.

As respects this defense, the plaintiff's position must be judged by the facts as they were when the suit was begun, not by the facts of a different condition and an earlier time. P. 147.

Plaintiff's beverage, widely sold under the name "Coca-Cola," with

a picture of coca leaves and cola nuts on the labels, and containing certain harmless extractives from coca leaves and cola nuts, claimed to add flavor, with some caffein from the nuts and more superadded, originally contained also some cocaine derived from the coca leaves, and was once advertised as an "ideal nerve tonic and stimulant"; but long before this suit began, cocaine was eliminated, the article was advertised and sold as a beverage only, free from cocaine; and, for the public generally, the name came to signify the beverage itself, the plaintiff's product, rather than its ingredients. *Held*, that the continued use of the name with the picture was not a fraud depriving the plaintiff of the right to enjoin infringement and unfair competition in selling a like preparation under the name of "Koke"; but that the injunction should not restrain use of the name "Dope," a featureless word not specifically suggestive of "Coca-Cola" by similarity or in use, nor forbid manufacture and sale of the product, including the coloring matter. P. 145.

255 Fed. Rep. 894, reversed.

THE case is stated in the opinion.

*Mr. Frederick W. Lehmann*, with whom *Mr. Harold Hirsch*, *Mr. Frank F. Reed*, *Mr. Edward S. Rogers* and *Mr. Charles E. Rushmore* were on the briefs, for petitioner.

*Mr. Richard E. Sloan* and *Mr. Joseph W. Bailey*, with whom *Mr. Jesse M. Littleton* and *Mr. C. L. Parker* were on the briefs, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the Coca-Cola Company to prevent the infringement of its trade-mark Coca-Cola and unfair competition with it in its business of making and selling the beverage for which the trade-mark is used. The District Court gave the plaintiff a decree. 235 Fed. Rep. 408. This was reversed by the Circuit Court of Appeals. 255 Fed. Rep. 894. Subsequently a writ of certiorari was granted by this Court. 250 U. S. 637.

It appears that after the plaintiff's predecessors in title had used the mark for some years it was registered under the Act of Congress of March 3, 1881, c. 138, 21 Stat. 502, and again under the Act of February 20, 1905, c. 592, 33 Stat. 724. Both the Courts below agree that subject to the one question to be considered the plaintiff has a right to equitable relief. Whatever may have been its original weakness, the mark for years has acquired a secondary significance and has indicated the plaintiff's product alone. It is found that defendant's mixture is made and sold in imitation of the plaintiff's and that the word Koke was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff and of selling the imitation as and for the plaintiff's goods. The only obstacle found by the Circuit Court of Appeals in the way of continuing the injunction granted below was its opinion that the trade-mark in itself and the advertisements accompanying it made such fraudulent representations to the public that the plaintiff had lost its claim to any help from the Court. That is the question upon which the writ of certiorari was granted and the main one that we shall discuss.

Of course a man is not to be protected in the use of a device the very purpose and effect of which is to swindle the public. But the defects of a plaintiff do not offer a very broad ground for allowing another to swindle him. The defence relied on here should be scrutinized with a critical eye. The main point is this: Before 1900 the beginning of the good will was more or less helped by the presence of cocaine, a drug that, like alcohol or caffein or opium, may be described as a deadly poison or as a valuable item of the pharmacopœa according to the rhetorical purposes in view. The amount seems to have been very small, but it may have been enough to begin a bad habit and after the Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 768, if not earlier, long before this

suit was brought, it was eliminated from the plaintiff's compound. Coca leaves still are used, to be sure, but after they have been subjected to a drastic process that removes from them every characteristic substance except a little tannin and still less chlorophyl. The cola nut, at best, on its side furnishes but a very small portion of the caffein, which now is the only element that has appreciable effect. That comes mainly from other sources. It is argued that the continued use of the name imports a representation that has ceased to be true and that the representation is reinforced by a picture of coca leaves and cola nuts upon the label and by advertisements, which however were many years before this suit was brought, that the drink is an "ideal nerve tonic and stimulant," &c., and that thus the very thing sought to be protected is used as a fraud.

The argument does not satisfy us. We are dealing here with a popular drink not with a medicine, and although what has been said might suggest that its attraction lay in producing the expectation of a toxic effect the facts point to a different conclusion. Since 1900 the sales have increased at a very great rate corresponding to a like increase in advertising. The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in *United States* v. *Coca Cola Co.*, 241 U. S. 265, 289, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled. The coca leaves and whatever of cola nut is

employed may be used to justify the continuance of the name or they may affect the flavor as the plaintiff contends, but before this suit was brought the plaintiff had advertised to the public that it must not expect and would not find cocaine, and had eliminated everything tending to suggest cocaine effects except the name and the picture of the leaves and nuts, which probably conveyed little or nothing to most who saw it. It appears to us that it would be going too far to deny the plaintiff relief against a palpable fraud because possibly here and there an ignorant person might call for the drink with the hope for incipient cocaine intoxication. The plaintiff's position must be judged by the facts as they were when the suit was begun, not by the facts of a different condition and an earlier time.

The decree of the District Court restrains the defendant from using the word Dope. The plaintiff illustrated in a very striking way the fact that the word is one of the most featureless known even to the language of those who are incapable of discriminating speech. In some places it would be used to call for Coca-Cola. It equally would have been used to call for anything else having about it a faint aureole of poison. It does not suggest Coca-Cola by similarity and whatever objections there may be to its use, objections which the plaintiff equally makes to its application to Coca-Cola, we see no ground on which the plaintiff can claim a personal right to exclude the defendant from using it.

The product including the coloring matter is free to all who can make it if no extrinsic deceiving element is present. The injunction should be modified also in this respect.

*Decree reversed.*

*Decree of District Court modified and affirmed.*

# UNITED STATES *v.* NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPPIJ (HOLLAND-AMERICA LIJN.)

APPEAL FROM THE COURT OF CLAIMS.

No. 53. Argued January 28, 1920; restored to docket for reargument October 11, 1920; reargued November 17, 1920.—Decided December 6, 1920.

A foreign steamship company alleged that, under duress practiced by the immigration authorities, it paid bills rendered by them under color of the Immigration Act, for maintenance and medical care furnished by the United States to certain immigrants who, after landing from the company's ships, were temporarily detained before being admitted to the country, and it claimed reimbursement under the Tucker Act, upon the ground that the exactions were in violation of its rights as an alien subject, secured by the Constitution, treaties and laws of the United States. *Held*, that the claim, being founded on alleged torts of federal officials, was not within the Tucker Act or the jurisdiction of the Court of Claims. P. 155.

53 Ct. Clms. 522, reversed.

THE case is stated in the opinion.

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

*Mr. Howard Mansfield*, with whom *Mr. Lucius H. Beers* and *Mr. Franklin Grady* were on the briefs, for appellee:

The claim sued on is founded both upon a law of Congress and upon a regulation of an executive department of the Government, and the Court of Claims clearly had jurisdiction. *Patton* v. *Brady*, 184 U. S. 608, 611; *Dooley* v. *United States*, 182 U. S. 222; *United States* v. *Lynah*, 188 U. S. 445.

The cases cited by the Government hold, what is not disputed, that Congress has not permitted suits against the Government for mere torts, nor for tortious acts of its representatives, unless the claim is founded upon the Constitution, some law of Congress, or some regulation of an executive department. Attention is not drawn to any decision of this court holding that when an officer or other representative of the United States, professing to act under a law of Congress, wrongfully exacts money from an individual, and pays the money into the United States Treasury, the United States has not authorized a suit for the recovery of such money. Distinguishing: *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46; *Tempel* v. *United States*, 248 U. S. 121; *Basso* v. *United States*, 239 U. S. 602; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228; *Peabody* v. *United States*, 231 U. S. 530; *Crozier* v. *Krupp*, 224 U. S. 290; *Harley* v. *United States*, 198 U. S. 229; *Russell* v. *United States*, 182 U. S. 516; *Schillinger* v. *United States*, 155 U. S. 163; *Langford* v. *United States*, 101 U. S. 341; *Gibbons* v. *United States*, 8 Wall. 269.

These cases hold no more than that the United States cannot be sued for a tort, unless the case arises (1) under the Constitution, (2) under a law of Congress, or (3) under a regulation of an executive department.

No liability was imposed by law upon claimant to pay the hospital expenses of aliens ultimately admitted to the United States.

Claimant was under no contract obligation to pay such expenses.

These expenses were payable out of the head tax fund, provided by Congress for that purpose, and ample in amount.

The payments having been involuntarily made under compulsion and duress, claimant is entitled to recover the amounts paid.

MR. JUSTICE DAY delivered the opinion of the court.

A suit was brought in the Court of Claims by the Holland-American Line to recover from the United States for the cost of the maintenance and medical care furnished by the United States for certain aliens brought by the plaintiff to this country on the steamers of its line which it had been required to pay.

The petition sets forth that the United States immigration officials temporarily detained some aliens in hospitals because they were alleged to be suffering from temporary illness, or accompanied aliens who were so suffering, and subsequently permitted them to enter the country; the aliens were detained and subsequently admitted under the act of Congress known as the Immigration Act, passed February 20, 1907, c. 1134, 34 Stat. 898. It is stated that the Secretary of Commerce and Labor and the Commissioner General of Immigration, and their subordinates, claiming to act under the authority of the Immigration Act, rendered to the petitioner from month to month bills for the hospital treatment and maintenance of the aliens so detained and subsequently admitted. Certain regulations of the Commissioner General of Immigration are cited; and it is alleged that the United States officials threatened that, if the bills were not paid, thereafter all aliens so brought to this country would be held on board ship until their application for admission to the United States should be finally adjudicated. It is set forth that on all vessels arriving in the port of New York there were aliens who were temporarily detained and subsequently admitted; that detention on board ship would have delayed the sailing of petitioner's vessels for periods varying from a few days to several weeks. The threats were actually carried out, at least in one instance, and if vessels were so detained the result would have been not merely great inconvenience and financial loss to the petitioner,

but a complete disruption of oceanic commerce in the port of New York and the United States. "Consequently, the petitioner paid, under duress and involuntarily, the bills, when rendered."

It is alleged that the exaction of such payments of the petitioner, and the making of such threats, were entirely without warrant of law; that the Immigration Act provides that, where a suitable building is used for the detention and examination of aliens, the immigration officials shall there take charge of such aliens and the transportation companies shall be relieved of the responsibility for their detention thereafter; that there was in the port of New York a suitable building for the detention and examination of aliens; that the Immigration Act required petitioner to pay the United States $4.00 for each alien entering the United States on its vessels; that the aliens whose hospital and maintenance expense bills were rendered to and paid by the petitioner, were detained and examined and subsequently admitted to the United States pursuant to the requirements of the Immigration Act; that special appropriations have been made for all expenses of the enforcement of the laws regulating the immigration of aliens into the United States, so that there has always been an available fund in the United States Treasury for the payment of the expenses of regulating the immigration of aliens into the United States, including the hospital bills referred to above.

Petitioner recites disagreement, as to such charges, between the Secretary of Commerce and Labor and the steamship companies transporting aliens to the United States, and sets forth that an action was brought by the United States in the United States District Court for the Southern District of New York against the petitioner, to recover hospital charges for aliens brought to the port of New York and temporarily detained and subsequently admitted. A judgment in favor of the Company was

subsequently reviewed by the Circuit Court of Appeals and was there affirmed. (See 212 Fed. Rep. 116, affirmed by an equally divided court, 235 U. S. 686.)

It is further alleged that the exaction from the claimant of the above mentioned hospital charges under duress was in violation of its rights and privileges secured to petitioner as a subject of the Kingdom of the Netherlands under the Constitution of the United States, by the treaties between the United States and the Kingdom of the Netherlands and the laws of the United States; that the amounts thus unlawfully exacted from the claimant were remitted to the Commissioner of Immigration at the port of New York as required by him.

There being no demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises on the part of the United States, the Court of Claims directed a general traverse under the rules of the court, and afterwards made findings of fact, and, substantially following the decision of the Circuit Court of Appeals, *supra*, held the United States liable for the payments exacted.

As to the claim that the plaintiff had bound itself by contract to pay these charges, the court held that the claimant was coerced into making the contract by threats of the defendant which would have destroyed the plaintiff's business if ever executed.

The Government contends that the claim thus presented was one sounding in tort, and, consequently, not within the jurisdiction of the Court of Claims, and that the petition should have been dismissed.

The jurisdiction of the Court of Claims rests upon § 145 of the Judicial Code, reënactment of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505. The jurisdiction conferred includes:

"All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress,

upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

We think that the statement of the substance of the petitioner's claim, as above set forth, shows that it rested upon payments alleged to have been made under duress because of the wrongful and tortious acts of officials of the United States Government acting without authority of law in coercing the claimant to pay the sums demanded.

In many decisions of this court it has been held that by the provisions of the Tucker Act the Government did not subject itself to liability for the torts or wrongful acts of its officers. *Gibbons* v. *United States,* 8 Wall. 269; *Morgan* v. *United States,* 14 Wall. 531; *Hill* v. *United States,* 149 U. S. 593; *Schillinger* v. *United States,* 155 U. S. 163; *United States* v. *Buffalo Pitts Co.,* 234 U. S. 228; *Tempel* v. *United States,* 248 U. S. 121; *Ball Engineering Co.* v. *White & Co.,* 250 U. S. 46.

The appellee relies upon and quotes certain expressions found in the opinion delivered in *Dooley* v. *United States,* 182 U. S. 222. In *Basso* v. *United States,* 239 U. S. 602, suit was brought in the Court of Claims for the illegal arrest and imprisonment of the claimant upon a charge of having imported goods from the United States into Porto Rico without having made entry of the same under an act of Congress which the appellant alleged was not in force in Porto Rico. It was alleged that the court was without jurisdiction, and that, therefore, the trial, conviction and sentence of imprisonment deprived him of his liberty without due process of law in violation of the Constitution. The United States filed a general

traverse of the petition, and subsequently moved to dismiss upon the ground that the court had no jurisdiction as the action sounded in tort. This motion was sustained in the Court of Claims, and an appeal taken to this court. Speaking of the contention of the appellant that the Court of Claims had jurisdiction, this court said:

"He, however, contends that the Court of Claims has jurisdiction under the Tucker Act over claims *ex delicto* founded upon the Constitution of the United States. And, this, he further contends, is supported by the recent decisions of this court, and relies especially upon *Dooley* v. *United States*, 182 U. S. 222.

"But that case did not overrule *Schillinger* v. *United States*, 155 U. S. 163, which, counsel says, holds directly contrary to his contention and that he has not the ingenuity to suggest how the court can now decide the case at bar in appellant's favor without at least by implication overruling the *Schillinger Case*. We are not disposed to overrule the case, either directly or by implication. . . .

"The *Dooley Case* and cases subsequent to it which are relied upon by appellant concerned the exaction of duties or taxes by the United States or its officers or property taken by the Government for public purposes. In such cases jurisdiction in the Court of Claims for the recovery of the duties and taxes or for the value of the property taken was declared.

"In the case at bar (assuming as true all that is charged) there was a wrong inflicted, if a wrong can be said to have been inflicted by the sentence of a court legally constituted after judgment upon issues openly framed by the opposing parties both of fact and the applicable law, whether that law was §§ 2865 and 3082 of the Revised Statutes or the Constitution of the United States. But conceding that a wrong was inflicted through these judicial forms, the case nevertheless is of different character from the *Dooley*

*Case*, as was also the *Schillinger Case*. The latter case passed upon the jurisdiction of the Court of Claims in actions founded on tort and declared the general principle to be, based on a policy imposed by necessity, that governments are not liable (155 U. S., p. 167), 'for unauthorized wrongs inflicted on the citizen by their officers, though occurring while engaged in the discharge of official duties.' And it was further said (p. 168): 'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on wrongful proceedings of an officer of the Government.' *Gibbons* v. *United States*, 8 Wall. 269, 275; *Morgan* v. *United States*, 14 Wall. 531, 534."

The principle, reaffirmed in the case just quoted, is applicable here for the reason that the claim presented sounded in tort, and was in substance an action to recover for the wrongful acts of the United States officials in compelling the claimant to pay under duress and without authority of law the sums sued for. Following the well-established construction of the Tucker Act, as declared in many cases in this court, we think that the Court of Claims should have dismissed the petition because it presented a claim not within its jurisdiction. The judgment of the Court of Claims is reversed, and the cause remanded to that court with instructions to dismiss the petition.

*Reversed.*

# BERLIN MILLS COMPANY *v.* PROCTER & GAMBLE COMPANY.

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

No. 93. Argued November 15, 1920.—Decided December 6, 1920.

Patent No. 1,135,351, issued April 13, 1915, to Procter & Gamble Company, as assignee of John J. Burchenal, is void for lack of invention as to claims 1 and 2, claiming, respectively, a homogeneous lard-like food product consisting of incompletely hydrogenized vegetable oil, and a like product consisting of incompletely hydrogenized cottonseed oil. Pp. 161, 164.

The process of changing vegetable oil into a homogeneous, semi-solid, edible substance, by acting upon it with hydrogen in the presence of nickel, was known and open to general use, and its application to the manufacture of the food products here in question was such a step as would occur to persons skilled in the art, without the exercise of invention. P. 165.

256 Fed. Rep. 23, reversed.

THE case is stated in the opinion.

*Mr. Marcus B. May* and *Mr. Charles E. Hughes*, with whom *Mr. John C. Pennie* and *Mr. Melville Church* were on the briefs, for petitioner.

*Mr. Livingston Gifford*, with whom *Mr. Alfred M. Allen* was on the briefs, for respondent.

*Mr. Charles E. Hughes* and *Mr. Royall Victor*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by the Procter & Gamble Company against the Berlin Mills Company for the infringe-

ment of the patent of John J. Burchenal for a food product, issued on April 13, 1915, Number 1,135,351, to the Procter & Gamble Company, assignee. The District Court held the patent void for lack of invention, and also that the claims in suit were not infringed. The Circuit Court of Appeals, one judge dissenting, held the patent valid and infringed. 256 Fed. Rep. 23.

The patent in controversy relates to a lard-like food product consisting of a vegetable oil partially hydrogenized to a homogeneous whitish, yellowish product. The record discloses that the making of lard substitutes has been accomplished by mixing melted fat with vegetable oils.

These oils contain glycerides—olein, linolin and stearin. The hydrogenation, or hardening process, has the effect to increase the proportion of the solid glycerides of high saturation. Stearin is called a saturated glyceride for the reason "that there are present in the molecule as many hydrogen atoms as possibly can be joined to the carbon atoms." Linolin and olein are called unsaturated glycerides and can be converted by the addition of hydrogen into hardened glycerides.

The patentee in the specifications of his patent states the object of his alleged invention, and what he intended to accomplish, as follows:

"The special object of the invention is to provide a new food product for a shortening in cooking, in which the liability to become rancid is minimized, and in which the components of such vegetable oils which are inferior and detrimental to use as such a food product have been to a large extent converted into a higher and more wholesome form. All such vegetable oils contain glycerids of unsaturated fatty acids, and among these, notable quantities of fatty glycerids of lower saturation than olein. It is the presence of these glycerids of lower saturation that seriously affects the rancidity of the material. Oxidation is

largely the cause of rancidity, which oxidation weakens the fat at the point of absorption at the double bonds, and these glycerids of lesser saturation readily absorb oxygen from the air at ordinary temperatures, while the more highly saturated glycerids, as olein, only absorb oxygen at elevated temperatures. It is evident, therefore, that oils or fats containing notable quantities of glycerids of linolic acid, or of lesser saturation, are distinctly inferior as an edible product to those containing a minimum of these glycerids with a larger per cent. of olein. On the other hand, while it is important to get rid of the readily oxidizable glycerids of lower saturation, it is also important not to supply too large a per cent. of fully saturated glycerids. . . . Oil, liquid at the ordinary temperatures, does not make the best shortening, because the oil remains liquid, keeping the food in a soggy condition, and the oil will even settle to the under part of the cooked product and soil the cloth, paper, or whatever it may come in contact with. Moreover, fats of a melting point above the temperature of the human body, 98° F., are not so digestible as fats which are liquid at this point, or which have a melting point below 98° F. It is, therefore, my object in the preparation of my new lard-like composition and food-product, and in preparing same from cottonseed oil, to change the chemical composition of the oil to obtain a product with a high percentage of olein, a low percentage of linolin and the lesser-saturated fats, and with only sufficient stearin to make the product congeal at ordinary temperatures.

"In manufacturing this product, cottonseed or other vegetable oil is caused to chemically absorb a limited amount of hydrogen by reacting on the oil with hydrogen in the presence of a catalytic agent and at an elevated temperature. The oil is preferably agitated in a closed vessel in the presence of an atmosphere of compressed hydrogen, a catalyser of finely-divided nickel carried by

kieselguhr being maintained in suspension in the oil and its temperature being raised to about 155° C.

"According to the present invention, the amount of hydrogen absorbed is carefully regulated and limited. In practice, the operation is stopped when the oil has been converted into a product which cools to a white or yellowish semi-solid more closely resembling lard than do the commercial mixtures of cottonseed oil and animal oleostearin, while in many respects the product is superior to the best leaf lard as a shortening. It is not so liable to become rancid and the product can be heated to a considerably higher temperature than lard without smoking or burning. The high temperature to which my product can be raised without smoking or burning makes the product ideal for frying, inasmuch as a crust forms almost instantly on the food fried, which prevents any absorption of the shortening. A lard-like product thus prepared from cottonseed oil has a saponification value of about 195; and an iodin value ranging from about 55 to about 80. The product having an iodin value of 55 has a titer of about 42° and a melting-point of about 40° C.; that having an iodin value of 80 has a titer of about 35° and a melting-point of about 33° C. While but partially hydrogenized, containing from about 1.5% to 2.5% of additional hydrogen more than in the nonhydrogenized material, it shows no free cottonseed oil when subjected to the Halphen test, thereby differing from all commercial lard substitutes containing this oil. It contains from twenty to twenty-five per cent. of fully saturated glycerids, from five to ten per cent. linolin and from sixty-five to seventy-five per cent. olein, and an average of a number of samples gives twenty-three per cent. of saturated fats, seven and five-tenths per cent. linolin and sixty-nine and five-tenths per cent. olein, while the cottonseed oil before treatment contained seventeen per cent. saturated fats, thirty-seven per cent. linolin and forty-six per cent. olein. It will thus be seen

that I have produced an ideal food product, which is high in olein, low in linolin and lesser-saturated fats, and with only enough stearin to make the product congeal at ordinary temperatures."

The patent has seven claims; two broad claims, which are the ones here involved:

1. "A homogeneous lard-like food product consisting of an incompletely hydrogenized vegetable oil."

2. "A homogeneous lard-like food product consisting of incompletely hydrogenized cottonseed oil."

The five additional claims, more specific and limited, are not involved in this suit. Two of the four judges who considered this patent and the validity of the claims in suit reached the conclusion that they were void for want of invention; two judges of the Circuit Court of Appeals held the patent valid, and infringed.

In deciding between these conflicting views we must consider the genesis of the alleged invention, and what was theretofore known and disclosed in the art. Burchenal, the patentee, was not a chemist, and was the General Manager of the Procter & Gamble Company, whose principal business had been the manufacture of soap. One Edwin C. Kayser, who had been in the employ of Crossfield & Son, an English firm, and familiar with the Normann process, to be hereinafter considered, came to this country in 1907, and saw Mr. Burchenal at the Procter & Gamble factory. A contract was made with Kayser, and an experimental plant was erected at the Procter & Gamble works for hydrogenating oil.

It is the contention of the respondent that the merit of Burchenal's alleged invention arises from the fact that he was the first to originate and develop the process involved so as to make a food product of the character described.

The District Court found that Burchenal in fact invented nothing, and that all that was real invention, as established by the testimony, came from Kayser. But

considering, for the purposes of this discussion, that the thought occurred to Burchenal, which he developed in the production of a food product, the subject-matter of this patent, the primary question is presented whether what Burchenal accomplished amounted to invention within the meaning and protection of the patent law.

In considering the patentability of this alleged invention, it is to be remembered that this is not claimed to be a process patent. While the process is described in the specifications, Burchenal makes no claim that it is his invention, indeed, he concedes in the testimony that the process is not his, and counsel frankly say that the patent must stand or fall upon its validity as a product patent of a new and useful thing within the meaning of the patent law. If this product was the result of mechanical improvement only, when viewed in the light of that which was previously disclosed and open to public use, the step in advance being only that which one skilled in the art might well make, without the exercise of the originating or inventing faculty, then the achievement is not within the protection of the patent law.

The English patent to Normann of October, 1903, disclosed to the world the process of converting unsaturated fatty acids, or their glycerides, into saturated compounds. After referring to other discoveries he says:

"By causing acetylene, ethylene, or benzene vapour in mixture with hydrogen gas to pass over one of the said metals, the said investigators obtained from the unsaturated hydrocarbons saturated hydrocarbons, partly with simultaneous condensation.

"I have found, that it is easy to convert by this catalytic method unsaturated fatty acids into saturated acids. This may be effected by causing vapours of fatty acid together with hydrogen to pass over the catalytic metal, which is preferably distributed over a suitable support, such as pumice stone. It is sufficient, however, to expose

the fat or the fatty acid in a liquid condition to the action of hydrogen and the catalytic substance.

"For instance, if fine nickel powder obtained by reduction in a current of hydrogen, is added to chemically pure oleic acid, then the latter heated over an oil bath, and a strong current of hydrogen is caused to pass through it for a sufficient length of time, the oleic acid may be completely converted into stearic acid.

"The quantity of the nickel thus added and the temperature are immaterial and will only affect the duration of the process. Apart from the formation of small quantities of nickel soap, which may be easily decomposed by dilute mineral acids, the reaction passes off without any secondary reaction taking place. The same nickel may be used repeatedly. Instead of pure oleic acid, commercial fatty acids may be treated in the same manner. The yellowish fatty acids of tallow, which melt between 44 and 48° C. and whose iodine number is 35.1, will, after hydrogenation, melt between 56.5 and 59° C., while their iodine number will be 9.8 and their colour slightly lighter than before, and they will be very hard.

"The same method is applicable not only to free fatty acids, but also to their glycerides occurring in nature, that is to say, to fats and oils. Olive oil will yield a hard tallow-like mass; linseed oil and fish oil will give similar results.

"By the new method, all kinds of unsaturated fatty acids and their glycerides may be easily hydrogenized."

An expert witness, called by petitioner, gives in his testimony certain views of this process which commend themselves to our judgment as entirely reasonable and accurate, and so well stated that we quote them in part:

"Dr. Normann discovered, and sets forth in the patent, that unsaturated acids or unsaturated oils by the action of hydrogen in the presence of finely divided nickel may be converted into corresponding saturated compounds. He

defines the reaction rather carefully in some regards. He says, for instance, if fine nickel powder obtained by reduction in a current of hydrogen is added to chemically pure oleic acid, then the latter heated over an oil bath and a strong current of hydrogen is caused to pass through it for a sufficient length of time, the oleic acid may be completely converted into stearic acid.

"Further on he says: 'Apart from the formation of small quantities of nickel soap, which may be easily decomposed by dilute mineral acids, the reaction passes off without any secondary reaction taking place.'

"I think that those two sentences which I have read very well define the product which is obtained by such reduction especially the second sentence, where he says that the reaction goes on in a quantitative way, we will say; that is he says that there is no side reaction takes place. A chemist would know from this first paragraph where he says that oleic acid goes to stearic acid, and from the second one where he says that no side reaction takes place, the chemist would know exactly what the product is which is formed by this reaction. . . .

"I would call attention particularly to the fact that he hardened olive oil to a hard, tallow-like mass. Tallow is a substance that is obtained from the fat of either cattle or of sheep and is a substance of somewhat semi-solid character; that is, its lower limit of melting point is within a lard range and its upper limit is just slightly beyond the lard range so that if Normann hardened olive oil to a tallow-like mass that means that he hardened it to a product of a semi-solid character. . . .

"Q. 63. Does Normann specify anywhere in his patent any of the purposes for which his patents are intended?

"A. He does not. He says nothing in the patent as to what these products should be used for. The presumption is that they might be used for any purpose for which fats of that general character could be utilized. They might be

used for making candles; they might be used for soaps; they might be used for edible purposes.

"By the passages I have read he has very carefully specified what the product is so that any chemist would know for what particular purposes it might be useful.

"Q. 64. In the process of hydrogenation as described in the Normann patent from which you made citations; that is, the British patent No. 1515 of 1903, what would your conclusion be as to the edibility of the resultant product when the material hydrogenated was among those suggested by him, olive oil?

"A. If an edible olive oil was started with one would certainly obtain an edible hydrogenated product."

It is in evidence that this method, shown by Normann, is a practicable one, and may be used for the making of edible food products of the kind here involved.

With the knowledge disclosed in the Normann patent conclusively presumed to be known by the patentee, was it invention to apply the known process to vegetable oils? In this connection the history of the application for the patent in suit in the Patent Office is interesting and instructive. It is true that claims one and two were finally allowed, and the patentee is entitled to the presumption which arises from the granting of them. But it appears in the history of the application for the Burchenal patent, found in the record, that as originally presented it contained two claims not so broad as the ones now in suit, and a third claim for "A semi-solid hydrogenized oil," was added by amendment. All of the claims were rejected, the examiner saying:

"The composition of lard and of cottonseed oil as to the glycerides olein and stearin that they contain is well known. To make a product from cottonseed oil that shall simulate lard the content of stearin should be increased. [Referring to patents.] It is thought therefore that if the problem of simulating lard from cottonseed oil were

presented to an oil chemist, an incomplete hydrogenization of the cottonseed oil would at once suggest itself to him as a solution of the problem. All the claims are accordingly rejected on the above ground of lack of invention. Claim 3 is further rejected on the product formed by the above cited patents."

Replying to the communication of the examiner amendment was made canceling claim 3. Further consideration was requested on claims 1 and 2, upon arguments which were presented. The claims were afterwards rejected upon reference to patents to Kayser of September 26, 1911, and November 14, 1911, the examiner stating that these patents were adapted to hydrogenize glycerides, the latter one specifically mentioning its adaptability for cottonseed oil, and that the process could be arrested at any time during its progress and thus an incompletely hydrogenized article be produced.

Subsequently the specifications were amended, giving more definitely the percentages of olein, linolin and stearin. The patentee concludes the amended specifications, stating "It will thus be seen that we have produced an ideal food product, which is high in olein, low in linolin and lesser-saturated fats, and with only enough stearin to make the product congeal at ordinary temperatures;" additional and more limited claims were added, but ultimately the patent, containing the broad claims here involved, was granted.

It is true, as the Circuit Court of Appeals states in its opinion, that the applicant never did acquiesce in the examiner's action rejecting his claims, and finally obtained what he had in the first place asked for.

This record establishes that it was known before Burchenal took up the subject that a vegetable oil could be changed into a semi-solid, homogeneous, substance by a process of hydrogenation arrested before completion and that it might be edible. This much of the art was public

property and open to general use. The product of this process was known and open to public use. To supply such products as the patentee has described in the broad claims in suit may have been new and useful, but does not in our opinion arise to the dignity of invention, and is an advance step which would occur to one skilled in the art when investigating and considering the subject. It follows that the decree of the Circuit Court of Appeals must be reversed and the cause remanded to the District Court with directions to dismiss the bill on the ground that claims 1 and 2 are void for the reasons stated in this opinion.

*Reversed.*

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## De REES *v.* COSTAGUTA ET AL., INDIVIDUALLY AND AS CO-PARTNERS COMPOSING THE CO-PARTNERSHIP OF DAVID COSTAGUTA AND COMPANY, ET AL.

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

No. 341. Submitted October 11, 1920.—Decided December 6, 1920.

A jurisdictional appeal, directly to this court from the District Court under § 238 of the Judicial Code, will not lie where the question of jurisdiction presented and decided involved only principles common to courts in general and not the jurisdiction of the District Court as a federal court. P. 173.

Whether the allegations of a bill are adequate to justify the relief sought, is not a question of jurisdiction. *Id.*

Where the jurisdiction of the District Court is invoked against non-resident defendants under Jud. Code, § 57, to enforce a lien on property within the district claimed to result from a contract between them and the plaintiff, a decision quashing service by publication, followed by a judgment dismissing the bill, upon the ground that

the contract alleged creates no lien upon or right *in rem* in such property, does not involve the jurisdiction of the court as a federal court. *Id. Chase* v. *Wetzlar*, 225 U. S. 79, distinguished.

Questions arising under the Constitution are not presented in this case. P. 174.

Appeal dismissed.

THE case is stated in the opinion.

*Mr. Marion Erwin* and *Mr. Frederick M. Czaki* for appellant:

The District Court had general jurisdiction of the parties.

All the requisite elements existed to give the court jurisdiction of the subject-matter under § 57, Jud. Code. *Goodman* v. *Niblack*, 102 U. S. 556; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 234 U. S. 369; *Chesley* v. *Morton*, 9 App. Div. 461. Distinguishing: *York County Savings Bank* v. *Abbot*, 139 Fed. Rep. 988; *Jones* v. *Gould*, 149 Fed. Rep. 153; *Wabash R. R. Co.* v. *West Side Belt R. R. Co.*, 235 Fed. Rep. 645.

The constitutional principle invoked against the exercise by the court of the power to dismiss the bill, in part on *ex parte* affidavits in opposition to the jurisdictional averments of the bill, in the manner and form in which it was done, raised and raises a constitutional question not merely incidentally collateral to the general jurisdiction of the court derived from the Constitution, but which goes to the power of the court to deprive the plaintiff without due process of law of his right of property in the suit, by a procedure which deprived him of such right. The constitutional question goes to the marrow of the jurisdictional question, and we think that the court has plenary jurisdiction over the whole case under § 238, Jud. Code. We know of no decision of this court which covers this matter, unless it be by inference, *Filhiol* v. *Torney*, 194 U. S. 356.

A constitutional question may become "involved" or "drawn in question" by the decision or action of the court as well as by the acts of the parties (*Chappell* v. *United States*, 160 U. S. 499, 507, 509), and if it exists it is immaterial whether there is or not a certificate as to the jurisdiction, so far as investing this court with plenary power to review the entire case. The constitutional question being paramount, the limitation on review is not operative, certainly not where the one involves the other. The limitation is operative only where there is a jurisdictional question and questions other than constitutional ones involved.

Section 37 of the Code gave the court no power under the circumstances to dismiss for want of jurisdiction without any plea to the jurisdiction on which evidence might be taken and witnesses examined pro and con. *Hartog* v. *Memory*, 116 U. S. 588; *Turpin* v. *Lemon*, 187 U. S. 51, 58; *Hurtado* v. *California*, 110 U. S. 516, 539. And here the court in fact reached its conclusion, not on the face of the bill merely, but in part through facts set up in the opposing *ex parte* affidavits as interpretative of the contract. But in the manner in which it proceeded it deprived plaintiff of due process of law and his constitutional right to invoke the jurisdiction of the court for protection of his property right, and thus it was without jurisdiction to dismiss the bill upon the *ex parte* evidence it so received and considered.

*Mr. Walter H. Merritt* for appellees. *Mr. A. Delafield Smith* was also on the brief.

They cited, on the jurisdictional question: *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175, 177; *Swift & Co.* v. *Hoover*, 242 U. S. 107; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523; *Blythe* v. *Hinckley*, 173 U. S. 501; *Illinois Central R. R. Co.* v.

*Adams*, 180 U. S. 28, 35; *Scully* v. *Bird*, 209 U. S. 481; *Smith* v. *McKay*, 161 U. S. 355; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 234 U. S. 369, 372; *Public Service Co.* v. *Corboy*, 250 U. S. 153, 162; *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243; *Chase* v. *Wetzlar*, 225 U. S. 79; *Gage* v. *Riverside Trust Co.*, 156 Fed. Rep. 1002; *Jones* v. *Gould*, 149 Fed. Rep. 153.

MR. JUSTICE DAY delivered the opinion of the court.

The appellant, plaintiff below, a resident and citizen of the State of New Jersey, filed a bill of complaint against David Costaguta, Marcos A. Algiers, Alejandro Sassoeli, Eugenio Ottolenghi, individually, and as co-partners composing the firm of David Costaguta & Company, asserting that they, and each of them, were aliens, and residents of the Republic of Argentine, South America. The bill joined as defendants Renado Taffell, a British subject, resident of New York and the Southern District thereof, and the American-European Trading Corporation, organized under the laws of New York.

The bill sets forth at length a contract whereby it is alleged that a co-partnership was formed between the plaintiff and David Costaguta & Company for the buying and selling of hosiery. The bill alleges that to carry the contract into effect a place of business was established in New York City; that disagreements arose between the parties; that plaintiff elected to terminate the contract and demanded a liquidation of the merchandise and an accounting; that the firm of David Costaguta & Company caused the American-European Corporation to be organized under the laws of New York and that said firm caused certain assets of the co-partnership to be transferred to the corporation in fraud of the plaintiff, and which assets, it was alleged, were within the territorial jurisdiction of

the Southern District of New York. Plaintiff prayed a dissolution of the alleged co-partnership; the liquidation of the property thereof; that the non-resident defendants account for their acts and transactions, and that it be established what sum, if any, remained due to the plaintiff; that the plaintiff be decreed to have a lien upon all of the property of the defendants and on the property and assets of the American-European Trading Corporation; that a receiver *pendente lite* be named. An order was prayed for the delivery of the property to the receiver, and an injunction to restrain its transfer or disposition. A temporary restraining order was asked, pending the hearing and the return of the rule *nisi*, prohibiting in any manner or form interference with the property, or removing the same from the jurisdiction of the court. An order was issued requiring the defendants to show cause why such receiver *pendente lite* should not be appointed, and the defendants required to transfer the property to such receiver, and enjoining them from otherwise transferring the same. The subpœna and order for the rule were served on the resident defendants American-European Trading Corporation and Taffell. Plaintiff then procured an order for service upon the non-resident defendants by publication under § 57 of the Judicial Code. The non-resident defendants filed a special appearance for the purpose of asking the court to quash and set aside the order for service by publication, and for an order requiring the plaintiff to show cause why an order should not be made vacating and setting aside the service by publication, and also to vacate, quash and set aside certain alleged service on an agent of the firm in the Southern District of New York. A motion was also made by the American-European Trading Corporation and Taffell, by special appearance, for the purpose of opposing the jurisdiction. The District Court denied the plaintiff's motion for an injunction and receiver, and granted the non-resident

defendants' motion to vacate the order for service by publication. This resulted in the dismissal of the plaintiff's bill by final decree, and the case was brought here by the plaintiff under § 238 of the Judicial Code upon the question of jurisdiction of the court.

The District Judge after entering the decrees of dismissal made a certificate as follows:

"I hereby certify that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the district, of which this court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this court could render a judgment otherwise than a judgment *in personam* against the non-resident aliens who appeared specially and objected to the jurisdiction of the court."

The Judge also delivered an opinion, which is in the record, holding that under the terms of the contract the plaintiff had no right in the assets as such, and no partner's lien upon the property, but was confined to his rights *in personam* against the firm, and that, therefore, there could be no service by publication under § 57 of the Judicial Code. That section is a reënactment of § 8 of the Act of March 3, 1875, c. 137, 18 Stat. 472. It provides for service by publication when in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto.[1]

Section 238 of the Judicial Code provides that, the case

[1] Section 57. "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real

being one in which the jurisdiction of the court is in issue, that question shall be certified to this court.

The appellees challenge the jurisdiction of this court to entertain this appeal on the ground that the case does not present a jurisdictional issue properly reviewable by this court.

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or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

Since the decision of *Shepard* v. *Adams*, 168 U. S. 618, it has been the accepted doctrine that where there is a contention that no valid service of process has been made upon the defendant, and the judgment is rendered without jurisdiction over the person, such judgment can be reviewed by direct appeal to this court. This principle was restated and previous cases cited as late as *Merriam & Co.* v. *Saalfield*, 241 U. S. 22, 26.

It is equally well settled that, where the question of jurisdiction presented and decided turns upon questions of general law, determinable upon principles alike applicable to actions brought in other jurisdictions, the jurisdiction of the court as a federal court is not presented in suchwise as to authorize the jurisdictional appeal directly to this court; and the question must be decided as other questions are, by the usual course of appellate procedure, giving review in the Circuit Court of Appeals. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Scully* v. *Bird*, 209 U. S. 481, 485; *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137.

That the question of the adequacy of the allegations of the bill to justify the relief sought does not present a jurisdictional question was held in *Smith* v. *McKay*, 161 U. S. 355; *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 234 U. S. 369, 372; *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243; *Public Service Co.* v. *Corboy*, 250 U. S. 153, 162.

The opinion of the court below, read in connection with the certificate, shows that it was held that the contract set up in the bill gave no lien upon or right *in rem* in the assets sought to be reached within the district. The question was presented, the court in the exercise of jurisdiction, after an examination of the contract set forth in the bill and a consideration of its terms, determined it

upon principles which would have been equally applicable had the question been presented in other jurisdictions. Its decision, therefore, did not involve the jurisdiction of the federal court as such, which, it is settled, is required in order to justify a direct appeal to this court.

In *Chase* v. *Wetzlar*, 225 U. S. 79, the Act of March 3, 1875, now § 57 of the Judicial Code, was involved, and there was an attempt to have service on alien defendants by publication under the provisions of the statute. The issue made was as to whether there was property of the defendants within the jurisdiction of the court. That issue was held to present a question of jurisdiction properly reviewable in this court under § 238. In the case now presented no question is made as to the presence of property in the district. The attempted service was set aside, and the bill dismissed, upon consideration of the allegations of the bill which, it was held, upon application of general principles, did not show that the plaintiff had any lien upon or interest in the property authorizing him to invoke the procedure outlined in § 57 of the Judicial Code.

As to the contention that the whole case is here upon a constitutional question because of the procedure in the court below, § 238 provides that when a case comes here upon a question of jurisdiction, that question alone shall be certified. Moreover, we find no merit in the alleged deprivation of constitutional rights so as to present questions arising under the Constitution.

It follows that the appeal must be dismissed for want of jurisdiction.

*Dismissed.*

# WELLS FARGO AND COMPANY *v.* TAYLOR.

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

No. 41. Argued December 19, 1919.—Decided December 6, 1920.

1. Where the District Court sustains a bill in equity against a demurrer and upon final hearing renders a decree for the plaintiff, a reversal ordered by the Circuit Court of Appeals purely because of an amendable deficiency of the bill and unaccompanied by any direction that the bill be dismissed or implication forbidding its amendment, leaves the District Court free to permit the amendment; and the fact that the Circuit Court of Appeals, in denying a petition for rehearing, refused to direct the allowance of the amendment signifies merely that it saw no occasion to control the District Court's discretion in the matter. P. 181.
2. The provision of the Judicial Code (§ 265, formerly Rev. Stats., § 720) forbidding any court of the United States to grant an injunction to stay proceedings in any court of a State, is intended to give effect to the principle of comity and to prevent unseemly interference with the orderly disposal of litigation in the state courts, but not to hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and by the laws of Congress. P. 182.
3. The inhibition does not forbid the federal courts to enjoin a party from collecting a judgment obtained in a state court where its enforcement would be contrary to recognized principles of equity and the standards of good conscience. P. 183. See headnote 6, *infra*.
4. An arrangement between a railroad company and an express company whereby, in consideration of stipulated payments, the former grants to the latter the exclusive privilege of conducting the express business over its line, and transports, by cars provided by it and attached to its passenger trains, the express matter and accompanying messengers of the latter, besides furnishing room in its stations for the express company's use, and under which the latter assumes all risk of damage to its property and express matter so transported and of injury to its agents and employees while engaged in its business on the trains or property of the railroad company, and agrees to indemnify that company against claims for damages suffered by

such agents or employees while so engaged—does not create a partnership relation but constitutes the business of the express company distinct from that of the railroad company, so that an employee of the express company, while employed as its messenger on an express car in course of transportation, cannot be treated as an employee of the railroad company for the purpose of applying the Employers' Liability Act. P. 186.

5. The Employers' Liability Act, applicable to "every common carrier by railroad," does not embrace an express company conducting its business under such an arrangement with a railroad company. P. 187.

6. An express company operating over a railroad under an agreement by which it assumed all risk of injury to its employees while engaged in its business on the trains of the railroad company and agreed to indemnify that company against such claims, employed a messenger who, as a condition to his employment, assented to this understanding and agreed on his part to assume all risk of injury incident to his employment, from whatever cause arising. The employee was injured by the negligence of the railroad company while in discharge of his duties to the express company, and recovered judgment against the railroad company in an action in a state court in which the express company was not a party and could not be heard. He was financially irresponsible. *Held*, that his contract was valid and bound him to the express company not to assert such a liability against either company, and that the express company was equitably entitled to enforce the obligation by a suit against him in the District Court (diverse citizenship being present) in which collection of the judgment should be enjoined. P. 188.

249 Fed. Rep. 109, reversed.

THE case is stated in the opinion.

*Mr. Charles W. Stockton*, with whom *Mr. K. E. Stockton* and *Mr. Edward R. Whittingham* were on the brief, for petitioner.

*Mr. Thomas Fite Paine* for respondent.

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

Oscar G. Taylor, an express messenger of Wells Fargo & Company, a common carrier by express, received sub-

stantial personal injuries through the derailment of an express car in which he was working, and which was part of a passenger train moving over the railroad of the St. Louis and San Francisco Railroad Company in the State of Mississippi,—the derailment resulting from negligence on the part of the railroad company and its employees. To recover for these injuries Taylor brought an action against the railroad company in the Circuit Court of Monroe County, Mississippi, and obtained a judgment for $4,000, which was affirmed by the Supreme Court of the State without an opinion. See 58 So. Rep. 485.

In his declaration in that case Taylor explained and justified his presence on the train and in the express car by alleging that he was then in the employ of the express company as its messenger and in the course of that employment was in charge of express matter which the railroad company was transporting for the express company, that this transportation was in pursuance of a contract between the two companies, and that under the contract the express car was furnished by the railroad company and he, as the express company's messenger, was permitted to accompany the express matter carried therein.

While the declaration said nothing more about the nature or terms of that contract, it is important here to have them in mind. The contract shows that it was intended to, and did, cover all express business on and over the railroad company's road, both within and without the State of Mississippi, for a specified period, including the day when Taylor was injured. It gave to the express company the exclusive privilege of conducting an express business on and over the railroad and obligated the railroad company to refrain from conducting an express business. There were provisions whereby the railroad company agreed, (a) to transport by suitable cars, to be provided by it and attached to its passenger trains, all express matter of the express company and the messengers accompanying the

same, (b) to light and warm the cars and equip them with necessary conveniences, and (c) to permit portions of its station houses to be used by the express company for the reception, safekeeping and delivery of express matter. And there were other provisions whereby the express company agreed, (a) to make stated payments—usually a percentage of the gross earnings—for the facilities furnished and service rendered by the railroad company, (b) to assume all risks, losses and damages to its own property, express matter and valuable packages transported under the contract, (c) to assume all risk and damage to its agents and employees while engaged in its business on the trains or property of the railroad company, and (d) to indemnify and hold harmless the railroad company in respect of all claims for damages suffered by such agents and employees while so engaged.

There was also a contract between Taylor and the express company, spoken of as a messenger's agreement, wherein,—following a recital that he had full knowledge of the service required and the conditions on which the railroad company would permit messengers to accompany express matter on its trains, and that with such knowledge he was desirous of becoming a messenger of the express company,—it was stipulated, as a term or condition of his employment, that neither the express company nor the railroad company should under any circumstances or in any case be liable for any injury which he might receive while on the railroad company's trains as such messenger, whether caused by negligence of the railroad company or otherwise, and that he would assume all and every risk incident to such employment, from whatever cause arising.

Promptly after Taylor sued the railroad company in the Circuit Court of Monroe County, and before the case was brought to trial, the express company presented to that court in that cause a petition wherein it set out the contracts just described and asked to be made a party defend-

ant. To this the railroad company assented, but Taylor evidently objected and the petition was denied. The railroad company by its answer and evidence sought to avail itself of the stipulation in the messenger's agreement, in connection with those in the other contract, but the court ruled against it and Taylor obtained the judgment before mentioned.

What has been recited will conduce to a right understanding of another suit the decree in which we are now to review.

The suit is in equity and was brought by the express company against Taylor in the District Court of the United States for the Northern District of Mississippi. The federal jurisdiction rests on diversity of citizenship,—the express company being a corporation and citizen of Colorado, and Taylor a citizen of Mississippi residing in the Northern District. The bill, with a supplement and amendment, proceeds on the theory that, in suing the railroad company and obtaining a judgment against it, which as between that company and the express company must be paid by the latter as stipulated in their contract, Taylor not only violated the messenger's agreement, but perpetrated a legal fraud on the express company; that the judgment is therefore one which in equity and good conscience he has no right to enforce; that if he be permitted to enforce it the express company will be without any effective remedy in that he has no property which can be reached by legal process (a fact which is both alleged and proved); and that the express company, which was not a party to that case, and has not been in any wise negligent or at fault, is in equity and good conscience entitled to have the messenger's agreement respected and to demand that the claims embraced in the inequitable judgment be relinquished and the enforcement of the judgment enjoined. The prayer conforms to that theory and is in substance that Taylor be required specifically to perform

and carry out the messenger's agreement, to execute a sufficient release of all claims on account of the injuries received, and to abstain from enforcing the judgment. General relief also is prayed.

Taylor challenged the bill by a demurrer, which was overruled, and after a hearing in due course the express company prevailed. On appeal to the Circuit Court of Appeals that decree was reversed and the suit remanded because in that court's opinion the bill did not show that Taylor was not in the employ of the railroad company or that he was solely in the employ of the express company. 220 Fed. Rep. 796. After the mandate was received, Taylor, conceiving that the decision of the Circuit Court of Appeals fully disposed of the merits and was final, requested the District Court to enter a decree dismissing the bill, and the express company requested leave to amend the bill by correcting the defect pointed out by the Circuit Court of Appeals. Taylor's request was denied and that of the express company was granted. The bill was accordingly amended so as to show that Taylor was not in the employ of the railroad company, but was on the train solely in virtue of his employment by the express company, and that in his declaration in the action against the railroad company he did not claim or allege any employment by that company, but, on the contrary, claimed and alleged that it permitted him to be on the train because he was accompanying the express matter as the express company's employee. Taylor then filed a new answer, and on a further hearing a decree for the express company was entered. By it the District Court found that the allegations of the bill, with its supplement and amendment, were all true; declared that the institution of the action against the railroad company and its prosecution to judgment constituted a violation of the messenger's agreement and a legal fraud on the express company; directed Taylor to carry out and perform the messenger's

agreement and to execute, within a fixed time, an appropriate instrument releasing the express company and the railroad company from all claims for damages on account of his injuries, and enjoined him from collecting or attempting to collect the judgment against the railroad company. On a further appeal to the Circuit Court of Appeals that decree was reversed with directions to dismiss the bill. 249 Fed. Rep. 109. A writ of certiorari was then granted by this court.

On the second appeal the Circuit Court of Appeals put its decision entirely on the ground that the express company was a "common carrier by railroad" within the meaning of the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and therefore under § 5 of the act the messenger's agreement was void. Taylor advanced that and other grounds in asking a reversal, but the court did not discuss the other grounds. All are pressed on our attention, and we take them up in what seems the natural order.

1. It is urged that the decision of the Circuit Court of Appeals on the first appeal was final in that it disposed of all questions in the suit and left nothing open to the District Court but to dismiss the bill. Had this been so, the Circuit Court of Appeals on the second appeal hardly would have failed to enforce its prior decision. But that decision did not go as far as is claimed. It turned on the sufficiency of the bill, and on that alone. The District Court had held the bill sufficient when challenged by a demurrer. The Circuit Court of Appeals held it insufficient, and for that reason reversed the decree and remanded the suit. Had the District Court taken that view when acting on the demurrer, it undoubtedly could, and probably would, have allowed an amendment curing the defect. Could it not equally allow the amendment after the Circuit Court of Appeals pointed out the defect and remanded the suit? It, of course, was bound to give effect to the decision and

mandate of the Circuit Court of Appeals; but that court did not order the bill dismissed nor give any direction even impliedly making against the amendment. All that was disposed of was the matter of the sufficiency of the bill. And recognition of this is found in the last opinion of the Circuit Court of Appeals, where it is said that the first reversal was "based upon the insufficiency of the pleadings." We think the decision on the first appeal was not final and that the District Court was left free, in the exercise of its discretion, to permit the amendment. Equity Rules, Nos. 19 and 28; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 258–259; *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553; *Smith* v. *Adams*, 130 U. S. 167, 177. It appears that in denying a petition for a rehearing on the first appeal the Circuit Court of Appeals refused to direct the allowance of the amendment; but this signifies nothing more than that no occasion was perceived for controlling the District Court's discretion in the matter.

2. Section 265, Judicial Code, formerly § 720, Rev. Stats., provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy"; and this is relied on as showing that the District Court could not entertain the suit. That court held the provision not applicable, and the Circuit Court of Appeals said nothing on the subject on either appeal, possibly because in a similar case it had held the provision without application.

Is the suit one to stay proceedings in a state court in the sense of that provision? If it is, the District Court erred in not dismissing the bill on that ground. *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *United States* v. *Parkhurst-Davis Co.*, 176 U. S. 317. If it is not, the court rightly entertained the suit and proceeded to an adjudication of the merits, for the citizenship of the

parties and the amount in controversy were within the jurisdictional requirements.

The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States, *Ex parte Young*, 209 U. S. 123; *Truax* v. *Raich*, 239 U. S. 33; *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 538, 543; or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts, *French* v. *Hay*, 22 Wall. 250; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 219; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 221; or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience, *Marshall* v. *Holmes*, 141 U. S. 589; *Ex parte Simon*, 208 U. S. 144;

*Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Public Service Co.* v. *Corboy*, 250 U. S. 153, 160; *National Surety Co.* v. *State Bank of Humboldt*, 120 Fed. Rep. 593.

*Marshall* v. *Holmes*, just cited, was a suit in equity to enjoin one who had obtained judgments in a state court from enforcing them, that relief being sought on the ground that they were secured by fraud which was not discovered until after they were rendered; and the question distinctly presented was whether the suit was one which the Circuit Court of the United States could entertain and decide, the requisite diversity of citizenship and amount in dispute being present. This court,—after adverting to prior decisions stating the familiar doctrine that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery," and also showing that such a suit is not one to review or revise the action of the court rendering the judgment, but is a new and independent suit for equitable relief,—answered the question by saying: "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a

state court. It would simply take from him the benefit of judgments obtained by fraud."

*Simon* v. *Southern Ry. Co.*, *supra*, was a suit in a Circuit Court of the United States to enjoin the enforcement of a judgment in a state court on the ground that it was obtained by fraud and without notice, and the defendant invoked the provision in § 265. The Circuit Court took jurisdiction and awarded the relief sought. That decision was affirmed by the Circuit Court of Appeals and on a further appeal was sustained by this court. At that time this court considered the provision in the light of its origin and purpose, reviewed the prior decisions and in an extended opinion having the approval of the entire court reaffirmed the ruling in *Marshall* v. *Holmes*.

*National Surety Co.* v. *State Bank of Humboldt*, *supra*, was a suit in a federal court to obtain like relief in respect of a judgment in a state court on the ground that through a mistake of a public officer, for which he alone was responsible, the judgment had been rendered without opportunity for putting in a defense, and this when there was one which was both meritorious and complete. The suit was not brought by the judgment defendant, but by one who was obligated to pay the judgment if it was enforced. The bill was dismissed because of the provision now relied on; but that decision was reversed by the Circuit Court of Appeals in a well considered opinion wherein it was said that in cases otherwise within the jurisdictional statute "the Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a state court, which has been procured by fraud, accident, or mistake, that they have to restrain him from collecting a like judgment of a federal court"; that the bill presented a new and justiciable case which had not been presented to nor decided by the state court and did not "fall under the ban of the section of the statute under consideration"; and

that "In this case all these facts concur—the judgment which it is against conscience to allow to be used to extort money that is not owing from a defendant remediless at law, the complete meritorious defense to the claim on which this judgment is based, the fact that the defendant in the judgment was prevented from availing itself of its defense to the cause of action by an unavoidable accident, and the absence of any negligence of the defendant or of its agents. These facts appeal with compelling force to the conscience of a chancellor. They have been presented to a court to which the Constitution and the acts of Congress have granted the power, and upon which they have imposed the duty, to grant the relief to which the complainants are equitably entitled; and the decree which dismissed their bill must be reversed."

Without pursuing the subject further, we hold that the present suit is not one to stay proceedings in a state court in the sense of § 265.

3. Does the Employers' Liability Act affect the validity of the messenger's agreement?

The act provides that "every common carrier by railroad" shall be liable in damages for the injury or death of any of its employees occurring while it is engaged and he is employed in interstate commerce and resulting in whole or in part from the negligence of any of its officers, agents or employees, or from any defect or insufficiency, due to its negligence, "in its cars, engines, appliances, machinery, track, roadbed," etc.; and in § 5 it declares that any contract whereby a common carrier exempts itself from "any liability created by this Act" shall to that extent be void.

In his declaration in the state court Taylor did not claim that he was in the employ of the railroad company, and his judgment was not obtained on that theory. Here it is shown with certainty that he was not in that company's employ. True he urges that the contract between the two

companies shows a co-proprietorship or sort of partnership between them which made him an employee of both; but the contract discloses no basis for the claim or for distinguishing his case from that of the Pullman porter recently before us. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 237 U. S. 84. Here the businesses of the companies concerned were quite as distinct in point of control and otherwise as they were there. That here the railroad company provided the express car is not material, for it is measurably equalized by other differences. In both cases the railroad company provided the motive power and the train operatives. The messenger here, like the porter there, was on the train as an employee, not of the railroad company, but of another by whom he was employed, directed and paid, and at whose will he was to continue in service or be discharged.

As respects the express company, it appears not merely that Taylor was in its employ, but also that the injuries were received while it was engaged and he was employed in interstate commerce; and so the question is presented whether the act embraces a common carrier by express which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown. The District Court answered the question in the negative and the Circuit Court of Appeals in the affirmative. A negative answer also has been given in a like situation by the Court of Errors and Appeals of New Jersey, *Higgins* v. *Erie R. R. Co.*, 89 N. J. L. 629; and a recent decision by the Supreme Court of Minnesota makes persuasively for that view. *State ex rel. Great Northern Express Co.* v. *District Court*, 142 Minnesota, 410.

In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words,

but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 212–213); by the obvious reference in the latter part of §§ 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co.* v. *Wagner*, 241 U. S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown. 1 I. C. C. 349; *United States* v. *Morsman*, 42 Fed. Rep. 448; *Southern Indiana Express Co.* v. *United States Express Co.*, 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co.* v. *United States*, 212 U. S. 522, 531, 534.

As Taylor was not an employee of the railroad company and the express company was not within the Employers' Liability Act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement.

4. There being no statute regulating the subject, it is settled by the decisions of this court, and is recognized in other jurisdictions, that the messenger's agreement was a valid and binding contract whereby Taylor agreed to assume all risk of injury incident to his employment, from whatever cause arising, assented to the contractual arrangement between the two companies in respect of such injuries, and became obligated to the express company to refrain from asserting any liability against it or the railroad company on account of any such injuries. *Express Cases*, 117 U. S. 1; *Baltimore & Ohio Southwestern Ry. Co.* v. *Voigt*, 176 U. S. 498, and cases cited; *Santa Fe*,

*Prescott & Phœnix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177; *Robinson* v. *Baltimore & Ohio R. R. Co., supra; Perry* v. *Philadelphia, Baltimore & Washington R. R. Co.*, 24 Delaware, 399; *McKay* v. *Louisville & Nashville R. R. Co.* (Tenn.), 182 S. W. Rep. 874; *Fowler* v. *Pennsylvania R. R. Co.*, 229 Fed. Rep. 373. In violation of that agreement he wrongfully sought and obtained a judgment against the railroad company, which as between the two companies the express company is bound to pay. The judgment was obtained in an action to which that company was not a party and wherein it could not be heard. He is financially irresponsible and if the judgment is collected the express company, which has not been in any wise negligent or at fault, will be remediless. In these circumstances, that company is entitled in equity and good conscience, as is shown by the cases before cited, to a decree holding him to his agreement and depriving him of his present inequitable advantage, and to that end enjoining him from collecting the judgment.

It follows that the decree of the District Court was right and that the Circuit Court of Appeals erred in reversing it.

*Decree reversed.*

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## JIN FUEY MOY *v.* UNITED STATES.

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

No. 44. Argued October 11, 1920.—Decided December 6, 1920.

1. In a case properly here on a constitutional question under Jud. Code, § 238, the court retains its jurisdiction to decide other questions presented, after the constitutional question has been settled in another case. P. 191.
2. In an indictment charging defendant with unlawfully selling mor-

phine in violation of the Anti-Narcotic Act by issuing a prescription, the clause as to issuing the prescription, being intimately involved in the description of the offense, cannot be treated as surplusage, but it is not repugnant to the charge of selling, since under the act one person may take a principal part in a prohibited sale of morphine belonging to another by issuing a prescription for it, in view of Crim. Code, § 332, making whoever aids, abets, counsels, commands, induces or procures the commission of an offense a principal. P. 192.

3. Subdivision (a) of § 2 of the Anti-Narcotic Act, in allowing the dispensing or distribution of narcotic drugs "to a patient" by a registered physician "in the course of his professional practice only," confines the immunity strictly within the appropriate bounds of a physician's professional practice, not permitting sales to dealers or distributions intended to satisfy the appetites or cravings of persons addicted to the use of such drugs. P. 194.

4. In a criminal prosecution in the District Court in Pennsylvania, the defendant's wife is not competent to testify for her husband, either generally or by contradicting testimony that certain matters transpired in her presence. P. 195.

253 Fed. Rep. 213, affirmed.

THE case is stated in the opinion.

*Mr. H. Ralph Burton*, with whom *Mr. Blaine Mallan* was on the briefs, for plaintiff in error.

*The Solicitor General* for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error was indicted and convicted for violating § 2 of an Act of Congress approved December 17, 1914, commonly known as the Harrison Anti-Narcotic Act (38 Stat. 785, c. 1).[1] His motion in arrest of judgment having

[1] SEC. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. . . . Nothing contained in this section shall apply—

(*a*) To the dispensing or distribution of any of the aforesaid drugs

been overruled (253 Fed. Rep. 213), he brought the case here by direct writ of error under § 238, Judicial Code, upon the ground of the unconstitutionality of the act. Afterwards this question was set at rest by our decision in *United States* v. *Doremus*, 249 U. S. 86, sustaining the act; but our jurisdiction continues for the purpose of disposing of other questions raised in the record. *Brolan* v. *United States*, 236 U. S. 216; *Pierce* v. *United States*, 252 U. S. 239.

These questions relate to the sufficiency of the indictment, the adequacy of the evidence to warrant a conviction, the admissibility of certain evidence offered by defendant and rejected by the trial court, and the instructions given and refused to be given to the jury.

The indictment contained twenty counts, differing only in matters of detail. Defendant was convicted upon eight counts, acquitted upon the others. Each count averred that on a date specified, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of the court, defendant was a practicing physician, and did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away certain derivatives and salts of opium, to-wit, a specified quantity of morphine sulphate, to a person named, not in pursuance of a written order from such person on a form issued in blank for that purpose by the

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to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; . . .

(*b*) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: . . .

Commissioner of Internal Revenue under the provisions of § 2 of the act, "in manner following, to-wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense" to the person named a certain prescription of which a copy was set forth, and that said person "was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only; contrary to the form of the Act of Congress," etc.

It is objected that the act of selling or giving away a drug and the act of issuing a prescription are so essentially different that to allege that defendant sold the drug by issuing a prescription for it amounts to a contradiction of terms, and the repugnance renders the indictment fatally defective. The Government suggests that the clause as to issuing the prescription may be rejected as surplusage; but we are inclined to think it enters so intimately into the description of the offense intended to be charged that it cannot be eliminated, and that unless defendant could "sell," in a criminal sense, by issuing a prescription, the indictment is bad. If "selling" must be confined to a parting with one's own property there might be difficulty. But by § 332 of the Criminal Code, "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." Taking this together with the clauses quoted from § 2 of the Anti-Narcotic Act, it is easy to see, and the evidence in this case demonstrates, that one may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription to the would-be purchaser. Hence there is no necessary repugnance between prescribing and selling, and the indictment must be sustained.

The evidence shows that defendant was a practicing

physician in Pittsburgh, registered under the act so as to be allowed to dispense or distribute opium and its derivatives without a written order in official form, "in the course of his professional practice only"; that he was in the habit of issuing prescriptions for morphine sulphate without such written order and not in the ordinary course of professional practice; that he issued them to persons not his patients and not previously known to him, professed morphine users, for the mere purpose, as the jury might find, of enabling such persons to continue the use of the drug, or to sell it to others; in some cases he made a superficial physical examination, in others none at all; his prescriptions called for large quantities of morphine—8 to 16 drams at a time—to be used "as directed," while the directions left the recipient free to use the drug virtually as he pleased. His charges were not according to the usual practice of medical men, but according to the amount of the drug prescribed, being invariably one dollar per dram. All the prescriptions were filled at a single drug store in Pittsburgh, the recipients being sent there by defendant for the purpose; and persons inquiring at that drug store for morphine were sent to defendant for a prescription. The circumstances strongly tended to show coöperation between defendant and the proprietors of the drug store. At and about the dates specified in the indictment—the spring of the year 1917—and for more than two years before, the number of prescriptions issued by defendant and filled at this drug store ran into the hundreds each month, all calling for morphine sulphate or morphine tablets in large quantities. In one case a witness who had procured from defendant two prescriptions—one in his own name for 10 drams, the other in the name of a fictitious wife for 6 drams—and had been directed by defendant to the specified drug store in order to have them filled, asked defendant to confirm the prescriptions by telephone so there would be no trouble; to which defendant replied:

"Oh, never mind; we do business together; we understand each other." On another occasion the same witness, having received from defendant two prescriptions for 8 drams each, one in his own name, the other in the name of the supposed wife, stating in one case a Cleveland address, in the other a Pittsburgh address, presented them at the drug store to be filled, and was told by the manager that he would not fill any more prescriptions under a Pittsburgh address; "they were taking too big a chance, and I must go back to the Chinaman and tell him what he told me, and he would understand—the Chinaman would understand." Witness returned the two prescriptions to defendant, told him what the manager had said, and defendant retained those prescriptions and issued to the witness a new one for 16 drams in place of them, with which the witness returned to the drug store and procured the specified quantity of the drug.

In each case where defendant was found guilty the evidence fully warranted the jury in finding that he aided, abetted, and procured a sale of morphine sulphate without written order upon a blank form issued by the Commissioner of Internal Revenue; and that he did this by means of a prescription issued not to a patient and not in the course of his professional practice, contrary to the prohibition of § 2 of the act. Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it. *Webb* v. *United States*, 249 U. S. 96.

Errors assigned to the instructions given and refused to be given by the trial judge to the jury are disposed of by what we have said.

But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act, and the relaxation of the rule in this regard by § 858, Rev. Stats., being confined to civil actions. *Logan* v. *United States*, 144 U. S. 263, 299–302; *Hendrix* v. *United States*, 219 U. S. 79, 91. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not "in behalf of her husband," that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the Government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give.

The judgment under review is

*Affirmed.*

# CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL. *v.* DES MOINES UNION RAILWAY COMPANY ET AL.

# DES MOINES UNION RAILWAY COMPANY ET AL. *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

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

Nos. 66, 67. Argued March 23, 24, 1920.—Decided December 6, 1920.

1. It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects and the beneficiaries. P. 208.
2. If the subject of a trust be a legal interest in property and capable of legal transfer, the trust is not perfectly created unless the legal interest be actually vested in the trustee. But it is not necessary that the trust be expressed in the same instrument that transfers the title; various instruments may be read together in order to ascertain the intention to establish one. *Id.*

Three railroad companies agreed that they would contribute in stated proportions to establish a terminal for the common use of themselves and of such other railroads as they might admit, that the title should be in a trustee, that they would share the cost of maintenance and operation in proportion to their use of the terminal, and that a depot company might be formed to take permanent control and issue its mortgage bonds to them for their respective contributions to the purchase and improvements. Later they caused to be formed a terminal railroad company with broad corporate powers to which they conveyed, by absolute deeds, the property they had acquired for the terminal. The bonds and stock of the terminal company were declared to be issued to them "in payment," but recitals and provisions of its articles, and resolutions attending the transfer, evinced that the main object was, not to abandon, but to effectuate the plan of the original agreement. A subsequent contract between the four companies fixed terms for management of the property,

for performance of the terminal service and division of the cost among the three railroads according to use, permanently allotted the stock among them, authorized one of them to sell one-half its allotment to any outside railroad, acceptable to a majority of them, which might then be admitted as a party to the agreement, but provided that, with such exception, admission of an outside company to the use of the terminal should require consent of all three. *Held:*

3. That the terminal company took the title in trust to maintain and operate the property and to exercise all its corporate powers for the common use and benefit of the three railroad companies, their successors and assigns, and such other companies as might be admitted by them to a proprietary participation in the terminal. Pp. 202–206.
4. That the subsequent contract was a modification only of the original plan and inconsistent with a purpose to treat the terminal company as an independent entity subject only to contractual obligations and remit the proprietary companies to the ordinary rights of stockholders. P. 208.
5. That, as between the proprietaries and others having notice, the stockholding interest was restrained to the full extent necessary to give effect to the trust, and the shares, representing the right to participate in the trust, could not be regarded, while the trust continued, as having an independent exchange value. P. 210.
6. That the fiducuary character of the terminal company extended to its officers and directors. P. 211.
7. That, where stock in the terminal company was sold by one of the proprietary companies to fiduciaries, officers and directors of the terminal company, for value, to enable them to sell it to some company capable of participating in the use of the terminal, the successor of such vendor company was not estopped from denying that the vendees acquired a substantial and valuable interest in the terminal company. P. 213.
8. That where a successor of two of the proprietary companies bought terminal shares from such individuals and afterwards, through its directors, transferred to one of them and to another officer and director of the terminal, in settlement of a loan, equivalent shares of the terminal and enough more to make more than a majority of the terminal stock, still retaining an interest, it was not estopped to dispute their claim of full ownership, or from asserting its rights under the trust and seeking relief against any inequitable use of the shares so transferred. P. 214.

9. That, in the absence of express authorization, agents deputed by the proprietary companies to vote their stock in the terminal company, including the presidents of two and the vice president of the other, were without power to amend its articles so as to do away with the trust or seriously impair the rights of the proprietaries under it. P. 215.
10. That the absence of any reference to the trust in deeds and mortgages of the property, including the terminal shares, of the proprietary companies, and in contracts made by the terminal company in discharging its functions, was not persuasive evidence against the existence of the trust. P. 218.
11. That, where the articles of the terminal company were in form amended so as to deprive the proprietary companies, as it was claimed, of their exclusive ownership and control, and in effect to discharge the trust, and the validity of the amendments was unchallenged for 17 years, and where certain individuals, for value, acquired from proprietary companies bonds and a majority of the shares of the terminal company, and held them many years during which the property increased in value, the successors of the proprietary companies were not estopped, or barred by laches, from asserting the trust against such individuals, it appearing that the latter were and remained officers and directors of the terminal company, with constructive and actual knowledge of the trust, and were not misled, that the amendments were not authorized or ratified by the proprietaries, that, although their officers acquiesced in certain internal changes in the terminal company directed by the amendments and in the *de facto* distribution of its stock, there was no substantial departure from the trust in the management and possession of the property, and it appearing further that no claim that the trust had been repudiated was made until shortly before the suit. Pp. 219–222.
12. That the fiduciaries holding such shares were estopped to avail themselves of incautious, negligent or mistaken acts of officers of the proprietary companies in order to obtain an advantage for themselves at the expense of those companies. Pp. 221, 222.
13. That the shares, held by such fiduciaries, represented no value or interest which they could set up against the proprietaries, and that the latter, upon repaying what the former had paid for them, with interest, were entitled to have the shares surrendered and canceled, and meanwhile to have any sale, assignment, transfer or voting of the shares prevented by an injunction. P. 223.
14. That, under contracts of the parties, earnings derived from switch-

ing and other terminal services and privileges should be credited, as they accrued, to the proprietaries in proportion to their use of the terminal, *i. e.*, to wheelage. P. 225.

254 Fed. Rep. 927, reversed.

THE case is stated in the opinion.

*Mr. Robert J. Cary* and *Mr. Burton Hanson*, with whom *Mr. John C. Cook*, *Mr. Winslow S. Pierce*, *Mr. Lawrence Greer* and *Mr. F. C. Nicodemus, Jr.*, were on the briefs, for Chicago, Milwaukee & St. Paul Ry. Co. *et al.*

*Mr. James L. Parrish* and *Mr. Frederick W. Lehmann* for Des Moines Union Ry. Co. *et al.*

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit in equity brought in the year 1907 in the Circuit (now District) Court of the United States for the Southern District of Iowa by the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company against the Des Moines Union Railway Company. By an amended bill the individual defendants, Frederick M. Hubbell, Frederick C. Hubbell, and their firm of F. M. Hubbell & Son, were brought in; and afterwards the Wabash Railway Company, having succeeded to the rights of the Wabash Railroad Company, was substituted as a complainant in its stead. Jurisdiction depended entirely upon diverse citizenship of the parties.

Complainants own and operate lines of railroad extending to the City of Des Moines, Iowa, and connecting there with a joint terminal property, legal title to which is held by the defendant Des Moines Union Railway Company (hereinafter called for convenience the terminal company), in which complainants hold a minority of stock, the Wabash Company an eighth, the other complainant a quarter,

while the Messrs. Hubbell hold five eighths. Complainants assert that the terminal company holds its property in trust for their use, and that they are the sole beneficial owners, having an equitable tenancy in common, and being entitled to the joint use of the property in perpetuity, exclusive except as other railroads may be admitted to participate in such use with their consent. This is the principal matter in controversy. Intimately connected with it is the question of the validity as against complainants of the Messrs. Hubbell's claim to ownership of five eighths of the capital stock. A subordinate issue relates to the disposition of what are called "surplus earnings," acquired by the terminal company from outside parties during the operation of the terminal under an agreement made in the year 1889 between the terminal company and the predecessors of complainants and which expired in 1918.

Complainants base their principal contention upon a trust alleged to have been established under and pursuant to an agreement made January 2, 1882, between three companies then engaged in the construction of as many railroads converging at Des Moines, and through the incorporation of the terminal company in the year 1884 for the express purpose of acting as trustee for the three companies, and the conveyance to it by them of the terminal property, followed by the working agreement of 1889; from all of which it is contended that the terminal company has from the beginning held and still holds all its property subject to a trust under which the three railroad companies and their successors and assigns, and such other railroad companies having lines terminating at Des Moines as may be admitted with their consent, are entitled to have the terminal property maintained and operated for their use and benefit at the actual cost of the terminal service performed. Complainant Chicago, Milwaukee & St. Paul Railway Company is the remote

successor of two of the three companies, owning what may be called the Northern and the Northwestern lines. Complainant Wabash Railway Company is the remote successor of the original company that owned the third, which may be called the St. Louis line. The bill of complaint prayed for a decree declaring and establishing the trust; an accounting for all income and profits received by the terminal company for switching or handling traffic at the terminal for companies other than complainants and their predecessors, and for rentals of real estate and the like; and specifically and generally for other appropriate relief. The defenses set up in the answer and attempted to be supported by the proofs are, briefly, that by the deeds of conveyance made to the terminal company it took title not as trustee but absolutely and for its own sole use and benefit; that, whatever relation may have arisen from the provisions of the original articles of incorporation, whether fiduciary or merely contractual, was substantially modified, and if fiduciary terminated, by amendments adopted April 8, 1890, alleged to have been thereafter recognized by complainants and their predecessors as valid and so treated by defendants and all others concerned; that complainants by their conduct and that of their predecessors are estopped from setting up the equitable title alleged, and have been guilty of laches barring relief in equity; hence that they are not entitled to assert any right or interest in the terminal property except such as arises from their ownership of a portion of the stock of the terminal company and from the provisions of the agreement of 1889; and that by the proper construction of that agreement the so-called surplus earnings are the property of the terminal company and not of complainants.

Upon final hearing the District Court made a decree from which both sides appealed to the Circuit Court of Appeals, where it was held (one judge dissenting) that

the terminal company had complete and absolute title to the terminal property; that complainants, except as holders of its stock or bonds, had no interest in it, nor voice in the control or management; that by the true construction of the 1889 agreement complainants were entitled to the surplus earnings until May 1, 1918, and that thereafter the rights of the parties respecting the use of the terminal were only such as sprang from their nature as carriers and their physical and business relations to each other and to the terminal; by reason of which the terminal company must furnish them with reasonable terminal facilities at reasonable charges to be agreed upon, or in default of agreement to be fixed by the proper public tribunal. 254 Fed. Rep. 927.

Cross-writs of certiorari bring the resulting decree here for review.

The facts are intricate, and the evidence so voluminous that any detailed recital of it would be unduly tedious. It is sufficiently referred to in the prevailing and dissenting opinions delivered in the Circuit Court of Appeals, and we will content ourselves with touching upon the salient points. The case involves no abstruse legal or equitable doctrine; the application of familiar principles to the facts as they are developed will direct us to the proper outcome.

The agreement of January 2, 1882, was made between the three railroad companies and two individuals in whose names certain titles had been taken for the benefit of the companies. Its principal provisions were that terminal facilities in Des Moines should be purchased, constructed, and maintained at the joint expense of the three companies and held and used in common; that the expense of acquisition should be borne one-half by the St. Louis Company, one-quarter by each of the others; "that a depot company may be organized and may take permanent charge of the property upon the terms herein set forth, and

that said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements. . . . The title to said property shall be and remain in a trustee to be named by agreement of said companies, but subject to the joint use and occupation of all of said railway companies upon the terms herein described." The St. Louis Company was to be charged with police control, supervision, and maintenance of the terminal, and the expense thereof (including taxes) apportioned between it and the other companies according to the use they should respectively make as evidenced by the wheelage; spur tracks were to be built connecting the terminal with factories and other sources of trade in and about the city, but if either of the companies should deem the construction of any such track not advantageous the question of constructing it and which of the three companies should pay for it was to be determined by arbitration; any railroad company having a line not extending to Des Moines but having effected an arrangement for running its trains into the city over the line of either of the three companies was to be entitled to the use of the terminal facilities upon paying a fair sum for rental and a proportion of the maintenance account, the rental to inure to the three companies in the same proportion as the original outlay, and the sum due for maintenance to be determined in the same manner as in the case of the three companies; railroad companies having lines extending into Des Moines might be admitted to the use of the terminal by agreement of all three companies; differences arising under the agreement were to be referred to arbitration.

The terminal company was organized by representatives of the three companies under articles of incorporation dated December 10, 1884, which recited the 1882 contract in full, with special emphasis upon the provision that a

depot company might be organized to take permanent charge of the property, and declared that the new company was organized for this purpose as well as others that were expressed. The articles contained apt provisions to comply with the laws of the State of Iowa so as to enable it to construct, own, and operate a railway in, around, and about the city, with depots and everything else useful and convenient for the operation of railways at the terminal point, and with all the powers conferred upon corporations for pecuniary profit. Its corporate existence was to continue for fifty years, with the right of renewal. It was expressly declared: "All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." There was a provision that the written assent of the three companies should be necessary before the terminal company should lease or otherwise dispose of the use of any part of its franchises to any other railroad company. The capital stock was to be $1,000,000, divided into shares of $100 each, and paid in as the board of directors might determine, with authority to the board to receive in payment the property and franchises in Des Moines held by the three companies and their trustees. Four members of the board of directors were to be nominated by the St. Louis Company, two members by each of the other proprietary companies, and no stockholder to be eligible for membership in the board unless so nominated; this provision to apply to and be enjoyed by any grantee or assignee of either of the three companies. No contract, lease, or other agreement amounting to a permanent charge upon the property of the corporation to be entered into unless first approved by the three companies or their assigns and by more than three-fourths of all the stockholders.

January 1, 1885, each of the three companies held a stockholders' meeting, at which formal resolutions were

adopted reciting the contract of January 2, 1882, and the organization of the terminal company as contemplated in that contract and in order to carry out its purpose; each company thereby accepting and ratifying, so far as its interests were affected, the articles of incorporation of the terminal company as in substantial accord and compliance with the terms and conditions of the contract, and authorizing its officers to transfer to the new company all its right, title, and interest in the terminal property in exchange for a proper share of the bonds and stock of the terminal company.

On the same day the board of directors of the terminal company adopted resolutions accepting the transfer, management, and operation of the terminal property, appointing a committee to confer with the three railroad companies with respect to the terms and price at which the terminal property and franchises should be conveyed to it, and to procure from them "such conveyance and transfer as may be necessary to fully invest this company with the title, control and management of said properties as provided for in said contract of January 2nd, 1882"; and authorizing the issue of all its capital stock and not exceeding $500,000 of bonds to be secured by mortgage of the properties so to be conveyed; the bonds and stock to be used in paying for the property, maintaining, operating, and improving it, and purchasing other property necessary to carry out the objects of the company.

Due apparently to the financial embarrassment of the original Wabash Company, which dominated the St. Louis and the Northwestern, terminal matters remained in abeyance until November, 1887, when deeds were authorized, which, between that time and the following April, were made by the companies and the individual trustees with the effect of vesting in the terminal company complete legal title to the properties that had been acquired for the purpose of establishing the terminal. The

deeds were absolute in form. The terminal company by amendment of its articles increased its capital stock from $1,000,000 to $2,000,000, and authorized the making of a mortgage, which afterwards was given as of date November 1, 1887, to the Central Trust Company of New York as trustee, to secure an issue of $800,000 of 5 per cent. bonds for the purpose of paying for its property and completing improvements thereon; the mortgage covering all its real estate, rolling-stock, etc., then owned or thereafter to be acquired.

Until May 1, 1888, the terminal property continued to be operated by the St. Louis Company under the original agreement; on that date the terminal company took possession, and ever since then has continued to operate it and render terminal service thereon to the three railroad companies and their successors, as well as to other companies admitted from time to time under special agreements.

Upon a review of all the evidence, construing the writings in the light of the circumstances and the manifest purpose and intent of the parties, we are clear that the effect of the transactions thus far recounted was to establish a trust in the full and proper sense of the word, the terminal company being invested as trustee with complete legal title, but without beneficial ownership, and subject to a duty to maintain and operate the property and exercise all its corporate powers for the common use and benefit of the three railroad companies, their successors and assigns, and such other companies as might be admitted by them to a proprietary participation in the terminal.

The gist of defendants' argument to the contrary is that the incorporation of the terminal company and the conveyance of the property to it by deeds absolute in form manifested a substantial change of plan from that embodied in the contract of January 2, 1882; stress being laid

upon the fact that the powers of a terminal railway company as acquired under the articles of incorporation were much more extensive than those of a depot company, and it being contended that the provisions of the articles respecting the control of the terminal company and the resolutions providing for the transfer of the property to it, the form of the deeds themselves, and the issuance of stock and bonds to the proprietary companies in payment, demonstrated a purpose to invest the terminal company with title for all purposes. But the main object of establishing a joint terminal at the common expense and for the common use of the three companies and to retain their proprietary interest in it while confiding its maintenance and operation to their trustee is so manifest that all the proceedings are properly to be construed as designed to give effect to it, and seeming inconsistencies and ambiguities resolved accordingly. The provision of the articles that "all the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract" is not merely contractual, but amounts to a declaration of trust and together with the other evidence shows clearly that the powers were procured from the State expressly to enable the company the better to fulfill the purposes of its existence as such trustee, and not to set it up in business on its own account. The substitution of the terminal company with more elaborate powers in place of the depot company contemplated at the beginning shows a development and modification of the original plan, but no departure or substantial change. The particular stipulations contained in the articles respecting the control of the terminal company were intended not as a substitute for but as safeguards of the trust. The absolute form of the conveyances, and the issuance of stock and bonds "in payment," were intended to give credit to the company in its dealings with outside parties and to render its bonds more readily salable; but they constituted the

mere mechanism for carrying into effect the main purpose of the parties, and as between them were controlled by that purpose and by the articles and resolutions that manifested an express declaration of the trust. All the circumstances, and what we have quoted from the resolution of the terminal company directors, show that the title was conveyed for the purpose of enabling that company to control and manage the terminal in furtherance of the objects of the 1882 agreement.

It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries. *Colton* v. *Colton*, 127 U. S. 300, 310. But if, as here, the subject of the trust be a legal interest in property and capable of legal transfer, the trust is not perfectly created unless the legal interest be actually vested in the trustee. *Adams* v. *Adams*, 21 Wall. 185, 192, 194. Hence the necessity in this case of deeds conveying the fee to the terminal company. But it is not necessary that the trust be expressed in the same instrument that transfers the title. Various instruments may be read together in order to ascertain the intention to establish one. *Loring* v. *Palmer*, 118 U. S. 321, 340.

The agreement of May 10, 1889, between the terminal company of the first part and the three proprietary companies of the second part fixed the terms upon which the property should be managed and the terminal service performed for a period of thirty years to date from May 1, 1888. It constituted a working arrangement for that period, but did not in terms or by implication set aside the trust or place a time limit upon it. It provided that for the terminal service the proprietary companies should make payments, in proportion to the wheelage of each, to cover interest upon the mortgage bonds, the cost of maintenance, repairs, taxes, and insurance, and the cost of operating the terminal, including all expenses (except the operation of engine-houses, care of engines, and repairs

thereto, which were separately dealt with), after deducting any amounts which other railway companies might be obliged to pay for the use of the property. Engine-house expenses were to be apportioned according to the number of engines of each company, engine repairs to be charged to the company for which the work was done. The agreement contained other provisions of permanent effect, providing for the allotment of the stock of the terminal company to the proprietary companies and declaring the terms upon which outside companies might be admitted to ownership of the stock or the use of the property. It recited that the proprietary companies were entitled to the stock in the proportion of one-half to the St. Louis Company, one-fourth to each of the others, and provided for the issuance of certificates accordingly, and that these should express upon their faces that they were not transferable without the consent in writing of all the proprietary companies, except as to shares issued to qualify directors. And there was a provision that the St. Louis Company might sell one-half of its stock, or one-quarter of the whole, to such railroad company as might be acceptable to a majority of the proprietary companies, in which case the purchasing company might be admitted as one of the parties to the agreement upon the same terms and conditions as those stipulated for the other parties of the second part; and that, except as thus provided, other railroad companies should not be admitted to the use of the terminal property without the consent of all the parties of the second part.

Here again we have a further modification of some of the details of the original plan, but in respects altogether consistent with the continuance of the trust; inconsistent, indeed, with a purpose to treat the terminal company as an independent entity subject only to contractual obligations and remit the proprietary companies to the ordinary rights of stockholders. Their contributions to the original cost

of the property having been secured by mortgage bonds according to the plan of 1882, provision was now made for distributing the entire capital stock according to the original proportions, one-half to the St. Louis, one-quarter to each of the two other companies, but with certain material restrictions upon the ordinary rights of stockholders expressed in the agreement and others necessarily implied.

Since, from the very nature and terms of the trust, all the property and franchises of the terminal company were to be held for the benefit of the proprietary companies, and all its corporate powers exercised in the administration of the joint terminal for their common use, the stockholding interest in the terminal company necessarily must be modified, as between the parties, to the extent necessary to give full effect to the trust. In the hands of the proprietors of the connecting lines the stock was the evidence of their right to participate in the benefits of the trust, in the control and management of the terminal company, and in the use of the terminal; but such use, in the nature of things, must be proportioned, not according to the magnitude of their respective stock holdings, but according to their respective traffic requirements. And since the terms of the trust required that these connecting lines should have the entire beneficial use of the property upon paying the cost of the terminal service, there was no room for a profit from the operations of the terminal company out of which dividends could be paid. Except in the theoretically possible but extremely improbable event of an abandonment of the terminal (as to the effect of which no opinion need be expressed), it is plain that, as between the parties to the trust and others having notice of it, the stock could have little or no exchange value except to a company owning or operating a railroad line connecting or capable of connecting with the terminal. In the hands of others having notice of the trust, the stock represented no sub-

stantial property interest. Some recognition of the anomalous status of the stockholding interest is to be found in the acts of the parties above set forth, especially in the provisions of the agreement of 1889. The amount of stock provided for shows that it was deemed probable that eventually the property would have a value in excess of the original cost represented by the bond issue, or that value might be given to the stock through liquidation of the bonds or otherwise, and that upon a sale of a participation in the terminal property and facilities to an outside railroad company, evidenced by a transfer of stock in the terminal company, some return could be got for such increased value. The apportionment of the original issue, and the stipulations of the 1889 agreement, recognized that the St. Louis Company, as representative of the original Wabash Company, was equitably entitled to preference in any profits that might be derived from such a sale to an outside company. And evidently it was then anticipated that there would be four proprietary companies, each holding one-fourth of the stock, with equal representation in the board of directors.

We are not here concerned with any question pertaining to the rights of the bondholders. It may be assumed that, if necessary for their protection, the mortgage would be treated as conveying the entire estate, both legal and equitable, in the terminal property. No express provision appears to have been made for paying off the principal of the bonds. Whether the beneficiaries of the trust, as between themselves, were or are entitled to have provision made for discharging the principal by including periodic amortization charges as a part of the cost of operating the terminal is a question that we need not consider.

Nor are we at this moment concerned with any question that might arise if stock of the terminal company had come or should come to the hands of a *bona fide* purchaser for value without notice. The principal contro-

versy arises from the fact that defendants F. M. Hubbell and F. C. Hubbell have become the holders of five-eighths of the capital stock, upon which fact, together with the alleged effect of the amendments to the articles of incorporation adopted April 8, 1890, defendants rest the insistence that the proprietary companies have lost their right to control the action of the terminal company, that the Messrs. Hubbell as stockholders are entitled to control it and to have dividends out of its profits, and that from and after the expiration of the 1889 agreement, complainants have no right to the use of the terminal except upon terms to be agreed upon by the terminal company as controlled by the Messrs. Hubbell.

It is important, therefore, to consider the circumstances under which their stock was acquired and the amendments adopted.

Obviously the fiduciary character of the terminal company extended to its officers and directors as to all others concerned in its management, charging them with a duty to uphold the trust and imposing upon them the usual disability about reaping a personal advantage at the expense of the beneficiaries. And it is clear and undisputed that the Messrs. Hubbell acquired their stock with full notice of all essential facts pertaining to the trust; they themselves at all times material were officers and directors of the terminal company and acted in a fiduciary capacity in everything relating to its affairs. Mr. F. M. Hubbell was an officer and director of that company at the beginning and continuously thereafter, especially active in its management; and during a period which included the important transactions in question he also was a director and officer of each of the proprietary companies and their trusted representative in respect to terminal matters at Des Moines. Mr. F. C. Hubbell became a director of the terminal company in January, 1890, president two years later, and has been such continuously since.

In the year 1886 and thereafter until and during the year 1890 the property of the Wabash system, including the stock of the St. Louis Company with control of its part of the stock of the terminal company, was in the hands of a purchasing committee as trustees for the Wabash bondholders. In February, 1890, F. M. Hubbell obtained from this committee an option for the purchase of $135,000 of the terminal company bonds and a quarter interest in its capital stock for $135,000, accepted the option, made over to General Dodge a half interest in it, and Hubbell and Dodge each received one-half of the specified bonds and one-eighth of the outstanding capital stock, with a guaranty on the part of the purchasing committee that the St. Louis Company would approve the transfer (as it afterwards did, through its board of directors), and that the committee would consent to such change in the articles of incorporation of the terminal company as would permit one director to be nominated by any person or company holding one-eighth of the stock. At this time General Dodge was president of the terminal company, and also president and principal stockholder of the Northern Company; Hubbell, besides his relation to the terminal company, was president of the Northwestern Company and its controlling stockholder. In correspondence between Mr. Hubbell and the purchasing committee antecedent to this transaction they warned him that it would be necessary to confine a sale of stock "to such railway companies as would be interested in the station"; and he assented to this, acknowledging that "it would be prejudicial to sell any of this stock to outsiders, and I understand it as you do that the stock cannot be sold without the consent of the different railroad companies who now form the terminal company." Later Hubbell acquired from the purchasing committee $50,000 of the bonds and an additional eighth interest in the capital stock of the terminal company for $57,736, being

par and accrued interest for the bonds and 15% of par for the stock, upon the understanding expressed in writing that an eighth interest should be "sufficient to represent a proprietorship in the company, according to the understanding we had when you were here"—evidently meaning that the eighth retained by the purchasing committee should carry with it a proprietary interest and influence in the terminal not limited in proportion to the amount of the stock.

Defendants insist that because the purchasing committee sold the stock to Hubbell and Dodge for a valuable consideration, they must be taken to have dealt with it as having substantial value; and that since, in afterwards making report to the board of directors of the Wabash Company, with an account of their financial transactions, the committee included their receipts from sales of the stock and bonds of the terminal company, and the directors approved the account, complainant Wabash Railway Company is estopped from denying that Hubbell and Dodge acquired a substantial and valuable interest in the terminal company. We deem it clear, however, that the intent of the purchasing committee, known and assented to by Hubbell and Dodge at the time, was merely to enable the latter to sell the three-eighths interest to some railroad company capable of participating in the use of the terminal. Whether consistently with their fiduciary relations or not, they took advantage of this opportunity in the following year, when the Northern and Northwestern companies were consolidated and they sold to the consolidated company the stock in question, apparently and presumably at a profit over and above what they paid the purchasing committee for it. There is no foundation for the suggested estoppel.

The title now asserted by the Messrs. Hubbell to five-eighths of the terminal company stock was derived not directly from the Wabash purchasing committee, but from

the consolidated Northern and Western company. That company, in addition to the three-eighths transferred to it by Hubbell and Dodge, had the two quarter-interests originally owned by those companies, making seven-eighths in all. In October, 1893, the consolidated company pledged to F. M. Hubbell & Son five-eighths of the terminal company stock (2,500 shares) as security for a debt. The stock was transferred to the Hubbell firm on the books at that time, and so remained down to the institution of this suit, except as to five "qualifying shares" placed in the names of individuals but controlled by the firm. On January 29, 1894, the indebtedness was settled between the directors of the consolidated company and the Messrs. Hubbell upon terms that included a purchase by the latter of the 2,500 shares of terminal company stock at ten per centum of its par value. Passing for the moment certain special grounds of attack upon the title they thus acquired to these shares, it is obvious that they took them subject to all qualifications arising out of the trust that pertained to the property and franchises of the terminal company.

The quarter-interest in the terminal company stock retained by the consolidated company afterwards passed from it to the complainant Chicago, Milwaukee & St. Paul Railway Company, which acquired at the same time the Northern and Northwestern lines. That company took with notice of the claim of the Hubbells to a five-eighths interest; but this does not estop it from disputing the validity of their claim, nor from setting up, as in this suit, whatever beneficial participation in the trust respecting the terminal property may be incident to its ownership of one-fourth of the stock of the terminal company together with connecting lines of railroad, and asking for relief against any inequitable use by the Hubbells of the five-eighths interest claimed by them.

As to the amendments to the articles of incorporation: These are alleged to have been adopted at a meeting of

the stockholders of the terminal company held April 8, 1890. Their purport was, briefly, to omit from the articles the copy of the contract of 1882 recited therein, the declaration that the powers exercised by the company should be in accordance with the terms and spirit of that contract, and the requirement that assent in writing of the proprietary companies should be necessary before any disposition of the franchises of the terminal company should be made; to set aside previous proceedings respecting the amount of capital stock to be issued to the proprietary companies and provide for the distribution of a much decreased amount ($400,000 par instead of $2,000,000) but in the same proportions as before, the remaining capital stock ($1,600,000 par) to be issued only by resolution of the stockholders adopted by vote of more than seven-eighths of all the stock theretofore issued; and to eliminate the former method of selecting directors and provide that they should be elected by the stockholders, but that it should require the votes of more than seven-eighths of all the stock to elect a director, and that as to all matters except the ordinary operation of the property the directors could act only upon unanimous vote of the eight members of the board. One of the articles adopted purported to repeal, strike out, and expunge the proceedings of a stockholders' meeting held December 10, 1884, at which the original articles of incorporation were adopted.

It is plain enough, and is conceded, that the corporation could not, by merely altering its own internal organization, affect the interests of its *cestuis que trustent.* It is as evidence of a modification of the agreement between the stockholders of the terminal company—themselves beneficiaries of the trust—that the amendments are invoked. So regarding them, the question is, by what authority and with what intent were they adopted? The stockholders' meeting was attended by six individuals (including the two Hubbells), and two others by proxy, each of

whom assumed to represent, and in a general sense did represent, one or the other of the three proprietary companies. F. M. Hubbell himself was president of the Northwestern Company and assumed to represent it. Others present were the vice president of the Northern and the president of the St. Louis companies. The evidence fails to show that those present had express authority to act for the proprietary companies in amending the articles; and action of this kind—materially affecting the property interests of the three companies in a matter so vital as the ownership and control of an important terminal—was so far out of the usual or ordinary course of business that authority to represent their corporations in assenting to it was not to be implied as coming within the general scope of their duties. Nor did either of the proprietary companies, by any formal corporate action, accept or ratify the amendments.

Moreover, it affirmatively appears, and both courts below in effect found, that there was no actual intent on the part of any of the parties concerned to affect the substantial rights or equities of the proprietary companies, or to terminate, repudiate, or substantially modify the trust respecting the terminal property. It does appear that some of those active in proposing the amendments, and assuming to act for the proprietary companies in assenting to them (there is a question whether they actually were adopted by a proper vote of the stockholders, but we do not go into this), were under the impression that the contract of 1882, recited in the articles of incorporation, already had been abrogated and the trust set aside by the issuance of the terminal company's bonds and apportionment of the stock to the proprietary companies in payment for the property conveyed and by the making of deeds absolute in form; that both in respect to the ownership of the property and the management of it under the contract of 1889 the original arrangement had been abandoned; and

that it was desirable to amend the articles so as to make them conform to the situation actually existing.

Clearly, this was a mistaken impression, as will appear from what we have said. It was a mistake not indeed as to any mere matter of fact, nor on the other hand as to any pure question of law, but rather as to the existing legal rights, interests, and relations of the parties resulting from antecedent transactions. Whether it was such a mistake as to furnish ground for a cancellation of the amendments in equity, is a question into which we need not enter. (See *Snell* v. *Insurance Co.*, 98 U. S. 85, 90; *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Utermehle* v. *Norment*, 197 U. S. 40, 56; *Philippine Sugar Co.* v. *Philippine Islands*, 247 U. S. 385, 389; Pom. Eq. Jur., §§ 841–849.) For the fact that those who assumed to act for the proprietary companies in assenting to the amendments were mistaken as to the existing legal situation, so that the amendments, if given effect according to their terms, instead of bringing the articles into conformity with the situation already actually existing, would materially change the situation to the disadvantage of the proprietary companies by putting an end to an important trust contrary to their actual intent as parties beneficially interested, is a cogent reason for holding as we do that authority on the part of agents to assent to such amendments is not to be implied where it was out of the ordinary course of business and express authority was not conferred.

In support of the contention that the terminal property was not subject to any trust either before or after the amendments, defendants cite a series of contracts in which the terminal company asserted its ownership without qualification, and of conveyances, mortgages, etc., by the proprietary companies recognizing the legal title of the terminal company to its property and asserting in themselves only a title to shares in the terminal company. But when a trust is once established and acknowledged it does

not need to be constantly reiterated or confessed. None of the instruments referred to is in anywise inconsistent with the trust; the contracts of the terminal company were made in the very course of its administration of the trust; and the mortgages and conveyances of the proprietary companies dealt with legal titles only, their equitable interests in the terminal passing without mention as incidental to their ownership of the stock together with the connecting lines.

The majority of the Circuit Court of Appeals held that the control of the proprietary companies was relinquished by reason of the amendments and the conduct of the parties at the time and thereafter, upon this theory: that although the amendments were neither previously authorized nor afterwards formally accepted or ratified by the three companies, yet since their executive officers were aware of and approved the action of the meeting; since Hubbell was encouraged to purchase the bonds and stock, the value of the stock being wholly prospective; since after the amendments the stock of the terminal company was issued in accordance therewith and directors elected by the new method, the railroads making no attempt to exercise their right of naming directors in certain proportions as before; since for seventeen years the railroads acted, as it seemed to the court, in harmony with the amended articles, not questioning their validity until this suit was commenced; they could not, after such delay, enforce their rights in a court of equity against defendants who to their knowledge had acted upon the belief that such rights did not exist, and had acquired and held property which had largely increased in value in the interval. It was held that this result had come to pass although the railroads never had intended it; that the sale of a part of the Wabash stock by the purchasing committee to Hubbell and Dodge, then influential in the two other roads, would seem at the time a mere rearrangement of the interests of

the three companies in the terminal company; but that the effect of the amendments was a severance of the control of the roads over the terminal company, and subsequent events confirmed this, so that when the Hubbells disposed of their interests in the Northern and Northwestern to the Milwaukee, retaining for themselves a majority of the terminal holdings, the result was that the railroads themselves had gradually let slip that exclusive ownership and control which at the beginning they had so much valued and so carefully guarded.

Convinced that the relation of the parties was fiduciary and not merely contractual, we are unable to accept the view thus outlined. It would require a clear case to warrant a court of equity in declaring that the trustees of an express trust, in the very course of their administration of the trust, had acquired a dominant interest in the trust property and in effect a discharge of the trust, through mere inattention or even negligence—not raising an estoppel or amounting to laches—on the part of the parties beneficially interested, or of their executive officers. Conduct merely equivocal, or apparently inconsistent with a vigilant insistence upon the obligations of the trustee, is not sufficient to discharge a trust. The *cestui que trust* is entitled to rely upon the fidelity of the trustee, until plainly put on guard against him. And the trustee is at all times disabled from making a profit for himself out of any dealings in the trust property without the express consent of the *cestui que trust.*

Nothing appears to create an estoppel against complainants. Neither they nor their predecessors have misled defendants to their disadvantage. The purchasing committee accepted a money consideration from Hubbell and Dodge for the transfer of a block of stock. But the purchasers had more complete and intimate knowledge of the situation than the committee had, and were specially put on notice, as the correspondence shows. Indeed, their

knowledge of the true nature and office of the terminal company constituted adequate notice. And again, when the Messrs. Hubbell reacquired the same three-eighths with an additional one-quarter interest from the consolidated Northern and Western Company, they were as before chargeable with full notice of all the facts out of which the equities of complainants arise.

The question of laches presents more difficulty; but after mature consideration we are convinced that it must be resolved in favor of complainants. Acquiescence by the executive officers of the proprietary companies in the changed situation resulting from the amendments of April 8, 1890, is stressed by counsel for defendants, as it was in the majority opinion of the Circuit Court of Appeals; it being pointed out that after the amendments directors were elected in the new mode, and that in an agreement of ratification dated July 31, 1897, made for the purpose of giving recognition to the participation of the Wabash and of the consolidated Northern and Western Company in the obligations of the 1889 agreement, it was declared that so much of that agreement as related to the issuance and distribution of the capital stock of the terminal company was no longer binding, and the stock was held in specified proportions, including "F. M. Hubbell & Son 2,500 shares." This was a recognition of their status as *de facto* stockholders, but not a concession that the fiduciary character of the terminal company had been changed, or that the stock possessed any quality or value other than was consistent with the nature and terms of the trust. The parties acted in harmony with the amended articles so far as the internal organization of the company was concerned, but the company remained in possession of the property as before and continued to manage it in accordance with the terms of the agreement of 1889. Such possession was as consistent with a continued recognition of the trust as with the opposite; and it does not appear

that at any time until shortly before the bill was filed defendants contended that the amendments amounted to an express repudiation of the trust or that the terminal company would be free from obligation at the expiration of the agreement. Prior to this there had been a difference about the disposition of the "surplus earnings," but this was no more than a question about the proper construction of the working agreement.

It seems to us the court below attributed undue weight to the conduct of the executive officers of the proprietary companies indicating acquiescence in a supposedly changed situation resulting from the amended articles. It would not be surprising if occasionally there was a failure to appreciate fully and accurately the rights and obligations growing out of the trust. But the Messrs. Hubbell, because of their fiduciary relation, are estopped from laying hold of the incautious, negligent or mistaken acts of the executive officers as a ground on which to build up a profit or advantage for themselves at the expense of the proprietary roads which were their *cestuis que trustent.*

Upon the whole case, it is our conclusion that the trust with respect to the terminal property continues substantially as it was established at the incorporation of the terminal company; that this company holds all its property and franchises—whether conveyed to it at the beginning or acquired since—in trust for the purpose of carrying out, in substance, the terms and spirit of the contract of January 2, 1882, with such minor changes as have been agreed upon since, and is bound to exercise all its powers (including its power to renew the corporate charter) in furtherance of the trust; that the amendments of April 8, 1890, were unauthorized by the proprietary companies and had no effect in discharging or modifying the trust; that complainants are the sole beneficial owners of the property and franchises of the terminal company, and they and their successors and assigns, and such other

railroad companies owning or operating lines of railroad extending to or near to Des Moines as may be admitted to a proprietary interest by consent of complainants and their successors and assigns, are (as between the present parties and their successors) entitled to the sole beneficial use of the terminal property upon paying the cost of the terminal service, including interest upon the mortgage debt and other proper charges, after crediting all revenues derived from other sources, and without profit to the terminal company; and that from and after the expiration of the 1889 agreement complainants were and are entitled to have a similar working arrangement renewed from time to time perpetually: its specific terms to be agreed upon between themselves, or judicially ascertained if they are unable to agree.

Complainants are entitled to a decree establishing the trust, with all appropriate incidental relief. We do not attempt to lay down the particular provisions of the decree. These may be settled by the District Court upon the going down of the mandate.

To consider, next, the status of the Hubbell stock: The title acquired by them from the consolidated company is attacked by the Chicago, Milwaukee & St. Paul on the ground that it was acquired by inequitable means, the Hubbells being at the time in control of the board of directors. It is attacked by the Wabash on the ground that the consolidated company could not in equity pass the stock to the Hubbells and thus impair the interest in the terminal company then held by the St. Louis Company, to which the Wabash has succeeded. We have not found it necessary to consider whether these contentions ought to be sustained as independent grounds of substantive relief, or to what extent they would be affected by the agreement of July 31, 1897, in which the consolidated and the Wabash companies apparently gave recognition to the ownership of the stock by the Hubbells.

We pass this, because convinced that as incidental to the

principal relief granted, and necessary to give full effect to it, complainants are entitled upon equitable terms to have the Hubbell shares (including all "qualifying shares" controlled by them) surrendered for cancellation. Our reasons, briefly, are as follows: The issuance of the stock to the Messrs. Hubbell, and the clause of the 1897 agreement relating to it, already have been considered with other evidence cited by defendants to show an assent to or acquiescence in a modification or abandonment of the trust, and are found insufficient for the purpose. Hence this stock, being like all other stock of the terminal company subordinate to the trust that dominates all its property and franchises, does not represent in the hands of the Hubbells any property interest that they are entitled to set up as against the proprietary companies. When they acquired it, and at all other times material, they themselves were and still are acting in a fiduciary relation to the trust; hence they cannot be heard to assert any right in the stock that is inconsistent with the trust. Manifestly it would be inequitable for them to sell it to a *bona fide* purchaser who might claim (even though unsuccessfully) to hold it exempt from the trust. They may have expected to sell it at a profit to one of the proprietary companies, or with their consent to an outside company or companies qualified to participate in the beneficial use of the terminal property under the trust. But, because of their fiduciary character, they are debarred in equity from trafficking in the trust property in this or any other way, without the express consent of the beneficiaries; they would be bound to account for any profit that might accrue; and any seeming consent on the part of the beneficiaries to waive such profit in advance, not amounting to a termination of the fiduciary relation, is in its nature revocable. The Hubbell stock, therefore, representing no legitimate proprietary interest as against complainants, serves merely to evidence a voting power and to qualify its holders to act as directors

and officers of the terminal company: in short, to participate in a fiduciary employment, without profit beyond compensation for the value of the services rendered. But complainants, being the sole present beneficiaries of the trust and equitable owners of the terminal property, are entitled in equity to a controlling voice in the choice of directors, and especially to have the management of the trustee company, now and hereafter, freed from the domination of a stock interest that represents no property interest in the concerns of the trust. To guard against such alien control and at the same time prevent the danger of the Hubbell stock getting into the hands of *bona fide* holders who might set up rights under it which the present holders are debarred in equity from asserting—in short, to avoid undue jeopardy to the trust—complainants are entitled to have this stock surrendered, retired and canceled, and, until surrendered, to an injunction against any sale, assignment, or transfer of it or any part of it, and against the exercise of any voting power thereon; but upon terms that complainants shall repay to the Messrs. Hubbell the amount they paid to the consolidated Northern and Western Company for it, viz., $25,000, with interest thereon from January 29, 1894. How this should be apportioned, as between complainants, has not been discussed. It may be settled by the District Court.

The issue as to the surplus earnings relates to a considerable accumulation of moneys received by the terminal company from sources outside the proprietary companies. Possibly it may have become a moot question, in view of the result we have reached upon the main matter; but as this is not altogether clear we will dispose of the issue as raised. The agreement of 1889 provided that in making up the net cost of maintenance and operation chargeable to the proprietary lines on a wheelage basis, there should be deducted "the amount if any which other railway companies may be under obligation to pay by virtue of con-

tracts for the use of said property or parts thereof." In the course of time, the terminal company received not only payments from outside railroad companies under contracts technically for participation in the use of the terminal property—which have been credited to complainants and their predecessors according to their wheelage—but, in addition, substantial sums from railroad companies and others for switching and other terminal services and for rent of portions of the property and privileges thereon. Receipts of the latter character were called "surplus earnings." For a period of nearly two years after the making of the 1889 agreement they were included in the credits given to the proprietary companies. This was done at first by the accounting officers of the terminal company under the general direction of its president and executive committee. In February, 1891, the practice was approved by action of the board of directors. About a year later the board resolved that until its further action sums received as rents of real estate and all switching charges should not be thus credited, but should be used as a cash capital "with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies." Thereafter the surplus revenues were not again credited to the proprietary companies.

We concur in the opinion of the Circuit Court of Appeals that by the fair construction of the 1889 agreement and the practical construction placed upon it by the parties at the beginning—a construction entirely consonant with the terms of the trust—complainants and their predecessors were entitled to credit for the surplus earnings as they accrued, each company to a share proportioned to its wheelage; and that the 1897 contract did not change this. It was decreed that these earnings belonged to complainants, and that there should be an accounting to ascertain the part due to each upon a wheelage basis. As to this the only question that occurs to us is whether the accounting

should include sums that have been appropriated out of these earnings and devoted to capital expenditures for acquiring additional property and for permanent improvements—sometimes, apparently, with approval of complainants or their predecessors, sometimes without. This would hardly seem to be of serious consequence in view of the result we have reached upon the main issue. It is chiefly of interest to complainants; but they have not argued the question, declaring indeed that the entire controversy as to the surplus earnings would be material only should this court decide that complainants had no proprietary interest in the terminal company. Defendants have assigned error to so much of the decree of the Circuit Court of Appeals as awards the surplus earnings to complainants, but have not furnished data enabling us to draw an accurate line between those that were and those that were not disbursed for permanent improvements, or between those disbursements that were approved and those that were not. Unaided by counsel we hardly could be expected to unravel the somewhat obscure evidence bearing upon these points. We must therefore content ourselves with simply affirming that portion of the decree which relates to the surplus profits.

The main portion of the decree as attacked by complainants must be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

As to costs, the decrees of the courts below apportioned them one-half to complainants and one-half to the terminal company. We leave this disposition undisturbed. The entire costs in this court should be paid by defendants Frederick M. Hubbell and Frederick C. Hubbell.

*No. 66. Decree reversed.*

*No. 67. Decree affirmed.*

*Cause remanded to the District Court for further proceedings in conformity with this opinion.*

# NICCHIA *v.* PEOPLE OF THE STATE OF NEW YORK.

ERROR TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK.

No. 74. Argued November 17, 1920.—Decided December 6, 1920.

It is within the police power of a State to require payment of license fees by the owners of dogs in cities, under penalty of fine. P. 230.

If, in exercising this power, the State sees fit to provide that the licenses shall be issued and the fees collected by a private corporation created by the State for the purpose of aiding in the enforcement of laws enacted to prevent cruelty to animals, and that the fees so collected shall be applied by such corporation in payment of its expenses fairly incurred and as just compensation for valuable service rendered in such law enforcement, the owners of dogs are not thereby deprived of property or liberty in violation of the Fourteenth Amendment. P. 231.

224 N. Y. 637, affirmed.

THE case is stated in the opinion.

*Mr. George P. Foulk*, with whom *Mr. Joseph Nicchia* was on the brief, opened for plaintiff in error. The court declined to hear further argument.

*Mr. Harry E. Lewis*, *Mr. Harry G. Anderson*, *Mr. J. Mayhew Wainwright* and *Mr. William N. Dykman* for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error owned two dogs which she harbored within New York City without having obtained the license required by c. 115, Laws of New York 1894, as amended by c. 412, Laws 1895, and c. 495, Laws 1902. She was charged with violating the statute on October 11, 1916,

found guilty in the City Magistrates' Court, Brooklyn, and required to pay a fine. The Court of Appeals affirmed the judgment without opinion.

Chapter 115 as amended provides:

"Sec. 1. Every person who owns or harbors one or more dogs within the corporate limits of any city having a population of over eight hundred thousand, shall procure a yearly license and pay the sum of two dollars for each dog. . . ."

"Sec. 8. The American Society for the Prevention of Cruelty to Animals is hereby empowered and authorized to carry out the provisions of this act, and the said society is further authorized to issue the licenses and renewals, and to collect the fees therefor, as herein prescribed; and the fees so collected shall be applied by said society in defraying the cost of carrying out the provisions of this act and maintaining a shelter for lost, strayed or homeless animals; and any fees so collected and not required in carrying out the provisions of this act shall be retained by the said society as compensation for enforcing the provisions of title sixteen of the penal code and such other statutes of the state as relate to the humane work in which the said society is engaged."

"Sec. 9. Any person or persons, who shall hinder or molest or interfere with any officer or agent of said society in the performance of any duty enjoined by this act, or who shall use a license tag on a dog for which it was not issued, shall be deemed guilty of a misdemeanor. Any person who owns or harbors a dog without complying with the provisions of this act shall be deemed guilty of disorderly conduct, and upon conviction thereof before any magistrate shall be fined for such offense any sum not exceeding ten dollars, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid, but such imprisonment shall not exceed ten days."

The validity of the act was questioned upon the ground that it violates the Fourteenth Amendment, § 1, by "depriving a citizen of his liberty without due process of law, to-wit, the liberty of owning and harboring a dog without procuring a license from and paying a fee therefor to the Society, a private corporation." In *Fox* v. *Mohawk & H. R. Humane Society* (1901), 165 N. Y. 517, the Court of Appeals declared a statute essentially the same as c. 115 before the amendment of 1902 invalid under the state constitution because it appropriated public funds for the use of a private corporation and also because it conferred an exclusive privilege. But the court repudiated the suggestion that the statute deprived dog owners of property without due process or delegated governmental power to a private corporation. Thereafter (1902) the legislature amended c. 115 with the evident purpose of meeting objections pointed out in the *Fox Case*. Thus amended the law has been upheld. Our only concern is with the suggested federal question.

The American Society for the Prevention of Cruelty to Animals was incorporated by c. 469, Laws of New York 1866. "The purpose of the corporation was to enforce the laws enacted to prevent cruelty to animals." *Davis* v. *American Society*, 75 N. Y. 362, 366. It has long been recognized by the legislature as a valuable and efficient aid toward the enforcement of those laws. New York Penal Laws, Article XVI, § 196. The payment of public funds to a similar corporation for assistance in enforcing penal statutes has been declared unobjectionable. *People ex rel. State Board of Charities* v. *The New York Society for the Prevention of Cruelty to Children*, 161 N. Y. 233, 239, 250.

Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right. *Sentell* v. *New Orleans & Carrollton*

*R. R. Co.*, 166 U. S. 698. *Fox* v. *Mohawk & H. R. Humane Society*, *supra*. Its power to require those who wish to keep dogs to secure licenses from and pay fees to a public officer is also clear. And when the State in the reasonable conduct of its own affairs chooses to entrust the work incident to such licenses and collection of fees to a corporation created by it for the express purpose of aiding in law enforcement, and in good faith appropriates the funds so collected for payment of expenses fairly incurred and just compensation for the valuable services rendered, there is no infringement of any right guaranteed to the individual by the Federal Constitution. Such action does not amount to the taking of one man's property and giving it to another, nor does it deprive dog owners of liberty without due process of law.

The judgment below must be

*Affirmed.*

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## BOTHWELL ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 78. Argued November 9, 1920.—Decided December 6, 1920.

The contract implied from a taking by the Government is a contract to pay for the property actually taken. P. 232.

Where construction of a Government dam flooded private land, destroyed the owner's hay there stored and forced him to remove and sell his cattle, *held*, assuming an implied obligation to pay for the hay, there was none to pay the loss due to forced sale of the cattle and destruction of business. *Id.*

To review a judgment of the Court of Claims, the Government must appeal; it cannot attack it on the claimant's appeal. P. 233.

54 Ct. Clms. 203, affirmed.

THE case is stated in the opinion.

*Mr. Charles H. Merillat* for appellants.

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

Mr. Justice McReynolds delivered the opinion of the court.

Appellants owned and utilized in their business of stock raising a large tract of land lying in Sweetwater Valley, Wyoming. In June, 1909, much hay was stored upon the land and a thousand head of cattle were there confined. Under the Reclamation Act of June 17, 1902, c. 1093, § 7, 32 Stat. 389, the United States constructed the Pathfinder Dam. This arrested the flood waters and caused inundation of appellants' lands. The hay was destroyed and it became necessary to remove the animals and sell them at prices below their fair value.

Proceedings to condemn the land were instituted by the appellee, in the United States Circuit Court for Wyoming, before the overflow. It is said the right to enter was not acquired until thereafter. The value of the land was ascertained and paid, but the court denied appellants' claim for the hay, and for loss consequent upon forced sale of the cattle and destruction of the business. No appeal was taken. The present suit was instituted to recover for the items so disallowed. The court below gave judgment for value of the hay only, and the cause is here upon claimants' appeal.

Certainly appellants' position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of

justice and the terms of the Fifth Amendment so require." *United States* v. *Cress*, 243 U. S. 316, 329. But nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation. We need not consider the effect of the judgment in the condemnation proceedings.

It is suggested that although the United States did not appeal they may now contest the judgment upon the ground that there was no contractual obligation to make compensation for the hay. "Without an appeal, a party will not be heard in an appellate court to question the correctness of the decree of the trial court." *Cherokee Nation* v. *Blackfeather*, 155 U. S. 218, 221.

The judgment below is

*Affirmed.*

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## SAMPLINER *v.* MOTION PICTURE PATENTS COMPANY ET AL.

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

No. 89. Argued November 12, 1920.—Decided December 6, 1920.

A party who joins the opposing party in requesting the District Court to instruct peremptorily upon the ground that the evidence entitles him to a verdict as a matter of law, may reserve his right to go to the jury if the court should regard the facts as disputed; and where such reservation is properly made, the court cannot ignore it and assume to find the facts from the evidence as though the case had been unconditionally submitted. P. 239.

*Held*, that adequate and timely reservation of the right was made in this case.

255 Fed. Rep. 242, reversed.

THE case is stated in the opinion.

*Mr. John G. White*, with whom *Mr. Austin V. Cannon* was on the brief, for plaintiff in error.

*Mr. Samuel Seabury*, with whom *Mr. William M. Seabury*, *Mr. Robert H. McCarter*, *Mr. Charles F. Kingsley*, *Mr. Howard Thayer Kingsbury*, *Mr. Charles B. Samuels* and *Mr. Alfred P. W. Seaman* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The opinion below is reported in 255 Fed. Rep. 242.

By an assignment executed in Ohio December 28, 1911, the Lake Shore Film and Supply Company, a corporation of that State, undertook to convey to plaintiff in error its claim and right of action against defendants for damages resulting from their violations of the Sherman Act. Relying upon the assignment he brought suit for $750,000 January 16, 1917, in the United States District Court, Southern District of New York. The defendants denied liability, and set up the following as a separate and distinct defense:

"The plaintiff is and at the time of his alleged purchase of the claims in controversy, set up in the complaint herein, was an attorney and counsellor-at-law of the State of Ohio, practicing as such before the Courts of that State. . . . That at the time of said alleged purchase, it was, and is now, the law of the State of Ohio, that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty and got no title to such demand by such pur-

chase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the State of New York. . . . That the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing action thereon."

All parties agreeing, the court directed a separate trial before a jury upon the issues of fact and law arising under the special defense. Plaintiff in error testified in his own behalf and called two other witnesses—none were called by the defendants. The essential facts as well stated by the Circuit Court of Appeals follow:

"The assignment states that—'For value received the Lake Shore . . . Company . . . hereby sells, assigns, and transfers to J. H. Sampliner all of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement by and between the Motion Picture Patents Company; . . . all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore . . . Company, and contrary to and in violation of the Sherman Anti-Trust Act. . . .'

"The testimony shows that the plaintiff had rendered legal services to the assignor as its general counsel in connection with the difficulties in which it found itself with the defendants, and that those services extended over a period from July, 1910, to December, 1911. The plaintiff regarded the reasonable value of his services as worth from $8,000 to $10,000. On December 10, 1911, he was asked by the president of the Lake Shore Company whether he would be willing to bring suit against the defendants,

and that he replied that he would bring the suit, being satisfied that the company had a valid claim, and that it would cost from $8,000 to $10,000. He was informed by the president of the company that it had been losing money very heavily, and it was absolutely impossible for it to undertake any litigation of that kind. He was asked what the company already owed him, and replied in the neighborhood of $9,000 or $10,000. He was told the company did not have the money and could not pay him, and thereupon he said that, if the company would pay him $5,000 in cash, he would cancel the indebtedness. After some reflection the president, Mr. Mandelbaum, told him that the corporation would transfer to him all rights it had against the defendants if he would be willing to accept it as a satisfaction of the company's indebtedness to him. The plaintiff told him that he would think it over and give him an answer. After a few days' reflection the plaintiff expressed a willingness to accept the assignment, and was told that the board of directors wanted to know whether, if they made an assignment, the plaintiff would as a part of the consideration defend the company and its officers in case any suit was brought against them in matters growing out of their difficulties with the defendants. He agreed to do this, and the assignment was executed.

"It appears, therefore, that the assignment originated, not with the plaintiff, but with the Lake Shore Company, and that the consideration for the agreement involved the payment of a past indebtedness, as well as for future services of a professional character. It is also to be noted that the invalidity of the assignment is set up, not by the client, the assignor, who has at no time sought to repudiate it, but by third parties, between whom and the plaintiff no fiduciary relations have existed."

At the conclusion of the evidence the defendants asked a directed verdict "on the ground that the plaintiff has

not shown title to this cause of action; on the ground that it now affirmatively appears from the evidence in this case that the agreement under which the plaintiff assumed to bring this cause of action is champertous and void." Thereupon the following occurred—Mr. Rogers representing the plaintiff:

"Mr. Rogers: If your Honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that if your Honor is going to find for the defendant, that it be a non-suit to the plaintiff's cause of action. I think that is as far as your Honor can go.

"The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.

"Mr. Rogers: But, your Honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your Honor to determine, and I think the question whether the agreement is or is not champertous is one of law for the Court.

"The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

"Mr. Rogers: Well, if there are any questions of fact to be disposed of, your Honor, I ask to go to the jury upon the questions of fact.

"Mr. Seabury: I think he should specify and not put a hypothetical motion.

"The Court: I cannot have any 'ifs.' If you think under Section 973 of the Code, the Court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the Court is right, your exception will be addressed not to

the question of practice, but to the substantive questions in the case.

"Mr. Rogers: Then, your Honor, may I state my position on the record?

"The Court: Yes, certainly.

"Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the Court.

"My understanding is that the question is one of law to be passed upon by the Court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was *bona fide* for an antecedent indebtedness.

"The Court: The Court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the Court will rule.

"Mr. Rogers: Then I move for a direction, your Honor, for the plaintiff, upon the issue framed under your Honor's order on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your Honor's attention particularly to the form of the defense as pleaded. The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

"The Court: Both sides having moved for a direction

of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

"I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the Board of Directors."

A verdict for the defendants was directed and judgment entered thereon. The Circuit Court of Appeals declared itself concluded by the trial court's finding "that the plaintiff purchased this cause of action with intent to sue thereon," and held: "We must dispose of this case upon the theory that the plaintiff did not in fact take this assignment to extinguish a precedent debt, but that he purchased it for the purpose of suing upon it; that he, an attorney at law, purchased from his client for $5,000 a cause of action which he values at $750,000. The question we must answer, therefore, is whether the law sanctions such a transaction between parties standing in the confidential relation of attorney and client. We are satisfied that the common law does not sanction it."

Among other things counsel for plaintiff in error now insist that "if there were any questions of fact to be decided or divergent inferences of fact to be made the District Court erred in not submitting them to the jury." The point is well taken.

Statements by plaintiff's counsel made it sufficiently plain that while he sought an instructed verdict he also requested to go to the jury if the court held a contrary view concerning the evidence. In the circumstances disclosed we think the request was adequate and timely under former opinions of this court. *Empire State Cattle Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1, 8; *Sena* v. *American Turquoise Co.*, 220 U. S. 497, 501; *Schmidt* v. *Bank of Commerce*, 234 U. S. 64, 66; *Williams* v. *Vreeland*, 250 U. S. 295, 298. It should have been granted. Clearly some substantial evidence strongly

tended to show that the assignment was taken in extinguishment of an existing indebtedness and not for mere speculation upon the outcome of intended litigation.

*The judgment below must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.*

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## GREAT WESTERN SERUM COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 90. Argued November 12, 1920.—Decided December 6, 1920.

A contractual obligation of the United States to pay the owner cannot be implied from the seizure and destruction of anti-hog-cholera serum by agents of the Bureau of Animal Industry, without agreement to purchase, nor from the Act of March 4, 1915, c. 144, 38 Stat. 1115, authorizing the Secretary of Agriculture in dealing with an emergency arising from animal disease to expend money in its eradication, including payment of claims growing out of purchase and destruction of materials contaminated or exposed to the disease. P. 241.

54 Ct. Clms. 203, affirmed.

THE case is stated in the opinion.

*Mr. Edwin H. Cassels*, with whom *Mr. James H. Wilkerson* and *Mr. Edward F. Colladay* were on the briefs, for appellant.

*Mr. Assistant Attorney General Davis*, with whom *Mr.*

*Charles H. Bradley*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Serum Company sued to recover the value of anti-hog-cholera serum, anti-cholera virus and serum blood, seized without agreement to purchase by agents of the Bureau of Animal Industry in November, 1914, and thereafter destroyed. Judgment went for the defendant and we are asked to reverse it upon the ground that "as a conclusion of law the court should have found that the Act of Congress of March 4, 1915, created an obligation to pay for appellant's materials, and that the facts show an implied contract to purchase and to pay for such materials." The act provides:

"In case of an emergency arising out of the existence of foot-and-mouth disease, rinderpest, contagious pleuropneumonia, or other contagious or infectious disease of animals, which in the opinion of the Secretary of Agriculture threatens the live-stock industry of the country, he may expend in the city of Washington or elsewhere, out of any money in the Treasury not otherwise appropriated, the sum of $2,500,000, which sum is hereby appropriated, or so much thereof as he determines to be necessary, in the arrest and eradication of any such disease, including the payment of claims growing out of past and future purchases and destruction, in coöperation with the States, of animals affected by or exposed to, or of materials contaminated by or exposed to, any such disease, wherever found and irrespective of ownership, under like or substantially similar circumstances, when such owner has complied with all quarantine regulations, and said sum shall be immediately available for the purposes specified." 38 Stat. 1115.

There was no purchase of the destroyed articles or agreement therefor—none is claimed—and we think it quite clear that no contractual obligation by the United States to pay for them can be implied from the act itself.

The judgment below must be

*Affirmed.*

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## THAMES TOWBOAT COMPANY *v.* THE SCHOONER "FRANCIS McDONALD," HER TACKLE, &c., CUMMINS, CLAIMANT.

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

No. 97. Argued November 18, 1920.—Decided December 6, 1920.

The rule that contracts for the construction of ships are non-maritime and not within the admiralty jurisdiction applies to contracts for the work and material necessary to finish a partly constructed vessel which has been launched. P. 243.

Affirmed.

THE case is stated in the opinion.

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

*Mr. Mark Ash*, with whom *Mr. Peter Alexander* was on the brief, for appellee.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

The libel was dismissed for want of jurisdiction and the cause is here on that question only.

Seeking to recover for alleged supplies furnished and repairs made to the schooner "Francis McDonald" appellant libeled the vessel in United States District Court, Southern District of New York.

Under a definite contract the Palmer Shipbuilding Company began construction of the schooner at Groton, Connecticut, and launched the hull. That company found itself unable to proceed further, thereupon appellant agreed with the owner to complete the work and for such purpose the hull was towed to its yard at New London. While lying there in the stream the materials, work and labor for which recovery is now sought were furnished. Later the vessel, so advanced, was towed to Hoboken and finished by a third company. When received by appellant the schooner was manifestly incomplete—her masts were not in, the bolts and beams and gaff were lying on deck, the forward house was not built, and she was not "in condition to carry on any service." Appellant worked on her for six weeks, and thirty or forty more days were required to finish her.

Was appellant's contract to furnish the materials, work and labor for her completion, made after the schooner was launched but while yet not sufficiently advanced to discharge the functions for which intended, within the admiralty and maritime jurisdiction? The District Court thought not and so do we.

Under decisions of this court the settled rule is that a contract for the complete construction of a ship or supplying materials therefor is non-maritime and not within the admiralty jurisdiction. *People's Ferry Co.* v. *Beers,* 20 How. 393; *Roach* v. *Chapman,* 22 How. 129; *Edwards* v. *Elliott,* 21 Wall. 532; *The Winnebago,* 205 U. S. 354, 363; *North Pacific S. S. Co.* v. *Hall Bros. Co.,* 249 U. S. 119, 125.

But counsel for appellant insist that there is a broad distinction between such a contract and one for work and

material to finish a vessel after she has been launched and is water-borne. In support of this position they rely upon *The Eliza Ladd* (1875), Fed. Cases No. 4364; *The Revenue Cutter* (1877), Fed. Cases No. 11714; both by Judge Deady, in the United States District Court for Oregon—*The Manhattan*, District Court for Washington (1891), 46 Fed. Rep. 797, which followed the District Court for Oregon; and *Tucker* v. *Alexandroff*, 183 U. S. 424, 438. The first three cases are directly in point, but are opposed by many of no less authority. *Tucker* v. *Alexandroff* must be read in the light of the particular matter under consideration—detention of a foreign seaman—and the conclusion announced, that after the vessel was launched "she was a ship within the meaning of the treaty." The court had no immediate concern with contracts for ship construction, and there was no purpose to lay down any definite rule applicable to them. On the other side the following cases are cited, and they are entitled to the greater weight: *The Iosco*, Fed. Cases No. 7060; *The Pacific*, 9 Fed. Rep. 120; *The Count de Lesseps*, 17 Fed. Rep. 460; *The Glenmont*, 32 Fed. Rep. 703, and 34 Fed. Rep. 402; *The Paradox*, 61 Fed. Rep. 860; *McMaster* v. *One Dredge*, 95 Fed. Rep. 832; *The United Shores*, 193 Fed. Rep. 552; *The Dredge A*, 217 Fed. Rep. 617; *The Winnebago*, 205 U. S. 354, 363; *North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 125.

Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. *Edwards* v. *Elliott*, 21 Wall. 532, 554, 555; *The William Windom*, 73 Fed. Rep. 496; *Pacific Surety Co.* v. *Leatham & Smith Towing Co.*, 151 Fed. Rep. 440. And

we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended.

The judgment of the court below is

*Affirmed.*

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## ANA MARIA SUGAR COMPANY, INC., *v.* QUINONES.

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

No. 54. Argued October 21, 1920.—Decided December 6, 1920.

1. The rule that errors in rulings of law committed in a trial court cannot be considered on writ of error unless raised by bill of exceptions has no application to rulings by an intermediate appellate court, like the Supreme Court of Porto Rico, although it has power to review the evidence, make new findings of fact and enter such judgment as it may deem proper. Such rulings are part of the record and need not be excepted to. P. 247.
2. The jurisdiction of the Circuit Court of Appeals for the First Circuit under the Act of January 28, 1915, to review judgments of the Supreme Court of Porto Rico, does not include power to review findings of fact made by that court in an action at law. P. 248.
3. A mistake in bringing up such a case by an appeal instead of a writ of error, is cured by the Act of September 6, 1916, but that act does not abolish the distinction between the two modes of review, and the case will be reviewed as on writ of error. *Id.*
4. Where a judgment of the Supreme Court of Porto Rico in an action for breach of contract was assailed in the Circuit Court of Appeals as based on a particular method of measuring damages, alleged to have been erroneous, but it appeared from the opinion of the former court that the damages were allowed on other grounds which were

not assigned as error or otherwise objected to in the Circuit Court of Appeals and were not there considered, *held*, that they could not be insisted upon as grounds for reversal by this court. P. 249.

251 Fed. Rep. 499, affirmed.

THE case is stated in the opinion.

*Mr. E. Crosby Kindleberger* for petitioner.

*Mr. Jorge V. Dominguez*, for respondent, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Quinones sued the Ana Maria Sugar Co., Inc., in a district court of Porto Rico to recover damages for breach of an oral contract to deliver sugar. Liability was denied on the ground that plaintiff had agreed to deposit the purchase price in a bank to defendant's credit before the time for delivery and failed to do so. The trial judge, sitting without a jury, found on conflicting testimony that this stipulation was part of the contract; and, as the deposit had not been made, entered judgment for the defendant. Quinones appealed to the Supreme Court of Porto Rico with a bill of exceptions which embodied all the proceedings taken and included the evidence. The Supreme Court did not, like the trial court, make specific findings, but it found as a fact upon a review of conflicting evidence that the stipulation relied upon by the company had not been made, reversed the judgment of the trial court, and itself entered judgment for Quinones in the full amount claimed with interest. 24 P. R. 614. From that judgment the company appealed to the United States Circuit Court of Appeals for the First Circuit and assigned fifteen errors. Ten of them charged in different forms that the findings of fact on the main issue were erroneous; three related to the measure of damages; the others were that the complaint did not set

forth a cause of action and that the facts found were insufficient to support the judgment. The Circuit Court of Appeals held that it could consider the last two errors assigned, since they appeared on the face of the record. It gave as the reason for declining to consider the others, that the company had failed to submit to the Supreme Court any request for rulings and had taken no exceptions to rulings made. Concluding that the complaint set forth a good cause of action, that the Supreme Court had power to enter the judgment for Quinones and that the facts found supported its judgment, the Circuit Court of Appeals affirmed it. 251 Fed. Rep. 499. The case comes here on writ of certiorari. 248 U. S. 555.

*First.* The rule relied upon by the Circuit Court of Appeals for refusing to consider errors assigned is well settled. Errors in rulings of law occurring in the course of the trial cannot be considered on writ of error, unless incorporated into the record by bill of exceptions, *Rodriguez* v. *United States*, 198 U. S. 156, 165, because they are not part of the record proper, *Newport News & Mississippi Valley Co.* v. *Pace*, 158 U. S. 36. Compare *Nalle* v. *Oyster*, 230 U. S. 165. But this rule applies only when the error complained of is that of the trial court. It has no application when the errors assigned are wholly those alleged to have been committed by an intermediate appellate court; for if the intermediate court has erred in its judgment, the error will appear by the record of that court without a bill of exceptions. Compare *Morris* v. *Deane*, 94 Virginia, 572. This is true, although the intermediate appellate court has, like the Supreme Court of Porto Rico, power to review the evidence, to make new findings of fact thereon and to enter such judgment as to it may seem proper. See *Compilation of Revised Statutes and Codes of Porto Rico*, § 1141, p. 241; § 5350, p. 867. Compare *Andrews* v. *Cohen*, 221 N. Y. 148, 152-3. No complaint was made by the company of any action taken by the court of first

instance, which had decided in its favor. The errors assigned in the Circuit Court of Appeals related wholly to action taken by the Supreme Court. The reason given by the Circuit Court of Appeals for refusing to consider the errors assigned was, therefore, unsound. But, for other reasons, which will be stated, its decision was right.

*Second.* Under § 35 of the Act of April 12, 1900, c. 191, 31 Stat. 77, 85, the power to review final judgments and decrees of the Supreme Court of Porto Rico, then exercised exclusively by this court, was limited to matters of law. *Garzot* v. *De Rubio*, 209 U. S. 283; *Gonzales* v. *Buist*, 224 U. S. 126; *Rosaly* v. *Graham*, 227 U. S. 584; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Porto Rico* v. *Emmanuel*, 235 U. S. 251. When that act was superseded by § 244 of the Judicial Code, writs of error and appeals from the insular Supreme Court became subject to the same regulations which governed appeals from the district courts of the United States. Thereby this court acquired power to review questions of fact in cases coming to it on appeal in equity or admiralty, *Elzaburu* v. *Chaves*, 239 U. S. 283, 285; but in actions at law which are reviewable on writ of error, there was no right in this court to review the facts, although the case was tried without a jury. *Behn* v. *Campbell*, 205 U. S. 403, 407. The jurisdiction to review judgments and decrees of the Porto Rico courts conferred upon the Circuit Court of Appeals by Act of January 28, 1915, c. 22, 38 Stat. 803, is subject to the same limitation. The cause of action here sued on is in its nature a legal one. The review should therefore have been prosecuted by writ of error instead of by appeal, although the case was tried without a jury. *Oklahoma City* v. *McMaster*, 196 U. S. 529. By reason of § 4 of the Act of September 6, 1916, c. 448, 39 Stat. 727, this failure to adopt the proper appellate proceeding is no longer fatal. But the provision does not abolish the distinction between writs of error and appeals. It merely provides that the party seeking review

shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review. *Gauzon* v. *Compañia General, etc.*, 245 U. S. 86.

It was not contended in the insular Supreme Court that there was no legal evidence to support the finding of the district court. Its judgment was reversed solely because the insular Supreme Court reached a different conclusion on the issue of fact raised by conflicting testimony. Nor was it contended in the Circuit Court of Appeals that there was no legal evidence on which the insular Supreme Court could properly rest its finding. Ten of the assignments of error were directed to findings of fact by the Supreme Court. As these assignments of error raised no question of law and as the Circuit Court of Appeals had no power to review findings of fact in an action at law, it properly denied consideration to these ten assignments of error.

*Third.* It is contended that the judgment of the Circuit Court of Appeals should be reversed because the Supreme Court adopted an erroneous measure of damages. The contract was made August 4, 1914, and the contract price was $3.22½ per hundred weight. All the sugar was to have been delivered before the close of the following week which ended on August 15. The Supreme Court allowed as damages the sum of $6,173.24 with interest. It is insisted here that the sugar was deliverable in instalments; that there was a gradual rise in sugar between August 6 and August 15; and that the Supreme Court should have determined the amount recoverable by ascertaining the market price when each of the instalments was deliverable.

In the Circuit Court of Appeals the company likewise assigned as error that the Supreme Court had allowed compensation based upon the difference between the contract price of the sugar and its market price at the end of the term fixed for delivery. This assignment en-

titled it to have that question considered in the Circuit Court of Appeals, although no exception had been taken in the Supreme Court. The Circuit Court of Appeals did not consider whether the Supreme Court had adopted the proper measure of damages. It decided only that the Supreme Court was not obliged to send the case back to the court of first instance to fix the damages; that it had power to do so itself upon a review of the evidence introduced below; and that its discretion in doing this could not be said to have been exercised unreasonably, since the question of damages had been tried fully below, citing *Burnet* v. *Desmornes*, 226 U. S. 145, 148.

The difficulty with the company's contention is that it does not appear that the Supreme Court fixed the amount of the recovery by applying the measure of damages objected to. The contention that it did so finds some support both in the complaint and in the evidence. But the opinion which discusses the subject of damages at length rests the allowance on other grounds. The court found that the company had, during the month of August, sold at $6.52 large quantities of sugar, including the lot in question, and justified its allowance of damages on three grounds: (1) That on the facts the profits through sale at increased market prices were in contemplation of the parties when the contract was entered into, and the profit which would have been earned, being ascertainable, could be recovered at common law; (2) that the profits were earned by the company on sugar actually belonging to Quinones, and that under the Civil Code of Porto Rico he was entitled to these profits either "as damages or as the proceeds of a resulting trust"; and (3) that if the company wished to limit the damages by the market price on August 6, it must have proved that other sugar was obtainable on that day in Porto Rico, at what it contended was the then market price, but that it had not done so. These rulings by the Supreme Court on the

measure of damages were not assigned as error in the Circuit Court of Appeals and so far as appears objection to them was not otherwise called to its attention. Under Rule 11 of that court, 150 Fed. Rep. xxvii, errors not assigned are to be disregarded, except that the court, in its discretion, may notice a plain error not assigned. As the above rulings of the Supreme Court on the measure of damages were not assigned as errors in the Circuit Court of Appeals and were not considered by it they cannot be insisted upon here as grounds for reversal.[1]

The judgment of the Circuit Court of Appeals is

*Affirmed.*

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## UNITED STATES *v.* NORTHERN PACIFIC RAILWAY COMPANY.

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

No. 88. Argued November 11, 12, 1920.—Decided December 6, 1920.

The requirement of the Safety Appliance Acts that all trains used on any railroad engaged in interstate commerce shall have a certain per cent. of their cars equipped with power or train brakes under control of the engineer, applies to "transfer trains" moving between two yards of a railroad company, over a "transfer" track which crosses at grade streets and lines of independent railroad companies where freight and passenger trains are run, and which also is used, in part, by independent railroad companies for their freight trains. P. 253.

A moving locomotive and cars attached are without the provision of the act only when they are not a train; as where the locomotive is

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[1] Compare *Davis* v. *Hines*, 6 Oh. St. 473, 478; *Litchtenstadt* v. *Rose*, 98 Ill. 643; *Taylor* v. *Pierce*, 174 Ill. 9, 12; *Wilson* v. *Vance*, 55 Ind. 584, 591.

engaged in switching, classifying and assembling cars in a yard to make up a train. P. 254.

It is not the duty of courts applying the act to weigh dangers incident to particular railway operations. P. 255.

255 Fed. Rep. 655, reversed.

THE case is stated in the opinion.

*Mrs. Annette Abbott Adams*, Assistant Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

*Mr. D. F. Lyons*, with whom *Mr. Charles W. Bunn* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Northern Pacific Railway Company owns and uses in interstate commerce a terminal railroad along the water-front of Duluth extending from Rice's Point to Furnace, a distance of four miles. It was sued in the District Court of the United States for the District of Minnesota for violating the Safety Appliance Act [1] by operating over the whole of this road, in September, 1916, two transfer trains, without complying with the requirement that 85 per cent. of the train brakes be coupled so as to be under engine control. One train consisted of a locomotive and forty-eight cars, the other of a locomotive and forty cars. The company contended that the provision of the Safety Appliance Act did not control the operation because this terminal road was not part of a main line; that neither passenger nor freight trains, through or local, moved on it; that on it trains are not operated by time-tables, train

[1] Act of March 2, 1893, c. 196, § 1, 27 Stat. 531, as amended by Act of March 2, 1903, c. 976, § 2, 32 Stat. 943; and order of Interstate Commerce Commission dated June 6, 1910.

orders, or time-cards, nor is the use of the track controlled by block signals; that on it no train has right of way over another; but that there the single operating rule applies which requires all trains to move at such speed that they can be stopped at vision, and that trains are under the yardmaster's orders. The company's contention was sustained by the District Court which directed a verdict for defendant; and the judgment entered thereon was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 255 Fed. Rep. 655. The case comes here on writ of certiorari. 249 U. S. 597.

These additional facts are material: The road for a distance of a mile at the beginning and for less at the end is single track. It crosses at grade two streets on one of which run street cars. It crosses at grade, at five places in all, lines of three independent railroad companies which run freight trains to piers situated between Rice's Point and Furnace. One of these companies also runs passenger trains across defendant's tracks. In addition, two other independent companies use, under the usual traffic-right agreements, about a mile of this railroad as a part of their freight lines to piers situated between Rice's Point and Furnace. These four miles of railroad owned by the Northern Pacific are not used by it for switching or assembling cars. The switching, assembling and classification of cars for its through and local freight is done in the Rice's Point yard where there are fifty-five tracks, each four thousand feet long and at Furnace, where there are fifteen tracks, cars are also switched and assembled. At Berwind and Boston, two intermediate points, where there are respectively nine and six tracks, cars are frequently set out or picked up by transfer trains. The transfer trains here in question appear to have run solid between Rice's Point and Furnace. Trains are run by the Northern Pacific on this line at a speed varying from three to eighteen miles an hour.

The company contends that the rule applied in *United States* v. *Erie R. R. Co.*, 237 U. S. 402; *United States* v. *Chicago, Burlington & Quincy R. R. Co.*, 237 U. S. 410, and *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U. S. 534,[1] is not applicable, because here, unlike those cases, no part of the trains' journey was performed on a track used as part of the main line of the Northern Pacific system. If use of the road as part of a main line were essential in order that operations on it be controlled by the Safety Appliance Act, the requirement would be satisfied in this case by the fact that two independent companies use the road for freight trains under air control and that the passenger trains of another company cross it. "Not only were these [the defendant's] trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect." *United States* v. *Chicago Burlington & Quincy R. R. Co., supra.* But there is nothing in the act which limits the application of the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains . . . used on any railroad engaged in interstate commerce." It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making

[1] That case was decided by this court, April 21, 1919. The decision of the Circuit Court of Appeals in the case at bar was rendered January 15, 1919.

up trains. Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented.

The judgment of the United States Circuit Court of Appeals is

*Reversed.*

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## UNITED STATES *v.* LEHIGH VALLEY RAILROAD COMPANY ET AL.

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

No. 1. Argued October 12, 13, 1916; restored to docket for reargument May 21, 1917; reargued November 7, 1917; restored to docket for reargument June 10, 1918; submitted October 7, 1919; restored to docket for oral argument May 17, 1920; reargued October 5, 1920. —Decided December 6, 1920.

Prior to the enactment of the Anti-Trust Law, the Lehigh Valley Railroad Company, in combination with the Lehigh Valley Coal Company, a subsidiary created and operated as a mere agency or instrumentality of the Railroad Company, deliberately entered upon the policy of purchasing and leasing the anthracite coal lands in Pennsylvania tributary to its extensive railroad system, and of buying up the stocks of corporations owning such lands, for the purpose of controlling the mining, transportation and sale of the coal to be obtained therefrom and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce. This policy was continued after the enactment of the Anti-Trust Act, with the result that a practical monopoly was attained of the transportation and sale of the anthracite derived from the lands tributary to the railroad, the amount so transported coming to exceed one-fifth of the entire annual anthracite production of the country. Considering this result, the methods employed in

achieving it, and the great volume of production and trade involved, as compared with the restricted area of the whole anthracite territory, *held*, that the combination effected a restraint of trade or commerce among the States and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, within the meaning of the first and second sections of the Anti-Trust Act. P. 269.

For the purpose of divesting itself in appearance of interest in the coal transported, the Railroad Company, with the Coal Company, brought about the creation and organization of a Sales Company, whose stock was subscribed for by stockholders of the Railroad Company only, with the aid of a dividend declared by that company for the purpose, and whose management was largely made up of former agents and officials of the Railroad and Coal Companies; the Sales Company, thereupon, in pursuance of the plan, made, in form, an agreement with the Coal Company, for a term of ten years but subject to termination by either party on six months' notice, by which the Coal Company agreed to sell and the Sales Company to buy all coal mined or produced by the Coal Company, at prices mostly fixed at a specified percentage of New York prices, and by which the Coal Company agreed to lease all of its facilities, structures and trestles to the Sales Company, and the Sales Company was inhibited from buying any coal except from the Coal Company and from selling any not so purchased. *Held*, that the Sales Company was neither an independent buyer nor a free agent, and that the contract being a mere device to evade the commodities clause of the Interstate Commerce Act, and obnoxious also to the Anti-Trust Act, was void. *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516. P. 264.

225 Fed. Rep. 399, reversed.

THE case is stated in the opinion. A motion to modify the decree was made and denied at this term. Post, 617.

*The Solicitor General* for the United States.[1]

[1] At the first and second hearings the case was argued by *Mr. Solicitor General Davis* and *Mr. Assistant to the Attorney General Todd*. *Mr. Attorney General Gregory* and *Mr. Arthur W. Machen, Jr.*, Special Assistant to the Attorney General, were also on the brief. At the third hearing the case was submitted by *Mr. Attorney General Palmer* and *Mr. Solicitor General King*, on an additional brief.

*Mr. Edgar H. Boles* for Lehigh Valley Railroad Company, Delaware, Susquehanna & Schuylkill Railroad Company, and the individual defendants.[1]

*Mr. F. W. Wheaton*, with whom *Mr. Allan McCulloh* was on the briefs, for Lehigh Valley Coal Company and Coxe Brothers & Company, Inc.

*Mr. Nicholas W. Hacker*, with whom *Mr. Everett Warren* was on the briefs, for Lehigh Valley Coal Sales Company.

*Mr. E. V. B. Getty* filed a brief on behalf of the G. B. Markle Company.

*Mr. John Hampton Barnes* and *Mr. Elihu Root, Jr.*, filed a brief on behalf of the Girard Trust Company.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal from a decree entered in a suit to dissolve the intercorporate relations existing at the time it was commenced in March, 1914, between the defendant corporations, other than Girard Trust Company, for the reason, it is averred, that they were so united that they constituted a combination in restraint of interstate trade and commerce in anthracite coal and an attempt to monopolize and an actual monopolization of a part of such commerce, in violation of the Anti-Trust Act of Congress of July 2, 1890, c. 647, 26 Stat. 209; and also for the alleged reason that the Lehigh Valley Railroad Company was transporting over its lines of railway anthracite coal in which it had an interest, in violation of the Commodities Clause of the Act of June 29, 1906, c. 3591, 34 Stat. 585.

[1] At the first hearing the case was argued by *Mr. John G. Johnson* and *Mr. Edgar H. Boles*. At the second hearing it was argued by *Mr. Edgar H. Boles*, who also submitted at the third hearing.

It will be necessary to consider only the relations and activities of the Lehigh Valley Railroad Company, hereinafter designated the Railroad Company, the Lehigh Valley Coal Company, designated the Coal Company, and the Lehigh Valley Coal Sales Company, designated the Sales Company.

A condensed history, chiefly admitted, of the organization, stock ownership and conduct of these three companies, and the application to the facts thus developed of fully established principles of law, will be decisive of the case.

The limited area of anthracite-producing territory, its relation to the interstate transportation system and markets of our country and the various attempts to monopolize and control the great railway tonnage originating therein have all been so often described in reported cases, that they need not be repeated here in detail.[1]

It will suffice for our present purpose to say that the anthracite-producing territory is very restricted in area, it all being within seven counties of eastern Pennsylvania with the known deposits underlying only 309,760 acres of land. For trade purposes it is divided into three fields, the northerly is called the Wyoming field, the next southerly the Lehigh or Middle field and the southerly the Schuylkill field. The lines of the Railroad Company extend into the Wyoming and Lehigh fields but to only one colliery in the Schuylkill field. Much the greater part of its tonnage is derived from the Wyoming field, and four-fifths of it moves in interstate commerce.

The Railroad Company in 1913 owned 1438 miles of main line and a total trackage of 3354 miles, its capital

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[1] *United States* v. *Reading Co.*, 183 Fed. Rep. 427; *United States* v. *Reading Co.*, 226 Fed. Rep. 229; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516; *United States* v. *Reading Co.*, 226 U. S. 324; *United States* v. *Reading Co.*, 253 U. S. 26.

stock was $60,600,000, its funded debt was $85,800,000, its total assets had a book value of $182,700,000, but a much greater actual value, and it carried a larger tonnage of anthracite coal than any other railroad in the country—over 13,000,000 tons in 1913, this being 18.84% of the total 69,000,000 tons shipped over all railroads in that year.

In 1864 the Railroad Company by merger with a coal company acquired a small acreage of anthracite-containing land and thereupon added the mining, shipping and selling of coal to its duties as a carrier.

The annual reports of the Railroad Company show that, as early as 1868, it entered upon the policy of acquiring by purchase and lease the control of as much as possible of the anthracite coal-containing lands tributary to its lines of railroad for the purpose of preventing, or, when it had become established of suppressing, competition in the carrying of coal over its interstate lines to interstate markets.

Thus the annual report of the Company for 1868 shows that, it having been determined that it was of "the utmost importance" to the future welfare of the company to secure "control of tonnage for our roads from regions having other outlets to market," the Company, by merger of two coal companies, obtained coal lands which secured to it the whole trade of the Hazelton Coal field and "the withdrawal from competition" of a business so large as to greatly strengthen the "future prospects of our road."

In 1869 the policy of securing a proportion of the coal trade from each region by the purchase of interests in companies owning lands on or near the several branches of the company was approved and "continued."

In 1871 it is reported, "We have continued to acquire interests in coal lands situated in our various regions."

In 1872, after detailing the purchase for $2,000,000 of 5800 acres of land having upon it ten collieries, the report of the Company declares that, "Should there be a corre-

sponding increase for a year or two more the total consumption will so nearly equal the full capacity of the mines for production as to *render unnecessary all attempts to regulate or control the trade.*"

After reciting that a contract had been entered into granting to the Delaware, Susquehanna & Schuylkill Railroad Company trackage rights to tidewater, the report of the Railroad Company for 1894 continues, saying that there is thereby assured to the Company "an important traffic . . . for which several outlets existed and which had been in contention for some time previously. It also removed an incentive to the construction of further new lines into the territory tributary to the Lehigh Valley System."

Although in 1875 it caused the Coal Company (hereinafter discussed) to be organized for the purpose of taking title to coal lands then owned or which might thereafter be purchased, and although the Anti-Trust Law was enacted in 1890, nevertheless, the Railroad Company continued its policy of purchasing for control and from time to time it acquired and took in its own name the title to extensive tracts of coal lands and to stocks in coal companies. Thus in 1885 it acquired the entire capital stock of the Wyoming Valley Coal Company, the owner of 1657 acres of anthracite land, in 1900 it acquired the entire capital stock of the Westwood Coal Company, a considerable owner of anthracite land, in 1901 it acquired the entire capital stock of the Connell Coal Company, and in the same year the entire capital stock of the Seneca Coal Company, the owner of 1308 acres of anthracite land.

In the years prior to 1905 the Railroad Company made a number of other purchases of coal land, but in that year it made its largest single and most significant purchase, when it acquired, for the sum of $17,440,000, all of the capital stock of Coxe Brothers & Company, Inc. This company was the largest independent coal operator then

on the line of the Railroad Company, and its production for 1905 exceeded 1,100,000 tons. It not only owned extensive areas of coal land, on which were located eight collieries, but it was also owner of all of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company, which owned fifty miles of railway which served other large independent mines in addition to those of Coxe Brothers & Company, Inc. This railroad had connections with the Reading, Pennsylvania and New Jersey Central lines, which were taken up or fell into disuse when the control of it passed to the defendant Lehigh Valley Railroad Company. The Railroad Company continued to own all the capital stock of Coxe Brothers & Company, Inc., to the time the testimony was taken in this suit and it is admitted that that company then held in fee or under long lease 36,490 acres of land in the anthracite field, 7,169 acres of which were known to contain anthracite coal. This purchase was confessedly made to prevent the diversion of traffic to other lines, and, while the company was continued in form as a separate corporation, the officers and directors of the Coal Company were made its officers and directors, and in June following the year of the purchase its directors by resolution provided that the net earnings of the company should be paid to the Railroad Company without the formality of declaring a dividend, and this practice continued until 1911.

Thus, this important Coal Company and its railroad became a mere coal-producing and transporting agency of the defendant Railroad Company.

In 1874 the State of Pennsylvania adopted a constitution containing the provision that:

"No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works." (Constitution of Pennsylvania, 1874, Art. 17, § 5.)

Prior to this time the Railroad Company had been a large owner, miner, shipper and seller, as well as carrier, of anthracite coal and, as if for the purpose of complying with the new constitution of the State from which it derived its franchise, it caused the Lehigh Valley Coal Company to be created in 1875 by the consolidation of two smaller companies. This company, which was organized for the purpose of taking title to coal lands and stocks in coal companies, then owned or thereafter to be acquired by the Railroad Company, and to conduct the business of mining, shipping and selling coal, had an original capital of $650,000, which was afterwards increased to $1,965,000, all of which has been owned by the Railroad Company from the beginning. Coal-producing lands and stocks in various coal companies were purchased from time to time by the Railroad Company, directly or through advances of money to the new coal company for that purpose, title thereto being taken in the Coal Company, with the result: that when this suit was commenced that company admitted itself to be the owner of 54,229 acres of land in the anthracite-producing regions, of which 24,748 acres were located along the lines of the Railroad Company; that the funded debt of the company had become $20,000,000; and that the value of its assets amounted to about $35,000,000. Eight and one-half million tons of anthracite, of the thirteen millions carried by the Railroad Company in 1913, were produced by this Coal Company and by Coxe Brothers & Company, Inc., owned, as we have seen, by the Railroad Company. The combined acreage of lands owned by the Coal Company and by Coxe Brothers & Company, Inc., is admitted to be 90,719 acres, of which 61,238 acres are located along the lines of the Railroad Company. The annual reports of the Coal Company show that in 1903 56.77% of the coal transported over the Railroad was produced by the Coal Company and its affiliated companies; that in 1906 the percentage produced and pur-

chased was 85.25% of that transported; and in 1907 it was 87.11%. The Interstate Commerce Commission found that in 1908 the company controlled 95% of the tonnage moving over its line to tidewater. *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 21 I. C. C. 129, 154.

The Railroad Company and the Coal Company had usually the same president, secretary, treasurer and auditor, and the latter company admits, as it must, that the Railroad Company "as the owner of stock controls and long since has been controlling the election of its directors." The Railroad Company constantly advanced large sums of money to the Coal Company for the purchase of property and for operating capital. The total of these advances to the year 1892 exceeded $15,500,000, which amount, however, was reduced by operations of the Coal Company to $11,500,000. The Coal Company never paid any dividends, its earnings being frankly treated as those of the Railroad Company, and the financial and other relations between the two companies were so intimate and interlaced that in argument it is admitted that "in the last analysis the assets of the Coal Company are the assets of the Railroad Company."

There is much more in the record to like effect, but sufficient has been stated to make it clear beyond controversy, that the Coal Company was organized and conducted as a mere agency or instrumentality of the Railroad Company, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands and in the conducting of coal mining, shipping and selling operations by the Railroad Company, and that the policy of purchasing and leasing coal lands tributary to its lines for the purpose of controlling interstate trade and commerce in anthracite coal and of preventing and suppressing competition therein, was deliberately entered upon by the Railroad Company, and in combination with its agency, the Coal Company, was consistently pursued, with in-

creasing energy and scope after the passage of the Anti-Trust Act, until the commencement of this suit, unless these purposes and results, in point of law, were modified and cured by the organization in 1912 of the Sales Company and by the functions which it performed—which remain to be considered.

On January 11, 1912, the board of directors of the Railroad Company requested the directors of the Coal Company "to consider the propriety of organizing a coal sales company" and of entering into a contract with it when formed "for a limited time" for the purchase and sale by it "of the coal mined, purchased and owned by the Coal Company." The board also requested that the privilege of subscribing for the stock of the new company be extended, "not to the Railroad Company, but, pro rata, to the common and preferred stockholders of the Railroad Company." As if anticipating compliance with its request on the part of the Coal Company, of which it owned all of the stock, the officers of the Railroad Company were authorized at the same meeting of the board to take such action and make such conveyances as might be deemed necessary or advantageous in perfecting the sales arrangement with the new company to be organized, and in aid of the enterprise a dividend of ten per cent. on the stock of the Railroad Company was declared, payable on February 26, which amounted in the aggregate to $6,060,800.

On the same day the board of directors of the Coal Company resolved: that the new Sales Company should be organized, as requested by the Railroad Company, with a capital stock of $10,000,000, but that only $6,060,800 of it should be issued; that when the new company was formed the Coal Company should, "if possible," contract with it for a "limited time" for the sale to it "of all coal which shall be mined, purchased, owned or acquired" by the Coal Company during the term of the proposed contract, so that the title to such coal should vest in the Sales

Company "before the transportation thereof shall be commenced."

The privilege of subscription to the capital stock of the new company was restricted to the stockholders of the Railroad Company.

The Sales Company was promptly organized and the minutes of the company show that slightly less than 97% of the stock was subscribed for by stockholders of the Railroad Company.

The Sales Company had seven directors. One of these, J. W. Skeele, who was also elected president, had been general sales agent of the Coal Company; another, W. R. Evans, had been assistant to the general sales agent of the Coal Company; another, L. D. Smith, was a director of the Railroad Company, and a fourth, Paul Moore, was a son of a large stockholder in the Railroad Company. The vice president of the company, G. N. Wilson, had been general auditor of the Railroad Company, and the treasurer, W. J. Burton, had been employed as assistant secretary of the Coal Company.

It is too plain for discussion that with a company thus organized and officered, the making of a contract by the Coal Company for the sale of all of its coal to the Sales Company was, in substance and effect, making a contract with itself, the terms of which it could determine in its discretion.

Immediately after the organization of the Sales Company, the anticipated contract between that company and the Coal Company for the purchase of all the coal which the latter might mine or purchase was entered into and bears date March 1, 1912. This contract was to continue for ten years unless terminated in the manner which it provides for, and its terms are so nearly identical with the earlier Lackawanna contract, which is considered in *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, that the judge who tried this case below, with

entire propriety, says that the differences between the two are "wholly unsubstantial" (225 Fed. Rep. 401). This court held that the contract in the *Lackawanna Case* was void because violative of the provisions of the Anti-Trust Act and the Commodities Clause of the Act to Regulate Commerce.

The discussion of the Lackawanna contract is so full and satisfactory in 238 U. S. 516, that it would not serve any useful purpose to comment in detail upon the contract which we have here. It will suffice to say that the provisions of the Lackawanna contract, which were clearly determinative of the former decision by this court, are plainly the same in substance, and almost exactly the same in form, as those in the contract we are considering, viz: The agreement (1) of the Coal Company to sell and of the Sales Company to buy all of the coal mined by the Coal Company from lands owned or leased by it, together with all coal which it might purchase; (2) that the prices to be paid for the more important grades of coal shall be sixty-five per cent. of the New York prices—the two contracts are in precisely the same words in this respect; (3) that, with negligible exceptions, the Sales Company is to sell no other coal, for itself or for any other, than that "purchased" from the Coal Company; (4) that the Coal Company shall lease all of its facilities, structures and trestles to the Sales Company; (5) that either party shall have the right to abrogate and cancel the contract upon giving to the other six months' notice of its desire so to do; (6) that the Sales Company shall not buy coal except from the Coal Company—a provision which excludes the Sales Company, potentially a strong competitor, from the market. The Coal Company purchased 2,960,000 tons of coal in 1911 in addition to that which it mined.

These are the contract provisions which led this court, in the former case, to hold that a corporation organized and circumstanced as is the Sales Company which we have

here,—subject to be stripped at the will of another of all of its business and of all its facilities for carrying on the business for which it was incorporated—was neither an "independent buyer nor a free agent."

Being entirely satisfied with the reasoning upon which the *Lackawanna Case* proceeds to its conclusion, we hold now, as it was there in principle held: that the purchase in form by the Sales Company did not so dissociate the Railroad Company from the transportation of coal in which it was interested as to meet the requirements of the law, that the contract, nominally of purchase, was so calculated to restrain interstate trade as to be obnoxious to the Anti-Trust Act of Congress, and that for this reason it is unlawful and void.

It will be of service in determining the purposes of the defendant Railroad Company with its corporate subsidiaries in the activities thus discussed, to recall the history of the defendant Railroad Company, as it appears in the decisions of this and of other courts.

In 1892 the defendant Railroad Company and the Central Railroad Company of New Jersey leased their lines of railway for the term of 999 years to the Reading Railroad Company, a parallel competing carrier, extensively engaged in mining, marketing and selling anthracite coal. This combination, had it become operative, would have gone far toward monopolizing the interstate transportation and trade in anthracite coal of our entire country, but all operations under the lease of the Central Railroad Company of New Jersey were enjoined by the New Jersey courts, for the reason that it was deemed to be in restraint of trade, against public policy and calculated to partially destroy competition in the production and sale of anthracite coal, a staple commodity of the State. *Stockton* v. *Central R. R. Co.*, 50 N. J. Eq. 52. Thereupon the lease of defendant's property was abandoned and surrendered.

Six years later, in 1898, the defendant Railroad Company combined with the Reading and four other railway companies to contribute a large sum of money, which was successfully used to prevent the construction of a projected, competing line of railroad from the anthracite fields to tidewater. Of this enterprise this court said: "We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the States in plain violation of the Act of Congress of July 2, 1890." *United States* v. *Reading Co.*, 226 U. S. 324, 355.

Four years later, in 1902, the defendant Railroad Company united with the Reading and four other anthracite carriers in a combination to control the entire tonnage of coal produced by independent operators along the lines of their respective railways. The device this time resorted to was a contract to purchase all the coal produced by independent mines, then opened or which might thereafter be opened by the vendors, and to pay therefor sixty-five per cent. of the market price prevailing at tidewater points at New York, to be computed from month to month by an arbitrator to be selected by agreement. These contracts were elaborately considered and unsparingly condemned by this court in the case which is cited, and the conclusion reached was that the defendants in that case had unlawfully combined, by and through the instrumentality of the sixty-five per cent. contract, for the purpose of controlling the sale at tidewater of the independent output of anthracite coal. The contracts were declared to be unlawful and were ordered cancelled. 226 U. S. 370, 371, 373.

In 1911, in *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 21 I. C. C. 129, 154, 163, the Interstate Commerce Commission held that the only line of demarkation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company was one of bookkeeping; that the Rail-

road Company had "monopolized the coal field served by it" and that it had been guilty of unjust discrimination and of charging unreasonable rates for which reparation was awarded. 23 I. C. C. 480. This decision was sustained by this court in *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412.

And yet again, in 1915, the Interstate Commerce Commission, after an investigation extending over three years, in which the defendant Railroad Company and all other initial carriers of anthracite were parties, held that the rates charged by the defendant and other carriers to tidewater and to certain interior points were unreasonable; that by trackage and other arrangements they had extended advantages to their subsidiary coal companies, to the prejudice of other shippers; and that concessions as obnoxious as "direct cash rebates" had been made to such coal companies. *In the Matter of Rates, Practice, Rules, and Regulations Governing the Transportation of Anthracite Coal*, 35 I. C. C. 220.

This history of almost twenty-five years casts an illuminating light upon the intent and purpose with which the combination here assailed was formed and continued. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 76.

Without further comment, this discussion of the record requires us to conclude that it is clearly established that prior to the enactment of the Anti-Trust Act, the Railroad Company, in combination with its coal company subsidiary, deliberately entered upon a policy of making extensive purchases of anthracite land tributary to the Railroad Company's lines, for the purpose of controlling the mining, transportation and sale of coal to be obtained therefrom and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and that this policy was continued after the passage of the Anti-Trust Act with increasing energy and tenacity of purpose, with the result that a

practical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.

The area of the anthracite territory is so restricted that to thus obtain control of the supply of such coal on a great system of railway (the amount transported exceeded one-fifth of the entire production of the country for the year before this suit was commenced) by a combination of corporations, such as we have here, and by such methods as we have seen were employed, effected a restraint of trade or commerce among the several States and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, clearly within the meaning of the first and second sections of the Anti-Trust Act as they have frequently been interpreted by this court. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 61; *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 392, 393; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209; *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 533; *United States* v. *Reading Co.*, 253 U. S. 26.

Since we have also found that the contract between the Coal Company and the Sales Company was a mere device to evade the Commodities Clause of the Interstate Commerce Act and therefore void, it results that the decree of the District Court must be reversed and the case remanded with instructions to enter a decree, in conformity with this opinion, dissolving the combination effected through the intercorporate relations subsisting between the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, Coxe Brothers & Company, Inc., the Delaware, Susquehanna & Schuylkill Railroad Company and the Lehigh Valley Coal Sales Company, with such provisions for the disposition of all shares of stock, bonds, or other evidences of indebtedness, and of all property

of any character, of any one of said companies owned or in any manner controlled by any other of them as may be necessary to establish their entire independence of and from each other. The contract of March 1, 1912, between the Coal Company and the Sales Company must be decreed to be void and all contract relations between the two companies enjoined which would serve in any manner to render the Sales Company not entirely free to extend its business of buying and selling coal where and from and to whom it chooses with entire freedom and independence, so that it may in effect, as well as in form, become an independent dealer in coal, and free to act in competition, if it desires, with the defendant Coal Company or Railroad Company.

As to the New York & Middle Coal Field Railroad & Coal Company, the G. B. Markle Company, the Girard Trust Company and the individual defendants, the bill must be dismissed.

*Reversed and remanded with instructions to enter a decree in conformity with this opinion.*

THE CHIEF JUSTICE and MR. JUSTICE HOLMES, while if they exercised an independent judgment would be for affirmance, nevertheless concur in the conclusion now announced by the court because they consider that they are so constrained to do in virtue of the controlling effect of the previous decisions in the *Lackawanna* and *Reading Cases* cited in the opinion of the court.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS did not take part in the consideration and decision of this case.

# HAUPT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 85. Argued November 10, 1920.—Decided December 6, 1920.

Appellant sued to recover a large sum of money for the use which he claimed the Government had made of his patented improvements in dikes and breakwaters in the construction of jetties, which, with dredging, had resulted in rendering navigable to seagoing vessels the channel of Aransas Pass, on the coast of Texas. *Held*, that the appropriation acts evinced the willingness of Congress to expend money in testing his patented devices, but no intention to pay him until their usefulness should be proved; and that no promise of the Government to pay him for the use made could reasonably be implied. P. 278.

53 Ct. Clms. 591, affirmed.

THE case is stated in the opinion.

*Mr. Benjamin Carter*, with whom *Mr. George Ramsey* was on the brief, for appellant.

*Mr. Daniel L. Morris*, Special Assistant to the Attorney General, with whom *Mr. Assistant Attorney General Davis* and *Mr. Edward G. Curtis*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

Aransas Pass is an inlet, naturally too shallow for ocean navigation, connecting the waters of the Gulf of Mexico and those of Aransas Bay and the Bay of Corpus Christi on the coast of Texas. The problem of obtaining a navigable channel through this Pass occupied the attention of the Government and of private enterprise for many

years prior to 1912, when a channel of the desired depth of twenty feet was obtained.

This is a suit instituted by the appellant, Haupt, a distinguished engineer and the patentee of improvements in dikes and breakwaters, to recover a large sum of money for the use which he claims the Government made of his invention in the construction of jetties, which, with dredging, resulted in the creating of the Aransas Pass channel in 1912. The Court of Claims dismissed the petition holding that no contract, express or implied, with the United States was shown for the use of appellant's patented invention and that it was therefore without jurisdiction.

A resumé of what was done in the effort to procure the channel, which is necessary to a decision of the case, will develop the relations of the appellant to the enterprise and to the Government on which he bases his claim.

Between 1880 and 1889 the United States Government constructed what is designated in the record as the "Mansfield Jetty," 5,500 feet in length, designed to deepen the channel through the Pass,—but it had no appreciable effect on the depth of water and the work was suspended in 1889.

In 1890 the State of Texas chartered the Aransas Pass Harbor Company, a private corporation, organized for the purpose of improving the channel at Aransas Pass, and in the same year Congress authorized the company to construct such jetties and breakwaters as might be necessary to create and permanently maintain a navigable channel "across the outer bar, which obstructs the entrance to Aransas Pass Harbor." This company built the jetty designated in the record as the "Nelson Jetty," about 1,800 feet in length, which also failed to deepen the channel and was abandoned in 1893.

In 1894 another act of Congress granted an extension of time to the same company to further pursue its objects, and at this point in the history the appellant appeared

with United States Patent No. 380,569 for certain improvements in dikes and breakwaters for improving the channels of rivers and harbors.

In the view we take of the case it will be a sufficient statement of the principle involved in, and of the claims of, appellant's patent to say that the inventor aimed to accomplish results with a single jetty, of a form specially adapted to each locality, which had theretofore been accomplished only with two or more jetties. The claims are variously worded, as usual, but the substance of the alleged discovery is, that the study of the conformation of the bottom and shores of a given locality and of the prevailing currents, tidal and other, will enable one skilled in the art to so apply the principles disclosed in the patent as to give such form and location to a single breakwater or jetty that it will "cut the advancing waves" and "resist and decompose the flood resultant" in such manner that, without the aid of a second jetty or of dredging, it will scour out and maintain a channel of the required depth in a designated location.

The appellant granted a license to the Aransas Pass Harbor Company to use his patented device or design, on condition that the work should be done under his supervision, and he thereupon prepared the necessary plans and drawings for the construction which he thought would effectuate the desired result. The cost of the jetty, as thus designed by the appellant, was too great for the resources of the company and, upon request, he eliminated a portion of it which reduced the estimated cost by one-half. The jetty thus modified consisted of a reverse curve or letter S and a contract for the construction of it was let in July, 1895. Work was prosecuted vigorously until the following January, by which time it was ascertained that a portion of the first, the "Mansfield Jetty," which had been reported officially as having disappeared, was still in place and in such a position, it was claimed, as to

prevent free erosion by the currents as they had been and would be modified by the new jetty under construction. Thereupon a contract was let for the removal of a part of the "Mansfield Jetty," but in May, 1897, before the new jetty was completed or the old one removed, all work was suspended.

This suspension in the month of May, 1897, marks the end of the effort to obtain the desired channel through private enterprise, and Congress, in May of the following year, by resolution called upon the Secretary of War to prepare and submit plans for the deepening of the Pass to at least twenty feet. Six months later a board created by the War Department reported in favor of two jetties, to be supplemented by dredging. It was recommended that the northerly jetty should be located substantially upon the line of the one partially constructed by the Aransas Pass Harbor Company and the other some distance southerly from it.

While the subject was thus before Congress, appellant brought his plan for dealing with the problem to the attention of the committee, and proposed to enter into a contract to construct and maintain the desired channel for a much less sum of money than the estimated cost of the work recommended by the War Department board. His proposition was given serious attention and, although it was rejected, he was assured by members of the congressional committee that they desired to give his plan a trial,—as well they might, for, if it had proved successful, it would have resulted in a great saving to the Government in dealing with many like situations and problems.

Before any further work was done, the Aransas Pass Harbor Company conveyed to the United States the jetty or breakwater, which we have seen was constructed as designed by appellant, and Congress, in 1899, appropriated $60,000 for dredging and improving the Pass, but with the proviso that the Secretary of War was authorized "to

contract for the removal of that portion of the old Government jetty [the Mansfield Jetty] in said harbor from the end nearest the curved jetty" constructed by the Aransas Pass Harbor Company, but in such manner as not to interfere with that jetty. This is a plain indication of interest on the part of Congress in appellant's theory or method of dealing with the problem, for he was claiming that the old jetty constituted an obstruction to the action of the water and prevented the jetty which the Harbor Company had built under his direction from scouring out the desired channel.

That appropriation was expended and three years later, in 1902, Congress appropriated $250,000 for continuing the improvement of the Pass, but again with the proviso "that the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore carried out on said jetty by said company."

Here again is plainly evidenced the purpose of Congress to give appellant's theory a full and fair trial, for, it should be noted, as yet it had never been reduced to actual practice.

Plans and specifications for the contract under this second appropriation were drawn by the Government engineer in charge and were by him submitted to the Aransas Pass Harbor Company and the appellant suggested amendments, which were adopted. Among other things done under this contract was the removal of a considerable part of the Mansfield Jetty which the appellant had claimed so affected the action of the currents as to prevent the obtaining of the desired results from his construction.

Three years later, in 1905, Congress appropriated a further sum of $100,000, and in 1906 a like amount, for the improvement of the Pass and in each case the provision was incorporated that the money was to be applied to

construction "in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done."

The findings of the Court of Claims are: that in compliance with the provisions of these various acts the work of improvement was continued and completed in 1906, in accordance with the plans and specifications, as modified by appellant; that from 1896 to 1906 the depth and width of the channel were variable and shifting, with a ruling depth of only six feet of water in 1908; and that the evidence does not show to the satisfaction of the court that the so-called Haupt jetty, which was constructed under appellant's direction, "did produce, or would have produced, a navigable channel of the necessary or proper depth and width for navigation purposes."

It is upon the terms in which the three appropriations were made in 1902, 1905 and 1906, each for the construction or completion of the project "in accordance with the design and specifications of the Aransas Pass Harbor Company," that the appellant relies, and from them it is argued that a contract to pay him for the use of his design and for the impairment of his patent should be derived. But we not only have the Court of Claims finding that the experiment of attempting to procure the desired channel by appellant's method and under his plans, pursued through many years and definitely for four years, from 1902 to 1906, at an expense to the Government of $450,000, resulted in failure, but we have the further action of Congress, next to be described, which clearly shows the correctness of the court's conclusion.

In March, 1906, as we have seen, the work of improvement according to the plans as modified by the appellant was completed without securing the required channel. In the following December, a board, appointed by the War Department to further consider the Aransas Pass project, recommended that the spacing which Haupt had left

between the end of his jetty and St. Joseph's Island, for its influence on the currents, should be closed and that a parallel jetty should be built to the south of the Haupt jetty, thus making the project one of two jetties, instead of the single jetty of appellant's plan.

In 1907 Congress appropriated $200,000, and authorized contracts for the additional amount of $290,000 for improving the Pass "in accordance with the plans submitted in its report of December twenty-second, nineteen hundred and six, by the Board of Engineers created by authority of [the] Act of June thirteenth, nineteen hundred and two." It will be seen that all reference to appellant's method of solving the problem disappeared from this act, which adopted the new plan of solution.

Contracts were made under this appropriation of 1907 and a second jetty, generally parallel to the Haupt jetty, was commenced in March, 1908, and completed in 1911. The Court of Claims finds: that, beginning with 1912, coastwise and seagoing vessels have been going through the Pass and that in that year the port of "Aransas Pass" was given the status of a commercial port on a par with Galveston by the Railway Commission of Texas; that "dredging was necessarily done in the years 1912 and 1915, inclusive, to maintain a proper navigable depth of channel in the pass"; and that this construction as ultimately completed "did not embody any of the devices of the plaintiff's [appellant's] letters patent No. 380,569."

It is, of course, essential to recovery by appellant on a *quantum meruit*, that he should prove a contract express or implied, on the part of the Government to pay him, that his patented method of construction was used, and what the value of it was. *Gibbons* v. *United States*, 8 Wall. 269; *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46. The three acts requiring the money appropriated to be used in accordance with the design and specifications of the Aransas Pass Harbor Company, which were prepared by

appellant, implied clearly that Congress intended to give the experimental construction of appellant a fair trial and common honesty would infer a disposition, but not a contract, to pay for the use of the patented form of construction, if it should be found to be valuable. But, saying as much as it did, the failure of Congress to say more imports a determination on its part to hold within its discretion the decision as to the usefulness of appellant's ideas and as to what, if anything, should be paid for them. The absence of any reference to appellant or to his patent and of any words implying a contract to pay him, from the three acts of Congress in which reference is so distinctly made to the specifications embodying his ideas, is unmistakable evidence that Congress deliberately dealt with appellant's theories as still in the experimental stage, and that it was willing to use the public money to give them a trial in practice, but that payment for them was reserved for consideration until their usefulness should be established,—and this, the finding by the Court of Claims shows, was never done.

For these reasons, to the sufficient finding that the construction which produced the desired channel did not embody any of the devices of the appellant's patent, we must add that the record fails wholly to show anything from which a promise by the Government to pay for the use of such devices can reasonably be implied, and therefore the judgment of the Court of Claims must be affirmed.

Being of opinion that our conclusion would not be affected by any findings to be made on the points asked for in the appellant's motion to remand for additional findings of fact, that motion is denied.

*Affirmed.*

# STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER.

IN EQUITY.

No. 23. Original. Motion for order on receiver submitted November 15, 1920.—Order entered December 6, 1920.

Order directing receiver to return certain lands, etc.

UPON CONSIDERATION of the motion of the General Oil Company filed herein November 15, 1920, for an order authorizing Frederic A. Delano, Esq., Receiver herein, to return to said company certain lands claimed under patents from the State of Texas, and the consent of T. P. Roberts and R. S. Allen, owners of patented lands, filed on the date last mentioned, and the response of the Receiver to said motion filed November 20, 1920.

IT IS ORDERED that said Receiver do return to said General Oil Company one certain well known by Receiver's number one hundred and seventy-six (176), which lies south of the south edge of the sand bed of the Red River as it was on the first day of April, 1920, (marked generally by the border line of vegetation along the edge of the flood plain), together with the land appurtenant thereto lying to the south of the south edge of the sand bed of said river, and the structures, equipment, and material pertaining to said well, and the net proceeds of the production thereof that have come to the hands of said Receiver, less operating expenses and reservations, upon terms that said General Oil Company comply with the provisions contained in the order of this Court made June 7, 1920, respecting the return of certain lands lying south of the south edge of the sand bed of said river which were on the first day of April, 1920, in the possession of persons claim-

ing under patents from the State of Texas, and not included in the river bed lands as in said order defined.

IT IS FURTHER ORDERED that except as herein above granted the motion of said General Oil Company for the return of lands, filed November 15, 1920, be, and it is hereby, denied.

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## UNITED STATES *v.* WHEELER ET AL.

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

No. 68. Argued April 28, 1920.—Decided December 13, 1920.

1. In all the States, from the beginning down to the establishment of the Articles of Confederation, the citizens possessed the right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom. A consequent authority resided in the States to forbid and punish violations of this right. P. 293.
2. Uniformity of this right was secured by the Articles of Confederation, not by lodging power in Congress to deal with the subject, but by subjecting the continued state power to the limitation that it should not be used to discriminate, Art. IV providing that the free inhabitants of each State, with certain exceptions, should be entitled to all the privileges and immunities of free citizens in the several States, and that the people of each State should have free ingress and regress to and from any other State. P. 294.
3. The Constitution, by Art. IV, § 2, plainly intended to preserve and enforce this limitation imposed upon the several States by Art. IV of the Articles of Confederation, and in so doing necessarily assumed that the States possessed the authority to protect the right of free residence, ingress and regress as a part of their reserved power. *Id.*
4. The Constitution does not guarantee this right against wrongful interference by individuals, but only against discriminatory action by States. P. 297. *Crandall* v. *Nevada*, 6 Wall. 35, distinguished.

5. A conspiracy to deprive citizens of the United States of their right to remain in a particular State, by seizing them and deporting them to another State, is not an offense under § 19 of the Criminal Code.

254 Fed. Rep. 611, affirmed.

THE case is stated in the opinion.

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

Our claim, and our entire claim, is that the right of free ingress and egress is secured, not by any express provision of the Constitution (except in so far as the Fourteenth Amendment enlarges the scope of the term "citizen of the United States"), but impliedly by the creation of citizenship of the United States, as contradistinguished from purely state citizenship, which the Constitution as certainly and immediately effected as it did the Union itself. It was "the people of the United States" who ordained and established the Constitution, and it was they who, upon its ordination and establishment, became citizens of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 403, 404.

Prior to the Constitution the rights of such persons (if any) would be governed by international or municipal law. They would not differ materially in this respect from the rights of persons who were expelled at the present day from one of the United States into Canada or Mexico. In so far as the political bodies themselves were concerned, the only action possible would be diplomatic correspondence, followed (it may be) by reprisals or even by war. In so far as the individuals injured were concerned, there might be, either under international or under municipal law, prosecutions in the State *ab quo*, or, perhaps in the State *ad quem*, if it could be said that the crime was consummated in the latter.

What would be the situation after the Constitution?

For, in so far as greater or additional rights appear at the later period, such greater or additional rights must necessarily be rights granted and hence secured by the Constitution.

As to the political bodies, the right to diplomatic correspondence, reprisals, and war was expressly taken away by the Constitution, Art. I, § 10, and there arose therefrom a new and different remedial right, viz., the right to sue in the federal courts either the political body or the individuals responsible for the damage. *South Carolina* v. *Georgia*, 93 U. S. 4, 9; *Missouri* v. *Illinois*, 180 U. S. 208, 241; *s. c.*, 200 U. S. 496, 518–520; *Kansas* v. *Colorado*, 185 U. S. 125, 146, 147; *s. c.*, 206 U. S. 46, 96, 97; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237.

The question is, Did the Constitution change the situation, as respects the individuals injured, in any respect? Did it give them greater or additional rights? Or did it leave them as to their rights in the same situation in which it found them? Whereas before they were merely citizens of one particular State, being aliens in a sense to all others, they now became in addition citizens of the United States. This was implied in the very formation of the Federal Union. A new allegiance was created with a new corresponding duty in the liege of protection to the subjects. They came within the "peace of the United States." *In re Neagle*, 135 U. S. 1, 69. Their progress therefore from one State to another (or into the Territories), their egress from one, their ingress into another, while it might find them in places where their state citizenship would not give them all the rights it did at their domiciles, would never find them in any place where the all-prevailing quality of citizenship of the United States would not accompany them, with all the rights, substantive and remedial, which the term denotes.

It is important to emphasize the fact (as we claim)

that federal citizenship, with all its main privileges and immunities, came from the very fact of the institution of the new government under the Constitution, and not from the Fourteenth Amendment. Of this there can be no possible doubt.

It was early assumed and held, that the Constitution impliedly created a citizenship of the United States, and it followed necessarily that it also impliedly secured the requisite privileges and immunities of such a status. 1 Stat. 103; *Talbot* v. *Jansen*, 3 Dall. 133, 136, 153, 154; *State* v. *Hunt*, 2 Hill, 1, 218–220; *Hepburn* v. *Ellzey*, 2 Cranch, 445; *New Orleans* v. *Winter*, 1 Wheat. 91; *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542; *Gassies* v. *Ballon*, 6 Pet. 761; *Lynch* v. *Clarke*, 1 Sandf. Ch. Rep. 583, 640, 641, 642; *Prentiss* v. *Brennan*, 2 Blatchf. 162, 164, 165; *Minor* v. *Happersett*, 21 Wall. 162, 165–167.

The right of a citizen of one of the States to free ingress and regress to or from another State (a right somewhat similar to the one set up in the indictment in the case at bar), is secured in some sense by § 2 of Art. IV of the Constitution. *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Slaughter-House Cases*, 16 Wall. 36, 75. We, however, expressly disclaim any reliance upon this constitutional provision. It was held in the *Slaughter-House Cases*, *supra*, that the rights referred to in § 2 of Art. IV are the fundamental rights of citizenship, as such, and not the rights peculiarly conferred upon the citizens of the United States first created by the Constitution. The rights of ingress and regress are impliedly included in § 2 of Art. IV merely because included in the fundamental rights to life, liberty, and the pursuit of happiness. These rights a citizen of a State is entitled to as such. The outland citizen acquires this right under the Constitution solely because the domestic citizen has it, and only to the same extent. He is entitled only to be free from discrim-

ination by the State, without "reasonable ground for the diversity of treatment." *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60. His only remedy, therefore, under § 2 of Art. IV for actions such as are complained of in the case at bar would be by prosecution in the state courts, if the laws of the State provided such a remedy. It is possible that Congress might provide a remedy, if the State discriminated against him, in regard to such outrages, on account of his outland citizenship; but Congress (so far as we are aware) has never done so. At any rate § 19, Crim. Code, does not do so. It is therefore not enough in the case at bar to show that the right set up in the indictment is a fundamental right common to all citizens of civilized States everywhere. It must be shown in addition that it is a right peculiar to the complex, federal citizenship which is at the basis of the "indissoluble Union of indestructible States" created by the Constitution of the United States.

In this term "citizen of the United States," are included two fundamental concepts, bound together and interacting, viz., the concept of "the United States" as a corporate entity, exercising full and paramount sovereignty within its constitutional powers over all the persons within its territorial limits, and the concept of the several States as a collective body, retaining all their sovereign powers and activities over the persons within their territorial limits except in so far as those powers have been granted to the collective aggregate. Langdell, 12 Harvard Law Rev. 365, 367–370; *Tennessee* v. *Davis*, 100 U. S. 257, 263; *Ex parte Siebold*, 100 U. S. 371, 394; *Hoke* v. *United States*, 227 U. S. 308, 321, 322.

The existence of the States prevents a citizen of the United States from deriving, as such, a right under the Constitution to territorial mobility within the limits of any particular State. To that extent he is dependent upon the laws and agencies of the several States. The right, how-

ever, to move freely, *suo intuitu*, from one State into another is an entirely different matter and brings into the problem the concept of the Union. It is a right necessarily inherent in federal citizenship and secured, therefore, by the Constitution. Unless this be true, no Union was in fact established in 1789, because no less than this can be properly attributed to citizenship of the United States.

The injury done by the defendants in this case has a double aspect, one toward the individuals deported and the other toward the State into which they were deported. By their deportation the individuals became, or might become, a charge upon the State of New Mexico, a disturbance of its peace, or an offense to its own state policy. According to the decisions of this court, and especially *Kansas* v. *Colorado*, and *Missouri* v. *Illinois*, *supra*, the offended State was secured by the Constitution a right to sue the offending State in the federal courts, and to have applied there, not the law of the offending State, but a general or international law. Is not this a strong reason for believing that the Constitution also secured a right to the individuals, not as citizens of Arizona but as citizens of the United States, to have their cases determined in a federal court by federal law?

In every case in which this court has applied § 19, Crim. Code, the claim that the offense was only assault, murder, kidnapping, etc., could have been, and in some of them evidently was made. Yet this court upheld the federal jurisdiction because the real purpose of the conspiracy was, not to murder, assault, etc., but to prevent voting, to prevent informing of crime, to prevent egress from a State. *United States* v. *Waddell*, 112 U. S. 76, 80; *Buchanan* v. *United States*, 233 Fed. Rep. 257.

The Fourteenth Amendment has had no effect upon the question presented in this case, except incidentally in so far as it has, perhaps, enlarged and constitutionally fixed

the status of a citizen of the United States. That status was fully recognized before the Amendment. See the discussion, including the decision by Mr. Justice Johnson in *Ex parte Eckstein*, and an opinion by Attorney General Wirt, relative to acts of South Carolina affecting the ingress and egress of free negroes. (Reports Committees, 27th Cong., 3d sess., House Rep. 80, pp. 15, 27, 35; Mass. Legal Docs., 1845, Senate No. 31.) See also *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Passenger Cases*, 7 How. 283, 465–467, 492; *Crandall* v. *Nevada*, 6 Wall. 35, 43–45. *Crandall* v. *Nevada* has been referred to by this court in later cases with full approval, and undoubtedly represents the settled law. It is on principle decisive of the case at bar. *Slaughter-House Cases*, 16 Wall. 36, 79, 80; *Twining* v. *New Jersey*, 211 U. S. 78, 97, 98; Cooley, Principles of Constitutional Law, pp. 245, 246.

The point that in *Crandall* v. *Nevada*, the action complained of was by the State itself, whereas in the case at bar it is by individuals, does not distinguish that case from this one. If the right be one secured by the Constitution, Congress may protect it against action by individuals, as well as against action by the State, if it deem the former mode appropriate to the end. This is decided in *Prigg* v. *Pennsylvania, supra.* The Fourteenth Amendment expressly banned state action, but it did not limit the general and original power of Congress to protect rights secured by the Constitution in such manner as it thought most effective. This is proved by the case of *Crandall* v. *Nevada* itself, which arose prior to the Fourteenth Amendment and can therefore derive no assistance from its provisions. The fact that only state action was before the court in that case proves nothing as to the question whether a right of a citizen is secured under the Constitution only against state action. Indeed, the fallacy of the argument is shown by all the decisions which have held § 19, Crim. Code, constitutional. Particular reference may be made

to the statement of this court in *United States* v. *Reese*, 92 U. S. 214, 217.

As for the authorities after the Fourteenth Amendment, [*Slaughter-House Cases*, 16 Wall. 36, where the court stated that a citizen of the United States has a right specially secured under the Amendment to reside in a State for the purpose of acquiring citizenship therein—a right clearly violated in the case at bar—Justice Bradley's dissenting opinion, 16 Wall. 112, 113; *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127; *United States* v. *Cruikshank*, 92 U. S. 542, 552, 553; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651, 663–666; *Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487; *United States* v. *Mosley*, 238 U. S. 383, 386; *United States* v. *O'Toole*, 243 U. S. 476, 485–489; *United States* v. *Bathgate*, 246 U. S. 220; *United States* v. *Harris*, 106 U. S. 629; *Hodges* v. *United States*, 203 U. S. 1, 14; *United States* v. *Powell*, 212 U. S. 564; compare *United States* v. *Shipp*, 203 U. S. 563; *Logan* v. *United States*, 144 U. S. 263, 293–295; *United States* v. *Waddell*, 112 U. S. 76, 80; *In re Quarles*, 158 U. S. 532, 536; *Motes* v. *United States*, 178 U. S. 458, 462, 463; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Patrick*, 54 Fed. Rep. 338, 347,] we submit that the decisions of this court on the subject of the rights secured by the Constitution to a citizen of the United States show not only that these rulings do not in any manner or to any extent limit or qualify the principles made the basis of the judgment in *Crandall* v. *Nevada*, *supra*, but that they reinforce that decision by the uniform and consistent opinion of this court that § 19, Crim. Code, constitutionally covers every right of a citizen of the United States, as such, whether it arise from some express provision of the Constitution, or whether it be implied in the very organization and healthy operations of the Na-

tional Government which substituted for a mere league of States and a single state citizenship a real, vital Union based upon a citizenship of the United States.

*Mr. Charles E. Hughes*, with whom *Mr. E. E. Ellinwood*, *Mr. John Mason Ross* and *Mr. Clifton Mathews* were on the brief, for defendants in error:

There are two classes of rights enjoyed by citizens of the United States, as such, (a) rights by which one is entitled to protection merely against action by or on behalf of States where that action is in conflict with the provisions of the Federal Constitution, and (b) rights by which one is entitled to protection against the action of individuals. Section 19, Crim. Code, is not concerned with the former, but exclusively with the latter.

This distinction between federal rights which protect the citizen simply against state action, and federal rights which protect the citizen against the action of individuals, abundantly established by decisions of this court (*United States* v. *Cruikshank*, 92 U. S. 542, 554, 555; *Virginia* v. *Rives*, 100 U. S. 313, 318; *United States* v. *Harris*, 106 U. S. 629, 639; *Civil Rights Cases*, 109 U. S. 3, 11–13; *James* v. *Bowman*, 190 U. S. 127; *Barney* v. *City of New York*, 193 U. S. 430; *Hodges* v. *United States*, 203 U. S. 1, 14–16) has been disregarded in this prosecution. See also *Karem* v. *United States*, 121 Fed. Rep. 250; *United States* v. *Moore*, 129 Fed. Rep. 630; *United States* v. *Powell*, 151 Fed. Rep. 648, affd. 212 U. S. 564.

It thus appears that it is not enough for the Government to establish that there is a federal right, in order to invoke § 19, if it appears, as we submit it does clearly appear in the present case, that the right is of that class which connotes protection only against state action.

The decisions may be searched in vain for any authoritative precedent applying § 19, unless there is a right to protection as against individual action and not simply as

against state action. *Ex parte Yarbrough*, 110 U. S. 651; *Guinn* v. *United States*, 238 U. S. 347; *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Butler*, Fed. Cas. No. 14,700; *United States* v. *Crosby*, Fed. Cas. No. 14,893; *Felix* v. *United States*, 186 Fed. Rep. 685; *United States* v. *Stone*, 188 Fed. Rep. 836; *Aczel* v. *United States*, 232 Fed. Rep. 652; *United States* v. *Waddell*, 112 U. S. 76; *Haynes* v. *United States*, 101 Fed. Rep. 817; *Buchanan* v. *United States*, 233 Fed. Rep. 257; *Logan* v. *United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458; *United States* v. *Lancaster*, 44 Fed. Rep. 885, 896; *United States* v. *Patrick*, 54 Fed. Rep. 338; *Davis* v. *United States*, 107 Fed. Rep. 753; *United States* v. *Morris*, 125 Fed. Rep. 322; *Smith* v. *United States*, 157 Fed. Rep. 721.

As examples of prosecutions which have failed because of the prosecutor's inability to point out, to the satisfaction of the court, the constitutional provision securing the right said to have been conspired against, see: *United States* v. *Cruikshank*, 92 U. S. 542; *Hodges* v. *United States*, 203 U. S. 1; *United States* v. *Gradwell*, 243 U. S. 476; *Karem* v. *United States*, 121 Fed. Rep. 250; *McKenna* v. *United States*, 127 Fed. Rep. 88; *United States* v. *Eberhart*, 127 Fed. Rep. 254; *United States* v. *Moore*, 129 Fed. Rep. 630; *United States* v. *Powell*, 151 Fed. Rep. 648, affd. 212 U. S. 564; *United States* v. *Bathgate*, 246 U. S. 220.

The right of a citizen of the United States to reside and work within the bounds of the United States wherever he may choose is a fundamental right pertaining to his individual liberty. Like other fundamental rights of life, liberty, and property, so far as interference therewith on the part of individuals is concerned, it is a right which the Constitution of the United States leaves to the protection of the several States having jurisdiction. So far as there is a right pertaining to federal citizenship to have free ingress or egress with respect to the several States, the right is

essentially one of protection against the action of the States themselves and of those acting under their authority. *Slaughter-House Cases*, 16 Wall. 36, 76; *Corfield* v. *Coryell*, 4 Wash. C. C. 371.

The privileges and immunities clause of Art. IV, § 2, does not confer a right of protection against the acts of individuals, but is aimed at the hostile action of the States. It is this clause which gives the citizens of the several States "the right of free ingress into other States, and egress from them." *Paul* v. *Virginia*, 8 Wall. 168, 180; *Slaughter-House Cases*, 16 Wall. 36, 75; *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 381; *Ward* v. *Maryland*, 12 Wall. 418, 430. It confers no right whatever with respect to the action of individuals, but only affords protection as against the hostile action of the States and their agencies. *Slaughter-House Cases*, *supra*, 76, 77; *United States* v. *Harris*, 106 U. S. 629, 643. See also, *Hodges* v. *United States*, 203 U. S. 1, 15.

The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State. *Slaughter-House Cases*, *supra*, 77; *Civil Rights Cases*, *supra*, 11; *United States* v. *Cruikshank*, 92 U. S. 542, 555. See also *Virginia* v. *Rives*, *supra*, and *United States* v. *Harris*, *supra*.

If it be assumed that, apart from § 2 of Art. IV and the Fourteenth Amendment, there is an inherent federal right of a citizen of the United States freely to cross the boundary of a State, it is of the essence of that right that it is one which exists only with respect to action by the States and their agencies. So far as mere individual liberty is concerned, in the absence of action by the States, the State boundary has no significance.

In dealing with the offense of kidnapping or of false imprisonment or of libel or of assault or of murder, where the State and its agencies are not the actors, the state

boundary is of no significance, and personal right is protected, as it always has been protected, under the laws of the State having jurisdiction. We find nothing in *Crandall* v. *Nevada*, 6 Wall. 35, which in any way contravenes this well-settled distinction.

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

The case is here under the Criminal Appeals Act to directly review a judgment quashing an indictment against the 25 persons who are defendants in error. The indictment contained four counts, but as the fourth is now abandoned by the Government we need not consider it.

The first count charged the accused with conspiring, in violation of § 19 of the Criminal Code, to injure, oppress, threaten, or intimidate 221 named persons, alleged to be citizens of the United States residing in Arizona, of rights or privileges secured to them by the Constitution or laws of the United States, that is to say, the right and privilege pertaining to citizens of said State peacefully to reside and remain therein and to be immune from unlawful deportation from that State to another. And the overt acts alleged were: The arming of the conspirators; the seizure and holding of the persons named until by means of a railway train procured for that purpose they were forcibly transported into New Mexico and in that State released under threat of death or great bodily harm should they ever return to the State of Arizona.

The second count was the same as the first except that only 25 of the persons alleged in the first count to have been injured were named, and they were stated to be citizens of the United States residing in but not citizens of the State of Arizona.

The third count was also identical with the first except that it embraced only 196 of the injured persons named in

the first count and one additional person not therein named, all being declared to be citizens of the United States and of the State of Arizona residing in that State.

The court quashed the indictment on the ground that no power had been delegated by the Constitution to the United States to forbid and punish the wrongful acts complained of, as the right to do so was exclusively within the authority reserved by that instrument to the several States. As the entire case will be disposed of by testing the accuracy of this view we come immediately to consider that subject.

In argument the asserted error in the conclusion is based, not upon the direct result of any particular provision of the Constitution, but upon implications arising from that instrument as a whole, the conditions existing at the time of its adoption, and the consequences inevitably produced from the creation by it of the Government of the United States. A wide field of inquiry common to all the contentions is thus opened. In order, therefore, to afford a common basis by which to measure the correctness of the various implications insisted upon, we state under separate headings doctrines which are applicable to all the contentions and which are in reason so well founded and so conclusively sustained by authority as to be indisputable.

(a) In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380–381; *Slaughter-House Cases*, 16 Wall. 36, 76.

(b) Whether, in disregard of the principles of comity, any of the States recognized in their own citizens rights on

this subject which they refused to grant to citizens of other States, we need not consider, in view of the provision of the Articles of Confederation on the subject. By that provision uniformity was secured, not by lodging power in Congress to deal with the subject, but, while reserving in the several States the authority which they had theretofore enjoyed, yet subjecting such authority to a limitation inhibiting the power from being used to discriminate. The text of Article IV which provides for this subject is as follows:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, . . ."

Thus, while power remained in the several States, the boundaries demarking them became, at least for the purpose of the enjoyment of the right here in question, negligible, and the frontiers of the Confederation became the measure of the equal right secured to the inhabitants of each and all the States.

(c) That the Constitution plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress, cannot be denied for the following reasons: (1) Because the text of Article IV, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and (2) because that view has been so conclusively settled as to leave no room for controversy. Thus

in *Paul* v. *Virginia*, 8 Wall. 168, 180, considering the operation and effect of Article IV, § 2, of the Constitution, it was said:

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

"Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

Again, in *Ward* v. *Maryland*, 12 Wall. 418, 430, upon the same subject, the court declared:

"Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire per-

sonal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

In the *Slaughter-House Cases*, 16 Wall. 36, 75–76, the court, after reciting both the provisions of Article IV of the Articles of Confederation and Article IV, § 2, of the Constitution, said:

"There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

"Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.

"'The inquiry,' he says 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'

"This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward* v. *The State of Maryland*, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure."

The controlling influence of the opinion in the *Slaughter-House Cases*, as well as that of Mr. Justice Washington in *Corfield* v. *Coryell*, stands out in bolder relief when it is observed that in the latter case, following the statement of the general principles contained in the passage quoted in the *Slaughter-House Cases*, there is found, by way of illustration, an enumeration of particular rights declared to be clearly embraced by the general principles, one of which is described as, "The right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."

Applying these doctrines, let us come to test the soundness of the implications from the Constitution relied upon to establish the absence of all state authority to deal with the individual wrongs complained of, and the possession by the Federal Government of power for that purpose; and, as pertinent thereto, to refer briefly to the authorities which it is assumed sustain those implications.

Undoubtedly the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from,

the several States had, prior to the Confederation, a two-fold aspect: (1) as possessed in their own States and (2) as enjoyed in virtue of the comity of other States. But although the Constitution fused these distinct rights into one by providing that one State should not deny to the citizens of other States rights given to its own citizens, no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one State in another of rights possessed in that State by its own citizens was a violation of a right afforded by the Constitution. This is the necessary result of Article IV, § 2, which reserves to the several States authority over the subject, limited by the restriction against state discriminatory action, hence excluding federal authority except where invoked to enforce the limitation, which is not here the case; a conclusion expressly sustained by the ruling in *United States* v. *Harris*, 106 U. S. 629, 645, to the effect that the second section of Article IV, like the Fourteenth Amendment, is directed alone against state action. And this was but a summary of what had been previously pointed out in the *Slaughter-House Cases*, 16 Wall. 36, where in dealing with the privileges and immunities embraced by Article IV, § 2, of the Constitution, it was observed (p. 77):

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power

of the States, and without that of the Federal government."

Nor is the situation changed by assuming that as a State has the power, by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom, it may, without violating the prohibitions of Article IV against discrimination, apply a like rule to citizens of other States, and hence engender, outside of Article IV, a federal right. This must be so since the proposition assumes that a State could, without violating the fundamental limitations of the Constitution other than those of Article IV, § 2, enact legislation incompatible with its existence as a free government and destructive of the fundamental rights of its citizens; and furthermore, because the premise upon which the proposition rests is state action and the existence of federal power to determine the repugnancy of such action to the Constitution, matters which, not being here involved, are not disputed.

This leads us furthermore to point out that the case of *Crandall* v. *Nevada,* 6 Wall. 35, so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions; and hence it also follows that the observation made in *Twining* v. *New Jersey,* 211 U. S. 78, 97, to the effect that it had been held in the *Crandall Case* that the privilege of passing from State to State is an attribute of national citizenship, may here be put out of view as inapposite.

With the object of confining our decision to the case before us, we say that nothing we have stated must be considered as implying a want of power in the United States to restrain acts which, although involving ingress or

egress into or from a State, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge, as illustrated in the *Crandall Case, supra.*

*Judgment affirmed.*

MR. JUSTICE CLARKE dissents.

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## WALLS, ATTORNEY GENERAL OF THE STATE OF WYOMING, ET AL. *v.* MIDLAND CARBON COMPANY ET AL.

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

No. 219. Argued October 13, 1920.—Decided December 13, 1920.

1. As applied to the facts of this case, the statute of Wyoming which prohibits, as wasteful, the burning and consumption of natural gas for its products without fully and actually applying and utilizing its heat for other manufacturing or domestic purposes, and which forbids owners or lessees of gas wells to sell or dispose of such gas for the manufacture of carbon or other resultant products in the making of which its heat is not so utilized for other manufacturing or domestic purposes, and which limits the prohibition to cases where the gas wells or sources of supply are within ten miles of any incorporated town or industrial plant, and penalizes infractions as misdemeanors,—is a legitimate exercise of the police power, and is not constitutionally objectionable as taking property without due process or as an unreasonable or arbitrary discrimination. Pp. 313 *et seq.*
2. So *held*, where it was objected that enforcement of the statute would destroy a heavy investment in a plant for the manufacture of carbon black, a substance of great utility, the value of which, with that of the gasoline also produced in the process, was claimed to exceed any other value obtainable from a like quantity of gas, and the manufacture of which, it was claimed, would be impracticable if the heat from the gas must be utilized as the statute prescribed. *Id.*
3. The statute seeks merely to prevent the selection of products the

production of which will tend to the rapid exhaustion of the gas supply; and it is not to be construed as demanding that the heat be utilized further than natural laws and existing instrumentalities allow. P. 325.

4. Owing to the fact that natural gas has no fixed *situs* in the earth but moves from place to place, possession of land is not possession of the gas within it, and the landowner does not gain an absolute property in the gas until he has captured it. P. 316.
5. From this also it results that a State may interpose its police power to prevent a waste or disproportionate use of the gas by a particular landowner in order to protect the equal right of other owners and to conserve the gas as a resource of the State. Pp. 316–319, 323. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190.
6. In confining its application to cases where the source of the gas is within ten miles of an incorporated town or industrial plant, the Wyoming statute is within the limits of classification permissible under the equal protection clause of the Fourteenth Amendment. Pp. 314, 324. *Bacon* v. *Walker*, 204 U. S. 311.
7. The validity of the regulation cannot depend upon the relative values or importance of the industries favorably and unfavorably affected by it, or their relations to the welfare of the State, these being matters for the judgment of the state legislature. P. 322.
8. The fact that plaintiffs' products—carbon black and gasoline—may be sold for more than the gas consumed in making them would bring for fuel purposes, is not a ground for denying the State the power to prevent the disproportionate use and rapid depletion of the natural gas supply involved in the process. *Id.*

Reversed.

THE case is stated in the opinion.

*Mr. Henry E. Lutz*, with whom *Mr. William L. Walls*, Attorney General of the State of Wyoming, was on the brief, for appellants:

*Mr. John W. Lacey* and *Mr. Reid L. Carr*, with whom *Mr. Herbert V. Lacey* was on the brief, for appellees:

It is noteworthy that appellants did not, by affidavit or otherwise, controvert any of the following matters: (1) That appellees had, prior to the enactment of the statute, made an investment in the business of manu-

facturing carbon black of nearly seven hundred thousand dollars; (2) that the factory of the appellees is most efficient and economical, and yields the largest amount of merchantable black that can be produced by any known method; (3) that the market price and value of the products, gasoline and carbon black, exceed the market price and value for any other purpose of the natural gas consumed to make them; (4) that carbon black made from natural gas is not only useful but indispensable for the manufacture of the printing inks required by the high-speed presses now in use, and its place can be supplied by no substitute; (5) that it is further a necessity for various manufactures of rubber, for carbon papers, typewriter ribbons, phonograph records and many manufactured articles of universal daily use; (6) that it is impossible so to use gas in manufacturing carbon black that the heat contained in the gas shall be "fully and actually used for other manufacturing purposes or domestic purposes;" (7) that the manufacturing operations of the appellees are so conducted as to cause no injury to the health, morals or comfort of anybody; (8) that the inevitable effect of the statute is not only to require the Midland Company to cease operating said factory, but to render it impossible to sell or use any gas derived from the wells of the Occidental Company for the manufacture of carbon black at any time or place; (9) nor is there the slightest attempt to prove that anyone of the "incorporated towns" or "industrial plants" owns any interest whatever in the gas wells or gas lands located within a radius of ten miles outside their boundaries. In other words, the showing is that the statute, instead of conserving gas for the reasonable use of all the collective owners of the lands under which it lies, seeks to appropriate the gas—or what appellants term a "paramount right" thereto—for the benefit of certain communities and industries in the vicinity of the gas wells, and to deprive the owners of these gas lands and wells of

the right to use or sell the gas they reduce to possession in the manner that will produce the best return to the owners and the greatest benefit to the public at large, viz, for the manufacture of carbon black.

In *Bacon* v. *Walker,* 204 U. S. 311, a statute was examined which limited the herding and grazing of sheep on the public domain within two miles of the dwellings of others than the sheep-owners. As will clearly appear from the case, and especially from the two Idaho cases cited in the opinion, one ground of sustaining the statute was that herding sheep close to the habitation of a settler is a nuisance. In *Sweet* v. *Ballentine,* 8 Idaho, 431 (cited in the opinion of this court) it was further emphasized that the plaintiff was not the owner of the lands affected and that "these statutes were not intended to prevent owners from grazing sheep upon their own lands, although situated within two miles of the dwelling of another."

Not one of the cases cited by appellants furnishes either authority or example upholding the right to take away property without price from any individual merely for the financial benefit of another person or any number of persons, although such seems to be the deduction made from those cases.

Not one gives countenance to the claim that natural gas, when reduced by the landowner to possession, is in any sense public property. Not one asserts the power of the legislature to deprive the owner of natural gas lands of the right to sell in the best market, or to put to a use beneficial and necessary to society, such gas as naturally arises in his wells, merely in order that he may thereby be compelled to keep his gas till certain neighboring towns or factories desire it. Each is within well-known principles governing the exercise of police power, and any general language used must be read in the light of the facts involved.

It does not follow that by calling the act a "conserva-

tion" measure, or by declaring the manufacture of carbon black from natural gas to be "wasteful" or "extravagant," the legislature has foreclosed judicial consideration of the subject. *Bunting* v. *Oregon*, 243 U. S. 426, 435; *Coppage* v. *Kansas*, 236 U. S. 1; *Passenger Cases*, 7 How. 283. The principles governing inquiry into the propriety of the purported exercise of police power were formulated long ago in *Lawton* v. *Steele*, 152 U. S. 133. In the recent case of *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, this court indicated the tests.

The authorities quoted, as well as those cited below, fully establish not only that the true purpose and effect of the act as distinguished from its ostensible purpose, but also the reasonableness of the restrictions sought to be imposed, and the truth of the accusation of waste are all fully open to judicial review.

The business of manufacturing carbon black is a long-established, necessary and legitimate one, neither noisome nor a nuisance, nor a detriment to "public health, morals or safety." The statute does not attempt to prescribe any limitation as to the place where carbon-black factories shall be located or maintained; does not attempt to deal with the escape of natural gas into the air; does not seek to prescribe for all landowners alike a limit as to the measure or proportion of the productive capacity of each well that shall be withdrawn or marketed; does not regulate the right of proportionate acquisition, nor restrain any of the collective owners from appropriating an undue or excessive quantity through the use of pumps or other artificial means of accelerating the natural flow.

What it does is, after the natural gas has been reduced to possession and has thus become a commodity of commerce, to divest it of one of the attributes of property, namely the right of disposal for an essential commercial purpose. Concretely stated, it deprives the appellees altogether of the right to dispose of or use a single cubic foot of

gas from their lands for the operation of their factory. This it does by imposing conditions as to full utilization of heat which are impossible of fulfillment.

The prohibition is imposed not upon all landowners who derive their supply of gas from a common source or reservoir, but only upon those whose wells are located within ten miles of any incorporated town or industrial plant. Each incorporated town and each private industrial plant (except that of the appellees), is thus surrounded by a circle or prohibited zone, whose area is three hundred and fourteen square miles. Elsewhere the ban is inoperative. What is the object of the ten-mile limitation? Admittedly, to benefit certain manufacturers and private consumers, who are or may become purchasers of natural gas, by depriving the owners of the gas produced in certain large areas of the right of sale to certain other manufacturers.

Natural gas is not public property. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 209; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 254; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217. In the case at bar not only are the appellees among the common owners because owners of lands in which the gas is found, but they have also become the owners in possession of the gas itself as private property in the four wells here involved.

Like the Oklahoma statute, the Wyoming statute does exactly what the Indiana statute did not do, and omits precisely those things which were with such care included in the Indiana statute. The Wyoming statute entirely ignores the rights of the owners of the land in which the natural gas is found—the common owners of the gas. It makes no provision for their protection. It does not restrict the number of wells that may be drilled into the gas reservoirs, nor the amount of gas that may be withdrawn by one well or by any one owner, nor does it prohibit the discharge of the gas into the open air without making

any use of it. And there is uncontradicted evidence in the record that such waste within the true meaning of that word is taking place.

On the contrary, the sole purpose was to select the market, to preserve the gas, not for the owners but for third parties, that is to say, for private industries and private consumers in incorporated towns.

The intent of the statute was to take away certain rights to sell gas from the private owners of the gas and make a donation to that extent to certain towns and manufacturing establishments. The purpose is commercial—the business welfare of these towns and manufacturing plants, as coal might be, or timber. *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 255.

The peculiar form of the statute renders it applicable to these appellees alone, while leaving the door open for others to engage in similar manufacturing pursuits elsewhere in Wyoming. The inference is clear that the spoliation of the appellees for the advantage of the residents and industrial plants of Lovell is the real object sought.

The statute thus takes private property for private use under pretext of the public good. These purposes are not even public purposes such as would authorize the exercise of eminent domain to take the property of the appellees in their gas, nor yet public in such sense as would authorize any taxes therefor to be levied upon the property here involved even if it were located in one of the towns receiving the indirect benefits. *Cole* v. *La Grange*, 113 U. S. 1, 6; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Michigan Sugar Co.* v. *Dix*, 124 Michigan, 674; *Dodge* v. *Mission Township*, 107 Fed. Rep. 827; *Oxnard Beet Sugar Co.* v. *Nebraska*, 73 Nebraska, 57; Const., Wyoming, Art. I, §§ 32, 33.

The statute here in controversy takes property, since it forbids sale and use, although such sale and use in no way

create or contribute to any nuisance or injury to the health, morals or comfort of anyone. And the sale and use prohibited, under the evidence, is without question the most profitable sale and use that can be made of the gas, and the one most beneficial to the world and to civilization. 2 Kent's Com. 320; *Litchfield* v. *Bond*, 186 N. Y. 66, 80; *Buchanan* v. *Warley*, 245 U. S. 60, 74; *In re Kelso*, 147 California, 609.

The statute "does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it." *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 254. So, too, the deprivation of the right to use the factory, or the imposition of restraints rendering such use impossible, is a taking of property in as real a sense as if the factory were physically appropriated. *Dobbins* v. *Los Angeles*, 195 U. S. 223; *In re Smith*, 143 California, 368. See also: *Forster* v. *Scott*, 136 N. Y. 577; *People* v. *Otis*, 90 N. Y. 48; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Kansas City Gas Co.* v. *Kansas City*, 198 Fed. Rep. 500.

Oil is also a fuel, produced and transported under conditions substantially similar to natural gas. It is also an essential ingredient in printing inks, into the composition of which eight times as much oil as gas-black enters. The heating value of oil so used is totally lost. Would it be a reasonable exercise of police power to declare that oil—or oil from certain wells—must not be sold for such use unless the heat contained in the oil be fully used for domestic or manufacturing purposes?

Wood is a fuel—the oldest and most widely used of fuels. From wood is made news-print paper. Again the heat, or fuel value, is lost. Could it be deemed a reasonable exercise of police power to forbid the sale of wood to pulp mills unless the heat contained therein be fully employed for other uses?

In each instance a fuel is consumed. Its heating value is lost. A product of great pecuniary and cultural value results. The manufacture of the product would be impossible except at the sacrifice of the heat. A requirement that it shall be preserved is unreasonable and destructive.

Manifestly the contour and extent of the field or reservoir constituting the common source of supply are determined by geological conditions, bearing no reference to the boundaries of incorporated political subdivisions or to the location of industrial plants. If the fugitive character of natural gas, and the "co-equal right of all landowners to draw from a common source of supply" is, as stated in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 203, the very basis of the power of the legislature to restrain waste, then argument certainly cannot be needed to show that it may not lawfully require some to desist from such "waste" while permitting the same "waste" to others. The two propositions are mutually destructive.

Still more glaringly is it violated if permission to "waste" or "wastefully use" from the common store is denied to some and granted to others. Yet this is the precise construction of the law adopted and upheld by the state officials.

As construed by the state courts, the act involved in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, prohibited only the use of pumps or artificial contrivances to accelerate the natural flow of percolating water, with the object, not to use the water in connection with the enjoyment of the land, but to extract and vend the gas as merchandise, allowing the water to run to waste. So construed, it was sustained by this court (p. 77).

Even if the analogy between water and natural gas were complete, the present law is wholly dissimilar.

Further as to arbitrary discrimination, see: *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *International Har-*

*vester Co.* v. *Missouri*, 234 U. S. 199, 215; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *s. c.*, 229 Fed. Rep. 284; *Smith* v. *Texas*, 233 U. S. 630.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The complainants are corporations of Delaware and have their places of business in that State.

The defendants are officers of Wyoming, being respectively, its Attorney General, Prosecuting Officer of Big Horn County, and the Governor of the State.

It is alleged that jurisdiction of the District Court depends upon diversity of citizenship, and the Constitution of the United States, the Constitution being violated by an act of the legislature of the State. Chapter 125 of the Session Laws of 1919.

The object of the suit is to restrain defendants, and each of them, from enforcing or attempting to enforce the legislation.

It is declared by the act, which is attacked, that its purpose is "the protection and conservation of the supply of natural gas." The first section is as follows:

"The use, consumption or burning of natural gas taken or drawn from any natural gas well or wells, or borings from which natural gas is produced for the products where such natural gas is burned, consumed or otherwise wasted without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes is hereby declared to be a wasteful and extravagant use of natural gas and shall be unlawful when such gas well or source of supply is located within ten miles of any incorporated town or industrial plant."

Section 2 prohibits the use, sale or other distribution of

natural gas, the product of any well owned, leased or managed by any person, for the purpose of manufacturing or producing carbon or other resultant products from the burning or consumption of such gas, without the heat therein being fully and actually utilized for other manufacturing purposes or domestic purposes. Violations are made misdemeanors.

The grounds of contention against the act are set forth in very voluminous pleadings, supplemented by a number of affidavits. But only a brief summary of them is necessary to present the question involved, which is, stated broadly, that the act transcends the police power of the State, its purpose and effect being not to regulate and conserve natural gas, but to prohibit its use, and make a discrimination between owners having equal rights, and thereby violates Article I, § 10, of the Constitution and the Fourteenth Amendment thereof.

Prior to the enactment of the statute, the Midland Company had erected a factory for the manufacture of carbon black, which factory is located about 1½ miles from the town of Cowley, Big Horn County, at an expenditure of $375,000. It is equipped for the manufacture of such carbon black, and can be used for no other purpose, and there is produced from it approximately 13,000 pounds of that article daily, which is sufficient for the manufacture of 117,000 pounds of printing ink. From the gas consumed to make the carbon black, there is first extracted approximately 1600 gallons per day of high-gravity gasoline.

The uses of carbon black are enumerated, and it is alleged that no form of it possessing the same properties and the wide variety of uses can be commercially manufactured from any material or substance other than natural gas.

The origin of the industry and the uses of its product are variously detailed, and it is alleged that the company's

factory is so conducted as to permit no waste, that the best known processes and appliances are employed, and that the operation of the gasoline absorption plant and the recovery of gasoline from the gas supplied by the wells would be impossible if the carbon plant should cease to be operated, for the reason that the gas cannot be sold to other users in that locality in sufficient quantities to render the extraction of gasoline therefrom commercially profitable.

The Occidental Oil and Gas Company owns the land upon which are located the gas wells constituting the principal source of supply to the plant and carbon factory of the Midland Company. The Occidental Oil and Gas Company also constructed, owns and operates the pipe line by which the gas is conveyed to the factory, and delivers it to the factory, receiving from the Eastern Fuel Company, which owns and operates the gasoline extraction plant, a royalty of one-half of the gasoline extracted therefrom. The Oil Company also owns mineral leases covering 1200 acres of proved gas territory within ten miles of Cowley. Its business is an integral and inseparable part of that of the Midland Carbon Company, and all of its investments have been made in view of the carbon business.

In the construction of its pipe line it expended $65,000, and in the purchase of lands upon which the wells are located, a sum exceeding $30,000. Other gas lands are alleged to have been purchased and leased prior to the enactment of the law.

There are other allegations asserting the use of the gas and its products, and that such use is not a waste of the gas. Various ways in which the law violates complainants' rights under the Constitution of the United States are detailed: that under the guise of regulation the restrictions of the act are so framed as to abolish, ruin and destroy complainants' business, while leaving it open to others to engage in carbon manufacture, without saving the gaso-

line; that the penalties imposed by the act are harsh, unreasonable and confiscatory, and that a dispute of its legality would impose a penalty of $1,000 for each separate daily violation of it. Other injuries are alleged.

As already said, affidavits made by representatives of various trades and industries, displaying the qualities of carbon black and its uses, are attached to the bill. Other affidavits express the detriment, in the opinion of the affiants, of any restriction or regulation of the production of it. And others, from asserted experts, exhibit the source of the gas and the process of manufacture from it of carbon black, and that, in its manufacture, heat is necessarily evolved, but that as soon as any attempt is made to transform the heat into any other form of energy, such as light or mechanical power, an enormous but inevitable loss of heat results.

An injunction is prayed, interlocutory and permanent, restraining defendants from enforcing the act.

Upon the bill, (it is verified) exhibits and affidavits, it was ordered that the application for interlocutory injunction be heard by three judges and that in the meanwhile a temporary restraining order be granted upon filing a bond in the sum of $1,000.

The answer in its admissions, denials, and independent averments, asserts waste of the gas by complainants' gas factory and processes, the depletion of the wells and their product, from which it is estimated that within three years all of the wells will have been utterly and completely depleted, and the depletion will relate not only to the wells furnishing gas for the manufacture of carbon black, but will likewise relate to the entire region and vicinity.

And it is alleged that by preventing the use of the gas for the manufacture of carbon black, the towns of Lovell and Cowley and all industrial plants therein will be afforded a supply of gas for all domestic and industrial purposes for a period of thirty years.

The vice attributed to the act by complainants is denied, and a benefit and virtue asserted for it.

It is prayed that the bill be dismissed, and the restraining order be dissolved. The answer is verified.

A motion to dissolve the temporary restraining order was made which was supported by affidavits and opposed by others.

The affidavits are too long to quote. Those on the part of defendants represent the interest of the city of Lovell and other towns, and the necessity to their industries, if there are to be any, of the natural gas from the wells with which this case is concerned, and represent a depletion of the gas supply by the use made of the gas by complainants. Figures are given. Particulars are stated in one affidavit, and for a review of what are deemed the important tests and elements of judgment of the conditions which existed and would succeed the present practice, it is said:

"In conclusion, assuming that the present consumption of gas from this sand is 15,000,000 cubic feet per day (as I have been reliably informed) and that the decrease in pressure for the last year has been 150 pounds, and knowing that the present pressure is approximately 200 pounds, it is a simple problem in mathematics to ascertain the future life of the field. In other words, at the present rate of decrease in pressure, the field will be exhausted in sixteen months and there will be no pressure to force the gas out of the sand. On the same basis of reasoning there are approximately 7,200,000,000 cubic feet left in the sand and the present consumption is five and a half billion cubic feet per year."

The court sustained the application for temporary injunction.

The question in the case is, as we have said, whether the legislation of Wyoming is a valid exercise of the police power of the State, and brings into comparison the limits of the power as against the asserted rights of property,

—whether the legislation is a legal conservation of the natural resources of the State, or an arbitrary interference with private rights. Contentions of this kind have been before this court in other cases and their discussions and decisions have materiality here. We mean, not discussions or decisions on the police power in the abstract or generality, but discussions and decisions involving conditions and principles pertinent to the present case.

It will be observed that the act under review does not prohibit the use of natural gas absolutely. It prohibits, or, to use its words, declares it to be a "wasteful and extravagant use of natural gas," when it is burned or consumed "without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes." But not even that unlimitedly, but only when the "gas well or source of supply is located within ten miles of any incorporated town or industrial plant." Such is the prohibition upon the user or consumer. There is a prohibition upon the owner or lessee of wells within the designated distance from a town or industrial plant to sell or dispose of the gas except under the specified conditions "for the purpose of manufacturing or producing carbon or other resultant products."

There are two elements, therefore, to be considered: (1) The distance of the wells from an incorporated town or industrial plant; (2) the elment of heat utilization for manufacturing or domestic purposes. These elements are the determining ones in the accusations against the law. The first is the basis of the discrimination charged against it; the second is the basis of the charge that the law deprives the companies of their property by the ruin of their business and capital investments, and impairs the obligations of preëxisting contracts.

In *Bacon* v. *Walker*, 204 U. S. 311, a statute of Idaho was considered which made it unlawful, with consequent liability to damages, "for any person owning or having

charge of [the] sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of said possessory claim." The statute was sustained as a lawful exercise of the police power of the State against the assertion of the right of one citizen to use the public domain as much as another citizen, and that to impose damages upon him for the exercise of the right deprived him of his property without due process of law, and, besides, arbitrarily discriminated between sheep grazing and the grazing of other kinds of stock. We there said in substance that, the power of regulation existing, the imposition of some limit to a right, when its exercise would impinge upon the equal right of another, was the exercise of legislative power and that the circumstances which induced it could not be pronounced illegal "on surmise or on the barren letter of the statute." And we said further, that where equal rights existed the State has an interest in their accommodation. Pertinent cases were cited, and the exclusion from grazing within two miles of the possessory claim of another was decided to be legal, that "the selection of some limit is a legislative power," and that it was "only against the abuse of the power, if at all, that the courts may interpose." The mere distance expressed nothing.

The case, and those it cites, are authority for the position that a State may consider the relation of rights and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed. Of this *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, is especially illustrative and pertinent and conducts naturally to the consideration of the second proposition, that is, to the element of heat utilization.

The suit was by the State and was based upon a statute which was directed against and prohibited one having

possession or control of any natural gas or oil well to permit the flow of gas or oil from any such well to escape into the open air for a longer period than two days after the gas or oil had been struck. From the standpoint of the law, to do so was a waste of gas. A right against the statute was set up, based upon the asserted or implied postulate that the owner of the land owned all beneath the surface and all that could be brought to the surface within the lines of the land. The postulate was rejected upon the ground of the nature of the gas, the capability of its flow from place to place, the common right to domestic and industrial use of it, and the power of the State to regulate and conserve such right.

The Oil Company contended as owner of the land (it was the lessee) and producer of the oil, that it had expended many thousands of dollars in purchasing and equipping machinery for the sole purpose of raising and producing oil, it not being engaged in producing or transporting natural gas, and that it used the gas as "power, force and agency" to raise the oil to the surface of the ground, and that such was "the usual, natural and ordinary method of raising and saving oil in such cases." And further, that no machinery or process of any kind had been devised by which the oil could be produced and saved otherwise, and by forbidding it, the company's business would be destroyed and the State deprived of the use and profits of the oil which was of vastly more value than the gas. And it was asserted that no more gas was permitted to escape than was consistent with the due operation of the well with the highest skill. It was hence urged against the act that it deprived of property without due process of law and denied to the Oil Company the equal protection of the laws. The answer was adjudged by the Supreme Court of the State not to constitute a defense. The adjudication was sustained by this court. We said, citing a case, "possession of the land is not necessarily possession

of the gas," and again, on the authority of cases, "that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface." It was decided, however, that before that event occurs, indeed in prevention of it, the State may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner in order to conserve the equal right of other owners and advance the public interest. And in support of this power of regulation a similarity between natural gas and other sub-surface minerals was rejected. "True it is," it was said, "oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed *situs* under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission." Necessarily, therefore, it was adjudged that their use by one owner of the surface affected the use of other owners, and an excessive use by one diminished the use by others, and a similarity of other minerals, as we have seen, was rejected, and the analogy between oil and gas and animals *ferœ naturœ* was declared. It was hence decided that the power of the State "can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

To the contention that oil could not be taken at a profit by one who made no use of the gas, it was replied that such fact went "not to the power to make the regulations, but to their wisdom." And this can be said of the contention, in the case at bar, that one element is more valuable than another, that carbon black is more valuable than the gas from which it is extracted.

It will be observed that the basic principle of the Indiana statute is the same as the basic principle of the

Wyoming statute, that is, the power of regulation dependent upon the natures of oil and gas, and that the absolute dominion of the surface of the land is not an unlimited dominion over them.

The case was cited in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, to defeat a suit brought to restrain the officers of the State of New York from enforcing against the gas company a statute which made it unlawful to pump from wells or otherwise draw by artificial appliances that class of mineral waters holding in solution carbonic acid gas, or producing an unnatural flow of such gas "for the purpose of extracting, collecting, compressing, liquifying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated."

The company alleged that the gas could be lifted to the surface only by means of pumps or other artificial appliances and that many other landowners in Saratoga Springs had like wells which were operated in a like way with a like purpose. The utility of the gas was alleged and a property right asserted which the statute, it was further alleged, deprived of in violation of the Constitution of the United States.

A demurrer was sustained to the bill; therefore its averments were admitted. The basis of the contention of the offense of the statute against the Constitution of the United States explicitly was, that the company, being the owner of the land owned, had power and authority over all beneath the land's surface that it could reduce to possession. This was the same postulate, it will be observed, that was asserted in *Ohio Oil Co.* v. *Indiana.* It was rejected upon the authority of that case. We, however, said, "were the question an open one we still should solve it in the same way."

May the principle and its justification be extended to the Wyoming statute? The statute of Wyoming (we

repeat it to have it immediately before our eyes) declares it to be a "wasteful and extravagant use of natural gas" to use, consume or burn it when taken or drawn from any gas well or wells or borings "for the products where such natural gas is burned, consumed or otherwise wasted without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes." The declaration of illegality, however, only applies when the "gas well or source of supply is located within ten miles of any incorporated town or industrial plant." Section 2 explicitly mentions carbon black as within the illegality of the law, and as this case concerns its production we may accept its production as a test of the companies' case.

Of the range of the utility of carbon black there can be no controversy and to this fact the companies give an especial emphasis in their averments, supplementary affidavits, and argument. The fact, however, is but of incidental importance. The determining consideration is the power of the State over, and its regulation of a property in which others besides the companies may have rights and in which the State has an interest to adjust and preserve, natural gas being one of the resources of the State. And in this consideration it is more important to consider not for what a particular owner uses the gas, but the proportion of his use to that of others, or it may be, the prevention of use by others; and the striking fact is presented by the companies' averments that by the processes and devices employed by them there is only obtained from each thousand cubic feet of natural gas consumed 1¾ pounds of carbon black and 2/10 of a gallon of high-gravity gasoline. To this averment the defendants add that every thousand cubic feet of gas contains from 33 to 40 pounds of carbon and therefore, "that the inefficiency of the process used by complainants is very high, ranging only from 2.8% to 4.6%." It is the further asser-

tion of defendants that the companies are utilizing and withdrawing from the earth gas at the rate of approximately 10,000,000 cubic feet per day and that the same can never be replaced or restored.

To these averments we may add the affidavits. There is something in them but not enough to reduce the importance of the facts averred. Those on the part of the companies are directed to a great extent to the value of carbon black and its use and the detriment or disaster of the discontinuance or even reduction of its manufacture. And the explicit assertion is that it is absolutely impossible to utilize the heat generated as an incident to its manufacture. A comparison is made with other fuels and the affidavits are explicit in statement that the requirement that the heat contained in them must be "fully and actually applied and utilized" (to use the words of the Wyoming statute) is not only unreasonable but impossible. Figures are given not only of gas engines but of oil, air and steam engines. This is dwelt on at great length and it is declared that it is abolutely impossible to utilize heat generated as an incident to the manufacture of carbon black. And it is said, "If the true test of the waste of gas or any other fuel is whether or not the heat therein contained is fully utilized, it would follow that practically every industrial use of fuel must be characterized as wasteful."

There is also testimony from those familiar with the geological formations, and the production of natural gas in Wyoming, that there are very extensive deposits underlying ten counties, and that their development has scarcely more than commenced and that their potential capacity far exceeds the capacity of the wells now drilled. Further, that the aggregate capacity of the existing wells exceeds 650,000,000 cubic feet per day, and that this production could be largely augmented if the demands for natural gas in the State warranted.

Opposing affidavits set forth the needs of the towns, present and prospective, and of industries other than carbon black, and that the wells of the companies are drilled into the same sand in which the wells of the Lovell Gas and Electric Company, an industry which furnishes gas and electricity to the town of Lovell, are drilled. The sand is a free flowing sand, that is, one in which the gas has free access from one part of the field to the other, consequently the gas pressure would be approximately the same at all the wells drilled into it. With the operation of the wells of the companies came a diminution of pressure, and "if the present consumption of gas continues for another year, there will not be sufficient gas in this field in the particular sand in question, to supply even the domestic uses of the town of Lovell."

And it is affirmed that the plant of the Midland Gas Company consists of about ninety separate buildings constructed of sheet iron and steel, in such a way that they can be moved more readily than almost any other character of construction and were evidently designed with the idea of portability in mind, and at the present rate of consumption of the gas, they will have to be moved, in any event, within a year. Corroborating figures of the supply and consumption are given, and it is said that if the wells now driven be allowed to flow at their full capacity they will be entirely exhausted in ninety days. The proof of this is said to be that the use of 15,000,000 cubic feet per day of gas produced within the last eighteen months has caused a loss of 57% of the available gas in the producing sand. In contrast, it is estimated, that if the gas consumed at the carbon plant was conserved the supply available for domestic and industrial use in the towns of Lovell and Cowley would last for a period of ten years.

There is speculation as to other basins of deposits of gas and its utility for industries, but which cannot be undertaken against the depletion by the production of carbon

black. The process to make the latter is said to be simple and is similar to holding a cold plate over an old-fashioned gas jet. In fact, it is said, the process used by the Midland Carbon Company is merely an incomplete combustion of gases in an insufficient amount of air, the flames from the different jets practically touching cast iron channel plates, which are suspended over the flames and are moved backward and forward at a very slow rate of speed. The carbon is scraped off the plates into hoppers and carried to the packing houses by conveyors. All of this is mechanical.

It is testified (by an engineer of the Bureau of Mines in the Interior Department who had made a study of the making of carbon black) that the efficiency of the carbon black industry is very low; that the largest yield of which affiant had any knowledge did not exceed 1½ pounds per 1000 cubic feet of natural gas though it is a well known and chemically ascertained fact that one thousand cubic feet of natural gas contains approximately from 33 to 45 pounds of carbon.

The companies replied with affidavits of opposing tendency and made comparisons of the money value of carbon black with the money value of natural gas, the former being the more valuable. And there is contradiction of the asserted lower pressure of the wells and the tendency to the depletion of the gas, and assertion that other forms of industry can well use coal for fuel.

The affidavits (which we have presented necessarily in barest outline) whether they may be regarded as presenting issues of fact or of judgment, exhibit the conditions which may have moved the policy and legislation of the State. Manifestly, conceding a power to the State of regulation, a comparison of the value of the industries and a judgment upon them as affecting the State, was for it to make. Such comparison may, therefore, be put aside. It may be, as it is deposed, that 1000 cubic feet of natural gas converted into gasoline and carbon black may

be sold much higher than can be obtained from the same amount of gas sold for fuel purposes, but it does not follow from that fact that the State may not consider, and direct its legislation by the consideration that (and we take the averment of the companies) 1000 cubic feet of natural gas is consumed to produce 1¾ pounds of carbon black and about 2/10 of a gallon of gasoline. That it may so consider depends upon the question whether its statute is within the principle of the statutes passed on in *Ohio Oil Co.* v. *Indiana,* and *Lindsley* v. *Natural Carbonic Gas Co.* By reverting to these cases it will be immediately observed that the power of regulation over natural gas is possessed by a State; and in the first case, (*Ohio Oil Co.* v. *Indiana*), it was exercised to prohibit the employment of the gas as a means or agency in the production of oil, against an asserted right of property in the ownership of the land upon which the oil was produced, and, therefore, of the oil and gas as incidents of such ownership, which could be used in such manner and quantity as the landowner might choose.

In the *Lindsley Case* the power of the State was exerted to prohibit the owner of the surface from pumping on his own land, water charged with gas. This was but an exertion, it was said, to preserve from depletion the subterranean supply common to him and other owners, and that the statute, therefore, was not unconstitutional as depriving owners of their property without due process of law. *Ohio Oil Co.* v. *Indiana,* as we have pointed out, was cited as a precedent and its principle applied. The case at bar is, we think, within that principle, in other words, the power is exerted to prohibit an extravagant or wasteful or disproportionate use of the natural gas of the State.

We have seen that the method of production by natural gas is like holding a cold plate over a candle, or, as it is expressed by a witness, it can only be produced "by combustion and the impinging of the flame on the metallic sur-

face." And there is great disproportion between the gas and the product, and necessarily there was presented to the judgment and policy of the State a comparison of utilities which involved, as well, the preservation of the natural resources of the State, and the equal participation in them by the people of the State. And the duration of this utility was for the consideration of the State, and we do not think that the State was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, or used in such way that tended to their depletion, having no power of interference.

The cited cases determine otherwise, and that, as the State of Indiana could prevent the exhaustive use of gas in the production of oil, and as the State of New York could prevent the owner of land from using artificial means to obtain the carbonated waters under his land, the State of Wyoming has the same power to prevent the use of natural gas in the production of carbon black, the tendency of which is (it may be the inevitable effect of which is) the exhaustion of the supply of natural gas and the consequent detriment of other uses.

It may be said, however, indeed is said, that the purpose of the act or its effect is a discrimination between producers of carbon black, those ten miles from a town or industrial plant not being within its provisions. We think the classification is justified by the case of *Bacon* v. *Walker*, *supra*, and indeed, by the principles which determine classification.

To the contention that the statute is not one of conservation because carbon black factories are permitted if ten miles distant from a town or industrial plant, the immediate answer is that it is for the State to determine not only if any conservation be necessary but the degree of it, and certainly the companies cannot complain if the State has not exerted its full power.

As we have seen, many affidavits were addressed to the

impossibility of complying with the statute, that is, of utilizing the heat of natural gas to the extent of the words of the statute. We say to the extent of the words of the statute because we think the statute must be construed with reference to the facts of nature and their possibilities, and that all that was intended by the words employed was to require a practical and possible use of the heat, as in other fuels and by the existing instrumentalities, and if this should be done it was a legal use of the gas—was an application and utilization of the heat contained in it. The statute was only intended to prevent the selection of a product whose production tended, and according to some of the affidavits, whose inevitable effect was, to exhaust the supply of gas in a very little while.

The decree granting the interlocutory injunction is reversed, and the case remanded to the District Court for further proceedings in conformity to this opinion.

*Reversed.*

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS, dissent.

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## GILBERT *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 79. Argued November 10, 1920.—Decided December 13, 1920.

1. The law of Minnesota declaring it a misdemeanor for any person to teach or advocate by any written or printed matter or by oral speech that citizens of the State should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States, is valid under the Federal Constitution. P. 327.
2. Such an enactment may be upheld both as a legitimate measure of

coöperation by the State with the United States, not in conflict with the federal war power, p. 328; and also as an exercise of the police power to preserve the peace of the State. P. 331. *Halter* v. *Nebraska*, 205 U. S. 34; *Presser* v. *Illinois*, 116 U. S. 252.

3. The right of free speech does not cover false and malicious misrepresentations of the objects and motives of this country in entering upon a war, made in a public speech for the purpose of discouraging the recruiting of troops, while the war is flagrant and armies are being raised. P. 332.

141 Minnesota, 263, affirmed.

THE case is stated in the opinion.

*Mr. George Nordlin* and *Mr. Frederic A. Pike* for plaintiff in error.

*Mr. James E. Markham*, Assistant Attorney General of the State of Minnesota, with whom *Mr. Clifford L. Hilton*, Attorney General of the State of Minnesota, was on the briefs, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A statute of Minnesota makes it unlawful "to interfere with or discourage the enlistment of men in the military or naval forces of the United States or of the State of Minnesota."

Its second and third sections are as follows:

"Sec. 2. Speaking by word of mouth against enlistment unlawful.—It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States or the state of Minnesota.

"Sec. 3. Teaching or advocating by written or printed matters against enlistment unlawful.—It shall be un-

lawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

Section 4 defines a citizen to be "any person within the confines of the state," and § 5 declares violations of the act to be gross misdemeanors and punishable by fine and imprisonment.

The indictment charged that Gilbert at a time and place designated in the State, and under the conditions prohibited by § 2, the United States being then and there at war with the Kingdom and Imperial Government of Germany, used the following language:

"We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. You say, what is the matter with our democracy. I tell you what is the matter with it: Have you had anything to say as to who should be president? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a great democracy, for Heaven's sake why should we not vote on conscription of men. We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours. . . ."

A demurrer to the indictment was overruled, and Gilbert was tried and convicted. The judgment was that he pay a fine of $500 and be imprisoned in the county jail of the County of Goodhue for one year, and pay the costs of the prosecution. The judgment was affirmed by the Supreme Court of the State.

The statute, it is contended, is repugnant to the Constitution of the United States in that, (1) "all power of legis-

lation regarding the subject matter contained in the statute is conferred upon Congress and withheld from the States." (2) And that the statute is obnoxious to the "inherent right of free speech respecting the concerns, activities and interests of the United States of America and its Government."

We shall consider the objections in their order. It is said in support of the exclusive power in Congress, that Congress alone can under the Constitution "'provide for the common defence and general welfare of the United States,' 'declare war,' 'raise and support armies,' 'make rules for the government and regulation of the land and naval forces.'" To these affirmative delegations of power to Congress, there is added, it is said, a prohibition to the States to "engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." And, "that the State of Minnesota is not a party to the war now [then] being waged. And if it has not engaged in any war, and until it does so engage, legislation such as a belligerent sovereign might enact, is beyond its province." These specific grounds of objection to the statute are attempted to be reinforced by analogy to the power of Congress over interstate commerce to the exclusion of the interference of the States.

The bases of the objections seem to be that plaintiff in error had an accountability as a citizen of the United States different from that which he had as a citizen of the State, and that, therefore, he was not subject to the power or jurisdiction of the State exercised in the act under review. Manifestly, to support the contention something more is necessary than the letter of the cited constitutional provisions. The broader proposition must be established that a State has no interest or concern in the United States or its armies or power of protecting them from public enemies.

Undoubtedly, the United States can declare war and it,

not the States, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them—whether it is repellent and adverse or eager and militant; and to maintain it eager and militant against attempts at its debasement in aid of the enemies of the United States, is a service of patriotism; and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt. Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of coöperation against the enemies of all. Of such instance, we think, is the statute of Minnesota and it goes no farther. It, therefore, has none of the character of the illustrations adduced against it, nor the possibility of conflict of powers which they condemn. This was the view of the Supreme Court of the State, and the court expressed it with detail and force of reasoning. The same view of the statute was expressed in *State* v. *Holm*, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the statute, the court declaring that the fact that the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from

enforcing such duty. "The same act," it was said, "may be an offense or transgression of the laws of both" Nation and State, and both may punish it without a conflict of their sovereignties. Numerous cases were cited commencing with *Moore* v. *Illinois*, 14 How. 13, and terminating with *Halter* v. *Nebraska*, 205 U. S. 34.[1]

The latter case is especially pertinent in its sentiment and reasoning. It sustained a statute of Nebraska directed against the debasement of the National flag to trade uses against the contention that the flag being the National emblem was subject only to the control of the National power. In sustaining the statute it was recognized that in a degradation of the flag there is a degradation of all of which it is the symbol, that is, "the National power and National honor" and what they represent and have in trust. To maintain and reverence these, to "encourage patriotism and love of country among its people," may be affirmed, it was said, to be a duty that rests upon each State, and that "when, by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State."

And so with the statute of Minnesota. An army is an instrument of government, a necessity of its power and honor, and it may be, of its security. An army, of course, can only be raised and directed by Congress, in neither has

[1] In *Gustafson* v. *Rhinow*, 144 Minnesota, 415, the Supreme Court of Minnesota sustained a law of the State giving to soldiers who served in the war against Germany $15 for each month or fraction of a month of service, against an attack that the soldiers were soldiers of the United States. The court expressed the concern and interest of the State as follows: "It is true that the Federal government alone has power to declare war, but having done so, the government and people of Minnesota became bound to defend and support the national government. While the states of the nation are sovereign in a certain field, they are also members of the family of states constituting the national organization."

the State power, but it has power to regulate the conduct of its citizens and to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the welfare of the Nation and State. To do so is not to usurp a National power, it is only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag.

We concur, therefore, in the final conclusion of the court, that the State is not inhibited from making "the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes."

The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the State. As counsel for the State say, "The act under consideration does not relate to the raising of armies for the national defense, nor to rules and regulations for the government of those under arms. It is simply a local police measure, aimed to suppress a species of seditious speech which the legislature of the State has found objectionable. If the legislature has otherwise power to prohibit utterances of the character of those here complained of, the fact that such suppression has some contributory effect on the federal function of raising armies is quite beside the question." And the State knew the conditions which existed and could have a solicitude for the public peace, and this record justifies it. Gilbert's remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence. And such is not an uncommon experience. On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a

danger of it is a proper exercise of the power of the State. *Presser* v. *Illinois*, 116 U. S. 252, 267.

The next contention is, that the statute is violative of the right of free speech, and therefore void. It is asserted that the right of free speech is a natural and inherent right, and that it, and the freedom of the press, were "regarded as among the most sacred and vital possessed by mankind, when this nation was born, when its constitution was framed and adopted." And the contention seems necessary for the plaintiff in error to support. But without so deciding or considering the freedom asserted as guaranteed or secured either by the Constitution of the United States or by the constitution of the State, we pass immediately to the contention and for the purposes of this case may concede it, that is, concede that the asserted freedom is natural and inherent, but it is not absolute, it is subject to restriction and limitation. And this we have decided. In *Schenck* v. *United States*, 249 U. S. 47, 52, we distinguished times and occasions and said that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"; and in *Frohwerk* v. *United States*, 249 U. S. 204, 206, we said "that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." See also, *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616. In *Schaefer* v. *United States*, 251 U. S. 466, commenting on those cases and their contentions it was said that the curious spectacle was presented of the Constitution of the United States being 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. And we did more than reject the contention, we forestalled all repetitions of it, and the contention in the case at bar is a repetition of it. It is a direct assault upon

the statute of Minnesota, and a direct assertion in spite of the prohibition of the statute that one can by speech, teach or advocate that the citizens of the State should not aid or assist "the United States in prosecuting or carrying on war with the public enemies of the United States," and be protected by the Constitution of the United States.

The same conditions existed as in the cited cases, that is, a condition of war and its emergency existed, and there was explicit limitation to § 3 in the charge of the trial court to the jury. The court read §§ 2 and 3 of the statute to the jury and said, "I take it from the reading of the whole indictment that it is prosecuted under Section 3, which I have just read to you."

Gilbert's speech had the purpose they denounce. The Nation was at war with Germany, armies were recruiting, and the speech was the discouragement of that—its purpose was necessarily the discouragement of that. It was not an advocacy of policies or a censure of actions that a citizen had the right to make. The war was flagrant; it had been declared by the power constituted by the Constitution to declare it, and in the manner provided for by the Constitution. It was not declared in aggression, but in defense, in defense of our national honor, in vindication of the "most sacred rights of our Nation and our people."[1]

This was known to Gilbert for he was informed in affairs and the operations of the Government, and every word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted. He could have had no purpose other than that of which he was charged. It would be a travesty on the constitutional privilege he invokes to assign him its protection.

*Judgment affirmed.*

[1]Words of President Wilson in his War Message to Congress, April 2, 1917.

MR. JUSTICE HOLMES concurs in the result.

THE CHIEF JUSTICE, being of the opinion that the subject-matter is within the exclusive legislative power of Congress, when exerted, and that the action of Congress has occupied the whole field, therefore dissents.

MR. JUSTICE BRANDEIS, dissenting.

Joseph Gilbert, manager of the organization department of the Non-partisan League, was sentenced to fine and imprisonment for speaking on August 18, 1917, at a public meeting of the League, words held to be prohibited by c. 463 of the laws of Minnesota, approved April 20, 1917. Gilbert was a citizen of the United States, and apparently of a State other than Minnesota. He claimed seasonably that the statute violated rights guaranteed to him by the Federal Constitution. This claim has been denied; and, in my opinion, erroneously.

The Minnesota statute was enacted during the World War; but it is not a war measure. The statute is said to have been enacted by the State under its police power to preserve the peace;—but it is in fact an act to prevent teaching that the abolition of war is possible. Unlike the Federal Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, it applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances. The restriction imposed relates to the teaching of the doctrine of pacifism and the legislature in effect proscribes it for all time. The statute does not in terms prohibit the teaching of the doctrine. Its prohibition is more specific and is directed against the teaching of certain applications of it. This specification operates, as will be seen, rather to extend, than to limit the scope of the prohibition.

Sections 1 and 2 prohibit teaching or advocating by printed matter, writing or word of mouth, that men should not enlist in the military or naval forces of the United States. The prohibition is made to apply whatever the motive, the intention, or the purpose of him who teaches. It applies alike to the preacher in the pulpit, the professor at the university, the speaker at a political meeting, the lecturer at a society or club gathering. Whatever the nature of the meeting and whether it be public or private, the prohibition is absolute, if five persons are assembled. The reason given by the speaker for advising against enlistment is immaterial. Young men considering whether they should enter these services as a means of earning a livelihood or as a career, may not be told that, in the opinion of the speaker, they can serve their country and themselves better by entering the civil service of State or Nation, or by studying for one of the professions, or by engaging in the transportation service, or in farming or in business, or by becoming a workman in some productive industry. Although conditions may exist in the Army or the Navy which are undermining efficiency, which tend to demoralize those who enter the service and would render futile their best efforts, the State forbids citizens of the United States to advocate that men should not enlist until existing abuses or defects are remedied. The prohibition imposed by the Minnesota statute has no relation to existing needs or desires of the Government. It applies although recruiting is neither in process nor in contemplation. For the statute aims to prevent not acts but beliefs. The prohibition imposed by § 3 is even more far-reaching than that provided in §§ 1 and 2. Section 3 makes it punishable to teach in any place a single person that a citizen should not aid in carrying on a war, no matter what the relation of the parties may be. Thus the statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief,

of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do any police officer may summarily arrest them.

That such a law is inconsistent with the conceptions of liberty hitherto prevailing seems clear. But it is said that the guaranty against abridging freedom of speech contained in the First Amendment of the Federal Constitution applies only to federal action; that the legislation here complained of is that of a State; that the validity of the statute has been sustained by its highest court as a police measure; that the matter is one of state concern; and that, consequently this court cannot interfere. But the matter is not one merely of state concern. The state law affects directly the functions of the Federal Government. It affects rights, privileges and immunities of one who is a citizen of the United States; and it deprives him of an important part of his liberty. These are rights which are guaranteed protection by the Federal Constitution; and they are invaded by the statute in question.

Congress has the exclusive power to legislate concerning the Army and the Navy of the United States, and to determine, among other things, the conditions of enlistment. It has likewise exclusive power to declare war, to determine to what extent citizens shall aid in its prosecution and how effective aid may best be secured. Congress, which has power to raise an army and naval forces by conscription when public safety demands, may, to avert a clear and present danger, prohibit interference by persuasion with the process of either compulsory or voluntary enlistment. As an incident of its power to declare war it may, when the public safety demands, require from every citizen full support, and may, to avert a clear and present danger, prohibit interference by persuasion with the giving of such support. But Congress might conclude that the most effective Army or Navy would be one composed wholly of men who had enlisted with full appreciation of

the limitations and obligations which the service imposes, and in the face of efforts to discourage their doing so.[1] It might conclude that the most effective Army would be one composed exclusively of men who are firmly convinced that war is sometimes necessary if honor is to be preserved, and also that the particular war in which they are engaged is a just one. Congress, legislating for a people justly proud of liberties theretofore enjoyed and suspicious or resentful of any interference with them, might conclude that even in times of grave danger, the most effective means of securing support from the great body of citizens is to accord to all full freedom to criticise the acts and administration of their country, although such freedom may be used by a few to urge upon their fellow-citizens not to aid the Government in carrying on a war, which reason or faith tells them is wrong and will, therefore, bring misery upon their country.

The right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail. It was held in *Crandall* v. *Nevada*, 6 Wall. 35, 44, that the United States has the power to call to the seat of government or elsewhere any citizen to aid it in the conduct of public affairs; that every citizen has the correlative right to go there or anywhere in the pursuit of public or private business; and that "no power can exist in a State to obstruct this right which would not enable it to defeat the purpose for which the government was established." The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing

[1] See General John A. Logan, "The Volunteer Soldier of America," pp. 89–91; Col. F. N. Maude in the Contemporary Review, v. 189, p. 37.

or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so "the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government" would be a right totally without substance. See *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Slaughter-House Cases*, 16 Wall. 36, 79. Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril. There are times when those charged with the responsibility of Government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative; because the emergency does not permit reliance upon the slower conquest of error by truth. And in such emergencies the power to suppress exists. But the responsibility for the maintenance of the Army and Navy, for the conduct of war and for the preservation of government, both state and federal, from "malice domestic and foreign levy" rests upon Congress. It is true that the States have the power of self-preservation inherent in any government to suppress insurrection and repel invasion; and to that end they may maintain such a force of militia as Congress may prescribe and arm. *Houston* v. *Moore*, 5 Wheat. 1. But the duty of preserving the state governments falls ultimately upon the Federal Government, *Luther* v. *Borden*, 7 How. 1, 77; *Prize Cases*, 2 Black, 635, 668; *Texas* v. *White*, 7 Wall. 700, 727. And the superior responsibility carries with it the superior right. The States act only under the express direction of Congress. See National Defence Act, June 3, 1916, c. 134, 39 Stat.

166; Selective Service Act, May 18, 1917, c. 15, 40 Stat. 76. The fact that they may stimulate and encourage recruiting, just as they may stimulate and encourage interstate commerce, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329, does not give them the power by police regulations or otherwise to exceed the authority expressly granted to them by the Federal Government. See *Kurtz* v. *Moffitt*, 115 U. S. 487; *Prigg* v. *Pennsylvania*, 16 Pet. 539. Congress, being charged with responsibility for those functions of Government, must determine whether a paramount interest of the Nation demands that free discussion in relation to them should be curtailed. No State may trench upon its province.

Prior to the passage of the Minnesota statute it had been the established policy of the United States, departed from only once in the life of the Nation,[1] to raise its military and naval forces in times of war as in peace exclusively by voluntary enlistment. Service was deemed a privilege of Americans, not a duty exacted by law. Specific provision had been made to ensure that enlistment should be the result of free, informed and deliberate choice.[2] The law of the United States left an American as

[1] Act of March 3, 1863, c. 75, 12 Stat. 731.

[2] Recruiting officers were required to explain to every man before he signed the enlistment paper the nature of the service, the length of the term, the amount of pay, clothing, rations and other allowances to which a soldier is entitled by law; and to read and explain to the applicant many of the Articles of War before administering to him the oath of enlistment. U. S. Army Regulations, 1913, paragraphs 854, 856.

The following is contained in the instructions sent to all officers and men assigned to recruiting duty:

"All progress and success rests fundamentally on truth. Hence never resort to indirection or misrepresentation or suppression of part of the facts in order to push a wavering case over the line. Recruits signed up on misrepresented facts or partial information do not make good soldiers. They resent being fooled just as you would, and will never yield their full value to a Government whose agents obtained their services in a way not fully square. Therefore tell your prospect anything he

free to advise his fellows not to enter the Army or the Navy as he was free to recommend their enlistment. The Government had exacted from American citizens no service except the prompt payment of taxes. Although war had been declared such was still the policy and the law of the United States when Minnesota enacted the statute here in question.

The Minnesota statute was, when enacted, inconsistent with the law of the United States, because at that time Congress still permitted free discussion of these governmental functions. Later, and before Gilbert spoke the words complained of, the Federal Espionage Law was enacted, but the Minnesota statute was also inconsistent with it. The federal act did not prohibit the teaching of any doctrine; it prohibited only certain tangible obstructions to the conduct of the existing war with the German Empire committed with criminal intent. It was so understood and administered by the Department of Justice.[1] Under the Minnesota law, teaching or advice that men

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wants to know about the Army. If the real facts are not strong enough to win him, you don't want him anyway." Recruiters Handbook, United States Army, p. 16.

[1] "The general policy of the Attorney General (Mr. Gregory) toward free speech has been well understood and adhered to by his subordinates with a good deal of consistency. From the outset, recognizing that free expression of public opinion is the life of the nation, we have endeavored to impress on our subordinates the necessity of keeping within the limits of policy established by Congress and bearing in mind at all times the constitutional guarantees. Repeatedly their attention has been called to the fact that expression of private or public opinion relating to matters of governmental policy or of political character must not be confused with wilful attempts to interfere with our conduct of the war. At all times we have had before us the dangers which follow attempts to restrain public discussion and so far as instructions issued by the Attorney General have been concerned, they have consistently and at all times emphasized this general policy." John Lord O'Brian, "Civil Liberty in War Time," Report of New York State Bar Association, vol. 42, p. 308.

should not enlist is made punishable although the jury should find (1) that the teaching or advocacy proved wholly futile and no obstruction resulted; (2) that there was no intent to obstruct; and the court, taking judicial notice of facts, should rule (3) that, when the words were written or spoken, the United States was at peace with all the world. That this conflict was not merely a technical one but a cause of real embarrassment and danger to the Federal Government, we learn from one of the officials entrusted with the administration of the Espionage Act:

"In the State of Minnesota because of what was claimed to be either inadequate federal law or inadequate federal administration, state laws of a sweeping character were passed and enforced with severity. Whether justified or not in adopting this policy of repression, the result of its adoption increased discontent and the most serious cases of alleged interference with civil liberty were reported to the federal government from that state." [1]

In *Johnson* v. *Maryland*, *ante*, 51, this court held that the power of Congress to establish post roads precluded the State from requiring of a post-office employee using the state highway in the transportation of mail the customary evidence of competency to drive a motor truck, although the danger to public safety was obvious and it did not appear that the Federal Government had undertaken to deal with the matter by statute or regulation. The prohibition of state action rests, as the court pointed out there, "not upon any consideration of degree but upon the entire absence of power on the part of the States to touch . . . the instrumentalities of the United States." As exclusive power over enlistments in the Army and the Navy of the United States and the responsibility for the conduct of war is vested by the Federal Constitution in Congress,

[1] Report of New York Bar Association, vol. 42, p. 296.

legislation by a State on this subject is necessarily void unless authorized by Congress. It is so when Congress makes no regulation, because by omitting to make regulations Congress signifies its intention that, in this respect, the action of the citizen shall be untrammelled. This would be true, even if the subject in question were one over which Congress and the States have concurrent power. For where Congress has occupied a field theretofore open also to state legislation, it necessarily excludes all such. *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426. Here Congress not only had exclusive power to act on the subject; it had exercised that power directly by the Espionage Law before Gilbert spoke the words for which he was sentenced. The provisions of the Minnesota statute and its title preclude a contention that its purpose was to prevent breaches of the peace. Compare *Ex parte Meckel*, 220 S. W. Rep. (Tex.) 81. But neither the fact that it was a police regulation, *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, nor the fact that it was legislation in aid of congressional action would, if true, save the statute. For "when the United States has exercised its exclusive powers . . . so far as to take possession of the field, the States can no more supplement its requirements than they can annul them." *Pennsylvania R. R. Co.* v. *Public Service Commission*, 250 U. S. 566, 569; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370. The exclusiveness of the power of the Federal Government with which this state legislation interferes springs from the very roots of political sovereignty. The States may not punish treason against the United States, *People* v. *Lynch*, 11 Johns. (N. Y.) 549; *Ex parte Quarrier*, 2 W. Va. 569; although indirectly acts of treason may affect them vitally. No more may they arrogate to themselves authority to punish the teaching of pacifism which the legislature of Minnesota appears

to have put into that category. Compare *Schaefer* v. *United States*, 251 U. S. 466, 494, note.

As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment. But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, *Coppage* v. *Kansas*, 236 U. S. 1, the right of a business man to conduct a private employment agency, *Adams* v. *Tanner*, 244 U. S. 590, or to contract outside the State for insurance of his property, *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, although the legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.

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## UNITED STATES ON THE RELATION OF HALL *v.* PAYNE, SECRETARY OF THE INTERIOR.

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

No. 95. Argued November 17, 1920.—Decided December 13, 1920.

Whether a homestead right can be initiated by filing an application while the land is reserved to give opportunity for lieu selections by a State, under the Act of 1894, 28 Stat. 394, is a question involving a

construction of that statute which the Secretary of the Interior must decide in determining between such applicant and one who was in possession and made application when the period for state selection expired; and mandamus will not lie to control the Secretary's decision. P. 347.

48 App. D. C. 279, affirmed.

THE case is stated in the opinion.

*Mr. Patrick H. Loughran* for plaintiff in error.

*Mr. Assistant Attorney General Nebeker,* with whom *Mr. H. L. Underwood,* Special Assistant to the Attorney General, was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the consideration of a mandamus brought by plaintiff in error, hereinafter called relator, against the Secretary of the Interior.

The proceedings were instituted in the Supreme Court of the District of Columbia by petition and its essential allegations stated narratively are as follows:

The lands in question are within a township which was reserved under an act passed August 18, 1894, c. 301, 28 Stat. 394, from adverse appropriation by settlement or otherwise except under rights found to exist of prior inception, for a period to extend from the application for survey until the expiration of sixty days from the date of the filing of the township plat of the survey in the proper district land office.

The plat of the survey was filed in the proper district land office May 17, 1915. During the sixty-day period, nor since, the described land has not been selected by the State. On June 5, 1915, the relator settled on the land and on July 17, 1915, was still actually residing thereon

with the *bona fide* intention and purpose of appropriating and entering it under the homestead laws of the United States, in the event that the State of Montana did not select the same in accordance with the statute.

On the latter date, relator filed in the Land Office, perfect application for the land as a homestead which the Register and Receiver rejected for the stated reason that on July 16, 1915, they had permitted one George E. Kennedy to make a homestead entry of the lands.

The permission for the entry of Kennedy rested wholly upon an application made May 25, 1915, at a time when the lands were reserved as before stated.

On May 25, 1915, the Register and Receiver rejected Kennedy's application in the following terms: "Rejected May 25, 1915, because land not open to entry until July 17, 1915, except to State of Montana and settlers prior to March 10, 1910."

On June 4, 1915, the Register and Receiver made the following notation upon Kennedy's application: "Suspended June 4, 1915, pending preference right of State of Montana. Rejection of May 25, 1915, hereby revoked."

Theretofore it had been the consistent and uniform practice of the General Land Office to reject any and all filings such as Kennedy's.

Relator appealed from the rejection of his application to the General Land Office and that office affirmed the decision of the Register and Receiver, and relator appealed to the Secretary of the Interior who on July 28, 1916, affirmed the decision of the General Land Office and held that "Kennedy's application being prior in time, is also prior in right."

The Secretary in his decision did not refer to any of the asserted prior decisions or practice, but arbitrarily disregarded the mandate and will of Congress expressed in the Act of August 18, 1894.

Relator at the moment of the expiration of the sixty-day

limit was actually residing on the land with the intention of making entry thereof under the homestead laws, and the right to make such entry after the sixty-day period was secured to him by such residence by the provisions of the third section of the Act of May 14, 1880, c. 89, 21 Stat. 140, and the uniform decisions of the Department of the Interior under said act, and the Secretary of the Interior has arbitrarily denied to him the exercise and enjoyment of that right. And in ruling that Kennedy had acquired a right under the homestead laws relator is deprived of the benefit to him of performance by the Secretary of the Interior of a purely ministerial duty, and he prays that a writ of mandamus be issued, directed to the Secretary to approve his, the relator's application, and deliver to him the proper evidence thereof. General relief is also prayed.

An order to show cause against the petition was issued and served on the Secretary to which he made reply affirming the legality of the action of the local land office, and the decision of the General Land Office affirming it, and his decision of concurrence.

He denies that there had been any ruling by the Secretary of the Interior that during the sixty-day period applications for homestead entry must be rejected. Such, however, he admits, may have been the ruling by the local land office and even by the Commissioner of the General Land Office, but he stated that from August 31, 1910, the construction of the act was pending before the Secretary upon an appeal from a decision of the Commissioner, that a decision upon said appeal is reported in 45 L. D. 37, under the title of *Northern Pacific Ry. Co.* v. *Idaho*, dated April 12, 1916, and that he decided that selections during such period should not be rejected but held suspended until final adjudication of the rights of the State.

He avers that such is the proper construction of the act, and that the act being one of the land laws of the United States, its construction, as well as the determination of all

equitable rights of parties under it, is within the jurisdiction of the Secretary of the Interior so long as the legal title of the land yet remains in the United States, (and that it appears on the face of relator's petition that the legal title of the land in controversy is still in the United States,) and involves the exercise of judgment and discretion, not reviewable by any court on direct proceeding either by mandamus or in equity.

He prays that the rule to show cause be discharged.

Relator demurred to the return and in passing upon it the court observed that there were two questions in the case, one, whether the facts exhibited a case for mandamus of the Secretary, that is, "in apparent defiance of the law, acting capriciously or arbitrarily or beyond the scope of the administrative authority confided to him," the other, the construction of the Act of 1894.

To the first question the court answered negatively, and to the second question replied, that "independently of the question of the propriety of a review of the action of the Secretary of the Interior in the pending case, it would seem that the decision rendered by him was one entirely permissible under the law." The demurrer to the return was therefore overruled. Relator electing to stand upon it, the rule was discharged and the petition dismissed.

This action was affirmed by the Court of Appeals.

It is manifest from this statement that the petition presents a controversy over the true construction of the Act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. The direction of the act that the lands be reserved "from any *adverse* appropriation" means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view. He could not administer or apply the act without construing

it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683.

We need not consider the fact that Kennedy, whose application was sustained, is not a party to the petition (see *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578); nor need we consider whether a more appropriate remedy will be open to the relator. See *Brown* v. *Hitchcock*, 173 U. S. 473; *Minnesota* v. *Lane*, 247 U. S. 243, 249, 250.

*Judgment affirmed.*

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## VALLELY, AS TRUSTEE IN BANKRUPTCY OF NORTHERN FIRE & MARINE INSURANCE COMPANY, *v.* NORTHERN FIRE & MARINE INSURANCE COMPANY.

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

No. 96. Submitted November 17, 1920.—Decided December 13, 1920.

1. A petition to revise in matter of law under § 24*b* of the Bankruptcy Act is the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealed from the adjudication. P. 352.
2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation and therefore within the exceptions of § 4*b* of the Bank-

ruptcy Act, as amended in 1910, the court of bankruptcy is without jurisdiction and its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding dismissed upon the motion of the company, even after the time for appeal has expired. P. 352.

3. Where an insurance corporation adjudged bankrupt in an involuntary proceeding after the passage of the Act of 1910, upon due service of process and default, does not appeal from the adjudication but acquiesces therein and aids the trustee in the performance of his duties in administering the estate, it is not estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed. *Id.*

THE case is stated in the opinion.

*Mr. Rome G. Brown* for Vallely, Trustee. *Mr. C. J. Murphy* and *Mr. T. A. Toner* were also on the brief:

As soon as a petition is filed, the court has the duty, and the statute gives it the power, to decide whether an alleged bankrupt comes within the class that may be declared bankrupt. The decision of that fact involves the exercise of jurisdiction. The jurisdiction is none the less real and valid because the court might decide the question wrongly. Neither the allegation nor the fact that the alleged bankrupt is an insurance company, and as such exempt, is jurisdictional. If the court in the exercise of that power reached a wrong conclusion, the judgment is not void; it is merely error to be corrected on appeal or by motion to vacate, timely made; but as long as it stands it is binding on everyone. *In re Worsham*, 142 Fed. Rep. 121; *Edelstein* v. *United States*, 149 Fed. Rep. 636; *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. Rep. 316; *In re First National Bank*, 152 Fed. Rep. 64; *In re Broadway Savings Trust Co.*, 152 Fed. Rep. 152; *In re Plymouth Cordage Co.*, 135 Fed. Rep. 1000.

The following decisions are to the same effect: *In re New England Breeders' Club*, 169 Fed. Rep. 586; *Birch* v. *Steele*, 165 Fed. Rep. 577; *In re T. E. Hill Co.*, 159 Fed.

Rep. 73; *Sabin* v. *Larkin-Green Logging Co.*, 218 Fed. Rep. 984; *Roszell Bros.* v. *Continental Coal Co.*, 235 Fed. Rep. 343; *In re Brett*, 130 Fed. Rep. 981; *Denver First National Bank* v. *Klug*, 186 U. S. 202; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *In re Columbia Real-Estate Co.*, 101 Fed. Rep. 971; *McCormick* v. *Sullivant*, 10 Wheat. 192.

In most of these cases the question related to the jurisdiction of the court where it appeared that the corporation against whom adjudication was sought was not one coming within the purview of the Bankruptcy Act. Other cases relate to the jurisdiction of the federal court generally, arising in instances where a diversity of citizenship was not shown. The principle involved is the same, and so recognized by the decisions of this as well as by other courts. In some of those cases particular emphasis was laid upon the fact that there had been some delay, and, even though it were not great in those particular cases, the court took notice of the fact that the speedy administration of bankrupt estates is contemplated by the law, and that prejudice and loss would result if interested parties were permitted, after recognizing proceedings of this kind, and participating therein, to question the validity thereof. The facts established in the record in this case show clearly that loss would result to the general creditors of respondent if the proceedings taken by the petitioner in connection with managing and conserving the estate of the respondent are ignored, and the bankruptcy set aside.

The jurisdiction of the bankruptcy court is granted and defined by § 2 of c. II of the Bankruptcy Law, which contains no limitations as to the persons or corporations that may be adjudged bankrupts. Subdivisions *a* and *b* of § 4 of c. III do not relate to the jurisdiction, but cover procedure, like the numerous state statutes requiring certain suits to be brought in certain counties, and similar statutes.

Municipal corporations have never been subject to any bankruptcy act, and they would not be subject to the present act whether excepted therefrom or not. Loveland on Bankruptcy, § 125; *Walter* v. *Iowa, etc., Ry. Co.*, 2 Dill. 487.

*Mr. N. C. Young* for Northern Fire & Marine Insurance Company. *Mr. Tracy R. Bangs* and *Mr. Philip R. Bangs* were also on the brief.

Mr. Justice McKenna delivered the opinion of the court.

The Insurance Company was adjudged an involuntary bankrupt May 3, 1917, upon petition of its creditors. The petition averred the corporate capacity of the Company under the laws of North Dakota, and that it had been "engaged in the business of insuring property against loss by fire, hail, etc." Process was duly issued and served, and, the Company making default, an order of adjudication was entered against it. No appeal was taken from the order. The administration of the estate proceeded in due course, claims presented, assets collected and reduced to money, payments made to protect equities, and suits brought by the trustee in his official capacity. In the matters of the estate the trustee frequently conferred with the president and secretary of the bankrupt and received from them coöperation, assistance and information without question of the validity of the adjudication. Considerable moneys were paid out and expenses incurred by the trustee.

After the above course of administration, and on December 18, 1917, the Company by its attorneys filed a motion in the District Court to vacate the adjudication as null and void, and to dismiss the proceedings, upon the ground that it appeared that the Company was an insur-

ance corporation and that the court was, therefore, without jurisdiction. The motion was sustained and an order entered vacating the adjudication and dismissing the petition of the creditors on authority of § 4-*b* of the Bankruptcy Act, as amended by the Act of June 25, 1910, c. 410, 36 Stat. 839, which provides that "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, . . . may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act."

The trustee filed a petition to revise the order of the District Court in a matter of law in the Circuit Court of Appeals, and the latter court certifies that it is indispensable to the determination of the case, and to the end that the court may properly discharge its duty, desires instruction upon the following questions:

"1. Is a petition to revise in matter of law under section 24-*b* of the Bankruptcy Act the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealing from the adjudication?

"2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation and therefore within the exceptions of section 4-*b* of the Bankruptcy Act as amended June 25, 1910 (36 Stat. 839), is there such an absence of jurisdiction in the court of bankruptcy that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding be dismissed upon the motion of the bankrupt after the time for appeal has expired?

"3. Where an insurance corporation adjudged bankrupt

in an involuntary proceeding after the passage of the amendatory Act of June 25, 1910 (36 Stat. 839), upon due service of process and default, does not appeal from the adjudication but acquiesces therein and aids the trustee in the performance of his duties in administering the estate, may it be estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed?"

Of the construction of the statute there can be no controversy; what answer shall be made to the questions turns on other considerations, turns on the effect of the conduct of the Company as an estoppel. That it has such effect is contended by the trustee, and there is an express concession that if objection had been made the Company would have been entitled to a dismissal of the petition. It is, however, insisted that it is settled "that an erroneous adjudication against an exempt corporation, whether made by default or upon a contest or trial before the bankruptcy court, can be attacked only by appeal, writ of error, or prompt motion to vacate," and that § 4 does not relate to the jurisdiction of the court over the subject-matter. "It does not, therefore," is the further contention, "create or limit jurisdiction of the court with respect to its power to consider and pass upon the merits of the petition." And that "the valid exercise of jurisdiction does not depend on the correctness of the decision." And again, if the court in the exercise of its jurisdictional power, "reached a wrong conclusion, the judgment is not void; it is merely error to be corrected on appeal or by motion to vacate, timely made, but as long as it stands it is binding on every one." There is plausibility in the propositions taken in their generality, but there are opposing ones. Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are

not voidable, but simply void, and this even prior to reversal. *Elliott* v. *Peirsol*, 1 Pet. 328, 344; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8.

Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other. There is such citation in the pending case. Plaintiff in error cites among others, *McCormick* v. *Sullivant*, 10 Wheat. 192; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Denver First National Bank* v. *Klug*, 186 U. S. 202.

*McCormick* v. *Sullivant* involved the effect of diversity of citizenship, and it was decided that an absence of its allegation did not impeach the judgment rendered in the case and preclude its being conclusive upon the parties. And it was said (as it has often been said), that the courts of the United States are "of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

In *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, there came up to be considered also the effect of a prior adjudication as dependent upon an allegation of diversity of citizenship, and the ruling in *McCormick* v. *Sullivant* was affirmed.

The immediate comment on these cases is that the courts had jurisdiction of their subject-matter and necessarily power to pass upon the fact (diversity of citizenship) upon which that jurisdiction depended in the given case. The subject-matter of the suit was not withheld from them by explicit provision of the law which was their sole warrant of power.

*Denver First National Bank* v. *Klug* is nearer to the

question in the case at bar. It was a case in bankruptcy. The Act of July 1, 1898, 30 Stat. 544, provided that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil" might "be adjudged an involuntary bankrupt upon default or an impartial trial" and should "be subject to the provisions and entitled to the benefits" of the act.

A petition in involuntary bankruptcy was filed against Klug and a trial was had upon the issue, whether he was "engaged chiefly in farming" within the meaning of the act, and the jury having found accordingly, the District Court entered a judgment dismissing the petition. The question of the jurisdiction was certified to this court and it was held that the "District Court had and exercised jurisdiction." This further was said, "The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned." Citing *Mueller* v. *Nugent*, 184 U. S. 1, 15; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25; *Smith* v. *McKay*, 161 U. S. 355.

It will be observed, therefore, that the Act of 1898 made jurisdiction depend upon an inquiry of fact and necessarily jurisdiction was conferred to make the inquiry, and pronounce judgment according to its result. The case, therefore, is not pertinent to, or authority upon the case at bar. The Act of June 25, 1910, which covers the present proceeding is peremptory in its prohibition. It excludes, by § 4-*a*, insurance corporations from the benefits of voluntary bankruptcy, and by sub-division *b* prohibits them from being adjudged involuntary bankrupts. The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of "municipal, railroad, insur-

ance, or banking" corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result. We may use for illustration a municipal corporation. Its creditors may be enterprising, its officers acquiescent or indifferent; can, therefore, the allegations of the former and the default of the latter confer jurisdiction on the District Court to entertain a petition in bankruptcy against the corporation and render a decree therein, and if not, why not? If consent can confirm jurisdiction, why not initially confer jurisdiction? It is not necessary to point out the disorder that would hence result and the difficulties that the officers of a bankruptcy court would encounter in such situation. The legislative power thought care against the possibility of it was necessary, and in that care associated insurance corporations. For a court to extend the act to corporations of either kind is to enact a law, not to execute one.

The first question concerns procedure only, and should be answered in the affirmative. *Denver First National Bank* v. *Klug, supra; Matter of Loving*, 224 U. S. 183.

The second and third questions concern the merits and are respectively answered in the affirmative and negative.

*So ordered.*

# GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY *v.* WOODBURY ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 100. Submitted November 15, 1920.—Decided December 13, 1920.

1. The declaration of the Act to Regulate Commerce (§ 1) that it shall apply to any common carrier engaged in the transportation of persons or property from any place in the United States to an adjacent foreign country, contemplates its application also to the transportation by such a carrier from the adjacent foreign country into the United States, since the test of the application of the act is the field of the carrier's operation and not the direction of the movement. P. 359.
2. Where a passenger traveling from Canada to Texas and return without any express stipulation as to the liability of the carrier for loss of baggage, through the fault of the carrier lost her trunk in Texas on the journey out, *held*, that the amount of her recovery was limited under the Carmack Amendment by the carrier's published tariffs filed with the Interstate Commerce Commission. *Id.*
3. The right of a carrier, under the Carmack Amendment, to limit by tariff the amount of its liability for the baggage of a passenger, was not altered by the Act of March 4, 1915, known as the Cummins Amendment, as amended August 9, 1916. *Id.*

209 S. W. Rep. 432, reversed.

THE case is stated in the opinion.

*Mr. T. J. Beall* for petitioner.

*Mr. Rufus B. Daniel* for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On March 14, 1917, Mrs. Woodbury took the Galveston, Harrisburg & San Antonio Railway at San Antonio,

Texas, for El Paso, Texas, and checked her trunk, which she took with her. It was lost and she sued the company in a state district court for the value of trunk and contents, which the jury found to be $500. Mrs. Woodbury was traveling on a coupon ticket purchased at Timmins, Ontario, from a Canadian railroad, entitling her to travel over it and connecting lines, from Timmins to El Paso and return, apparently with stop-over privileges. When the trunk was lost she was on her journey out. She was not told when she purchased her ticket or when she checked her trunk that there was any limitation upon the amount of the carrier's liability. It did not appear whether the ticket purchased contained notice of any such limitation, nor did it appear what was the law of Canada in this respect. The company insisted that Mrs. Woodbury was on an interstate journey; and that under the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, as amended, it was not liable for more than $100; since it had duly filed with the Interstate Commerce Commission and published a tariff limiting liability to that amount unless the passenger declared a higher value and paid excess charges, which Mrs. Woodbury had not done. She insisted that her transportation was not subject to the Act to Regulate Commerce, because it began in a foreign country; and that the liability was governed by the law of Canada, which should in the absence of evidence be assumed to be like the law of Texas, the forum; and that by the law of Texas the limitation of liability was invalid. The trial court held that she was entitled to recover only $100, and entered judgment for that amount. This judgment was reversed by the Court of Civil Appeals, which entered judgment for Mrs. Woodbury in the sum of $500. 209 S. W. Rep. 432. The case came here on writ of certiorari, 250 U. S. 637. The only question before us is the amount of damages recoverable.

If Mrs. Woodbury's journey had started in New York

instead of across the border in Canada, the provision in the published tariff would clearly have limited the liability of the carrier to $100. For her journey would have been interstate although the particular stage of it on which the trunk was lost lay wholly within the State of Texas. Compare *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111. And the Carmack Amendment under which carriers may limit liability by published tariff applies to the baggage of a passenger carried in interstate commerce, *Boston & Maine R. R. Co.* v. *Hooker*, 233 U. S. 97; although it does not deal with liability for personal injuries suffered by the passenger. *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher*, 248 U. S. 359. The subsequent legislation, the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441, has not altered the rule regarding liability for baggage.

But counsel for Mrs. Woodbury insists that solely because her journey originated in Canada the provisions of the Act to Regulate Commerce do not apply. The contention is that § 1 of the Act of 1887 does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger but of property. *Boston & Maine R. R. Co.* v. *Hooker, supra.* The second is that the act does apply to the transportation of both passengers and property from an *adjacent* foreign country, such as Canada. Section 1 declares that the act applies to "any common carrier . . . engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country." A carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. The test of the application of the act is not the direction of the movement, but

the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission. *International Paper Co.* v. *Delaware & Hudson Co.*, 33 I. C. C. 270, 273, citing *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197. It is in harmony with that placed upon the words of § 1 of the Harter Act, February 13, 1893, c. 105, 27 Stat. 445, "any vessel transporting merchandise or property from or between ports of the United States and foreign ports," which in *Knott* v. *Botany Mills*, 179 U. S. 69, 75, were construed to include vessels bringing cargoes from foreign ports to the United States. There is a later clause in § 1 which deals specifically with the transportation of property to or from foreign countries; but cases arising under that clause are not applicable here. That clause applies where the foreign country is *not* adjacent to the United States. The cases which hold that the act does not govern shipments from a foreign country in bond through the United States to another place in a foreign country, whether adjacent or not, are also not in point. Compare *United States* v. *Philadelphia & Reading Ry. Co.*, 188 Fed. Rep. 484; *In the Matter of Bills of Lading*, 52 I. C. C. 671, 726–729; *Canales* v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 37 I. C. C. 573.

Since the transportation here in question was subject to the Act to Regulate Commerce, both carrier and passenger were bound by the provisions of the published tariffs. As these limited the recovery for baggage carried to $100, in the absence of a declaration of higher value and the payment of an excess charge, and as no such declaration was made and excess charge paid, that sum only was recoverable.

*Reversed.*

# THORNTON ET AL. *v.* DUFFY ET AL., MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 76. Argued November 8, 1920.—Decided December 20, 1920.

1. The construction placed on the constitution and laws of a State by its highest court must be accepted by this court in determining their consistency with the Federal Constitution. P. 368.
2. The right of a State to enforce a legitimate public policy includes the right to change and improve its regulations for that purpose, even to the making of changes which conflict with the arrangements and contracts made by individuals in reliance on previous regulations. P. 369.
3. The State of Ohio, in carrying out its policy of workmen's compensation (see *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571), first allowed employers, in certain cases, the privilege of paying directly to their workmen or their dependents the compensation provided by law, instead of contributing to the state fund established to insure such payments; but afterwards, acting under power reserved over the subject, it took away this privilege from employers who indemnified themselves by insurance. *Held*, that the change did not impair the constitutional rights of property or of contract of an employer who had elected to take the privilege of direct payment and had insured himself with an insurance company before the change was made. P. 366.

99 Oh. St. 120, affirmed.

THE case is stated in the opinion.

*Mr. Judson Harmon* and *Mr. A. I. Vorys* for plaintiffs in error:

The legislature has the power to compel all employers to contribute to the state workmen's compensation fund, or it may provide the conditions upon which employers may pay into the state fund, and the conditions upon

which they may pay compensation directly to employees, but the desire of an employer, who elects to pay compensation directly, to indemnify himself cannot be made the sole basis of a legislative classification of employers, distinguishing them as ineligible to pay compensation directly. Such basis of classification is not related to the purpose of the constitutional amendment and the workmen's compensation law. *Adams* v. *Tanner*, 244 U. S. 590; *State* v. *U. S. F. & G. Co.*, 96 Oh. St. 250; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549; *Chicago* v. *Netcher*, 183 Illinois, 104; *Traux* v. *Raich*, 239 U. S. 33; *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271; *Chenoweth* v. *State Board*, 57 Colorado, 74; *Byers* v. *Meridian Printing Co.*, 84 Oh. St. 408; *Dunahoo* v. *Huber*, 185 Iowa, 753.

The legislature has no power to prohibit employers from insuring or indemnifying themselves against their liability to employees. Insurance is not inimical to public policy. *Phœnix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312; *Allgeyer* v. *Louisiana*, 165 U. S. 578. Liability insurance is not inimical to public policy. *American Casualty Company's Case*, 82 Maryland, 535; *Kansas City &c. R. R. Co.* v. *Southern News Co.*, 151 Missouri, 373; *Breeden* v. *Frankford Insurance Co.*, 220 Missouri, 327; *Stone* v. *Old Colony St. Ry. Co.*, 212 Massachusetts, 459; *Rumford Falls Co.* v. *Casualty Co.*, 92 Maine, 574; *Hoadley* v. *Purifoy*, 107 Alabama, 276. Contracts indemnifying employers are not inimical to public welfare and the legislature cannot prohibit such contracts. *Adams* v. *Tanner, supra; Allgeyer* v. *Louisiana, supra; Dobbins* v. *Los Angeles*, 195 U. S. 223; *Yee Gee* v. *San Francisco*, 235 Fed. Rep. 757; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *Chenoweth* v. *State Board, supra; Wilson* v. *New*, 243 U. S. 332, 347.

Assuming, for the purpose of this branch of the argu-

ment only, that the state fund "insures" the compensation due to employees from employers, and, that the law may give the state fund a monopoly of such insurance and deny the right to issue such insurance to all others, still the State cannot abrogate existing insurance, valid when it was issued, *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227; *American Building & Loan Association* v. *Rainbolt*, 48 Nebraska, 434; *McNamara* v. *Keene*, 98 N. Y. S. 860; *Industrial Building & Loan Association* v. *Meyers Co.*, 12 Arizona, 48; nor can it take away the right of the employer to procure other insurance by making contracts of insurance in other States, or by any other means over which the State has no control. *Stone* v. *Old Colony St. Ry. Co., supra; New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357; *Allgeyer* v. *Louisiana, supra.*

Neither § 1465–69 nor § 1465–101, as amended in 1917, was intended to apply, and they do not apply to contracts theretofore made by employers. *Sturges* v. *Carter*, 114 U. S. 511; *Bernier* v. *Becker*, 37 Oh. St. 72; *Kelley* v. *Kelso*, 5 Oh. St. 198; *State* v. *Creamer*, 85 Oh. St. 349; *Hathaway* v. *Mutual Life Insurance Co.*, 99 Fed. Rep. 534; *Burridge* v. *New York Life Insurance Co.*, 211 Missouri, 158; Black's Constitutional Law, 3d ed., § 296; Lewis' Sutherland Statutory Construction, 2d ed., § 642.

The plan of workmen's compensation, as operated by the State Industrial Commission under the law of Ohio, is not insurance.

*Mr. Timothy S. Hogan* and *Mr. B. W. Gearheart*, with whom *Mr. John G. Price*, Attorney General of the State of Ohio, was on the briefs, for defendants in error.

Mr. Justice McKenna delivered the opinion of the court.

This suit was brought by the plaintiff in error, Thornton, against defendants in error, hereinafter called defendants,

composing the Industrial Commission of Ohio. The Cleveland Stamping and Tool Company filed an answer and cross petition. From a judgment sustaining demurrers to the petition of Thornton, and to the answer and cross petition of the Cleveland Stamping and Tool Company, there was an appeal to the Court of Appeals and thence by proceeding in error to the Supreme Court of the State, by which court the judgment was affirmed. This writ of error is prosecuted by Thornton and the Cleveland Company.

Thornton's petition and the pleadings of the Cleveland Company are substantially the same. We use for convenience, Thornton's petition and state its allegations narratively as follows: He is a manufacturer at Cleveland, Ohio, employing more than forty men. The Industrial Commission determined, as required by the Act of the General Assembly of the State, passed February 26, 1913, and comprised in §§ 1465–41 A to 1465–106, General Code of Ohio, that he was of sufficient financial ability to render certain the payment of compensation to injured employees, the benefits provided by that act. He, on the — day of January, 1914, elected to accept the act and proceed under it, has since complied with its provisions, has abided by the rules of the Commission and all that is required of him by the act.

January, 1914, he made a written contract with the Ætna Life Insurance Company of Hartford, Connecticut, a duly licensed company, wherein that company agreed to pay to his injured employees the compensations required by the act of the assembly for injuries or upon death, and agreed to indemnify him against the liabilities and requirements of the act.

December 1, 1917, the Commission adopted a resolution which recited the Act of the Assembly of the State of February 16, 1917, amending § 1465–101, General Code of Ohio, and an Act of the General Assembly passed

March 20, 1917, amending § 1465–69, General Code of the State, and an Act passed March 21, 1917, and resolved and declared that no employers should be permitted to pay or furnish directly to injured employees, or the dependents of killed employees, the compensation and benefits provided for in §§ 1465–41 A to 1465–106, General Code of Ohio, if such employers by contract or otherwise, shall provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof. The Commission revoked its previous findings and authorizations, the revocation to stand as of January 10, 1918, and directed notices of the revocation and the resolution of the Commission to be given to all employers, including Thornton, and these notices will be sent unless restrained.

The resolution of the Commission, the revocation of its previous action, and the notices which it threatens to send, are based upon the sole ground that it is its duty so to do under the laws of the State indicated above.

The contract of Thornton with the Ætna Company is a valid, subsisting contract and he has a right to continue it until it be cancelled, and that the sending of the notices as above stated, and the revocation of the findings of fact that the Commission had made and its refusal to certify to Thornton its findings of fact, as provided for in § 1465–69, will cause him irreparable injury and damage, for which he has no adequate remedy at law. Further, that there are more than 675 employers situated as Thornton is and that, therefore, the questions involved are of common and general interest, and as it is impractical to bring them all into court, he sues for the benefit of all.

The laws invoked by the Commission do not justify its action, and if it be determined that they do, then they, and the acts of the Commission under them, are in contravention of the Fourteenth Amendment of the Constitution

of the United States, and of Article I, § 10 of that Constitution, and also of the constitution of the State of Ohio.

An injunction, temporary and permanent, against the action of the Commission was prayed, and a temporary restraining order granted, but it was subsequently dissolved, and as we have said, a demurrer was sustained to the petition and judgment entered dismissing the suit. It, as we have also said, was affirmed by the Supreme Court of the State.

The various acts of legislation of the State were sustained by the courts of the State and hence their validity under the constitution of the State is removed from the controversy, and our inquiry is confined to the effect upon them of the Constitution of the United States.

In support of the contention that the Constitution of the United States makes the legislation and the action under it illegal, it is said that insurance against loss is the right of everybody, and specifically it is the right of employers to indemnify themselves against their liability to employees, and that the right is so fixed and inherent as to be an attribute of liberty removed from the interference of the State.

The provisions of the legislation are necessary elements in the consideration of the contention. (1) The constitution of Ohio authorizes Workmen's Compensation Laws. Explicitly it provides for the passage of laws establishing a State Fund to be created by compulsory contributions thereto by employers, the fund to be administered by the State. The constitutionality of a law passed under that authorization was sustained by this court in *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, against the charge that its classifications were arbitrary and unreasonable. And Workmen's Compensation Laws of other States have been declared inoffensive to the Fourteenth Amendment of the Constitution of the United States. *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219. (2)

The law that was passed provided that every employer (there were exceptions not necessary to mention) in the month of January, 1914, and semi-annually thereafter, should pay into the State Insurance Fund the amount of premium determined and fixed by the State Liability Board of Awards for the particular employment or occupation of the employer. It was, however, also provided (we quote from the opinion of the Supreme Court) "that certain employers under certain conditions might elect to pay individually, or from a benefit fund, department or association, compensation to workmen and their dependents for death or injuries received in the course of employment." This was an alternative granted, and its conditions were fulfilled, it was contended, and that upon the faith of the fulfillment of it and in indemnity against contingencies, plaintiff entered into a contract of insurance with the Ætna Company. It was further contended that the alternative and the insurance against its requirements became property, and inviolable; became contracts with immunity from impairment. To the contention the Supreme Court replied that the alternative to contribution to the State Fund of dealing with the employees directly was a privilege that need not have been granted and that, therefore, to effect the purpose of the constitution and law, could be withdrawn, that the right to withdraw the privilege depended not merely upon the police power of the State "but rather directly upon the constitutional grant of power"; and that, besides, the right was reserved in that provision of § 22 of the original act which gave to the Commission power to "'at any time change or modify its findings of fact . . . if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law. . . . '" And it was said that the experience of four years demonstrated the necessity or desirability of a change and that, therefore, it was made.

The meaning thus ascribed to § 22 we must accept. It expressed a continuing condition upon the concession to employers to deal directly with their employees, and the Industrial Commission by the power reserved could terminate the concession at any time.

There was besides, subsequent and empowering legislation in the amendment of March 20, 1917, as the Supreme Court pointed out. That act specifically limits the privilege of electing between directly dealing with employees and contribution to the State Fund to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof." The court hence decided that it became the duty of the Commission to change or modify its findings. And it was also decided that the act was not only clearly within the power of the State, but was "in furtherance of the purpose and intent of the constitution and the law, to create and maintain one insurance fund, to be administered by the state."

We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the constitution of the State, as much a part of both as if expressed in them (*Douglass* v. *County of Pike*, 101 U. S. 677), and we are unable to yield to the contention that the legislation or the requirement transcends the power of the State, or in any way violates the Constitution of the United States. The law expressed the constitutional and legislative policy of the State to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions. There was an attempt at the accommodation of the new policy to old conditions in the concession to employers to deal directly with their employees, but there was precaution against failure in the

provision of § 22 giving discretion to the Commission to withdraw the concession. After a few years' experience, that discretion was turned into a duty and by the amendment of March 20, 1917, the concession was taken away from those employers who indemnified themselves by insurance. This was considered necessary to execute the policy of the State, and we are unable to yield to the contention that property rights or contract rights had accrued against it. To assert that the first steps of a policy make it immutable, is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new and we have heretofore been invoked to pronounce judgment upon it. Complying, we said, that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467.

We are not disposed to extend the discussion. Indeed, we think the case is in narrow compass. We are not called upon to controvert the right to insure against contingent losses or liabilities, or to minimize the value of insurance to business activities and enterprises, or discuss the general power or want of power of the State over it. We are only called upon to consider its relation to and possible effect upon the policy of a workmen's compensation law and we can readily see that it may be, as it is said the experience of Ohio demonstrated, inimical to that policy to permit the erection of an interest or a power that may be exerted against it or its subsidiary provisions. This was the view of the Supreme Court of the State, and by it the court justified the power conferred upon and exercised by the Commission. See *Mountain Timber Co.* v. *Washington*, *supra.*

*Judgment affirmed.*

THE CHIEF JUSTICE, concurring.

To compel an employer to insure his employee against loss from injury sustained in the course of the employment without reference to the negligence of the employee and at the same time to prohibit the employer from insuring himself against the burden thus imposed, it seems to me, if originally considered, would be a typical illustration of the taking of property without due process and a violation of the equal protection of the law.

But in view of the decision in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, sustaining the constitutionality of a law of the State of Washington which necessarily excluded the possibility of the insurance by the employer of the burden in favor of his employees, which the statute in that case imposed, I do not think I am at liberty to consider the subject as an original question, but am constrained to accept and apply the ruling in that case made, and for that reason I concur in the judgment now announced.

MR. JUSTICE MCREYNOLDS dissents.

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## MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* WASHBURN LIGNITE COAL COMPANY.

ERROR TO THE DISTRICT COURT, SIXTH JUDICIAL DISTRICT, OF THE STATE OF NORTH DAKOTA.

No. 55. Argued January 29, 1920.—Decided December 20, 1920.

A judgment of a state court cannot be reviewed here by writ of error upon the claim that it gives effect to a local rate statute in violation of a carrier's rights under the Fourteenth Amendment, when it is apparent, from the state court's opinion, that it did not uphold and

enforce the statutory rate as such but rested its decision on other, independent grounds, substantial in character, broad enough to sustain the judgment, and not involving any federal question of a kind for which review may be had by writ of error under Jud. Code, § 237, as amended by the Act of September 6, 1916. P. 373.

Writ of error to review 40 N. Dak. 69, dismissed.

THE case is stated in the opinion.

*Mr. John L. Erdall*, with whom *Mr. A. H. Bright* and *Mr. H. B. Dike* were on the brief, for plaintiff in error.

*Mr. Alfred Zuger* and *Mr. Andrew Miller*, with whom *Mr. B. F. Tillotson* was on the brief, for defendant in error.

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

This was an action by a railroad company against a shipper, for whom it had carried many carloads of coal between points in the State of North Dakota, to recover for that service a compensation in addition to what was demanded and paid when the service was rendered. Judgment went against the carrier in the court of first instance, and again in the Supreme Court of the State, 40 N. Dak. 69; and this writ of error was sued out on the theory that the judgment upheld and gave effect to a local rate statute which the carrier was contending was repugnant to the due process of law clause of the Fourteenth Amendment. If this theory is not right, the writ of error must be dismissed, for it is without other support. See § 237, Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726.

To show what was involved and decided it is necessary to refer with some particularity to a prior litigation out of which the present case arose.

In 1907 the State of North Dakota, by an act of its legislature, prescribed a schedule of maximum rates for carry-

ing coal in carload lots between points within the State, c. 51, Laws 1907; and this and other carriers refused to put the schedule into effect. Suits for injunctions against further disobedience were brought by the State in its Supreme Court, and the carriers defended on the ground that the schedule was confiscatory and therefore in conflict with the due process of law clause of the Fourteenth Amendment. On the hearing that court sustained the schedule and directed that the injunctions issue. 19 N. Dak. 45 and 57. The carriers brought the cases to this court on writs of error and it affirmed the judgments, but did so without prejudice to the right of the carriers to reopen the cases if an adequate trial of the schedule in the future enabled them to prove that it was confiscatory. 216 U. S. 579 and 581. Mandates to that effect issued and the state court modified its judgments accordingly. In obedience to the injunctions the carriers then put the schedule into effect in accordance with local laws (Rev. Code, 1905, §§ 4339–4342); that is to say, they printed and filed coal tariffs based on the maximum rates named in the schedule and gave public notice of their purpose to apply those tariffs. After trying the schedule for a year or more the carriers presented in the state court petitions wherein they told of the trial made, asserted their ability and readiness to prove that the schedule was confiscatory, and prayed permission to do so. The petitions were entertained, proofs were taken, and on a hearing the schedule was sustained and the existing injunctions continued. 26 N. Dak. 438. On writs of error prosecuted by the carriers those judgments were reversed by this court, because the proofs satisfied it that the schedule was not adequately remunerative, and the cases were remanded for further proceedings not inconsistent with the opinion. 236 U. S. 585. On receiving the mandates the state court set aside its judgments and dismissed the cases.

The injunctions in those cases were awarded without

taking any bond and without imposing any terms or conditions other than reserving to the carriers, as before shown, a right to reopen the cases and again attack the schedule after subjecting it to a fair trial. When this right was exercised the carriers did not ask a suspension of the injunctions pending a hearing and decision, and the injunctions remained in force until the cases were dismissed. Neither at the time of the dismissal nor at any prior stage of the proceedings was there any order saving or securing to the carriers a right to demand or collect additional compensation in respect of shipments whereon the schedule rate was demanded and paid while the injunctions were effective.

The shipments as to which additional compensation is sought in the present case were made while the injunction against this carrier was in force;—that is to say, after the schedule was sustained by the first judgments and before it was adjudged unremunerative as a result of the attack made after it had been in effect for a year or more. At the time of the shipments the carrier demanded and the shipper paid the maximum rate named in the schedule, it being the duly filed and published rate. The carrier did not then protest that it was entitled to more; nor did the shipper engage to pay more.

In suing for further compensation the carrier took the position that the schedule was confiscatory and therefore invalid under the Fourteenth Amendment; that the coal was carried at the schedule rate because the injunction in the prior litigation compelled it; that the schedule ultimately was adjudged unremunerative and invalid and the injunction dissolved; and that in these circumstances there arose an obligation on the part of the shipper to pay an additional sum, such as with that already paid would amount to a reasonable compensation.

The Supreme Court of the State put its judgment against the carrier on the following grounds:

1. There was no contract, express or implied, on the part of the shipper to pay any rate other than that shown in the tariff filed and published according to law,—the court saying on this point: "Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of publication becomes a mere trap for the unwary. In our judgment, it is wholly improper, in the absence of clear allegations of the rendition of services under a distinct protest, for a court to find that a shipper had, in effect, undertaken conditionally to pay according to a rate different from that published in compliance with the statute."

2. The injunction, in obedience to which the schedule was put into effect and maintained during the period covered by the shipments, was awarded without taking any bond or imposing any terms or conditions for the security of the carrier; and in these circumstances the damage arising from the injunction was *damnum absque injuria*, for which no recovery could be had,—the court citing on this point *Russell* v. *Farley*, 105 U. S. 433, 437–438,[1] and saying: "In reality, the plaintiff's [carrier's] whole case seems properly hinged upon the real meaning and effect of the first decree of the United States Supreme Court. The matter that was settled in that suit [meaning by that decree] was the right of the State to an injunction, and it was found that the State was entitled to the relief sought. Neither the state court nor the United States Supreme Court saw fit to impose any terms or conditions. . . . The error in the plaintiff's [carrier's] contention inheres in the failure to recognize the injunction as being the continuing expression of the court until such time as it

[1] See also *Meyers* v. *Block*, 120 U. S. 206, 211; *Lawton* v. *Green*, 64 N. Y. 326, 330; *Palmer* v. *Foley*, 71 N. Y. 106, 108; *City of St. Louis* v. *St. Louis Gaslight Co.*, 82 Mo. 349, 355; *Hayden* v. *Keith*, 32 Minn. 277, 278; *Scheck* v. *Kelly*, 95 Fed. Rep. 941; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 145.

may be modified or dissolved by a new judgment or decree. During such time, it is impossible that there could have been any other measure of the rights and obligations of the parties than that provided in the decree itself. . . . When that court finally dissolved the injunction, it did not reverse its prior judgment, nor, it seems to us, did it profess to give to the carriers any rights with respect to past shipments that did not exist at the time they were made. These rights were governed by the former decree."

3. The principle that one who has been unjustly enriched at the expense of another may be made to respond to the latter was without application, for here the shipper was responsible in no greater degree for what occurred than was the carrier.

The opinion rendered by that court shows that it did not uphold or give effect to the statutory rate as such, but rested its decision on other independent grounds which appeared to it to preclude a recovery by the carrier. These grounds are broad enough to sustain the judgment, and, if not well taken, are not without substantial support. See *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 163–165. Some may possibly involve federal questions, but under the jurisdictional statute, as amended in 1916, they are not such as entitle the carrier to a review of the judgment on a writ of error.

*Writ of error dismissed.*

# MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* C. L. MERRICK COMPANY.

ERROR TO THE DISTRICT COURT, SIXTH JUDICIAL DISTRICT, OF THE STATE OF NORTH DAKOTA.

No. 15. Argued January 29, 1920.—Decided December 20, 1920.

A decree of this court affirming "without prejudice" an injunctive decree of a state court upholding a statutory railroad rate against a charge of confiscation, determines the adequacy of the rate for the period antedating the decree, and is not superseded by a decree in a subsequent suit holding the rate confiscatory upon new evidence developed by a further test. P. 377.

A federal question which has been specifically settled and is no longer an open one in this court, is not an adequate basis for a writ of error. *Id.*

Writ of error to review 35 N. Dak. 331, dismissed.

THE case is stated in the opinion.

*Mr. John L. Erdall,* with whom *Mr. A. H. Bright* and *Mr. H. B. Dike* were on the brief, for plaintiff in error.

*Mr. Alfred Zuger* and *Mr. Andrew Miller,* with whom *Mr. B. F. Tillotson* was on the brief, for defendant in error.

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

This is a companion case to *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Washburn Lignite Coal Co.,* just decided, *ante,* 370, and was brought by a shipper to recover charges exacted in excess of the statutory rate. The shipments were made prior to the first judgment in the injunction suit, when the carrier was refusing to give effect to the schedule; and the excess was paid under pro-

test and because the carrier would not deliver the coal on payment of the statutory rate. In the trial court there was a judgment against the shipper, and this was reversed by the Supreme Court with a direction to award the shipper the amount claimed. 35 N. Dak. 331. The carrier prosecutes this writ of error.

The pleadings, the opinion of the Supreme Court, and the briefs in this court, show that the only controversy in that court was over the meaning and effect of the first judgment in the injunction suit as affirmed by this court "without prejudice," etc. On the part of the shipper it was insisted that that judgment finally and conclusively determined the validity of the statutory rate in respect of the period preceding its rendition; and on the part of the carrier it was insisted that the judgment was interlocutory merely and was entirely superseded and held for naught by the subsequent judgment of this court in the later proceeding. The court sustained the shipper's contention and rejected that of the carrier, saying:

"The fallacy in respondent's [carrier's] contention, as we view it, lies in the unwarranted assumption that the latter judgment relates back and supersedes the first. When respondent [carrier] applied for and was granted leave to make a new showing as to the confiscatory character of the statutory rates, it amounted in legal effect to the commencement of a new action to determine a new issue; to-wit, whether as applied to and in the light of facts *subsequently arising*, such statutory rates are confiscatory. The case was not reopened for the purpose of relitigating the issues formerly decided, nor was the former decree in any way affected. This is made clear by the recent decision of the Supreme Court in *Missouri* v. *Chicago, B. & Q. R. Co.*, 241 U. S. 533."

In support of that view the court quoted portions of the opinion in the case cited, including the following:

"In a rate case where an assertion of confiscation was

not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as 'without prejudice,' not to leave open the controversy as to the period with which the decree dealt, and which it concluded, but in order not to prejudice rights of property in the future if from future operation and changed conditions arising in such future it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in conditions arose. . . . A complete illustration of the operation of the qualification is afforded by the *North Dakota Case*, just cited [216 U. S. 579], since in that case as a result of the qualification 'without prejudice' the case was subsequently reopened and upon a consideration of new conditions arising in such future period, a different result followed [236 U. S. 585] from that which had been previously reached."

When we have in mind the question which the Supreme Court was called on to decide, and did decide, and the fact that the question was no longer an open one in this court, as is shown by our opinion in the *Missouri Case*, it is apparent that this writ of error is without any adequate basis.

*Writ of error dismissed.*

## ARNDSTEIN *v.* McCARTHY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 575. Petition of trustee in bankruptcy for leave to intervene, for certification of the entire record, and for reargument, submitted November 22, 1920.—Denied December 20, 1920.

The decision of this case, to which the present application relates, is reported in this volume, pages 71 *et seq.*

*Mr. Saul S. Myers, Mr. Francis M. Scott* and *Mr. Walter H. Pollak*, for the trustee in bankruptcy, in support of the petition.

Memorandum for the court by MR. JUSTICE MCREYNOLDS.

The trustee in bankruptcy has filed an earnest petition asking that we (a) allow him to intervene, (b) permit reargument of the appeal, (c) direct that the entire record be certified to this court, (d) recall the mandate, (e) stay all proceedings in respect thereto, and (f) grant further and proper relief.

The court below heard the cause as upon demurrer and held the petition for *habeas corpus* insufficient. Disagreeing with the result we concluded that the bankrupt did not waive his constitutional privilege merely by filing sworn schedules, that the petition was adequate, and that the writ should have issued. The mandate only requires the trial court to accept our decision upon the point of law, to issue the writ and then to proceed as usual. If the petition does not correctly set forth the facts, or if proper reasons exist for holding the prisoner not shown by the petition neither our opinion nor mandate prevents them from being set up in the return and duly considered.

Alleged defects in the record appear to be based upon a misconception.

Our conclusion concerning the constitutional question presented, we think, is so plainly correct that a reargument would be unprofitable.

*The petition is denied.*

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

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## MARSHALL, AS RECEIVER OF ALL PACKAGE GROCERY STORES COMPANY, *v.* PEOPLE OF THE STATE OF NEW YORK.

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

No. 294. Submitted October 12, 1920.—Decided December 20, 1920.

1. At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due to it, whether the property was in possession of the debtor or of a third person, or *in custodia legis;* and the priority could be defeated or postponed only through passing the title to such property, absolutely or by way of lien, before the sovereign sought to enforce his right. P. 382.
2. A like right of priority, based on sovereign prerogative, belongs to the State of New York, as her highest court has decided, through her adoption, by her constitutions, of the common law, and attaches to a debt due the State by a sister-state corporation as a license fee or tax for the privilege of doing business in New York, although no statute of the State makes the tax a lien or declares its priority. P. 383.
3. The question whether this priority is a prerogative right or a rule of administration is a question of local law, the determination of which by the highest court of the State concludes the federal courts. P. 384.
4. The priority extends to all property of the debtor within the borders

of the State, whether the debtor be a resident or a non-resident, and is enforceable against such property in the hands of a receiver appointed by a federal court within the State, since such a receiver takes property subject to all liens, priorities or privileges existing or accruing under the state laws. P. 385. *City of Richmond* v. *Bird*, 249 U. S. 174, distinguished.

262 Fed. Rep. 727, affirmed.

THE case is stated in the opinion.

*Mr. A. S. Gilbert, Mr. Francis Gilbert* and *Mr. William J. Hughes* for petitioner.

*Mr. Cortland A. Johnson* and *Mr. Robert P. Beyer* for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On December 4, 1917, the District Court of the United States for the Southern District of New York appointed H. Snowden Marshall general receiver of the property of the All Package Grocery Stores Company, a corporation organized under the laws of Delaware, but having a place of business and property in the State of New York. The latter State asked to have certain debts due to it declared payable as preferred claims out of the assets in the hands of the receiver. These debts consisted of (a) amounts due for annual franchise taxes assessed under § 182 of the New York Tax Law, and (b) amounts due for license fees or taxes for the privilege of doing business within the State, assessed under § 181 of that law and payable but once. The State asserted in its claim "that said taxes accrued and became a lien on all the property of the defendant corporation pursuant to the provisions of the Tax Law of the State of New York prior to the appointment of the receiver herein." The District Court held that both

classes of claims were taxes, but that the lien created by § 197 of the Tax Law applied only to annual franchise taxes and that no provision of the law gave a lien for license taxes until a levy was made therefor. It accordingly allowed the preference as to the amounts due for annual franchise taxes and denied it as to the amounts due for license taxes. Upon appeal by the State, the Circuit Court of Appeals held that, independently of specific statutory provision, the law of New York as declared by its courts gave to the State as sovereign a lien or priority for payment of taxes over unsecured creditors; that this priority was a prerogative right, not a mere rule of administration; and that it applied, therefore, in the federal courts, 262 Fed. Rep. 727. The case came here on writ of certiorari, 252 U. S. 577. The propriety of allowing to the State a preference as to amounts due for the annual franchise taxes is admitted by the receiver. No question of the relative priority of the State and the United States is involved. Nor does any question arise as to priority of the State over incumbrances. The single question is presented whether the State of New York has priority in payment out of the general assets of the debtor over other creditors whose claims are not secured by act of the parties nor accorded a preference, by reason of their nature, by the state legislature or otherwise.

At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was *in custodia legis*. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. *Giles* v. *Grover*, 9 Bing. 128, 139, 157, 183; *In re Henley & Co.*, 9 Ch. D. 469. Compare *United States* v.

*National Surety Co.*, decided by this court November 8, 1920, *ante*, 73. The first constitution of the State of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of the Colony on April 19, 1775, should be and continue the law of the State, subject to such alterations as its legislature might thereafter make. This provision was embodied, in substance, in the later constitutions. The courts of New York decided that, by virtue of this constitutional provision, the State, as sovereign, succeeded to the crown's prerogative right of priority; and that the priority was not limited to amounts due for taxes, but extended alike to all debts due to the State, *e. g.*, to amounts due on a general deposit of state funds in a bank. *Matter of Carnegie Trust Co.* 151 App. Div. (N. Y.) 606; 206 N. Y. 390. This priority has been enforced by the courts of New York under a great variety of circumstances in an unbroken series of cases extending over more than half a century.[1] It has been enforced as a right and not as a rule of administration.

This priority arose and exists independently of any statute. The legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority.[2] The only changes of the right made by statute have been by way of enlarging its scope in

[1] See in addition to cases cited in the text: *Matter of Receivership of Columbian Insurance Co.*, 3 Abb. N. Y. Ct. App. Dec. 239, 242 [1866]; *Central Trust Co.* v. *New York City & Northern R. R. Co.*, 110 N. Y. 250, 259 [1888]; *Matter of Atlas Iron Construction Co.*, 19 App. Div. (N. Y.) 415, 419 [1897]; *Matter of Niederstein*, 154 App. Div. (N. Y.) 238, 246 [1912]; *Matter of Wesley*, 156 App. Div. (N. Y.) 403, 405 [1913]; *People* v. *Metropolitan Surety Co.*, 158 App. Div. (N. Y.) 647, 650 [1913]; *Mixter* v. *Mohawk Clothing Co., Inc.*, 155 N. Y. S. 647 [1915].

[2] See *Matter of Niederstein*, 154 App. Div. (N. Y.) 238, 244–6; *Matter of Wesley*, 156 App. Div. (N. Y.) 403, 405.

certain cases. Thus, while by the common law of England, *The King* (*in aid of Braddock*) v. *Watson*, 3 Price, 6, and by that of New York, *Wise* v. *L. & C. Wise Co.*, 153 N. Y. 507, 511, the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of New York extended the prerogative right, so as to give certain taxes priority over prior incumbrances. An extension of this nature is found in § 197 of the Tax Law which declares in respect to the annual franchise tax, that "Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full." By reason of that provision the annual franchise tax takes priority over incumbrances on the corporate property. *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512. Under the earlier law a debt for franchise taxes was not "a technical lien on specific property" and had been ordered paid out of monies in receivers' hands. *Central Trust Co.* v. *New York City & Northern R. R. Co.*, 110 N. Y. 250, 259. In the case at bar the District Judge relied upon § 197 as justifying him in giving priority for the claim for annual franchise taxes; and in denying priority for the claim for license fees, because in respect to the latter no corresponding provision is to be found in the Tax Law. But he had no occasion to seek statutory support for the priority sought by the State; since here it does not seek to displace any prior lien. It asks merely to have its prerogative right enforced against property on which there is no prior lien and upon which it is impossible to levy, because the property has been taken out of the hands of the debtor and placed in the custody of the court for purposes of protection and distribution.

Whether the priority enjoyed by the State of New York is a prerogative right or merely a rule of administration is a matter of local law. Being such, the decisions of the

highest court of the State as to the existence of the right and its incidents, will be accepted by this court as conclusive. Compare *Lewis* v. *Monson*, 151 U. S. 545, 549; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358; *Archer* v. *Greenville Gravel Co.*, 233 U. S. 60, 68–69; *Guffey* v. *Smith*, 237 U. S. 101, 113. The priority of the State extends to all property of the debtor within its borders, whether the debtor be a resident or a non-resident and whether the property be in his possession or *in custodia legis*. The priority is, therefore, enforceable against the property in the hands of a receiver appointed by a federal court within the State. *Duryea* v. *American Woodworking Machine Co.*, 133 Fed. Rep. 329; *Conklin* v. *United States Shipbuilding Co.*, 148 Fed. Rep. 129, 130; compare *Franklin Trust Co.* v. *New Jersey*, 181 Fed. Rep. 769; *Washington-Alaska Bank* v. *Dexter Horton National Bank*, 263 Fed. Rep. 304. For a receiver appointed by a federal court takes property subject to all liens, priorities or privileges existing or accruing under the laws of the State. In the case at bar a warrant for the amount of the license tax might have issued but for the appointment of the receiver, and if the levy had been made it would have become, under § 201 of the Tax Law, a lien on all the property of the company from "the time an actual levy shall be made by virtue thereof." Since the prerogative right of the State could not be enforced by levy and seizure, an application to the court for payment of the debt due was the appropriate remedy. *In re Tyler*, 149 U. S. 164, 184.

The State's right to be paid out of the assets prior to other creditors does not, as pointed out in *In re Tyler, supra* (quoting *Greeley* v. *Provident Savings Bank*, 98 Missouri, 458), arise from an express lien on the assets existing at the time they passed into the receiver's hands. *State* v. *Rowse*, 49 Missouri, 586, 592; *George* v. *St. Louis Cable & Western Ry. Co.*, 44 Fed. Rep. 117, 118; *Hamilton*

v. *David C. Beggs Co.*, 171 Fed. Rep. 157; *Coy* v. *Title Guarantee & Trust Co.*, 212 Fed. Rep. 520, 523; 220 Fed. Rep. 90. The right of priority has been likened to an equitable lien. *State* v. *Rowse, supra.* The analogous preference in payment given to claims for labor by state statutes, and to which the Bankruptcy Act gives priority, have been described as being "tantamount" to a lien. *In re Laird*, 109 Fed. Rep. 550, 555; *In re Bennett*, 153 Fed. Rep. 673, 677. The priority is a lien in the broad sense of that term which includes "those preferred or privileged claims given by statute or by admiralty law." 2 Bouvier Law Dict. (15th ed., 1883) 88. The prerogative right of the State resembles the privilege accorded by the civil law of Louisiana to certain classes of debts which it was assumed in *Burdon Central Sugar Refining Co.* v. *Payne*, 167 U. S. 127, would be enforced against property in the custody of a receiver appointed by a federal court. The fact that the right rests on the common law independently of any statute, does not, of course, affect the right of enforcement in the federal courts.

*City of Richmond* v. *Bird*, 249 U. S. 174, relied upon by the petitioner is not in point. The city sought there in vain to have taxes declared payable out of the bankrupt's assets in preference to the claim of the landlord thereon which was secured by a specific lien arising upon distraint. This court held that the city did not have such superior right since neither the laws of the United States nor those of Virginia accorded such priority. Here it is not sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York.

*Affirmed.*

Counsel for Appellants.

# COCHRAN ET AL., AS SURVIVING EXECUTORS OF COCHRAN, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 116. Argued December 15, 16, 1920.—Decided January 3, 1921.

Section 29 of the War Revenue Act of June 13, 1898, which taxed legacies and distributive shares at so much per hundred dollars of clear value, was repealed by the Act of April 12, 1902, with a proviso saving all taxes imposed by § 29 prior to July 1, 1902, when the repeal became effective. In an action against the United States to recover taxes computed, returned and voluntarily paid by executors after July 1, 1902, on legacies paid over before that date, *held*:

1. That a formal assessment prior to July 1, 1902, was not necessary to bring the taxes within the saving clause as taxes "imposed" prior to that date. P. 390.
2. That such assessment was not necessary to ascertain the value of life interests in trust funds, their value being ascertainable by computation upon mortality tables and rules lawfully adopted by the Commissioner of Internal Revenue. *Id.* See *Simpson* v. *United States*, 252 U. S. 547.
3. That the fact that the estate was not completely settled and that the legatees and trustee might be liable to refund if retained assets proved insufficient to pay all claims, was no ground for recovery of the taxes, in view of the facts that the personal estate greatly exceeded in value the amount of the legacies, and the total of claims and expenses during many years after the commencement of administration was comparatively insignificant. P. 392.
4. One who seeks to recover money voluntarily paid as a tax upon the ground that the tax was illegal, must prove its illegality and may not rely on mere assertion and speculation. P. 393.

54 Ct. Clms. 219, affirmed.

THE case is stated in the opinion.

*Mr. H. T. Newcomb*, with whom *Mr. Frederick L. Fishback* was on the brief, for appellants.

*The Solicitor General* for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a judgment of the Court of Claims denying recovery of taxes paid under the War Revenue Act of June 13, 1898, and amendments, upon certain legacies made under the will of William F. Cochran.

The facts so far as we deem them material are as follows: Cochran died in New York, December 27, 1901, leaving a will and a personal estate of the value of $7,918,027.18, of which appellants and Eva S. Cochran were made executors. The latter has since died. The will was probated January 9, 1902, and letters testamentary issued the same date and administration was immediately undertaken and proceeded with without extraordinary or unnecessary delay.

Six months' notice to creditors was given as required by the law of New York and the time for the presentation of claims expired August 4, 1902. Prior to September 30, 1902, debts and claims against the estate were presented and for the most part paid to the aggregate amount of $98,589.04 of which amount $66,776.25 were paid prior to July 1, 1902. Expenses of administration during that period had been ascertained to be $125,000, of which sum $13,047.16 were paid prior to July 1, 1902. Otherwise, claims and expenses of administration had not been ascertained.

Certain sums were bequeathed to the executors in trust for the children of Cochran and there was also a legacy to a niece and one to a stranger to his blood. Trusts were set up in accordance with the will and the legatees were paid prior to July 1, 1902, the sums provided to be paid. The aggregate payment so made amounted to the sum of $3,140,979.10.

In 1892 and 1893 litigation was instituted against the decedent which might involve the estate, it was estimated, in the payment of several hundred thousand dollars or more. The litigation according to the findings of the Court of Claims is still in progress and on account of it money has been retained by the executors that might otherwise have been distributed. The probable outcome of the litigation is not shown.

Under the laws of New York funds in the hands of executors after the expiration of notice to creditors are liable to after-discovered debts, and legatees who have received money prior to the expiration of such notice are liable up to the amount paid them for claims subsequently presented. The executors were not secured for the payments to legatees prior to July 1, 1902, and prior to that date the value of the residuary estate had not been ascertained.

In compliance with § 30 of the Act of June 13, 1898, the executors on February 17, 1903, made a return and filed it with the Collector of Internal Revenue giving a schedule of the legacies arising from the personal property of the estate and the amount of tax due thereon. The Collector accepted the schedule as correct. The amount paid to him by the executors was the amount they estimated as the amount of the taxes due. The schedule showed the taxes on each legacy and that the total was $158,321.78, which sum was by the Collector paid to the United States.

July 16, 1904, a demand was made upon the Commissioner of Internal Revenue for the repayment to the executors of the sum paid. After one rejection (October 22, 1910), the Commissioner (March 15, 1915), recommended the claim for allowance in the sum of $107,292.24, and for the rejection of $51,029.54. The recommendation was approved by the Secretary of the Treasury. The former sum was paid, the latter was not, and remains unrefunded.

This sum was computed in respect to the interest of eight different legatees of which six were residuary legatees, and the computations were made according to certain general rules, tables and instructions for the use of Internal Revenue officers, administrators and trustees in determining the amount of taxes to be paid to the United States upon legacies or distributive shares arising from personal property under the Act of June 13, 1898. There was no special investigation by the Commissioner of Internal Revenue as to the expectancy of life of the several beneficiaries or as to the earning power of the bonds placed in trust for them respectively, and for their benefit.

The contentions of the parties are quite accurately opposed. The appellants contend that an assessment was a necessary condition to the collection of the taxes and that there was no assessment until after July 1, 1902, and that on that date the law which established the taxes was repealed.

In opposition it is urged by the United States that if an assessment was necessary the right to make it was reserved by the Repealing Act, and that the appellants, as executors, having made a report of the legacies and the taxes thereon, the report and its acceptance by the Collector of Internal Revenue was to all intents and purposes an assessment. It is further urged that if an assessment was necessary for the purpose of collecting the taxes, it is now immaterial.

These contentions constitute the issue in the case and depend upon the relation of the law (mostly statutory) to the facts and what it determines. As an element in the determination, the use of the rules of the Department and the mortality tables counsel dismisses from controversy, in concession to *Henry* v. *United States*, 251 U. S. 393, and *Simpson* v. *United States*, 252 U. S. 547. The remaining element, that is, the necessity of an assessment prior to July 1, 1902, to the validity of the taxes in ques-

tion, counsel for appellants say, revolves "upon the meaning and application of the word 'imposed,' the fifth word in the special saving clause of the repealing Act of April 12, 1902." And counsel define the word to include all of the steps necessary to the collection of a tax, making it tantamount to "accrued." In other words, the contention is, that a tax is not "imposed" by the simple declaration of a law that property shall be subject to it, but "imposed" only when the tax becomes due and payable, and that the taxes in the present case had not reached that essential condition before July 1, 1902, because they had not been assessed. In support of the contention, counsel cites *Mason* v. *Sargent*, 104 U. S. 689, and *Hertz* v. *Woodman*, 218 U. S. 205. There is much in the latter case which, it may be urged, is adverse to the contention, but upon this we are not called upon to pass, for counsel concede that if a statute imposes a tax in such way as that the amount is readily reduced to a certainty, no assessment is necessary. And this is true of the taxes in question.

By § 29 of the Act of June 13, 1898, c. 448, 30 Stat. 448, legacies or distributive shares such as this case is concerned with [1] are made subject to a duty at the rate of seventy-five cents for each and every hundred dollars of the clear value thereof and the tax is made a lien and charge for twenty years and its payment required before payment and distribution to the legatees. The section also requires the trustee to make and render to the Collector a schedule, list or statement of the legacies together with the amount of duty that has accrued or shall accrue thereon. Section 30 was amended March 2, 1901, but no change in anything important to the present controversy. Section 29 and the amendments of March 2, 1901, were repealed by Act of April 12, 1902, c. 500, 32 Stat. 97, *et*

[1] We disregard a distinction in the legacies as not important to the argument.

*seq.*, but it was provided that "all taxes or duties imposed by section twenty-nine . . . and amendments thereof, prior to the taking effect" of the repealing act, should "be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty . . . and amendments thereof, which are hereby continued in force." Except as so continued in force the repealing statute took effect July 1, 1902.

The schedule under § 29 was rendered, as we have seen, accepted by the Collector, and taxes were paid in accordance therewith, in the sum of $158,321.78.

The schedule included legacies that had been paid after July 1, 1902, but as by Act of June 27, 1902, c. 1160, 32 Stat. 406, such legacies were not subject to a tax, the taxes on them were refunded, upon demand of the executors, but the Government refused to refund the taxes on legacies paid prior to that date. This suit was brought for their amount, that is, the sum of $51,029.54.

To support recovery, it is contended that there was no obligation of payment because, as has already been said, the amount to be paid was not made certain by assessment, or, to quote counsel, was not "so certain (or capable of such ascertainment) that reasonable minds could not disagree and that the exercise of judgment and the consideration and weighing of evidence could not affect the result." For this *Hagar* v. *Reclamation District*, 111 U. S. 701, and other cases are cited and reviewed.

But we cannot agree that there was uncertainty. We have seen the amount of taxes imposed by the statute was definite and the appellants had no trouble in estimating and returning the value of the legacies upon which it was imposed. The basis of the claim of uncertainty is that the estate was and is not settled and that there is a possibility that the legatees may be called upon to pay debts. The contention is as strained and baseless as that rejected in *Simpson* v. *United States*, *supra*.

It is to be remembered besides, that the case does not present a case of resistance to the payment of a tax, but of the recovery of taxes voluntarily paid and that, therefore, the illegality of them should be shown not only by averment but by proof, not, as it is attempted to be, by assertion and speculation. It is true that it is averred that prior to July 1, 1902, the amount of claims against the estate had not been ascertained and that there was responsibility upon the trustees and legatees to make a return of the whole or ratable portions of the legacies to the extent that the sums remaining in the estate should be insufficient to satisfy all valid claims. It is conceded, however, the contingency of this might have terminated August 1, 1902, and while it is averred that the clear value of the interests of the legatees was at all times prior to July 1, 1902, uncertain and indefinite, and still is so, there stand in opposition the facts of the case and the refutation that an estate of the net personal value of nearly eight million dollars was or is in danger of embarrassment by the payment of legacies of less than one million dollars. And we have seen that the executors who had knowledge of the condition of the estate, and all that it might be made subject to, did not hesitate to make a return of the legacies to the Collector of Internal Revenue and pay the taxes thereon. The petition in this case was filed in the Court of Claims June 23, 1916, fourteen years after the commencement of the administration of the estate and nearly as long after the time of presentation of claims against it, and the record shows that the total of the claims and expenses of administration, including funeral expenses, amounts to the sum of $235,700. In the face of this exhibition we are asked to speculate upon possibility of the existence of liabilities that fourteen years have not developed.

*Judgment affirmed.*

# ERIE RAILROAD COMPANY *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL.

# SAME *v.* SAME.

# PASSAIC WATER COMPANY *v.* SAME.

# WESTERN UNION TELEGRAPH COMPANY *v.* SAME.

# D. FULLERTON & COMPANY *v.* SAME.

# MEYER ET AL., PARTNERS DOING BUSINESS AS MEYER & DEVOGEL, *v.* SAME.

# MORRIS & COMPANY *v.* SAME.

# PUBLIC SERVICE RAILWAY COMPANY *v.* SAME.

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

Nos. 33–40. Argued November 16, 17, 1920.—Decided January 3, 1921.

1. A State may require a railroad company to do away with grade crossings of public streets, whether laid out before or after the construction of the railroad, and may place upon the company the expense of executing the State's plan to accomplish this by running the streets over or beneath the tracks. P. 409.
2. Of the two conflicting interests in such cases—that of the public using the streets and that of the railroad and the public using it—the former is paramount; and the State may constitutionally insist that the streets be kept free of danger whatever the cost to the parties introducing it. P. 410. Distinguishing cases involving the power to regulate trains.
3. The authority so exercised is an obvious case of the police power; or it may be regarded as an authority impliedly reserved when the State granted to the railroad the right to occupy the land. *Id.*

4. The order requiring the changes should be regarded as stating a condition that must be complied with if the railroad continues to use the soil of the State; but the railroad cannot be compelled to serve at a loss. P. 410.
5. There being reason to believe that safety requires the change, the facts that the execution of the plan will interfere with prior contracts and involve expenditures so heavy as to impair the efficiency of the railroad as an agency of interstate commerce or even lead to bankruptcy, do not bring the State's order into conflict with the contract or commerce clauses of the Constitution or the due process clause of the Fourteenth Amendment. P. 411.
6. The rights of the railroad company in respect of private sidings are no greater than those in respect of the main line. *Id.*
7. The burden of paying for the required changes may be laid upon an operating lessee railroad company, without regard to the financial ability of the lessors to compensate it for the required improvements if the leases should be terminated. *Id.*
8. As the railroad company might be charged the entire expense, it cannot complain that only 10 per cent. of it is cast upon a street railway company as to streets used by the latter. 412.
9. While it may be that an order of a state board directing such changes at heavy expense to a railroad company would be so unreasonable as to be void if the evidence plainly did not warrant a finding that the particular crossings were dangerous, yet such crossings are generally dangerous and the conclusion reached by the board and confirmed by the state courts is entitled to much weight and, if reasonably warranted, must stand. *Id.*
10. As a State may delegate legislative or *quasi*-legislative power to a board, subject to review in the courts (*Hall* v. *Geiger-Jones Co.*, 242 U. S. 539,) the constitutional aspect of changes ordered at grade crossings, as regards the railroad company affected, is the same whether the board ordering them was obliged to do so upon finding danger or had a discretion in the matter, under the state law. P. 413.
11. A street railway crossing the tracks of a steam road at grade increases the danger and may be obliged to bear part of the expense of removing it. *Id.*
12. And where changes are lawfully ordered, a water company is not deprived of property without due process by being obliged to adjust the pipes to the new conditions at its own expense. *Id.*
13. In being so required, a water company is not denied equal protection of the laws as compared with a street railroad company required to pay 10 per cent. of the total expense of the crossing and

presumably more than the expense of merely readjusting its tracks. P. 413.

14. *Held*, that changes ordered at railroad grade crossings involving expense to a telegraph company in adjusting its lines, did not infringe its rights under the Fourteenth Amendment or violate the commerce clause. P. 414.

15. An order and plan for abolishing grade crossings of a railroad and public streets, if otherwise valid, is not unconstitutional because it will dislocate private sidings connected with the railroad and put their owners to expense. *Id.*

89 N. L. J. 57, 24; 90 N. J. L. 672, 673, 714, 729, 677, 694, 715, affirmed.

THE cases are stated in the opinion.

*Mr. George S. Hobart* and *Mr. Charles E. Hughes* for plaintiffs in error in Nos. 33 to 39. *Mr. Gilbert Collins* and *Mr. George F. Brownell* were on the brief for plaintiff in error in Nos. 33 and 34. *Mr. William B. Gourley* was on the brief for plaintiffs in error in Nos. 38 and 39. The argument in Nos. 33 and 34 was as follows:

The order imposes a burden upon the interstate traffic of the plaintiff in error and interferes with and impairs its ability to perform its duty as an interstate carrier of freight and passengers.

So far as relates to side tracks the execution of the order requires the entire destruction of several without any provision for reconstruction or relocation, and requires the destruction of others and suggests reconstruction at different grades and locations. If the order be construed to require such cost to be paid by the side-track owners, it is invalid, as these owners are not public utilities; if it requires the cost to be paid by plaintiff in error, it is equally invalid, because plaintiff in error is not legally bound to pay, and an order requiring it so to do takes its property for the benefit of others. As neither the railroad nor the siding owners can be compelled to reconstruct and relocate the several sidings, the result

is that the sidings or the connections thereof with the main tracks are destroyed and no one can be compelled to restore them. This interferes with the interstate commerce of plaintiff in error and for that reason is in violation of the Federal Constitution. *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543.

The order also operates as a regulation of interstate commerce because the great cost of carrying it out impairs the ability of plaintiff in error to perform its public duty as a common carrier of interstate traffic. Discussing: *Kansas City Southern Ry. Co.* v. *Kaw Valley District*, 233 U. S. 75; *Chicago, Burlington & Quincy R. R. Co.* v. *Wisconsin R. R. Commission*, 237 U. S. 220; *Mississippi R. R. Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388. Distinguishing: *Denver & Rio Grande R. R. Co.* v. *Denver*, 250 U. S. 241.

There was no real occasion or necessity for imposing such an enormous burden upon the company in the present case. Under the statute upon which the order is based, the city might well have selected any one of the crossings, rather than combining 15 of them in a single proceeding. If 15 crossings in a single city may be considered in one proceeding, there is no reason why all of the crossings within the limits of a municipality should not be considered—indeed, there is no logical stopping place fixed by the boundary line of any municipality; we might as well include all of the grade crossings in the entire State upon any particular railroad. We do not ask this court to review the supposed discretion of the board to include more than one crossing in the same order, but we insist that under the undisputed testimony the necessary effect of an order which requires several millions to be spent within the limits of a single municipality, covering about two miles of main-line track, is a direct interference with and a burden upon the interstate commerce of plaintiff in error. There are over

2,200 miles of railroad tracks which it is necessary for plaintiff in error to maintain in an operating condition; and to appropriate a large part of the money which might be, and ought to be, used for that purpose and pour it into a single town—to the detriment of all the rest of the system, is a direct burden upon the interstate commerce; and, indeed, even more, because the inevitable result is to leave plaintiff in error no money with which to maintain the rest of its system, even if it had enough in the first instance (which the proof shows it had not) to pay the cost of eliminating the crossings in Paterson.

The order was unreasonable and arbitrary and therefore violates the due process clause, because the evidence shows without dispute that plaintiff in error did not have sufficient funds or any means of procuring them for the purpose of meeting the cost of complying.

The legislature may prescribe a standard, by which the action of an administrative board is to be governed, but when it undertakes to commit to such board certain powers which are dependent upon the existence of certain facts, the statute must itself prescribe some standard upon which the board's action is made to depend.

It is impossible to lay down any hard and fast rules for determining whether a crossing is "dangerous," and hence there is no standard upon which the action of the board in any particular case must be based. It is equally impossible to lay down any rule by which the question of whether public travel is "impeded" may be determined—unless the word "impeded" be applicable only to permanent obstructions and not merely to delays or hindrances caused by the passage of trains.

The statute confers on the board arbitrary power to order or to refuse to order the alteration of a grade crossing, even though it may find the jurisdictional facts on which the right to make such order under the statute depends.

There is no provision which requires that the orders of the commission be lawful and reasonable, as there are in many other similar statutes. See *Public Util. Comm.* v. *Toledo &c. R. R. Co.*, 267 Illinois, 93; *State* v. *Great Northern Ry. Co.*, 100 Minnesota, 445.

Furthermore, there is no standard fixed with regard to the proportion of the expense to be borne by a street railway company, as the board may, but need not, order not exceeding 10 per cent. to be paid by the street railway company.

The opinion of the state Supreme Court is not clear as to whether the statute is to be construed as permissive or as mandatory, after the board has found the jurisdictional facts as to danger to public safety, or as to impediment to public travel. If the statute be so construed as to authorize the board to order plaintiff in error to do certain work for the purpose of eliminating grade crossings, and to decline to order some one else to do like work in substantially similar circumstances, plaintiff in error is deprived of the equal protection of the laws, by being obliged to use its money and property to eliminate grade crossings, while other railroads, similarly situated, might not be required so to do. In considering the constitutionality of a statute, the question depends upon not what is done, but what might or could be done under it. *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160; *Security Trust Co.* v. *Lexington*, 203 U. S. 323; *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127; *In re Christensen*, 43 Fed. Rep. 243; *Grainger* v. *Douglas Park Club*, 148 Fed. Rep. 513.

On the other hand if, under the statute, the board has no power to consider any facts other than danger to public safety and impediment to public travel, and, therefore, cannot take into consideration the question of whether the elimination of the crossing or crossings would result in any compensating advantage to the railroad or to the

public, and cannot consider the financial ability of the railroad to do the work required by the order, the statute might as well have stated that every grade crossing must be eliminated, as every crossing, in the very nature of things, is to some extent dangerous to public safety and to some extent impedes public travel.

We submit that these are not reasonable standards upon which the action of an administrative body is to be based, and that, if this be the proper construction, the statute deprives plaintiff in error of its property without due process of law.

If it is permissive, it deprives plaintiff in error of the equal protection of the laws. If the view of the state courts, that plaintiff in error is not concerned about the construction of the statute on this point, is correct, we further submit that the evidence in the present record shows that the action of the board was unreasonable and arbitrary, because it appears, without dispute that plaintiff in error did not have the financial ability to comply with the order, and hence, if we assume, for the purpose of argument, that the statute is valid, as against the objections stated above, the question still remains whether the present order can be sustained.

Discussing: *Cattaragus Board of Trade* v. *Erie R. R. Co.*, N. Y. Pub. Serv. Comm., December 2, 1914; *St. Johnsbury* v. *Boston & Maine R. R. Co.*, Vermont Pub. Serv. Comm., P. U. Rep., 1915 A, p. 641; Maryland Pub. Serv. Comm., December 16, 1912, Reports, 1912; Report of Pub. Util. Commrs. of Connecticut, 1912, p. xlvii; Iowa Board of Railroad Commrs., Report 1913, p. 43; *Erie R. R. Co.* v. *Board of Public Utility Commrs.*, Supreme Court of New Jersey, April, 1915 (not reported); *Houston &c. R. R. Co.* v. *Dallas*, 98 Texas, 396; *Northern Central Ry. Company's Appeal*, 103 Pa. St. 621; *Pennsylvania &c. R. R.* v. *Philadelphia & Reading R. R.*, 160 Pa. St. 277; *Cleveland &c. Ry. Co.* v. *State Public Utilities Comm.*,

273 Illinois, 210; *Connecticut Co.* v. *Stamford*, 95 Connecticut, 26; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416.

The foregoing authorities show that the element of expense is an important one; if it is found to be unreasonable under the circumstances of the particular case, that fact will usually suffice to demonstrate that the order is arbitrary. See also *Chicago &c. Ry. Co.* v. *Minneapolis*, 238 Fed. Rep. 384; *Health Department* v. *Trinity Church*, 145 N. Y. 32.

The order was unreasonable and arbitrary and therefore violates the due process clause because plaintiff in error was not given the alternative of reducing or eliminating the alleged danger to public safety and the alleged impairment to public travel by decreasing the number of train movements or by abandoning the railroad.

The general rule that, where a railroad has been constructed and put in operation, the company has no right to abandon the enterprise or cease to operate, does not go to the extent of requiring the continuance of operation at a loss, unless a statute expressly so provides. *Jack* v. *Williams*, 113 Fed. Rep. 823; affd. 145 Fed. Rep. 281; *Iowa* v. *Old Colony Trust Co.*, 215 Fed. Rep. 307; *Northern Pacific R. R. Co.* v. *Dustin*, 142 U. S. 492; *Amesbury* v. *Citizens Electric Ry. Co.*, 199 Massachusetts, 394; *Sherwood* v. *Atlantic &c. Ry. Co.*, 94 Virginia, 291; *Mississippi R. R. Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388; *Chicago &c. Ry. Co.* v. *Minneapolis*, 238 Fed. Rep. 384.

If the company has no legal power to abandon the railroad no matter how great the loss, it should at least be given the alternative of decreasing the alleged danger and impediment by decreasing the number of train movements, especially when it proposes a reasonable and practicable scheme therefor which would greatly improve the train service to and from Paterson and would result

in a saving of at least half (and probably more) of the great burden imposed upon it by the order.

In so far as the order requires plaintiff in error to make certain changes in the properties of the Street Railway Company and in so far as it limits the proportion of the expense to be paid by the Street Railway Company to certain of the crossings to be eliminated, the order violates the due process clause for the reason that it takes the property of plaintiff in error for the use of the Street Railway Company.

The order impairs the obligation of the contracts between the plaintiff in error and the respective owners or lessees of side tracks. If construed to require the plaintiff in error to relocate or reconstruct side tracks (either on or off its right of way), at its own expense, it deprives the plaintiff in error of property, without due process of law. If not so construed, it deprives the owners or lessees of side tracks of their property, without due process of law. Citing: *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Oregon R. R. & Navigation Co.* v. *Fairchild*, 224 U. S. 510; *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211; *Tap Line Cases*, 234 U. S. 1; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585; *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340; *Seaboard Air Line Ry. Co.* v. *Railroad Commission of Georgia*, 240 U. S. 324; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416; *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, and other cases.

The case is not like that where there is a custom to construct and maintain side tracks for the benefit of industries that may adjoin the main line tracks. Here we have express written agreements. In this respect, the case differs from *Armour* v. *N. Y., N. H. & H. R. R. Co.*, 41 R. I. 361. It is more like *American Malleables Co.* v. *Bloomfield*, 83 N. J. L. 728.

We do not question the general rule that in the reasonable exercise of the police power contracts may be impaired or even canceled.

Under the various statutes and leases by virtue of which plaintiff in error runs trains through Paterson over the tracks of the Paterson & Hudson River Railroad Company and the Paterson & Ramapo Railroad Company, the legal title to the railroad property remains in the original companies. If plaintiff in error is obliged to expend the sum of three million dollars and upwards in the improvement of the properties of those companies, the question arises whether such a forced expenditure takes its property for their private benefit. These companies under their respective leases (which have been duly authorized or ratified by the legislature) may be relieved from the obligation of running trains during the term of the lease, but under the order they are also relieved from the burden of altering the crossings or even from making any financial contribution for that purpose; they are not even included as joint obligees, although plaintiff in error requested that if any order were made it be made against these two companies and plaintiff in error jointly, so that the question of the apportionment of the cost of eliminating the crossings might be determined by appropriate proceedings. As the landlords of plaintiff in error and owners of the real estate upon which the improvements required by the order are to be made, they may sit back and receive the full benefit in the vastly increased value of their property without the expenditure of one penny. There are several contingencies upon which the leases might be terminated. Even if under obligation to do so, the lessors would not be financially able to pay for the outlay. But if it be claimed that under the statute the plaintiff in error is required to make this vast expenditure for public use rather than for the private benefit of the two original companies, the statute

is objectionable as taking the property of the plaintiff in error without just compensation. Under the charters, the State may take over the property without paying more than its first cost. The facts bring this feature of the case within the principle of decision in *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478.

Again, the statute violates the Fourteenth Amendment because the cost of complying with the order made by virtue thereof will greatly exceed the value of the interest of plaintiff in error in the property, and will make its investment incapable of earning a fair and reasonable return upon such investment. All the expense is charged to the plaintiff in error as the operating company, within the meaning of the statute, and the two underlying companies are not required to pay any part. The duty to operate still rests upon the two underlying companies; the mere fact that they have executed leases to some other company whereby the latter undertakes to perform that duty for them, does not relieve the original companies from their performance of such duty.

There is no valid reason for a distinction between a lessor and a lessee company which would reasonably justify the imposition of the entire cost of changes of grade upon the lessee company, without any contribution whatever from the lessor. See *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556.

The statute, as construed, violates the contract clause in that it impairs the obligation of the contracts between plaintiff in error and the lessor companies.

The statute, as construed, violates the contract clause, in that it impairs the obligation of the contracts between the State of New Jersey and the lessor companies, to whose rights plaintiff in error has succeeded, by imposing upon plaintiff in error a greater duty, with respect to the construction and maintenance of grade crossings, than was imposed upon them.

A reserved right to alter charters does not authorize the confiscation or destruction of property of corporations, or the taking of property without compensation, and it must be construed subject to the restrictions of the state and federal constitutions forbidding the taking of property without due process of law. *Delaware, &c. R. R. Co.* v. *Board of Pub. Util. Commrs.*, 85 N. J. L. 28; *State* v. *Bancroft*, 148 Wisconsin, 124; *Berea College* v. *Kentucky*, 211 U. S. 45; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Wisconsin*, 238 U. S. 491.

The statute violates the contract clause and the due process clause, in that it impairs the obligation of the contracts between plaintiff in error and the Street Railway Company by altering their respective rights and duties as fixed by said contracts; in that it fixes a maximum proportion to be paid by the Street Railway Company, without regard to the terms of the contracts and without regard to the proportion of the danger or impediment created by the Street Railway Company.

The statute violates the Fourteenth Amendment in that it is an unreasonable exercise of the police power. *Sanitary District* v. *Chicago & Alton R. R. Co.*, 267 Illinois, 252; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Lawton* v. *Steele*, 152 U. S. 133; *Holden* v. *Hardy*, 169 U. S. 366; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Otis Elevator Co.* v. *Chicago*, 263 Illinois, 419. Distinguishing: *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556.

The question of whether a statute is a reasonable or an unreasonable exercise of the police power, depends, to a certain extent, upon the course of legislation, as well as upon general public opinion. *Muller* v. *Oregon*, 208 U. S. 412; *Merrick* v. *Halsey & Co.*, 242 U. S. 568; *Bosley* v. *McLaughlin*, 236 U. S. 385; *People* v. *Charles Schweinler Press*, 214 N. Y. 395 [followed by references to the legis-

lation respecting grade crossings, in New Jersey and in other States].

In determining whether the police power has been exercised in a reasonable manner, attention must be paid to the element of cost and the practical effect of the statute under consideration. *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Oregon R. R. & Navigation Co.* v. *Fairchild*, 224 U. S. 510; *Houston &c. R. R. Co.* v. *Dallas*, 98 Texas, 396; *Northern Central Railway Company's Appeal*, 103 Pa. St. 621; *Pennsylvania &c. R. R.* v. *Philadelphia & Reading R. R.*, 160 Pa. St. 277; *Cleveland &c. Ry. Co.* v. *State Public Utilities Comm.*, 273 Illinois, 210; *Connecticut Co.* v. *Stamford*, 95 Connecticut, 26; *Chicago &c. Ry. Co.* v. *Minneapolis*, 238 Fed. Rep. 384; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416.

If the present statute is sustained, there is no limit to the enormous burden that might thus be imposed upon a railroad company, short of the elimination of every grade crossing on its entire system. If an administrative body is given power to determine as a matter of fact what constitutes danger or impediment, and if its conclusion in that respect is binding on the reviewing court, except in a case where there is no evidence whatever to sustain it, then there is no limit to what might be ordered under such a statute, other than the sound discretion of the administrative body to whom is committed this vast power. [Counsel referring to and explaining the following cases in this court: *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556; *Missouri Pacific Ry. Co.* v. *Omaha*, 235 U. S. 121; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583; *St. Paul &c. Ry. Co.* v. *Minnesota*, 214 U. S. 497; *Cincinnati &c. R. R. Co.* v. *Connersville*, 218 U. S. 336; *Chicago &c. Ry.* v. *Minneapolis*, 232 U. S. 430; *Lake Shore &c. Ry. Co.* v. *Clough*, 242 U. S. 375; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548; *Chicago &*

*Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67; *Great Northern Ry. Co.* v. *Clara City*, 246 U. S. 434. Also cases of railway bridges over navigable waters: *Chicago &c. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *West Chicago Street R. R. Co.* v. *Chicago*, 201 U. S. 506; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194.]

The present case is illustrated by *Chicago &c. Ry. Co.* v. *Minneapolis*, 238 Fed. Rep. 384. The only case in this court in which the question of the validity of a state law providing for the abolition of grade crossings has been directly involved, is the *Bristol Case, supra*, which is distinguishable both on the facts and on the statute then under consideration.

*Mr. Frank Bergen* for plaintiff in error in No. 40.

*Mr. L. Edward Herrmann* and *Mr. Frank H. Sommer*, with whom *Mr. Francis Scott* was on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

These are writs of error brought by parties interested in an order of the Board of Public Utility Commissioners of New Jersey, dated April 20, 1915, directing a change in fifteen places in the City of Paterson, where the Erie Railroad now crosses that number of streets at grade. The order was reviewed on writs of certiorari and affirmed by the Supreme Court, and on appeal by the Court of Errors and Appeals. 89 N. J. L. 57, 24. 90 N. J. L. 672, 673, 714, 729, 677, 694, 715. The Erie Railroad Company made two applications to the Supreme Court, the second being based upon a refusal by the Board to grant a rehearing of its order. Accordingly it has two writs of error here.

But the second adds nothing to the first as we could not say that the Board unreasonably refused further delay. Those of the other parties are to the judgments affirming the original order of the Board. The Erie Railroad was ordered to make the change by carrying fourteen of the crossings under, and one, at Madison Avenue, over the railroad. It will also have to bear the cost, subject to a charge to the Public Service Railway Company of ten per centum of the cost of changing three crossings used by its road. The most important questions arise in the Erie Railroad Company's case and we take that up first.

The order was made under an Act of March 12, 1913, c. 57, P. L. 1913, p. 91, which is construed by the State Courts to authorize it, subject to the constitutional questions to be dealt with here. The Erie Railroad's line in Paterson is over tracks originally belonging to the President and Directors of the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, but now held by the Erie Railroad, by assignment of perpetual leases upon the terms that if in any unforeseen way the leases terminate the value of erections and improvements must be repaid by the lessors. They however are small corporations having no assets except their roads and the rentals received from the Erie Company. The leases were ratified by an Act of March 14, 1853, providing that they should not be held to confer any privilege or right not granted to the lessors by their charters. It is admitted that the statute must be taken to impose the duty of making the changes upon the company operating the road, the plaintiff in error, which is an interstate road. It put in evidence that it did not have assets sufficient to make the changes, at least without interfering with the proper development of its interstate commerce, and also contended that the whole evidence did not justify the finding of the Board that the crossings were dangerous to public safety but at most showed that

the change would be a public convenience. It is said that the order must be reasonable to be upheld and that it is not reasonable to require an expenditure for such a purpose of over two million dollars from a company that has not more than $100,000 available, and that the order and the statute when construed to justify it not only interfere unwarrantably with interstate commerce and impair the obligation of contracts but take the Erie Company's property without due process of law.

Most of the streets concerned were laid out later than the railroads and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the State to throw the burden of this improvement upon the railroad. That is the fundamental question in the case. It might seem to be answered by the summary of the decisions given in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis*, 232 U. S. 430, 438. "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways." *Missouri Pacific Ry. Co.* v. *Omaha*, 235 U. S. 121; *Northern Pacific Ry. Co.* v. *Puget Sound & Willapa Harbor Ry. Co.*, 250 U. S. 332. For although the statement is said to be explained as a matter of state law by the previous decisions in Minnesota, it is made without reference to those decisions or to any local rule, and moreover the intimation of the judgment in the present case is that whatever may have been the earlier rulings the law of New Jersey now adopts the same view.

But it is argued that the order is unreasonable in the circumstances to which we have adverted, the principle applied to the regulation of public service corporations being invoked. *Mississippi Railroad Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388, 391; *Chicago,*

*Burlington & Quincy R. R. Co.* v. *Railroad Commission of Wisconsin*, 237 U. S. 220. But the extent of the States' power varies in different cases from absolute to qualified, somewhat as the privilege in respect of inflicting pecuniary damage varies. The power of the State over grade crossings derives little light from cases on the power to regulate trains.

Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the State, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy

nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & Rio Grande R. R. Co.* v. *Denver,* 250 U. S. 241, 246. To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. *Denver & Rio Grande R. R. Co.* v. *Denver,* 250 U. S. 241, 244; *Union Dry Goods Co.* v. *Georgia Public Service Co.,* 248 U. S. 372; *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467; *Northern Pacific Ry. Co.* v. *Duluth,* 208 U. S. 583; *Manigault* v. *Springs,* 199 U. S. 473, 480. If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 U. S. 396. Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the Courts below the evidence justified the conclusion of the Board that the expense would not be ruinous. Many details as to the particular situation of this road are disposed of without the need of further mention by what we have said thus far.

The plaintiff in error discusses with considerable detail the effect of the changes upon private sidings. But its rights in respect of these are at least no greater than those in respect of the main line and are covered by the preceding discussion. So are the objections that if the leases ever are terminated it has no chance of being repaid the value of its improvements because of the smallness of the lessor corporations. They would have this property in that event and it would be subject to their obligation—but the answer to the complaint of the plaintiff in error in all its forms is that which we have made. Whatever the cost, it may be required by New Jersey not to im-

peril the highways if it does business there. We agree with the decisions below that as the railroad company might have been charged with the whole expense the fact that no more than ten per centum of the cost of three crossings is thrown upon a street railway company is a matter of which it cannot complain.

If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous. The Board must be supposed to have known the locality and to have had an advantage similar to that of a Judge who sees and hears the witnesses. The Courts of the State have confirmed its judgment. The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion their judgment must stand. We cannot say that they were not. At some crossings the danger was less than at others, but it was necessary or at least prudent to proceed on a general plan. Upon the whole matter while it is difficult to avoid the apprehension that the state officials hardly gave due weight to the situation of the company as a whole in their anxiety for the well-being of the State, we are of opinion that they did not exceed their constitutional powers. The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil. Probably the conclusion that we have reached could be supported upon the narrower ground that a continuing obligation was imposed by the charters of the plaintiff in error's lessors, and was assumed by the plaintiff in error, but that which we have stated seems to us free from doubt.

Some argument is based upon a discretion supposed

to be left to the Board by the statute, which reads that when it appears to the Board that the crossing is dangerous it may order, &c. The State Courts seem to regard the words as imposing a positive duty, but upon either construction we perceive no infraction of the company's constitutional rights. If the words are imperative the reasons that we have given apply. If they leave a discretion it is subject to review by the Courts, and this Court has no concern with the question how far legislative or *quasi*-legislative powers may be delegated to a commission or board. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539; *Engel* v. *O'Malley*, 219 U. S. 128; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 225. We deem it unnecessary to give our reasons in greater detail for deciding that the judgment against the Erie Railroad Company must be affirmed.

While the Railroad Company contends that the Public Service Railway Company should be charged more, the latter company comes here upon the proposition that it should be charged nothing. We agree with the Courts below that a street railway crossing the tracks of a steam road at grade in a public street increases the danger and may be required to bear a part of the expense of removing it. The amount charged does not appear to be excessive and upon the principles that we have laid down the payment of it may be made a condition of the continued right to use the streets. *Detroit, Fort Wayne & Belle Isle Ry.* v. *Osborn*, 189 U. S. 383, 390; *Missouri Pacific Ry. Co.* v. *Omaha*, 235 U. S. 121, 129.

The Passaic Water Company contends that the expense of moving its pipes cannot be thrown wholly upon it—mainly on the ground that the change of grade was unlawful. This ground fails and the company must adjust itself to the lawfully changed conditions. It also contends that it does not receive the equal protection of the laws because the street railway instead of being charged

the expense of moving its tracks is charged ten per centum of the total expense at its crossings. Presumably this charge is greater than the mere adjustment of tracks to a new surface. It is based upon the share of the street railroad in creating the danger. As the street railroad cannot complain, certainly the Water Company cannot.

The Western Union Telegraph Company makes similar objections and also says that its interstate commerce is interfered with and presents from its own point of view arguments dealt with so far as they seem to us to need mention in disposing of the principal case. The other plaintiffs in error own side tracks which will be dislocated by the change and they will be put to further expense if the plan is carried out according to what the New Jersey Court decides to be suggestions not commands. The rights in the side tracks are subordinate to changes in the main track otherwise lawful. As against these as against the others the judgment of the Court of Errors and Appeals is affirmed.

*Judgments affirmed.*

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.

# SOUTHERN PACIFIC COMPANY *v.* BERKSHIRE, TEMPORARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF LINDER.

CERTIORARI TO THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 106. Submitted November 19, 1920.—Decided January 3, 1921.

1. The installation of railway mail cranes so close to the track that the arm of a crane when extended comes as near as 14 inches to the window of an engine cab, thus becoming a source of danger to the engineer while in performance of his duty, is not negligence upon the part of the railroad company as respects its employees, when such placing of the cranes is uniform along the railroad, and done by direction of the Post Office Department pursuant to a plan it found necessary in handling the mails. P. 417.
2. *Held*, that the question whether such installation was negligence should not have been submitted to the jury.
3. An experienced locomotive engineer who has operated many times over a railroad where mail cranes are set up close to the track, must be presumed to have known the danger of his being struck by their projecting arms when leaning from his cab window in discharge of his duty, and must be held, as a matter of law, to have assumed the risk. P. 418.

207 S. W. Rep. 323, reversed.

THE case is stated in the opinion.

*Mr. W. I. Gilbert* and *Mr. Wm. F. Herrin* for petitioner. *Mr. Guy V. Shoup* and *Mr. Henry H. Gogarty* were also on the briefs.

*Mr. C. B. Hudspeth* and *Mr. Geo. E. Wallace* for respondent. *Mr. A. J. Harper* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought in a state court against the petitioner for causing the death of Linder, the plaintiff's

intestate. At the trial the petitioner requested instructions that Linder assumed the risk of injury from the cause complained of and that a verdict should be rendered for the defendant. These were refused, the defendant saving its rights upon the record, and the plaintiff got a verdict and judgment. The Court of Civil Appeals affirmed the judgment; the Supreme Court denied a writ of error, and thereupon a writ of certiorari was allowed by this Court upon the ground that an immunity set up under the Federal Employers' Liability Act was involved.

The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Texas, to Deming, New Mexico. At Carney, in New Mexico, he was found sitting on his engineer's seat, unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane, or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers. In order to have uniformity the Post Office Department fixes the distance of the cranes from the equipment, and the length of the hooks, so that, in the language of a witness for the plaintiff, "the same hook that will take a sack off a crane in Arizona or New Mexico will take it as it goes through western Kansas." The evidence was all to the effect that this crane stood at the same distance as all the others along the road. The end of the crane when elevated was not nearer to the train than fourteen inches, but might have been found to be as near as that, and therefore near enough to be capable of hitting a person leaning out of the window, as indeed was shown by the event.

Linder had been upon this route for some years, had

passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat half a mile ahead, through a front window. About a mile before reaching Carney Linder had noticed that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indicate that he was more than fourteen inches out from the engine's side.

In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the travelling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. The first element in it is the standard of conduct to be laid down for the road. The standard concerns a permanent condition not only at this place, but at many places along the road and presumably at innumerable others on all the large railroads of the United States. There are no special circumstances to qualify this part of the question—which is whether or not it is consistent with the duty of a railroad to its employees to erect railroad cranes of which the end of the arm when in use is fourteen inches from the side of the train. The railroad is required and presumed to know its duty in the matter and it would seem that the Court ought to be equally well informed. It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case. See *Southern Pacific Co.* v. *Pool,* 160 U. S. 438, 440.

It is impracticable to require railroads to have no

structures so near to their tracks as to endanger people who lean from the windows of the cars. Most passengers are familiar with cautions against putting out heads or arms. However it may be in other cases where there is more or less choice as to position, this is true as to the postal cranes. The farthest point at which a bag could be picked up is twenty-nine inches, and it requires a less distance than that to be sure of getting the bag. In short it would be impossible to use the contrivance with absolute certainty that no accident would happen if a man put his head out at the wrong moment. It equally is impossible to condemn railroads as wrongdoers simply for adopting the device with the conditions imposed by the Post Office Department. When a railroad is built it is practically certain that some deaths will ensue, but the builders are not murderers on that account when the foreseen comes to pass. On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it. It is going very far to leave it open to a jury to attach liability in tort to a system by which the ends of the arms of postal cranes come to fourteen inches from the car.

But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from

the train. As we have said, the only possible inference on the uncontradicted evidence of the plaintiff's witnesses was that he leaned out considerably more than fourteen inches as shown by the position of his body and the place of the cut on his head. The probability is that the distance of the crane was somewhat greater than the minimum that we have assumed, but that we lay on one side. Confining ourselves to the case of postal cranes we are of opinion that to allow the jury to find a verdict for the plaintiff was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law. *Butler* v. *Frazee*, 211 U. S. 459, 465–467. *Kenney* v. *Meddaugh*, 118 Fed. Rep. 209.

*Judgment reversed.*

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

Engineer Linder, when leaning out of his cab, in the discharge of his duty to see the condition of a "hot driving pin," was struck on the head and killed by the end of a horizontally extended arm of a mail crane. There is no question of contributory negligence in the case,—the judgment could not be reversed for that, under the Federal Employers' Liability Act. The negligence of the railroad company is palpable but, nevertheless, the finding of a properly instructed jury and of two state courts, is here reversed because this court concludes, as a matter of fact, that the mail crane arm was such an obvious and conspicuous source of danger to Linder that he must be held, as a matter of law, to have assumed the danger from it, by continuing in the service of the company.

The record shows: that Linder was a freight engineer, and as such had nothing to do with mail cranes and had neither occasion nor opportunity, except very rarely, to see what, if any, danger the crane arms could be to him when in the discharge of his duties, for, during the two

years next before his death, he had made but twelve trips on passenger trains, only three of which were on trains which "picked up" mail from cranes; that when mail cranes are not in use the arms hang vertically beside the supporting post, which is three feet eight inches from the side of an engine, and obviously in such position they are not a source of danger to train men; that, on the line involved, the arms of cranes were extended horizontally toward the track, so as to be a source of danger to engineers, only two or three times a day, at widely separated intervals, when they were used to support a mail bag for ten minutes before the arrival of each mail train,—a fraction of an hour in twenty-four; and that Linder, when leaning out of his cab to see the condition of a hot driving pin, was struck an inch above his ear, so that if the arm had been three or four inches farther from the track he would not have been injured.

The record does not show: that government requirements for mail cranes require them to be as close to the track as this one was. On the contrary, the only evidence to the point is that of an employee in the government mail service, who testified, that the hooks on mail cars are adjusted to catch mail bags if within twenty-nine inches of their sides, that allowing for the swaying of the cars, they will catch them if twenty-six inches away, and that the sides of the cars are "flush" with the sides of engine cabs. The point of the crane arm which killed Linder "was about fourteen inches from the side of the cab," but on this evidence it could have been placed twenty-six inches away, where it would not have been a source of danger to him.

Although the civil engineer who had charge of the cranes on the division was a witness for the company he was not asked the distance of the crane causing the injury, or of any other crane, from the track—a suspicious circumstance—and that other cranes were at the same dis-

tance as the one which caused the injury can only be inferred from inadequate statements of witnesses who had never made any measurements and who gave the merest impressions with respect to them. Where, as here, three or four inches is a matter of life and death, random estimates are valueless and should not be accepted, especially when the company certainly had perfectly definite information, which was suppressed. A hard and fast assumption of law should not be based on findings of fact by this court derived from such evidence.

There is no description whatever in the record of the length, dimensions or appearance of the arms of the crane which caused the death of Linder. How, on such evidence, can it be justly stated, that such crane arm was so permanent and conspicuous a source of danger that, as a matter of law, Linder, a freight engineer, usually running past it at high speed when its arms were down, should be charged with knowing and appreciating and assuming the risk!

It has been a criminal offense in Ohio for twenty years to maintain mail cranes nearer than eighteen inches to the nearest point of contact with the widest locomotive on the road erecting such cranes, 97 O. L. 274, and there are similar statutes in other States. If the point of the crane arm here involved had been eighteen inches, four inches farther than it was, from the engine, Linder would not have been injured.

There is no evidence whatever that Linder actually knew that the crane arm extended close enough to the track to cause him injury, and the latest formulation by this court of the rule applicable to the case is: "In order to charge an employé with the assumption of a risk attributable to a defect due to the employer's negligence, [as this defect was], it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else

such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it." *Gila Valley, Globe & Northern Ry. Co.* v. *Hall*, 232 U. S. 94, 102.

Earlier expressions of the rule are that the danger must be "plainly observable" (*Texas & Pacific Ry. Co.* v. *Archibald*, 170 U. S. 665, 672; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *McDade*, 191 U. S. 64, 68), or "so patent as to be readily observable" (*Texas & Pacific Ry. Co.* v. *Swearingen*, 196 U. S. 51, 62).

It is "a strong thing" to hold, on the indefinite evidence in this record, which I have attempted accurately to detail, that a mail crane arm is such a permanent and conspicuous source of danger to a freight engineer as to bring this case within the scope of the decisions cited, and it is a yet stronger thing to reverse the finding of a jury properly instructed, and the judgments, on a question of fact, of two state courts, which the record shows acted with full appreciation of, and with a desire to follow, the decisions of this court with respect to assumption of risk.

In practice certainly, and I think in theory, the decision of the court in this case will introduce a new and unfortunate standard into the law of assumption of risk, which will confuse the doctrine as it has been worked out in the cases cited, will render railway companies careless in placing obstructions near to their tracks, and will result in the injury and death of many innocent and careful men, if the effect of it is not promptly corrected by state and national statutes, and therefore I cannot consent to join in it.

# ATWATER *v.* GUERNSEY ET AL., TRUSTEES IN BANKRUPTCY OF ATWATER, ET AL.

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

No. 511. Submitted December 14, 1920.—Decided January 3, 1921.

Petitioner advanced his son the money to buy a seat in the New York Stock Exchange and to pay the initiation fee, executing releases to the son which were filed with the Exchange in compliance with its rules, and the son paid interest on the amount advanced. The evidence showed that the advance was intended as a gift and that the interest was paid as a moral obligation merely. *Held*, irrespective of the technical operation of the releases, that the petitioner had no valid claim to reimbursement against the trustee of the son's firm in bankruptcy.
266 Fed. Rep. 278, affirmed.

THE case is stated in the opinion.

*Mr. Abram J. Rose* for petitioner. *Mr. Frank B. Lown* was also on the brief.

*Mr. R. D. Whiting* for respondents. *Mr. C. W. H. Arnold* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from an order expunging a claim of the petitioner, Edward S. Atwater, against his son, Eliot Atwater, a member of the firm of Atwater, Foote and Sherill, adjudicated bankrupts. The claim is for $75,000 furnished by the father to the son, to enable him to buy a seat in the New York Stock Exchange and to pay his initiation fee. The seat was bought and the use of it was

contributed to the firm by Eliot Atwater, the seat remaining his individual property, as the Master and both Courts have found, and as we see no reason to doubt. In connection with the purchase, as required by the rules of the Stock Exchange, Edward S. Atwater executed a release of all claims against Eliot Atwater, "and more particularly by reason of an advance of the sum of ($73,000) Seventy-Three Thousand Dollars, made to said Eliot Atwater, to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange." There was a second release with a similar special clause covering $2,010, to enable the son "to pay his initiation fee to the New York Stock Exchange." The Master and both Courts considered the release a bar to the appellant's claim.

It hardly was necessary to reach that point, as it seems to us obvious that whatever moral obligation was considered to remain, both father and son understood at the time of the transaction that no legal obligation arose from the advance, and the release expressed the fact. There is no doubt that the release was intended to be an operative instrument, at least so far as creditors who were members of the Stock Exchange were concerned. That being so it would be going very far to allow a cotemporaneous parol understanding to be shown that it should not do the very thing that on its face it specifically purported to effect. But we find no such understanding. It is admitted that no document ever was given to show it. The father testified that his son never agreed to repay the money and that nothing was said about repayment; the son testified that he understood that there was no claim against himself legally. It is true, no doubt, and natural that he should have considered that there was a moral obligation, and in pursuance of it interest was paid to the father until the bankruptcy. It is true, also, that father and son in their testimony use some phrases that favored the present claim. But we are satisfied that,

at the time, the release was given in good faith, and meant what it said without equivocation or reserves. It is unnecessary to consider whether the Circuit Court of Appeals were successful in distinguishing *Sterling* v. *Chapin*, 185 N. Y. 395, from the present case, on the assumption that the parties attempted to qualify the release. More need not be said to show that the decree should be affirmed.

*Decree affirmed.*

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## NATIONAL BRAKE & ELECTRIC COMPANY *v.* CHRISTENSEN ET AL.

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

No. 111. Argued December 10, 1920.—Decided January 3, 1921.

1. When a patent for an invention has been sustained by the Circuit Court of Appeals and the case has been remanded to the District Court for an accounting, a party claiming that a subsequent decree in another circuit should be given effect as *res judicata* against the patent should apply by petition to the Circuit Court of Appeals for leave to file a bill in the District Court in the nature of a bill of review, setting up the new matter as a bar to further proceedings. P. 429.
2. Such applications are addressed to the sound discretion of the appellate tribunal, and should be decided upon consideration of the materiality of the new matter and diligence in its presentation. P. 430.
3. Leave to file such a bill of review may be granted after the judgment of the appellate tribunal and after the going down of its mandate at the close of the term at which judgment was rendered. P. 431.
4. *Held*, that an application made to the Circuit Court of Appeals in this case was an application of that character, and not an application to have the other decree pronounced *res judicata* by that court. P. 432.
5. The decision of the Circuit Court of Appeals rejecting such an

application is reviewable in this court by certiorari, not by appeal, since the application is ancillary to the original jurisdiction over the case, as one arising under the patent laws. P. 432.

258 Fed. Rep. 880, reversed.

THE case is stated in the opinion.

*Mr. John S. Miller*, with whom *Mr. Edward Osgood Brown*, *Mr. Paul Synnestvedt* and *Mr. Charles A. Brown* were on the briefs, for petitioner, contended, *inter alia*, that the decree in Pennsylvania was the first final one, the Wisconsin decree being merely interlocutory, and that it was the duty of the Circuit Court of Appeals in the latter case to give effect to the Pennsylvania decree, by recalling its mandate, setting aside its affirming order and directing the District Court to vacate its own former decree and enter one adjudging the patent invalid. They claimed that the case was one with *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294.

*Mr. Joseph B. Cotton* and *Mr. Louis Quarles*, with whom *Mr. William R. Rummler* and *Mr. Willet M. Spooner* were on the brief, for respondents, contended that the Wisconsin decrees were final and settled the law of the case; that, for various reasons, the rulings in Pennsylvania were not *res judicata*, and that there was no application for the *Hart Steel Co. Case*, in which the decree set up as *res judicata* was presented to the Circuit Court of Appeals in a case pending before and as yet undecided by it. A number of other propositions were discussed in both arguments.

*Mr. Charles Neave* and *Mr. Clarence D. Kerr*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought by Christensen and the Allis-Chalmers Company in the District Court of the United States for

the Eastern District of Wisconsin against the National Brake & Electric Company for infringement of patent to Christensen No. 635,280 for improvement in a combined pump and motor. After answer, the petition was amended so as to set up that Christensen before the issue of the patent No. 635,280 had obtained a patent for the same invention under No. 621,324, and that because of defects the same had been returned to the Commissioner of Patents, and the new letters issued for the same invention, and that the Commissioner of Patents cancelled letters patent No. 621,324 and issued letters patent No. 635,280 for the full term of 17 years from October 17, 1899.

In the amended bill it was prayed that the patent monopoly to Christensen be adjudged to be valid for 17 years from March 21, 1899, the date of the first patent, and the second letters patent be held by the court to be evidence of the grant for the term of 17 years from that date. Answer was filed, testimony taken, and a decree was rendered in favor of Christensen, the District Court holding that whether the patent monopoly were evidenced by one or the other or both of the two letters patent, was immaterial. Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, where the decree of the District Court was affirmed (229 Fed. Rep. 564), and mandate was duly issued to the District Court. After a petition for rehearing was denied, an application was made to this court for a writ of certiorari, which was denied February 21, 1916. 241 U. S. 659. On the remand to the District Court a master was appointed and an accounting begun.

On March 11, 1916, Christensen and the Allis-Chalmers Company filed a bill of complaint against the Westinghouse Traction Brake Company in the District Court of the United States for the Western District of Pennsylvania. Issues were made up, and evidence was taken.

We do not deem it necessary for present purposes to

recite the history of the litigation in the proceedings in Pennsylvania. Thereafter, the Brake & Electric Company made application in the District Court in Wisconsin asking to have the benefit of the decree in Pennsylvania dismissing the bill by setting up that decree as *res judicata*. The District Court denied the petition. Afterwards, on August 19, 1918, the Brake & Electric Company presented and filed a motion and petition upon which the Circuit Court of Appeals, Seventh Circuit, rendered the decree which is now the subject of review.

The petition alleges that the decree in the Pennsylvania suit was one presenting the same issues as were presented and considered in the Wisconsin suit; that the plaintiffs were the same, and the defendants were in privity; that in the Pennsylvania suit it was adjudged, in accordance with the mandate issued by direction of the Circuit Court of Appeals of the Third Circuit that patent No. 635,280 was issued without warrant, and that the bill of complaint as to that patent should accordingly be dismissed; that upon further proceedings had in the Court of Appeals in the Third Circuit and the District Court in Pennsylvania as to patent No. 621,324 the bill upon that patent was dismissed for want of prosecution. A transcript of the proceedings in the District Court of the United States for the Western District of Pennsylvania was presented, and petitioner stated that it was advised that the District Court for the Eastern District of Wisconsin had no power or authority without the assent of the Circuit Court of Appeals for the Seventh Circuit to entertain the motion or application to set aside or modify the former decree of such District Court affirmed by the Circuit Court of Appeals, but that the Circuit Court of Appeals had such jurisdiction and power, and that because of the final adjudication in the District Court for the Western District of Pennsylvania the suit in the District Court of the Eastern District of Wisconsin should be dismissed on the

motion of the petitioner. The petition recited the proceedings in the District Court of Wisconsin, and the fact that that court was proceeding to take an accounting under the former decree. The prayer of the petition was that the Circuit Court of Appeals take jurisdiction of the petition, and inquire into and determine the status of the case, and the force and effect of the final judgment of the District Court of the Western District of Pennsylvania, and hold the same to be a final adjudication, and that the petitioner was entitled to a final decree in the suit in Wisconsin dismissing the same for want of equity; that the District Court be directed to proceed and act accordingly; and the court was asked to issue such orders in the premises, and such writ or writs of certiorari or otherwise as might be necessary or proper, and such further and different orders, directions, writs or relief as should seem proper or necessary.

The Circuit Court of Appeals for the Seventh Circuit refused to grant any relief upon the petition, holding that the decree of the Wisconsin Court was final in its character, notwithstanding it was interlocutory in form, and that the decree in the Third Circuit could not be set up as *res judicata* between the parties. 258 Fed. Rep. 880. From that decree the writ of certiorari brings the case to this court.

It thus appears that in a suit upon a patent, and one subsequently issued alleged to be for the same invention, Christensen had obtained a decree in the Wisconsin District Court sustaining the right to a patent monopoly and an accounting. From this decree appeal had been taken to the Circuit Court of Appeals for the Seventh Circuit, where the decree was affirmed, and the cause remanded to the District Court, where the accounting was in progress. Subsequently Christensen brought the suit in Pennsylvania upon the patent rights in controversy which resulted in a decree which, it is contended,

is binding upon Christensen, and *res judicata* as to the invalidity of the patent.

In such case the Brake & Electric Company if it wished to avail itself of the Pennsylvania decree had the right to apply by petition in the appellate court of the Seventh Circuit for leave to file a bill in the court of original jurisdiction in the nature of a bill of review, setting up the new matter as a bar to further proceedings. Such applications are addressed to the sound discretion of the appellate tribunal, and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation. *Rubber Co.* v. *Goodyear*, 9 Wall. 805; *In re Gamewell Co.*, 73 Fed. Rep. 908; *Keith* v. *Alger*, 124 Fed. Rep. 32; *Society of Shakers* v. *Watson*, 77 Fed. Rep. 512.

The matter was considered in *In re Potts*, 166 U. S. 263, where this court reversed a decree of the Circuit Court dismissing a bill upon a patent, holding that the patent was valid and had been infringed by the defendant, and remanding the cause to the Circuit Court for further proceedings. It was held that the Circuit Court had no authority to grant or entertain a petition filed without leave of this court for a rehearing for newly discovered evidence, and that mandamus was the proper remedy to set aside the order of the Circuit Court failing to execute the mandate of this court. The authorities were reviewed by Mr. Justice Gray, speaking for the court. Among other things he said: "In this respect, a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in *Southard* v. *Russell*, above cited, said: 'Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to

that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits.' 16 How. 570, 571. So, in *United States* v. *Knight*, 1 Black, 488, 489, Chief Justice Taney said that, in a case brought before this court exercising general jurisdiction in chancery, 'the defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered.' "

In *In re Potts* it was held that unless application was made to this court within twenty days for leave to file a petition for a rehearing in the Circuit Court, the writ of mandamus would issue as prayed.

In *Potts & Co.* v. *Creager*, 97 Fed. Rep. 78, 79, it appears from the statement of subsequent proceedings in the case that this court upon application granted leave to file a petition for rehearing in the Circuit Court.

That leave to file a supplemental petition in the nature of a bill of review may be granted after the judgment of the appellate court, and after the going down of the mandate at the close of the term at which judgment was rendered, was held in *In re Gamewell Co.*, 73 Fed. Rep. 908, in a carefully considered opinion rendered by the Circuit Court of Appeals for the First Circuit, reciting the previous consideration of the question in cases in this court. We think these cases settle the proper practice in applications of this nature.

This case is unlike the one before us in *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, in which it was held that a decree in a patent infringement suit affirmed by the Circuit Court of Appeals for the Sixth Circuit, while a like decree was pending but not yet heard before the Circuit Court of Appeals for the Seventh Circuit, upon a

motion seasonably made in the latter Court of Appeals, should have been held to be *res judicata* because of the legal identity of the subject-matter and privity of the parties.

In the instant case the Circuit Court of Appeals for the Seventh Circuit, treating the application as an original petition to have the decree made in the Third Circuit pronounced *res judicata*, held that the former decree in the Seventh Circuit was final, and denied the prayer of the petition.

In our view the proper practice in matters of this sort required the Circuit Court of Appeals to regard the petition, taking all of its allegations together, and with its prayer for general relief, as an application for leave to file in the District Court a petition in the nature of a bill of review invoking a consideration of the effect of the judgment in the Third Circuit. Such consideration the Circuit Court of Appeals may well be directed to undertake in the exercise of its proper function in determining the rights of the parties, and for that purpose its judgment should be reversed, without passing in this court upon the merits of the petition. This procedure is sanctioned by former decisions of this court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257; *Cramp & Sons Co.* v. *Curtiss Turbine Co.*, 228 U. S. 646; *Brown* v. *Fletcher*, 237 U. S. 583.

A motion was made to dismiss the writ of certiorari upon the ground that this case is one in which an appeal might have been had. But we are of opinion that in view of the nature of the application, and the status of the case brought for infringement of the patents in question, the proceeding was not of that character in which an appeal would lie to this court. We held in *Macfadden* v. *United States*, 213 U. S. 288, that the line of division between cases appealable from the Circuit Court of Appeals and those made final in that court was determined by the

source of original jurisdiction of the trial court, and not by the nature of the questions of law raised or decided.

In our view the petition filed in the Circuit Court of Appeals was ancillary to the original jurisdiction invoked, and was still in its essence and nature a suit involving the validity of a patent, which is expressly made final in the Circuit Court of Appeals, subject to the right of this court to review by writ of certiorari.

It follows that the decree of the Circuit Court of Appeals should be reversed, and the case remanded to that court for further proceedings upon the petition filed by the National Brake & Electric Company in conformity with the opinion of this court.

*Reversed.*

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## SULLIVAN ET AL. *v.* KIDD.

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

No. 65. Argued April 27, 1920; restored to docket for oral argument May 17, 1920; reargued December 10, 1920.—Decided January 3, 1921.

1. In the absence of a controlling treaty, the capacity of an alien to inherit land within a State of the Union depends upon the law of that State. P. 435.
2. Treaties are to be interpreted upon the same principles as written contracts between individuals, all parts being considered with a view to giving a fair operation to the whole; and they are to be executed in the utmost good faith to effectuate the purposes of the high contracting parties. P. 439.
3. The Treaty of March 2, 1899, between Great Britain and the United States, grants the subjects of each party certain rights of inheritance respecting real property within the territories of the other, but declares (Art. IV) that its stipulations shall not be applicable to any of the colonies or foreign possessions of the British

Crown unless a notice to that effect shall have been given by Great Britain to the United States on behalf of such colony or possession, and that its provisions shall extend and apply to any territory pertaining to or occupied by the United States beyond the seas, only upon notice to that effect being given by the United States to Great Britain. *Held*, that the giving of such notice conditions the applicability of the treaty to a foreign possession, not merely in respect of the property there situate, but also in respect of the subjects and citizens there residing; so that, no notice having been given on behalf of Canada, a subject of Great Britain who was a citizen and resident of that Dominion acquired no right under the treaty to inherit land in the United States. P. 436.

4. The fact that Canada, as a self-governing dependency, in the exercise of her legislative power, has granted aliens the right to inherit, cannot affect the construction of the treaty. P. 440.
5. In the practice of this country, the "most favored nation" clause is held not to extend the rights acquired by treaties containing it because of reciprocal benefits expressly conferred in treaties with other nations in exchange for rights or privileges given to our Government. P. 441.
6. The "most favored nation" clause in the above cited treaty does not control its specific condition upon the right of citizens of a foreign possession to participate in its benefits. *Id.*
7. In construing the treaty little weight can be attached to a different construction placed by Great Britain on an earlier treaty with Japan but which was not made known to the representative who negotiated the treaty in question for this country. P. 442.
8. A construction placed upon a treaty and consistently adhered to by the Executive Department, should be given much weight by the courts. *Id.*

Reversed.

THE case is stated in the opinion.

*Mr. Geo. F. Beatty* and *Mr. B. I. Litowich*, for appellants, submitted. *Mr. C. W. Burch* and *Mr. La Rue Royce* were also on the brief.

*Mr. H. M. Langworthy*, with whom *Mr. O. H. Dean*, *Mr. R. B. Thomson*, *Mr. R. D. Williams*, *Mr. J. E. Madden* and *Mr. W. D. McLeod* were on the briefs, for appellee.

*The Solicitor General*, by special leave of court, submitted a brief on behalf of the United States.

Mr. Justice Day delivered the opinion of the court.

This is an appeal from a decree of the United States District Court for the District of Kansas. It involves the construction of the Treaty between Great Britain and the United States of March 2, 1899, relating to the tenure and disposition of real and personal property. Compilation of Treaties in Force 1904, 375 (Malloy); 31 Stat. 1939.

The case arises from the following facts:

Peter Martin died at Osawatomie, Kansas, January 29, 1915, owning real estate situated in the County of Saline, Kansas. He left surviving him certain relatives, among others a sister Margaret Ingoldsby, a resident of the township of Sheffield, County of Lennox-Addington, Province of Ontario, Canada. After the death of Peter Martin, and on July 28, 1916, Margaret Ingoldsby died at her home in Canada, and by her last will and testament, duly probated, she named the appellee, Jane Kidd, her sole devisee and legatee. The real estate in Kansas has been sold in partition sale, and the question to be decided is whether Jane Kidd, thus holding by devise the interest of Margaret Ingoldsby, is entitled to succeed to the undivided one-seventh of the estate of Peter Martin.

Primarily the devolution of the estate, it being situated in the State of Kansas, would be determined by the laws of that State. *Blythe* v. *Hinckley*, 180 U. S. 333, and previous cases in this court cited and quoted on page 341 *et seq.* Under the constitution and laws of Kansas Margaret Ingoldsby, an alien, was incapable of inheriting, and the estate would pass to the brothers and sisters and their representatives who were native citizens. *Johnson* v. *Olson*, 92 Kansas, 819.

The right of Jane Kidd to succeed to the interest of Margaret Ingoldsby is said to arise from the fact that the latter was, although a citizen and resident of Canada, a British subject, and entitled to the succession because of the Treaty of March 2, 1899. The District Court sustained this contention. Pertinent provisions of the Treaty are:

"ARTICLE I.

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn.

"ARTICLE II.

"The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

* * * * * * * *

"ARTICLE IV.

"The stipulations of the present Convention shall not be applicable to any of the Colonies or foreign possessions of Her Britannic Majesty unless notice to that effect shall have been given, on behalf of any such Colony or foreign possession by Her Britannic Majesty's Representative at Washington to the United States Secretary of State, within one year from the date of the exchange of the ratifications of the present Convention.

"It is understood that under the provisions of this Article, Her Majesty can in the same manner give notice of adhesion on behalf of any British Protectorate or sphere of influence, or on behalf of the Island of Cyprus, in virtue of the Convention of the 4th of June, 1878, between Great Britain and Turkey.

"The provisions of this Convention shall extend and apply to any territory or territories pertaining to or occupied and governed by the United States beyond the seas, only upon notice to that effect being given by the Representative of the United States at London, by direction of the treaty making power of the United States.

"ARTICLE V.

"In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the High Contracting Parties shall in the Dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation.

"ARTICLE VI.

"The present Convention shall come into effect ten days after the day upon which the ratifications are exchanged, and shall remain in force for ten years after such exchange. In case neither of the High Contracting Parties shall have given notice to the other, twelve months before

the expiration of the said period of ten years, of the intention to terminate the present Convention, it shall remain in force until the expiration of one year from the day on which either of the High Contracting Parties shall have given such notice.

"The United States or Her Britannic Majesty shall also have the right separately to terminate the present Convention at any time on giving twelve months' notice to that effect in regard to any British Colony, foreign possession, or dependency, as specified in Article IV, which may have acceded thereto."

The case was argued and submitted at the last term of this court. It was ordered reinstated with notice to the Attorneys General of the United States and of the State of Kansas. The case has been reargued. The Solicitor General presented the views of the State Department of the United States, and submitted a brief in behalf of the Government.

There are opposing views of the treaty, one taken by the British, and the other by the American Government, the view of the former being that British subjects, resident of Canada, or elsewhere, are entitled to inherit property in any State of the United States, and citizens of the United States are entitled to inherit in Great Britain and its possessions and colonies, provided as to the latter, that notice has been given under Article IV of the treaty of adhesion to the terms of the convention as to such colonies and possessions. The American contention is stated by the Solicitor General, and appears by a communication from the Secretary of State of October 2, 1920, sent in response to the invitation of the Solicitor General and now on the files of the Department of Justice. The Secretary of State sets forth that it is the view of this Government that British subjects, citizens and residents of Canada, do not inherit in the United States by virtue of the stipulations of the treaty, because as to the Domin-

ion of Canada no notice of adhesion to the same has been given as is required by the stipulations of Article IV. It hence appears that the one contention is that the notice required by Article IV has a territorial effect only, and when given brings such territory into the operative force of the treaty as to the property situated therein; the other, that, as to subjects and citizens, the notice is required to bring residents and property within the operative effect of the treaty.

Applied to the concrete case, the American contention is that Margaret Ingoldsby was not entitled to inherit in Kansas by the terms of this treaty because notice of adherence for the Dominion of Canada was not given. The communication of the State Department to the Solicitor General shows that the American Government is ready, and has expressed its willingness to take up the matter of extending the treaty provisions to the Dominion of Canada, notwithstanding the fact that the stipulated time for notice has expired.

Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, International Law Digest, vol. 5, 249. At the time of the negotiation of the treaty Great Britain had numerous colonies and possessions, and the United States had recently acquired certain islands beyond the seas. Concerning these the contracting parties made the stipulations contained in Article IV, adding the right to give like notice in behalf of any British protectorate, or sphere of influence, or on behalf of the Island of Cyprus by virtue of the Convention of June 4, 1878, between Great Britain and Turkey. As to the islands beyond

the seas occupied or governed by the United States, they were to come within the terms of the treaty only upon notice to that effect by direction of the treaty-making power of the United States.

If the contention of the appellee be correct, it necessarily follows that as to British possessions, the inhabitants thereof being British subjects, had nothing to gain by giving notice which Article IV specifically required, for as to them their rights had been secured by Articles I and II of the treaty. Applying this construction to the instant case, Canadians while residents of the Dominion, and citizens of a self-regulating and self-governing community, acquired by virtue of this treaty as British subjects the right to inherit in every State of the American Union regardless of local laws; this while citizens of the United States acquired no corresponding right to inherit in the Dominion of Canada until notice be given; a matter entirely beyond the control of American authority. The American right to inherit in Canada became a matter of grace on the part of the other contracting nation when it saw fit to grant it by signifying its adhesion to the treaty. Such construction is inconsistent with the general purpose and object of such conventions to secure equality in exchange of privileges and reciprocity in rights granted and secured. *Geofroy* v. *Riggs*, 133 U. S. 258, 271.

The fact that Canada, as a self-governing dependency, in the exercise of the legislative power which is hers, has seen fit to give aliens the right to inherit, adds nothing to the argument in favor of the appellee. The Dominion of Canada has not the treaty-making power. Whatever the Dominion may see fit to do in the exercise of its own legislative authority cannot affect the right of a State of the American Union to determine for herself whether aliens shall inherit property within her borders. The construction insisted upon by the United States makes for the exchange of reciprocal rights under the provisions

of the treaty, and when the required notice is given, British subjects resident of Canada would have property rights in the United States similar to those accorded citizens of the United States in Canada. That notice was deemed essential to the security of rights of British subjects, resident of the colonies, is shown by the practice which has followed the making of the Supplementary Convention of 1902 (Treaties in Force 1904, 377; 32 Stat., p. 1914) extending for twelve months from July 28, 1901, the time fixed in Article IV of the Treaty of March 2, 1899, for the notification of accession to that Convention by British colonies or foreign possessions. In a note to this treaty, published in Treaties in Force 1904, *supra*, it appears that most of the British colonies and possessions have given notice of adhesion to the Treaty of 1899.

The significance of Article VI is important. In this article provision is made for the right of the United States or the British Government to terminate separately the Convention by twelve months' notice to that effect in regard to any British colony, foreign possession or dependency, as specified in Article IV, which may have acceded to the Convention. This article lends strong support to the argument that only colonies or possessions which accede to the Convention are to have the benefit thereof; such rights, recognized as acquired by accession, being subject to termination by the withdrawal provision of Article VI.

Nor are we impressed with the argument that Canadian citizens, being also British subjects, are entitled to inherit in Kansas by virtue of the most favored nation clause. That clause has been held in the practice of this country to be one not extending rights acquired by treaties containing it because of reciprocal benefits expressly conferred in conventions with other nations in exchange for rights or privileges given to this Government. This clause cannot overcome the specific provisions of Article

IV making adhesion to the treaty necessary in order to bring citizens and property of colonies and possessions within the benefits of the treaty.

We are unable to see that the construction of this treaty is aided by the argument of counsel in the supplemental brief of the appellee that Lord Salisbury for the British Government insisted upon the construction which they contend for in relation to a similar convention with Japan. We find nothing in the archives of the Department of State to show that this insistence was brought forward in the course of negotiations or in any manner came to the attention of the American Representative, Mr. Hay, who negotiated this treaty with Sir Julian Pauncefote, the British Representative.

The American Government upon a message from the President for the purpose of securing the consent of the Senate, as we learn from public documents on file in the State Department, has with the consent of the Senate extended the provisions of the Convention of 1899 to Porto Rico and has so notified the British Government. We are advised by the letter of the Secretary of State of October 2, 1920 (on file in the Department of Justice), that this Government is ready to take up with the British Government the matter of extension of the treaty provisions to Hawaii and the Dominion of Canada.

While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight. *Charlton* v. *Kelly*, 229 U. S. 447, 468. See also *Castro* v. *De Uriarte*, 16 Fed. Rep. 93, 98 (opinion by Judge Addison Brown).

Taking the view which we have here expressed of the

real purpose of the treaty as evidenced by its terms, which is strengthened by the practices of both governments in pursuance of it, we reach the conclusion that for lack of notice of the adhesion of Canada to the terms of the treaty, the law of Kansas was not superseded in favor of British subjects resident in Canada, and it determined the right of aliens to inherit lands in that State.

*Reversed.*

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## DUPLEX PRINTING PRESS COMPANY *v.* DEERING ET AL., INDIVIDUALLY AND AS BUSINESS AGENTS OF DISTRICT NO. 15 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.

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

No. 45. Argued January 22, 1920.—Decided January 3, 1921.

1. The Act of October 15, 1914, known as the Clayton Act, in so far as it grants relief by injunction to private suitors, or affixes conditions and otherwise modifies the Sherman Act, is applicable to a suit for an injunction pending at the time of its enactment. P. 464.
2. For the purpose of compelling a manufacturer of printing presses to unionize its factory in Michigan, in which there had been an unsuccessful strike, and to enforce there the "closed shop," the eight-hour day and the union scale of wages, organizations of machinists with headquarters at New York City, and a larger organization of national scope with which they were affiliated, entered into a combination to interfere with and restrain the manufacturer's interstate trade by means of a "secondary" boycott, centered particularly at New York City and vicinity where many of the presses were marketed; in pursuance of which this manufacturer's customers in and near New York were warned, with threats of loss and of sympathetic strikes in other trades, not to purchase or install its presses; a trucking company usually employed by customers

was notified, with threats, not to haul them; employees of the trucking company and of customers were incited to strike in order to prevent both hauling and installation; repair shops were notified not to repair them; union men were coerced by threats of the loss of their union cards and of being blacklisted as "scabs" if they assisted in installing them; an exposition company was threatened with a strike, if it allowed them to be exhibited, etc., etc.,—all of which seriously interfered with the interstate trade of the manufacturer and caused great loss to its business. *Held*, a combination and conspiracy to restrain interstate commerce against which the manufacturer was entitled to relief by injunction under the Sherman Act, as amended by the Clayton Act. Pp. 461 *et seq.*

3. A conspiracy is a combination of two or more by concerted action to accomplish an unlawful purpose or to accomplish a purpose not in itself unlawful by unlawful means. If the purpose be unlawful, it may not be carried out by means otherwise lawful; and although it be lawful, it may not be carried out by means that are unlawful. P. 465.
4. A "secondary boycott" is a combination not merely to refrain from dealing with the person aimed at, or to advise or by peaceful means persuade his customers to refrain, but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage through fear of loss or damage to themselves. P. 466.
5. In determining the right to an injunction under the Clayton and Sherman Acts, the legality or illegality of a boycott under the common law or under the statutes of a particular State is of minor consequence, since the acts of Congress are paramount in their field and must be given full, independent effect. P. 466.
6. It is settled by decisions of this court that a restraint of interstate commerce produced by peaceable persuasion violates the Sherman Act, and is not justified by the fact that the participants in the combination or conspiracy have an object beneficial to themselves or their associates which they might have been at liberty to pursue in the absence of the statute. P. 468.
7. Section 6 of the Clayton Act, in declaring that nothing in the anti-trust laws shall be construed to forbid the existence and operation of labor organizations or to forbid their members from lawfully carrying out the legitimate objects thereof, and that such organizations or their members shall not be construed to be illegal combinations or conspiracies in restraint of trade, assumes that the normal objects of such organizations are legitimate, but contains nothing

to exempt them or their members from accountability when they depart from objects that are normal and legitimate and engage in an actual combination or conspiracy in restraint of trade. It does not authorize any activity otherwise unlawful, or enable a normally lawful organization to cloak such an illegal combination or conspiracy. P. 468.

8. The first paragraph of § 20 of the Clayton Act—which provides that injunctions shall not be granted in any case between an employer and employees, etc., growing out of a dispute concerning the terms and conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and that such property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney,—is merely declaratory of the law as it stood before. P. 469.
9. The second paragraph of § 20 of the Clayton Act, which provides that "no such . . . injunction shall prohibit" certain specified acts, manifestly refers to injunctions in any case of the character mentioned in the paragraph preceding, namely, "a case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment;" and the concluding words of the second paragraph, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be so held when committed by parties concerned in a "dispute concerning terms or conditions of employment." P. 469.
10. As the section imposes an exceptional and extraordinary restriction upon the equity powers of the federal courts, and upon the general operation of the anti-trust laws, conferring a special privilege or immunity upon a particular class to the detriment of the general public, the rules of statutory construction forbid that the privilege be enlarged by resorting to a loose construction or by ignoring or slighting the qualifying words of the section. P. 471.
11. This section confines the exceptional privilege to those who are proximately and substantially concerned in an actual dispute respecting the terms or conditions of their own employment, past, present or prospective; it does not use the words "employers and employees" in a general class sense, or treat all the members of a labor organization as parties to a dispute which proximately affects but a few of them. Pp. 471 *et seq.*

12. That the Clayton Act was not intended to legalize the secondary boycott is shown by its legislative history. P. 474.
13. In construing an act of Congress, debates expressing views and motives of individual members may not be resorted to, but reports of committees and explanatory statements in the nature of a supplemental report made by the committee member in charge of the bill in course of passage, may. *Id.*

252 Fed. Rep. 722, reversed.

THE case is stated in the opinion.

*Mr. Walter Gordon Merritt* and *Mr. Daniel Davenport* for appellant:

This is not an ordinary labor case in which the defendants have sought to improve their conditions of employment by a strike and incidental picketing against their employer, to which the ordinary rules relative to labor unions are applicable. Such a case involves manufacturing and production, which are the peculiar concern of labor unions.

The attack here is upon complainant's trade and commerce, *United States* v. *Knight Co.*, 156 U. S. 1; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; and there is not, nor has there been, any strike or discontent among the complainant's employees, except the ordered quitting work on August 27, 1913, of eleven out of 200 in the factory at Battle Creek and three road men erecting presses in different parts of the country. The complainant's productive organization is intact, and there is a harmonious copartnership between it and its employees, producing goods which are being attacked by union men in the interest of union factories and their employees. If complainant's employees were dissatisfied and had withdrawn from their employment with the complainant, and there was nothing else in the case, it would be a strike case, but since outsiders are trying to attack the trade and commerce being carried on through a harmoni-

ous partnership of labor and capital it is a boycott case. When employer and employees are working happily together to such an extent that the workmen refuse all inducements to strike, any further interference with their rights, whether it be by violence, intimidation or a boycott of the fruits of their toil, is illegal. If strikers or labor union representatives cannot persuade men to quit work, their rights are exhausted and they cannot resort to additional and more drastic methods. A strike is a fight between labor and capital, where labor withdraws from its copartnership with capital, and such a withdrawal because of dissatisfaction with the terms of the partnership is lawful. But a boycott necessarily implies that the goods are being produced by an existing organization of labor and capital, so that any attack on the goods and the sale of those goods is an attack upon both labor and capital, by union men working in the interest of union employers—and sometimes at their instigation—to prevent the sale of the open-shop products and secure a monopoly for the union-made products; it is the open-shop employer and his employees on the one side and the union employer and union employees on the other side, and the legality of the combination is not to be tested by the rules applicable to a labor-capital fight where labor merely withdraws from its partnership with capital, but is to be tested by the anti-trust laws which define the lawful methods of competition in the sale and distribution of products.

One of the purposes of the anti-trust laws is to give the public the benefit of free competition, so that all products surviving the battle of fair competition may flow naturally into the public markets of the nation for the selection of consumers. Any artificial or unreasonable obstruction to trade which deprives the public of these advantages necessarily violates the anti-trust laws.

To unduly restrict competition or obstruct the course

of trade is injurious to the public because it deprives the public of its inherent right of enjoying the service and the fruits of the service of everybody, and because if the obstruction is successful it keeps goods from the market and restricts the public's right of choice in determining what articles it may purchase. Any combination which, by artificial means, seeks to obstruct the course of trade, is illegal, and only that obstruction is tolerated which is incidental to the ordinary and regular pursuit of a business. The combination in the case at bar and the injury which it has inflicted and threatens to inflict upon the complainant was not incidental to the pursuit of any legitimate business, but had for its sole and direct purpose the suppression of the complainant's competition by erecting an artificial barrier between complainant and its customers and destroying its interstate trade.

The object of the defendants is to prevent the sale and use of machines unless they come from factories operated and exclusively manned by members of the combination and in accordance with methods approved by it. According to the defendants' contentions, and the contentions of the union factories which have conceded their demands, they must protect the union factories from the competition of the open-shop factories, because, under the natural laws of trade and competition, the union factories cannot survive with their increased cost of production. Not being able to control the complainant's producing organization at Battle Creek because the employees are contented with their employment, the only possible method by which this could be accomplished is to restrain the trade and commerce of the complainant by making their products unsalable. This is done by calling strikes against their installation, preventing common carriers from hauling them, threatening purchasers with strikes of pressmen, and with the impossibility of operating the presses, causing breakdowns of such presses, preventing

their repair, and finally even seeking to suppress their public exhibition and advertisement. If this can be done the barrier between the complainant and the public market will be unsurmountable.

There is no relation between the complainant's factories in Battle Creek and the places where the presses are to be exhibited, hauled, installed or operated, except commerce, so that the only way in which the conditions in the factories can be affected by the conduct of the men at the place of consignment is by controlling commerce.

The combination violates the Federal Anti-Trust Law and the complainant is entitled to an injunction under the Act of October 15, 1914.

The right to work or quit work is no more absolute than any other constitutional right and ceases to be a right when exercised for the purpose of injuring another or accomplishing a result contrary to public policy or restraining trade contrary to law. *Aikens* v. *Wisconsin*, 195 U. S. 204; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459; *Loewe* v. *Lawlor*, 208 U. S. 274; 235 U. S. 522; *Montague* v. *Lowry*, 193 U. S. 38; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600; *United States* v. *Patten*, 226 U. S. 525; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *State* v. *Duluth Board of Trade*, 107 Minnesota, 506.

A private party is entitled to an injunction against acts in violation of the Federal Anti-Trust Law. Clayton Act, § 16.

There is nothing in §§ 6 and 20 of the Clayton Act which legalizes conspiracies or forbids the issuance of injunctions in cases like this.

There is nothing in the act which indicates any intention to "draw the teeth" of the Anti-Trust Law, and everything points to a determination for more stringent

enforcement through supplementary legislation. The presence of § 6, as shown by the history of the legislation, is due to the fact that it was thought desirable to put at rest the contentions of some that the mere existence of labor unions for legitimate purposes was forbidden by the Sherman Anti-Trust Law.

Section 20 has no application to the case. It is obvious that none of the defendants is or has been or probably ever will be an employee of the complainant, whose factories are situated a thousand miles away from the State where the defendants reside. The limitation with which this section commences therefore excludes its application to the case at bar.

As a general proposition even workmen on strike are not "employees." *Atchison, Topeka & Santa Fe Ry. Co.* v. *Gee*, 139 Fed. Rep. 582; *Knudsen* v. *Benn*, 123 Fed. Rep. 636; *Union Pacific R. R. Co.* v. *Ruef*, 120 Fed. Rep. 102; *Iron Molders' Union* v. *Allis-Chalmers Co*, 166 Fed. Rep. 45 (Judge Grosscup's opinion).

It would seem that the word "employee" implies the existence of a continuing employment relation. *Louisville &c. R. R. Co.* v. *Wilson*, 138 U. S. 501. The various acts specified in § 20, as acts not to be enjoined, have some reasonable significance when considered as the acts of employees carried on incidentally with the calling of a strike, but are not acts which can be lawfully and properly carried on by outsiders. The defendants' contention and the decision of the Circuit Court of Appeals lead to the conclusion that a "dispute concerning conditions of employment" between the complainant and any one of its employees justifies all of the other so-called employees in the United States, including the 3,000,000 members of the American Federation of Labor, engaging in a conspiracy to prevent the sale of articles made by 99.9 per cent. of the contented employees of the complainant. If, as in this case, the union can create a necessary dispute

to legalize its attack by ordering 5 per cent of the workmen to quit, it may likewise open the flood gates of destruction against the joint products of the employer and his 99 per cent. contented employees by merely showing that 1 per cent. has responded to its orders. And it is, of course, obvious that § 20 refers to a dispute between the employers and employees and does not extend any immunity to outsiders or sympathizers. Certainly the word "employer" or "employee" or "dispute" should not be extended beyond its natural meaning when to do so will make it operate in derogation of common rights of the particular class of litigants specified.

The intent of § 20 was to forbid the issuance of injunctions in those cases, only, where the acts enumerated in its several clauses would not be "unlawful in the absence of such dispute," referring, of course, to a "dispute concerning terms or conditions of employment" between the several classes of persons enumerated in the first sentence of the section. Acts which were unlawful before the passage of the Clayton Act are still unlawful under it, because they are unlawful independently of and in the absence of a trade dispute.

In other words, in trade dispute cases the presence of a trade dispute shall not itself taint the specified acts with illegality if they are otherwise legal. Since the secondary boycott is still unlawful in the absence of a trade dispute, *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, it must likewise be unlawful when connected with a trade dispute. This whole section of the law, as shown by its history, was only intended to put at rest the contentions of labor, fallacious though they were, that the courts discriminated unfairly against lawful acts in trade dispute cases. The secondary boycott therefore remains as unlawful as ever.

It is further obvious that the various acts mentioned

in § 20 against which injunctions shall not issue in this limited class of cases are most of them acts which in and of themselves are ordinarily lawful as between an employer and his employees, and that this section accomplishes no other purpose than to declare the previously existing law on this subject. It merely declares that the acts specified of themselves and by themselves shall not be held to violate any federal law, but it does not mean that jurisprudence shall be revolutionized by declaring that such acts may be done with impunity to accomplish criminal purposes. If, as stated by this court, not even the recognition of a right by the Constitution can justify its exercise in furtherance of a criminal plot (*Aikens* v. *Wisconsin*, 195 U. S. 194), and the constitutional privilege of free speech cannot be used as a defense to an injunction which restrains speech or writing, in furtherance of an illegal conspiracy (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 439), then it certainly follows that the recognition of a right by a statute such as the Clayton Act will not justify the exercise of that right in furtherance of a criminal conspiracy, which is expressly recognized by the same statute. When these acts are used in furtherance of a criminal plot they become acts of an entirely different character from those described by this section, for they are colored, and their character determined, by the illegal plot.

Defendants' contention, besides requiring a repeal by implication, renders § 20 unconstitutional as class legislation, especially as it would exempt laborers, not as such but in their attempts to control sale and distribution of commodities. *Cleland* v. *Anderson*, 66 Nebraska, 252; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

From these well-reasoned decisions it would seem to follow that an exemption from the anti-trust laws extended to any class of people, purely as a class, is unconstitutional, if the exemption extends to that class

under the identical circumstances where other classes are bound by the law.

A statute forbidding the federal courts to issue any restraining order or injunction to prohibit the doing of enumerated acts, however unlawful they may be, and however necessary such order or injunction may be to preserve the subject-matter of the litigation, would conflict with the statutes creating those courts and with the general law giving them equitable jurisdiction over such cases when the matter involved exceeds $5,000 in amount.

Such a law would violate not only the due process clause of the Constitution, but that other clause which declares that the judicial power of federal courts of equity shall extend to all cases and controversies over which, by the statutes of their creation, they are given jurisdiction.

The right to injunction under the Clayton Act is established by *Paine Lumber Co.* v. *Neal*, 244 U. S. 459; and *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229. The act applies to a suit pending. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 431; *Montgomery* v. *Pacific Ry. Co.*, 258 Fed. Rep. 382. And our construction of the act is sustained by *United States* v. *Rintelen*, 233 Fed. Rep. 793, 799; *Lamar* v. *United States*, 260 Fed. Rep. 561; *Alaska S. S. Co.* v. *International Longshoremen's Assn*, 236 Fed. Rep. 964; *Tri-City Central Trades Council* v. *American Steel Foundries*, 238 Fed. Rep. 728; *United States* v. *King*, 250 Fed. Rep. 908; 229 Fed. Rep. 275; *Stephens* v. *Ohio State Telephone Co.*, 240 Fed. Rep. 759; *Dowd* v. *United Mine Workers*, 235 Fed. Rep. 1; *United Mine Workers* v. *Coronado Co.*, 258 Fed. Rep. 829; and it is confirmed by its legislative history.

The combination is unlawful at common law. [Citing numerous decisions, including: *Shine* v. *Fox Bros. Mfg. Co.*, 156 Fed. Rep. 357; *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1; *Irving* v. *Joint District Council*, 180 Fed.

Rep. 896; *Huttig Sash & Door Co.* v. *Fuelle*, 143 Fed. Rep. 363; *Purvis* v. *United Brotherhood*, 214 Pa. St. 348; *Purington* v. *Hinchliff*, 219 Illinois, 159; *Lohse Patent Door Co.* v. *Fuelle*, 215 Missouri, 421; *Moores* v. *Bricklayers* (Ohio), 23 Law Bull. 665; *Thomas* v. *Cincinnati &c. Ry. Co.*, 62 Fed. Rep. 818; *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. Rep. 730; *Thomson Machine Co.* v. *Brown*, 89 N. J. Eq. 326; *Employing Printers Club* v. *Blosser Co.*, 122 Georgia, 509; *Seubert* v. *Reiff*, 98 Misc. 402; 164 N. Y. S. 522; *Schlang* v. *Ladies' Waist Makers' Union*, 124 N. Y. S. 289; 67 Misc. 221; *Burnham* v. *Dowd*, 217 Massachusetts, 351; *Loewe* v. *Lawlor*, 208 U. S. 274, 288; *Martell* v. *White*, 185 Massachusetts, 255].

The question of the applicability of the common law is for the independent decision of the federal courts, not controlled by the decisions of the New York courts. *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368; *Burgess* v. *Seligman*, 107 U. S. 33; *Smith* v. *Alabama*, 124 U. S. 465; *Rocky Mountain Telephone Co.* v. *Montana Federation of Labor*, 156 Fed. Rep. 809; *Loewe* v. *California State Federation of Labor*, 139 Fed. Rep. 71.

*Mr. Frank X. Sullivan*, with whom *Mr. Frank L. Mulholland* was on the brief, for appellees:

The means employed by the defendants to secure an eight-hour day and minimum rate of wage throughout the trade are authorized by the Clayton Amendment. Prior to this amendment the factor of "economic sympathies" referred to in *Gill Engraving Co.* v. *Doerr*, 214 Fed. Rep. 111, 120, note, placed the legality of the acts of labor unions in such doubt that it was not possible safely to direct the action of a combination of working men during a period of industrial dispute. Now this amendment clearly states what may be done; and whether it amplifies or merely clarifies what was the law, is im-

material. When the amendment was before Congress, it was recognized that the purpose was to change or clarify the law as laid down by the Supreme Court in the *Danbury Hatters' Case, Loewe* v. *Lawlor,* 208 U. S. 274; 235 U. S. 522; *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600; 51 Cong. Rec., p. 15945. It affirmatively appears that it was the decision in the *Danbury Hatters' Case* that brought the amendment about, and the great publicity of that case created the sentiment in its favor. There had been earlier attempts in Congress to exempt organizations of farmers and laborers from the Anti-Trust Law. *Loewe* v. *Lawlor,* 208 U. S. at p. 301; *Lawlor* v. *Loewe,* 209 Fed. Rep. 721, 726.

The collection of the judgment in the *Danbury Hatters' Case* (235 U. S. 522), by sale on execution of the workingmen's homes, could not be shifted from the shoulders of those directly bearing the burden to the public at large. It was a calamity for them, and the purpose of the Clayton Amendment was in part to prevent the recurrence of just such a catastrophe.

The effort of labor organizations to secure an equalization of the hours of labor and rate of wages throughout a trade is not only lawful but extremely beneficial both to employers and employees, and in accomplishing this purpose they are regarded with favor and approval by the courts of the community. *Wilson* v. *New,* 243 U. S. 332; *Paine Lumber Co.* v. *Neal,* 244 U. S. 459, 471; *Bossert* v. *Dhuy,* 221 N. Y. 342. It is perfectly clear that the object sought by the defendants was legitimate and laudable, and as such affords no ground for charging them with a conspiracy. Distinguishing: *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373; *United States* v. *Rintelen,* 233 Fed. Rep. 793, 799; *Auburn Draying Co.* v. *Wardell,* 227 N. Y. 1. This case falls directly within § 20 of the

Clayton Act, and is not analogous to the *Paine Lumber Company Case*, because here there was a strike or dispute over wages and hours between employer and employee.

The position of defendants has been that they will do all of appellant's work or none of it; that they refuse to handle and erect appellant's presses unless they can manufacture them. The appellant's contention is that it desires to employ men ten hours a day without any basic minimum wage, and to employ members of the International Association when it desires them to erect its presses when sent out from Battle Creek; and the application in this action is primarily to compel the members of the Association to erect the presses of appellant constructed under the conditions above referred to.

The action of the members of the Association in "terminating" their relation of employment with appellant is expressly authorized by the Clayton Amendment, and was lawful prior thereto. *National Protective Association* v. *Cumming*, 170 N. Y. 315, 324; *Paine Lumber Co.* v. *Neal*, *supra*. The Clayton Act prohibits injunctions restraining members of labor organizations "from ceasing to perform any work or labor," or from "recommending, advising or persuading others by peaceful and lawful means so to do." *Paine Lumber Co.* v. *Neal*, *supra*; *Bossert* v. *Dhuy*, *supra*. All that was done by anyone in behalf of the Association or by or at the direction of the defendants was recommending, advising or persuading others not to work in handling or installing the presses of appellant.

It is undisputed that the sole purpose of the defendants and the Association is to improve the condition of its members by securing them proper hours of work and proper remuneration. Submitted to appellant, their terms have been rejected upon the ground that appellant refuses to recognize the rights of the organization "to make any demands." This has been followed by the

workmen peacefully ceasing their employment in the establishment of appellant, and in men of their organization refusing to erect appellant's presses. There has been no interference with interstate commerce. There has been no threat made to any of appellant's customers. All that has been done is to bring to their attention the existence of the labor difficulties now existing between appellant and the Association. If these are not peaceful and lawful means to be employed by a labor organization in effecting the proper purposes for which it is created, then it is obvious that there is no such thing as lawful conduct on the part of a labor organization as soon as it begins to be effective.

The appellant's entire claim of conspiracy rests not upon the unlawfulness of any act, but upon the effectiveness of the acts of the Association. The question of conspiracy, however, depends not upon the effectiveness of the means employed, but whether such means are lawful and proper. *Tri-City Central Trades Council* v. *American Steel Foundries*, 238 Fed. Rep. 728, 732.

Irreparable injury to property and property rights is neither alleged nor proven. The defendants and the Association did nothing more than tell purchasers that a strike existed at Battle Creek, and that it refused to permit its members to handle these presses in loading them into vehicles or in loading them from vehicles and erecting them in the plants of the purchasers.

It is impossible for appellant to successfully urge that the freedom of others to deal with any concern they choose can be abridged by injunction which would prevent such persons from ascertaining the true facts in connection with the commodity purchased or to be purchased. While it probably would enable appellant to sell more presses, if it could prevent these facts from becoming known, it would obviously be contrary to all known rules of equitable jurisprudence to give, by injunc-

tion, rights to appellant which affect primarily business interests of other employers and of its own customers. Again, if appellant could enjoin the machinists from refusing to handle these presses during the strike, such injunction would grant rights contrary to the freedom of men to contract, and workmen would thereby be forced to work for and be employed by an employer contrary to their desires and contrary to their legal and constitutional rights. The appellant has the right which no court can abridge—to employ whom it chooses. Likewise, the workingmen have the right to choose whom they will work for and under what conditions. And it is no more a conspiracy for the Association to refuse to handle appellant's presses during a strike of its members than it would be for appellant to refuse to allow its men to handle appellant's presses.

The property right which appellant alleges it possesses is nothing more than the right to solicit business under fair competition. This right is similar to the right that the defendants have—to work for whom they choose and under what conditions they choose. These rights are not property rights; they are personal rights, and stand on the same basis. There is no property interest of appellant threatened and no act done or threatened which in any way affects property rights. *Paine Lumber Co.* v. *Neal*, 212 Fed. Rep. 259, 267, 268.

There being no proof adduced upon the trial of irreparable injury to property and property rights, only the United States could apply for injunctive relief under the Sherman Act. *Paine Lumber Co.* v. *Neal*, 244 U. S. 459.

It cannot be successfully argued that the Clayton Act intended to grant further rights and privileges to employers to enjoin the members of labor organizations.

Appellant cannot maintain this suit in order to declare the organization to which the appellees belong unlawful under the Sherman Act. *National Fireproofing Co.* v.

*Mason Builders' Association*, 169 Fed. Rep. 259. To render an association or organization so unlawful, it must have been formed for the purpose of restraining trade or commerce among the several States or foreign nations, or such restraint must necessarily result from such combination. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454; *Gibbs* v. *McNeeley*, 118 Fed. Rep. 120; *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. Rep. 704, 709; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *Bossert* v. *Dhuy*, 221 N. Y. 342. The activities of the defendants would not have a tendency to interfere with competition but would in fact make the competition more free.

There was no interference with interstate commerce. All complaints of appellant with respect to the delivery and erection of presses relate to the refusal of members of the Association to transport and handle them after they had reached the point of consignment. This refusal caused embarrassment in some instances in a local way, and appellant alleges that, because men employed by draymen refused to work, interstate commerce was interfered with. If this proposition be sound, then teamsters and machinists' helpers employed by draymen could not legally combine or cease from working, as in every instance, no matter how local the situation was, the contention would be raised that interstate commerce had been interfered with.

The fact that appellant's profits may be less because the defendants have directed the machinists not to handle and erect these presses, does not constitute interference with interstate commerce. *United States* v. *Knight Co.*, 156 U. S. 1, 12; *Anderson* v. *United States*, 171 U. S. 604, 615; *Pettibone* v. *United States*, 148 U. S. 197.

Labor of a human being is not a commodity or article of commerce. Clayton Act, § 6.

Irrespective of the Clayton Act, there were no facts adduced on the trial which would warrant the issuance of an injunction. *Bossert* v. *Dhuy, supra; Lindsay & Co.* v. *Montana Federation of Labor*, 37 Montana, 264; *Macauley Brothers* v. *Tierney*, 19 R. I. 255; *Ames* v. *Union Pacific Ry. Co.*, 62 Fed. Rep. 7, 14; *National Protective Association* v. *Cumming, supra; State* v. *Stockford*, 77 Connecticut, 227; *Gill Engraving Co.* v. *Doerr, supra; National Fireproofing Co.* v. *Mason Builders' Association, supra.*

Mr. Justice Pitney delivered the opinion of the court.

This was a suit in equity brought by appellant in the District Court for the Southern District of New York for an injunction to restrain a course of conduct carried on by defendants in that District and vicinity in maintaining a boycott against the products of complainant's factory, in furtherance of a conspiracy to injure and destroy its good will, trade, and business—especially to obstruct and destroy its interstate trade. There was also a prayer for damages, but this has not been pressed and calls for no further mention. Complainant is a Michigan corporation and manufactures printing presses at a factory in Battle Creek, in that State, employing about 200 machinists in the factory in addition to 50 office-employees, traveling salesmen, and expert machinists or road men who supervise the erection of the presses for complainant's customers at their various places of business. The defendants who were brought into court and answered the bill are Emil J. Deering and William Bramley, sued individually and as business agents and representatives of District No. 15 of the International Association of Machinists, and Michael T. Neyland, sued individually and as business agent and representative of Local Lodge No. 328 of the same association. The Dis-

trict Council and the Lodge are unincorporated associations having headquarters in New York City, with numerous members resident in that city and vicinity. There were averments and proof to show that it was impracticable to bring all the members before the court and that the named defendants properly represented them; and those named were called upon to defend for all, pursuant to Equity Rule 38 (226 U. S. 659). Other jurisdictional averments need no particular mention. The District Court, on final hearing, dismissed the bill, 247 Fed. Rep. 192; the Circuit Court of Appeals affirmed its decree, 252 Fed. Rep. 722; and the present appeal was taken.

The jurisdiction of the federal court was invoked both by reason of diverse citizenship and on the ground that defendants were engaged in a conspiracy to restrain complainant's interstate trade and commerce in printing presses, contrary to the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. The suit was begun before but brought to hearing after the passage of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730. Both parties invoked the provisions of the latter act, and both courts treated them as applicable. Complainant relied also upon the common law; but we shall deal first with the effect of the acts of Congress.

The facts of the case and the nature of the relief prayed are sufficiently set forth in the report of the decision of the Circuit Court of Appeals, 252 Fed. Rep. 722. The case was heard before Circuit Judges Rogers and Hough and District Judge Learned Hand. Judge Rogers, although in the minority, stated the case and the pleadings for the court (pp. 723–727) and delivered an opinion for reversal in which he correctly outlined (pp. 734–737) the facts as shown by the undisputed evidence—defendants having introduced none. Judges Hough and Hand followed with separate opinions for affirmance, not, however, disagreeing with Judge Rogers as to the facts. These may

be summarized as follows. Complainant conducts its business on the "open shop" policy, without discrimination against either union or non-union men. The individual defendants and the local organizations of which they are the representatives are affiliated with the International Association of Machinists, an unincorporated association having a membership of more than 60,000; and are united in a combination, to which the International Association also is a party, having the object of compelling complainant to unionize its factory and enforce the "closed shop," the eight-hour day, and the union scale of wages, by means of interfering with and restraining its interstate trade in the products of the factory. Complainant's principal manufacture is newspaper presses of large size and complicated mechanism, varying in weight from 10,000 to 100,000 pounds, and requiring a considerable force of labor and a considerable expenditure of time—a week or more—to handle, haul and erect them at the point of delivery. These presses are sold throughout the United States and in foreign countries; and, as they are especially designed for the production of daily papers, there is a large market for them in and about the City of New York. They are delivered there in the ordinary course of interstate commerce, the handling, hauling and installation work at destination being done by employees of the purchaser under the supervision of a specially skilled machinist supplied by complainant. The acts complained of and sought to be restrained have nothing to do with the conduct or management of the factory in Michigan, but solely with the installation and operation of the presses by complainant's customers. None of the defendants is or ever was an employee of complainant, and complainant at no time has had relations with either of the organizations that they represent. In August, 1913 (eight months before the filing of the bill), the International Association called a strike at complain-

ant's factory in Battle Creek, as a result of which union machinists to the number of about eleven in the factory and three who supervised the erection of presses in the field left complainant's employ. But the defection of so small a number did not materially interfere with the operation of the factory, and sales and shipments in interstate commerce continued. The acts complained of made up the details of an elaborate programme adopted and carried out by defendants and their organizations in and about the City of New York as part of a country-wide programme adopted by the International Association, for the purpose of enforcing a boycott of complainant's product. The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or having purchased not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned

in hauling, handling, or installing the presses. In some cases the threats were undisguised, in other cases polite in form but none the less sinister in purpose and effect. All the judges of the Circuit Court of Appeals concurred in the view that defendants' conduct consisted essentially of efforts to render it impossible for complainant to carry on any commerce in printing presses between Michigan and New York; and that defendants had agreed to do and were endeavoring to accomplish the very thing pronounced unlawful by this court in *Loewe* v. *Lawlor*, 208 U. S. 274; 235 U. S. 522. The judges also agreed that the interference with interstate commerce was such as ought to be enjoined, unless the Clayton Act of October 15, 1914, forbade such injunction.

That act was passed after the beginning of the suit but more than two years before it was brought to hearing. We are clear that the courts below were right in giving effect to it; the real question being, whether they gave it the proper effect. In so far as the act (a) provided for relief by injunction to private suitors, (b) imposed conditions upon granting such relief under particular circumstances, and (c) otherwise modified the Sherman Act, it was effective from the time of its passage, and applicable to pending suits for injunction. Obviously, this form of relief operates only *in futuro*, and the right to it must be determined as of the time of the hearing. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431–432. See, also, *United States* v. *The Schooner Peggy*, 1 Cranch, 103, 110; *Sampeyreac* v. *United States*, 7 Pet. 222, 239–240; *Mills* v. *Green*, 159 U. S. 651, 653; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Berry* v. *Davis*, 242 U. S. 468, 470.

The Clayton Act, in § 1, includes the Sherman Act in a definition of "anti-trust laws," and, in § 16 (38 Stat. 737), gives to private parties a right to relief by injunction in any court of the United States against threatened loss or

damage by a violation of the anti-trust laws, under the conditions and principles regulating the granting of such relief by courts of equity. Evidently this provision was intended to supplement the Sherman Act, under which some of the federal courts had held, as this court afterwards held in *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471, that a private party could not maintain a suit for injunction.

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future; is proved by clear and undisputed evidence. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act.

Looking first to the former act, the thing declared illegal by its first section (26 Stat. 209) is "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone* v. *United States*, 148 U. S. 197, 203. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although

the purpose be lawful it may not be carried out by criminal or unlawful means.

The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott," that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act. But, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular States. Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes.

In *Loewe* v. *Lawlor*, 208 U. S. 274, where there was an effort to compel plaintiffs to unionize their factory by preventing them from manufacturing articles intended for transportation beyond the State, and also by preventing vendees from reselling articles purchased from plaintiffs and negotiating with plaintiffs for further purchases, by means of a boycott of plaintiffs' products and of dealers who handled them, this court held that there was a conspiracy in restraint of trade actionable under § 7 of the

Sherman Act, and in that connection said (p. 293): "The act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business. The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." And when the case came before the court a second time, 235 U. S. 522, 534, it was held that the use of the primary and secondary boycott and the circulation of a list of "unfair dealers," intended to influence customers of plaintiffs and thus subdue the latter to the demands of the defendants, and having the effect of interfering with plaintiffs' interstate trade, was actionable.

In *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, wholesale dealers were subjected to coercion merely through the circulation among retailers, who were members of the association, of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in *Lawlor* v. *Loewe,* 235 U. S. 522, 534: "That case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States."

It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the

prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Upon the question whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the Circuit Court of Appeals was divided; the majority holding that under § 20, "perhaps in conjunction with section 6," there could be no injunction. These sections are set forth in the margin.[1] Defendants seek to derive from them some

[1] "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

"Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining

authority for their conduct. As to § 6, it seems to us its principal importance in this discussion is for what it does *not* authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.

The principal reliance is upon § 20. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases, with respect to (a) the terms and conditions of the relief and the practice to be pursued, and (b) the character of

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or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

acts that are to be exempted from the restraint; and in the concluding words it declares (c) that none of the acts specified shall be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is to be a "case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment."

The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that "no *such* restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be so held when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation

of the provisions of the anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the Circuit Court of Appeals appear to have entertained the view that the words "employers and employees," as used in § 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong"; and that, as there had been a dispute at complainant's factory in Michigan concerning the conditions of employment there—a dispute created, it is said, if it did not exist before, by the act of the Machinists' Union in calling a strike at the factory—§ 20 operated to permit members of the Machinists' Union elsewhere—some 60,000 in number—although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce—and this where there was no dispute between such employers and their employees respecting terms or conditions of employment.

We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of

the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war. "Terms or conditions of employment" are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.

Nor can § 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members,—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of § 20, which contain no mention of labor organizations, so as to produce an inconsistency with § 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization. At the same time it would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not favored; and in effect, as

was noted in *Loewe* v. *Lawlor*, 208 U. S. 274, 303–304, would confer upon voluntary associations of individuals formed within the States a control over commerce among the States that is denied to the governments of the States themselves.

The qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated as a violation of the laws of the United States, that is to say: (a) "terminating any relation of employment, . . . or persuading others by peaceful and lawful means so to do"; (b) "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working;" (c) "ceasing to patronize or to employ any party to such dispute, or . . . recommending, advising, or persuading others by peaceful and lawful means so to do"; (d) "paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits . . ."; (e) "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." The emphasis placed on the words "lawful" and "lawfully," "peaceful" and "peacefully," and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the anti-trust laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the "ceasing to patronize" provision, and by the clear force of the language employed the exemption is limited to pressure exerted upon a "party to such dispute" by means of "peaceful and *lawful*" influence upon neutrals. There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes or a cessation of work

on the part of employees of complainant's customers or prospective customers, or of the trucking company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed "peaceful and lawful" persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.

The majority of the Circuit Court of Appeals, very properly treating the case as involving a secondary boycott, based the decision upon the view that it was the purpose of § 20 to legalize the secondary boycott "at least in so far as it rests on, or consists of, refusing to work for any one who deals with the principal offender." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. Let us consider this.

By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge* v. *Williams*, 3 How. 9, 24; *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 79; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns* v. *United States*,

194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Binns* v. *United States, supra; Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198–199; *United States* v. *Coca Cola Co.*, 241 U. S. 265, 281; *United States* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310, 318.

In the case of the Clayton Act, the printed committee reports are not explicit with respect to the meaning of the "ceasing to patronize" clause of what is now § 20. (See House Rept. No. 627, 63d Cong., 2nd sess., pp. 33–36; Senate Rept. No. 698, 63d Cong., 2nd sess., pp. 29–31; the latter being a reproduction of the former.) But they contain extracts from judicial opinions and a then recent text-book sustaining the "primary boycott," and expressing an adverse view as to the secondary or coercive boycott; and, on the whole, are far from manifesting a purpose to relax the prohibition against restraints of trade in favor of the secondary boycott.

Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb) who had the bill in charge when it was under consideration by the House. The question whether the bill legalized the secondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative.[1] The subject—he declared in substance or

[1] Extracts from Congressional Record, vol. 51, Part 10, 63d Cong., 2d sess.

(Page 9652.)

MR. VOLSTEAD. Would not this also legalize the secondary boycott? . . .

MR. WEBB. Mr. Chairman, I do not think it legalizes a secondary boycott.

MR. VOLSTEAD. Let me read the lines, if the gentleman will permit. And no such restraining order or injunction shall prohibit anyone—

"from ceasing to patronize *those who* [or to] employ any party to

effect—was under consideration when the bill was framed, and the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott and confining boycotting to the parties to the dispute, allowing parties to cease to patronize and to ask others to cease

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such dispute, or from recommending, advising, or persuading others by peaceful means so to do."

Now, does not the word "others" in that instance refer to others than parties to the dispute?

MR. WEBB. No; because it says in line 15:

"From ceasing to patronize or employ any parties to such dispute."

MR. VOLSTEAD. . . . Can there be any doubt this is intended or does, in fact, legalize the secondary boycott?

MR. WEBB. I will say frankly to my friend when this section was drawn it was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does. There may be a difference of opinion about it, but it is the opinion of the committee that it does not legalize the secondary boycott and is not intended to do so. It does legalize the primary boycott; it does legalize the strike; it does legalize persuading others to strike, to quit work, and the other acts mentioned in section 18 [now section 20], but we did not intend, I will say frankly, to legalize the secondary boycott.

(Page 9653.)

MR. WEBB. I will say this section was drawn two years or more ago and was drawn carefully, and those who drew this section drew it with the idea of excluding the secondary boycott. It passed the House, I think, by about 243 to 16, and the question of the secondary boycott was not raised then, because we understood so clearly it did not refer to or authorize the secondary boycott.

(Page 9658.)

MR. WEBB. Mr. Chairman, I should vote for the amendment offered by the gentlemen from Minnesota [Mr. Volstead] if I were not perfectly satisfied that it is taken care of in this section. The language the gentlemen reads does not authorize the secondary boycott, and he could not torture it into any such meaning. While it does authorize persons to cease to patronize the party to the dispute and to recommend to others to cease to patronize that same party to the dispute, that is not a secondary boycott, and you can not possibly make it mean a secondary boycott. Therefore this section does not authorize the secondary boycott.

I say again—and I speak for, I believe, practically every member

to patronize a party to the dispute; it was the opinion of the committee that it did not legalize the secondary boycott, it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which it was reported. In substantially that form it became law; and since in our opinion its proper construction is entirely in accord with its purpose as thus declared, little need be added.

The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute—people constituting, indeed, the general public

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of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man vote for it. It is not the purpose of the committee to authorize it, and I do not think any person in this House wants to do it. We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute.

upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the anti-trust laws, of which the section under consideration forms after all a part.

Reaching the conclusion, as we do, that complainant has a clear right to an injunction under the Sherman Act as amended by the Clayton Act, it becomes unnecessary to consider whether a like result would follow under the common law or local statutes; there being no suggestion that relief thereunder could be broader than that to which complainant is entitled under the acts of Congress.

There should be an injunction against defendants and the associations represented by them, and all members of those associations, restraining them, according to the prayer of the bill, from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing press or presses manufactured by complainant, or the transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any contract or contracts made by complainant respecting the sale, transportation, delivery, or installation of any such press or presses, by causing or threatening to cause loss, damage, trouble, or inconvenience to any person, firm, or corporation concerned in the purchase, transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any such contract or contracts; and also and especially from using any force, threats, command, direction, or even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant,

or engaged in hauling, carting, delivering, installing, handling, using, operating, or repairing any such press or presses for any customer of complainant. Other threatened conduct by defendants or the associations they represent, or the members of such associations, in furtherance of the secondary boycott should be included in the injunction according to the proofs.

Complainant is entitled to its costs in this court and in both courts below.

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

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur.

The Duplex Company, a manufacturer of newspaper printing presses, seeks to enjoin officials of the machinists' and affiliated unions from interfering with its business by inducing their members not to work for plaintiff or its customers in connection with the setting up of presses made by it. Unlike *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, there is here no charge that defendants are inducing employees to break their contracts. Nor is it now urged that defendants threaten acts of violence. But plaintiff insists that the acts complained of violate both the common law of New York and the Sherman Act and that, accordingly, it is entitled to relief by injunction under the state law and under § 16 of the Clayton Act, October 15, 1914, c. 323, 38 Stat. 730, 737.

The defendants admit interference with plaintiff's business but justify on the following ground: There are in the United States only four manufacturers of such presses; and they are in active competition. Between 1909 and 1913 the machinists' union induced three of

them to recognize and deal with the union, to grant the eight-hour day, to establish a minimum wage scale and to comply with other union requirements. The fourth, the Duplex Company, refused to recognize the union; insisted upon conducting its factory on the open shop principle; refused to introduce the eight-hour day and operated for the most part, ten hours a day; refused to establish a minimum wage scale; and disregarded other union standards. Thereupon two of the three manufacturers who had assented to union conditions, notified the union that they should be obliged to terminate their agreements with it unless their competitor, the Duplex Company, also entered into the agreement with the union, which, in giving more favorable terms to labor, imposed correspondingly greater burdens upon the employer. Because the Duplex Company refused to enter into such an agreement and in order to induce it to do so, the machinists' union declared a strike at its factory, and in aid of that strike instructed its members and the members of affiliated unions not to work on the installation of presses which plaintiff had delivered in New York. Defendants insist that by the common law of New York, where the acts complained of were done, and where this suit was brought, and also by § 20 of the Clayton Act, 38 Stat. 730, 738, the facts constitute a justification for this interference with plaintiff's business.

*First.* As to the rights at common law: Defendants' justification is that of self-interest. They have supported the strike at the employer's factory by a strike elsewhere against its product. They have injured the plaintiff, not maliciously, but in self-defense. They contend that the Duplex Company's refusal to deal with the machinists' union and to observe its standards threatened the interest not only of such union members as were its factory employees, but even more of all members of the several affiliated unions employed by plaintiff's competitors and

by others whose more advanced standards the plaintiff was, in reality, attacking; and that none of the defendants and no person whom they are endeavoring to induce to refrain from working in connection with the setting up of presses made by plaintiff is an outsider, an interloper. In other words, that the contest between the company and the machinists' union involves vitally the interest of every person whose coöperation is sought. May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? Applying common-law principles the answer should, in my opinion, be: Yes, if as matter of fact those who so coöperate have a common interest.

The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life. It is conceded that, although the strike of the workmen in plaintiff's factory injured its business, the strike was not an actionable wrong; because the obvious self-interest of the strikers constituted a justification. See *Pickett* v. *Walsh*, 192 Massachusetts, 572. Formerly courts held that self-interest could not be so served. Commons, History of Labor in the United States, vol. 2, c. 5. But even after strikes to raise wages or reduce hours were held to be legal because of the self-interest, some courts held that there was not sufficient causal relationship between a strike to unionize a shop and the self-interest of the strikers to justify injuries inflicted. *Plant* v. *Woods*, 176 Massachusetts, 492; *Lucke* v. *Clothing Cutters' Assembly*, 77 Maryland, 396; *Erdman* v. *Mitchell*, 207 Pa. St. 79.

But other courts, repeating the same legal formula, found that there was justification, because they viewed the facts differently. *National Protective Association* v. *Cumming*, 170 N. Y. 315; *Kemp* v. *Division No. 241*, 255 Illinois, 213; *Roddy* v. *United Mine Workers*, 41 Oklahoma, 621. When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workingmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. *Burnham* v. *Dowd*, 217 Massachusetts, 351; *Purvis* v. *United Brotherhood*, 214 Pa. St. 348; *Booth* v. *Burgess*, 72 N. J. Eq. 181. But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself. *Bossert* v. *Dhuy*, 221 N. Y. 342; *Cohn & Roth Electric Co.* v. *Bricklayers Union*, 92 Connecticut, 161; *Gill Engraving Co.* v. *Doerr*, 214 Fed. Rep. 111; *State* v. *Van Pelt*, 136 N. C. 633; *Grant Construction Co.* v. *St. Paul Building Trades Council*, 136 Minnesota, 167; *Pierce* v. *Stablemen's Union*, 156 California, 70, 76.

So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, that the defendants and those from whom they

sought coöperation have a common interest which the plaintiff threatened. This view is in harmony with the views of the Court of Appeals of New York. For in New York, although boycotts like that in *Loewe* v. *Lawlor*, 208 U. S. 274, are illegal because they are conducted not against a product but against those who deal in it and are carried out by a combination of persons not united by common interest but only by sympathy, *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1, it is lawful for all members of a union by whomever employed to refuse to handle materials whose production weakens the union. *Bossert* v. *Dhuy, supra; P. Reardon, Inc.*, v. *Caton*, 189 App. Div. 501; compare *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471. "The voluntary adoption of a rule not to work on non-union made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer." *Bossert* v. *Dhuy, supra*, p. 355. In my opinion, therefore, plaintiff had no cause of action by the common law of New York.

*Second.* As to the anti-trust laws of the United States: Section 20, of the Clayton Act, declares,—

"Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The acts which are thus referred to are, whether performed singly or in concert,—"Terminating any relation of employment, or . . . ceasing to perform any work or labor, or . . . recommending, advising, or persuading others by peaceful means so to do; or . . . attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or . . . peacefully per-

suading any person to work or to abstain from working; or . . . ceasing to patronize or to employ any party to such dispute, or . . . recommending, advising, or persuading others by peaceful and lawful means so to do; or . . . paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or . . . peaceably assembling in a lawful manner, and for lawful purposes; or . . . doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

This statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workingmen and employer as industrial combatants. Aside from the use of the injunction, the chief source of dissatisfaction with the existing law lay in the doctrine of malicious combination,[1] and, in many parts of the country, in the judicial declarations of the illegality at common law of picketing and persuading others to leave work. The grounds for objection to the latter are obvious. The objection to the doctrine of malicious combinations requires some explan-

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[1] See "Malice and Unlawful Interference," Ernest Freund, 11 Harv. L. Rev. 449, 461; "Rights of Traders and Laborers," Edward F. McClennen, 16 Harv. L. Rev. 237, 244; "Crucial Issues in Labor Litigation," Jeremiah Smith, 20 Harv. L. Rev. 429, 451; Principles of Labor Legislation, Commons and Andrews, pp. 95–116; Hoxie, Trade Unionism in the United States, p. 231; Groat, Attitude of American Courts Towards Labor Cases, pp. 76–77; 221; 246; J. W. Bryan, The Development of the English Law of Conspiracy, p. 147, *et seq.*

Report of the Industrial Commission, 1901, vol. XVII, p. cxiv, pp. 515, 556; Report of Royal Commission on Trade Disputes and Trade Combinations, 1906, p. 12; Report of Commission on Industrial Relations, 1915, p. 135; p. 377.

For attempts to reach this doctrine by legislation see also 52nd Cong., H. R. 6640, § 1; 56th Cong., H. R. 11667, § 7; 57th Cong., S. 649, § 7.

ation. By virtue of that doctrine, damage resulting from conduct such as striking or withholding patronage or persuading others to do either, which without more might be *damnum absque injuria* because the result of trade competition, became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful.[1] It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful;[2] and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to

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[1] See James Wallace Bryan, The Development of the English Law of Conspiracy:—

"We find little difficulty in attributing the illegality of combinations to strike or otherwise to advance the interests of labor, not to the material loss inflicted upon the employer concerned, but to the harm supposed to result from their activities to the public at large." And since the judge or jury believe the conduct socially bad and since it is admittedly done intentionally, not inadvertently, they declare that the actors are animated by malice which negatives the justification of "fair competition," e. g., Lord Bowen in *Mogul S. S. Co.* v. *McGregor, Gow & Co.*, 1892 A. C. 25, "intentionally to do that which is calculated . . . to damage . . . and does damage another in his property or trade is actionable if done without just cause or excuse, and . . . is what the law calls a malicious injury."

[2] See A. V. Dicey, "The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century," 17 Harv. L. Rev. 511, 532: "The very confusion of the present state of the law corresponds with and illustrates a confused state of opinion."

be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of *injuria* from the damages thereby inflicted, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or a legal injury, because in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act.[1] The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course.[2] Both the

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[1] It was said that this doctrine "completely unsettle(d) the law . . . and set up the chancellor in the midst of the labor organization at the inception of a strike as an arbiter of their conduct as well as a controller of their fates." 62nd Cong., 2nd sess. Hearings Before a Subcommittee of the Senate Committee on the Judiciary on H. R. 23635, p. 429.

Again, it was pointed out that the incorporation of this idea in the Sherman Law had "done violence to the right to strike—to cease work collectively . . . and to the right to withhold patronage and to agree to withhold patronage." Brief by Samuel Gompers, Hearings before the House Committee on the Judiciary on Trust Legislation, 63rd Cong., 2nd sess., vol. 2, p. 1808.

[2] Compare the following: "There are apparently, only two lines of action possible: First to restrict the rights and powers of employers

majority and the minority report of the House Committee indicate that such was its purpose.[1] If, therefore, the act applies to the case at bar, the acts here complained of cannot "be considered or held to be violations of any law of the United States," and, hence, do not violate the Sherman Act.

The Duplex Company contends that § 20 of the Clayton Act does not apply to the case at bar, because it is restricted to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment"; whereas the case at bar arises between an employer in Michigan and workingmen in New York not in its employ, and does not involve their conditions of employment. But Congress did not restrict the provision to employers and workingmen *in their em-*

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to correspond in substance to the powers and rights now allowed to trade unions, and second, to remove all restrictions which now prevent the freedom of action of both parties to industrial disputes, retaining only the ordinary civil and criminal restraints for the preservation of life, property and the public peace. The first method has been tried and failed absolutely. . . . The only method therefore seems to be the removal of all restrictions upon both parties, thus legalizing the strike, the lockout, the boycott, the blacklist, the bringing in of strike-breakers, and peaceful picketing." Report of the Committee on Industrial Relations, 1915, p. 136.

[1] The majority declared that the section sets out "specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trades dispute," which it has been necessary to affirm because of "the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules." The minority insisted that the section prescribes "a set rule forbidding under any circumstances the enjoining of certain acts which may or may not be actuated by a malicious motive or be done for the purpose of working an unlawful injury, etc." 63rd Cong., 2nd sess., House Report 627, p. 30; *id.* Part 2, Appendix A, p. 20.

*ploy*. By including "employers and employees" and "persons employed and persons seeking employment" it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship. *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 166 Fed. Rep. 45, 52–53; *Louisville, Evansville & St. Louis R. R. Co.* v. *Wilson*, 138 U. S. 501, 505; cf. *Rex* v. *Neilson*, 44 N. S. 488, 491. The further contention that this case is not one arising out of a dispute concerning the conditions of work of one of the parties is, in my opinion, founded upon a misconception of the facts.

Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.

# BRACHT *v.* SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 118. Argued December 16, 1920.—Decided January 3, 1921.

Where, in the contemplation of the parties and by the terms of the bill of lading, a shipment is purely intrastate and neither the bill nor any state regulation gives a right to divert or reship, the action of the shipper and connecting carrier in forwarding the goods, after arrival at destination, to a new destination in another State under a new bill can not impress the original shipment with an interstate character, subject it to the Interstate Commerce Act and interstate tariffs, and so render the initial carrier liable under the Carmack Amendment for damage occurring under the new consignment.

200 Mo. App. 655, affirmed.

THE case is stated in the opinion.

*Mr. I. N. Watson*, for petitioner, submitted. *Mr. Hal R. Lebrecht* and *Mr. L. A. Laughlin* were also on the brief.

*Mr. Samuel Herrick*, with whom *Mr. Robert J. Boyle* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

June 10, 1915, the petitioner delivered to respondent Railway Company at Ingleside, Texas, a carload of vegetables consigned to himself at Dallas, Texas, a point off its lines, where he intended to sell them. He accepted a bill of lading upon the face of which was plainly printed—"For use only between points within the State of Texas."

It contained no reference to a diversion or reshipment; and the record discloses no rule or regulation by the state statutes or authorities on that subject.

The car moved over respondent's road to Waco and then over the M. K. & T. Railway to Dallas, where it appears to have arrived promptly with contents in good condition. Upon petitioner's request, made after such arrival, the M. K. & T. Railway forwarded the car to Kansas City over its own lines, took up the original bill of lading and issued an interstate one acknowledging receipt of the vegetables at Dallas. When the car reached Kansas City the contents were in bad condition and thereupon petitioner sued respondent as the initial carrier claiming a right to recover damages under the Carmack Amendment to the Interstate Commerce Act (34 Stat. 584, c. 3591).

The court below held that the provisions in interstate tariffs permitting reconsignment or change of destination did not apply, that the carrier only agreed to transport to Dallas and was not liable for damage sustained beyond that point.

Respondent's contract appears to have related only to a movement between points in the same State. It had no notice or reason to suppose that the freight would pass beyond the destination specified. The original undertaking was an intrastate transaction, subject, of course, to any applicable rules and regulations prescribed by state authority. The record discloses none; and we are unable to say as matter of federal law that the tariff schedules for interstate shipments or the provisions of the Interstate Commerce Act constituted part of the agreement. The general principles announced in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S. 403, 411, are applicable. *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, and similar cases are not

controlling. They involved controversies concerning carriage between points in the same State which was really but part of an interstate or foreign movement reasonably to be anticipated by the contracting parties —a recognized step towards a destination outside the State. The distinctions are elucidated in *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.* Here neither shipper nor respondent had in contemplation any movement beyond the point specified and the contract between them must be determined from the original bill of lading and the local laws and regulations.

*Affirmed.*

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## UNITED STATES *v.* STRANG ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 206. Argued December 9, 1920.—Decided January 3, 1921.

1. A person employed as an inspector by the Emergency Fleet Corporation is not an agent of the United States, within the meaning of § 41 of the Criminal Code. P. 491.
2. The Emergency Fleet Corporation, though all of its stock is owned by the United States, is a separate entity. P. 492.
3. Generally agents of a corporation are not agents for the stockholders and cannot contract for them. *Id.*

Affirmed.

THE case is stated in the opinion.

*The Solicitor General*, with whom *Mr. A. F. Myers*, Special Assistant to the Attorney General, was on the brief, for the United States.

*Mr. John W. Dodge* for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The ultimate question for determination is whether the employment of defendant Strang as an inspector by the United States Shipping Board Emergency Fleet Corporation, without more, made him an agent of the Government within the meaning of § 41, Criminal Code.

"Sec. 41. No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years."

Holding that this employment did not suffice to create the relation alleged, the trial court sustained a demurrer to the indictment. It contains four counts, three of which charge that Strang unlawfully acted as agent of the United States in transacting business with the Duval Ship Outfitting Company, a co-partnership of which he was a member, in that while an employee of the Fleet Corporation as an inspector he signed and executed (February, 1919) three separate orders to the Outfitting Company for repairs and alterations on the steamship Lone Star. The other defendants are charged with aiding and abetting him. The trial court and counsel here have treated the fourth count as charging all the defendants with conspiracy to commit the offenses set forth in the three preceding counts. *United States* v. *Colgate & Co.*, 250 U. S. 300.

Counsel for the Government maintain that the Fleet

Corporation is an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers and duties vested by Congress in the President and by him delegated to it; that the acts of the Corporation within its delegated authority are the acts of the United States; that therefore in placing orders with the Duval Company in behalf of the Fleet Corporation while performing the duties as inspector Strang necessarily acted as agent of the United States.

The demurrer was properly sustained.

As authorized by the Act of September 7, 1916, c. 451, 39 Stat. 728, the United States Shipping Board caused the Fleet Corporation to be organized (April 16, 1917) under laws of the District of Columbia with $50,000,000 capital stock, all owned by the United States, and it became an operating agency of that Board. Later, the President directed that the Corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917, c. 29, and he likewise authorized the Shipping Board to exercise through it another portion of such power and authority. See *The Lake Monroe*, 250 U. S. 246, 252. The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of § 41.

Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. *Bank of the United*

*States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907, 908; *Bank of Kentucky* v. *Wister*, 2 Pet. 318; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257; *Salas* v. *United States*, 234 Fed. Rep. 842. The view of Congress is further indicated by the provision in § 7, Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 384,—"*Provided*, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section." Also, by the Act of October 23, 1918, c. 194, 40 Stat. 1015, which amends § 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States owns stock.

*Affirmed.*

MR. JUSTICE CLARKE dissents.

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## MANGAN, ADMINISTRATOR OF PILLOW, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 112. Argued December 10, 1920.—Decided January 3, 1921.

To establish a claim, under Jud. Code, § 162, to the proceeds of property seized by the Government under the Abandoned Property Act of March 12, 1863, the claimant must prove his ownership at the time of seizure. P. 496.

54 Ct. Clms. 207, affirmed.

THE case is stated in the opinion.

*Mr. Chas. F. Consaul*, with whom *Mr. John S. Blair* and *Ida M. Moyers* were on the brief, for appellant.

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

MR. JUSTICE CLARKE delivered the opinion of the court.

Essential findings of fact by the Court of Claims in this case are as follows:

On January 23, 1863, John H. Hamiter, of Arkansas, sold 175 bales of cotton to the Government of the Confederate States and executed and delivered a bill of sale, containing this paragraph:

"The undersigned having sold to the Confederate States of America, and received the value of same in bonds, the receipt whereof is hereby acknowledged, 175 bales of cotton, marked, numbered and classed as in the margin, which is now deposited at my plantation, hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same *as* (at) his own expense at Conway, on Red River, in the State of Arkansas, to the order of the Secretary of the Treasury, or his agents or their assigns."

The payment in bonds not being made, "five or six months later" Hamiter notified the agent of the government that if they were not delivered, he would treat the sale as rescinded, and, the bonds not being forthcoming, he sold the cotton to his father, who died not long thereafter.

About two years later, in September, 1865, Hamiter, "as administrator or other agent of his father's estate," sold 70 bales of the cotton to plaintiff's decedent, then Mrs. Trigg (afterwards Mrs. Pillow) and received pay for it. Mrs. Pillow sent it to the Red River for shipment to market, where it was seized by the United States Treasury agents, under authority of "An Act to provide for the Collection of abandoned Property" &c., approved March 12, 1863, c. 120, 12 Stat. 820. It was sold, and

for the proceeds paid into the United States Treasury Mrs. Pillow, since deceased, instituted this action.

The Court of Claims dismissed the petition without an opinion, probably because it deemed the showing of title to the cotton by the claimant's decedent so obviously insufficient as not to require discussion.

The only warrant for such a suit at this late day is found in § 162 of the Judicial Code and to entitle the claimant to recover he must prove that his decedent was the owner of the cotton at the time it was seized. *Thompson* v. *United States*, 246 U. S. 547, 549.

There is no finding by the Court of Claims that Mrs. Pillow was the owner of the cotton when it was seized, but it is argued that facts are found which require that conclusion. These are: that Hamiter owned the cotton, that he sold it to Mrs. Pillow who paid for it, and that after she took possession of it the Government seized it. It is argued that these facts show title in her, which was not divested by anything afterwards done by her, and therefore the claim of her representative for the proceeds of the cotton should be allowed.

Other facts found, however, on which we must proceed to judgment are: that Hamiter sold the cotton to the Confederate States government, and when it was not paid for declared the sale void and then sold it to his father; that afterwards, "as administrator or other agent of his father's estate," he sold it to Mrs. Pillow; and that after she had failed to secure its release by the United States Government, she demanded that Hamiter should refund to her the purchase price. This demand at first Hamiter refused but "upon fear of threatened arrest and punishment for his transactions in connection with the cotton," he consented, gave his note to Mrs. Pillow for the amount of the purchase price and filed a claim for the cotton in his own name, which was disallowed. Thus Hamiter obviously thought the contract in form a sale had been

rescinded by mutual consent, and that Mrs. Pillow was of the same conviction is shown by the fact that when Hamiter's note at six months was not paid she sued him upon it but "it does not satisfactorily appear what was the result of this suit."

The natural and impressive inference from these facts is, not that Mrs. Pillow obtained from Hamiter a good title to the cotton and a right to the proceeds of it, but that these two persons, parties to the sale, who were fifty years nearer to it than courts can now be placed and who knew more about it than it is possible now to learn, agreed that it should be rescinded because of the prior "transactions [of Hamiter] in connection with the cotton," which must mean that the title which he was able to confer upon Mrs. Pillow was not deemed by her satisfactory, and therefore, by mutual agreement she released all interest in the cotton and necessarily in the proceeds of it. No rights of third persons being involved, the parties were as competent to rescind the contract of sale as they were to make it, and the finding of fact is that they did so for what Mrs. Pillow obviously thought a sufficient consideration.

We are not concerned with whether Rev. Stats., § 3477, prevented the transfer to Hamiter of any rights against the Government which Mrs. Pillow may have had. The claimant did not undertake to prove that Hamiter, or anyone else, had a valid claim, but that Mrs. Pillow owned the cotton at the time it was seized, and this, we think, he failed to do, and therefore the judgment of the Court of Claims must be

*Affirmed.*

# DIRECTOR GENERAL OF RAILROADS ET AL. *v.* THE VISCOSE COMPANY.

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

No. 424. Argued December 8, 1920.—Decided January 3, 1921.

1. Under the Federal Control Act and the Transportation Act of 1920, changes in the classification of a commodity and in the rules determining its acceptance for shipment are as fully within the jurisdiction of the Interstate Commerce Commission when proposed by the Director General of Railroads as if proposed by a carrier subject to the Interstate Commerce Act. P. 501.
2. An amendment or supplement to a freight tariff schedule, filed with the Interstate Commerce Commission, canceling the published classification and rates on artificial and natural silk and amending a rule so as to include such silk among the articles not accepted for shipment, attempts both a classification and a change of regulation within the meaning of the Interstate Commerce Act, the reasonableness of which, when challenged by a shipper, presents a question within the exclusive initial jurisdiction of the Commission. P. 500.
3. *Held*, that a shipper, complaining of such changes, should apply for relief to the Interstate Commerce Commission, and that the District Court was without jurisdiction, in the first instance, to annul the changes and enjoin carriers from complying with them.

THE case is stated in the opinion.

*Mr. Henry Wolf Biklé* and *Mr. Theodore W. Reath*, with whom *Mr. F. Markoe Rivinus* and *Mr. Frederic D. McKenney* were on the brief, for the carriers.

*Mr. Harold S. Shertz* for The Viscose Company.

MR. JUSTICE CLARKE delivered the opinion of the court.

Silk, artificial and natural, had been accepted by the railway carriers of the country for transportation as

freight for many years prior to the action which gave rise to the question which the Circuit Court of Appeals for the Third Circuit has certified herein to this court and it had been classified in tariffs as first class. On January 21, 1920, Walker D. Hines, as Director General of Railroads, authorized an amendment or supplement to the appropriate freight tariff schedule so as to cancel the published classification and rates on such silk and to so amend rule 3 of "Consolidated Freight Classification No. 1" as to include it among the articles "that will not be accepted for shipment."

On the 28th of January, 1920, the supplement thus authorized was filed with the Interstate Commerce Commission, to become effective on the 29th day of February following, and if no other action had been taken the result would have been to have excluded such silks from shipment as freight after the effective date, for after that date there would not have been any published rate applicable to them.

The appellee, The Viscose Company, is an extensive manufacturer of artificial silk, eighty per cent. of which "it maintains" must be shipped as freight, and, claiming that it would suffer great and irreparable damage if the supplement to the tariff proposed by the appellants were allowed to become effective, on February 26th, three days before it would have taken effect, the company applied for and obtained a temporary, and later on a permanent, injunction from the District Court of the United States for the Eastern District of Pennsylvania, restraining the Director General of Railroads and the other appellants:

(1) "From putting into effect and enforcing the provisions of the said 'Supplement No. 2 to Consolidated Freight Classification No. 1,' designed to cancel the existing classification of artificial silk as a commodity of freight," and

(2) "From refusing to accept from The Viscose Company artificial or fibre silk for transportation under classifications which existed prior to the effective date of said Supplement No. 2, or under such other classification as may be put into effect thereafter."

An appeal from the District Court carried the case to the Circuit Court of Appeals, which certifies to this court the question:

"Did the District Court have jurisdiction to decide the matter raised by the complainant's bill and thereupon to annul the said action of the Director General of Railroads and enjoin the carriers from complying therewith?"

Appellants contend that exclusive initial jurisdiction over the controversy here involved is in the Interstate Commerce Commission and that the appellee should have applied to that tribunal for relief. It is argued that the proposed supplement, striking silks from the first class in the tariffs filed, was a change in classification and that the change in rule 3, adding them to the list of commodities which would not be accepted for shipment as freight, was a change of regulation and that over the reasonableness of both of these the Interstate Commerce Commission is given exclusive initial jurisdiction by §§ 1, 3, 6, 13 and 15 of the Interstate Commerce Act (34 Stat. 584, as amended 36 Stat. 539).

On the other hand, it is argued by the appellee that for a common carrier to exclude a commodity from the tariffs and to refuse to accept it for shipment is neither classification nor regulation, and that an attempt to do such a thing presents a question of law for the courts,—that exclusion is not classification nor regulation.

Section 1 of the Interstate Commerce Act makes it the duty of all carriers subject to its provisions to provide and furnish "transportation upon reasonable request therefor" . . . "to establish, observe, and enforce just and reasonable classifications of property for trans-

portation" . . . "and just and reasonable regulations and practices affecting classifications, rates, or tariffs" . . . "and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property." (36 Stat. 539, 545, 546.)

Section 3 of the act makes it unlawful for any carrier to subject "any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (24 Stat. 379, 380.)

Section 6 requires every carrier to print and file with the Commission schedules in form prescribed, showing "the classification of freight in force, . . . and any rules or regulations which in any wise change, affect, or determine . . . the value of the service rendered to the . . . shipper." (34 Stat. 584, 586.)

Section 13 gives to any person or corporation the right to apply to the Commission for relief on account of "anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof." (36 Stat. 539, 550.)

And § 15 declares that whenever there is filed "any new individual or joint classification, or any new individual or joint regulation or practice" the Commission shall have power to suspend the operation of such schedule, classification, regulation or practice until, upon complaint or upon its own initiative, an investigation shall be made, and if the proposed classification or regulation is found to be unreasonable or otherwise in violation of the act, the Commission may find what will be just and reasonable in the premises and may require the carrier thereafter to conform to its finding. (36 Stat. 539, 552.)

The power to suspend classifications or regulations when issued by the President was taken away from the Interstate Commerce Commission by the "Act To provide for the operation of transportation systems while under Federal control," etc. (40 Stat. 451, 456), but the

power over them after hearing remained, and the power to suspend was restored when "The Transportation Act, 1920," approved February 28, 1920, became effective (41 Stat. 456, 487). The action of the Director General of Railroads, under consideration in this case, may, therefore, be treated as if it had been taken by a carrier subject to the act.

Without more, these references to the Interstate Commerce Act are sufficient to show that if the proposed change in the tariffs, and in the rule, which we are considering, constituted a change of classification or of regulation within the meaning of the Commerce Act, there was ample and specific provision made therein for dealing with the situation through the Commission,—for suspending the supplement or rule or annulling either or both if investigation proved the change to be unreasonable, and for providing for just treatment of shippers in the future. Strangely enough, it is a shipper not a carrier which here seeks to exclude the latter from this extensive jurisdiction of the Commission.

The certificate does not state what the purpose of the Director General of Railroads was in attempting to make the proposed change, but whether it was to permanently refuse to carry artificial silk as freight because of its value or of the risk involved, or for any other reason, or whether the action was taken to clear the way for putting into effect a commodity rate higher than the first-class rate (as might be done under appropriate conditions, *Chamber of Commerce, Houston, Texas,* v. *International & Great Northern Ry. Co.*, 32 I. C. C. 247, 255; *Wheeling Corrugating Co.* v. *Baltimore & Ohio R. R. Co.*, 18 I. C. C. 125, 126), in either case it was necessary that the published classification of rates should be withdrawn by change of the tariffs on file and that notice should be given, through rule or regulation, that the silk would not be accepted for shipment in the future. Thus the supple-

ment involved a change in the contents of previously filed classification lists and in a rule or regulation of the carriers.

That "exclusion is not classification" is an arresting but illusory expression. Classification in carrier rate-making practice is grouping,—the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates. To exclude a commodity from all classes is classification of it in as real a sense and with as definite an effect as to include it in any one of the usual classes. To strike artificial silk from the first class and to include it in the "prohibited list" which, for any cause, the carrier refuses to accept as freight, classifies it and sets it apart in a group subject to special treatment, as much as if it had been changed to the second class. We cannot doubt that the "exclusion" in this case was an attempted "classification," and that the proposed change in rule 3 was an attempted change of regulation, applicable to artificial silks, and that when challenged by the shipper the reasonableness of both presented a question for decision within the exclusive initial jurisdiction of the Interstate Commerce Commission.

Confirmation of this conclusion may be found in *Lake-and-Rail Butter and Egg Rates*, 29 I. C. C. 45. There carriers on the Great Lakes issued a supplement to their tariffs (as was done here) adding to the list of commodities which would not be accepted for shipment, among other articles, butter, poultry and eggs. This was defended on the ground that such traffic required refrigeration at a cost greater than it would bear. Upon complaint by shippers to the Interstate Commerce Commission that the proposed action was unreasonable, the supplement was promptly suspended and upon full hearing it was held

that the refusal to carry such commodities in the past and the attempt to fortify such refusal for the future by filing tariffs declining in terms to receive them, were unduly prejudicial to the traffic involved, and, the request of shippers for such transportation being held reasonable, an order that it be furnished was authorized.

The contention of the carriers, faintly made, that the common law and not the Interstate Commerce Act furnished the measure of their obligation to the public was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.

The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (*Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S. 138, 146; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 469, and *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 49), and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative.

*Question answered, No.*

Dissenting: Mr. Justice McKenna, Mr. Justice Van Devanter, Mr. Justice Pitney and Mr. Justice McReynolds.

# J. W. GOLDSMITH, JR.-GRANT COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 214. Argued December 8, 1920.—Decided January 17, 1921.

1. Under § 3450, Rev. Stats., which declares, *inter alia*, that every carriage, or other conveyance whatsoever, used in the removal or for the deposit and concealment of goods removed, deposited or concealed with intent to defraud the United States of any tax thereon, shall be forfeited, an automobile, so used by a person who had it on credit from an owner who retained the title, is subject to libel and forfeiture, although the owner was without notice of the forbidden use. The statute treats the thing as the offender. P. 509.
2. So construed and applied, the statute does not deprive the owner of property in violation of the Fifth Amendment. *Id.*
3. Section 3450, in this respect, is not modified or affected by §§ 3460 and 3461. P. 512.

Affirmed.

THE case is stated in the opinion.

*Mr. L. C. Hopkins*, with whom *Mr. C. T. Hopkins, Mr. J. L. Hopkins* and *Mr. Charles B. Shelton* were on the brief, for plaintiff in error:

Forfeiture of the property of an innocent man for the wrong of another is violative of fundamental rights. The exact language of § 3450, Rev. Stats., if strictly taken, authorizes such a forfeiture.

Therefore § 3450 is unconstitutional, unless it can be so construed as not to authorize such a forfeiture. Such a construction is possible. *United States* v. *Doremus*, 249 U. S. 86.

If it is claimed that in *Dobbins's Distillery* v. *United States*, 96 U. S. 395, and *United States* v. *Stowell*, 133

U. S. 1, this court has decided against such a construction of statutes similar to § 3450, we respectfully submit that (with the possible exception of the butts in the latter case), those two cases are distinguishable on their facts from the case at bar. If the facts as to the butts in the *Stowell Case* are not so distinguishable, we think this court should review and overrule that part of that decision.

But no question as to the constitutionality of the acts there under consideration was made in either of those cases. The constitutional question made in the case at bar is open.

The theory that in these *in rem* proceedings the thing is the offender and forfeitable irrespective of the guilt or innocence of its owner, is a worn out fiction, to which the Circuit Courts of Appeals still adhere in these forfeiture cases. It should be discarded. *Boyd* v. *United States*, 116 U. S. 616; *Coffey* v. *United States*, 116 U. S. 427.

Congress having no general police power, and the Act of 1866, of which § 3450 is a part, being a revenue act, Congress had no power to put into it any penalty which was not a reasonable and necessary aid to the collection of the revenue. The forfeiture provision of § 3450 is not such an aid. It is neither reasonable nor necessary. If the objectionable features of § 3450 were inserted in an attempt to exercise the police power, they are void. *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *United States* v. *Dewitt*, 9 Wall. 41.

*Mrs. Annette Abbott Adams*, Assistant Attorney General, for the United States:

By a long line of decisions it has been established that the forfeitures authorized by these two statutes (Rev. Stats., §§ 3450, 3062) are absolute and include the interest of an owner who was not a participant in the illegal

acts which effected the forfeiture, and had no knowledge of them. *United States* v. *Two Horses*, 28 Fed. Cas. 16,578; *United States* v. *Two Bay Mules*, 36 Fed. Rep. 84; *Dobbins's Distillery* v. *United States*, 96 U. S. 395; *United States* v. *One Black Horse*, 129 Fed. Rep. 167; *United States* v. *Stowell*, 133 U. S. 1; *United States* v. *Mincey*, 254 Fed. Rep. 287; *Logan* v. *United States*, 260 Fed. Rep. 746; and *United States* v. *One Saxon Automobile*, 257 Fed. Rep. 251, overruling *United States* v. *Two Barrels Whisky*, 96 Fed. Rep. 479.

Similar forfeitures have been sustained under other revenue acts. *United States* v. *246 1/2 Pounds of Tobacco*, 103 Fed. Rep. 791; *United States* v. *220 Patented Machines*, 99 Fed. Rep. 559; *United States* v. *The Little Charles*, 26 Fed. Cas. 16,612; *United States* v. *Brig Malek Adhel*, 2 How. 209; *The Hampton*, 5 Wall. 372; *The Frolic*, 148 Fed. Rep. 921.

The statute, so construed, is constitutional. Similar forfeiture statutes have been in effect since the foundation of the Nation, and the principle upon which they are based was, even before that, established in the general law. These forfeitures are based primarily upon the proposition that it is the thing that offends. It has long been recognized that it is within the power of government to require owners of property to assume certain obligations regarding its control and disposition. See *People* v. *Barbiere*, 33 Cal. App. 770, and cases cited.

There is nothing unreasonable in requiring the owner of a vehicle to see to it that his property is not used in the execution of frauds upon the Government. And if for failure so to do his property becomes forfeited to the United States, his hardship is no greater than that endured by the innocent purchaser without notice, who is held to take nothing by his purchase after the offense. See *Henderson's Distilled Spirits*, 14 Wall. 44; *United States* v. *1,960 Bags of Coffee*, 8 Cranch, 398.

MR. JUSTICE MCKENNA delivered the opinion of the court.

By an Act of Congress passed July 13, 1866, c. 184, 14 Stat. 98, 151 (now § 3450, Revised Statutes, and we shall so refer to it), it was enacted that, "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, . . . shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

In pursuance of this enactment a libel was filed against a Hudson automobile of the appraised value of $800, and it charged that the automobile before its seizure was used by three persons who were named, in the removal and for the deposit and concealment of 58 gallons of distilled spirits upon which a tax was imposed by the United States and had not been paid.

Plaintiff in error, herein referred to as the Grant Company, was, on its petition, permitted to intervene and to give bond and replevy the automobile.

The Company subsequently answered, alleging the facts hereinafter mentioned, and, in addition, pleaded against a condemnation and forfeiture of the car the Constitution of the United States, especially Article V of Amendments, which prohibits the deprivation of life, liberty or property without due process of law.

The case was tried to a jury upon an agreed statement of facts, which recited that: The Grant Company was a

seller of automobiles and was the owner in fee simple of the automobile seized in this case, and sold it, retaining the title for unpaid purchase money, to J. G. Thompson [he was named in the libel], who was a taxi-cab operator, and W. M. Lamb, who was in the newspaper business; that the car was used by Thompson in violation of § 3450, Rev. Stats., but that such use was without the knowledge of the Company or of any of its officers, nor did it or they have any notice or reason to suspect that it would be illegally used.

The court charged the jury to render a verdict finding the car guilty, overruling a motion of the Grant Company to direct a verdict for it on the grounds: (1) That § 3450, Rev. Stats., was in violation of Article V of Amendments of the Constitution of the United States, in that it deprived the Grant Company of its property without due process of law. (2) That the section was not to be construed to forfeit the title of a third party entirely innocent of wrongdoing, and that the proper construction of the section was that it contemplated forfeiting only the interest or title of the wrongdoer. (3) That the title reserved by the Company for the balance of the purchase money had never been divested, and, therefore, could not be condemned, and that only the interest of Thompson and Lamb could be condemned.

The jury found the car guilty, and in pursuance of the verdict a judgment of condemnation and forfeiture was entered, but, as a bond with security had been given for the car, it was adjudged that the United States recover from the Grant Company as principal and J. W. Goldsmith, Jr., as security, the principal sum of $800 and costs. Execution was awarded accordingly.

Motion for a new trial was denied, and this writ of error was then prosecuted.

This statement indicates the questions in the case and, as we have seen, involves the construction of § 3450 and

its constitutionality, if it be not construed as contended by the Grant Company.

If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. It is, hence, plausibly urged that such could not have been the intention of Congress, that Congress necessarily had in mind the facts and practices of the world and that, in the conveniences of business and of life, property is often and sometimes necessarily put into the possession of another than its owner. And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt.

Regarded in this abstraction the argument is formidable, but there are other and militating considerations. Congress must have taken into account the necessities of the Government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion and the ways and means of violation or evasion. In breaches of revenue provisions some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of *deodand* by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited.

To the superstitious reason to which the rule was ascribed, Blackstone adds "that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." And he observed, "A like punishment is in like cases inflicted by the Mosaical law: 'if an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten.' And, among the Athenians, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic." See also *The Blackheath*, 195 U. S. 361, 366, 367; *Liverpool &c. Navigation Co.* v. *Brooklyn Terminal*, 251 U. S. 48, 53.

But whether the reason for § 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced. *Dobbins's Distillery* v. *United States*, 96 U. S. 395, is an example of the rulings we have before made. It cites and reviews prior cases, applying their doctrine and sustaining the constitutionality of such laws. It militates, therefore, against the view that § 3450 is not applicable to a property whose owner is without guilt. In other words, it is the ruling of that case, based on prior cases, that the thing is primarily considered the offender. And the principle and practice have examples in admiralty. *The Palmyra*, 12 Wheat. 1.

The same principle was declared in *United States* v. *Stowell*, 133 U. S. 1. The following cases at circuit may also be referred to: *United States* v. *Mincey*, 254 Fed. Rep. 287 (1918); *Logan* v. *United States*, 260 Fed. Rep. 746 (1919); *United States* v. *One Saxon Automobile*, 257 Fed. Rep. 251; *United States* v. *246 1/2 Pounds of Tobacco*, 103 Fed. Rep. 791; *United States* v. *220 Patented Machines*, 99 Fed. Rep. 559.

Counsel resist the reasoning and precedent of these cases in an argument of considerable length erected on the contention of the injustice of making an innocent man

suffer for the acts of a guilty one, and the anxious solicitude the court must feel and exercise, and which, it is said, it has often expressed, and by which it has been impelled to declare laws unconstitutional that offend against reason and justice.

The changes are rung on the contention, and illustrations are given of what is possible under the law if the contention be rejected. It is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it. And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent.

Counsel further urge that § 3450 should be read in connection with §§ 3460 and 3461, and other sections of the Revised Statutes, and should be construed to provide for the forfeiture of no interest for which those sections offer protection. We are, however, unable to concur with counsel that they modify the requirement or effect of § 3450. They have no relation to the latter section, nor is their remedy applicable to cases under that section.

There is an intimation that in the prior cases there was something in the relation of the parties to the property or its uses from which it was possible to infer its destination to an illegal purpose; at any rate, the risk of such purpose; and that such relation had influence in the decision of the cases.

We are unable to accept the intimation. There may, indeed, be greater risk to the owner of property in one

form or purpose of its bailment than in another, but wrong cannot be imputed to him by reason of the form or purpose. It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a "thing" that can be used in the removal of "goods and commodities" and the law is explicit in its condemnation of such things.

*Judgment affirmed.*

MR. JUSTICE MCREYNOLDS dissents.

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## BULLOCK, JUDGE OF THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, ET AL. *v.* STATE OF FLORIDA UPON THE RELATION OF THE RAILROAD COMMISSION OF THE STATE OF FLORIDA ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 262. Argued December 6, 7, 1920.—Decided January 17, 1921.

1. The judgment of the state Supreme Court was reviewable in this case by certiorari and not by writ of error. P. 518.
2. Where a judgment of a state Supreme Court prohibiting proceedings in a lower court was essentially based on the denial of a substantive right claimed by a party, this court is not precluded from reviewing, on a constitutional ground, by the fact that the judgment was in terms based on a denial of the prohibited court's jurisdiction. P. 520.

3. Apart from statute or express contract, those who invest in a railroad, though built under a charter and the eminent domain power received from the State, are not bound to go on operating at a loss if there is no reasonable prospect of future profit; and their right to stop does not depend upon the consent of the State. P. 520.
4. Where a state Supreme Court prohibited a lower court, in foreclosing a railroad, from authorizing and confirming a sale with liberty to the purchaser to dismantle the railroad, basing its decision upon the ground that the State was not a party and that the dismantling could not be so authorized without the State's consent, *held*, that the prohibition could not affect the constitutional rights of the mortgagor, since the right to dismantle, as against the State, could not be conferred by a foreclosure decree in the State's absence, and would pass to the purchaser, if it existed, whether the decree so provided or not. P. 521.
5. Whether a State is bound by a foreclosure proceeding to which it voluntarily makes itself a party before final decree, is a local question, the decision of which this court will not review in a case from a state court. P. 522.

82 So. Rep. 866, affirmed.

THE case is stated in the opinion.

*Mr. George C. Bedell* for petitioners:

The judgment and writ of prohibition under review deprive the mortgagee Hood of his property without due process of law, and deny to him the equal protection of the law, contrary to the Fourteenth Amendment. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396, 399.

See also *Munn* v. *Illinois*, 94 U. S. 113, 116; *Mississippi Railroad Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595; *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, 609, 614.

The court's finding that the railroad cannot be operated except at a loss is conclusive and has not been questioned by the Supreme Court of Florida.

Before such conclusion was reached, however, the State was not only given an opportunity to test that matter through the operation of the road for more than a year by a receiver of its own choice, but was given every opportunity to prove the contrary. It was formally made a party to this cause on March 27, 1919, but had been actively engaged in the litigation for more than a year prior thereto.

In the opinion rendered upon the demurrer to the suggestion in the prohibition case, something is said to the effect that the State was not made a party to the suit until after the decree of foreclosure had been entered and the sale of the property made, but when the court came to settle the judgment to be rendered in the case, its ruling was not based upon any matter of procedure, but squarely upon the authority of the Circuit Court, which was prohibited "from exercising any further jurisdiction in said cause relating to the junking of said property" and "from undertaking by decree, order or otherwise to authorize the dismantling of said railroad, or the taking up and selling of the rails therefrom." And this view has expression by the same court in the subsequent case of *Anderson* v. *Dent*, 85 So. Rep. 151.

Under state statutes and constitution, the trustee's rights are limited to the rights of a lienor, that is, to the proceeds of the mortgaged property, and do not extend to the *corpus*, and enforcement of the lien can only be sought by foreclosure in the Circuit Court. Denial to a trustee of the right to subject the proceeds of the property to his lien is a deprivation of the very substance of his right. *New York Trust Co.* v. *Portsmouth & Exeter St. Ry. Co.*, 192 Fed. Rep. 728; *Jack* v. *Williams*, 113 Fed. Rep. 823, affd. 145 Fed. Rep. 281; *Central Bank & Trust Corp.* v. *Cleveland*, 252 Fed. Rep. 530; *Iowa* v. *Old Colony Trust Co.*, 215 Fed. Rep. 307; *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana, supra.*

The Supreme Court of Florida has indicated no other means whereby a mortgagee can have relief than by foreclosure suit and the statutes make it clear that he must get his relief from the proceeds of the foreclosure sale or not at all. To deny him the right in the foreclosure case to have the property sold for the purpose of dismantling is to deny him the only redress that will permit him to subject all that is of any value to the lien of his mortgage. The statutes stand to-day precisely as they stood when the trust deed was made. *Butz* v. *Muscatine*, 8 Wall. 575. The holding of the Supreme Court of Florida affects the essential qualities of the plaintiff's lien. *The J. E. Rumbell*, 148 U. S. 1; *Green* v. *Biddle*, 8 Wheat. 76, 84; *Bronson* v. *Kinzie*, 1 How. 311; *Gantly's Lessee* v. *Ewing*, 3 How. 707; *Barnitz* v. *Beverly*, 163 U. S. 118; *Bradley* v. *Lightcap*, 195 U. S. 1.

The practical effect of the ruling of the court is to take from the plaintiff's security all that there is of any value in it that the property may be held for public use, and this is depriving plaintiff of his property without due process of law. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana, supra; Ochoa* v. *Hernandez*, 230 U. S. 139, 161.

The effect of the judgment and writ of prohibition was to restrict the plaintiff's right to the sale of the property with this limitation upon its use: that it shall not be dismembered when its use means continuing loss. Under the decisions of this court that is confiscation. *Smyth* v. *Ames*, 169 U. S. 466; *Northern Pacific Ry. Co.* v. *North Dakota, supra; Norfolk & Western Ry. Co.* v. *West Virginia, supra.*

*Mr. Dozier A. De Vane* for respondents:

The authority of the State sustained by the Supreme Court of Florida neither deprives the trustee of his property without due process of law nor subjects private prop-

erty to public uses without compensation. The decision merely holds that an inferior court is without jurisdiction to order dismantling of a carrier's property to satisfy a creditor's lien taken upon property then charged with a public duty, where the State is not a party to such suit. If the mortgage lien contracted for is ineffectual to secure the indebtedness, the mortgagee can not justly complain, since the lien was taken under the law governing the subject-matter of the lien, *Barton* v. *Barbour*, 104 U. S. 126; and "there is no statute in this State giving such authority to the courts or to other tribunals." 82 So. Rep. 866.

This presents no question reviewable by this court.

The State has maintained throughout this proceeding that the trustee has no right to have determined in a foreclosure suit the question of dismantling of a carrier's property and that this was especially true where the State was not a party to the proceedings. The rights of the purchaser at the foreclosure proceedings are not involved in this case and can not be considered. Neither is the right of the owners of the property to discontinue operation and dismantle.

"Upon principle it would seem plain that railroad property once devoted and essential to public use, must remain pledged to that use so as to carry to full completion the purpose of its creation; and that this public right . . . is superior to the property rights of corporations, stockholders and bond-holders." And, "a corporation . . . has no right as against the State to abandon the enterprise." *Gates* v. *Boston & New York R. R. Co.*, 53 Connecticut, 333.

See also *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24.

This duty of a carrier is most frequently defined in the following language: "Such corporations may not by any

act of their own, without the consent of the State, disable themselves from performing the functions the undertaking of which was the consideration for the public grant." *Thomas* v. *Railroad Co., supra; King* v. *Severn & Wye R. R. Co.*, 2 Barn. & Ald. 646; and many other cases.

Persons in private business may abandon it at their whim or pleasure. Not so with a railroad. It is a public highway. It is created by the State for the public use. It exercises the State's great power of eminent domain for the public good. *Barton* v. *Barbour*, 104 U. S. 135; *Ellis* v. *Tampa Water Works Co.*, 57 Florida, 533; *Ellis* v. *Atlantic Coast Line R. R.*, 53 Florida, 650; *Gainesville* v. *Gainesville Gas & Electric Power Co.*, 65 Florida, 404.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding by the relators seeking a prohibition forbidding a State judge of a lower Court to confirm a sale of a railroad "for the purpose of and with the privilege on the part of the purchaser of dismantling the same" as authorized by a foreclosure decree. The trustee of the mortgage under foreclosure was made a party to the proceeding and demurred upon the ground that the prohibition would deprive him of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of Florida granted the prohibition, 82 So. Rep. 866, and thereupon this defendant sued out a writ of error and filed a petition for a writ of certiorari from this Court. Action upon the latter was postponed to the hearing on the writ of error. Certiorari being the only remedy the petition is granted, as the case is deemed a proper one to be reviewed.

The road concerned is that of the Ocklawaha Valley Railroad Company. It succeeded by foreclosure of a

previous mortgage to a logging road, and gave the present mortgage to Hood, one of the plaintiffs in error, in trust for the bondholders. The bonds are held by the Assets Realization Company. Before the present bill for foreclosure was filed the Railroad Company had applied to the Railroad Commission for leave to cease operations, had been refused, and the State, by the Railroad Commission, had obtained an injunction forbidding the dismantling of the road and requiring it to go on. It ceased operations however on December 7, 1917. On December 10, 1917, the bill to foreclose was filed. On the same day the State filed a bill in the same Court, ancillary to its other bill, asking for a receiver to operate the road until further order, and a few days later sought to have its bill consolidated with the foreclosure suit. This was denied and the State's bill was dismissed. The decree of foreclosure complained of was entered on December 24, 1917, but on January 22, 1918, in deference to the State's contention that the road could be run at a profit, although the State had not been admitted formally as a party, H. S. Cummings was appointed a receiver, he being the most available man and being able by his connections to give the road a good deal of business in the way of carrying lumber. After nearly a year's trial the Court was satisfied that the road could not go on and thereupon ordered a sale which was made on February 3, 1919. On March 27, 1919, the Court admitted the State as a party and informed counsel that if it turned out, as the receiver and State insisted, "that the road was operating so as to pay expenses of operation and the taxes and had some reasonable show for business the sale would not be confirmed." On May 5, 1919, the Court entered an order finding that the road was hopelessly insolvent and could not be operated so as to have any net income whatever but postponing confirmation of the sale until May 12, before which time the proceedings for prohibition were begun.

The foreclosure decree of December 24, 1917, provided for a first offer of the road to be used as a common carrier, but if less than $200,000 was bid, there was to be a second offer with the privilege of dismantling. If, however, the bid on the second offer did not exceed by $100,000 the bid under the first offer, if there was one, the bid under the first offer was to be accepted. The trustee for bondholders was authorized to use the indebtedness of the company in bidding and to apply his bid, if accepted, to the same. There was no bid on the first offer and the Assets Realization Company bought the property under the second. The prohibition is against confirming the sale and against so much of the foreclosure decree as authorized the second offer or dismantling the road. The ground of decision was that in the absence of statute a railroad company has no right to divert its property to other uses without the consent of the State and that the lower Court had no jurisdiction to make the prohibited portion of the decree in a proceeding to which the State was not a party until after the decree had been made.

It is not questioned that the lower Court had jurisdiction of the foreclosure and it is not suggested that any statute forbids the decree that was made. The decision of the Court proceeds upon a doctrine as to the duty of the railroad company, again a duty not based upon statute, and although stated in terms of jurisdiction, depends entirely upon a determination of what the rights of the company are. If the company had the right to stop its operations and dismantle its road we do not understand that it is doubted that the decree might embody that right in its order of sale. If we are correct, the word jurisdiction must not prevent a further consideration of the case. *Kenney* v. *Supreme Lodge of the World, Loyal Order of Moose*, 252 U. S. 411, 414, 415.

Apart from statute or express contract people who have put their money into a railroad are not bound to go on

with it at a loss if there is no reasonable prospect of profitable operation in the future. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the State a party to a proceeding for leave to stop, and whether the State would proceed would be for the State to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the State if the facts were as supposed. Purchasers of the road by foreclosure would have the same right.

But the foreclosure was not a proceeding *in rem* and could confer no rights except those existing in the mortgagor. A purchaser at the sale would acquire all such right as the mortgagor had to stop operations, whatever words were used in the decree, and, whatever the words, would get no more. The prohibition excluding from the decree the words purporting to authorize dismantling the road did not cut down the future purchaser's rights, any more than did the presence of those words enlarge them. Therefore the action of the Supreme Court is not open to objection under the Constitution of the United States, although it may be that it hardly would have been taken if the authority to dismantle had not sounded more absolute than it could be in fact, considering the nature of the proceeding. Without previous statute or contract to compel the company to keep on at a loss would be an unconstitutional taking of its property. But the prohibition does not compel the company to keep on, it simply excludes a form of authority from the decree that gives the illusion of a power to turn the property to other uses that cannot be settled in that case.

As the State voluntarily made itself a party to the foreclosure suit before the decree went into effect, as indeed the decree never has, it might seem that the State ought to be bound in a way that otherwise it would not be. But if in a revisory proceeding the higher State Court says that the State should not be bound and that the decree was wrong in this particular, that is a local question with which we have nothing to do. The result is that although the State Court may have acted on questionable or erroneous postulates there is nothing in its action that calls for a reversal of its judgment.

*Writ of Error dismissed.*
*Writ of Certiorari granted.*
*Judgment affirmed.*

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## EX PARTE IN THE MATTER OF MUIR, MASTER OF THE GLENEDEN.

PETITION FOR A WRIT OF PROHIBITION AND/OR FOR A WRIT OF MANDAMUS.

No. 18, Original. Argued January 7, 1919.—Decided January 17, 1921.

1. Over a privately-owned ship, arrested in the District, and a libel for damages due to a collision alleged to have resulted from negligence of the owner's agents, the District Court has *prima facie* jurisdiction; and a mere allegation that the ship is an admiralty transport in the service of a foreign government is not enough to establish her immunity. P. 532.
2. A foreign government is entitled to appear in the District Court and propound its claim to a vessel in a libel suit upon the ground that the status of the vessel is public and places it beyond the jurisdiction; or its accredited representative may appear in its behalf; or, its claim, if recognized by our executive department, may be presented to the court by a suggestion made by or under authority of the

522. Argument for Petitioner.

Attorney General; but the public status of the ship, when in doubt, can not be determined upon a mere suggestion of private counsel appearing as *amici curiæ* in behalf of the embassy of the foreign government. P. 532.

3. This court, in its discretion, may decline to issue the writs of prohibition and mandamus to prevent exercise of jurisdiction by the District Court in an admiralty proceeding, where the jurisdiction is merely in doubt and the state of the case is such that the question may well be reconsidered by the District Court and on appeal. P. 534.

Rule discharged and petition dismissed.

THE case is stated in the opinion.

*Mr. John M. Woolsey*, with whom *Mr. J. Parker Kirlin* and *Mr. D. M. Tibbetts* were on the brief, for petitioner:

The *Gleneden* as a British Admiralty transport in the service of the British Government was and is immune from arrest under process of the courts of the United States and should have been released by the United States District Court for the Eastern District of New York on the suggestion filed by counsel for the British Embassy as *amici curiæ*.

The method of proving the status of the *Gleneden* as a British public ship by a suggestion filed in behalf of the British Embassy by counsel appearing as *amici curiæ* was in accordance with the well established practice. *The Roseric*, 254 Fed. Rep. 154; *The Athanasios*, 228 Fed. Rep. 558; *The Maipo*, 252 Fed. Rep. 627; *The Adriatic*, 253 Fed. Rep. 489.

On the facts shown by the suggestion the ship was immune and the District Court should have released her forthwith on that representation. *The Exchange*, 7 Cranch, 116; *The Roseric, supra; The Broadmayne* [1916], Prob. 64; *The Messicano*, 32 T. L. R. 519; *The Erissos* (Lloyd's List, Oct. 24, 1917); *The Crimdon*, 35 T. L. R. 81.

It follows that the District Court exercised an unwar-

ranted assumption of power in retaining the *Gleneden* under process of arrest in order to force the giving of security. For, as the vessel was immune from process, there was no way in which the court could legally force an appearance by the owner of the vessel.

In our jurisprudence jurisdiction can only be obtained by personal service of process or by attachment or arrest of property. *Ex parte Indiana Transportation Co.*, 244 U. S. 456. A ship must be either a public ship or a private ship. *Tucker* v. *Alexandroff*, 183 U. S. 424, 446. If she was a public ship, which is conclusively proved by the suggestion, she was and is immune from process.

It has been held both here and in England that the question of the immunity of a vessel from arrest can be properly raised on an agreement such as that made here to give a bond in the event that the vessel is held not to be immune. *The Florence H*, 248 Fed. Rep. 1012, 1014; *The Roseric, supra; The Crimdon, supra.*

The jurisdiction of this court to grant the relief asked is undoubted. There is not any other remedy. An appeal would not have been possible either to this court or to the Circuit Court of Appeals because the order requiring the giving of a bond was not a final order as against any party to the case.

Considerations of public policy and comity between the Government of the United States and the Government of Great Britain and the necessity for a speedy determination of the important questions here involved require the granting the relief prayed.

*Mr. Homer L. Loomis*, with whom *Mr. Joseph A. Barrett* and *Mr. J. Alvis Grace* were on the brief, for respondent.

*Mr. Frederic R. Coudert* and *Mr. Howard Thayer Kingsbury*, as *amici curiæ*, in behalf of the British Embassy:

522. Argument of amici curiæ for the British Embassy.

As an Admiralty transport, in the public service of the British Government, the *Gleneden* is immune from judicial process. *The Exchange*, 7 Cranch, 116; Moore's Int. Law Dig., vol. 2, p. 576; *Moitez* v. *The South Carolina*, Bee, 422, 17 Fed. Cas. No. 9,697; *Briggs* v. *Light-Boats*, 11 Allen, 157; *The Fidelity*, 9 Ben. 333; affd. 16 Blatchf. 569; *The John McCraken*, 145 Fed. Rep. 705; *The Thomas A. Scott*, 10 L. T. R. (N. S.) 726; *The Tartar*, Moore's Int. Law Dig., vol. 2, p. 577; *The Constitution*, L. R. 4 P. D. 39; *The Parlement Belge*, L. R. 5 P. D. 197, reversing L. R. 4 P. D. 129; *The Maipo*, 252 Fed. Rep. 627; *Young* v. *S. S. Scotia* [1903], A. C. 501; *The Broadmayne* [1916], Prob. 64; *The Messicano*, 32 T. L. R. 519; *The Erissos*, (Lloyd's List, Oct. 24, 1917); *The Crimdon*, 35 T. L. R. 81; *The Roseric*, 254 Fed. Rep. 154. The case of *The Attualita*, 238 Fed. Rep. 909, was distinguished in *The Roseric, supra*, on the ground that it was decided before this country became a co-belligerent.

This court has very recently held that the change in international relations caused by this nation becoming a co-belligerent instead of a neutral alters the relation of the court to cases having an international aspect. See *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9.

*The Luigi*, 230 Fed. Rep. 493, was also decided while this country was neutral and no official representations were made therein until after the vessel had been released upon a bond voluntarily given by her private owners.

There is another class of distinguishable cases, in which property belonging to a government has nevertheless been subjected to a lien for salvage or general average when such lien could be enforced without disturbing the possession and control of government representatives. See *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Long* v. *The Tampico*, 16 Fed. Rep. 491; *United States* v. *Wilder*, 3 Sumner, 308; *The Johnson Lighterage Co. No. 24*, 231 Fed. Rep. 365.

The test applied in these cases is whether the private lien can be asserted without interfering with the actual employment of the property in the public service. *The Fidelity, supra.*

Other cases, however, lay down the broader principle that property belonging to a sovereign Government is absolutely immune from local jurisdiction, irrespective of its immediate physical possession. *Hassard* v. *United States of Mexico,* 29 Misc. 511; 46 App. Div. 623; 173 N. Y. 645; *Vavasseur* v. *Krupp,* L. R. 9 Ch. D. 351; and see Moore's Int. Law Digest, vol. 2, pp. 591–593.

It may be noted that this rule does not apply where the sovereign consents to be sued (*United States* v. *Morgan,* 99 Fed. Rep. 570), or to an uncondemned prize brought into a neutral port in violation of neutrality (*The Appam,* 243 U. S. 124).

Counsel also distinguished: *The Charkieh,* L. R. 8 Q. B. 197; L. R. 4 Adm. & Eccl. 59; *Oyster Police Steamers of Maryland,* 31 Fed. Rep. 763; *Workman* v. *New York City,* 179 U. S. 552; *The Florence H,* 248 Fed. Rep. 1012; *The Prins Frederik,* 2 Dod. 451 (see *The Parlement Belge,* L. R. 5 P. D. 213; *De Haber* v. *Queen of Portugal,* 17 Q. B. 171); *The Swallow,* Swab. 30; *The Inflexible,* Swab. 32.

The criteria of immunity are government control and dedication to the public service. When government control intervenes, neither ownership nor technical possession fixes liability to process, mesne or final, upon the vessel or her owners. See *The Utopia* [1893], A. C. 492, 499.

In this case the Privy Council referred to *The Parlement Belge, supra,* as an accepted authority, and in *The Castlegate* [1893], A. C. 38, 52, the House of Lords also cited it with approval.

The public importance of the question is not affected by the armistice.

The suggestion of immunity by counsel for the British Embassy is a proper method of procedure, and is conclu-

sive as to the official facts thus stated. *Dillon* v. *Strathearn S. S. Co.*, 248 U. S. 182.

This court has power to grant appropriate relief in this proceeding and such relief is necessary to meet the situation.

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

On July 28, 1917, the *Gleneden*, a British steamship privately owned, and the *Giuseppe Verdi*, an Italian steamship similarly owned, came into collision in the Gulf of Lyons, both being seriously damaged. November 7, 1918, the British owner of the *Gleneden* commenced a suit *in rem* in admiralty against the *Giuseppe Verdi* in the District Court for the District of New Jersey to recover damages occasioned by the collision; and a few days later the Italian owner of the *Giuseppe Verdi* commenced a like suit against the *Gleneden* in the District Court for the Eastern District of New York. The libel in each suit attributed the collision entirely to negligence of servants and agents of the owner of the vessel libeled, it being alleged that she was in their charge at the time. When the suits were begun the vessels were within the waters of the United States and each was within the particular district where libeled.

The proceedings in the suit against the *Gleneden* are of immediate concern. After process issued and the vessel was arrested, private counsel for the British Embassy in Washington, appearing as *amici curiæ*, presented to the court a suggestion in writing to the effect that the process under which the vessel was arrested should be quashed and jurisdiction over her declined, because, as was alleged, "the said steamship is an Admiralty transport in the service of the British Government by virtue of a requisition from the Lords Commissioners of the

Admiralty, and is engaged in the business of the British Government, and under its exclusive direction and control and is under orders from the British Admiralty to sail from the Port of New York on or about November 25, 1918, to carry a cargo of wheat belonging and consigned to the British Government"; because the court "should not exercise jurisdiction over a vessel in the service of a co-belligerent foreign government," and because "the British courts have refused to exercise jurisdiction over vessels in government service, whether of the British Government or of allied governments, in the present war, and that by comity the courts of the United States should in like manner decline to exercise jurisdiction over vessels in the service of the British Government." An affidavit of the master of the vessel affirming the truth of much that was alleged accompanied the suggestion. The libelant, being cited to show cause why the suggestion should not be acceded to, responded by objecting that it was not presented through official channels of the United States and by denying that the facts were as alleged. A hearing on the suggestion was had in which the libelant and counsel for the British Embassy participated,—the latter only as *amici curiæ*,—and at which the owner of the *Gleneden* was represented informally, without an appearance. In the course of the hearing counsel for the libelant called on the others to submit proof in support of the allegations in the suggestion, particularly to produce the ship's articles and other instruments bearing on the suggested public status of the vessel, and to present the master for examination; but both the counsel for the British Embassy and the representative of the owner refused to do any of these things and insisted that the court was bound on the mere assertion of the claim of immunity to quash the process and release the vessel. The libelant produced the libel in the suit against the *Giuseppe Verdi*, depositions given in that suit by the

master and other officers of the *Gleneden*, a certificate from the customs officers in New York showing the report and entry of the *Gleneden* on her arrival, and other evidence, all tending measurably to show that the vessel was operated by her owner under a charter party whereby the owner was to keep her properly manned, furnished and equipped, was to assume any liability arising from negligent navigation, and was to bear all loss, injury or damages arising from dangers of the sea, including collision. "On all the facts" thus put before it, the court found that "the *Gleneden* was owned by and was still in the beneficial possession of the Gleneden Steamship Co., Ltd., a private British corporation who, through its servants, was in the actual control of the steamer and of her navigation, but engaged in performing certain more or less public services for the British Crown under a contractual arrangement amounting to the usual or government form of time charter party." The court "decided accordingly that the *Gleneden* was not a public ship in the sense that she was either a government agency or entitled to immunity"; and the suggestion was overruled and an order was entered to the effect that the vessel would be released only on the giving of a bond by the owner securing the claim in litigation or a bond to the marshal conditioned for the return of the vessel when that could be done consistently with the asserted needs of the British Government

Afterwards, on November 29, 1918, the master, appearing specially for the interest of the owner and for the purpose of objecting to the arrest and detention of the vessel, interposed a special claim to the effect that the Gleneden Steamship Company, Limited, was the true and sole owner of the vessel and he as master was her true and lawful bailee; and also interposed therewith a peremptory exception to the jurisdiction of the court on the grounds taken in the suggestion on behalf of the British Embassy. This claim and exception concluded

with a prayer that the process be quashed and the vessel released. The exception was not set down for hearing and remains undisposed of. There was no appearance by either the owner or the master save as just stated; nor was there any appearance by the British Government or by any representative of that government other than through the suggestion which counsel for the Embassy in Washington presented as *amici curiæ*.

After filing the special claim and exception, the master applied to the Circuit Court of Appeals for the Second Circuit for writs of prohibition and mandamus preventing the District Court from exercising further jurisdiction and commanding it to undo what had been done; but the application was denied for reasons which need not be noticed now. 255 Fed. Rep. 24.

A few days later an arrangement was effected whereby an acceptable surety company undertook to enter into and file a stipulation for value in the usual form and in a sum to be named by the libelant, not exceeding $450,000, unless on an intended application to this court for a writ of prohibition the vessel should be held immune from the process under which she was arrested and detained. Following that arrangement, on December 10, 1918, the District Court entered the following order:

"On the annexed agreement for security, and consent of the proctors for the libellant herein, and the record herein, it is

"ORDERED that in order to prevent further delay and expense, the steamship *Gleneden* be and she hereby is allowed to proceed on her voyage and leave the physical custody of the Marshal of the Eastern District of New York, provided, however, that this order does not and shall not be deemed to constitute any withdrawal or quashing of the writ of arrest; and it is

"FURTHER ORDERED that all proceedings herein be stayed and special claimant's or libellant's time to file any other

or further papers herein be extended to and including the 23rd day of December, 1918, and in case application is made for a writ of prohibition to the Supreme Court on or before December 23rd, 1918, all proceedings herein be stayed and the time of the special claimant or of the libellant to file any other or further papers herein be extended until ten (10) days after the entry and service of an order or decree on the final decision of the United States Supreme Court on the said writ of prohibition."

The master thereupon asked leave of this court to file a petition for a writ of prohibition preventing the District Court from proceeding with the suit and from interfering with the *Gleneden* in any manner, and for a writ of mandamus directing that court to vacate the order made when the suggestion on behalf of the British Embassy was overruled and to enter an order releasing the vessel without requiring security,—the grounds advanced in the petition being essentially a repetition of those embodied in the suggestion of counsel for the British Embassy. The requested leave was given, a rule to show cause was issued, a return was made by the District Judge, and counsel have been heard. Whether on the case thus made either of the writs should be granted is the matter to be decided.

The principal question sought to be presented—whether the *Gleneden* is such a public vessel of the British Government as to be exempt from arrest in a civil suit *in rem* in admiralty in a court of the United States—is one of obvious delicacy and importance. No decision by this court up to this time can be said to answer it. The nearest approach is in the case of *The Exchange*, 7 Cranch, 116, where an armed ship of war, owned, manned and controlled by a foreign government at peace with the United States, was held to be so exempt. To apply the principle or doctrine of that decision to the *Gleneden* would be

taking a long step, and the present posture of this litigation is such that we find no occasion to consider whether there is proper warrant for taking it.

It is conceded that the *Gleneden* is not an armed ship of war, and that she is not owned by a foreign government but by a private corporation. In a sense she may be temporarily in the service and under the control of the British Government, but the nature and extent of that service and control are left in uncertainty by the proofs, although the facts evidently are susceptible of being definitely shown.

*Prima facie* the District Court had jurisdiction of the suit and the vessel, *The Belgenland*, 114 U. S. 355, 368–369, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. They were not specially within the knowledge of the libelant, nor did it have any superior means of showing the real facts. Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge.

As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire*, 11 Wall. 164, 167; *The Santissima Trinidad*, 7 Wheat. 283, 353; *Colombia* v. *Cauca Co.*, 190 U. S. 524. Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne*, 3 Wheat. 435, 445–446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the as-

serted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange,* 7 Cranch, 116; s. c. 16 Fed. Cas. No. 8,786; *The Pizarro,* 19 Fed. Cas. No. 11,199; *The Constitution,* L. R. 4 P. D. 39; *The Parlement Belge,* L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197.

But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiæ,* and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited); and in our opinion the libelant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States* v. *Lee,* 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it.

From all that has been said it is apparent that the status of the *Gleneden,* judged in the light of what was done and shown in the District Court, is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, for it turns on the status of the vessel. The suit is still in the interlocutory stage. The court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. In addition, the question

may be reëxamined in regular course on an appeal from the final decree.

The power of this court, under § 234 of the Judicial Code, to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable. But this power, like others, is to be exerted in accordance with principles which are well settled. In some instances, as where the absence of jurisdiction is plain, the writ goes as a matter of right. *Ex parte Phenix Insurance Co.*, 118 U. S. 610, 626; *Ex parte Indiana Transportation Co.*, 244 U. S. 456. In others, as where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary. *In re Cooper*, 143 U. S. 472, 485; *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523, 531; *In re Alix*, 166 U. S. 136. And see *Ex parte Gordon*, 104 U. S. 515, 518–519; *The Charkieh*, L. R. 8 Q. B. 197.

Here the most that can be said against the District Court's jurisdiction is that it is in doubt; and in other respects the situation is such that we deem it a proper exercise of discretion to refuse the writ. Nothing need be added to show that the request for a writ of mandamus is on no better footing. *In re Morrison*, 147 U. S. 14, 26; *Ex parte Oklahoma*, 220 U. S. 191, 209; *Ex parte Roe*, 234 U. S. 70.

*Rule discharged and petition dismissed.*

# ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 117. Submitted December 9, 1920.—Decided January 17, 1921.

An order of a state public service commission requiring an interstate railroad to detour two of its through passenger trains from its main line over a branch for the benefit of a small city already adequately served by local, connecting trains, *held*, void as an undue burden on interstate commerce. P. 536.

277 Missouri, 264, reversed.

THE case is stated in the opinion.

*Mr. William F. Evans* and *Mr. Edward T. Miller* for plaintiff in error.

*Mr. James D. Lindsay* for defendant in error. *Mr. R. Perry Spencer* was also on the brief.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error's main line extends from St. Louis to Memphis—305 miles. As originally constructed it turned sharply southeastward at Hayti, Missouri—220 miles from St. Louis—ran thence seven miles to Caruthersville, a city of four thousand people, thence southwestward nine miles to Grassy Bayou and thence south. A "cut-off" between Hayti and Grassy Bayou—six miles—became part of the main line in 1904 and thereafter through freight and night passenger trains passed that way. The through day passenger trains—Nos. 801 and 802—continued to

move along the old line until August, 1913, when they were routed over the "cut-off." At the same time two new daily passenger trains were put on and operated between Blytheville, Arkansas, and Cape Girardeau, Missouri, by way of Caruthersville.

The Missouri Public Service Commission directed the Railway Company to restore trains 801 and 802 to the route followed prior to 1913 and the State Supreme Court approved this action. We are asked to declare the order invalid because it unduly burdens interstate commerce. The point is well taken.

Fourteen local daily passenger trains move in and out of Caruthersville—seven each way. Some of these make close connections with all through trains at Hayti. These locals do not carry equipment of the highest class, but apparently they afford fair facilities for reaching and leaving Caruthersville without serious delay or great inconvenience. If deficient in schedule or equipment there is an easy remedy by means other than detours of the through trains.

The applicable general doctrine has been often considered and in *Chicago, Burlington & Quincy R. R. Co.* v. *Wisconsin Railroad Commission*, 237 U. S. 220, 226, this court said:

"In reviewing the decision we may start with certain principles as established: (1) It is competent for a State to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily in-

volved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement. *Gladson* v. *Minnesota,* 166 U. S. 427; *Lake Shore R. R.* v. *Ohio,* 173 U. S. 285; *Atlantic Coast Line* v. *Nor. Car. Corp. Comm.,* 206 U. S. 1; *Mo. Pac. Ry.* v. *Kansas,* 216 U. S. 262; *Cleveland &c. Ry.* v. *Illinois,* 177 U. S. 514; *Mississippi R. R. Comm.* v. *Ill. Cent. R. R.,* 203 U. S. 335; *Atlantic Coast Line* v. *Wharton,* 207 U. S. 328."

Considering the facts disclosed we think it plain that the fourteen local passenger trains meet the reasonable requirements of Caruthersville and that the Commission's order unduly burdens interstate commerce. Compliance with it would require the Railway to maintain sixteen more miles of track at the high standard essential for the through trains, and to move the latter ten miles further with consequent delay and inconveniences all along the line. The burden certainly would not be less serious than those which were condemned in some if not all of the causes above referred to.

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

*Reversed.*

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent.

# PERE MARQUETTE RAILWAY COMPANY *v.* J. F. FRENCH & COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 105. Argued November 19, 1920.—Decided January 17, 1921.

1. Upon arrival of a carload of goods at destination, the carrier at the direction of the person in possession of the bill of lading turned over the car to another carrier for further carriage, the old waybill being retained with the names of the new carrier and new destination inserted in lieu of the old. *Held*, a delivery under the original consignment. P. 542.
2. Under the Uniform Bills of Lading Act, a carrier is justified in delivering the goods to the person in physical possession of the order bill of lading properly endorsed, unless it has information that such person is not lawfully entitled to them. P. 543.
3. A delivery to a person holding such a bill as the agent of another person is tantamount to a delivery to the latter if ratified by him. P. 544.
4. The exoneration of the carrier resulting under the act from a delivery in good faith to a person in possession of the bill of lading properly endorsed, is not defeated by failure of the carrier to take up the bill, if no loss is occasioned by such failure. P. 545.
5. Where a carrier delivered the goods to one who had without right acquired possession of the bill of lading apart from a draft originally attached by the shippers, *held*, that the shippers, upon buying back the bill and the draft with full knowledge of the facts did not become *bona fide* purchasers of the bill within §§ 10–12 of the Uniform Bills of Lading Act, since the purpose of those sections is to give bills of lading the attributes of commercial paper, and they protect only purchasers who are entitled to assume that the goods have not been delivered and that they will not be except to a holder of the bill of lading. P. 545.
6. The Uniform Bills of Lading Act does not impose upon the carrier a specific duty to the shipper to take up the bill of lading. P. 546.
7. Noncompliance with a clause of a bill of lading requiring its surrender before delivery of the goods will not render the carrier liable to the shipper for conversion, when the delivery is to the holder of

the bill, duly endorsed, or his agent, and the loss resulting to the shipper is not attributable to the carrier's failure to take up the bill, but to the deliveree's wrongful acquisition of the bill and subsequent conduct, for which the carrier was not responsible. P. 546.

204 Michigan, 578, reversed.

THE case is stated in the opinion.

*Mr. Oscar E. Waer*, with whom *Mr. John C. Shields* was on the briefs, for petitioner.

*Mr. Clare J. Hall*, with whom *Mr. Joseph R. Gillard* and *Mr. Myron McLaren* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Federal Uniform Bills of Lading Act of August 29, 1916, c. 415, 39 Stat. 538, provides by § 9 that a carrier is, subject to the provisions of §§ 10, 11 and 12, "justified . . . in delivering goods to one who is"

(c) "A person in possession of an order bill for the goods by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

The main questions presented for our decision in this case are, whether, upon the facts hereinafter stated, there was a delivery to one in possession of the bill, and, if so, whether the delivery exonerated the carrier, it having been made without requiring surrender of the bill of lading.

In 1917 J. F. French & Company shipped a carload of potatoes from Bailey, Michigan, to Louisville, Kentucky, by the Pere Marquette Railroad as initial carrier and the Big Four Railroad as connecting and terminal carrier. The shipment was made on a "consignor's order" bill of

lading in the standard form by which the car was consigned to the shipper's order at Louisville; and there was a notation: "Notify Marshall & Kelsey, c/o Capt. Bernard, Commissary, Camp Zachary Taylor." The shipper attached the bill of lading to a draft on Marshall & Kelsey for the purchase price of the potatoes and sold and delivered both, duly endorsed in blank, to a bank at Grand Rapids. This bank transmitted for collection the draft, with bill of lading attached, to an Indianapolis bank. The latter, without obtaining payment of the draft, detached the bill of lading from it and wrongfully delivered the bill of lading to Marshall & Kelsey. The car having reached Louisville, its destination named in the bill of lading, it was physically delivered by the Big Four, upon request of one Bindner, to the Southern Railroad to be forwarded to Dumesnil, under the circumstances hereinafter set forth, without requiring surrender of the bill of lading. Later upon the refusal of Marshall & Kelsey to accept the potatoes and honor the draft, possession of the car and bill of lading was returned to the shippers who accepted them under protest and, without waiving any rights which they might have, proceeded to dispose of the potatoes elsewhere in order to make the damage as light as possible for all concerned. The shippers then brought this suit in a state court of Michigan against the Pere Marquette to recover compensation, contending that the carrier had by delivering the car upon request without requiring surrender of the bill of lading become liable for conversion of the potatoes. The court directed a verdict for plaintiff; and the judgment entered thereon was affirmed by the Supreme Court of Michigan. 204 Michigan, 578. The case comes here on writ of certiorari. 250 U. S. 637.

The following additional facts are material: Camp Zachary Taylor was located about six miles from Louisville on the Southern Railroad, near Dumesnil station.

Marshall & Kelsey had contracted with the Government to supply a large quantity of potatoes at this camp; and had made a contract of purchase with J. F. French & Company. The car in question was shipped to Louisville to be applied on these contracts. The endorsed bill of lading for this, as for other cars shipped under like circumstances, had been left by Marshall & Kelsey at Dumesnil with one Bindner, an employee of the Southern Railroad, for safe-keeping. He, having the bill of lading in his possession at Dumesnil, telephoned from there, at Marshall & Kelsey's request, to the Big Four Railroad to ascertain whether the car had arrived at Louisville. Finding that it had, Bindner, knowing the Government's need of potatoes, told the Big Four trackage clerk that "he had the bill of lading and to let the car go out to the camp." Bindner had no specific instructions from Marshall & Kelsey to do this; but his action was later ratified by them. Upon receiving Bindner's further assurance that a small demurrage charge which had accrued would be paid, the trackage clerk, without requiring surrender of the bill of lading, released the car, changed the waybill so as to provide for delivery of the car at Dumesnil, and turned it over to the Southern. A charge of 6 cents per hundred pounds thereby became payable to the Southern Railroad for the local carriage from Louisville to Dumesnil; and it was left by the waybill payable by the consignee with the other freight charges upon receipt of the car at Dumesnil. The Big Four had no information that the draft covering the car had not been paid or of the circumstances under which Bindner obtained possession of the bill of lading. The car arrived at Dumesnil, but the Government did not accept it. Thereupon Bindner returned the bill of lading to Marshall & Kelsey upon their request; they returned it to the Indianapolis bank; this bank returned it and the draft to the Grand Rapids bank; which in turn surrendered both to J. F. French & Company, upon being

repaid the sum originally credited to their account. The shippers then took possession of the car; disposed of the potatoes elsewhere, but at a lower price; and brought this suit to recover the amount of their loss. The evidence is in conflict concerning the reason for the failure of the Government to accept the potatoes, their condition, and the cause of deterioration in them, if any; and no finding of fact was made by the Supreme Court of Michigan on this issue. But, in an action for conversion the matter could affect only the question of damages and not that of liability; and it is not material in the view which we take of the case.

There is no controversy over the amount of the loss. Nor is it denied that suit was properly brought against the Pere Marquette as initial carrier. The shipment was interstate. The shippers sue the initial carrier under § 20 of the Act to Regulate Commerce as amended contending that there was a conversion of the goods by a misdelivery of them at Dumesnil instead of a delivery at Louisville; or, if it be held that there was a delivery at Louisville, that it was an unjustifiable delivery in violation of the contract of carriage, since a clause in the bill of lading declared: "The surrender of this original bill of lading properly endorsed shall be required before delivery of the property." The carrier defends on the ground that there was a delivery at Louisville which exonerated it under § 9 of the Federal Uniform Bills of Lading Act. Is the carrier liable for misdelivery, because the car was sent from Louisville to Dumesnil upon Bindner's request without requiring surrender of the bill of lading?

*First.* The Supreme Court of Michigan held that the Big Four in sending the car over the Southern to Dumesnil at the request of Bindner made not a delivery but an irregular reconsignment. Whatever name be used in referring to the act of forwarding the car, the Big Four, when it surrendered possession of the car to the Southern at Bind-

ner's request, terminated its relation as carrier; just as it would have done if, at his request, it had shunted the car onto a private industrial track or had given the control of it to a truckman on the team tracks. Having brought the goods to the destination named in the bill of lading the carrier's only duty under its contract was to make a delivery at that place; and it could make that delivery by turning the goods over to another carrier for further carriage. Compare *Bracht* v. *San Antonio & Aransas Pass Ry. Co.*, *ante*, 489; *Seaboard Air-Line Railway* v. *Dixon*, 140 Georgia, 804; *Melbourne & Troy* v. *Louisville & Nashville R. R. Co.*, 88 Alabama, 443. The fact that in forwarding the car the Big Four used the original waybill, striking out the word "Louisville" under the "destination" and substituting "Dumesnil, Ky. So. R. R." is of no significance. The shipment from Louisville to Dumesnil was a wholly new transaction. In turning over the car for this new shipment the railway made a disposal of it in assumed termination and discharge of its obligations, which was, in legal contemplation, a delivery. Whether it was a justifiable delivery and did indeed discharge its obligations we must next consider.

*Second.* Was the delivery at Bindner's order one which the carrier was justified in making under the provisions of § 9 of the Federal Uniform Bills of Lading Act? Prior to the enactment of the Federal Uniform Bills of Lading Act, or of other applicable legislation, a carrier was not ordinarily relieved from liability to the consignor or owner for delivery of goods to a person not legally entitled to receive them, although such person was in possession of an order bill of lading duly endorsed in blank, and surrendered it to the carrier at the time of delivery. Delivery was held not to be a justification because the bill of lading, despite insertion therein of words of negotiability, did not become a negotiable instrument. Independently of statute (and, indeed, also under earlier state statutes) the

insertion of words of negotiability had merely the effect of enabling title to the goods to be transferred by transfer of the document. See *Berkley* v. *Watling*, 7 A. & E. 29. But one who did not have a valid title to the goods could not by transfer of the bill of lading give a good title to a *bona fide* holder. *Shaw* v. *Railroad Co.*, 101 U. S. 557. When in the interests of commerce the Federal Uniform Bills of Lading Act extended to bills of lading certain characteristics of negotiable paper in order to protect a *bona fide* purchaser of such bills, it was deemed proper to afford also certain protection to the carrier. This was done, in part, by providing in § 9 that the carrier would be justified in making delivery to any person in possession of an order bill of lading duly endorsed, with certain exceptions to be noted below.

The shippers contend that Bindner was not "a person in possession" of the bill, because he held it as agent for Marshall & Kelsey and not on his own account. So far as the carrier is concerned that fact is entirely immaterial. Under § 9 it is physical possession of the bill which is made a justification for delivery of the goods by the carrier. Under that section it is immaterial in what capacity the person holds possession of the bill, and also whether he holds it lawfully or unlawfully, so long as the carrier has no notice of any infirmity of title. But the shippers' contention would not be advanced if it were held that the legal, not the physical, possession is determinative. For Bindner's request of the trackage clerk to have the car forwarded to Dumesnil was later ratified by Marshall & Kelsey. If his physical possession of the bill were deemed legally their possession of it, the physical delivery to him of the car would likewise be deemed legally a delivery of it to them and, hence, satisfy in this respect the requirements of § 9.

The only exception to the rule justifying the carrier in making delivery to one in possession of an order bill of

lading endorsed in blank, which is urged as applicable here, is where the carrier has information that the person in possession of the bill is not lawfully entitled to the goods. The shippers contend that the Big Four when it made delivery of the car had such information regarding Bindner. For this contention there is not the slightest basis in the evidence. The Big Four had no such information. Nor was there in the circumstances anything which should even have led it to doubt that Bindner was lawfully entitled to request that the car be shipped to Dumesnil.

Concluding, therefore, that there was a delivery, that it was made to a person in possession of the bill of lading properly endorsed and that it was made in good faith, the important question remains: Does such a delivery exonerate the carrier upon suit by the shipper when it failed to require surrender of the bill of lading as provided in that instrument? In our opinion there is no exoneration where loss to shipper or subsequent purchaser of the bill results from such a failure; but where the loss suffered is not the result of the failure to take up the bill, mere failure to take it up does not defeat the exoneration.

The plaintiffs seek to establish the carrier's liability for its failure to take up the bill on two theories,—first, that they are *bona fide* purchasers of the bill left outstanding; and second, that as shippers and owners their goods were converted by a delivery in violation of the terms of the bill of lading. But the shippers cannot claim the protection of § 11 of the act as *bona fide* purchasers of the bill, as those words are understood in the law, even if in taking back the draft and the bill of lading from the bank they can be deemed purchasers within the meaning of the act. They took back the bill of lading after the events here in question, with full knowledge of them, and because of them. The purchaser whom the act protects is he who is entitled to assume that the carrier has

not delivered the goods and will not thereafter deliver them except to a person who holds the bill of lading. The purpose of §§ 10, 11 and 12 is to give bills of lading attributes of commercial paper. Here the plaintiffs were not buying commercial paper but a law suit.

There is nothing in the act which imposes upon the carrier a specific duty to the shipper to take up the bill of lading. Under § 8 the carrier is not obliged to make delivery except upon production and surrender of the bill of lading; but it is not prohibited from doing so. If instead of insisting upon the production and surrender of the bill it chooses to deliver in reliance upon the assurance that the deliveree has it, so far as the duty to the shipper is concerned, the only risk it runs is that the person who says that he has the bill may not have it. If such proves to be the case the carrier is liable for conversion and must, of course, indemnify the shipper for any loss which results. Such liability arises not from the statute but from the obligation which the carrier assumes under the bill of lading.

Does a delivery without compliance with the surrender clause of the bill of lading render the carrier liable for conversion under the facts shown here? Although there is a conflict of language in the cases in which a shipper sues a carrier for delivery of goods without requiring a surrender of the bill of lading, there appears to be no conflict of principle or in decision. Where the failure to require the presentation and surrender of the bill is the cause of the shipper losing his goods, a delivery without requiring it constitutes a conversion. *Babbitt* v. *Grand Trunk Western Ry. Co.*, 285 Illinois, 267; *Turnbull* v. *Michigan Central R. R. Co.*, 183 Michigan, 213; *Judson* v. *Minneapolis & St. Louis R. R. Co.*, 131 Minnesota, 5; see *First National Bank* v. *Oregon-Washington Railroad & Navigation Co.*, 25 Idaho, 58; compare *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190. But

where delivery is made to a person who has the bill or who has authority from the holder of it, and the cause of the shipper's loss is not the failure to require surrender of the bill but the improper acquisition of it by the deliveree or his improper subsequent conduct, the mere technical failure to require presentation and surrender of the bill will not make the delivery a conversion. *Chicago Packing & Provision Co.* v. *Savannah, Florida & Western Ry. Co.*, 103 Georgia, 140; *Famous Mfg. Co.* v. *Chicago & Northwestern Ry. Co.*, 166 Iowa, 361; *Nelson Grain Co.* v. *Ann Arbor R. R. Co.*, 174 Michigan, 80; *St. Louis Southwestern Ry. of Texas* v. *Gilbreath*, 144 S. W. Rep. (Tex. Civ. App.) 1051. In the *Chicago Packing Co. Case, supra*, the court said, "The loss in the present case was not occasioned by the failure of the railway company to require the production and surrender of the bills of lading, but by the faithlessness of Hobbs & Tucker to their principal." Similarly, in the case before us, the failure of the carrier to require production and surrender of the bill of lading did not cause the loss. The same loss would have resulted if the bill had been presented and surrendered. The real cause of the loss was the wrongful surrender of the bill of lading by the Indianapolis bank to Marshall & Kelsey by means of which the car was taken to Camp Zachary Taylor and the shipper deprived of the Louisville market. Nor did the failure to take up the bill enable the buyer to throw back the loss upon the shippers. The shippers deliberately assumed the loss by their voluntary act in taking back the draft and the bill of lading which they had sold to the Grand Rapids Bank. Doubtless J. W. French & Company's relations with Marshall & Kelsey and with the Grand Rapids Bank and the relations of the latter with the Indianapolis Bank made this course advisable. But it is clear that they were under no duty to do so, since the tortious act of the Bank's agent for collection had occasioned the damage. Having as-

sumed the loss of their own volition they should not be permitted to pass it on to the carrier merely because of its technical failure to take up the bill of lading. The delivery was made to one in possession of the bill of lading who could, and doubtless would, have surrendered it, had he not been prevented by distance from doing so. To hold a carrier liable under such circumstances would seriously interfere with the convenience and the practice of business.

*Reversed.*

MR. JUSTICE HOLMES did not take part in the consideration and decision of this case.

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## LOUIE *v.* UNITED STATES.

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

No. 337. Argued December 8, 1920.—Decided January 17, 1921.

Upon an indictment of an Indian for the murder of another Indian within the limits of an Indian Reservation (Crim. Code, §§ 273, 328), an objection that the District Court has no jurisdiction over person or subject-matter because the defendant had been declared competent and because the act charged was committed on land which had been allotted and deeded to him in fee simple, really goes, not to the jurisdiction, but to the merits, raising the question whether the act was a violation of the federal law; and the judgment of the District Court is not reviewable by direct writ of error from this court, but should go to the Circuit Court of Appeals. P. 550. *Clairmont* v. *United States*, 225 U. S. 551, explained.

Reversed.

THE case is stated in the opinion.

*Mr. William B. McFarland*, with whom *Mr. Robert Early McFarland* was on the brief, for petitioner.

*Mr. W. C. Herron*, with whom *The Solicitor General* and *Mr. Assistant Attorney General Stewart* were on the brief, for the United States.

Mr. Justice Brandeis delivered the opinion of the court.

Louie, an Indian, was indicted under § 273 of the Penal Code in the District Court of the United States for the District of Idaho, Northern Division, for the murder of another Indian within the limits of the Coeur d'Alene Reservation. A motion to dismiss for want of jurisdiction was overruled and the defendant was tried and convicted. By motion in arrest of judgment, he objected in terms to the jurisdiction of the court over the person of defendant and over the crime charged on the ground that before the time of the alleged crime he had been declared competent and the land on which the crime was alleged to have been committed had been allotted and deeded to him in fee simple. Compare *United States* v. *Celestine*, 215 U. S. 278. This motion also was overruled; the defendant was sentenced; and the case was taken on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit. That court, one judge dissenting, dismissed the writ of error for want of jurisdiction on the ground that, since the sole question presented was whether the District Court had jurisdiction, its decision could be reviewed only by direct writ of error from this court to the District Court. See *United States* v. *Jahn*, 155 U. S. 109, 114, 115; compare *Raton Water Works Co.* v. *City of Raton*, 249 U. S. 552. The dissenting judge was of opinion that the Circuit Court of Appeals had jurisdiction of the writ of error, because an additional error relating to the merits had been assigned there, although not raised below.

A writ of certiorari was granted by this court. 253 U. S. 482.

We have no occasion to consider the question on which the Circuit Court of Appeals divided. The motions made by defendant in the District Court raised a question not of the jurisdiction of that court, but of the jurisdiction of the United States. The contention was, in essence, that, by reason of the facts set forth in the motions, the defendant was in respect to the acts complained of subject to the laws of the State of Idaho and not to the laws of the United States. In other words that he did not violate the laws of the United States. Compare *United States* v. *Kiya*, 126 Fed. Rep. 879, 880. Section 328 of the Penal Code provides that an Indian committing murder on another Indian "within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same penalties as are all other persons committing" the same crime "within the exclusive jurisdiction of the United States." *United States* v. *Kagama*, 118 U. S. 375; *Donnelly* v. *United States*, 228 U. S. 243, 269, 270. The defendant, in effect, denied that the killing was, in the statutory sense, within the reservation. If this was true an essential element of the crime against the United States was lacking; as much so as if it had been established in *United States* v. *Sutton*, 215 U. S. 291, or in *United States* v. *Soldana*, 246 U. S. 530, that the region into which liquor was introduced was not Indian country. That the District Court for Idaho had jurisdiction to determine whether the *locus in quo* was a part of the reservation was not questioned. By § 78 of the Judicial Code the whole State of Idaho is comprised within the District of Idaho; by paragraph second of § 24 district courts have original jurisdiction of all crimes and offenses cognizable under the authority of the United States; and the defendant was arrested within the District of Idaho.

Since defendant's motions in the District Court did not raise a question properly of the jurisdiction of the court but went to the merits, there was no basis for a direct writ of error from this court. *Pronovost* v. *United States*, 232 U. S. 487; *Lamar* v. *United States*, 240 U. S. 60, 65. He properly sought review in the Circuit Court of Appeals. In *United States* v. *Celestine*, 215 U. S. 278, and *United States* v. *Pelican*, 232 U. S. 442, where the defense was similar to that presented here, and in *United States* v. *Sutton*, *supra*, and *United States* v. *Soldana*, *supra*, the cases came to this court by direct writ of error to the District Court under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246. *Hallowell* v. *United States*, 221 U. S. 317, where a similar question was involved, came here on certificate. In *Clairmont* v. *United States*, 225 U. S. 551, 554, it was inadvertently assumed without discussion that the question involved was one of the jurisdiction of the District Court.

The judgment of the Circuit Court of Appeals is reversed and the case remanded to that court for further proceedings in conformity with this opinion.

*Reversed.*

THE CHIEF JUSTICE took no part in the decision of this case.

# PANAMA RAILROAD COMPANY *v.* PIGOTT, A MINOR, BY HIS GUARDIAN AD LITEM, MORRELL.

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

No. 133. Submitted January 13, 1921.—Decided January 24, 1921.

1. By the law of Panama, a railroad company is liable for the negligence of its servants and damages are recoverable for pain in a case of personal injuries. P. 553. *Panama R. R. Co.* v. *Toppin*, 252 U. S. 308.
2. Whether or not Panama law on these subjects should be judicially noticed by the District Court for the Canal Zone in an action involving injuries suffered in Panama, *held*, that the defendant railroad company was not harmed in this case by leaving it to be determined by the jury on conflicting evidence of experts. *Id.*
3. Due care may require a railroad company to keep a flagman at a dangerous street crossing. *Id.*
4. Conduct that would be contributory negligence as a matter of law in an older person may not be so in a boy of seven. *Id.*

256 Fed. Rep. 837, affirmed.

THE case is stated in the opinion.

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

*Mr. Theodore C. Hinckley* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought in the District Court of the Canal Zone for the Division of Cristobal to recover from the Panama Railroad Company for personal injuries suffered by the minor, Pigott, in the City of Colon, Republic

of Panama. Pigott recovered a judgment which was affirmed by the Circuit Court of Appeals. 256 Fed. Rep. 837. The case is brought to this Court under the Panama Canal Act, August 24, 1912, c. 390, § 9, 37 Stat. 560, 566. The facts may be stated in a few words. The minor, a boy of seven, was run over when attempting to cross the railroad track on a street in Colon. There was evidence that the crossing was much used and that, especially in the afternoon, the time of the accident, there usually were many children about; there were, however, neither gates nor a watchman at the place. A hedge higher than the child somewhat obstructed the view. The engine was backing a box car and did not have the lookout required by the company's rules There was evidence also that it gave no warning by bell or whistle. In short by the criteria of the common law the plaintiff had a right to go to the jury with his case.

The fundamental argument for the plaintiff in error is that the law of Panama was not applied in determining the principles of liability or in fixing the rule of damages. It is contended that if, as there was evidence to prove, due care had been used in the selection of servants by the railroad, the company was not answerable for their negligence, and that in any event there could be no recovery for pain. Both of these contentions are simply attempts to reargue what was decided in *Panama R. R. Co.* v. *Toppin*, 252 U. S. 308. The plaintiff in error certainly did not get less than it was entitled to when, in view of contradictory testimony from lawyers on the two sides, the Court left the law of Panama to the jury. The Court was warranted in also leaving to the jury the question whether proper care required the company to have a flagman or gate at the crossing and the other safeguards that we have mentioned. *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408. In view of the extreme youth of the plaintiff we cannot say that the court erred in allowing the jury

to attribute his misfortune to the defendant's conduct alone, whatever difficulties there might be in the case of an older person; and we perceive no other ground for not allowing the verdict and the decision of the two courts below to stand.

*Judgment affirmed.*

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## CENTRAL UNION TRUST COMPANY OF NEW YORK, INDIVIDUALLY AND AS TRUSTEE, &c., *v.* GARVAN, AS ALIEN PROPERTY CUSTODIAN.

## MERRILL ET AL., INDIVIDUALLY AND AS TRUSTEES, &c., *v.* SAME.

## MARSHALL ET AL., AS TRUSTEES, &c., *v.* SAME.

## MARSHALL ET AL., AS TRUSTEES, &c., *v.* SAME.

## METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, TRUSTEE, &c., *v.* SAME.

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

Nos. 392–396. Argued January 10, 11, 1921.—Decided January 24, 1921.

1. Decrees of the Circuit Court of Appeals affirming decrees of the District Court, placing the Alien Property Custodian in possession of property in libel proceedings brought by him under the Trading with the Enemy Act, *held* reviewable in this court by writ of error. P. 566.
2. Congress has power in war time to provide for immediate seizure, *in pais* or through a court, of property supposed to belong to the enemy, leaving the question of enemy ownership *vel non* to be settled later at the suit of the claimant. P. 566.
3. Under § 17 of the Trading with the Enemy Act of October 6, 1917,

554. Argument for Plaintiffs in Error in Nos. 392, 393.

which confers on the District Court jurisdiction to make all such orders and decrees as may be necessary and proper to enforce the provisions of the act, those courts have jurisdiction to enforce the demands of the Alien Property Custodian for the delivery of property to the possession of which the act entitles him. P. 566.

4. The Trading with the Enemy Act, § 7 (c), provides that, "If the President shall so require, any money or other property . . . held . . . for the benefit of an enemy," without license, "which the President after investigation shall determine . . . is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian." *Held*, that, upon a determination after investigation by the Custodian, exercising the President's power by delegation under § 5 of the act, that certain securities were held by trustees for the benefit of enemy insurance companies, followed by demand, the duty arose to deliver them to the Custodian; that the question of enemy property *vel non* could not be inquired into in his suit to compel delivery, but rights in that regard could be asserted and protected by claim, and if necessary suit, for return of the property, under § 9, as amended. P. 567
5. Proceedings of this character are alternative to direct seizure by the Custodian under § 7 (c) of the act as amended by the Act of November 4, 1918, and involve only the right to possession. P. 568. *Clinkenbeard* v. *United States*, 21 Wall. 65, distinguished.
6. In so far as concerns claimants who proceed as allowed by amended § 9, a proceeding like the present gives a mere preliminary custody, although in other respects the Custodian may get a conveyance under the act, with broad powers of management and disposition under § 12, as amended. P. 569.

265 Fed. Rep. 477; *id.* 481, affirmed.

THE cases are stated in the opinion.

*Mr. Perry D. Trafford* for plaintiffs in error in Nos. 392 and 393:

It is plain from the language of the Trading with the Enemy Act—and especially when the words selected are contrasted sharply with those proposed in the bill as originally introduced in Congress—that the property thereby directed to be transferred to the Alien Property Custodian is enemy property only.

The property which has been libeled is not enemy property but a trust fund, legally established, owned by an American citizen, and held by it primarily, if not wholly, for the benefit of American policyholders and creditors.

The very point involved has been passed upon by the courts in cases arising under the Confiscation Act of 1862, 12 Stat. 589, §§ 5 and 6. This act authorized the seizure "of all the estate and property, moneys, stocks and credits of" certain classes of persons. This is essentially the same as "any money or other property" of certain classes of persons in the Trading with the Enemy Act. *Day* v. *Micou*, 18 Wall. 156, 161; *In re Marcuard*, 20 Wall. 114, 115; *Burbank* v. *Conrad*, 96 U. S. 291, 293; *Conrad* v. *Waples*, 96 U. S. 279, 285.

Section 8 (a) of the Trading with the Enemy Act was not intended to enlarge the description contained in § 7 (c) of the property required to be transferred to the Custodian.

Even if the act should be construed as relating to all property which the Custodian after investigation may determine to be enemy property, yet, when he asks the aid of the court, and it appears upon the undisputed facts that he is not entitled as a matter of law to the relief he seeks, such relief should be denied. That a court of law will review the conclusion of an administrative officer upon admitted facts, and that such an officer cannot confer jurisdiction upon himself by his mistake as to the law, is settled by the authorities.

The amendment to § 7 (c) providing in substance that the sole remedy of any person having a claim to any property transferred to the Custodian shall be that provided by the terms of the act, refers to relief sought affirmatively by some person in relation to property which has passed into the actual or constructive possession of the Custodian. It is similar to the requirement that a receiver who has taken possession of property shall be sued only

in the court which appointed him. And the situation created by this amendment is not essentially different from that existing under our tax laws. *Clinkenbeard* v. *United States*, 21 Wall. 65.

Under any view the trustees are entitled to their day in court before they can be required to deliver the property from their possession to the Custodian.

*Mr. Emory R. Buckner*, with whom *Mr. Gerard C. Henderson* and *Mr. H. H. Nordlinger* were on the brief, for plaintiffs in error in Nos. 394 and 395:

The court may in this proceeding inquire whether the property was held for the benefit of an enemy, within the meaning of § 7 (c) of the Trading with the Enemy Act.

Enemy property may be of three kinds: (1) Property subject to capture at sea, (2) property subject to capture on land, and (3) property which cannot be captured at all, but which may with proper legislative authority be confiscated by appropriate legal proceedings. As for the occasion and effect of capture at sea and the necessity for subsequent judicial proceedings fully protecting the owner, see: *Lamar* v. *Browne*, 92 U. S. 187; *Manila Prize Cases*, 188 U. S. 254, 278; *Jecker* v. *Montgomery*, 13 How. 498, 516; Kent Comm., 13th ed., vol. 1, pp. 101, 102; *The Flad Oyen*, 1 C. Rob. 135; *Sawyer* v *Maine Ins. Co.*, 12 Massachusetts, 291, 295; *The Siren*, Fed. Cas. No. 12,911; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumner, 600; Moore's Digest, vol. 7, p. 630.

As to property on land, a sharp distinction is drawn between property subject to capture and property subject to confiscation. While the Constitution gives to Congress power to "make rules concerning captures on land and water," it is of course clear that without any legislation the military forces in the field have the power to capture any property in the hands of the hostile forces, or used or intended to be used for hostile purposes. *Kirk* v. *Lynd*,

106 U. S. 315, 317. There are only two requisites: (1) That the property be used or intended for hostile purposes, or peculiarly adapted to hostile use, and (2) that it be captured in the course of military activities. See *Mrs. Alexander's Cotton*, 2 Wall. 404; *Planters' Bank* v. *Union Bank*, 16 Wall. 483. The capture, "*flagrante bello*," of property used for hostile purposes has nothing to do with the ownership and involves no question upon which the courts can act. It rests upon military necessity. Hence, it is not surprising that with respect to movables the act of capture, immediately and without judicial proceedings, vests title in the government.

It follows as a corollary that no one, not even a loyal citizen or neutral, has redress in the courts for an unauthorized capture, unless Congress, as a matter of grace, grants a remedy. To permit suit against the military officers would hamper their conduct of military operations. *Lamar* v. *Browne*, *supra*. The government cannot be sued without its consent, and if there is no consent there is merely a wrong without a remedy.

In the Civil War, Congress granted a remedy under specific limitations. Abandoned Property Act of March 12, 1863, 12 Stat. 820; *United States* v. *Anderson*, 9 Wall. 56, 65; *United States* v. *Padelford*, 9 Wall. 531; Confiscation Act of August 6, 1861, 12 Stat. 319; *Kirk* v. *Lynd*, 106 U. S. 315; *Miller* v. *United States*, 11 Wall. 268.

In the case of property not taken *flagrante bello*, or by special legislative authority because used for hostile purposes, but property outside the field of hostilities, there is the right to confiscation because of its enemy ownership, under proper legislation. *Brown* v. *United States*, 8 Cranch, 109. But the Act of July 12, 1862, 12 Stat. 589, passed for this purpose, was sharply distinguished in the legal and constitutional theory upon which it was based, from either of the two acts previously considered. The Confiscation Act conferred on the Government a right

554. Argument for Plaintiffs in Error in Nos. 394, 395.

not previously existing. The Abandoned Property Act recognized an existing right in the Government, and conferred a remedy on certain persons injured thereby. "The one is penal, the other remedial; the one claims a right, the other concedes a privilege." *United States* v. *Anderson, supra.* The Abandoned Property Act covered only property in enemy territory, seized *flagrante bello* by the military authorities. *United States* v. *Padelford, supra; Planters' Bank* v. *Union Bank, supra.* The Confiscation Act covered only property in loyal States and did not authorize military seizure. *Planters' Bank* v. *Union Bank, supra.* The Abandoned Property Act recognized that title to hostile property captured by the military vested forthwith in the United States. The Confiscation Act recognized that property not captured by the military, and not affected by hostile use, could not be forfeited to the United States without legal proceedings. *United States* v. *Anderson, supra,* p. 66.

Equally significant is the distinction drawn by this court between the Confiscation Act of 1861 and the Confiscation Act of 1862. *Kirk* v. *Lynd, supra,* 319; *Bigelow* v. *Forrest,* 9 Wall. 339, 350; *United States* v. *Anderson, supra,* 67. When a military commander finds property used for hostile purposes he must act at once. He may seize the property and send it behind the lines; or he may destroy it on the spot. But where the only purpose is to cripple the enemy financially by confiscating his subjects' property, there is plenty of time for deliberate adjudication. There is no conceivable reason (aside from the natural impatience of executive officers with any judicial restraint upon their powers) why disputed questions of ownership should not be adjudicated, in an orderly way, before the seizure is complete. Custody of the property, throughout the proceedings, is in the court. Any decision may properly relate back to the date of capture. Every interest of the Government is fairly protected. And there

are preserved to the owners of property the inestimable benefits of due process of law.

The Trading with the Enemy Act should be examined in the light of these decisions.

The act as amended gives the Custodian more than a mere possessory right to enemy property seized by him. Immediately upon seizure, indeed upon mere requirement that the property be transferred, the Custodian acquires the right to sell, for any reason satisfactory to himself, and to deal with the property "as though he were the absolute owner thereof." Such a right is not reconcilable with any theory of provisional custody. It is not like the Confiscation Act of 1862. The provisional seizure authorized in that act was open to collateral attack, and the determination upon which it was made was not binding on the courts. *Day* v. *Micou*, 18 Wall. 156, 161.

Nor is there the slightest analogy between the right of seizure conferred on the Custodian and the rights of temporary possession conferred upon a naval commander by capture. The naval commander, like the military officer, must act at once, upon appearances; the Custodian is under no such necessity. Moreover, the naval commander's right to possession is qualified by an absolute duty (which may yield only to imperious military necessity), to submit his rights to a court at the earliest possible opportunity. If he does not, he may lose the ship, even though the original capture was rightful. The Custodian is under no such duty of vindicating his right to possession after the property has been seized. The absence of such a safeguard argues strongly against the intention of Congress to confer upon the Custodian a right to take possession free from review by the courts. The right in the claimant to institute a suit under § 9 is of slight value in comparison.

The Custodian's determination, therefore, cannot be conclusive. *United States* v. *Anderson, supra; Jecker* v.

*Montgomery, supra.* There is a generic difference between executive decisions made in the course of administration, which incidentally affect personal or property rights, and decisions made in proceedings whose only object is the confiscation of property because of the nationality or conduct of the owner. *Lawton* v. *Steele*, 152 U. S. 133, 140; *Rockwell* v. *Nearing*, 35 N. Y. 302; *Dunn* v. *Burleigh*, 62 Maine, 24; *Lowry* v. *Rainwater*, 70 Missouri, 152. And the Custodian, being authorized to seize only enemy property, exceeds his jurisdiction, and his decision in any event is reviewable by the courts, if the property is in truth non-enemy. See *Burfenning* v. *Chicago &c. Ry. Co.*, 163 U. S. 321, 323.

Cases under the Confiscation Act of 1862 afford a parallel so close as to be decisive upon this point. *Bigelow* v. *Forrest*, 9 Wall. 339, 351; *Day* v. *Micou*, 18 Wall. 156, 161, 162; *Conrad* v. *Waples*, 96 U. S. 279; *Burbank* v. *Conrad*, 96 U. S. 291; *Waples* v. *United States*, 110 U. S. 630; *Avegno* v. *Schmidt*, 113 U. S. 293; *Shields* v. *Schiff*, 124 U. S. 351. Furthermore, the administrative decision can be conclusive only upon a question of fact. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109, 110; *Gegiow* v. *Uhl*, 239 U. S. 3.

Having invoked the jurisdiction of the court, libelant must make out a case according to law. [Citing *Clinkenbeard* v. *United States*, 21 Wall. 65, and many other cases.]

The property libeled is not enemy property. Legal title to it is vested in American trustees, for the benefit of American creditors and policyholders. It is therefore not subject to seizure under the Trading with the Enemy Act.

The constitutional basis of the act, as well as the manifest absurdity and gross injustice of any other construction, make it clear that, as a matter of substantive law, the act was intended to vest in the Custodian no more than the interest of the enemy, and this is demonstrated by its legislative history.

The decisions of this court in our own Civil War establish to a demonstration that the only rights vested in the Custodian by the Trading with the Enemy Act are the rights belonging to the enemy. *Day* v. *Micou, supra; In re Marcuard,* 20 Wall. 114; *Burbank* v. *Conrad, supra; Conrad* v. *Waples, supra; Avegno* v. *Schmidt, supra; Risley* v. *Phenix Bank,* 83 N. Y. 318; affd. 111 U. S. 125. See also decisions under the British trading with the enemy act: *In re Ruben* [1915], 2 Ch. 313.

*Mr. Walter F. Taylor* for plaintiff in error in No. 396.

*Mr. Lucien H. Boggs,* Special Assistant to the Attorney General, and *Mr. Assistant Attorney General Spellacy,* with whom *The Solicitor General* and *Mr. Dean Hill Stanley,* Special Assistant to the Attorney General, were on the briefs, for defendant in error:

The only issue is the right to possession of the securities. Questions of title are not involved, and the demand of the Alien Property Custodian, made pursuant to determination after investigation, is conclusive herein.

The general plan of the act has no direct precedent, the nearest analogy in American or English legislative enactment being the captured and abandoned property acts of the Civil War period. 12 Stat. 820. In the past, captures of property on land have, in the main, followed the practice applicable to capture of prizes at sea; and acts have provided, not for the taking possession and holding of property subject to future disposition, but for immediate condemnation by appropriate judicial proceedings. Under that procedure the seizure is merely a preliminary by which the property is brought within the jurisdiction of some court for judicial determination of its status as lawful prize, and for condemnation if found so to be. In fact, until the present war, the tendency for several hundred years had been away from the practice of

capturing and confiscating property of the enemy found on land. The remarkable development of international trade, commerce and investments which had taken place during the half century preceding this war, and the development of international credits, made necessary a change in this practice, if Germany was to be deprived during this war of the power to utilize for purchases in neutral countries credits based upon her investments in the allied countries. These countries, therefore, particularly England, France, Russia, and Italy, all passed legislation by which some public official, holding powers analogous to those of the Alien Property Custodian, was authorized to secure possession of enemy property, and, under certain circumstances, to liquidate enemy investments. No permanent confiscation of enemy property was decreed by any of these countries, the ultimate disposition of the property seized being left for future action.

The determination of enemy ownership made pursuant to the provisions of § 7 (c) is conclusive in so far as the Custodian's right to possession is concerned; and demands for the possession of property made by the Custodian pursuant to this section must be complied with and thereafter judicial determination had with respect to claims of ownership, as provided by § 9.

This feature of the act, although in some quarters assailed as radical and contrary to all the principles of the common law, is well justified by precedent. Since almost the beginning of our Government, it has been the law that all property taken or detained under authority of any revenue law of the United States shall be irrepleviable, and subject only to the orders and decrees of the United States courts having jurisdiction thereof. Rev. Stats., § 934. The validity of this provision has been sustained in every decision in which it has been called into question. *Treat* v. *Staples*, Fed. Cas. No. 14,162; *Brice* v. *Elliott*, Fed. Cas. No. 1,854; *DeLima* v. *Bidwell*, 182 U. S. 1, 180.

Similar legislation with respect to money collected for customs duties in excess of the amount really due has also been upheld. *Cary* v. *Curtis*, 3 How. 236; *Bartlett* v. *Kane*, 16 How. 263; *Arnson* v. *Murphy*, 109 U. S. 238; and requiring a taxpayer to pay a disputed tax and sue to recover. *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Springer* v. *United States*, 102 U. S. 586; *Dodge* v. *Osborn*, 240 U. S. 118. Under the Abandoned Property Act of March 12, 1863, see *Haycraft* v. *United States*, 22 Wall. 81. See also *Barker* v. *Harvey*, 181 U. S. 481; *Botiller* v. *Dominguez*, 130 U. S. 238, 250; *Florida* v. *Furman*, 180 U. S. 402; *Moyer* v. *Peabody*, 212 U. S. 78; *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440.

While the remedy under § 9 remains, in contemplation of law there is no possibility that a person rightfully entitled to property seized by the Custodian can be materially injured or deprived of property without due process of law.

The decisions so far rendered upon the Trading with the Enemy Act support this contention. *Salamandra Ins. Co.* v. *New York Life Ins. & Trust Co.*, 254 Fed. Rep. 852; *American Exchange Bank* v. *Palmer*, 256 Fed. Rep. 680 (later in effect overruled in the same case); *Keppelmann* v. *Keppelmann*, 89 N. J. Eq. 390, reversed 108 Atl. Rep. 432; *Garvan* v. *$6,000 Bonds*, 265 Fed. Rep. 481; *Biesantz* v. *Royal Arcanum*, 175 N. Y. S. 46; *Kahn* v. *Garvan*, 263 Fed. Rep. 909; *Kohn* v. *Kohn*, 264 Fed. Rep. 253, and other cases in the lower courts, unreported.

The answer sets up no facts sufficient to justify any exception in this case to the proposition under discussion.

The fact that the Custodian has resorted to the courts for the enforcement of his demand does not alter the construction of the act with respect to his right of possession. It would be a strange perversion of the law to place a premium upon disobedience to the clear mandates of a war statute by holding that when litigation ensues the

person who had disobeyed the law had by such disobedience acquired greater rights than the person who had complied with its requirements.

The facts set forth in the answers confirm the determination of the Custodian and justify his demand. They establish, if true, that the securities libeled belonged to or were held for the Munich Re-Insurance Company within the purview of § 7 (c); that although policyholders and creditors of that company within the United States may have an interest in the nature of security therein, such interest is not within the scope of § 8 (a); and therefore that the Custodian is entitled to possession of these securities, leaving the protection of whatsoever rights these creditors and policyholders, or these claimants on their behalf, may have to the remedies provided by § 9.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are libels brought by the Alien Property Custodian under the Trading with the Enemy Act, October 6, 1917, c. 106, § 17, 40 Stat. 411, 425, to obtain possession of securities in the hands of the plaintiffs in error respectively as trustees. The libel in each case alleges that the Alien Property Custodian after investigation determined that a German insurance company named was an enemy not holding a license from the President, &c.; that certain specified securities belonged to it or were held for its benefit by the party now appearing as a plaintiff in error in that case; and that a demand for the property had been made but not complied with. The libellant prayed an order directing the marshal to seize the property and citing claimants of a right to possession to show cause why the same should not be delivered to him. The plaintiffs in error appeared as claimants in their several cases, denied that the funds were held for the benefit of an enemy, and set up the trust under which they held

them as required by the laws of Massachusetts or Connecticut for the security of American policyholders and creditors, with reasons for their right to retain the funds alleged in detail. The libellant moved for decrees for possession upon the pleadings which were granted by the District Court. The decrees were affirmed by the Circuit Court of Appeals, 265 Fed. Rep. 477; *ibid.*, 481. As the decision of the latter Court is not made final by the statute the cases have been brought on writ of error to this Court.

As is obvious from the statement of the pleadings the libels are brought upon the theory that these are purely possessory actions and that for the purposes of immediate possession the determination of the Enemy Property Custodian is conclusive, whether right or wrong. The claimants on the other hand set up substantive rights and seek to have it decided in these suits whether the funds are enemy property in fact and whether they have not the right to detain them. Strictly possessory actions still survive in the laws of some States and have been upheld, leaving the party claiming title to a subsequent suit. *Grant Timber & Manufacturing Co.* v. *Gray*, 236 U. S. 133. There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of mistake. As it can authorize a seizure *in pais* it can authorize one through the help of a Court. The only questions are whether it has done so as supposed by the libellant and if so whether the conditions imposed by the act have been performed.

If the Custodian was entitled to demand the delivery of the property in question it does not seem to need argument to show that the demand could be enforced by the District Courts under § 17 of the act, giving to those Courts jurisdiction to make all such orders and decrees as may

be necessary and proper to enforce the provisions of the act. The first question then is whether the Custodian had the right to make the demand. By § 5 the President may exercise any power or authority conferred by the act through such officers as he may direct. It is admitted that he has exercised the powers material to these cases through the Enemy Property Custodian and by the Act of November 4, 1918, c. 201, 40 Stat. 1020, the Custodian is given the right to seize. By § 7 (c), as originally enacted, "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of an enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian." We are to take it therefore that the President has "so required," and that a case is made out under § 17 unless we are to consider the defences interposed.

If we look no further than § 7 (c), it is plain that obedience to the statute requires an immediate transfer in any case within its terms without awaiting a resort to the Courts. The occasion of the duty is a demand after a determination by the President and it is hard to give much meaning to the words "which the President after investigation shall determine is so . . . held" unless the determination and demand call the duty into being. The condition "after investigation" additionally points to the intent to make his act decisive upon the point, as it is in other cases mentioned in § 7 (a). But it is said that the subject of the section is enemy property only and therefore that the determination cannot be final in its effect. *Day* v. *Micou*, 18 Wall. 156. And it is true that it is not final against the claimant's rights. Upon surrender the claimant may at once file a claim under § 9, if he satisfies the representa-

tive of the President may obtain a return, and, if he does not obtain it in sixty days after filing his application, or forthwith if he has given the required notice but filed no application to the President, may bring a suit to establish his rights in the District Court, in which case the property is to be retained by the Custodian until final decree. These provisions explain the initial words of § 7 (c) as saving the ultimate rights of the claimant while the determination of the President still may be given effect to carry out an immediate seizure for the security of the Government until the final decision upon the right. The reservation implies that mistakes may be made and assumes that the transfer will take place whether right or wrong.

The argument on the original words of the act in view of the manifest purpose seems to us to be strong, but it appears to us to be much strengthened by the amendments of later date. By the Act of November 4, 1918, c. 201, 40 Stat. 1020, § 7 (c) was amended among other things by adding after the requirements of transfer "or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act." This shows clearly enough the peremptory character of this first step. It cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand. *Clinkenbeard* v. *United States*, 21 Wall. 65, has no application. That was debt on a bond for a tax and turned on the right of the Government to the tax, not on possession. By a later paragraph "the sole relief and remedy of any person having any claim to any . . . property" transferred to the Custodian "or required so to be, or seized by him shall be that provided by the terms of this Act." The natural interpretation of this clause is that it refers to the remedies expressly provided, in this case by § 9; that property required to be transferred and property seized stand on the same footing, not that the resort by the Custodian

to the Courts instead of to force opens to the person who has declined to obey the order of the statute or who has prevented a seizure a right by implication to delay what the statute evidently means to accomplish at once.

To the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession—that the property is to be conveyed to him, and that by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, enlarging § 12, the Custodian "shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed," &c., to him, and is given the power to sell and manage the same as though he were absolute owner. All this may be conceded if no claim is filed. But this act did not repeal § 9, which is amended by the later Acts of July 11, 1919, c. 6, 41 Stat. 35, and of June 5, 1920, c. 241, 41 Stat. 977, and as we have said, provides for immediate claim and suit and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more.

*Decrees affirmed.*

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

# LA MOTTE ET AL. *v.* UNITED STATES.

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

No. 121. Submitted December 10, 1920.—Decided January 24, 1921.

1. As an incident of its guardianship over the Osage Indians, the United States may sue to enjoin the assertion of rights under leases of restricted allotments obtained from members of the tribe without conforming to applicable provisions of the statutes and valid administrative regulations, and to enjoin the negotiation of other such unlawful leases in the future. P. 575.
2. Under the Act of June 28, 1906, concerning the Osage Indians, § 7 of which gives members the right to lease their restricted allotments and provides that such leases "shall be subject only to the approval of the Secretary of the Interior," the Secretary is authorized not merely to approve or disapprove leases after execution, but to make necessary reasonable regulations prescribing in advance as conditions to approval of leases the mode in which they shall be executed and presented to him and the terms and conditions they shall contain for the protection of the Indian lessors. *Id.*
3. The authority of the Secretary to make such regulations is covered by § 12 of the act, declaring that all things necessary to carry the act into effect and not otherwise specifically provided for shall be done under his direction and authority; and without that section it would be implied. P. 576.
4. Section 7 of the act, in providing that such leases shall be subject "only" to the approval of the Secretary, distinguishes between leases by individuals, to be approved by the Secretary alone, and leases for the tribe, which, under § 3, need the sanction of the tribal council as well. *Id.*
5. Under § 7 of the act, construed with §§ 3 and 6 of the Act of April 18, 1912, the approval of the Secretary is requisite to the validity of leases of restricted lands of minor allottees or minor heirs, given by their guardians with the sanction of the local state courts in which the guardianships were pending. P. 577.
6. Under § 7, *supra*, leases of restricted land made by an Indian parent having a certificate of competency, or by a white parent not a

member of the tribe, on behalf of minor allottees or heirs, require the Secretary's approval. P. 578.

7. Land allotted in the right of a deceased member cannot be leased by his heirs without the Secretary's approval if they are members of the tribe and without certificates of competency. *Id.*

8. A devise of a direct or inherited restricted allotment by a will made pursuant to § 8 of the Act of 1912, *supra*, and approved by the Secretary of the Interior, operates as a conveyance of the land free of restrictions. So *held*, in view of the broad language of the section and its interpretation by Congress. *Id.*

9. Neither under the common law nor under the statutes of Oklahoma may a testator impose an indefinite restriction on the right of his devisee to alienate the land devised. P. 580.

10. Members of the Osage Tribe, though without certificates of competency, may lease, without the Secretary's approval, allotments which they have purchased after such allotments had become unrestricted, since there is nothing in the Acts of 1906 and 1912, *supra*, to reimpose restrictions once removed, or to subject to restrictions all lands, however acquired, which members without such certificates may own. *Id.*

11. Purchasers or lessees of unrestricted, undivided interests in Osage allotments should be enjoined from exerting control over the lands, to the exclusion of Indian co-tenants of restricted interests; but in this case the injunction was so broad as to prevent them from dealing with their own interests, and should be modified. *Id.*

256 Fed. Rep. 5, modified and affirmed.

THE case is stated in the opinion.

*Mr. T. J. Leahy* and *Mr. C. S. Macdonald* for appellants.

*Mr. Assistant Attorney General Nebeker* and *Mr. H. L. Underwood*, Special Assistant to the Attorney General, for the United States.

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

This is a suit by the United States to enjoin the defendants (appellants here) from asserting or exercising any

right under certain leases obtained from individual Osage Indians without the approval of the Secretary of the Interior, and from negotiating or obtaining other leases of the same class without conforming to statutory provisions and administrative regulations alleged to be applicable. The District Court granted the major part of the relief sought and denied the rest. On cross appeals the Circuit Court of Appeals enlarged the relief granted, but refused a part of what was denied by the District Court. 256 Fed. Rep. 5. The United States then acquiesced and the defendants took a further appeal to this court.

Prior to the Act of June 28, 1906, c. 3572, 34 Stat. 539, the lands to which the suit relates were tribal lands of the Osage Indians, and after that act were divided under its provisions among the members of the tribe, as were also the tribal funds. Each member received 160 acres designated as a homestead and approximately 500 acres designated as surplus lands. The tribal funds were divided by placing a *pro rata* share to the credit of each member or his heirs in the United States Treasury. Except as otherwise provided, the homestead is to be "inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee," the surplus lands are to be "inalienable for twenty-five years" and nontaxable for three years, and the funds as distributed are to be held in trust by the United States for twenty-five years. These periods do not all have a common point of beginning, but nothing turns on that here. The act contains express provision (§ 2, Seventh) that the Secretary of the Interior, in his discretion, upon the petition of any adult member, may issue to such member "a certificate of competency" authorizing him to sell and convey any of his surplus lands, if, upon investigation, he is found fully competent and capable of transacting his own business and caring for his own affairs, and that upon the issue of such certificate the surplus lands shall become subject to taxation and the mem-

ber shall have "the right to manage, control, and dispose of his or her lands [other than the homestead] the same as any citizen of the United States." The interest on the funds held in trust and also certain revenues and moneys from other sources (§ 4, First and Second) are to be paid quarterly to the members, except that in the case of minors payments are to be made to the parents, so long as the moneys are not misused or squandered, and where the parents are dead payments are to be made to legal guardians. Upon the death of a member his lands, moneys, and interests "descend" to his "legal heirs, according to the laws" of Oklahoma, with an exception not material here (§ 6). The leasing of allotted lands is specially dealt with as follows:

"Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided*, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further*, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Besides several provisions indicating that the act is to be executed under the supervision of the Secretary of the Interior, there is a concluding section declaring:

"Sec. 12. That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

An amendatory Act of April 18, 1912, c. 83, 37 Stat. 86, by its third section, subjects the property of deceased, orphan minor, insane and some other allottees to the jurisdiction of the county courts of Oklahoma in probate matters, but with the qualification, first, "that no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents," and, secondly, "that no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior." This amendatory act also contains a section dealing with disposals by will of which we shall speak presently.

In virtue of §§ 7 and 12 of the Act of 1906 the Secretary of the Interior adopted and promulgated regulations designating the mode in which leases of restricted lands for farming or grazing purposes should be executed and brought to his attention, indicating the terms and conditions which should be embodied in the leases for the protection of the Indian lessors, and informing intending lessors and lessees that where the regulations were not complied with the leases would not be approved.

The defendants (appellants here) are engaged in procuring leases of Osage lands for farming and grazing purposes, especially the latter. At times the leases are procured for their own benefit and at other times in the interest of cattlemen who desire and need large pastures. Where cattlemen are to be the beneficiaries, the defendants often take the leases in their own names and agree to protect the cattlemen against claims for trespass or damage. Some of the leases are for homesteads, others for surplus lands. Some are procured from adult allottees, or adult heirs of allottees, having certificates of competency, and some from like allottees or heirs where no such certificate has been issued. Others are obtained from parents or legal guardians of minor allottees or minor heirs, and still others from devisees holding under wills approved by the

Secretary of the Interior. Many of the leases are for restricted lands and yet are taken without conforming to the regulations and without obtaining the Secretary's approval. But notwithstanding this, the defendants proceed to use the lands for grazing purposes, or to enable others to do so, as if the leases were properly obtained. The failure to conform to the statute and the regulations is not accidental, but intentional and persistent.

The right of the United States to maintain the suit, although challenged by the defendants, is not debatable. The Osages have not been fully emancipated, but are still wards of the United States. The restrictions on the disposal and leasing of their allotments constitute an important part of the plan whereby they are being conducted from a state of tribal dependence to one of individual independence and responsibility; and outsiders, such as the defendants, are bound to respect the restrictions quite as much as are the allottees and their heirs. Authority to enforce them, like the power to impose them, is an incident of the guardianship of the United States. That relation and the obligations arising therefrom enable the United States to maintain the suit, notwithstanding it is without pecuniary interest in the relief sought. *Heckman* v. *United States*, 224 U. S. 413, 437–442; *United States* v. *New Orleans Pacific Ry. Co.*, 248 U. S. 507, 518; *United States* v. *Osage County*, 251 U. S. 128, 133. And see *Causey* v. *United States*, 240 U. S. 399, 402.

It is insistently urged that the regulations adopted and promulgated by the Secretary of the Interior are void and of no effect, and therefore that no right to relief can be predicated upon the defendants' disregard of them. The argument advanced is that the leasing provision says nothing about regulations; that the clause "subject *only* to the approval of the Secretary of the Interior" makes strongly against any regulations; that what is intended is to leave the Indian free to lease in his own way and on his

own terms, subject to the Secretary's approval or disapproval of the lease after it is given; and that the regulations, as adopted and promulgated, unwarrantably interfere with this freedom of action. In our opinion the insistence is not tenable, and for the following reasons:

The fact that the leasing provision says nothing about regulations is not important, for § 12 plainly enables the Secretary to employ any necessary means to carry that provision into effect. And, even without § 12, power to make regulations suitable to that end and consistent with the act would be implied. *United States* v. *Bailey*, 9 Pet. 238, 254–255.

The need for some regulations is obvious. The Osages among whom the lands were divided number about 2,000 and each member received an aggregate of approximately 660 acres, often in scattered tracts. All the lands were restricted in the beginning and most of them probably will remain so for several years. The leases are subjected to the Secretary's approval or disapproval to the end that the allottees and their heirs may be protected from their own improvidence and from overreaching by others. Both the lands and the Indians are remote from the seat of Government, and without some general and authoritative rules for the guidance of intending lessors and lessees it is certain that improvident and ill-advised leases would be given and multiplied in a way which would confuse and embarrass the Indians and greatly enhance the difficulties attending the Secretary's supervision.

We find nothing in the leasing provision indicating that no regulations are intended. True, the concluding proviso declares that "all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject *only* to the approval of the Secretary of the Interior." But this means, as the context and other parts of the act show, that leases given on restricted lands for the benefit of individual allottees, or

their heirs, and not for the benefit of the tribe, shall be subject to the approval of the Secretary of the Interior, but need not have the sanction of the tribal council. The word "only," on which the defendants place much emphasis, merely aids in marking an intended distinction between leases given for the benefit of individuals and those given for the benefit of the tribe, the latter, as § 3 shows, needing the sanction of the tribal council as well as the approval of the Secretary of the Interior.

Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval.

The regulations appear to be consistent with the statute, appropriate to its execution, and in themselves reasonable.

It follows from what has been said that in the main the action of both courts below was correct; that is to say, the defendants were properly enjoined from asserting or exercising any right under leases of restricted lands given by individual Osages without the approval of the Secretary of the Interior, and from negotiating or procuring other leases of the same class without conforming to the regulations prescribed.

Several questions relating to particular leases or lands remain to be noticed.

The defendants have leases of restricted lands, belonging to minor allottees or minor heirs, which were given by guardians with the sanction of the local courts in which the guardianships were pending, but were not approved by the Secretary of the Interior. The District Court ruled that the Secretary's approval was not required and the Circuit Court of Appeals held to the contrary. We take the latter

view. It is supported by the comprehensive words of the concluding proviso of the leasing provision and is strengthened by the second qualification found in § 3 of the amendatory Act of 1912, under which the local courts obtain probate jurisdiction over the property of such minors, and by the proviso in § 6 of that act relating to the partition of inherited lands.

Some of the defendants' leases of restricted lands were given by parents on behalf of minor allottees or minor heirs, —one of the parents having a certificate of competency and the other being of white blood and not a member of the tribe. Both courts ruled that the Secretary's approval was essential, and rightly so, as we think. In giving such leases the parents act for the child, not for themselves, and approval by the Secretary is required by reason of the child's status, as would be true if the lease were given by a guardian.

One of the leases held by the defendants is for lands which, in the course of the division, were selected and allotted in the right of a member then deceased. Under the statute the lands passed to the member's heirs and the lease was procured from them. They are members and without certificates of competency. The lease has not been approved by the Secretary. Both courts regarded the lands as restricted and the lease as requiring the Secretary's approval. That view has since been sustained by us in *Kenny* v. *Miles*, 250 U. S. 58.

Two leases, not approved by the Secretary, are for lands which passed to devisees under wills approved by that officer and duly admitted to probate. Both testators were adult members of the tribe, not mentally incompetent. One was an allottee and the other the sole heir of a deceased allottee. In their hands the lands were restricted. The defendants insist that under the approved wills the lands passed to the devisees freed from the restrictions. If so, the leases did not require the Secretary's approval. Both

courts held that the lands continued to be restricted. The question is not free from difficulty, but we think it must be ruled the other way. Strictly speaking a devisee takes under the will as an instrument of conveyance, and not by descent as an heir. This form of alienation was within the restriction imposed by the Act of 1906, *Taylor* v. *Parker*, 235 U. S. 42, but the amendatory Act of 1912 relaxed the restriction by declaring:

"Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, in accordance with the state law, if his will be approved by the Secretary. True, it does not say that a disposal by an approved will shall put an end to existing restrictions, but that is an admissible, if not the necessary, conclusion from its words. After its enactment the Secretary of the Interior construed it as having that meaning, and it was administered accordingly in that department up to the time of this suit. And that Congress intended it should have that meaning is at least inferable from a general act of the next session respecting wills by Indian allottees and their approval by the Secretary (c. 55, 37 Stat. 678); for that act, while providing that "the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period," expressly excepted the Osages from its reach. These matters apparently were not brought to the attention of the courts below. We regard them as of suffi-

cient weight to put the question at rest. In one of the wills the testator attempted to impose an indefinite restraint on the devisee's right to alienate the land; but, whether the attempt be tested by the common law or by the local statutes, it plainly was of no effect. We modify the decree by excluding this class of leases from the injunction.

Some of the leases are for lands which were purchased by the lessors after the lands in regular course had become unrestricted. Because the lessors were members of the tribe and without certificates of competency the Circuit Court of Appeals held that the leases were subject to the Secretary's approval. The District Court had held the other way. We think the District Court was right. There is no provision in the Act of 1906 or that of 1912 which reimposes restrictions after they have been removed, or which subjects to restrictions all lands, however acquired, which a member without a certificate of competency may own. See *McCurdy* v. *United States*, 246 U. S. 263. The restrictions reach such lands only as were allotted to the member or were inherited by him from another in whose hands they were restricted. Many members who are without certificates of competency have incomes and property which they are free to deal with as they choose. Some have purchased from white men having full title and an undoubted right to sell. See *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432. As to this class of leases we so modify the decree that the injunction shall not include them.

Through purchases or leases from heirs who have certificates of competency, or are white men and not members of the tribe, the defendants have come lawfully to own, or have leases of, undivided interests in particular lands the remaining interests in which continue to be restricted; and the defendants are using or exerting control over these lands to the exclusion of the Indian owners of the restricted interests. This use or control is colorably based on unapproved leases and other forms of consent given by

the other owners which are without legal sanction. Both courts rightly condemned these acts and portions of the injunction are directed against them. But as to some of the lands the injunction is open to an objection which the defendants urge against it, in that it prohibits them from "in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior." This prohibition would prevent them from selling their unrestricted interests, although that may not have been intended. It should be confined to the restricted undivided interests of the Indian owners; and we modify the decree accordingly.

Subject to the modifications here made the decree is affirmed.

*Decree modified and affirmed.*

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## THE JOURNAL AND TRIBUNE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 86. Argued November 10, 11, 1920.—Decided January 24, 1921.

1. The amount in controversy in a suit in the Court of Claims, for the purposes of an appeal to this court (Jud. Code, § 242) is determined from the petition as amended, and is the whole amount claimed without deduction for a partial defense. P. 584.
2. Where shipments of newspapers which their owner supposed were going by express at lower rates were in fact sent by mail, at higher but legal postal rates, through oversight of its agents, *held* that the United States was under no implied contract to reimburse it. P. 585.

53 Ct. Clms. 612, affirmed.

THE case is stated in the opinion.

*Mr. Benjamin Carter* for appellant.

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

Mr. Justice Pitney delivered the opinion of the court.

This suit was brought to recover moneys paid for the transportation of newspapers in the mails, upon the ground that they were paid under mistake of fact. The Court of Claims dismissed the petition. 53 Ct. Clms. 612.

The facts are as follows: Claimant was engaged in publishing at Knoxville, Tennessee, a daily morning newspaper having a circulation in eastern Tennessee and adjacent parts of Virginia and North Carolina. It sent out a considerable part of its daily issue, destined to points on the United States postal route between Bristol and Chattanooga or on other postal routes connecting therewith, upon a Southern Railway train leaving Knoxville at 4 a. m. daily. The mail was dispatched in wagons from the main post office at Knoxville to the office of a mail transfer clerk at the railway station, the wagons being operated by persons having contracts for the purpose with the United States postal authorities. For claimant's convenience, the post office authorities consented that its newspapers might be weighed, for mailing, at the railway station instead of at the post office; claimant furnishing scales for the purpose. The mail wagons, under an arrangement between claimant and the contractor, called at claimant's place of business and carried the newspapers thence to the station. For this service claimant compensated the contractor or the driver. While this arrangement was in effect, and in the fall of the year 1906, claimant concluded to transport a part of the newspapers by express instead of mail, the express charges upon large lots being one-half the postal charge for transporting newspapers as second-class mail. It notified the express company of this purpose, and requested the express agent to be on the watch. There-

after it caused certain copies of its newspaper intended for newsdealers—theretofore sent by mail—to be wrapped in bundles and labeled "Express or baggage," with directions for throwing them off the train at the several destinations. Other copies of the paper, intended for subscribers and for newsdealers, were placed, properly addressed, in mail sacks. The method of transporting the papers to the railway station continued as before, those intended to go by express and those contained in mail sacks being carried upon the same wagon and the driver instructed to take them to the railway station, which he did, depositing bundles and sacks on the platform where all mail was deposited. In the fall of 1906, and for about a year thereafter, the express company's office adjoined that of the mail transfer clerk, the doors of the two opening upon the same platform. Claimant's representative had notified the express company's agent of the purpose to send certain of the papers by express, and pursuant to that notice, until about October, 1908, a porter from the express agent's office went to the platform, took the bundles of newspapers labeled as mentioned, and caused them to be transported by express. During the same period the United States mail transfer clerk took the sacks of papers, ascertained the net weight, and caused them to be transported as second-class mail matter upon the same train. The net weight was reported to the postmaster, and he charged to claimant's account the proper second-class postage thereon. The system adopted was that claimant made a deposit with the postmaster to cover postage to accrue, and renewed the deposit from time to time as it was reduced by charges against it. During the year 1907 the express company's office was removed to a distance of about 150 yards from the transfer clerk's office, and about a year after this the express messenger or porter ceased calling at the mail platform for the bundles of papers labeled for transportation by express. Why he did so does

not definitely appear. Thereafter and down to March 31, 1913, claimant's newspapers, whether in sacks or in bundles, were alike treated as mail matter by the United States mail transfer clerk, who weighed them all and reported the net weights to the postmaster, and the bundles and sacks were transported to their respective destinations as second-class mail matter. The charge appropriate for such mail matter was regularly made against claimant's deposit and paid by claimant during the entire period. In the spring of 1913 claimant's business manager, having his attention called to the fact that the express bills were small, discovered upon investigation that the bundles of papers labeled "Express" were being transported as second-class mail matter; and the present suit followed. During the period referred to approximately 358,442 pounds of newspapers were transported by the United States mail that were labeled "Express" and had been intended by claimant to be transported by express. Claimant paid thereon the regular second-class mail matter rate of 1 cent per pound, aggregating $3,584.42. The transportation of the same matter by express would have cost claimant $1,792.21.

The Government insists that this court is without jurisdiction to entertain the appeal, upon the ground that the amount in controversy is less than the three thousand dollars specified in the applicable provision, § 242 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157). It is said that, viewing the claim in the most favorable light, and assuming a mistake was made entitling claimant to recover, the amount recoverable could not exceed the difference between what was paid as postage and what would have been paid had the newspapers been sent by express, that is to say $1,792.21. But, while in its original petition claimant prayed recovery for only the latter amount, in an amendment made by leave of the court it sought a return of the entire $3,584.42, on the

ground that there was a failure of consideration and it was entitled to a return of the whole sum as paid by mistake. The amount in controversy is to be determined by the amended rather than the original petition (*Washer* v. *Bullitt County*, 110 U. S. 558, 561–562); and since there is nothing in the nature of the case to prevent a recovery of the entire amount, were claimant's view of the law sustained, the amount claimed is the amount in controversy within the meaning of the jurisdictional act, notwithstanding there may be a defense to a part that would not extend to the entire claim. *Barry* v. *Edmunds*, 116 U. S. 550, 560–561; *Schunk* v. *Moline, etc., Co.*, 147 U. S. 500, 504–505; *Vance* v. *W. A. Vandercook Co.* (*No. 2*), 170 U. S. 468, 472; *Smithers* v. *Smith*, 204 U. S. 632, 642–643.

Upon the merits, we concur in the opinion of the Court of Claims that there is no legal basis for a recovery. The money was not paid under any such mistake as to render it inequitable for the United States to retain it. The bundles of newspapers actually were transported as mail by the Government, claimant being charged by the postmaster the amount fixed by law for the service rendered, and paying it without protest. No error is shown to have been made in the weights or in the rate charged. So far as any "mistake" appears from the findings it was that of claimant's agents in causing or permitting the papers to go by mail instead of by express as claimant intended. There is no finding attributing negligence or other fault to the mail transfer clerk; but if there were such and claimant's loss were attributable to it, this would not form a ground for recovery, since the United States has not consented to be sued in the Court of Claims for the torts of its officers or agents. *Bigby* v. *United States*, 188 U. S. 400, 404–407; *Hijo* v. *United States*, 194 U. S. 315, 323; *Tempel* v. *United States*, 248 U. S. 121, 129; *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, 57.

*Judgment affirmed.*

# JACKSON, RECEIVER OF THE FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C. *v.* SMITH ET AL.

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

No. 130. Argued December 17, 1920.—Decided January 24, 1921.

Persons who knowingly join with a receiver in purchasing real estate at a sale made by the trustee of a deed of trust mortgage securing a debt due the receivership, are jointly and severally liable to the receivership for all profits realized from the purchase. P. 588.
48 App. D. C. 565, reversed.

THE case is stated in the opinion.

*Mr. W. W. Millan* for petitioner.

*Mr. Louis Addison Dent* for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Smith and Wilson were sued in the Supreme Court of the District of Columbia by the receiver of the First Co-operative Building Association of Georgetown, D. C., for the amount of profits made by them and a former receiver of the Association in the purchase at a foreclosure sale and subsequent resale of land mortgaged to secure a note owned by the Association. The Supreme Court held them liable for the full amount of the profits, $743.68, with interest and costs. The Court of Appeals of the District reversed the decree and ordered that the bill be dismissed with costs. 48 App. D. C. 565. A writ of certiorari was granted by this court. 250 U. S. 655. The question before

us is whether the respondents are liable upon the following facts, and if so in what amount.

In 1908 the Supreme Court of the District appointed William E. Ambrose, a member of its bar, receiver of the First Co-operative Building Association of Georgetown, D. C. Among the assets of the Association so entrusted to the receiver was a note of Schwab for $2,700, secured by a mortgage deed of trust of land. The note being in default, Ambrose as receiver requested the trustee under the deed of trust to advertise the land for sale at public auction. The auction sale was held and a bid of $350 was made by Edwin L. Wilson, a member of the bar; but the trustee withdrew the property from sale because the bid was inadequate. Thereafter it was arranged between Wilson, Ambrose, and another lawyer, John Lewis Smith, who was counsel of the receiver, that the trustee should again advertise the property for sale; that Wilson should at the second sale use his own judgment whether to bid and, if so, what amount; and that, if he should happen to become the purchaser, the three should be jointly liable for the purchase price and any expenses incident to the purchase and should be jointly interested in the property purchased. The second sale was duly advertised. Smith and Ambrose were present, but gave no instructions or directions in regard to the sale either to the trustee or to his auctioneer. Wilson also attended and in the exercise of his own judgment and without previous conference with either Smith or Ambrose bid $491 and became the purchaser of the property. There was no evidence of any improper influence at the sale to prevent competition or to close competitive bidding or to bring about the sale to Wilson in preference to any one else. On the contrary it affirmatively appears that the sale was fairly conducted; that there was competitive bidding; and that the property was finally knocked down to the highest bidder.

Within a few days after the second sale Wilson and

Smith found, through the aid of real estate agents, a purchaser named Kite who was willing to pay $1,400 for the land. In order to convey a good title it was necessary to clear the land of tax liens and an outstanding tax title. This required $550—that is, $59 more than Wilson had bid. He voluntarily raised his bid by that amount. The land was conveyed by the trustee to Wilson and by Wilson to Kite, the deeds being recorded simultaneously when Kite paid the $1,400. Of this amount $652.32 was used to discharge taxes, tax liens and expenses of sale. The balance, $743.68, was divided equally between Wilson, Smith and Ambrose individually. Wilson had paid out in making the purchase no money of his own or theirs. The estate of which Ambrose was receiver got nothing, as the amount required to discharge the tax liens exceeded the amount bid by Wilson. Much later the facts were brought to the attention of the Supreme Court of the District. Ambrose resigned as receiver; Jackson was appointed in his stead; and as receiver brought this suit against Wilson and Smith to recover the profits which had been made by them and Ambrose.

Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker* v. *Schofield*, 243 U. S. 114; *Robertson* v. *Chapman*, 152 U. S. 673, 681. To this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. *J. H. Lane & Co.* v. *Maple Cotton Mill*, 232 Fed. Rep. 421. When he agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were, or might be, antagonistic to those of his trust. *Michoud* v. *Girod*, 4 How. 503, 552. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue. *Magruder* v. *Drury*,

235 U. S. 106, 119, 120. Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby. *Magruder* v. *Drury*, 235 U. S. 106. And others who knowingly join a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. *Emery* v. *Parrott*, 107 Massachusetts, 95, 103; *Zinc Carbonate Co.* v. *First National Bank*, 103 Wisconsin, 125, 134; *Lomita Land & Water Co.* v. *Robinson*, 154 California, 36. Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former although he had no other relation to the estate; the latter, without regard to the fact that he was also counsel for the receiver.

It is said that, at a sale made under a mortgage deed of trust, the duty to obtain the highest possible price rests not upon the note holder, but upon the trustee under the deed of trust, and that the creditor may bid at the sale or refrain from so doing, as he may see fit. *Richards* v. *Holmes*, 18 How. 143, 148; *Smith* v. *Black*, 115 U. S. 308, 315. This is true so far as it concerns the duty of the note holder to the debtor or other owner of the mortgaged property. But the many cases cited to this effect in Smith's and Wilson's behalf do not bear upon the question before us. Smith and Wilson are held liable for knowingly confederating with one who, as receiver of the estate of the note holder, owed a duty to it, and who put himself in a position where his personal interest conflicted with his duty.

We have considered the many other arguments urged in defense, but find in them nothing which should relieve Smith and Wilson from this liability. The decree of the Court of Appeals of the District of Columbia is reversed with costs and that of the Supreme Court of the District is affirmed.

*Reversed.*

# GEDDES ET AL. *v.* ANACONDA COPPER MINING COMPANY ET AL.

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

No. 25. Argued April 25, 28, 1919; restored to docket for reargument December 8, 1919; reargued March 3, 4, 1920.—Decided January 24, 1921.

1. The Anti-Trust Act of 1890 provided the exclusive remedies for the rights it created; and it did not enable a private party to set aside a sale because the purchaser bought in pursuance of a purpose to restrain interstate commerce in a commodity. P. 593.
2. Although the federal question which was the basis of the jurisdiction of the District Court became settled adversely to the plaintiff's contention by decisions of this court rendered in other cases after this suit was begun, the jurisdiction nevertheless continues to decide the other questions in the case. *Id.*
3. The evidence fails to show that defendants constituted in 1911, when this suit was begun, such a combination in monopoly or restraint of interstate or foreign trade in copper, within the terms of the Anti-Trust Act of 1890, as would justify granting an injunction to the plaintiff under § 16 of the Clayton Act. *Id.*
4. When the business of a purely private corporation has proved so unprofitable that there is no reasonable prospect of conducting it without loss, or when the corporation has not, and cannot obtain, the money necessary to pay its debts and to continue its business, even though it may not be insolvent in the commercial sense, the owners of a majority of the capital stock, exercising their discretion in good faith, may authorize a sale of all the corporate property for an adequate consideration, and distribute among the shareholders the net proceeds after payment of debts, even over the objection of the minority shareholders. P. 595.
5. Such a sale, if otherwise valid, will not be set aside upon the ground that the consideration is not money but shares in another corporation, if the shares received as the consideration have such an established value in a general market that the shareholder receiving them may convert them at once into a cash consideration adequate for his interest in the corporate property sold. P. 598.
6. Where the minority shareholders of a corporation seek to set aside a sale of its property to another corporation negotiated and made

by boards of directors having a member in common, the burden is upon those who would maintain the transaction to show its entire fairness and the adequacy of the consideration. P. 598.

7. Unless clearly erroneous, a concurrent finding of the District Court and the Circuit Court of Appeals that the consideration for the sale was inadequate will be accepted by this court. P. 600.
8. When it appears from the evidence in a suit to set aside a sale that the consideration was inadequate, the court is not justified in affirming the transaction merely because no greater amount is bid upon offering the property at public auction. *Id. Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, distinguished.
9. In a suit by minority shareholders to set aside for inadequacy of consideration a sale of all the property of their corporation to another corporation for a price paid in shares of the latter's stock, *held* that, under the pleadings, the court, having found the price inadequate, should have set the sale aside, and was without power to depart from the parties' contract by selling the property at auction for a cash price found adequate. P. 602.

245 Fed. Rep. 225, reversed.

THE case is stated in the opinion.

*Mr. T. J. Walsh*, with whom *Mr. C. B. Nolan* was on the briefs, for appellants.

*Mr. W. B. Rodgers*, with whom *Mr. L. O. Evans* was on the brief, for appellees.

MR. JUSTICE CLARKE delivered the opinion of the court.

With formalities, which are not assailed, a special meeting of the stockholders of the Alice Gold & Silver Mining Company, by resolution, ratified a contract in writing, theretofore authorized by the board of directors and executed by the officers of the company, for the sale to the Anaconda Copper Mining Company of all the property, of every kind, of the Alice Company. The officers were authorized and directed to execute such deeds and assignments as should be necessary to complete the sale, and a deed in form conveying all of the Alice property to the Anaconda Company was executed and delivered by

them on May 31, 1910. The consideration, thirty thousand shares of the capital stock of the Anaconda Company, was paid, and the purchaser took possession of the property.

Almost a year later, on May 8, 1911, at a special meeting of the stockholders of the Alice Company, a resolution was adopted, by the vote of more than two-thirds of the issued capital stock, in favor of dissolving the corporation, and the board of directors was authorized to take the court action prescribed by the laws of Utah, under which the company was organized, to accomplish such dissolution. Suit for this purpose was instituted in the appropriate state court.

On November 6, 1911, five months after the resolution in favor of dissolution was adopted, the bill in this case was filed by minority stockholders, praying for a decree, that the deed of May 31, 1910, be declared void, that it be delivered up and cancelled, that the consideration for it be returned to the Anaconda Company, and that all court proceedings to dissolve the Alice Company be stayed pending final decree in the case. The District Court approved and confirmed the sale, and its decree was affirmed by the Circuit Court of Appeals. The case is here on appeal.

The appellants claimed in the courts below and argue here that the sale was voidable for four reasons, viz:

(1) Because the purchase was made in pursuit of the purpose of the Amalgamated Copper Company and the Anaconda Company to monopolize the production of copper in the Butte Camp and to restrain the sale of it in interstate commerce and in the markets of the world, in violation of the Sherman Anti-Trust Act;

(2) Because the owners of less than all of the capital stock of the Alice Company could not authorize the sale of all of the property of the corporation over the protest of owners of a minority of the stock;

(3) Because the Alice Company could not lawfully acquire stock in another corporation; and

(4) Because the sale was negotiated by two boards of directors, with a common membership, and for an inadequate consideration.

We shall consider these claims in the order stated.

With respect to the first contention: It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit, such as we have here, would not now be entertained. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *United States* v. *Babcock*, 250 U. S. 328, 331. But the law has become thus settled since this suit was commenced in 1911, and the lower courts, upon the allegations in the bill, properly assumed jurisdiction and disposed of the case. *Busch* v. *Jones*, 184 U. S. 598, 599; *Clark* v. *Wooster*, 119 U. S. 322, 326.

It is, however, argued that § 16 of the Clayton Act (38 Stat. 730, 737), passed in 1914, was intended to, and does, modify the prior law, as declared by this court, and, since our decision will result in remanding the cause to the lower court, we shall consider its bearing upon the case.

The applicable provision of the Clayton Act is as follows:

"Sec. 16. That any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . ."

The contention of the appellants is that they will suffer irreparable loss by the sale of the Alice properties to the

Anaconda Company and that the sale should therefore be enjoined because that company and the Amalgamated Copper Company constitute a combination in restraint of interstate commerce within the prohibitions of the Sherman Anti-Trust Act.

The Amalgamated Copper Company, organized in 1899, is a holding company, and in 1911, when this case was commenced, it controlled by capital stock ownership the Anaconda Company which, in turn, held the title to the physical property which had been owned by other corporations, the union of which in this manner in the Amalgamated and Anaconda Companies constituted the alleged unlawful combination in restraint of interstate trade or commerce.

The evidence in the case renders it probable, that the promoters of the Amalgamated Company, when it was organized in 1899, entertained schemes or dreams of controlling the supply and price of copper in the interstate markets of this country and in the markets of the world, and that they did what they could to make that company rich and powerful.

But we are dealing with the Anaconda Company as it was in 1911 and with the extent to which its control of production and of prices appears in the record before us.

There is evidence that the total production of copper in the United States and Alaska, in 1899, was 581 million pounds, and of the Anaconda Company one million pounds, (probably an error, 100 million pounds being intended); but the total production of the world at that time is nowhere stated. The production in the United States in 1910, the year before the suit was brought, was 1,086 million pounds, and of this the Butte Camp, in which there were several mines other than those of defendants, produced 288 million pounds, or approximately 22 per cent. Here again there is no statement as to the total production of the world for that year.

Whatever the fact may have been, it is obvious that from such evidence as this it is not possible to determine to what, if to any substantial extent, the defendants restrained or monopolized the production of copper in the United States, much less in the world.

The evidence with respect to price control, although meagre, is more definite. The average price of copper in 1899, the year before the Amalgamated Copper Company was organized, was 17.6 per pound; in 1900 it was 16.1; in 1902, 11.6; in 1904, 12.8; in 1907, 20; in 1908, 13.2; in 1909, 12.98; 1912, 16.34; and in 1913, the last year for which the price is given, 15.26 cents.

It is obviously impossible to say that these fluctuating prices prove monopolistic control of the price of copper by the defendants.

No claim is made that the Anaconda Company restrained or restricted the production of copper, but so far as there is any evidence at all upon the subject it is to the effect that it maintained and perhaps increased the production in the Butte Camp.

Upon the case here made by the evidence it is impossible to conclude that the defendants constituted in 1911 such a combination, within the terms of the Anti-Trust Act, as would justify the granting of an injunction to the plaintiffs even under the provisions of § 16 of the Clayton Act, which we have quoted.

The decree of the lower courts as to this first claim must be affirmed.

The second contention is that the owners of less than all of the capital stock of the Alice Company could not authorize the sale of all of the property of the corporation over the protest of owners of a minority of the stock.

It is, of course, a general rule of law that, in the absence of special authority so to do, the owners of a majority of the stock of a corporation have not the power to authorize the directors to sell all of the property of the company and

thereby abandon the enterprise for which it was organized. But to this rule there is an exception, as well established as the rule itself, viz: that when, from any cause, the business of a corporation, not charged with duties to the public, has proved so unprofitable that there is no reasonable prospect of conducting the business in the future without loss, or when the corporation has not, and cannot obtain, the money necessary to pay its debts and to continue the business for which it was organized, even though it may not be insolvent in the commercial sense, the owners of a majority of the capital stock, in their judgment and discretion exercised in good faith, may authorize the sale of all of the property of the company for an adequate consideration, and distribute among the stockholders what remains of the proceeds after the payment of its debts, even over the objection of the owners of the minority of such stock. 3 Thompson on Corporations (2nd ed.), §§ 2424–2429; Noyes on Intercorporate Relations, § 111; 3 Cook on Corporations (7th ed.), § 670, p. 2170, note.

The rule that owners of a majority of the stock may not authorize the sale of all of the property of a going and not unprofitable company, rests upon the principle that exercise of such power would defeat the implied contract among the stockholders to pursue the purpose for which it was chartered. But this principle fails of application when a business, unsuccessful from whatever cause, is suspended without prospect of revival, and the law recognizes that under such conditions the majority stockholders have rights as well as the minority and that it should not require the former to remain powerless until the creeping paralysis of inactivity shall have destroyed the investment of both.

The case before us is a typical one for the application of this exception to the general rule. The Alice Company was organized in 1880, under the general incorporation laws of the then Territory of Utah, with authority

to buy, sell, lease, hold, own and operate mines, mining claims, etc., with many enumerated incidental powers. It acquired the mining properties in controversy in this case and conducted prosperously the mining chiefly of silver ores, until 1893, when its business ceased to be profitable and was suspended. Extensive shafts and underground workings were permitted to fill with water and for seventeen years before the sale the only business done by the company was leasing the upper workings of the old mines, and limited parts of the surface for shallow workings, to "tributors," who operated in such a small way that, although the expenses of the company, chiefly for caretakers, were very small, its income was less, so that when the sale was made an indebtedness of about $35,000 had accumulated. The stock of the company was non-assessable, it had no resources but the real estate which was sold to the Anaconda Company, and the evidence is clear that to re-open and operate the mines on its property, or to open new mines, would have been very expensive and the prospect of profitable operation of them wholly problematical. Although its properties had a large speculative value, and therefore the company cannot be said to have been insolvent, yet it must be accepted as established by the evidence that there was no reasonable prospect of the company's being able to profitably resume the mining business for which it was incorporated, and that the only way in which the stockholders could realize anything from their investment was by sale of its property. Under such circumstances as these the sale of all of the property of the company, if authorized, in good faith and for an adequate consideration, by the owners of a majority of the stock would be a valid sale, which could not be defeated or set aside by the minority stockholders.

It is next argued that the sale here in controversy is void for the reason that the Alice Company could

not lawfully acquire and hold title to the stock in the Anaconda Company in which the consideration for the sale was paid.

Here again the general rule is that while, under the circumstances of this case, a sale of all of the property of a corporation could be authorized by the owners of less than all of the stock for an adequate consideration, it must be for money only, for the reason that the minority stockholders may not lawfully be compelled to accept a change of investment made for them by others, or to elect between losing their interests or entering a new company.

But it has been suggested that this rule, also, should be subject to the exception that when stock which has an established market value is taken in exchange for corporation property, it should be treated as the equivalent of money and that a sale otherwise valid should be sustained. Noyes, Intercorporate Relations, § 120, and cases cited. We approve the soundness of such an exception. It would be a reproach to the law to invalidate a sale otherwise valid because not made for money, when it is made for stock which a stockholder receiving it may at once, in the New York or other general market, convert into an adequate cash consideration for what his holdings were in the corporate property.

In this case the trial judge determined without difficulty the market value of the stock received in payment for the Alice properties, and it is, of course, public knowledge that there was a wide and general market for Anaconda stock. This third contention of appellants must be denied.

Finally, it is argued that the sale of the Alice properties is void because negotiated and made by two boards of directors having a member in common and for an inadequate consideration.

John D. Ryan at the time of the sale was president and a director of the Alice Company; he was also a director

and general manager of the Anaconda Company and had been its president from 1903 to 1909; he was elected a director and president of the Amalgamated Copper Company in 1909, and had been a director of each of the subsidiary companies of the combination prior to that year. In 1905 he obtained an option on the majority of the Alice stock for $600,000, and carried it until it was purchased by the Butte Coalition Company, an Amalgamated subsidiary, of which he was a director, and that company voted a majority of the Alice stock in favor of the disputed sale.

The record shows beyond controversy that Ryan was the representative of the chief investors in the enterprise involved in this litigation, that he dominated the conduct of the practical administration of the affairs of the Amalgamated and Anaconda Companies, and that he very certainly was in control of the boards of directors of the companies which were parties to the sale of the Alice properties.

The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588; *Thomas* v. *Brownville, Ft. Kearney & Pacific R. R. Co.*, 109 U. S. 522; *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658; *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 90.

The District Court found that the price agreed to be paid by the Anaconda Company was not an adequate one and the Circuit Court of Appeals refused to disturb that finding. With this conclusion we agree, applying the settled rule of this court that in suits in equity a concurrent finding by two courts on a question of fact will be accepted unless it be clear that their conclusion is erroneous. *Baker* v. *Schofield*, 243 U. S. 114, 118, and cases cited.

But the District Court, notwithstanding this finding of inadequacy of price, did not set the sale aside but ordered that the Alice properties should be offered at public auction by a master and that if no bid should be received for an amount greater than that which the Anaconda Company had agreed to pay, the sale should be confirmed. The offer at public sale was made, no bid was received, and the private sale to the Anaconda Company was thereupon confirmed. The Circuit Court of Appeals, by a divided court, affirmed that decree.

Both courts relied upon *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, as authority for approving the sale for a price which they found was inadequate, after a greater amount could not be obtained for the property when offered at public sale, and in this we think they fell into error.

In the *Pewabic Case* the charter period of the corporation having expired, a majority of the stockholders favored the organization of a new company, with the same amount of capital stock as the old, to take over the whole of its property and that there should be allotted to the stockholders the same number of shares which they held in the old company or, in the alternative, that those who did not desire the stock should receive the value of their shares computed on a basis of $50,000 for the entire property of the company. The minority stockholders favored sale of the property and division of the proceeds.

On bill filed by the minority stockholders the Circuit Court enjoined the transfer to the new company and ordered a public sale of the property by a master, with a proviso in the decree that if no bids were offered in excess of $50,000 above the debts of the company then the proposal of the majority should be carried into effect under the direction of the master. Before the property was offered for sale each of the parties appealed to this court from separate parts of the decree. On that appeal, in addition to a question of accounting, not material here, this court considered and decided only the question, whether on such a winding up of the affairs of a corporation the majority of the stockholders could lawfully compel the minority to either take stock in a new company or accept for their stock a value to be fixed by the majority. No mention is made in the opinion of the court of the alternative character of the order of sale and, although it was subsequently shown that the price proposed was an inadequate one, there had not been any finding by the lower court that such was the fact when the case was decided here. It is probable that there was no objection to this feature of the decree. The minority stockholders, praying, as they were, for a public sale, for obvious reasons would not object to it, and the contention of the majority was that no sale at all should be ordered but that their reorganization plan should be adopted. The decree of the Circuit Court that the property should be sold at public sale was confirmed without any reference being made to the action ordered if the upset price should not be obtained and we must conclude that that part of the decree was not considered by this court.

As an original proposition, we cannot think that the amount offered for property at a public sale for cash, is such a measure of its value that the failure to obtain a bid at such sale for more should be accepted by courts as a sufficient reason for affirming a sale for a price which they

found, on other evidence, to be inadequate. In business life forced sales for cash are such a last resort for obtaining money that a sale "under the hammer" is synonymous with a sale at a sacrifice and prices obtained at such sales have usually been rejected by courts when tendered as evidence of value.

In this case, from evidence as to the character of the Alice properties, their location and surroundings, and from the opinions of experts, the trial court concluded that the price paid for them was inadequate, and we cannot doubt that from like or other evidence a more trustworthy conclusion could be obtained as to what their value was than would be derived from an offer at a public sale for cash.

To this it must be added that the resolutions of the Alice Company to sell and of the Anaconda Company to purchase were for a price named to be paid and received in designated stock. Neither contemplated a public offering of the properties and that a sale should be made at another price, greater than an amount decreed by the court, if it should be offered. Under the pleadings the court had power to confirm the sale if it was found to have been lawfully made, but only upon the terms on which the parties had contracted to make it and when the price was found to be inadequate, a decree should have been entered vacating and setting it aside, as prayed for by the appellants.

It results that the decree of the Circuit Court of Appeals must be reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.

*Reversed and remanded.*

MR. JUSTICE MCREYNOLDS concurs in the result.

# STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER.

IN EQUITY.

No. 23, Original. Orders entered January 24, 1921.

The motion of the Sinclair Oil and Gas Company, filed herein on December 20, 1920, for an order to require Frederic A. Delano, Esq., Receiver, to refund to it one-sixteenth (1/16) of the proceeds of the oil produced from certain premises in said motion described and heretofore deposited with said Receiver pursuant to the order of this Court, together with the interest collected thereon by said Receiver, and to require said Receiver to surrender and pay to said Sinclair Oil and Gas Company one-sixteenth (1/16) of the oil or the proceeds thereof delivered to said Receiver since the fifteenth day of October, 1920, is hereby denied, without prejudice.

The petition of the Oklahoma Petroleum and Gasoline Company, filed herein on December 20, 1920, for an order requiring Frederic A. Delano, Esq., Receiver, to file a statement of expenses incurred by him from May 16, 1920, to July 1, 1920, in operating certain wells designated in said petition, and requiring said Receiver to pay to said company the proceeds of one-sixteenth (1/16) of the oil produced from said wells from April 1, 1920, to November 15, 1920, and the interest collected by said Receiver upon said proceeds, and requiring said Receiver to refund to said company one-third (1/3) of the three-sixteenths (3/16) of the proceeds of the oil from said wells paid to said Receiver since November 15, 1920, and that said company be not required hereafter to pay to said Receiver more than two-sixteenths (2/16)

of the oil and gas produced from said wells, and for other relief, is hereby denied, without prejudice.

The motion of C. J. Benson, William Murdock, and James R. Armstrong, filed herein December 20, 1920, for an order requiring Frederic A. Delano, Esq., Receiver, to file an inventory of certain material and equipment purchased by him and paid for out of the proceeds of the oil produced by him from certain premises in said motion described, and to account for the value thereof; and requiring said Receiver to file forthwith an itemized statement of moneys charged by him against certain wells and a statement of all sums of money realized by him from certain wells, and for other relief, as in said motion specified, is hereby denied, without prejudice.

Upon consideration of the motion of Southwest Petroleum Company, filed herein January 3, 1921, for an order directing Frederic A. Delano, Esq., Receiver herein, to return to said company pursuant to the order of June 7, 1920, a certain well known as Receiver's well No. One hundred and eighty (180), together with the land appurtenant thereto and the structures, equipment, and material pertaining to said well, and the response of the Receiver to said motion filed January 5, 1921, and the response of the United States filed January 22, 1921, It is ordered that said Receiver do return to said Southwest Petroleum Company said well No. One hundred and eighty (180), which lies south of the south edge of the sand bed of the Red River as it was on the first day of April, 1920 (marked generally by the border line of vegetation along the edge of the flood plain), together with the land appurtenant thereto lying to the south of the south edge of the sand bed of said river, and the structures, equipment, and material pertaining to said well, and the net proceeds of the production thereof that have

come to the hands of said Receiver, less operating expenses and reservations, upon terms that said Southwest Petroleum Company comply with the provisions contained in the order of this Court made June 7, 1920, respecting the return of certain lands lying south of the south edge of the sand bed of said river which were on the first day of April, 1920, in the possession of persons claiming under patents from the State of Texas, and not included in the river bed lands as in said order defined.

## DECISIONS PER CURIAM, FROM OCTOBER 4, 1920, TO AND INCLUDING JANUARY 24, 1921, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 345. NORTHERN TRUST COMPANY ET AL., TRUSTEES, ETC. *v.* ADOLPH H. EILERS ET AL. Error to the District Court of the United States for the District of Oregon. Motion to dismiss submitted October 5, 1920. Decided October 11, 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. John Taylor Booz* for plaintiffs in error. *Mr. Ralph R. Duniway* for defendants in error.

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No. 426. VOGT BROTHERS MANUFACTURING COMPANY *v.* ELLICOTT MACHINE CORPORATION. Petition for writ of error to the Circuit Court of Appeals for the Sixth Circuit. Petition submitted October 5, 1920. Decided October 11, 1920. *Per Curiam.* The petition for writ of error is denied. See § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. Petition for a writ of certiorari and for a writ of mandamus denied. *Mr. Helm Bruce* and *Mr. Alex. G. Barret* for petitioner. *Mr. E. P. Humphrey, Mr. James Piper, Mr. A. P. Humphrey* and *Mr. William W. Crawford* for respondent.

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No. —, Original. *Ex parte:* IN THE MATTER OF THOMAS WELSH, PETITIONER. Submitted October 5, 1920. De-

cided October 11, 1920. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Martin Conboy* for petitioner.

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No. 192. MARY L. GREER CONKLIN *v.* GEORGE H. CONKLIN ET AL. Appeal from the District Court of the United States for the Southern District of Georgia. Argued October 12, 1920. Decided October 18, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Goodrich* v. *Ferris,* 214 U. S. 71, 79; *United Surety Co.* v. *American Fruit Co.,* 238 U. S. 140, 142; *Sugarman v. United States,* 249 U. S. 182, 184. *Mary L. Greer Conklin* pro se. *Mr. William M. Howard,* with whom *Mr. Jos. B. Cumming, Mr. J. C. C. Black, Mr. William H. Barrett, Mr. Bryan Cumming, Mr. C. Henry Cohen* and *Mr. W. G. Brantley* were on the brief, for appellees.

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No. 353. MARY L. GREER CONKLIN *v.* AUGUSTA CHRONICLE PUBLISHING COMPANY. Appeal from the District Court of the United States for the Southern District of Georgia. Argued October 12, 1920. Decided October 18, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Goodrich* v. *Ferris,* 214 U. S. 71, 79; *United Surety Co.* v. *American Fruit Co.* 238 U. S. 140, 142; *Sugarman* v. *United States,* 249 U. S. 182, 184. *Mary L. Greer Conklin* pro se. *Mr. Benjamin Pierce,* with whom *Mr. William H. Barrett* was on the brief, for appellee.

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No. —, Original. *Ex parte:* IN THE MATTER OF UNION TOOL COMPANY, PETITIONER. Submitted October 5, 1920.

Decided October 18, 1920. Motion for leave to file petition for a writ of mandamus denied. *Mr. Melville Church, Mr. A. V. Andrews, Mr. Frederick S. Lyon* and *Mr. William K. White* for petitioner.

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No. 23, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS. Motion for leave to intervene submitted October 11, 1920. Order entered October 18, 1920.

ORDER. The motion of E. Everett Rowell for leave to intervene is granted, but with the restriction that such intervention shall not delay the approaching hearing on general questions in the cause and that as respects that hearing this intervener must rely upon the evidence already taken and reported to the court. Other parties to the cause are granted ten days within which to answer the petition of this intervener.

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No. 28. FRANKLIN SHAW ET AL. *v.* JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR. Appeal from the Court of Appeals of the District of Columbia. Motion to dismiss or affirm submitted October 25, 1920. Decided November 8, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445; *Taylor* v. *Taft*, 203 U. S. 461. *Mr. Charles A. Towne, Mr. Duane E. Fox* and *Mr. Frank B. Fox* for appellants. *The Solicitor General* for appellee.

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No. 57. POSTAL TELEGRAPH-CABLE COMPANY *v.* J. L. DICKERSON. On writ of certiorari to the Supreme Court of the State of Mississippi. Argued October 21, 1920. Decided November 8, 1920. *Per Curiam.* Reversed upon

authority of *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27; *Western Union Telegraph Co.* v. *Boegli*, 251 U. S. 315. *Mr. W. W. Millan*, with whom *Mr. James N. Flowers* and *Mr. Ellis B. Cooper* were on the brief, for petitioner. *Mr. William D. Anderson*, for respondent, submitted.

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No. 60. MIDLAND LINSEED COMPANY *v.* AMERICAN LIQUID FIREPROOFING COMPANY ET AL. Error to the Supreme Court of the State of Iowa. Argued October 21, 1920. Decided November 8, 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. Denis M. Kelleher* for plaintiff in error. *Mr. Fred P. Carr*, for defendants in error, submitted.

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No. 73. JANE FIELD *v.* UNITED STATES. Appeal from the Court of Claims. Argued October 22, 1920. Decided November 8, 1920. *Per Curiam.* Affirmed upon the authority of *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351. *Mr. William W. Scott* for appellant. *Mr. Assistant Attorney General Davis* for the United States.

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No. 217. AUGLAIZE BOX BOARD COMPANY *v.* BESSIE HINTON, ETC., ET AL. Error to the Supreme Court of the State of Ohio. Motion to dismiss or affirm submitted October 25, 1920. Decided November 8, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U.

S. 300, 303; *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird*, 248 U. S. 268, 271. (2) *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher*, 248 U. S. 359, 362; *Berkman* v. *United States*, 250 U. S. 114, 118. *Mr. Earl H. Turner* for plaintiff in error. *Mr. J. H. Goeke*, *Mr. T. T. Ansberry* and *Mr. George T. Farrell* for defendants in error.

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No. 306. Sheldon Dole Leman et al., Excutors, etc. *v.* Sidney C. Eastman, Trustee, etc., et al. Error to the Supreme Court of the State of Illinois. Motions to dismiss submitted October 11, 1920. Decided November 8, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Reetz* v. *Michigan*, 188 U. S. 505, 508; *United States* v. *Heinze*, 218 U. S. 532, 545–546; *Lott* v. *Pittman*, 243 U. S. 588, 591; *Ex parte Abdu*, 247 U. S. 27, 30. (2) *Castillo* v. *McConnico*, 168 U. S. 674, 683; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *McDonald* v. *Oregon Railroad & Navigation Co.*, 233 U. S. 665, 669–670; *Gasquet* v. *Lapeyre*, 242 U. S. 367, 369–370. *Mr. Henry W. Leman* for plaintiffs in error. *Mr. Carl V. Wisner*, for Eastman, defendant in error. *Mr. Salmon O. Levinson*, *Mr. Benjamin V. Becker*, *Mr. Irwin T. Gilbruth* and *Mr. John P. Barnes*, for Northern Trust Company, defendant in error.

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No. 80. Jesse O. Starr et al. *v.* State of New Mexico. Error to the Supreme Court of the State of New Mexico. Argued November 9, 1920. Decided November 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530; *Hull* v. *Burr*, 234 U. S. 712, 720; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Norton* v. *Whiteside*, 239 U. S.

144, 147. *Mr. H. B. Holt* with whom *Mr. Frank Herron* and *Mr. W. A. Sutherland* were on the brief, for plaintiffs in error. *Mr. Harry S. Bowman*, for defendant in error, submitted. *Mr. O. O. Askren* was also on the brief.

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No. 81. STATE OF LOUISIANA EX REL. THOMAS J. DUGGAN, ETC. *v.* A. W. CRANDELL, REGISTER OF THE STATE LAND OFFICE. Error to the Supreme Court of the State of Louisiana. Argued November 9, 1920. Decided November 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530; *Hull* v. *Burr*, 234 U. S. 712, 720; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Norton* v. *Whiteside*, 239 U. S. 144, 147. (2) *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 470; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 303; *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird*, 248 U. S. 268, 271. *Mr. Henry H. Glassie*, with whom *Mr. W. J. Hennessy, Mr. W. O. Hart* and *Mr. Duane E. Fox* were on the brief, for plaintiff in error. *Mr. Paul A. Sompayrac*, with whom *Mr. L. E. Hall* was on the brief, for defendant in error.

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No. 83. BENJAMIN BOND *v.* AUGUSTA E. WALTERS. Error to the Court of Appeals for the First Appellate District, Division One, State of California. Submitted November 8, 1920. Decided November 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. Daniel N. Clark* and *Mr. Harry A. Hegarty* for plaintiff in error. *Mr. John W. Preston* and *Mr. John C. Brooke* for defendant in error.

No. 349. W. H. HUMPHREYS, AS ADMINISTRATOR, ETC. *v.* BATES & ROGERS CONSTRUCTION COMPANY. Error to the Court of Appeals of the State of Kentucky. Motion to affirm or place on the summary docket submitted November 8, 1920. Decided November 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Gaar Scott & Co.* v. *Shannon*, 223 U. S. 468, 470; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 303; *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird*, 248 U. S. 268, 271 (and see *Northern Pacific Ry. Co.* v. *Meese*, 239 U. S. 614, 619). (2) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk, &c. Ry. Co.*, 228 U. S. 596, 600; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618, 621; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20, 24. (3) *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 198; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 234; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 163; *Arizona Employers' Liability Cases*, 250 U. S. 400. (4) *Palmer* v. *Ohio*, 248 U. S. 32, 34. *Mr. Alan D. Cole* for plaintiff in error. *Mr. Edwin A. Swingle, Mr. E. L. Worthington* and *Mr. LeWright Browning* for defendant in error.

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No. 146. FRANK R. LOPEZ v. FREDERICK C. HOWE, AS COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK. Appeal from the Circuit Court of Appeals for the Second Circuit. Motion to dismiss submitted November 19, 1920. Decided November 22, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Kurtz* v. *Moffitt*, 115 U. S. 487, 498; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Cross* v. *Burke*, 146 U. S. 82, 88; *Whitney* v. *Dick*, 202 U. S. 132, 135; *Horn* v. *Mitchell*, 243 U. S. 247. Petition for writ of certiorari herein denied.

*Mr. Charles Recht* for appellant. *The Solicitor General, Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for appellee.

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No. 98. CITY OF NEWPORT *v.* HOWARD HECKERMAN ET AL., ETC. Appeal from the District Court of the United States for the Eastern District of Kentucky. Submitted November 18, 1920. Decided November 22, 1920. *Per Curiam.* Reversed with costs and remanded for further proceedings, upon the authority of *Wagner* v. *Covington*, 251 U. S. 95. *Mr. Brent Spence* for appellant. No appearance for appellees.

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No. 502. HUGH REILLY *v.* ROBERT SHIPMAN ET AL., ETC. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted November 8, 1920. Decided November 22, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Shulthis* v. *McDougal*, 225 U. S. 561, 568; *Hull* v. *Burr*, 234 U. S. 712, 720; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 302; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444. (2) *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530; *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575, 577. *Mr. Frank Faircloth* and *Mr. Harry L. Patton* for plaintiff in error. *Mr. Guy Mason, Mr. W. W. Spalding, Mr. S. B. Davis, Jr.*, and *Mr. E. R. Wright* for defendants in error.

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No. 61. ADA C. MONGRAIN *v.* W. H. AARON ET AL. Error to the Supreme Court of the State of Oklahoma. Sub-

mitted October 21, 1920. Decided December 6, 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. Preston A. Shinn* for plaintiff in error. *Mr. Nathan B. Williams* and *Mr. George B. Denison* for defendants in error.

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No. 197. Louis Wunder *v.* United States. Error to the District Court of the United States for the District of Maryland. Motion to dismiss or affirm submitted November 22, 1920. Decided December 6, 1920. *Per Curiam.* Affirmed upon the authority of *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Ruppert* v. *Caffey*, 251 U. S. 264. *Mr. George Louis Eppler* and *Mr. Fuller Barnard, Jr.*, for plaintiff in error. *The Solicitor General* for the United States.

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No. 23, Original. State of Oklahoma *v.* State of Texas. December 6, 1920. Order entered making allowances to counsel and to the receiver.

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No. 115. Isadore Workin et al. *v.* United States. Error to the Circuit Court of Appeals for the Second Circuit. Submitted December 9, 1920. Decided December 13, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Macfadden* v. *United States*, 213 U. S. 288. And see *Boise Water Co.* v. *Boise City*, 230 U. S. 98, 100; *Chott* v. *Ewing*, 237 U. S. 197; *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53, 60–61. *Mr. Lawrence B. Cohen* and *Mr. I. Maurice Wormser* for plaintiffs in error. *The Solicitor General* for the United States.

No. 140. DAVID LAMAR ET AL. *v.* UNITED STATES. Error to the Circuit Court of Appeals for the Second Circuit. Motion to dismiss submitted December 6, 1920. Decided December 13, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Macfadden* v. *United States*, 213 U. S. 288. And see *Boise Water Co.* v. *Boise City*, 230 U. S. 98, 100; *Chott* v. *Ewing*, 237 U. S. 197; *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53, 60–61. *Mr. Elijah N. Zoline* for plaintiffs in error. *The Solicitor General* and *Mr. Henry S. Mitchell* for the United States.

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No. 164. TRUMAN A. KETCHUM *v.* PLEASANT VALLEY COAL COMPANY ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted December 6, 1920. Decided December 13, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Shulthis* v. *McDougal*, 225 U. S. 561, 568; *Hull* v. *Burr*, 234 U. S. 712, 720; *L. & N. R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 302; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444. (2) *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530; *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575, 577, 578; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Mr. E. A. Walton* and *Mr. Charles C. Dey* for appellant. *Mr. William W. Ray* for appellees.

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No. 232. BENJAMIN HOROWITZ ET AL. *v.* UNITED STATES. Error to the Circuit Court of Appeals for the Second Circuit. Motion to dismiss submitted December 6, 1920. Decided December 13, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Mac-*

*fadden* v. *United States*, 213 U. S. 288. And see *Boise Water Co.* v. *Boise City*, 230 U. S. 98, 100; *Chott* v. *Ewing*, 237 U. S. 197; *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53, 60–61. *Mr. Elijah N. Zoline* and *Mr. John J. Fitzgerald* for plaintiffs in error. *The Solicitor General* for the United States.

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No. 1. UNITED STATES *v.* LEHIGH VALLEY RAILROAD COMPANY ET AL. Appeal from the District Court of the United States for the Southern District of New York. Motion to amend decree submitted December 16, 1920. Decided December 20, 1920. Motion to modify the decree of this court denied. *The Solicitor General* for the United States. *Mr. Edgar H. Boles* for appellees. See *ante*, 255.

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No. 301. NEW ORLEANS DRY DOCK & SHIPBUILDING COMPANY *v.* JOHN A. S. GRAY. Error to the Supreme Court of the State of Louisiana. Motion to dismiss submitted December 13, 1920. Decided January 3, 1921. *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. Frederic D. McKenney* and *Mr. John S. Flannery* for plaintiff in error. *Mr. Percy S. Benedict* for defendant in error.

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No. 132. HENRY RALPH ET AL. *v.* HARRY H. HOWARTH, ADMINISTRATOR, ETC. Error to the Supreme Court of the State of Nebraska. Argued January 13, 1921. Decided January 17, 1921. *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; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1. *Mr. Byron G. Burbank* for plaintiffs in error. *Mr. Otto H. Zacek* for defendant in error.

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No. 135. UNITED STATES EX REL. C. E. SYKES *v.* JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR. Error to the Court of Appeals of the District of Columbia. Argued January 13, 14, 1921. Decided January 17, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon authority of subdivision 5 of § 250 of the Judicial Code; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445. *Mr. Francis W. Clements* for plaintiff in error. *Mr. Leslie C. Garnett* and *Mr. H. L. Underwood* for defendant in error.

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No. 137. FITCH, CORNELL & COMPANY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. Error to the Supreme Court of the State of New York. Argued January 14, 1921. Decided January 17, 1921. *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; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1. *Mr. Harold G. Aron*, with whom *Mr. Henry M. Wise* was on the brief, for plaintiff in error. *Mr. Gardiner Lathrop* and *Mr. S. T. Bledsoe*, for defendant in error, submitted.

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No. 168. LOUIS H. DENEE *v.* PETER MORRISON. Error to the Supreme Court of the State of Washington. Submitted January 3, 1921. Decided January 17, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the au-

thority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1. *Mr. Fred B. Morrill* for plaintiff in error. *Mr. Reese H. Voorhees* and *Mr. F. T. Post* for defendant in error.

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No. —, Original. *Ex parte:* In the Matter of The City of Dallas, Petitioner. Submitted January 11, 1921. Decided January 17, 1921. Motion for leave to file a petition for a writ of mandamus herein denied. *Mr. Francis Marion Etheridge* for petitioner.

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No. —, Original. *Ex parte:* In the Matter of Hussein Lutfi Bey, Master of the Turkish Government Steamship *Gul Djemal*, Petitioner. Submitted January 14, 1921. Decided January 17, 1921. Motion for leave to file a petition for writs of prohibition and / or mandamus herein denied. *Mr. John M. Woolsey* for petitioner. Suggestions of the Spanish Ambassador on behalf of the Turkish or Ottoman Government submitted by *Mr. Frank J. McConnell.*

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No. 145. Charles S. Sickel *v.* Commonwealth of Virginia. Error to the Supreme Court of Appeals of the State of Virginia. Argued January 17, 1921. Decided January 24, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon authority of *Murdock* v. *Memphis*, 20 Wall. 590; *Ross* v. *Oregon*, 227 U. S. 150, 164; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 610; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164. *Mr. David H. Leake* and *Mr. Walter Leake*, for plaintiff

in error, submitted. *Mr. J. D. Hank, Jr.*, with whom *Mr. John R. Saunders* was on the brief, for defendant in error.

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No. 150. LOUIS F. NAGEL *v.* STATE OF IOWA. Error to the Supreme Court of the State of Iowa. Submitted January 18, 1921. Decided January 24, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1. *Mr. W. D. Milligan* for plaintiff in error. *Mr. Horace M. Havner* and *Mr. Freeman C. Davidson* for defendant in error.

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No. 160. MAGGIE HARJO *v.* W. A. KUNKLE ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Argued January 20, 1921. Decided January 24, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon authority of *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583; *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142; *Sugarman* v. *United States*, 249 U. S. 182, 184; *Berkman* v. *United States*, 250 U. S. 114, 118; *Piedmont Power & Light Co.* v. *Graham*, 253 U. S. 193. *Mr. Lewis C. Lawson* for appellant. *Mr. Preston C. West* and *Mr. A. A. Davidson*, for appellees, submitted.

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No. 163. GREAT NORTHERN RAILWAY COMPANY *v.* CITY OF MINNEAPOLIS. Error to the Supreme Court of the State of Minnesota. Argued January 20, 1921. De-

cided January 24, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, §2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1. *Mr. E. C. Lindley,* with whom *Mr. M. L. Countryman* was on the brief, for plaintiff in error. *Mr. Richard S. Wiggin,* with whom *Mr. Charles D. Gould* was on the brief, for defendant in error.

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No. 170. SANGER BROS., A COPARTNERSHIP, ETC. *v.* EMILY HUNSUCKER ET AL. Error to the Court of Civil Appeals, Second Supreme Judicial District, of the State of Texas. Submitted January 21, 1921. Decided January 24, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1. *Mr. Henry C. Coke* for plaintiff in error. No appearance for defendants in error.

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No. 647. JOHN W. SEAMAN ET AL. *v.* SAMUEL W. ADLER. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted January 17, 1921. Decided January 24, 1921. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Hull* v. *Burr,* 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.,* 237 U. S. 575, 577; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.,* 237 U. S. 300, 302; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439, 444. *Mr. William J. Hughes* for appellants. *Mr. Edward W. Foristel* for appellee.

## PETITIONS FOR WRITS OF CERTIORARI GRANTED, FROM OCTOBER 4, 1920, TO AND INCLUDING JANUARY 24, 1921.

No. 333. HERBERT L. HILDRETH *v.* JIM M. MASTORAS. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. George P. Dike* and *Mr. Frederic D. McKenney* for petitioner. *Mr. Joseph L. Atkins* for respondent.

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No. 371. FIRST NATIONAL BANK OF JASPER, FLORIDA, *v.* STATE BANK OF ROME, GEORGIA; AND

No. 372. FIRST NATIONAL BANK OF JASPER, FLORIDA, *v.* FIRST NATIONAL BANK OF ROME, GEORGIA. October 11, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. William Wade Hampton* for petitioner. *Mr. Henry C. Clark* for respondents.

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No. 383. THE BANK OF JASPER *v.* FIRST NATIONAL BANK OF ROME, GEORGIA; AND

No. 384. THE BANK OF JASPER *v.* STATE BANK OF ROME, GEORGIA. October 11, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. F. P. Fleming* for petitioner. *Mr. Henry C. Clark* for respondents.

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No. 387. GERTRUDE M. REED, ADMINISTRATRIX, ETC. *v.* DIRECTOR GENERAL OF RAILROADS, UNITED STATES

RAILROAD ADMINISTRATION, OPERATING PHILADELPHIA & READING RAILROAD. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted. *Mr. Frederick S. Tyler* for petitioner. *Mr. William Clarke Mason* for respondent.

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No. 412. JOHN GOOCH, JR. *v.* OREGON SHORT LINE RAILROAD COMPANY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. J. H. Peterson* for petitioner. *Mr. George H. Smith* for respondent.

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No. 462. UNITED STATES *v.* M. RICE & COMPANY ET AL. October 11, 1920. Petition for a writ of certiorari to the United States Court of Customs Appeals granted. *The Solicitor General* and *Mr. Assistant Attorney General Hanson* for the United States. *Mr. J. Stuart Tompkins* for respondents.

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No. 467. WHITE OAK TRANSPORTATION COMPANY *v.* BOSTON, CAPE COD & NEW YORK CANAL COMPANY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Edward E. Blodgett* for petitioner. *Mr. Samuel Park, Mr. William R. Sears* and *Mr. Thomas H. Mahoney* for respondent.

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No. 487. NORTHERN COAL COMPANY *v.* BOSTON, CAPE COD & NEW YORK CANAL COMPANY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of

Appeals for the First Circuit granted. *Mr. John G. Palfrey* for petitioner. *Mr. William R. Sears* for respondent.

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No. 469. THE PULLMAN COMPANY *v.* STATE INDUSTRIAL COMMISSION. October 11, 1920. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Department, of the State of New York granted. *Mr. Maurice C. Spratt* and *Mr. H. Prescott Gatley* for petitioner. *Mr. E. Clarence Aiken* for respondent.

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No. 491. WESTERN UNION TELEGRAPH COMPANY *v.* ESTEVE BROTHERS & COMPANY. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Rush Taggart, Mr. Francis Raymond Stark, Mr. W. B. Spencer* and *Mr. Joseph P. Egan* for petitioner. *Mr. Monte M. Lemann* for respondent.

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No. 511. EDWARD S. ATWATER *v.* STEPHEN G. GUERNSEY ET AL., TRUSTEES, ETC., ET AL. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Abram J. Rose* for petitioner. *Mr. R. D. Whiting* for respondents.

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No. 521. UNION TOOL COMPANY *v.* ELIHU C. WILSON. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Melville Church, Mr. A. V. Andrews, Mr. Frederick S. Lyon* and *Mr. William K. White* for petitioner. *Mr. F. W. Clements* for respondent.

No. 541. First National Bank of Gulfport, Mississippi, *v.* Wirt Adams, Revenue Agent, etc. October 25, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi granted. *Mr. William H. Watkins* for petitioner. No appearance for respondent.

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No. 543. Ephraim Lederer, Collector of Internal Revenue, *v.* Alexander J. Stockton, Sole Surviving Trustee, etc. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *The Solicitor General* for petitioner. *Mr. James Wilson Bayard* for respondent.

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No. 555. The Texas Company *v.* Hogarth Shipping Corporation, Limited, Owner, etc., et al. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. John W. Griffin* for petitioner. *Mr. John M. Woolsey* for respondents.

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No. 570. Chicago & North Western Railway Company *v.* C. C. Whitnack Produce Company. October 25, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska granted. *Mr. Wymer Dressler* and *Mr. Thomas P. Littlepage* for petitioner. *Mr. Henry H. Wilson* for respondent.

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No. 547. Elliott Frederick, Trustee, etc. *v.* Fidelity Mutual Life Insurance Company of Philadelphia.

October 25, 1920. Petition for a writ of certiorari to the Superior Court of the State of Pennsylvania granted. *Mr. Lowrie C. Barton* for petitioner. *Mr. George Sutherland* for respondent.

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No. 552. COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2, OF LAFAYETTE COUNTY, ARKANSAS, *v.* ST. LOUIS SOUTHWESTERN RAILWAY COMPANY. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Henry Moore, Jr.*, for petitioners. No appearance for respondent.

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No. 544. JAMES J. RAFFERTY, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *v.* SMITH, BELL & COMPANY, LIMITED. November 15, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. Charles Marvin* for petitioner. *Mr. Clarence B. Miller* for respondent.

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No. 548. JAMES J. RAFFERTY, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *v.* COMPANIA GENERAL DE TABACOS DE FILIPINAS. November 15, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. Charles Marvin* for petitioner. *Mr. Clarence B. Miller* for respondent.

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No. 553. JAMES J. RAFFERTY, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *v.* VISAYAN REFINING COMPANY. November 15, 1920. Petition for a

writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. Charles Marvin* for petitioner. *Mr. Clarence B. Miller* for respondent.

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No. 594. First National Bank of Aiken *v.* J. L. Mott Iron Works. November 22, 1920. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted. *Mr. William S. Nelson* for petitioner. *Mr. D. S. Henderson* for respondent.

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No. 595. Pacific Mail Steamship Company *v.* J. Lucas. November 22, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles J. Heggerty* for petitioner. *Mr. Frederick Clayton Peterson* for respondent.

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No. 603. United Zinc and Chemical Company *v.* Van Britt et al. November 22, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Henry D. Ashley* for petitioner. No appearance for respondents.

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No. 605. Arthur J. Dahn *v.* Walker D. Hines, Director General of Railroads. December 6, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Walter C. Clephane* and *Mr. J. Wilmer Latimer* for petitioner. No brief filed for respondent.

No. 617. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY *v.* J. B. McGINN. December 13, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. A. C. Spencer*, *Mr. C. E. Cochran* and *Mr. John F. Reilly* for petitioner. *Mr. R. L. Edmiston* for respondent.

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No. 629. WILLIAM R. CASTLE ET AL., TRUSTEES, ETC. *v.* JULIA WHITE CASTLE. December 13, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. A. G. Robertson* for petitioners. No appearance for respondent.

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No. 635. NG FUNG HO, OTHERWISE KNOWN AS UNG KIP, ET AL. *v.* EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO. December 13, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Jackson H. Ralston* and *Mr. George W. Hott* for petitioners. No brief filed for respondent.

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No. 672. CARLISLE PACKING COMPANY *v.* OLE SANDANGER. January 24, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Washington granted. *Mr. James A. Kerr* and *Mr. Evan S. McCord* for petitioner. No appearance for respondent.

## PETITIONS FOR WRITS OF CERTIORARI DENIED, FROM OCTOBER 4, 1920, TO AND INCLUDING JANUARY 24, 1921.

No. 426. VOGT BROTHERS MANUFACTURING COMPANY *v.* ELLICOTT MACHINE CORPORATION. See *ante*, 607.

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No. 319. GORDON L. DUTCHER *v.* LOUIS N. SANDERS. October 11, 1920. Petition for a writ of certiorari to the District Court of Appeals, Third District, of the State of California denied. *Mr. Charles R. Pierce* and *Mr. Marvin W. Conkling* for petitioner. *Mr. Thomas O. Toland* for respondent.

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No. 328. ROSANNA MCDOUGALL, ADMINISTRATRIX, ETC. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. L. W. Keplinger* for petitioner. No appearance for respondent.

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No. 336. VIRGINIAN RAILWAY COMPANY *v.* A. L. MILLS, ADMINISTRATOR, ETC. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. Harry T. Hall* and *Mr. G. A. Wingfield* for petitioner. No appearance for respondent.

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No. 343. GRAND TRUNK WESTERN RAILWAY COMPANY *v.* MAHLON H. WINGET, ETC. October 11, 1920. Petition

for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. James L. Parrish* for petitioner. *Mr. John D. Mackay* for respondent.

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No. 351. HENRY CHING *v.* UNITED STATES. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Asa V. Call* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

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No. 360. FRANK MOORE ET AL. *v.* STATE OF ARKANSAS. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Scipio A. Jones* and *Mr. E. L. McHaney* for petitioners. No appearance for respondent.

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No. 361. FRANK HICKS *v.* STATE OF ARKANSAS. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Scipio A. Jones* and *Mr. E. L. McHaney* for petitioner. No appearance for respondent.

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No. 368. ISAAC S. DEMENT ET AL. *v.* JAMES T. NEWTON, COMMISSIONER OF PATENTS. October 11, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Reeve Lewis* for petitioners. *The Solicitor General, Mr. Assistant Attorney General Davis* and *Mr. J. Frank Mothershead* for respondent.

No. 373. JESSE S. PHILLIPS ET AL., RECEIVERS, ETC. *v.* NOEL CONSTRUCTION COMPANY ET AL. October 11, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Chapman W. Maupin* for petitioners. No appearance for respondents.

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No. 380. PEOPLE OF THE STATE OF NEW YORK *v.* HUDSON RIVER CONNECTING RAILROAD CORPORATION. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Claude T. Dawes* for petitioner. *Mr. Robert E. Whalen* for respondent.

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No. 382. ERIE RAILROAD COMPANY *v.* MAY PINKNEY, ADMINISTRATRIX, ETC. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Henry A. Knapp* for petitioner. *Mr. Chester A. Garratt* for respondent.

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No. 385. SPEED MANKIN *v.* JAMES BARTLEY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. H. Sutherland* for petitioner. No appearance for respondent.

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No. 386. SPEED MANKIN *v.* G. C. SAUNDERS. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. H. Sutherland* for petitioner. No appearance for respondent.

No. 390. NEWLIN HAINES COMPANY *v.* EDWARD E. GROSSCUP, TRUSTEE, ETC. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward L. Katzenbach* and *Mr. D. Howard Evans* for petitioner. *Mr. Nathan Bilder* and *Mr. David H. Bilder* for respondent.

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No. 403. KANSAS CITY MOTION PICTURE MACHINE OPERATORS, LOCAL NO. 170, ET AL. *v.* JOHN E. HUGHES ET AL., ETC. Error to the Supreme Court of the State of Missouri. October 11, 1920. Petition for a writ of certiorari herein denied. *Mr. William J. Hughes* and *Mr. Joseph W. Folk*, for plaintiffs in error, in support of the petition. *Mr. J. W. Dana*, for defendants in error, in opposition to the petition.

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No. 404. JAMES F. BISHOP, ADMINISTRATOR, ETC. *v.* FREDERICK A. DELANO ET AL., RECEIVERS OF THE WABASH RAILROAD COMPANY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Fred W. Bentley* for petitioner. *Mr. Frederic D. McKenney* and *Mr. William Sherman Hay* for respondents.

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No. 411. S. NAKANO *v.* UNITED STATES. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles R. Pierce* and *Mr. Marshall B. Woodworth* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Stewart* for the United States.

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No. 414. LOUIS SINGER, DOING BUSINESS AS L. SINGER PRODUCE COMPANY, *v.* AMERICAN EXPRESS COMPANY.

October 11, 1920. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied. *Mr. Albert S. Marley* for petitioner. *Mr. Cyrus Crane* for respondent.

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No. 415. BENJAMIN C. ALLEN, ON BEHALF OF HIMSELF, ETC. *v.* PHILADELPHIA COMPANY ET AL. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George Wharton Pepper, Mr. Thomas Patterson, Mr. Robert Woods Sutton* and *Mr. H. F. Stambaugh* for petitioner. *Mr. Edwin W. Smith* and *Mr. George B. Gordon* for respondents.

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No. 416. LIM CHAN *v.* EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jackson H. Ralston* and *Mr. George W. Hott* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for respondent.

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No. 423. DU PONT ENGINEERING COMPANY *v.* EVANSVILLE ICE & STORAGE COMPANY. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Thomas J. Tyne* for petitioner. *Mr. W. K. McAlister* for respondent.

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No. 428. W. R. FELKER ET AL., ETC. *v.* SOUTHERN TRUST COMPANY, AS TRUSTEE, ETC., ET AL. October 11,

1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Dick Rice* for petitioners. *Mr. G. B. Rose, Mr. W. E. Hemingway, Mr. D. H. Cantrell* and *Mr. J. F. Loughborough* for respondents.

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No. 431. PASQUALE CIAFIRDINI *v.* UNITED STATES. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. A. B. Quinton* for petitioner. *The Solicitor General* for the United States.

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No. 432. SETON C. BENS *v.* JAMES M. POWER, UNITED STATES MARSHAL, ETC. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George R. Rubin* for petitioner. *The Solicitor General* for respondent.

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No. 436. MRS. CAMILLA DAVIS PUTNAM, WIDOW, ETC., ET AL. *v.* MRS. LOUISE STONE BORST. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edwin T. Merrick* for petitioners. *Mr. D. B. H. Chaffe* and *Mr. E. J. Bowers* for respondent.

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No. 437. FRED BLACKSTOCK *v.* UNITED STATES. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. L. D. Mitchell* and *Mr. M. K. Cruce* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. Roy C. McHenry* for the United States.

No. 438. GULF COMPRESS COMPANY ET AL. *v.* MERCHANTS COTTON PRESS & STORAGE COMPANY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas A. Evans* and *Mr. M. G. Evans* for petitioners. *Mr. William P. Metcalf* and *Mr. C. W. Metcalf* for respondent.

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No. 447. EUGENE W. MENTE *v.* MARK EISNER, COLLECTOR OF INTERNAL REVENUE, ETC. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic H. Cowden* for petitioner. *The Solicitor General* for respondent.

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No. 455. ROSS LUMBER COMPANY *v.* HUGHES LUMBER COMPANY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John E. Hall, Mr. Warren Grice* and *Mr. Charles J. Bloch* for petitioner. *Mr. Edward de Graffenried* for respondent.

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No. 456. EMPIRE GAS & FUEL COMPANY *v.* JOHN G. WETSEL ET AL. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. F. Garver* and *Mr. H. O. Caster* for petitioner. No appearance for respondents.

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No. 463. WILLIAM J. DANTE, COLLECTOR, ETC. *v.* ROSE KEELING HUTCHINS. October 11, 1920. Petition for a writ of certiorari to the Court of Appeals of the District

of Columbia denied. *Mr. George E. Sullivan* for petitioner. No appearance for respondent.

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No. 464. Los Angeles & Salt Lake Railroad Company *v.* City of Los Angeles. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. A. S. Halsted, Mr. Oscar Lawler, Mr. Alex. Britton* and *Mr. Evans Browne* for petitioner. No appearance for respondent.

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No. 465. Los Angeles & Salt Lake Railroad Company et al. *v.* City of Los Angeles. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. A. S. Halsted, Mr. Oscar Lawler, Mr. Alex. Britton* and *Mr. Evans Browne* for petitioners. No appearance for respondent.

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No. 471. Wesley M. Smith *v.* W. T. Apple. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. John S. Dean, Mr. Thomas F. Doran* and *Mr. Joseph Fairbanks* for petitioner. *Mr. Edward E. Sapp* for respondent.

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No. 474. George F. Auf der Heide *v.* Anna W. Kiskaddon et al. October 11, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Benjamin B. Blakeney* and *Mr. James H. Maxey* for petitioner. No appearance for respondents.

No. 477. HOUK MANUFACTURING COMPANY, INC., *v.* COWEN COMPANY. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Melville Church* for petitioner. *Mr. Isadore Shapiro* for respondent.

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No. 478. CLINTON MINING & MINERAL COMPANY *v.* J. S. BEACOM. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur O. Fording* for petitioner. No appearance for respondent.

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No. 479. THOMAS WELSH *v.* UNITED STATES. October 11, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Martin Conboy* for petitioner. *The Solicitor General* for the United States.

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No. 475. MOHAWK MINING COMPANY *v.* HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE, ETC. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alton C. Dustin* for petitioner. *The Solicitor General* and *Mrs. Annette Abbott Adams*, Assistant Attorney General, for respondent.

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No. 484. AMERICAN SOCIALIST SOCIETY *v.* UNITED STATES. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. S. John Block* and *Mr. Walter Nelles* for petitioner. *Mr. Assistant Attorney General Stewart* for the United States.

No. 485. PENNSYLVANIA RAILROAD COMPANY *v.* ELIZABETH SWANK, ADMINISTRATRIX, ETC. October 18, 1920. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. George A. Bourgeois* and *Mr. Harry R. Coulomb* for petitioner. *Mr. James Mercer Davis* for respondent.

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Nos. 488 and 489. FREDERICK B. LYNCH *v.* D. DARNELL ET AL., PARTNERS AS HAZEL-DARNELL MULE COMPANY. October 18, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas D. O'Brien, Mr. Edward T. Young* and *Mr. Alexander E. Horn* for petitioner. *Mr. Pierce Butler* and *Mr. William D. Mitchell* for respondents.

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No. 490. HARRY C. WILSON ET AL. *v.* UNITED STATES. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas Ball* for petitioners. *The Solicitor General* for the United States.

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No. 494. CHARLES B. MUNDAY *v.* PEOPLE OF THE STATE OF ILLINOIS. October 18, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. John F. McCarron, Mr. William J. Hughes* and *Mr. Edward H. Morris* for petitioner. No appearance for respondent.

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No. 498. LAFOREST L. SIMMONS *v.* JOE DUART. October 18, 1920. Petition for a writ of certiorari to the Su-

perior Court of the State of Massachusetts denied. *Mr. Edward C. Stone* for petitioner. *Mr. David R. Radovsky* for respondent.

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No. 500. REPETTI, INC. *v.* WALLACE & COMPANY. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry D. Nims* for petitioner. *Mr. Frank Chase Somes* and *Mr. Hugo Mock* for respondent.

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No. 501. CHARLEY TOY ET AL. *v.* UNITED STATES. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank Hendrick* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

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No. 503. TIBURCIO VALVERDE *v.* UNITED STATES. October 18, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Howard Boyd* and *Mr. James M. Sheridan* for petitioner. *The Solicitor General* for the United States.

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No. 504. ROY C. MEGARGEL ET AL., ETC. *v.* HERMAN B. GATES ET AL. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Bertram F. Shipman* for petitioners. *Mr. Henry Wollman* and *Mr. J. DuPratt White* for respondents.

No. 506. DIRECTOR GENERAL OF RAILROADS *v.* MRS. B. M. MOORE, ADMINISTRATRIX, ETC. October 18, 1920. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. H. O'B. Cooper, Mr. Clement Manly, Mr. Thomas S. Rollins, Mr. Julius C. Martin* and *Mr. George H. Wright* for petitioner. *Mr. Felix E. Alley* for respondent.

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No. 507. BLUEFIELDS FRUIT & STEAMSHIP COMPANY *v.* WESTERN ASSURANCE COMPANY OF TORONTO. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William C. Dufour, Mr. George Janvier* and *Mr. E. Howard McCaleb* for petitioner. *Mr. John C. Prizer* for respondent.

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No. 510. JULIUS BLOCK *v.* LOUIS HIRSH. October 18, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Jesse C. Adkins* and *Mr. Julius I. Peyser* for petitioner. *Mr. Myer Cohen, Mr. Richard D. Daniels* and *Mr. William G. Johnson* for respondent.

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No. 513. GEORGE HOLMES ET AL. *v.* UNITED STATES. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Leander A. Dale* and *Mr. Frank G. Morris* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. Roy C. McHenry* for the United States.

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No. 514. NEW YORK SANITARY UTILIZATION COMPANY *v.* AMERICAN ENGINEERING COMPANY ET AL. October 18,

1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. DeLancey Nicoll* for petitioner. *Mr. Frederick T. Kelsey, Mr. William N. Dykman* and *Mr. Arthur E. Goddard* for respondents.

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No. 515. MILEY JOHNSON ET AL. *v.* SETH SALMON ET AL. October 18, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. James M. Hays* for petitioners. No appearance for respondents.

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No. 516. SMITH BELL & COMPANY, LIMITED, *v.* WENCESLAO TRINIDAD, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS. October 18, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Clarence B. Miller* for petitioner. *The Solicitor General* and *Mr. Charles Marvin* for respondent.

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No. 517. MACLEOD & COMPANY, INC., *v.* WENCESLAO TRINIDAD, COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS. October 18, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Clarence B. Miller* for petitioner. *The Solicitor General* and *Mr. Charles Marvin* for respondent.

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No. 518. JOHN J. DIMMITT *v.* GLENN L. BREAKEY. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. M. Crane* for petitioner. No appearance for respondent.

No. 522. EMPIRE VOTING MACHINE COMPANY *v.* CITY OF CHICAGO ET AL. October 18, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Stephen A. Foster, Mr. Herbert Pope* and *Mr. Frank Keiper* for petitioner. *Mr. Horace Kent Tenney, Mr. Samuel A. Ettelson, Mr. Leon Hornstein* and *Mr. F. B. Johnstone* for respondents.

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No. 527. LEE U. ONG *v.* UNITED STATES. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* and *Mr. Charles R. Pierce* for petitioner. No brief filed for the United States.

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No. 528. FREDERICK C. TAXIS ET AL. *v.* UNIVERSAL FORM CLAMP COMPANY. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas F. Sheridan* and *Mr. Thomas H. Sheridan* for petitioners. *Mr. William R. Rummler* for respondent.

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No. 529. MARCELINO LONTOK *v.* UNITED STATES. October 25, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Howard Boyd* and *Mr. James M. Sheridan* for petitioner. *The Solicitor General* for the United States.

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No. 533. EGRY REGISTER COMPANY *v.* STANDARD REGISTER COMPANY. October 25, 1920. Petition for a writ of

certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. A. Toulmin* and *Mr. H. A. Toulmin, Jr.*, for petitioner. *Mr. Alfred M. Allen* for respondent.

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No. 534. RENE ARBIB *v.* UNITED STATES. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry N. Arnold* for petitioner. *The Solicitor General* for the United States.

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No. 535. GALVESTON, HOUSTON & HENDERSON RAILROAD COMPANY *v.* UNITED STATES. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alex. Britton, Mr. Evans Browne* and *Mr. J. W. Terry* for petitioner. *The Solicitor General* and *Mrs. Annette Abbott Adams*, Assistant Attorney General, for the United States.

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No. 537. ELIZABETH L. HUGHES *v.* SARA E. TECHT, ALSO KNOWN AS SARAH E. TECHT. October 25, 1920. Petition for a writ of certiorari to the Court of Appeals of the State of New York denied. *Mr. Allan C. Rearick* for petitioner. *Mr. Adolph Bloch* for respondent.

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No. 539. CATHERINE K. NEWTON ET AL. *v.* WILLIAM A. RHEA ET AL. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward H. S. Martin* and *Mr. Shepard Barclay* for petitioners. *Mr. Frank Hagerman* and *Mr. Thomas Hackney* for respondents.

No. 540. LUCKENBACH STEAMSHIP COMPANY, INC., ET AL. *v.* W. R. GRACE & COMPANY, INC. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Peter S. Carter* and *Mr. Oscar R. Houston* for petitioners. *Mr. John M. Woolsey* and *Mr. Edward R. Baird, Jr.*, for respondent.

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No. 542. JAMES F. BISHOP, ADMINISTRATOR, ETC., ET AL. *v.* GREAT LAKES TOWING COMPANY. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry W. Standidge* for petitioners. *Mr. Harvey D. Goulder, Mr. Thomas H. Garry* and *Mr. Ralph F. Potter* for respondent.

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No. 549. F. M. HATHAWAY ET AL. *v.* FORD MOTOR COMPANY. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Logan* for petitioners. *Mr. Robert Treat Platt* and *Mr. Harrison G. Platt* for respondent.

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No. 556. CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* EDNA MAY KNORR. October 25, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Charles E. Miller* for petitioner. *Mr. Rush B. Trescott* for respondent.

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No. 557. SHERWOOD S. MATTOCKS *v.* GREAT LAKES TOWING COMPANY. October 25, 1920. Petition for a

writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward Maher* and *Mr. Charles S. Thornton* for petitioner. *Mr. Harvey D. Goulder, Mr. Thomas H. Garry* and *Mr. Ralph F. Potter* for respondent.

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No. 565. E. HAMILTON ET AL. *v.* UNITED STATES. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry Bowden* and *Mr. George Sutherland* for petitioners. *The Solicitor General* for the United States.

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No. 567. MORRIS LEVINSON *v.* UNITED STATES ET AL. Appeal from the Circuit Court of Appeals for the Second Circuit. October 25, 1920. Petition for a writ of certiorari herein denied. *Mr. Russell T. Mount,* for appellant, in support of the petition. *The Solicitor General,* for appellees, in opposition to the petition.

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No. 381. ANDREW P. LOCKHART *v.* UNITED STATES. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. S. Littleton* and *Mr. Jesse M. Littleton* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

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No. 536. FREDERICK KERR *v.* FREDERICK TANINI TAGLIAVIA. October 25, 1920. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

*Mr. John H. Hazelton* for petitioner. *Mr. William C. Crane* for respondent.

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No. 561. SOUTHERN RAILWAY COMPANY *v.* ALMA R. MILLER, ADMINISTRATRIX, ETC. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. E. Randolph Williams, Mr. Henry W. Anderson* and *Mr. Thomas B. Gay* for petitioner. *Mr. Robert A. Talley* for respondent.

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No. 563. LEWISTON MILLING COMPANY, LIMITED, *v.* IRA D. CARDIFF ET AL., ETC. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James E. Babb* for petitioner. *Mr. Reese H. Voorhees* for respondents.

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No. 538. HARTMAN-BLANCHARD COMPANY *v.* KITTIE TEN EYCK ET AL. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Pierre M. Brown* for petitioner. *Mr. Chauncey I. Clark* for respondents. *Mr. Mark Ash,* by leave of court, as *amicus curiæ.*

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No. 564. ATLANTIC COAST LINE RAILROAD COMPANY *v.* EMMA RAULERSON. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William K. Jackson* and *Mr. John L. Doggett* for petitioner. *Mr. A. H. King, Mr. Roswell King* and *Mr. George C. Bedell* for respondent.

No. 569. ELIZABETH S. PRENTISS *v.* MARK EISNER, COLLECTOR OF INTERNAL REVENUE, ETC. October 25, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Royall Victor* and *Mr. Philip L. Miller* for petitioner. *The Solicitor General* and *Mrs. Annette Abbott Adams*, Assistant Attorney General, for respondent.

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No. 576. J. E. BREWER ET AL. *v.* POSTAL TELEGRAPH-CABLE COMPANY. October 25, 1920. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied. *Mr. Albert S. Marley* for petitioners. No appearance for respondent.

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No. 573. HARRY S. MECARTNEY *v.* BAINBRIDGE COLBY, SECRETARY OF STATE, ET AL. October 25, 1920. Motion to be heard orally on petition for a writ of certiorari refused, and petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Harry S. Mecartney* and *Mr. W. C. Sullivan* for petitioner. *The Solicitor General* for respondents.

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No. 19. NEW YORK SCAFFOLDING COMPANY *v.* GEORGE R. WHITNEY, SR., AS ADMINISTRATOR, ETC. November 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Announced by Mr. Justice McKenna. *Mr. Frank Chase Somes* and *Mr. C. P. Goepel* for petitioner. *Mr. Wallace R. Lane* and *Mr. Robert H. Parkinson* for respondent. See *ante*, 24, 32.

No. 568. CHICHAGOFF MINING COMPANY *v.* JOHN TUPPELA. November 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John P. Gray* for petitioner. *Mr. J. H. Cobb* for respondent.

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No. 359. CORNELIUS C. WATTS ET AL. *v.* STATE OF ARIZONA AT RELATION, ETC., OF IGNATIUS BURGOON, TREASURER, ETC. Error to the Supreme Court of the State of Arizona. November 15, 1920. Petition for a writ of certiorari herein denied. *Mr. Herbert Noble* and *Mr. Joseph W. Bailey,* for plaintiffs in error, in support of the petition. *Mr. Leslie C. Hardy,* for defendant in error, in opposition to the petition.

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No. 566. FERNAND V. GASQUET *v.* GEORGE F. LAPEYRE ET AL. November 15, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. J. C. Gilmore, Mr. Thomas Gilmore, Mr. William Winans Wall* and *Mr. G. T. Fitzhugh* for petitioner. No appearance for respondents.

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No. 574. KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* NICK LEINEN. November 15, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. S. W. Moore, Mr. James B. McDonough* and *Mr. A. F. Smith* for petitioner. *Mr. Fred B. Wheeler* for respondent.

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No. 584. CHAPIN-SACKS MANUFACTURING COMPANY *v.* HENDLER CREAMERY COMPANY ET AL. November 15,

1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Isaac Lobe Straus, Mr. Walter A. Johnston* and *Mr. F. M. Phelps* for petitioner. *Mr. Vernon Cook* for respondents.

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No. 591. SAMUEL C. JACKSON *v.* UNITED STATES. November 15, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Abner H. Ferguson* for petitioner. *The Solicitor General* for the United States.

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No. 596. WASHINGTON RAILWAY & ELECTRIC COMPANY *v.* GEORGE C. STUART. November 15, 1920. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John S. Barbour* for petitioner. No appearance for respondent.

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No. 597. ROBERTS CONE MANUFACTURING COMPANY *v.* FREDERICK A. BRUCKMAN ET AL. November 15, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. A. Toulmin* and *Mr. H. A. Toulmin, Jr.*, for petitioner. *Mr. Albert E. Dieterich* for respondents.

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No. 599. P. LORILLARD COMPANY ET AL. *v.* NATIONAL STEAM NAVIGATION COMPANY, LIMITED, OF GREECE. November 15, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John G. Milburn, Mr. Charles K. Carpenter* and *Mr.*

*D. Roger Englar* for petitioners. *Mr. J. Parker Kirlin* and *Mr. Cletus Keating* for respondent.

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No. 146. FRANK R. LOPEZ *v.* FREDERICK C. HOWE, AS COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK. See *ante*, 613.

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No. 583. PRODUCERS COKE COMPANY *v.* McKEEFRY IRON COMPANY. December 6, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel John Morrow* for petitioner. *Mr. Samuel McClay* and *Mr. William M. Robinson* for respondent.

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No. 611. WESTERN UNION TELEGRAPH COMPANY *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. December 6, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alexander Pope Humphrey, Mr. Rush Taggart, Mr. Francis Raymond Stark, Mr. W. Overton Harris, Mr. Edward P. Humphrey* and *Mr. William W. Crawford* for petitioner. *Mr. Helm Bruce, Mr. Henry L. Stone* and *Mr. Edward S. Jouett* for respondent.

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No. 616. R. L. AMMERMAN ET AL. *v.* UNITED STATES. December 6, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. G. McAdams* for petitioners. *Mr. Assistant Attorney General Spellacy* and *Mr. Leonard B. Zeisler* for the United States.

No. 589. FRED LASITER, ADMINISTRATOR, ETC. *v.* WALTER FERGUSON. December 13, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. C. Dale Wolfe* and *Mr. George C. Crump* for petitioner. No appearance for respondent.

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No. 585. LAMBERT RUN COAL COMPANY *v.* BALTIMORE & OHIO RAILROAD COMPANY. Appeal from the Circuit Court of Appeals for the Fourth Circuit. December 13, 1920. Petition for a writ of certiorari herein denied. *Mr. Rush C. Butler, Mr. John A. Howard* and *Mr. Frank E. Harkness,* for appellant, in support of the petition. *Mr. Hugh L. Bond* and *Mr. George E. Hamilton,* for appellee, in opposition to the petition.

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No. 598. FEDERAL MINING & SMELTING COMPANY *v.* STAR MINING COMPANY. December 13, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John A. Marshall* and *Mr. Frederick W. Lehmann* for petitioner. *Mr. John P. Gray* and *Mr. James A. Wayne* for respondent.

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No. 606. MOHAWK OIL COMPANY ET AL. *v.* MRS. EULA MCFADIN LAYNE, SOLE HEIR, ETC. December 13, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. W. P. Hall* and *Mr. J. D. Wilkinson* for petitioners. *Mr. S. L. Herrold* for respondent.

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No. 579. JESSIE L. WAYMIRE, ADMINISTRATRIX, ETC. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. De-

cember 20, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. E. C. Brandenburg* and *Mr. Charles W. Steiger* for petitioner. No appearance for respondent.

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No. 615. W. W. Casey et al. *v.* A. Eikland et al. December 20, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank P. Deering* and *Mr. George B. Grigsby* for petitioners. No appearance for respondents.

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No. 621. Perfection Disappearing Bed Company, Inc., et al. *v.* Murphy Wall Bed Company et al. December 20, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Herman H. Phleger* for petitioners. *Mr. William K. White* for respondents.

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No. 626. John Hedenskoy *v.* Alaska Packers Association. December 20, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jackson H. Ralston* and *Mr. H. W. Hutton* for petitioner. No appearance for respondent.

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No. 634. Solomon Rothman et al. *v.* United States. December 20, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Marshall* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 637. ADELBERT L. SPITZER ET AL., AS SPITZER-RORICK & COMPANY *v.* BOARD OF TRUSTEES FOR THE REGINA PUBLIC SCHOOL DISTRICT NO. 4 OF SASKATCHEWAN. December 20, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas H. Tracy* and *Mr. George D. Welles* for petitioners. No appearance for respondent.

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No. 639. L. W. BOEHNER *v.* UNITED STATES. December 20, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William R. Green* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

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No. 642. HENRY BRIGGS *v.* UNITED SHOE MACHINERY CORPORATION. December 20, 1920. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. William A. Milliken* for petitioner. *Mr. Robert H. McCarter* and *Mr. Walter Bates Farr* for respondent.

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No. 612. UNITED STATES FIDELITY & GUARANTY COMPANY ET AL. *v.* TRAVELERS INSURANCE MACHINE COMPANY. Error to the Court of Appeals of the State of Kentucky. January 3, 1921. Petition for a writ of certiorari herein denied. *Mr. William Marshall Bullitt*, for plaintiffs in error, in support of the petition. *Mr. David R. Castleman*, for defendant in error, in opposition to the petition.

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No. 623. SEABOARD AIR LINE RAILWAY COMPANY *v.* LEE VANDIVER. January 3, 1921. Petition for a writ of

certiorari to the Court of Appeals of the State of Georgia denied. *Mr. Hollins R. Randolph* for petitioner. *Mr. Virgil E. Adams* for respondent.

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No. 625. EMMA F. RUMSEY *v.* NEW YORK LIFE INSURANCE COMPANY ET AL. January 3, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. J. O'Donnell* for petitioner. No appearance for respondents.

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No. 628. BOSTON, CAPE COD & NEW YORK CANAL COMPANY *v.* C. W. CHADWICK & COMPANY. January 3, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas H. Mahony* for petitioner. *Mr. Edward E. Blodgett* for respondent.

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No. 630. BENJAMIN F. DORRANCE ET AL. *v.* CHARLES FRANCIS DORRANCE. January 3, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William A. Glasgow, Jr.*, and *Mr. William J. Hughes* for petitioners. *Mr. Kenneth McC. DeWeese* and *Mr. Charles A. Houts* for respondent.

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No. 620. ILLINOIS CENTRAL RAILROAD COMPANY *v.* C. B. JOHNSON. Error to the Supreme Court of the State of Alabama. January 17, 1921. Petition for a writ of certiorari herein denied. *Mr. Augustus Benners, Mr. W. S. Horton* and *Mr. R. V. Fletcher*, for plaintiff in error, in support of the petition. *Mr. William Augustus Denson*, for defendant in error, in opposition to the petition.

No. 627. JOSHUA SYKES ET AL. *v.* UNITED STATES. January 17, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Theodore A. Bell* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

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No. 631. JOHN BARTON PAYNE, AS AGENT, ETC. *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. January 17, 1921. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. Henley C. Booth* and *Mr. William F. Herrin* for petitioner. *Mr. Neal Power* and *Mr. Warren H. Pillsbury* for respondents.

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No. 647. JOHN W. SEAMAN ET AL. *v.* SAMUEL W. ADLER. Appeal from the Circuit Court of Appeals for the Eighth Circuit. January 17, 1921. Petition for a writ of certiorari herein denied. *Mr. William J. Hughes,* for appellants, in support of the petition. *Mr. Edw. W. Foristel,* for appellee, in opposition to the petition.

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No. 658. LEE WING WAH ET AL. *v.* EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO. January 17, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jackson H. Ralston* and *Mr. George W. Hott* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for respondent.

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No. 660. FIRST NATIONAL BANK OF CASSELTON, NORTH DAKOTA, *v.* FRANK M. SMITH. January 17, 1921. Peti-

tion for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Matthew W. Murphy* and *Mr. Thomas Sterling* for petitioner. No appearance for respondent.

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No. 661. DIRECTOR GENERAL OF RAILROADS *v.* MABEL BENNETT, ADMINISTRATRIX, ETC. January 17, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Clarke Mason* for petitioner. *Mr. Frank F. Davis* for respondent.

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No. 662. DIRECTOR GENERAL OF RAILROADS *v.* MINNIE TEMPLIN, ADMINISTRATRIX, ETC. January 17, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Clarke Mason* for petitioner. *Mr. Frank F. Davis* for respondent.

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No. 667. WALKER D. HINES, AS AGENT, ETC. *v.* HARVEY K. KEYSER. January 17, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Clarke Mason* for petitioner. *Mr. Frank F. Davis* for respondent.

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No. 676. GEORGE FRANCIS ROWE *v.* JOHN M. BOYLE, AS UNITED STATES MARSHAL, ETC. January 17, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Abner H. Ferguson* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. Roy C. McHenry* for respondent.

No. 586. ALEXANDER NEW ET AL., RECEIVERS, ETC. *v.* EFFIE MCMILLAN, ADMINISTRATRIX, ETC. January 24, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Arthur Miller* and *Mr. Ephraim H. Foster* for petitioners. No appearance for respondent.

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No. 666. KOKOMO STEEL WIRE COMPANY *v.* REPUBLIC OF FRANCE. January 24, 1921. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John R. Browne* for petitioner. *Mr. F. Winter* for respondent.

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## CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 4, 1920, TO AND INCLUDING JANUARY 24, 1921.

No. 138. UNITED STATES *v.* PICHER LEAD COMPANY. Error to the District Court of the United States for the Western District of Missouri. October 5, 1920. Dismissed, on motion of *The Solicitor General* for the United States. *Mr. A. E. Spencer* for defendant in error.

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No. 230. UNITED STATES *v.* JACOB WICIBDEZA (PLEASANT MAN). Error to the District Court of the United States for the District of North Dakota. October 5, 1920. Dismissed, on motion of *The Solicitor General* for the United States. No appearance for defendant in error.

No. 3. ADAMS STATE BANK *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. October 5, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Frank H. Bicek* for plaintiff in error. *Mr. Edward J. Brundage* and *Mr. James H. Wilkerson* for defendant in error.

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No. 32. HARRY WRONKOW KEATLEY *v.* UNITED STATES TRUST COMPANY ET AL., AS EXECUTORS, ETC. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 5, 1920. Dismissed with costs, on motion of counsel for petitioner. *Mr. W. Bourke Cockran* for petitioner. *Mr. Wm. A. W. Steward, Mr. Chas. B. Fernald* and *Mr. Edward W. Sheldon* for respondents.

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No. 59. W. F. HARN ET AL. *v.* MISSOURI STATE LIFE INSURANCE COMPANY. Error to the Supreme Court of the State of Oklahoma. October 5, 1920. Dismissed with costs, per stipulation. *Mr. W. F. Harn* for plaintiffs in error. *Mr. James R. Keaton* and *Mr. Frank Wells* for defendant in error.

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No. 153. WILLIAM H. RIGGIE *v.* GRAND TRUNK RAILWAY COMPANY. Error to the Supreme Court of the State of Vermont. October 5, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Harry Burton Amey* for plaintiff in error. *Mr. J. W. Redmond* for defendant in error.

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No. 18. NORTHERN PACIFIC RAILWAY COMPANY *v.* JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR. Ap-

peal from the Court of Appeals of the District of Columbia. October 6, 1920. Dismissed with costs, on motion of counsel for appellant. *Mr. Charles Donnelly*, *Mr. Alex. Britton* and *Mr. F. W. Clements* for appellant. *The Attorney General* for appellee.

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No. 248. SARAH A. WHITTEMORE *v.* MAUD B. CRAWFORD. Error to the Court of Appeals of the District of Columbia. October 7, 1920. Dismissed per stipulation. *Mr. L. A. Bailey* and *Mr. J. William Shea* for plaintiff in error. *Mr. Thomas M. Baker* for defendant in error.

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No. 42. PETER L. WHEELER ET AL., AS TRUSTEES, ETC. *v.* CITY OF OAKLAND. Error to the District Court of Appeals in and for the First Appellate District of the State of California. October 7, 1920. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Garret W. McEnerney*, *Mr. William H. Orrick* and *Mr. William B. Bosley* for plaintiffs in error. No appearance for defendant in error.

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No. 208. UNITED STATES *v.* DIMITRIOS J. THEOPHILATOS ET AL. Error to the District Court of the United States for the Southern District of New York. October 11, 1920. Dismissed, on motion of *The Solicitor General* for the United States. *Mr. William Harmon Black* and *Mr. William W. Spalding* for defendants in error.

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No. 316. EL PASO & SOUTHWESTERN RAILROAD COMPANY *v.* ROBERT L. LOVICK. Error to the Supreme Court

of the State of Texas. October 11, 1920. Dismissed with costs, per stipulation. *Mr. William R. Harr, Mr. W. A. Hawkins* and *Mr. C. H. Bates* for plaintiff in error. *Mr. Winbourn Pearce* and *Mr. A. L. Curtis* for defendant in error.

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No. 468. BENJAMIN F. BUSH, RECEIVER FOR THE MISSOURI PACIFIC RAILWAY COMPANY, *v.* ALBERT J. BRUNSWIG. On petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri. October 11, 1920. Petition dismissed with costs, on motion of counsel for petitioner. *Mr. Edward J. White* for petitioner. No appearance for respondent.

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No. 554. SECOND NATIONAL BANK OF PARKERSBURG, WEST VIRGINIA, ET AL. *v.* UNITED STATES FIDELITY & GUARANTY COMPANY. Appeal from the Circuit Court of Appeals for the Fourth Circuit. October 11, 1920. Dismissed with costs, per stipulation. *Mr. V. B. Archer* for appellants. *Mr. B. M. Ambler* for appellee.

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No. 50. ATLANTIC COAST ELECTRIC RAILWAY COMPANY *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY ET AL. Error to the Court of Errors and Appeals of the State of New Jersey. October 15, 1920. Dismissed with costs, pursuant to the nineteenth rule. *Mr. Robert H. McCarter* for plaintiff in error. *Mr. L. Edward Herrmann* for defendants in error.

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No. 56. JAMES A. PETERSON *v.* UNITED STATES. Error to the District Court of the United States for the Dis-

trict of Minnesota. October 18, 1920. Reversed, on confession of error, and cause remanded for further proceedings, on motion of *The Solicitor General* for the United States. *Mr. Frank D. Larrabee* for plaintiff in error.

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No. 64. LOUIS B. NAGLER *v.* UNITED STATES. Error to the District Court of the United States for the Western District of Wisconsin. October 20, 1920. Judgment reversed, on confession of error, and cause remanded for further proceedings in conformity with law, on motion of *The Solicitor General* for the United States. *Mr. Gilbert E. Roe* and *Mr. Herman L. Ekern* for plaintiff in error.

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No. 92. WILLIAM PARENT ET AL. *v.* IRENE L. SIMMONS PICOTTE. Appeal from the Circuit Court of Appeals for the Eighth Circuit. November 8, 1920. Dismissed with costs, on motion of counsel for appellants. *Mr. Thomas L. Sloan* and *Mr. Webster Ballinger* for appellants. *Mr. Edward E. Wagner* for appellee.

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No. 102. LAKEWOOD ENGINEERING COMPANY *v.* NEW YORK CENTRAL RAILROAD COMPANY. Error to the Circuit Court of Appeals for the Sixth Circuit. November 8, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Clifford Thorne* and *Mr. Mark A. Copeland* for plaintiff in error. *Mr. S. H. West* for defendant in error.

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No. 218. GERTRUDE GROOT *v.* CAROLINE I. REILLY. Error to the Court of Appeals of the District of Columbia.

November 8, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. William C. Prentiss* for plaintiff in error. *Mr. Mason N. Richardson* for defendant in error.

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No. 220. TONY TACHIN ET AL. *v.* STATE OF NEW JERSEY. Error to the Court of Errors and Appeals of the State of New Jersey. November 9, 1920. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Charles Recht* for plaintiffs in error. No appearance for defendant in error.

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No. 108. AMERICAN TELEPHONE & TELEGRAPH COMPANY OF BALTIMORE CITY *v.* STATE ROADS COMMISSION OF MARYLAND. Error to the Court of Appeals of the State of Maryland. November 11, 1920. Dismissed with costs, per stipulation. *Mr. Shirley Carter* for plaintiff in error. *Mr. Albert C. Ritchie, Mr. Ogle Marbury, Mr. Alexander Armstrong* and *Mr. J. Purdon Wright* for defendant in error.

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No. 119. CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF BALTIMORE CITY *v.* STATE ROADS COMMISSION OF MARYLAND. Error to the Court of Appeals of the State of Maryland. November 11, 1920. Dismissed with costs, per stipulation. *Mr. Shirley Carter* for plaintiff in error. *Mr. Albert C. Ritchie, Mr. Ogle Marbury* and *Mr. Alexander Armstrong* for defendant in error.

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No. 109. EMMA BERNHARDT ET AL. *v.* LEWIS PERRY. Error to the Supreme Court of the State of Missouri.

November 18, 1920. Dismissed with costs, pursuant to the tenth rule. *Mr. Abraham L. Levi* for plaintiffs in error. No appearance for defendant in error.

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No. 375. H. W. CARGILL, AS ASSESSOR, ETC., ET AL. *v.* UNITED STATES EX REL. FRANK PIERCE. On petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss for want of prosecution submitted November 15, 1920. Decided November 22, 1920. Dismissed for want of prosecution. *Mr. U. S. Bratton* for petitioners. *Mr. George B. Pugh* for respondent.

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No. 440. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* JOSEPH N. KINNEY. Error to the District Court of the United States for the Eastern District of Pennsylvania. November 22, 1920. Dismissed with costs, on motion of *The Solicitor General* for plaintiff in error. No appearance for defendant in error.

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No. 226. DALLAS LABOR TEMPLE ASSOCIATION ET AL. *v.* C. M. CURETON, ATTORNEY GENERAL, ETC., ET AL. Appeal from the District Court of the United States for the Northern District of Texas. November 22, 1920. Dismissed with costs, pursuant to the tenth rule. *Mr. Joseph Manson McCormick* for appellants. *Mr. C. M. Cureton* for appellees.

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No. 227. GEORGE RUSSELL HILL ET AL. *v.* C. M. CURETON, ATTORNEY GENERAL, ETC., ET AL. Appeal from the

District Court of the United States for the Northern District of Texas. November 22, 1920. Dismissed with costs, pursuant to the tenth rule. *Mr. Joseph Manson McCormick* for appellants. No appearance for appellees.

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No. 228. GALVESTON ARTILLERY CLUB ET AL. *v.* C. M. CURETON, ATTORNEY GENERAL, ETC., ET AL. Appeal from the District Court of the United States for the Northern District of Texas. November 22, 1920. Dismissed with costs, pursuant to the tenth rule. *Mr. Joseph Manson McCormick* for appellants. No appearance for appellees.

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No. 162. UNITED STATES *v.* THEODORE RAY. Error to the District Court of the United States for the District of Wyoming. December 6, 1920. Dismissed, on motion of *The Solicitor General* for the United States. *Mr. D. A. Preston* for defendant in error.

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No. 350. CLARK COUNTY NATIONAL BANK *v.* COMMONWEALTH OF KENTUCKY. Error to the Court of Appeals of the State of Kentucky. December 6, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. D. L. Pendleton* for plaintiff in error. No appearance for defendant in error.

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No. 601. CHANSLOR-CANFIELD MIDWAY OIL COMPANY ET AL. *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Motion to remand submitted December 6, 1920. Decided December 13, 1920. Joint motion of Recovery Oil Compny and the United

States that this cause be remanded to the District Court of the United States for the Southern District of California to carry into effect the settlement of the case reached pursuant to Act of Congress of February 25, 1920, granted. *Mr. Peter F. Dunne* and *Mr. U. T. Clotfelter* for appellants. *The Solicitor General* for the United States.

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No. 402. WILLARD B. BRYNE *v.* HELEN F. MARTELL, ADMINISTRATRIX, ETC. On petition for a writ of certiorari to the Superior Court of the State of Massachusetts. December 13, 1920. Dismissed for the want of prosecution. *Mr. James T. Lloyd* for petitioner. *Mr. Charles W. Darr* for respondent.

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No. 446. RUBIE C. CONNOR ET AL. *v.* MENA KYLE ELLIOTT, AS EXECUTRIX, ETC. On petition for a writ of certiorari to the Supreme Court of the State of Florida. December 13, 1920. Dismissed for the want of prosecution. *Mr. William E. Richardson* for petitioners. *Mr. Benjamin Micou* for respondent.

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No. 127. MORRIS ZUCKER *v.* UNITED STATES. Error to the District Court of the United States for the Eastern District of New York. December 13, 1920. Dismissed, pursuant to the sixteenth rule, on motion of *The Solicitor General* for the United States. *Mr. Louis B. Boudin* for plaintiff in error.

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No. 267. MICHAEL MCCOLE *v.* THE LIGHTER "HOWELL," ETC., CHELSEA LIGHTERAGE COMPANY, INCORPORA-

TED, CLAIMANT. Certificate from the Circuit Court of Appeals for the Second Circuit. January 3, 1921. Leave granted to withdraw certificate sent up by the Circuit Court of Appeals for the Second Circuit. *Mr. Robert Stewart* for McCole. *Mr. Bertrand L. Pettigrew* for claimant.

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No. 141. BLUMENSTOCK BROTHERS ADVERTISING AGENCY *v.* CURTIS PUBLISHING COMPANY. Error to the Circuit Court of Appeals for the Seventh Circuit. January 10, 1921. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Colin C. H. Fyffe* for plaintiff in error. No appearance for defendant in error.

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No. 550. UNITED STATES *v.* UNITED SHOE MACHINERY CORPORATION ET AL. Appeal from the District Court of the United States for the Eastern District of Missouri. January 11, 1921. Dismissed, on motion of *The Solicitor General* for the United States. *Mr. Frederick P. Fish, Mr. Charles F. Choate, Jr.*, and *Mr. Cordenio A. Severance* for appellees.

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No. 469. THE PULLMAN COMPANY *v.* STATE INDUSTRIAL COMMISSION. On writ of certiorari to the Supreme Court, Appellate Division, Third Department, of the State of New York. January 17, 1921. Dismissed per stipulation. *Mr. Maurice C. Spratt* and *Mr. H. Prescott Gatley* for petitioner. *Mr. E. Clarence Aiken* for respondent.

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No. 169. WABASH RAILROAD COMPANY *v.* BOARD OF REVIEW OF COOK COUNTY, ILLINOIS. Error to the Su-

preme Court of the State of Illinois. January 18, 1921. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. E. Marvin Underwood* and *Mr. La Rue Brown* for plaintiff in error. *Mr. Edward J. Brundage* for defendant in error.

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No. 165. JOSEPH B. BEUTEL ET AL. *v.* OSCAR G. FOREMAN ET AL., TRUSTEES, ETC. Error to the Supreme Court of the State of Illinois. January 19, 1921. Dismissed with costs, pursuant to the tenth rule. *Mr. Albert Fink* and *Mr. David D. Stansbury* for plaintiffs in error. *Mr. Samuel A. Ettelson* and *Mr. Chester E. Cleveland* for defendants in error.

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No. 629. WILLIAM R. CASTLE ET AL., TRUSTEES, ETC. *v.* JULIA WHITE CASTLE. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. January 24, 1921. Dismissed with costs, on motion of counsel for petitioners. *Mr. A. G. M. Robertson* for petitioners. No appearance for respondent.

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## CASES DISPOSED OF IN VACATION.

No. 184. HANS HOHNER *v.* FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN, ET AL. Appeal from the District Court of the United States for the Southern District of New York. August 21, 1920. Dismissed pursuant to the twenty-eighth rule. *Mr. A. W. Lafferty* for appellant. *The Attorney General* for appellees.

# APPENDIX

The contents and pagination of the Admiralty Rules as published in this Appendix are identical with the Admiralty Rules as originally published in pamphlet form by the Clerk of the Supreme Court of the United States.

# RULES OF PRACTICE

FOR THE

# COURTS OF THE UNITED STATES

## IN ADMIRALTY AND MARITIME JURISDICTION

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Promulgated by the

SUPREME COURT OF THE UNITED STATES

December 6, 1920.

To take effect March 7, 1921.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

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## ORDER.

IT IS NOW HERE ORDERED BY THE COURT that the rules of practice for the Courts of Admiralty of the United States this day adopted and established by the Court be, and the same are hereby, promulgated as such to be in force on and after March 7, 1921.

December 6, 1920.

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# ADMIRALTY RULES OF PRACTICE

## 1.

## PROCESS ON FILING LIBEL.

No mesne process shall issue from the district court in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall have been filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

## 2.

## SUITS IN PERSONAM—PROCESS IN—ARREST IN SAME.

In suits *in personam* the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libellant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the District. But no warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise.

3.

## BAIL—IMPRISONMENT FOR DEBT.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made on similar or analogous process issuing from the State court.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, on similar or analogous process issuing from a State court.

4.

## BAIL IN SUITS IN PERSONAM.

The marshal shall take from the party arrested, as bail, either sufficient cash or a bond or stipulation in a sufficient sum, with sufficient sureties or an approved corporate surety, to be held by him to secure the appearance of the party so arrested in the suit. And upon such bond or stipulation summary process of execution shall be issued against the principal and sureties or corporate surety by the court to which the process is returnable.

5.

## BOND IN ATTACHMENT SUITS IN PERSONAM.

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under a process author-

izing the same, the attachment shall be dissolved by order of the court to which the process is returnable, on the giving of a bond or stipulation, with sufficient sureties, or an approved corporate surety, by the respondent whose property is so attached, or by someone on his behalf, conditioned to abide by all orders, interlocutory or final, of the court, and to pay the amount awarded by the final decree of the court to which the process is returnable, or in any appellate court, not exceeding, however, the value of the goods so attached with interest at six per centum per annum and costs; and upon such bond or stipulation, summary process of execution shall be issued against the principal and sureties or surety by the court to which the process is returnable, to enforce the final decree so rendered or on appeal by any appellate court.

6.

BONDS—STIPULATION—HOW GIVEN.

All bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before the clerk or a deputy clerk or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or before any commissioner of the United States authorized by law to take bail and affidavits in civil cases, or otherwise by written agreement of the parties or their proctors of record.

7.

BONDS—PREMIUMS—TAXABLE AS COSTS.

If costs shall be awarded by the Court to either or any party then the reasonable premiums or expense paid on

all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party.

8.

## REDUCTION OF BAIL, BOND OR STIPULATION—NEW SURETIES.

In all suits either *in rem* or *in personam*, where bail is given or a bond or stipulation is taken, the court may, on motion, for due cause shown, reduce the amount of such bail or may reduce the amount of security given by either bond or stipulation; and in all cases, either *in rem* or *in personam*, where a bond or stipulation is given, if either of the sureties or the corporate surety shall be or become insufficient or the security for costs shall for any reason be insufficient pending the suit, new or additional security may be required by order of the court on motion.

9.

## MONITION TO THIRD PARTIES IN SUITS IN REM.

In all suits *in rem* against a ship, and/or her appurtenances if her appurtenances or any of them are in the possession or custody of any third person, the court shall, on due notice to such third person and after hearing, decree that the same be delivered into the custody of the marshal or other proper officer, if on hearing it appears that the same is required by law and justice.

## 10.

## PROCESS IN SUITS IN REM.

In all cases of seizure, and in other suits and proceedings *in rem*, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

## 11.

## PERISHABLE GOODS—HOW DISPOSED OF.

In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their proctors of record to that effect, or on a

due appraisement, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent. per annum and costs, as the one or the other course shall be ordered by the court.

**12.**

## SHIP—HOW APPRAISED, SOLD OR BONDED.

Where any ship shall be arrested, the same shall, on the application of the claimant, be delivered to him either on a due appraisement, to be had under the direction of the court, or on his filing an agreement in writing to that effect signed by the parties or their proctors of record, and on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation for like amount, with sufficient sureties, or an approved corporate surety, conditioned as provided in the foregoing rule; and if the claimant shall unreasonably neglect to make any such application, then the court may, on the application of either party, on due cause shown, order a sale of such ship, and require the proceeds thereof to be brought into court or otherwise disposed of.

13.

SEAMEN'S WAGES—MATERIAL-MEN—REMEDIES.

In all suits for mariners' wages or by material-men for supplies or repairs or other necessaries, the libellant may proceed *in rem* against the ship and freight and/or *in personam* against any party liable.

14.

PILOTAGE—COLLISION—REMEDIES.

In all suits for pilotage or damage by collision, the libellant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner.

15.

ASSAULT OR BEATING—REMEDIES.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

16.

MARITIME HYPOTHECATION—REMEDIES.

In all suits founded upon a mere maritime hypothecation of ship or freight, either express or implied, by the master for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of maritime interest, the libellant may proceed *in rem* and/or *in personam* against the master and/or the owners.

**17.**

## BOTTOMRY BONDS—REMEDIES.

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by its own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer.

**18.**

## SALVAGE—REMEDIES.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, and/or *in personam* against any party liable for the salvage service.

**19.**

## PETITORY OR POSSESSORY SUITS.

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent,

or by one or more part owners against the others to obtain possession of the ship for any voyage, on giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

## 20.

## EXECUTION ON DECREES.

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the State or Federal law for the enforcement of judgments or decrees.

## 21.

## REQUISITES OF LIBEL OF INFORMATION.

All informations and libels of information upon seizures for any breach of the revenue, or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute

or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

**22.**

## REQUISITES OF LIBEL IN INSTANCE CAUSES.

All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; and, if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and places of residence of the parties so far as known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights *in rem*, or *in personam*, as the case may be, and for such relief and redress as the court is competent to give in the premises.

**23.**

## AMENDMENTS TO LIBELS.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form

may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, on motion, at any time before the final decree, on such terms as the court shall impose. And where any defect of form is set down by the respondent or claimant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms on the libellant.

**24.**

## STIPULATIONS FOR COSTS.

In all cases the court may, on the filing of a libel or on the appearance of any respondent, or claimant, or at any other time, require the libellant, respondent or claimant, or either of them to give a stipulation or an additional stipulation with sufficient sureties, or an approved corporate surety, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him, it, or them, by the final decree of the court, or by any interlocutory order in the progress of the suit, or an appeal by any appellate court.

**25.**

## CLAIM—HOW VERIFIED—CLAIMANT'S BONDS.

In suits *in rem* the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the

property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, on putting in such claim, the claimant shall file a bond or stipulation for costs as above provided.

**26.**

## ANSWERS—REQUISITES OF.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answers of or on behalf of the respondent or claimant to the libels and interrogatories shall be on oath or solemn affirmation; and all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner or except to each interrogatory propounded by the libellant. But this rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed herein are necessary for the purposes of justice in the case before the court.

**27.**

## PLEADINGS—INTERROGATORIES—EXCEPTIONS TO.

Either party may except to the sufficiency, fullness, distinctness, relevancy or competency of any of the pleadings or interrogatories filed by the other party; and if the court shall so adjudge on a hearing on the exceptions, and

shall order further pleadings or answers to be filed by either party, such pleadings or answers shall be filed within such time and on such terms as the court may direct.

**28.**

## DEFAULT ON FAILURE TO ANSWER.

If the respondent or claimant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court may pronounce him to be in contumacy and default and thereupon shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may set aside the default, and upon the application of the respondent or claimant admit him to make answer to the libel on such terms as the court may direct.

**29.**

## EFFECT OF FAILURE TO ANSWER FULLY.

In all cases where the respondent or claimant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment or otherwise, compel the respondent or claimant to make further answer thereto; or may make such other order in the cause as it shall deem most fit to promote justice.

30.

## WHAT EITHER PARTY MAY OBJECT TO ANSWERING.

Either party may object by proper pleadings to answering any allegation contained in any pleading or interrogatory filed by the other party, which will tend to expose him, it, or them, to any prosecution or punishment for crime, or for any penalty or any forfeiture of his, its or their property for any penal offense.

31.

## INTERROGATORIES MAY BE REQUIRED TO BE ANSWERED UNDER OATH.

Either party shall have the right to require the personal answer of the other party or of its proper officer on oath or solemn affirmation to all interrogatories propounded by him, it, or them, in the libel, answer or otherwise as may be ordered by the court on cause shown and required to be answered. In default of due answer by either party to such interrogatories, the court may adjudge such party to be in default and enter such order in the cause as it shall deem most fit to promote justice.

32.

## DISCOVERY OF DOCUMENTS BEFORE TRIAL.

After joinder of issue, and before trial, any party may apply to the court for an order directing any other party, his agent or representative, to make discovery, on oath, of

any documents which are, or have been, in his possession or power, relating to any matter or question in issue. And the court may order the production, by any party, his agent or representative, on oath, of such of the documents in his possession or power relating to any matter in question in the cause as the court shall think right, and the court may deal with such documents, when produced, in such manner as shall appear just.

**33.**

## HOW VERIFICATION OF ANSWER TO INTERROGATORY OBVIATED.

Where either the libellant or the respondent or claimant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the respondent or claimant when and as soon as it may be practicable or may receive a verification by agent or attorney with like force and effect as if made by the party.

**34.**

## HOW THIRD PARTY MAY INTERVENE.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard therein, he shall pro-

pound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, on filing his allegations, to give a stipulation with sufficient sureties or an approved corporate surety to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded against him by the court on the final decree, whether it is rendered in the original or appellate court, not to exceed however in any event the agreed or appraised value of the property so claimed by him, it, or them, with interest at six per cent. per annum and costs.

**35.**

## EXCEPTIONS TO PLEADINGS FOR SURPLUSAGE OR SCANDAL.

Exceptions may be taken to any libel, allegation, answer or other pleading for surplusage, impertinence or scandal; and if on hearing the matter excepted to shall be held to be so objectionable it shall be expunged on such terms as the court may direct.

**36.**

## PROCEDURE AGAINST GARNISHEE.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to

the debts, credits, or effects of the respondent or claimant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits or effects, the same shall be held in his hands, or paid into the registry of the court and shall be held in either case subject to the further order of the court.

**37.**

## BRINGING FUNDS INTO COURT.

In cases of mariners' wages, or bottomry, or salvage, or other proceeding *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, on due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit, and if no cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and on failure of the party to comply with the order, may award an attachment, or other compulsory process to compel obedience thereto.

**38.**

## DISMISSAL FOR FAILURE TO PROSECUTE.

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, and comply with the orders of the

court, he shall be deemed in default and contumacy; and the court may, on the application of the respondent or claimant, pronounce the suit to be deserted, and the same may be dismissed with costs.

**39.**

## REOPENING DEFAULT DECREES.

The court may, in its discretion, on motion of the respondent or claimant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within sixty days after the decree has been entered, the respondent or claimant submitting to such further orders and terms in the premises as the court may direct; and the term of the court shall be deemed extended for this purpose until the expiration of such period of sixty days.

**40.**

## SALES IN ADMIRALTY.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

41.

## FUNDS IN COURT REGISTRY.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all of the checks so drawn and the date thereof.

42.

## CLAIMS AGAINST PROCEEDS IN REGISTRY.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

43.

## REFERENCE TO COMMISSIONERS.

In cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any

matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein. And such commissioners or assessors shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

**44.**

## RIGHT OF TRIAL COURTS TO MAKE RULES OF PRACTICE.

In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.

**45.**

## FURTHER PROOF ON APPEAL.

Further proof taken by leave of a circuit court of appeals or the Supreme Court on an appeal in admiralty shall be taken in such manner as may be prescribed by statute or by said court.

**46.**

## EVIDENCE—HOW TAKEN.

In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided

by statute, or agreement of parties. When deemed necessary by the court or the officer taking the testimony or by the parties, a stenographer may be employed who shall take down the testimony in shorthand or otherwise and, if requested by the court or either party, transcribe the same. The fees may be fixed by the court and taxed as costs.

**47.**

## COSTS—TRAVEL OF WITNESSES.

Traveling expenses of any witness for more than one hundred miles to and from the Court or place of taking the testimony shall not be taxed as costs.

**48.**

## ISSUE ON NEW FACTS IN ANSWER.

When the respondent or claimant in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication or reply, general or special, shall be filed, unless ordered by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the respondent or claimant shall answer such amendments.

## 49.

## RECORD ON APPEAL.

The Clerks of the District Courts shall make up the records to be transmitted to the Circuit Court of Appeals.

I. They shall contain the following:

*A*. The style of the court.

*B*. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

*C*. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof, all bail and stipulations, and, if any sale has been made, the orders, warrants, and reports relating thereto.

*D*. The libel, with exhibits annexed thereto.

*E*. The pleadings of the respondent or claimant with the exhibits annexed thereto.

*F*. The testimony as taken on the part of the libellant, and any exhibits not annexed to the libel.

*G*. The testimony as taken on the part of the respondent or claimant and any exhibits not annexed to his pleadings.

*H*. Any orders and opinions of the court.

*I*. Any report of a commissioner or assessor, if excepted to, with the orders of the court respecting the

same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the commissioner or assessor are to be stated.

*J*. The final decree.

*K*. The notice of or prayer for an appeal, and the assignment of errors.

II. The following shall be omitted:

*A*. The continuances.

*B*. All motions, rules, and orders which are merely preparatory for trial and to which no exception was taken or error assigned.

*C*. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more of these; in which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

III. The Clerk of the District Court shall page the copy of the record thus made up, and shall make an index

thereto, and he shall certify the entire document at the end thereof under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule.

IV. In making up the record to be transmitted to the Circuit Court of Appeals, the Clerk of the District Court shall omit therefrom any of the pleadings, testimony or exhibits which the parties, by their proctors, shall, by written stipulation, agree may be omitted; and shall receive and include in the record any statement of the case which may be signed by the proctors showing how the questions arose and were decided in the District Court and setting forth so much only of the facts alleged and proved, or sought to be proved, or of the evidence thereof, as is essential to a decision of such question by the Appellate Court, and such stipulation and statement shall be filed and certified up with the record.

## 50.

## SECURITY ON CROSS-LIBEL.

Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

## 51.

## LIMITATION OF LIABILITY—HOW CLAIMED.

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" now embodied in sections 4283 to 4285 of the Revised Statutes, as now or hereafter amended or supplemented, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment thereof into court with interest at the rate of six per cent. per annum from the date of said stipulation and costs, whenever the same shall

be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than thirty days from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.

**52.**

## PROOF OF CLAIMS IN LIMITED LIABILITY PROCEDURE.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any person interested to question or controvert the same; and on the completion of said proofs, the commissioner shall make report, or the court its finding on the claims so

proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

### 53.

### DEFENSE TO CLAIMS IN LIMITED LIABILITY PROCEDURE.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided he, it or they shall have complied with the requirements of Rule fifty-one and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both, provided such answer

shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied.

**54.**

## COURTS HAVING COGNIZANCE OF LIMITED LIABILITY PROCEDURE.

The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf; when the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship shall have already been libeled or sold, the proceeds shall represent the same for the purposes of these rules.

**55.**

## APPEALS IN LIMITED LIABILITY CASES.

All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel

shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts.

**56.**

## RIGHT TO BRING IN PARTY JOINTLY LIABLE.

In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon

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**57.**

## PROPERTY IN CUSTODY OF MARSHAL.

No property in the custody of the marshal or other officer of the court shall be delivered up without an order of the court but, except in possessory actions, such order may be entered, as of course, by the clerk, on the filing of either a written consent thereto by the proctor on whose behalf it is detained, or an approved stipulation or bond given as provided by law and these rules; or upon the dismissal or discontinuance of the libel; except that in proceedings under Section 941 of the Revised Statutes the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid into the court by the party receiving such property subject to the decision of the court with respect to the amount of costs due such officers.

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8. *Train Service; Burdensome Regulation.* Order of state commission requiring interstate road to detour two of its through passenger trains from main line over a branch for benefit of small city already adequately served by local, connecting trains, *held* void. *St. Louis & S. F. Ry.* v. *Public Service Comm.* . . . . . 535

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3. *Change of State Regulations.* Right of State to enforce legitimate public policy includes right to change regulations for that purpose, even to making of changes in conflict with contracts made by individuals in reliance on previous regulations. *Thornton* v. *Duffy*..... 361

4. *Id. Workmen's Compensation.* Where State first allowed employers the privilege of paying directly to workmen instead of contributing to state insurance fund, but afterwards took it away from employers who insured themselves, *held* that change did not impair contract rights of employer who had elected to pay directly and had insured himself before change was made. *Id.*

5. *Tax Exemption; Local Corporations.* Law granting exemption to terminal company properly construed by state courts as creating repealable privilege rather than contract right to exemption. *Troy Union R. R.* v. *Mealy*..... 47

6. *Id. Following State Courts.* In determining whether such exemption was a privilege or contract right, this court inclines to follow state tribunals. *Id.*

7. *Bridge Companies; Charter Rights; Tolls.* In action for penalties for failure to construct foot and carriage ways on railway bridge as required by act amending charter, it is premature to inquire whether provision reducing tolls on such ways impairs contract obligation. *International Bridge Co.* v. *New York*..... 126

8. *Id. Reserved Power over Charter.* Where New York and Canadian companies, after consolidation, constructed bridge over Niagara River for railroad uses only, *held*, that new company had no contract immunity from being required to add foot and carriage ways in New York, as contemplated by both original charters, irrespective of whether the duty, expressed positively in the Canadian charter, attached to the consolidation in New York. *Id.*

V. **War Power.** See IX, 3, *infra.*

1. *Enemy Property.* Congress may provide for immediate seizure, *in pais* or through a court, of enemy property, leav-

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ing question of enemy ownership *vel non* to be settled later at suit of claimant. *Central Union Trust Co.* v. *Garvan* ... 554

2. *State Legislation,* prohibiting teaching of citizens not to aid United States in prosecuting war sustained. *Gilbert* v. *Minnesota* ..... 325

3. *Id. Aid to Federal Power; Police Power.* Such regulation is legitimate as a measure of coöperation by State with United States, not in conflict with federal war power; and also as an exercise of power to preserve peace of State. *Id.*

VI. **Privileges and Immunities.**

1. *Free Residence, Ingress and Regress.* Right possessed by citizens in all States, prior to Articles of Confederation; authority of States to protect it. *United States* v. *Wheeler* 281

2. *Id.* By Art. IV of those Articles, the continued state power was subjected to limitation that it should not be used to discriminate. *Id.*

3. *Id. Const., Art. IV,* § *2,* preserved this limitation and assumed that States possessed authority to protect right as part of reserved power. *Id.*

4. *Id.* Constitution does not guarantee this right against wrongful interference by individuals, but only against discriminatory action by States. *Id.*

VII. **Treaties.**

*Inheritance by Aliens.* In absence of treaty, capacity to inherit land within State of the Union depends upon law of that State. *Sullivan* v. *Kidd* ..... 433

VIII. **Fifth Amendment.**

1. *Self-incrimination.* Involuntary bankrupt who filed schedules of assets and liabilities, which, standing alone, did not furnish proof of crime, and who later declined to answer questions concerning them on ground of self-incrimination, *held* not to have waived privilege under Amendment. *Arndstein* v. *McCarthy* ..... 71

2. *Id.* Privilege applies if it cannot be said that questions propounded, considered in light of circumstances disclosed, may be answered with entire impunity. *Id.*

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3. *Id. Bankruptcy Act*, § 7, is not a substitute for the protection of the Amendment, since it does not prevent use of bankrupt's testimony to search out other evidence to be used against him or his property. *Id.*

4. *Forfeiture; Property Used to Defraud United States of Tax.* Under Rev. Stats., § 3450, an automobile so used by person who had it on credit from the owner, is subject to forfeiture, although the owner was without notice of the forbidden use; so construed, the statute does not violate this Amendment. *Goldsmith-Grant Co.* v. *United States* .... 505

IX. **Fourteenth Amendment.**

(1) *Notice and Hearing.*

1. *Assessment; Arbitration.* Assessment without notice or hearing, *held* invalid, where taxpayer's remedy by arbitration proved abortive because arbitrators, though agreeing assessment was excessive, could not unite on new assessment before expiration of time within which law required them to render decision, in consequence of which, under the law, original assessment stood affirmed. *Turner* v. *Wade* .. 64

(2) *Liberty and Property; Police Power; Taxation.* See 1, *supra;* 32, 36, *infra.*

2. *Seditious Teaching; State Legislation.* State law prohibiting teaching of citizens not to aid in prosecution of war is legitimate as a measure of coöperation by State with United States, not in conflict with federal war power; and also as an exercise of power to preserve peace of State. *Gilbert* v. *Minnesota* ..... 325

3. *Id. Limitations on Free Speech.* False and malicious misrepresentations of objects and motives of this country in entering war, made for purpose of discouraging recruiting, while war is flagrant, are not protected. *Id.*

4. *Change of State Regulations.* Right to enforce legitimate public policy includes right to change regulations for that purpose, even to making of changes in conflict with arrangements made by individuals in reliance on previous regulations. *Thornton* v. *Duffy* ..... 361

5. *Id. Workmen's Compensation.* Where State first allowed employers privilege of paying directly to workmen, instead

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of contributing to state insurance fund, but afterwards took it away from employers who insured themselves, *held* that change did not impair property rights of employer who had elected to pay directly and had insured himself before change was made. *Id.*

6. *Natural Gas; Conservation.* State may prohibit use of natural gas for manufacturing carbon without fully utilizing heat for other manufacturing or domestic purposes. *Walls* v. *Midland Carbon Co.* ..... 300

7. *Id.* So *held* over objection that investment would be destroyed and manufacture would be impracticable if heat were utilized as prescribed. *Id.*

8. *Id.* State may prevent disproportionate use by landowner to protect equal rights of others and to conserve gas as a resource of the State. *Id.*

9. *Id.* That plaintiff's product may be sold for more than gas consumed in its manufacture would bring for fuel purposes, is no ground for denying state power. *Id.*

10. *Railroad Crossings.* State may abolish grade crossings, whether laid out before or after construction of railroad, and may place upon company expense of running streets over or beneath tracks, if it desires to continue operating. *Erie R. R.* v. *Public Utility Commrs* ..... 394

11. *Id. Conflicting Interests.* Interest of public using streets is paramount to that of railroad and public using them; State may require streets to be kept free of danger whatever cost to parties introducing it. *Id.*

12. *Id.* Authority so exercised is an obvious case of police power; or it may be regarded as authority impliedly reserved when State granted right to occupy the land. *Id.*

13. *Id. Operation at a Loss* cannot be required. *Id.*

14. *Id. Requiring Ruinous Expenditure.* That plan will involve expenditures so heavy as to impair efficiency of railroad or even lead to bankruptcy, does not bring State's order into conflict with due process clause. *Id.*

15. *Id. Private Sidings.* Rights of railroad in respect of private sidings are no greater than those in respect of main line. *Id.*

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16. *Id. Operating Lessee.* Burden of changes may be laid on, without regard to financial ability of lessors to compensate if leases terminated. *Id.*

17. *Id. Apportionment of Expense.* Railroad cannot complain that only 10 per cent. is cast upon street railway as to streets used by latter. *Id.*

18. *Id. Reasonableness. Finding of Danger*, by state board, confirmed by state courts, if reasonable, must stand. *Id.*

19. *Id. Delegation of Legislative Power, Subject to Judicial Review.* Constitutional aspect of changes ordered at grade crossings is same whether state board was obliged to order them upon finding danger or had a discretion in the matter, under state law. *Id.*

20. *Id. Street Railway*, crossing tracks of steam road at grade, increases danger; may be required to bear part of expense of removal. *Id.*

21. *Id. Water Companies.* May constitutionally be required to adjust pipes at their own expense. *Id.*

22. *Id. Telegraph Companies.* Changes involving expense in adjusting lines at crossings do not infringe rights under Amendment. *Id.*

23. *Id. Private Sidings.* Order not invalid because it will dislocate private sidings and put their owners to expense. *Id.*

24. *Railroads; Right to Dismantle; Consent of State.* Apart from statute or express contract, those who invest in a railroad, though built under charter and eminent domain power, are not bound to go on operating at a loss; right to stop not dependent on consent of State. *Bullock* v. *R. R. Comm. of Florida.* ..... 513

25. *Id. Foreclosure; Rights of Mortgagee.* Where state Supreme Court prohibited lower court from confirming sale with liberty to purchaser to dismantle, on ground that State was not a party, *held* that prohibition could not affect rights of mortgagee, since right to dismantle, as against State, could not be conferred by foreclosure decree in the State's absence, and would pass to purchaser, if it existed, whether decree so provided or not. *Id.*

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26. *Bridge Companies; Charter Rights; Tolls; Reserved Power of State.* Requiring company constructing international railroad bridge to add foot and carriage ways, as contemplated by charter, *held* not to violate Amendment in absence of showing that additions would not yield reasonable return. *International Bridge Co.* v. *New York* ..... 126

27. *Dog License Fees.* State may require payment, under penalty of fine. *Nicchia* v. *New York* ..... 228

28. *Id. Enforcement; Private Agency.* Exercise of power through private corporation created to aid in enforcement of laws for prevention of cruelty to animals, with power to issue licenses, collect fees and apply them toward its expenses. *Id.*

29. *Income Tax; Foreign Corporations.* In considering whether tax on locally-earned income reaches income earned outside State, it is not necessary to decide whether it is a direct tax on income or an excise measured by income. *Underwood Typewriter Co.* v. *Chamberlain.* ..... 113

30. *Id. Computing Tax; Earnings Within and Without State.* Tax on income of corporation manufacturing within State but deriving greater part of receipts from sales outside, computed by taking proportion of total net income which value of real and personal tangible property within bears to that outside, *held* not unreasonable. *Id.*

31. *Id.* Fact that amount of net income allocated to taxing State greatly exceeded portion actually received there, does not prove that income earned outside was included in assessment. *Id.*

(3) *Equal Protection of the Laws.* See 6–9, 29–31, *supra.*

32. *Classification. Natural Resources.* A statute prohibiting use of natural gas for manufacturing carbon without fully utilizing heat for other manufacturing or domestic purposes, where source of supply is within 10 miles of an incorporated town or industrial plant, *held* reasonable. *Walls* v. *Midland Carbon Co.* ..... 300

33. *Id.* Validity of regulation cannot depend upon relative values or importance of industries favorably and unfavorably affected by it, or their relations to the welfare of State, these being matters for judgment of state legislature. *Id.*

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34. *Id. Inheritance Tax.* State may distinguish between property which has borne fair share of tax burden in decedent's lifetime and property of same kind which has not. *Watson* v. *State Comptroller*. . . . . 122

35. *Id. Transfer of Securities.* Additional tax on transfer of certain kinds of securities held by decedent at his death on which neither general property tax nor alternative stamp tax has been paid during fixed period prior thereto, *held* reasonable. *Id.*

36. *Foreign Corporations; Income Tax; Discrimination.* Principle that State may not impose discriminatory tax on sister-state corporation which had made permanent investments in State before law was enacted, *held* inapplicable to case involving non-discriminatory tax on locally-earned income of manufacturing corporation. *Underwood Typewriter Co.* v. *Chamberlain*. . . . . 113

37. *Abolishing Grade Crossings; Apportioning Expense.* Where State orders removal of grade crossings, a water company, which is required to adjust pipes at its own expense, is not denied equal protection as compared with street railroad required to pay 10 per cent. of expense of crossing, presumably more than expense of merely readjusting its tracks. *Erie R. R.* v. *Public Utility Commrs*. . . . . 394

X. **Eighteenth Amendment; Intoxicating Liquors.**
*Scope of Prohibition.* Amendment indicates no purpose to confiscate liquors lawfully owned when it became effective and intended for lawful use. *Street* v. *Lincoln Safe Deposit Co*. . . . . 88

**CONSTRUCTION.** See **Admiralty,** 6–8; **Alien Enemies; Anti-Trust Act; Bankruptcy Act; Bridges; Carriers,** 2–7; **Chinese Exclusion Acts; Constitutional Law; Contracts; Criminal Law; Employers' Liability Act; Indians; Insurance; Interstate Commerce Acts; Intoxicating Liquors; Judgments,** 2; **Jurisdiction; Patents for Inventions; Public Lands; Safety Appliance Act; Statutes; Sureties; Taxation; Treaties; Trusts and Trustees.**

**CONTRACTS.** See **Bankruptcy Act,** 7; **Claims,** 7; **Insurance.**
Maritime supplies. See **Admiralty,** 1.
Restraint of trade. See **Anti-Trust Act,** 1–3.

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As device to evade commodities clause. See **Interstate Commerce Acts,** I.

Impairment of. See **Constitutional Law,** IV.

Transportation. See **Carriers; Interstate Commerce Acts.**

Charter. See **Bridges; Carriers,** 9, 10.

Lease. See **Indians,** 8–13, 16, 17.

Agency; when stockholders not bound. See **Corporations,** 10.

Sale of corporate property; adequacy of consideration. See *id.*, 1–6.

Employment; protection by injunction. See **Equity,** 4.

Employment; assumption of risk; release from liability for negligence; specific performance. See **Employers' Liability Act,** 3, 5.

Express and railroad companies, contract for conducting express business over railroad lines. See *id.*, 3.

Creating trust. See **Trusts and Trustees.**

1. *Non-Maritime.* Contracts for construction of ships are non-maritime and not within admiralty jurisdiction; rule applies to contracts for work and material necessary to finish partly constructed vessel which had been launched. *Thames Co.* v. *The "Francis McDonald"* . . . . . 242

2. *Government Work; Suspension; Damages.* Where contract gave Government power to suspend where necessary for purpose or advantage of work, permitted it to change materials, and, besides providing against claims for damages on account of such changes, declared that no claim should be allowed contractor for damages arising out of any delay caused by Government, *held,* that a delay ordered to await appropriation by Congress for substituted materials and another in anticipation of passage of postal law because of which plans were altered, would not support claim for damages. *Wells Bros. Co.* v. *United States* . . . . . 83

3. *United States; Taking of Property. Contract Implied* is to pay for property actually taken. *Bothwell* v. *United States* . . . . . 231

4. *Id.* Where construction of dam flooded private land, destroyed owner's hay there stored and forced him to remove and sell cattle, *held,* assuming an implied obligation to

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pay for hay, there was none to pay loss due to forced sale of cattle. *Id.*

5. *Id.* Obligation to pay not implied from destruction of anti-hog-cholera serum by officers, without agreement to purchase; nor from Act of 1915 authorizing Secretary of Agriculture to expend money in eradication of animal disease, including payment of claims growing out of purchase and destruction of exposed materials. *Great Western Serum Co.* v. *United States* ..... 240

6. *Use of Patented Devices; No Contract to Pay* implied from appropriation acts evincing willingness of Congress to expend money in testing devices, but no intention to pay until their usefulness should be proved. *Haupt* v. *United States.* ..... 272

7. *Loss Attributable to Mistake of Claimant.* Where shipments of newspapers which owner supposed were going by express at lower rates were in fact sent by mail, at higher but legal postal rates, through oversight of its agents, *held,* that United States was under no implied contract to reimburse it. *Journal & Tribune Co.* v. *United States* ..... 581

**CONTRIBUTORY NEGLIGENCE.** See **Employers' Liability Act,** 1, 2; **Negligence,** 5.

**CONVERSION.** See **Carriers,** 7.

**CONVEYANCE.** See **Bridges,** 8; **Alien Enemies,** 4; **Indians; Trusts and Trustees.**

**CORPORATIONS.** See **Bridges; Telegraph Companies.**

Agency for enforcement of state law. See **Constitutional Law,** IX, 28.

Reserved power of State; tax exemption. See *id.,* IV, 5, 6.

Foreign corporations; income tax. See **Taxation,** II, 3–6.

*Id.* Priority of State for payment of license tax. See **Priority,** 3.

*Id.* Claims against United States. See **Claims,** 7.

Insurance companies. See **Bankruptcy Act,** 5, 6.

Railroads; elimination of grade crossings. See **Constitutional Law,** IX, 10–23.

*Id.* Adjustment of lines and pipes of street railway, tele-

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graph, and water companies; apportionment of expense. See *id.*, IX, 20–22.

Parties; alignment; diverse citizenship. See **Jurisdiction,** IV, 1.

Trust agreement; conveyance by railroads for terminal use; rights as stockholders and *cestui que trustent*, and rights against purchasers of stock in terminal with notice. See **Trusts and Trustees,** 1–13.

Articles; when amendment ineffective to terminate trust. See *id.*, 8, 10.

1. *Sale of Property; Rights of Shareholders.* Where business unprofitable and corporation cannot pay debts and continue, though it is not insolvent, majority shareholders may authorize sale of all corporate property for adequate consideration, and distribute net proceeds after payment of debts, over objection of minority. *Geddes* v. *Anaconda Mining Co.* 590

2. *Id. Adequacy of Consideration.* Such sale will not be set aside because consideration is shares in another corporation, if such shares have established market value and shareholders receiving them may convert them into cash consideration adequate for their interest in corporate property sold. *Id.*

3. *Id. Common Directors; Burden of Proof.* Where minority seek to set aside sale to another corporation negotiated by boards of directors having a member in common, burden is on those who would maintain transaction to show fairness and adequacy of consideration. *Id.*

4. *Id. Concurrent Findings,* of lower courts, that consideration was inadequate, accepted by this court. *Id.*

5. *Id. Public Auction.* When it appears from evidence that consideration was inadequate, court is not justified in affirming transaction merely because no greater amount is bid at public auction. *Id.*

6. *Id. Setting Aside Sale.* In suit to set aside sale for inadequacy of consideration, *held* that, under pleadings, the court, having found price inadequate, should have set sale aside, and was without power to depart from parties' contract by selling property at auction for cash price found adequate. *Id.*

7. *Stock Control of Subsidiaries; Contract Fixing Prices; Limitation on Purchase and Sale.* Agreement between coal and

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sales companies created and controlled by railroad company, whereby sales company agreed to buy all coal produced by coal company at fixed percentage of New York prices and not to buy or sell coal except that purchased from coal company, *held* a mere device to evade commodities clause and violative of Anti-Trust Act. *United States* v. *Lehigh Valley R. R.* ..... 255

8. *Emergency Fleet Corporation.* Though all its stock is owned by United States, it is a separate entity. *United States* v. *Strang* ..... 491

9. *Id. Agents.* Inspector employed by Fleet Corporation is not an agent of United States, within Crim. Code, § 41. *Id.*

10. *Stockholders.* Generally agents of a corporation are not agents for stockholders and cannot contract for them. *Id.*

**CO-TENANCY.** See **Indians,** 17.

**COURT OF CLAIMS.** See **Jurisdiction,** II (4); V.

**COURTS.** See **Admiralty,** 1–5; **Bankruptcy Act,** 4–6; **Evidence; Indians,** 4–7; **Jurisdiction; Procedure; Statutes; Trial.**

Power over administrative decisions. See **Alien Enemies,** 2; **Interstate Commerce Acts,** III; **Procedure,** IV, 3; **Public Lands.**

Instructions. See **Criminal Law,** 3, 4; **Evidence,** 5; **Master and Servant,** 2; **Trial,** 1.

**CREEK INDIANS.** See **Indians,** 1–7.

**CRIMINAL CODE.** See **Criminal Law,** 6, 8, 9; **Jurisdiction,** IV, 3.

**CRIMINAL LAW:**

Conspiracy. See **Anti-Trust Act,** 6 *et seq.*

Self-incrimination. See **Constitutional Law,** VIII, 1–3.

Competency of wife as witness for husband. See **Evidence,** 6.

Indictment for murder within Indian reservation; objection *held* not to raise jurisdictional question. See **Jurisdiction,** IV, 3.

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1. *Intent.* One whose intentional conduct violates prohibitions of penal statute is not excused by purpose to keep within the law and his belief that he did so. *Horning* v. *District of Columbia* . . . . . 135

2. *Pawnbrokers; Engaging in Business Without License.* Act of 1913, prohibiting business in District of Columbia, without license, is violated where part of transaction occurs outside the jurisdiction. *Id.*

3. *Instructions; Verdict of Guilty.* When undisputed facts establish offense charged, the judge may instruct jurors that, while they cannot be constrained to return a verdict of guilty, it is their duty to do so. *Id.*

4. *Id. Harmless Error.* When cured by § 269, Jud. Code, in a case of admitted facts. *Id.*

5. *Unlawful Landing of Aliens.* Indictment, for unlawfully bringing in Chinese aliens, will lie under § 8 of Immigration Act of 1917, where acts charged do not amount to a landing in violation of § 11 of Chinese Exclusion Act of 1884. *United States* v. *Butt* . . . . . 38

6. *Anti-Narcotic Act; Indictment; Surplusage; Principals.* Where indictment charges unlawful selling by issuing a prescription, the clause as to issuing prescription, being intimately involved in description of offense, cannot be treated as surplusage, but it is not repugnant to charge of selling, since under the act one may take a principal part in a prohibited sale of morphine belonging to another by issuing a prescription for it, and Crim. Code, § 332, makes whoever aids, abets, etc., the commission of an offense a principal. *Jin Fuey Moy* v. *United States* . . . . . 189

7. *Id. Professional Practice.* Immunity of § 2 (a) of act is confined strictly within appropriate bounds of a physician's professional practice; it does not permit sales to dealers or distributions intended to satisfy appetites of persons addicted to use of drugs. *Id.*

8. *Conspiracy; Crim. Code,* § 19, does not embrace conspiracy to deprive citizens of right to remain in particular State, by seizing and deporting them to another State. *United States* v. *Wheeler* . . . . . 281

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9. *Crim. Code, § 41; Agent of Corporate Agency of United States.* One employed as inspector by the Emergency Fleet Corporation is not an agent of the United States. *United States* v. *Strang* ..... 491

**CUMMINS AMENDMENT.** See **Interstate Commerce Acts,** II, 3.

**DAMAGES.** See **Admiralty,** 2; **Claims,** 1–3; **Contracts,** 2; **Employers' Liability Act,** 1; **Interstate Commerce Acts,** II, 4; **Jurisdiction,** II, 4; **Telegraph Companies,** 2. Limitation of liability. See **Interstate Commerce Acts,** II, 2, 3.

*Pain; Panama Law.* Damages are recoverable for pain in case of personal injuries. *Panama R. R.* v. *Pigott* ..... 552

**DEBATES.** See **Statutes,** 8.

**DECREES.** See **Judgments.**

**DEEDS.** See **Indians,** 3–6, 8–17; **Trusts and Trustees.** Of trust. See **Trusts and Trustees,** 14.

**DELEGATION OF POWER.** See **Constitutional Law,** IX, 19, 28.

**DELIVERY.** See **Carriers,** 1–7; **Interstate Commerce Acts,** II, 4; **Intoxicating Liquors,** 2.

**DEMURRER.** See **Pleading,** 2.

**DEPORTATION.** See **Criminal Law,** 8.

**DESCENT AND DISTRIBUTION.** See **Indians,** 1–7, 13–15.

**DEVISE.** See **Indians,** 14, 15.

**DIRECT TAXES.** See **Constitutional Law,** IX, 29.

**DIRECTOR GENERAL.** See **Interstate Commerce Acts,** III, 3.

**DISCRIMINATION.** See **Interstate Commerce Acts,** II, 5; III, 1, 2.

**DISTRICT OF COLUMBIA.** See **Jurisdiction,** II (5); VI. PAGE
Pawnbrokers. See **Criminal Law,** 2.

**DISTRICT COURT.** See **Admiralty,** 2–5; **Bankruptcy Act,** 4–6; **Jurisdiction,** II (3); IV; **Procedure,** IV, 6.

**DIVERSE CITIZENSHIP.** See **Jurisdiction,** IV, 1.

**DOCUMENTS.** See **Constitutional Law,** VIII, 1–3.

**DOG LICENSES.** See **Constitutional Law,** IX, 27, 28.

**DRUGS.** See **Criminal Law,** 6, 7.

**DUE PROCESS.** See **Constitutional Law.**

**DURESS.** See **Claims,** 7.

**EIGHTEENTH AMENDMENT.** See **Constitutional Law,** X.

**ELECTION.** See **Constitutional Law,** IV, 4; IX, 5.

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1. *Legal Entity.* Fleet Corporation, though all stock owned by United States, is a separate entity. *United States* v. *Strang*. . . . . 491

2. *Agents; Crim. Code, § 41.* Inspector employed by Fleet Corporation is not an agent of United States. *Id.*

**EMINENT DOMAIN.** See **Carriers,** 9; **Claims,** 1, 2.

**EMPLOYER AND EMPLOYEE.** See **Anti-Trust Act,** 6–15; **Emergency Fleet Corporation,** 2; **Employers' Liability Act; Master and Servant; Negligence,** 1.
Workmen's compensation. See **Constitutional Law,** IV, 4; IX, 5.
Contracts; protection by injunction. See **Equity,** 4.

**EMPLOYERS' LIABILITY ACT.** See **Master and Servant.**

1. *Assumption of Risk.* Bars action; does not, like contributory negligence, go to reduction of damages. *Pryor* v. *Williams*. . . . . 43

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2. *Id. State Law Inapplicable.* Decision, applying local construction of common law, that risk of injury from defective tool was attributable to master's negligence, and that plaintiff did not assume it but was guilty of contributory negligence, *held* erroneous. *Id.*

3. *Employees Not Within Act; Express Companies.* Contract for conducting express business over lines of railroad, under which express company assumed risk of injury to its employees engaged in work on trains of railroad company and agreed to indemnify latter against claims for injuries, constitutes business of express company distinct from that of railroad, not a partnership, so that employee of former is not an employee of latter within federal act. *Wells Fargo & Co.* v. *Taylor*. . . . . 175

4. *Id.* "*Common Carriers by Railroad.*" Act does not embrace express company conducting business under such arrangement. *Id.*

5. *Id. Contract of Employment; Assumption of Risk; Enforcing Obligation.* Express messenger, who, as condition to employment, assented to such arrangement and agreed to assume risk, and was injured by negligence of railroad, *held* bound not to assert liability against either company. *Id.*

**ENEMIES.** See **Alien Enemies.**

**EQUAL PROTECTION OF THE LAWS.** See **Constitutional Law,** IX (3).

**EQUITY.** See **Judgments,** 8; **Pleading; Trusts and Trustees.**

Concurrent findings. See **Procedure,** IV, 6.

Bill of review; setting up decree in another circuit. See **Jurisdiction,** III, 1–3.

Injunction. See **Anti-Trust Act,** 4–15; **Judgments,** 2; **Trusts and Trustees,** 12.

*Id.* United States; enjoining rights under leases of restricted allotments. See **Indians,** 8.

Lien. See **Admiralty,** 6–8; **Jurisdiction,** II, 7; **Priority.**

Federal courts; limitation on powers; strict construction. See **Statutes,** 6.

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1. *Injunction; Trade-marks; Defense of Fraud and Unclean Hands.* That trade-mark and advertisements convey fraudulent representations to public affords but a narrow ground for refusing relief against infringer who seeks to reap advantages of plaintiff's good will. *Coca-Cola Co.* v. *Koke Co.* ..... 143

2. *Id.* As respects this defense, plaintiff's position must be judged by facts when suit was begun, not by facts of a different condition and earlier time. *Id.*

3. *Id.* Use of "Coca-Cola" with accompanying pictures on labels, *held* not to constitute fraud depriving plaintiff of right to enjoin infringement and unfair competition in selling like product under name of "Koke." *Id.*

4. *Id. Protection of Contracts of Employment.* In suit by corporation against its subsidiary and former employees of latter and their labor unions, wherein plaintiff sought to enjoin molestation of workmen of, and interference with performance of contract with plaintiff for manufacture of Government supplies by, defendant corporation, *held* that plaintiff's right was a right to protect from interference the contract between the defendant corporation and its workmen. *Niles-Bement-Pond Co.* v. *Iron Moulders Union* ... 77

5. *Id. Enforcement of State Judgment. Jud. Code, § 265,* does not forbid enjoining collection of judgment obtained in state court where its enforcement would be contrary to equity and good conscience. *Wells Fargo & Co.* v. *Taylor* .. 175

6. *Id.* Obligation of messenger, under contract of employment, not to assert liability for injury against either express or railroad company, enforced by suit in District Court to enjoin collection of judgment obtained in state court. *Id.*

**ERROR AND APPEAL.** See **Admiralty,** 2–5; **Bankruptcy Act,** 4–6; **Jurisdiction; Parties,** 2; **Procedure.**

**ERRORS, ASSIGNMENT OF.** See **Jurisdiction,** II, 4.

**ESTATES OF DECEDENTS.** See **Indians,** 1–7, 13–15; **Taxation,** II, 7–9.

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Of gift or loan. See **Bankruptcy Act,** 7.
Of invention. See **Patents for Inventions,** 5.
Of monopoly. See **Anti-Trust Act,** 4.
Of trust. See **Trusts and Trustees,** 9.

1. *Burden of Proof; Intent to Evade Jurisdiction.* In action for damages for mental anguish caused by mistake in transmission of telegram, where message was routed through another State to destination in State of origin, *held*, that if motive to evade state jurisdiction, by making the transaction interstate commerce, were material, it was error to lay burden on defendant of disproving it. *Western Union Tel. Co.* v. *Speight* ..... 17

2. *Id. Attacking Legality of Tax.* Necessity of proving illegality to recover money voluntarily paid; mere assertion and speculation may not be relied upon. *Cochran* v. *United States.* ..... 387

3. *Id. Inadequacy of Consideration; Interested Director.* Where minority shareholders of corporation seek to set aside sale of its property to another corporation negotiated by boards of directors having a member in common, burden is upon those who would maintain transaction to show its entire fairness and adequacy of consideration. *Geddes* v. *Anaconda Mining Co.* ..... 590

4. *Id.* Where it appears from evidence tnat consideration was inadequate, court is not justified in affirming transaction merely because no greater amount is bid upon offering property at public auction. *Id.*

5. *Foreign Law.* Whether or not Panama law as to negligence and damages for pain should be judicially noticed by District Court for Canal Zone, in case involving injuries

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suffered in Panama, *held*, that defendant was not harmed by leaving it to be determined by jury on conflicting evidence of experts. *Panama R. R.* v. *Pigott* ..... 552

6. *Witnesses; Competency; Husband and Wife.* In criminal prosecution in federal court in Pennsylvania, defendant's wife is not competent to testify for her husband either generally or by contradicting testimony that certain matters transpired in her presence. *Jin Fuey Moy* v. *United States* 189

**EXCEPTIONS:**

1. *Errors of Law.* Rule that errors of law by trial court cannot be considered on writ of error unless raised by bill of exceptions, has no application upon review of a judgment of the Supreme Court of Porto Rico, although that court has power to review evidence and make new findings of fact. *Ana Maria Sugar Co.* v. *Quinones* ..... 245

2. *Id. Record.* Such rulings are part of record and need not be excepted to. *Id.*

**EXCISE TAXES.** See **Constitutional Law,** IX, 29–31, 36.

**EXECUTIVE DEPARTMENTS.** See **Admiralty,** 4; **Treaties,** 7.

**EXECUTIVE OFFICERS.** See **Alien Enemies,** 3, 4; **Bridges,** 3, 5; **Claims,** 3, 7; **Indians,** 3, 9–14, 16; **Taxation,** I, 4, 6.
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**FEDERAL QUESTION.** See **Jurisdiction,** II, 6–9, 13, 15, 17, 18; IV, 2.

**FIFTH AMENDMENT.** See **Constitutional Law,** VIII.

**FINAL JUDGMENT.** See **Jurisdiction,** II, 3.

**FORECLOSURE.** See **Carriers,** 10; **Jurisdiction,** II, 16.

**FOREIGN CORPORATIONS.** See **Claims,** 7; **Priority,** 3; **Taxation,** II, 3–6.

**FOREIGN COUNTRIES.** See **Admiralty,** 3, 4; **Interstate Commerce Acts,** II, 1; **Treaties.**

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**HUSBAND AND WIFE.** See **Evidence,** 6.

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**INDIANS:**

Murder within reservation; objection held not to raise jurisdictional question. See **Jurisdiction,** IV, 3.

1. *Creek Allotment, in Name of Decedent; Alienation by Full-blood Heirs.* Lands of Indian who died after enrollment and before allotment and which were thereafter allotted in his name under Act of 1906, descend to his heirs, not as direct allotment but as an inheritance; alienability by full bloods is determined, not by provisions of Acts of 1906 and 1908 respecting allotments to living allottees, but by those governing alienability by heirs. *Harris* v. *Bell* ..... 103

2. *Id. Intent of Congress,* and not usual distinction between title by purchase and by descent, controls. *Id.*

3. *Id. Approval by Secretary of Interior.* Power, under Act of 1906, to approve conveyances by adult full-blood heirs, was not recalled by Act of 1908, as to conveyances made, though not approved, before its enactment; lapse of 2 1/2 years between deed and its approval does not affect validity of conveyance in absence of lawful intervening disposal. *Id.*

4. *Id. Approval by Court; Act of 1908,* § *9,* providing that no conveyance of interest of full-blood Indian heir shall be valid unless approved by court having jurisdiction of settlement of estate of deceased allottee, prescribes rule for future conveyances. *Id.*

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5. *Id. Minors; Probate Courts; Act of 1908, § 6,* subjecting persons and property to jurisdiction of probate courts of Oklahoma, does not affect inherited lands in its provision that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of court, etc. *Id.*

6. *Id.* Construing §§ 6 and 9 of Act of 1908, *held,* that proviso of § 9 refers only to adult full-blood heirs, and that probate court having jurisdiction over persons and property of minor full-blood heirs, but not of settlement of estate of deceased allottee from whom they inherited, was proper court to sanction conveyance of allotment made by their guardian. *Id.*

7. *Id. Guardianship.* General rule giving court of guardianship exclusive power to supervise ward's property, obtains in Oklahoma; intention to depart from it in act of Congress respecting lands of minor full-blood Indians not accepted unless clearly evinced. *Id.*

8. *Guardianship of United States; Right to Sue; Leases.* United States may enjoin assertion of rights under leases of restricted allotments obtained without conforming to statutes and administrative regulations, and enjoin negotiation of other unlawful leases in future. *La Motte* v. *United States* 570

9. *Act of 1906; Approval of Osage Leases; Regulations.* Secretary may not merely approve or disapprove leases after execution, but may make regulations prescribing in advance as conditions to approval mode in which they shall be executed and terms for protection of Indian lessors. *Id.*

10. *Id.* Section 7, in providing that leases shall be subject "only" to approval of Secretary, distinguishes between leases by individuals, to be approved by Secretary alone, and leases for tribe, which, under § 3, need sanction of tribal council as well. *Id.*

11. *Id. Minor Allottees; Guardianship.* Under § 7, construed with §§ 3 and 6 of Act of 1912, approval of Secretary is requisite to validity of leases of restricted lands of minor allottees or minor heirs, given by guardians with sanction of local courts in which guardianships were pending. *Id.*

12. *Id. Competency.* Under § 7, leases made by Indian parent having certificate of competency, or white parent

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not a member of tribe, on behalf of minor allottees or heirs, require Secretary's approval. *Id.*

13. *Id. Heirs.* Land allotted in right of deceased member cannot be leased by his heirs without Secretary's approval if they are members of tribe and without certificates of competency. *Id.*

14. *Id. Devise; Removal of Restrictions.* Devise of restricted allotment by will under § 8 of Act of 1912, approved by Secretary, operates as conveyance free of restrictions. *Id.*

15. *Id. Indefinite Restraint on Alienation.* Neither at common law nor under Oklahoma statutes may testator impose indefinite restriction on right of devisee to alienate land devised. *Id.*

16. *Lease After Removal of Restrictions.* Osage members, though without certificates of competency, may lease, without Secretary's approval, allotments purchased after such allotments had become unrestricted, since Acts of 1906 and 1912 do not reimpose restrictions once removed, or subject to restrictions all lands, however acquired, which members without such certificates may own. *Id.*

17. *Id. Co-tenants; Restricted and Unrestricted Interests; Form of Injunction.* Purchasers or lessees of unrestricted, undivided interests should be enjoined from exerting control over lands to exclusion of Indian co-tenants of restricted interests but not from dealing with their own interests. *Id.*

**INDICTMENT.** See **Criminal Law,** 5, 6.

**INFANTS.** See **Indians,** 5–7, 11, 12; **Negligence,** 5.

**INFRINGEMENT.** See **Patents for Inventions; Trademarks.**

**INHERITANCE.** See **Indians,** 1–7, 11–15; **Taxation,** II, 7–9; **Treaties,** 1–6.

**INJUNCTION.** See **Anti-Trust Act,** 4–15; **Equity; Judgments,** 2; **Trusts and Trustees,** 12.

Right of United States to enjoin assertion of rights under leases of restricted allotments. See **Indians,** 8.

*Id.* Scope and form of injunction. See **Judgments,** 7.

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**INSTRUCTIONS.** See **Criminal Law,** 3, 4; **Evidence,** 5; **Master and Servant,** 2; **Trial,** 1.

**INSURANCE.** See **Bankruptcy Act,** 5, 6.
Workmen's compensation. See **Constitutional Law,** IV, 4; IX, 5.

1. *Suicide; Sane or Insane and Incontestable Clauses,* of life policies, *construed* as implying that suicide of insured, sane or insane, after time specified, shall not be a defense. *Northwestern Mutual Life Ins. Co.* v. *Johnson* ..... 96

2. *Id. Public Policy.* Validity of such agreements, even when death is due to suicide, if it occur after lapse of certain time, depends upon state public policy. Where it did not appear in what State contracts were made, the court upheld them, which, *semble,* is in accord with general rule. *Id.*

**INTEREST:**
Payment, as evidence of gift or loan. See **Bankruptcy Act,** 7.

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**INTERLOCUTORY DECREE.** See **Judgments,** 1.

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**INTERNATIONAL LAW.** See **Alien Enemies; Negligence.**
Aliens; capacity to inherit. See **Treaties,** 1–6.
Admiralty; jurisdiction over vessel in service of foreign government. See **Admiralty,** 2, 3.
*Id.* Manner of raising question. See *id.,* 4.

**INTERSTATE COMMERCE.** See **Anti-Trust Act; Bridges,** 3 *et seq.;* **Constitutional Law,** III; **Employers' Liability Act; Interstate Commerce Acts; Jurisdiction,** IV, 2; **Safety Appliance Act.**
Uniform Bills of Lading Act. See **Carriers,** 2–7.

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1. *What Is?* Transmission of telegram between two States is interstate commerce as matter of fact; the fact must be tested by the actual transaction. *Western Union Tel. Co.* v. *Speight* ..... 17

2. *Id.* Message routed through another State to destination in State of origin *held* interstate. *Id.*

**INTERSTATE COMMERCE ACTS.** See **Anti-Trust Act; Employers' Liability Act; Safety Appliance Act.**
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I. **Commodities Clause.**

*Sales Company Device.* Agreement between coal and sales companies created and controlled by a railroad company, whereby sales company agreed to buy all coal produced by coal company at fixed percentage of New York prices and not to buy or sell coal except that purchased from coal company, *held* a mere device to evade commodities clause. *United States* v. *Lehigh Valley R. R.* ..... 255

II. **Shipper and Carrier.** See III, *infra.*

1. *Foreign Commerce.* Section 1 applies to carrier engaged in transportation of persons or property from adjacent foreign country into United States as well as from the United States to an adjacent foreign country. *Galveston &c. Ry.* v. *Woodbury* ..... 357

2. *Carmack Amendment; Limitation of Liability.* Where passenger traveling from Canada to Texas and return without express stipulation as to liability for loss of baggage, through fault of carrier lost her trunk in Texas on the journey out, *held,* that amount of recovery was limited under Carmack Amendment by published tariffs filed with Interstate Commerce Commission. *Id.*

3. *Id. Cummins Amendment* did not alter right of carrier under Carmack Amendment to limit by tariff amount of liability for baggage of passenger. *Id.*

4. *Bill of Lading; Diversion; Carmack Amendment.* Where shipment is purely intrastate and neither bill of lading nor state regulation gives right to divert, action of shipper and connecting carrier in forwarding goods, after arrival at des-

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tination, to new destination in another State under new bill, cannot impress original shipment with interstate character, subject it to Commerce Act and interstate tariffs, and so render initial carrier liable under Carmack Amendment for damage occurring under new consignment. *Bracht* v. *San Antonio & Aransas Pass Ry.* ..... 489

5. *Discrimination; Rates.* Discrimination between shippers, otherwise violative of § 2 of act, cannot be justified by exigencies of competition between carriers. *Seaboard Air Line Ry.* v. *United States* ..... 57

III. **Powers and Proceedings of Commission.**

1. *Switching Charges; Discrimination.* Finding of Commission that practice of carriers as to absorption of switching charges in transporting carload freight to and from Richmond was discriminatory between shippers, *held* not arbitrary nor beyond Commission's authority, and that order was not too vague and uncertain to be enforced. *Seaboard Air Line Ry.* v. *United States.* ..... 57

2. *Id. Findings of Commission,* as to likeness of contemporary transportation services rendered to different shippers and as to substantial similarity of circumstances and conditions in which they were rendered, will not be disturbed by courts unless arbitrary or in excess of authority. *Id.*

3. *Jurisdiction; Classification.* Under Federal Control and Transportation Acts, changes in classification of commodity and in rules determining its acceptance for shipment are as fully within jurisdiction of Commission when proposed by Director General as if proposed by carrier. *Director General* v. *Viscose Co.* ..... 498

4. *Id.* Amendment of freight tariff schedule, filed with Commission, canceling published classification and rates on silk and amending rule so as to include silk among articles not accepted for shipment, attempts both classification and change of regulation, the reasonableness of which, when challenged by a shipper, presents a question within exclusive initial jurisdiction of Commission. *Id.*

5. *Id.* Shipper complaining of changes should apply for relief to Commission; District Court is without jurisdiction, in first instance, to annul changes and enjoin carriers from complying. *Id.*

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**INTERVENTION.** See **Procedure,** III.

**INTOXICATING LIQUORS:**

Forfeiture; vehicles used for removal, etc., in defrauding United States of tax. See **Constitutional Law,** VIII, 4.

1. *Prohibition Act; Lawful Possession; Warehouses.* Liquors lawfully acquired and stored by owner prior to effective date of act in a room leased in public warehouse and so kept for his personal use, might lawfully be so stored after act became effective. *Street* v. *Lincoln Safe Deposit Co* ..... 88

2. *Id. Section 3; Possession and Delivery.* Warehouse owner did not "possess" such liquors, within § 3, nor would it "deliver" them, if it permitted removal to owner's dwelling for lawful use. *Id.*

3. *Id. Transportation, under Permit,* from warehouse to home of owner, is not unlawful. *Id.*

4. *Id. Eighteenth Amendment* indicates no purpose to confiscate liquors lawfully owned when it became effective and intended for lawful use. *Id.*

5. *Id. Unlawful Possession.* Section 25 does not apply to liquors stored by lawful owner in good faith for personal use; for that use is declared lawful by § 33. *Id.*

6. *Id. Place Where Manufactured, Sold, Kept; Nuisance under § 21.* Word "kept" means kept for sale or other commercial purposes. *Noscitur a sociis. Id.*

7. *Id. Intent to Confiscate* private property, even in intoxicating liquors, not raised by inference and construction from provisions which have ample field for other operation in effecting a purpose clearly indicated and declared. *Id.*

**INVENTIONS.** See **Patents for Inventions.**

**JOINT LIABILITY.** See **Trusts and Trustees,** 14.

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Function and effect of railroad foreclosure decree, and rights of purchaser thereunder. See **Carriers,** 10.

1. *Original Cases. Interlocutory Decree,* defining state boundary and appointing commissioners to locate and designate it. *Minnesota* v. *Wisconsin* . . . . . 14

2. *Effect of Decree in Subsequent Suit; Rates.* Decree of this court affirming without prejudice injunctive decree of state court upholding statutory railroad rate as non-confiscatory, determines adequacy of rate for period antedating decree, and is not superseded by decree in subsequent suit holding rate confiscatory upon new evidence. *Minneapolis &c. Ry.* v. *Merrick Co* . . . . . 376

3. *Res Judicata; Decree in Another Circuit; Bill of Review.* When Circuit Court of Appeals has sustained a patent and remanded the case for accounting, party desirous of setting up a subsequent decree in another circuit as *res judicata* should petition the Circuit Court of Appeals for leave to file a bill of review in District Court, setting up new matter as bar to further proceedings. *National Brake Co.* v. *Christensen* . . . . . 425

4. *Id. Discretion.* Such applications addressed to sound discretion of appellate tribunal. *Id.*

5. *Id. Close of Term.* Leave to file such bill of review may be granted after judgment of appellate tribunal and after going down of mandate at close of term. *Id.*

6. *Id.* Application *held* of that character, and not one to have the other decree pronounced *res judicata* by the appellate court. *Id.*

7. *Scope of Injunction; Indian Leases.* Injunction of purchasers or lessees of unrestricted, undivided interests in Osage allotments, from exercising control to exclusion of Indian co-tenants of restricted interests, should not be so broad as to prevent them from dealing with their own interests. *La Motte* v. *United States* . . . . . 570

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8. *Id.; Trade-mark Infringement.* Use of "Coca-Cola" with accompanying pictures on labels, *held* not to constitute fraud depriving plaintiff of right to enjoin sale of like product under name of "Koke"; but injunction should not restrain use of "Dope," a featureless word not specifically suggestive of "Coca-Cola" by similarity or in use, nor forbid manufacture and sale of product, including coloring matter. *Coca-Cola Co.* v. *Koke Co* ..... 143

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**JUDICIAL NOTICE:**

1. *Foreign Law; Leaving Question to Jury.* Whether or not Panama law as to negligence and damages for pain should be judicially noticed by District Court for Canal Zone, in an action involving injuries suffered in Panama, *held*, that defendant was not harmed in this case by leaving it to be determined by jury on conflicting evidence of experts. *Panama R. R.* v. *Pigott*..... 552

2. *Inventions; Prior Art.* Court notices earlier forms of scaffolding used in construction of buildings, in determining invention. *New York Scaffolding Co.* v. *Liebel-Binney Co.*.. 24

3. *Public Status of Vessel.* When it is claimed that ship is immune from process in libel for damages for collision, because in service of foreign government, the facts necessary to support claim, not being subjects of judicial notice, must be established. *Ex parte Muir*..... 522

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1. *Constitutionality and Construction of Statutes.* Power to construe is necessary incident of power to determine constitutionality. *Heald* v. *District of Columbia* ..... 20

2. *Allegations of Bill.* Whether adequate to justify relief sought, is not a question of jurisdiction. *De Rees* v. *Costaguta* ..... 166

3. *Enjoining Enforcement of Judgment in State Court. Jud. Code,* § 265, is intended to give effect to principle of comity and prevent interference with orderly disposal of litigation in state courts, but not to hamper federal courts in discharge of duties otherwise plainly cast upon them by Constitution and laws of Congress. *Wells Fargo & Co.* v. *Taylor* ..... 175

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4. *Id.* The inhibition does not forbid enjoining collection of judgment obtained in state court where its enforcement would be inequitable. *Id.*

5. *Local Questions.* Whether priority of State for payment of license taxes is a prerogative right or a rule of administration is a local question, the determination of which by highest court of State concludes federal courts. *Marshall* v. *New York* . . . . . 380

II. **Jurisdiction of this Court.**

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1. *Error or Appeal.* Mistake, in bringing up case by appeal instead of writ of error, is cured by Act of 1916, but act does not abolish distinction between two modes of review. *Ana Maria Sugar Co.* v. *Quinones* . . . . . 245

(2) *Over Circuit Court of Appeals.* See III, *infra.*

2. *Writ of Error; Trading with Enemy Act.* Decrees affirming decrees of District Court, placing Alien Property Custodian in possession of property, reviewable by writ of error. *Central Union Trust Co.* v. *Garvan.* . . . . . 554

3. *Certiorari.* Refusal of Circuit Court of Appeals after it has sustained a patent for an invention and ordered an accounting, to grant leave to file bill of review in District Court setting up an adjudication in another circuit, is ancillary to original jurisdiction arising under patent laws, and is reviewable by certiorari. *National Brake Co.* v. *Christensen.* . . . . . 425

4. *First Circuit; Porto Rico; Assignment of Errors.* Where judgment of Supreme Court of Porto Rico in law action was assailed in Court of Appeals for error in measuring damages, but it appeared from opinion of former court that damages were allowed on other grounds not assigned as error in Court of Appeals and not there considered, *held,* that they could not be insisted upon as grounds for reversal by this court. *Ana Maria Sugar Co.* v. *Quinones* . . . . . 245

(3) *Over District Court.* See IV, *infra.*

5. *Admiralty; Mandamus and Prohibition.* This court, in its discretion, may decline to issue writs to prevent exercise

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of jurisdiction by District Court, where jurisdiction is merely in doubt and state of case is such that question may be reconsidered by District Court and on appeal. *Ex parte Muir* 522

6. *Direct Appeal; Jurisdiction as Federal Court,* necessary to support appeal under Jud. Code, § 238. *De Rees* v. *Costaguta* ..... 166

7. *Id. Non-residents; Publication.* Such jurisdiction is not involved where jurisdiction is invoked against non-resident defendants under Jud. Code, § 57, to enforce lien on property within district, claimed to result from contract between them and plaintiff, and District Court quashes service by publication and dismisses bill, on ground that contract creates no lien. *Id.*

8. *Id. Merits and Jurisdiction.* Objection that District Court has no jurisdiction over indictment of Indian because defendant had been emancipated and act was committed on allotment in fee, goes not to jurisdiction, but to merits, and judgment of District Court is not reviewable by direct writ of error from this court. *Louie* v. *United States* ..... 548

9. *Deciding All Questions.* Jurisdiction to decide other questions, after federal questions have been settled by decisions of this court rendered in other cases. *Geddes* v. *Anaconda Mining Co.* ..... 590
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11. *Amount Involved; Jud. Code,* § 242. For purpose of appeal, amount determined from petition as amended, and is whole amount claimed without deduction for a partial defense. *Journal & Tribune Co.* v. *United States* ..... 581

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13. *Error or Appeal; Jud. Code, § 250, par. 3.* Judgment reviewable when it involves constitutionality as well as construction of act of Congress, though act be local to District of Columbia. *Id.*

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14. *Certiorari.* Judgment of state Supreme Court *held* reviewable by certiorari and not by writ of error. *Bullock* v. *R. R. Comm. of Florida* . . . . . 513

15. *Federal Question; When Really Decided.* Where judgment of state Supreme Court prohibiting proceedings in lower court in effect denies a substantive right claimed, the jurisdiction of this court to review on a constitutional ground is not affected by fact that in terms the prohibition is based on a denial of prohibited court's jurisdiction. *Id.*

16. *Local Question.* Whether State is bound by railroad foreclosure proceeding to which it voluntarily makes itself a party before final decree, is a local question. *Id.*

17. *Federal Question,* which has been settled and is no longer an open one in this court, no basis for writ of error. *Minneapolis &c. Ry.* v. *Merrick Co* . . . . . 376

18. *Id. Decision on Independent Non-federal Grounds.* State judgment not reviewable where it appears from state court's opinion that it rested its decision on independent non-federal grounds, substantial in character, broad enough to sustain judgment, and not involving federal question reviewable by writ of error under Jud. Code, § 237. *Minneapolis &c. Ry.* v. *Washburn Co.* . . . . . 370

19. *Following State Construction.* Construction of constitution and laws of State by its highest court accepted by this court in determining their consistency with Federal Constitution. *Thornton* v. *Duffy* . . . . . 361

III. **Jurisdiction of Circuit Court of Appeals.** See II (2), *supra;* IV, 4, 5, *infra.*
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1. *Bill of Review; Decree in Another Circuit; Res Judicata.* When Circuit Court of Appeals has sustained a patent and remanded the case for accounting, a party desirous of set-

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ting up a subsequent decree in another circuit as *res judicata* should petition Circuit Court of Appeals for leave to file bill of review in District Court, setting up new matter as a bar to further proceedings. *National Brake Co.* v. *Christensen*. . . . . 425

2. *Id. Close of Term.* Such leave may be granted after judgment of appellate tribunal and after going down of mandate at close of term. *Id.*

3. *Id.* Application *held* of that character, and not one to have the other decree pronounced *res judicata* by the appellate court. *Id.*

4. *First Circuit; Over Supreme Court of Porto Rico.* No jurisdiction to review findings of fact made by Supreme Court of Porto Rico in action at law. *Ana Maria Sugar Co.* v. *Quinones*. . . . . 245

5. *Id. Bill of Exceptions.* Errors committed by Supreme Court of Porto Rico in rulings of law in a law case become part of record and are reviewable on writ of error without a bill of exceptions, although that court has power to review evidence and make new findings of fact. *Id.*

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**SUBROGATION.** See **Sureties.**

**SUICIDE.** See **Insurance.**

**SURETIES:** PAGE

1. *Subrogation to Priority of United States. Rev. Stats., § 3468,* giving surety which pays United States amount due on bond of insolvent debtor the priority enjoyed by United States over other creditors under § 3466, does not entitle surety to share equally with United States when estate is insufficient to satisfy claim of United States. *United States* v. *National Surety Co.* ..... 73

2. *Id.* This is in harmony with rule under which surety liable only for part of debt does not become subrogated to remedies available to creditor unless he satisfies whole debt. *Id.*

**SURPLUSAGE:**

Indictment. See **Criminal Law,** 6.

**SWITCHING.** See **Interstate Commerce Acts,** III, 1, 2.

**TARIFFS.** See **Interstate Commerce Acts,** II, 2; III, 3–5.

**TAXATION:**

License fees. See **Constitutional Law,** II, 1; IX, 27, 28. *Id.* Priority of State for payment. See **Priority,** 3.

I. **Federal Taxation.**

1. *Forfeitures; Rev. Stats., § 3450; Vehicles Used to Defraud United States of Tax.* An automobile so used by person who had it on credit from the owner, is subject to forfeiture, although the owner was without notice of the forbidden use. *Goldsmith-Grant Co.* v. *United States* ..... 505

2. *Id. Fifth Amendment.* So construed and applied, statute does not deprive owner of property without due process. *Id.*

3. *Id. Sections 3460, 3461,* do not modify or affect § 3450 in this respect. *Id.*

4. *Refund. Right to Sue* is conditioned on prior appeal to and decision by Commissioner of Internal Revenue, after payment, and is not satisfied by an application for abatement of tax before it was paid. *Rock Island &c. R. R.* v. *United States.* ..... 141

5. *Id. Legacies; Assessment.* In action for refund of taxes computed, returned and voluntarily paid by executors after July 1, 1902, on legacies paid over before that date, formal

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assessment prior to July 1, 1902, *held* not necessary to bring taxes within saving clause of Repealing Act of 1902 as taxes imposed prior to that date. *Cochran* v. *United States* ..... 387

6. *Id. Life Estates; Trust Funds.* Such assessment not necessary to ascertain value, their value being ascertainable by computation upon mortality tables and rules of Commissioner of Internal Revenue. *Id.*

7. *Id. Unsettled Estate.* Estate's being unsettled and legatees and trustees possibly liable to refund if retained assets insufficient to pay claims, is no ground for recovery, where personal estate greatly exceeded amount of legacies, and total of claims and expenses of administration was comparatively insignificant. *Id.*

8. *Burden of Proof.* One who seeks to recover money voluntarily paid as tax, upon ground that tax was illegal, must prove its illegality and may not rely on mere assertion and speculation. *Id.*

II. **State Taxation.**

1. *Assessment; Notice and Hearing; Arbitration.* Assessment without notice or hearing, *held* invalid, where taxpayer's remedy by arbitration proved abortive because arbitrators, though agreeing assessment was excessive, could not unite on new assessment before expiration of time within which law required them to render decision, in consequence of which, under the law, original assessment stood affirmed. *Turner* v. *Wade* ..... 64

2. *Exemption; Reserved Power Over Corporations.* Law granting tax exemption to terminal company properly construed by state courts as creating repealable privilege rather than contract right to exemption. *Troy Union R. R.* v. *Mealy* .. 47

3. *Income Tax; Foreign Corporations; Earnings Within and Without State.* Tax based on proportion of net profits earned within State, the enforcement of which is left to ordinary means of collecting taxes, does not violate commerce clause. *Underwood Typewriter Co.* v. *Chamberlain* ..... 113

4. *Id.* In considering whether tax on locally-earned income reaches income earned outside the State, it is not necessary to decide whether it is a direct tax on income or an excise measured by income. *Id.*

**TAXATION**—*Continued.* PAGE

5. *Id. Computing Tax.* Tax on income of corporation manufacturing within State but deriving greater part of its receipts from sales outside, computed by taking proportion of total net income which proper value of real and personal tangible property within bears to that outside, *held* not unreasonable. *Id.*

6. *Id. Foreign Corporations.* Principle that State may not impose discriminatory tax on sister-state corporation which had made large permanent investments in State before tax law was enacted, *held* inapplicable to case involving nondiscriminatory tax on locally-earned income of manufacturing corporation. *Id.*

7. *Inheritance Tax; Classification.* State may distinguish between property which has borne fair share of tax burden in decedent's lifetime and property of same kind which has not. *Watson* v. *State Comptroller*. . . . . 122

8. *Id. Transfer of Securities; New York Law.* Additional tax on transfer of certain kinds of securities held by decedent at his death on which neither general property tax nor alternative stamp tax has been paid during fixed period prior thereto, is based upon reasonable classification. *Id.*

9. *Id.* Tax is neither a property tax nor a penalty. *Id.*

**TELEGRAPH COMPANIES:**

Adjustment of lines on change of railroad grade crossing. See **Constitutional Law,** IX, 22.

1. *Interstate Commerce.* Transmission of telegram between two States is interstate commerce as matter of fact; fact tested by actual transaction. *Western Union Tel. Co.* v. *Speight* . . . . . 17

2. *Id. Mental Anguish.* Where recovery hung on interstate character of message, *held* that message routed through another State to destination in State of origin was interstate. *Id.*

3. *Burden of Proof.* If motive, in so routing message, to evade jurisdiction of State of origin were material, it was error to lay burden on defendant of disproving it. *Id.*

**TEXAS.** See **Procedure,** I, 2, 3.

**TITLE.** See **Alien Enemies,** 4; **Claims,** 6; **Constitutional Law,** VIII, 4; **Indians; Trusts and Trustees,** 2. PAGE
By purchase. See **Indians,** 3.

**TOLLS.** See **Bridges,** 1, 2.

**TORTS.** See **Claims,** 7; **Employers' Liability Act; Master and Servant; Negligence; Telegraph Companies,** 2.

**TRADE-MARKS.** See **Judgments,** 8.

1. *Injunction; Infringement and Unfair Competition; Fraud and Unclean Hands.* That trade-mark conveys fraudulent representations to public affords but a narrow ground for refusing relief against infringer who seeks to reap advantages of plaintiff's good will. *Coca-Cola Co.* v. *Koke Co* .... 143

2. *Id.* As respects this defense, plaintiff's position must be judged by facts when suit was begun, not of a different condition and earlier time. *Id.*

3. *Id.* Use of "Coca-Cola" with accompanying pictures on labels, *held* not to constitute fraud depriving plaintiff of right to enjoin infringement and unfair competition in selling like product under name of "Koke." *Id.*

**TRADING WITH THE ENEMY ACT.** See **Alien Enemies; Jurisdiction,** II, 2; IV, 7.

**TRANSPORTATION ACT, 1920.** See **Interstate Commerce Acts,** III, 3.

**TREATIES:**

1. *Inheritance by Aliens.* In absence of treaty capacity to inherit land within State of the Union depends upon law of that State. *Sullivan* v. *Kidd* ..... 433

2. *Id. Treaty with Great Britain; Application to Canada.* Treaty of 1899 requires notice to bring foreign possessions within provisions granting rights of inheritance and enable subjects resident in the Dominion to inherit land in United States. *Id.*

3. *Id.* Fact that Canada, as self-governing dependency, has granted aliens right to inherit, cannot affect construction of treaty. *Id.*

**TREATIES** –*Continued.* PAGE

4. *Id.* "*Most Favored Nation Clause.*" *Held* not to extend rights acquired by treaties containing it because of reciprocal benefits expressly conferred in treaties with other nations in exchange for rights or privileges given to our Government. *Id.*

5. *Id.* Such clause in Treaty of 1899 does not control specific condition upon right of citizens of foreign possession to participate in its benefits. *Id.*

6. *Aids to Construction.* Little weight attached to construction by Great Britain of earlier treaty with Japan but which was not made known to representative who negotiated treaty in question for this country. *Id.*

7. *Id. Construction by Executive,* consistently adhered to, should be given much weight by courts. *Id.*

8. *Principles of Construction.* Like written contracts between individuals, all parts of treaty considered with view to giving fair operation to whole; they are to be executed in utmost good faith to effectuate purposes of parties. *Id.*

**TRIAL.** See **Criminal Law,** 3, 4; **Evidence,** 5; **Exceptions; Master and Servant,** 2.

1. *Directed Verdict; Right to Jury.* When party joining in request for peremptory instruction may reserve right to go to jury. *Sampliner* v. *Motion Picture Co* ..... 233

2. *Id. Findings.* Court cannot ignore reservation and assume to find facts from evidence as though case unconditionally submitted. *Id.*

**TRUST DEED.** See **Receivers,** 1.

**TRUSTS AND TRUSTEES.** See **Taxation,** I, 5–7.

1. *Creation.* Particular words unnecessary; certainty as to property, objects and beneficiaries required. *Chicago &c. Ry.* v. *Des Moines &c. Ry* ..... 196

2. *Id. Legal Title,* must be in trustee, where subject is legal interest capable of legal transfer. *Id.*

3. *Id. Several Instruments,* read together to establish intention. *Id.*

**TRUST AND TRUSTEES**—*Continued.* PAGE

4. *Railroad Terminal Company,* deriving its property from railroads which created it to serve their common use, taking its shares, etc., in proportion to their contributions, *held* not an independent concern but a trustee, bound to use property and to exercise its corporate powers for the railroads as beneficiaries. *Id.*

5. *Id. Significance of Shares.* Represent merely right of participation in use of terminal under the trust, and have no independent exchangeable value, at least in hands of purchaser with notice of trust. *Id.*

6. *Id. Officers.* Fiduciary character of terminal *held* to extend to its officers and directors. *Id.*

7. *Id. Estoppel.* Sale by railroad of shares in terminal company to officers of latter, for value, to enable them to sell them to company capable of participating in use of terminal, does not estop successor of vendor from denying that vendees acquired substantial interest in terminal and seeking to enjoin inequitable use of such shares. *Id.*

8. *Id. Unauthorized Amendment of Articles.* Officers of proprietaries authorized to vote their terminal stock may not amend articles of terminal company so as to terminate trust. *Id.*

9. *Id. Evidence.* Absence of reference to trust in deeds of property, including terminal shares, made by proprietaries, and in contracts made by terminal in discharging functions, is not persuasive evidence against existence of trust. *Id.*

10. *Id. Estoppel; Laches; Notice.* Unauthorized amendment of articles in purport discharging trust, unchallenged for 17 years, *held* not to estop, or bar for laches, successors of proprietaries from asserting trust against officers and directors of terminal company, who for value acquired from proprietaries majority of terminal shares. *Id.*

11. *Id.* Fiduciaries holding such shares are estopped to avail themselves of negligent or mistaken acts of officers of the railroad companies to obtain advantage. *Id.*

12. *Id. Injunction.* Such shares represent no interest which fiduciaries could set up against proprietaries; latter, upon repaying what former had paid for them, with in-

**TRUSTS AND TRUSTEES**—*Continued.* PAGE
terest, may have shares surrendered and canceled, and meanwhile prevent sale or voting thereof by injunction. *Id.*

13. *Accounting. Earnings* from switching and other terminal services credited to proprietaries in proportion to their use of terminal. *Id.*

14. *Receivers; Liability for Profits.* Persons who knowingly join with receiver in purchasing real estate at sale by trustee of deed of trust mortgage securing debt due receivership, are jointly and severally liable to receivership for all profits realized from purchase. *Jackson* v. *Smith* ..... 586

**UNFAIR COMPETITION.** See **Anti-Trust Act; Interstate Commerce Acts,** I; **Trade-marks.**

**UNITED STATES.** See **Alien Enemies; Bridges; Claims; Contracts,** 2–7; **Emergency Fleet Corporation.**
Contracts. See **Jurisdiction,** IV, 1, 2.
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Agents; Crim. Code, § 41. See **Emergency Fleet Corporation,** 2.
Debts due United States; priority. See **Sureties.**
Right to enjoin assertion of rights under leases of restricted allotments. See **Indians,** 8.

**VERDICT.** See **Criminal Law,** 3; **Trial.**

**WAIVER, OF PRIVILEGE.** See **Constitutional Law,** VIII, 1–3.

**WAR.** See **Alien Enemies; Constitutional Law,** V; IX, 3.

**WAR REVENUE ACT, 1898.** See **Taxation,** I, 5–7.

**WAR, SECRETARY OF.** See **Bridges,** 3, 5.

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**WATERS.** See **Boundaries; Bridges.**

**WATER COMPANIES:** PAGE
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**WORDS AND PHRASES:**
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