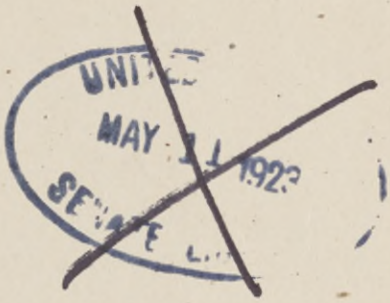
UNITED
MAY
1923
SENATE

UNITED STATES REPORTS

VOLUME 258

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1921

FROM FEBRUARY 27, 1922 (IN PART), TO
AND INCLUDING MAY 1, 1922

ERNEST KNAEBEL
REPORTER

GOVERNMENT PRINTING OFFICE
WASHINGTON
1923

The price of this volume is fixed under the Act of July 1, 1922 (Public No. 272), at $2.15 per copy, delivered. Sold by the Superintendent of Documents, Government Printing Office, Washington, D. C.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

WILLIAM HOWARD TAFT, 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.

HARRY M. DAUGHERTY, Attorney General.
JAMES M. BECK, Solicitor General.
WILLIAM R. STANSBURY, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.[1]

ORDER OF ALLOTMENT OF JUSTICES.

There having been a Chief 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, WILLIAM H. TAFT, 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 24, 1921.

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[1] For next previous allotment see 256 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1921.

HAWES *v.* STATE OF GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 95. Submitted January 17, 1922.—Decided February 27, 1922.

A state law providing that a person prosecuted for permitting apparatus for distilling intoxicating liquors to be upon real estate actually occupied by him shall be *prima facie* presumed to have known of the presence of such apparatus there found, does not violate due process of law, even where the defendant is not allowed to testify under oath or to have the testimony of his wife. P. 3.
150 Ga. 101, affirmed.

ERROR to a judgment of the Supreme Court of Georgia sustaining a conviction and sentence of the plaintiff in error for having knowingly permitted and allowed a certain person or persons to have and possess and locate on his premises apparatus for the distilling and manufacturing of liquors specified in the Act of March 28, 1917, Acts Ex. Sess. 1917, p. 7.

Mr. Marion Smith for plaintiff in error. *Mr. F. H. Colley* and *Mr. Carroll D. Colley* were also on the brief.

Mr. George M. Napier, Attorney General of the State of Georgia, and *Mr. Seward M. Smith* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment against Hawes under the law of Georgia for the offense of knowingly permitting certain persons to locate and have on his premises apparatus for distilling and manufacturing prohibited liquors and beverages.

A verdict of guilty was rendered. A motion for new trial was made and denied, which action and the judgment of the trial court were affirmed on appeal by the Supreme Court of the State.

The act of the State upon which the indictment was based [Acts Ex. Sess., 1917, p. 7] made it unlawful, among other things, "to distill, manufacture, or make any alcoholic, spirituous, vinous, or malted liquors or intoxicating beverages" in the State.

Section 22 of the act provides that when any apparatus used for such purposes "is found or discovered upon said premises the same shall be prima facie evidence that the person in actual possession had knowledge of the existence of the same, and on conviction therefor, shall be punished as prescribed in section 16 of this Act, the burden of proof in all cases being upon the person in actual possession to show the want of knowledge of the existence of such apparatus on his premises."

The trial court instructed the jury that Hawes was charged with knowing who had the apparatus upon the premises of which he was in possession or who operated it, and that under the act the burden was upon him to show the want of knowledge. And further, that all that the State had to show was that the apparatus was on the premises, and "When the State shows that, stopping there that makes out a *prima facie* case against defendant and you should find the defendant guilty as charged in the indictment," unless he show that the apparatus was there without his consent and knowledge.

1. Opinion of the Court.

The charge was made the basis of a motion for new trial on the ground that it was offensive to the due process clause of the Constitution of the United States and also of the constitution of Georgia. The same grounds were assigned in the Supreme Court of the State on appeal from the order and judgment denying the motion for new trial.

In the Supreme Court the specific error against the charge of the court was that it cast upon Hawes the burden of "showing the want of knowledge of the existence of the apparatus on his premises, and in fine his innocence of the crime with which he is charged," he "claiming that this was an unreasonable and arbitrary exercise of its power by the legislature of the State of Georgia."

And this is the assignment here, in other words, that § 22 creates a presumption of guilty knowledge from the finding of the apparatus upon premises occupied by him, and that both the trial court and the Supreme Court of Georgia enforced this statutory presumption and the same, therefore, entered into his conviction, and that the Fourteenth Amendment to the Constitution of the United States was thereby violated.

In aid of his contention and in emphasis of the effect of the statute against him, Hawes points out that a defendant in a criminal case is not allowed to testify as a witness, that he has only the right to make a statement not under oath, and that husband and wife are not competent or compellable to give evidence in any criminal proceeding for or against each other.[1]

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[1] Section 1036 of the Penal Code is as follows: "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be com-

It has been decided, as counsel concede, that the legislature may make one fact *prima facie* evidence of another, and it is certainly within the established power of a State to prescribe the evidence which is to be received in the courts of its own government. *Adams* v. *New York*, 192 U. S. 585, 588.

In *Hawkins* v. *Bleakly*, 243 U. S. 210, 214, it is said, " the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 42."

Undoubtedly there must be a relation between the two facts. *Bailey* v. *Alabama*, 219 U. S. 219; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79. That is, if one may evidence the other, there must be connection between them, a requirement that reasoning insists on and, necessarily, the law.

We think the condition is satisfied by the Georgia statute. Distilling spirits is not an ordinary incident of a farm and in a prohibition State has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the con-

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pelled to answer any questions on cross-examination, should he think proper to decline to answer."

Section 1037 of the Penal Code is as follows: " Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that the wife shall be competent, but not compellable, to testify against her husband upon his trial for any criminal offense committed, or attempted to have been committed, upon her person. She is also a competent witness to testify for or against her husband in cases of abandonment of his child, as provided for in section 116 of this Code."

trary, it may be presumed that one on such a farm or one who occupies it will know what there is upon it. It is not arbitrary for the State to act upon the presumption and erect it into evidence of knowledge; not peremptory, of course, but subject to explanation, and affording the means of explanation. Hawes had such means. An explanatory statement was open to him with a detail of the circumstances of his acquisition of the place, and he availed himself of it. He could have called others to testify to the circumstances of his acquisition, for the circumstances were not so isolated or secret as not to have been known to others.

We agree, therefore, with the Supreme Court of the State that the existence upon land of distilling apparatus, consisting of the still itself, boxes, and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation.

The principle and the presumption depending upon it were certainly not strained against Hawes. To the comment of the court we may add that the distilling apparatus was within 300 yards of his house. It is true that a pasture intervened, it was testified, between it and his house and then "a hill with pines growing on it, and there was a descent down a hill to where the still was located" though "it could not have been seen from the house, but smoke rising from it could have been seen. There was across the pasture a path leading toward the still." It was added, however, that the path might "have been made by cattle or stock." And a witness testified that the path was old.

Judgment affirmed.

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

MacARTHUR BROTHERS COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 97. Argued January 20, 1922.—Decided February 27, 1922.

Claimant contracted with the Government to construct a portion of a canal, both parties assuming that part of the work could be done "in the dry" and the specifications so providing; but, owing to leakage through an adjacent pier constructed by a different contractor, all the work had to be done "in the wet" at increased cost. The conditions were as open to claimant as to the Government; claimant was expected to and did visit the site and inform itself before making its bid; and its contract provided that the quantities in the specifications were approximate only, that no claim should be made against the United States on account of any excess or deficiency, absolute or relative, thereof, nor any allowance be made for failure of the contractor to estimate the difficulties correctly, that the expense of coffer dams, pumping plant and pumping to unwater all areas to be worked "in the dry" should be an incident of the general work and no special payment be made therefor, and that the United States assumed no liability whatsoever for loss of property or time due to failure of any part of the coffer dams, dikes or pumping plant. *Held*, that there was no misrepresentation by the United States that any part of the work could be done "in the dry" and that claimant could not recover. P. 9.
55 Ct. Clms. 181, affirmed.

APPEAL from a judgment of the Court of Claims dismissing appellant's second amended petition upon demurrer.

Mr. William B. King, with whom *Mr. George A. King*, *Mr. William E. Harvey* and *Mr. George R. Shields* were on the brief, for appellant.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. H. L. Underwood* were on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action to recover damages for a breach of contract growing out of an alleged misrepresentation.

The appellant essayed recovery upon a petition to which a demurrer was sustained; it then filed an amended petition which was subjected to a like disposition, and then a second amended petition. Demurrer by the Government being sustained to that, appellant declined to amend again, and judgment was entered dismissing the petition. From the ruling this appeal is prosecuted.

The last petition is, as the others were, a very voluminous paper. It is enough to say that it sets forth a cause of action based upon a contract entered into by appellant with the United States, September 23, 1910, for the construction of the west end of the new canal at Sault Ste. Marie, Michigan, which was authorized by the River and Harbor Act of March 2, 1907, c. 2509, 34 Stat. 1073, 1098. The petition details the specifications, but the misrepresentation is alleged to be that they and the contract represented that a portion of the work would be done in the "dry" and a portion in the "wet", whereas it was impossible to do any of the work in the "dry", and it was all done in the "wet" at a cost greatly exceeding what it would have been had it been done the other way.

For the purposes of permitting the work to be done in the dry, it was necessary to construct certain cofferdams and this was especially provided for by the specifications. One of the cofferdams was known as the West Cofferdam, and was to be built as a contract item and connected the rock spoil bank (extending along the north side of the work) with the old North West Pier. The latter pier was constructed by another contractor partly before and partly after the date the Company entered into its contract with the United States. The Company was a bidder

for the work the specifications of which were published and accessible. When the contract in suit was entered into, that prior contract was in progress but not completed, and was not completed until after the Company had begun work on its contract.

The Company, it alleges, made all reasonable inquiries and investigations upon the site of the contract between the date of advertisement and the date of submitting its bid, and, by its president and chief engineer, inspected the conditions. The work under the previous contract of March 23, 1908, was then in progress.

The Company estimated and believed, as it had a right to do, is its allegation, that the specifications of that contract had been and were being duly and properly performed. If they had been so performed, is the further allegation, the Company would have been able to perform, under its own contract in the dry, such portions of the work as were required by the contract to be done in the dry.

It was only during the progress of the work that the Company discovered that the previous contract had not been carried out and that the work was defective. In consequence, extraordinary and expensive means had to be resorted to for a continuance of the work, and the work was greatly delayed beyond the time that the Company would have had to take if the conditions had been as shown by the specifications of the previous contract and had the work been performed by the previous contractor according to the specifications.

This expense continued until July 3, 1913, and the description as dry work in the specifications was, by reason of the conditions existing at the site of the work, a misrepresentation of the character of the work to be done, and induced on the part of the Company a lower bid than would have been made if the conditions had been properly described.

Owing to the leakage coming through the old North West Pier, it was not practicable for excavation to be made in the dry. Notwithstanding, the engineer in charge compelled the work to be done as contracted for, and the Company sustained damages in the sum of $366,052.67 for which it prayed judgment.

It is contended that the circumstances detailed amount to a representation by the United States that the work could be done in the dry, but that it was impossible to so perform it and that, therefore, the resulting expense should be discharged by the Government and that the Court of Claims erred in dismissing the petition.

To these assertions the Government opposes denials: (1) There was no misrepresentation. (2) If there were it is not available to the Company since it had investigated conditions before entering into the contract. (3) There was no misrepresentation as to the method by which the excavating could be done.

In considering the opposing contentions there must be taken into account certain provisions of the contract. It is therein provided that " it is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work."

" It is expected that each bidder will, prior to submitting his bid, visit the site of the work, examine the local conditions, inform himself as to the accessibility of the work, ascertain the character of the material to be excavated, consult the plats on file at the U. S. Engineer Office at Sault Ste. Marie, Mich., and obtain such available information as will assist him to make an intelligent bid, and the failure of a bidder to make such examina-

tion may be held to be sufficient reason for rejecting his bid."

"The contractor must construct and maintain all necessary cofferdams, furnish suitable and adequate pumping plant, and do all the pumping required to unwater all areas where work is to be done in the dry, and no special payment will be made therefor, the above work and expense being considered as incident to the general work covered by the contract prices of other items. . . ."

"The United States assumes no responsibility whatsoever for loss of life, property or contractors' time, due to the failure of any part of the cofferdams, dikes, or the pumping plant."

In supplement of these provisions of the contract, the following provision of the Company's proposal upon which the contract was awarded is pertinent: "We make this proposal with a full knowledge of the kind, quantity, and quality of the plant, work and materials required. . . ."

The repellent effect of those provisions and the contentions of the Company, would seem to need no comment, and the effect is reinforced by other considerations. The contract of the Company was made September 23, 1910, and at that time, according to the averments of the petition, work on the prior contract was in progress and had been in progress two years. And it is averred that the Company "made all reasonable inquiries and investigations upon the site of the contract between the date of advertisement, July 30, 1910, and the date of submitting its bid, August 29, 1910, by the President and Chief Engineer of the company personally inspecting the conditions. The work under the previous contract of March 23, 1908, was then in progress and uncompleted."

The Company was undoubtedly impelled to this investigation by the requirement of its contract to inform itself of the conditions and that no allowance would

be made for the failure to estimate correctly the difficulties attending the execution of the work. Its investigation may or may not have been adequate. It, however, took its chances on that. But in reality there was no representation by the Government nor is it alleged that the Government had knowledge of the conditions or means of knowledge superior to the knowledge of the Company. The latter acquired knowledge only by the aid of divers as its work progressed. Such being the situation, does not the case present one of misfortune rather than misrepresentation? It is true that the Government's proposal was for a certain part of the work to be done in the dry, but it made no representation of the conditions that existed enabling it to be so done or precluding it from being so done. The Company had no relation with the Government through the other contract. The Company assumed that it had been properly performed but the Government did nothing to create or direct the assumption or induce confidence in it.

Such being the situation, the Company insists nevertheless, that the Government is liable and cites, among other cases, *Hollerbach* v. *United States,* 233 U. S. 165; *Christie* v. *United States,* 237 U. S. 234; *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1; *United States* v. *Smith,* 256 U. S. 11, and insists that, though the asserted representations of fact in the present case differ somewhat from those made in the cited cases, they are the same in principle, and that the provisions in paragraph 23 that " the work required to complete this portion [the portion of the proposed canal lying between certain cross sections] of the canal shall be performed in the dry "—was not only a mandate but was necessarily a representation that conditions would be encountered which would enable the work to be done in the dry.

A systematic explanation of the cases would extend this opinion to too great a length. They all declare the prin-

ciple that the Government will be liable in the same circumstances that private individuals would be liable, but necessarily, neither is liable if neither make representations.

In *Hollerbach* v. *United States,* 233 U. S. 165, 172, the Government was held liable because "the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants" and of those, it was said, "the Government might be presumed to speak with knowledge and authority."

In *Christie* v. *United States,* 237 U. S. 234, "there was" (we quote from the opinion) "a deceptive representation of the material, and it misled". The claimants in the case, it was said, were forced to rely upon the information furnished them by specifications which were untrue and known to the officers of the United States to be untrue. To the extent that they were untrue claimants recovered. As to other conditions which might or might not have been foreseen it was to be supposed, it was said, "that contemplation and judgment were exercised not only of certainties but of contingencies and allowance made for both at the time of bidding, with provision in the bid".

In *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1, the representations made by the Government were deceptive in that the test borings gave information to the Government, not imparted to bidders, of materials more difficult to excavate than those shown by the maps and specifications. The case is instructive as it considers other cases and the grounds of their decisions.

The elements which existed in each of the cited cases are absent from the case at bar. In the case at bar the Government undertook a project and advertised for bids for its performance. There was indication of the manner of performance but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them nor concealment of them,

nor, indeed, knowledge of them. To hold the Government liable under such circumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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

No. 259. Argued January 4, 1922.—Decided February 27, 1922.

A telegraph company whose line occupied part of a railroad right of way under an expired contract with the railroad company obtained a judgment under Ky. Stats., § 4679c, adjudging it a right to condemn the easement and fixing the damages, which it paid into court; and, pending an appeal upon which the Circuit Court of Appeals ordered a new trial on the right to include part of the property affected and on the damages, an act was passed (Acts 1916, c. 15) providing generally that no part of a railroad right of way should be condemned, longitudinally, for a telegraph line, and making no exception of pending cases. *Held:* (1) That the telegraph company acquired no vested right through the judgment, and its right to condemn was repealed by the later act. P. 18.

(2) Kentucky Stats., § 465, declaring against construing a new law to repeal a former law as to rights accrued or claims arising under it, or in any way whatever to affect any right accrued or claim arising before the new law takes effect, was inapplicable. P. 19.

(3) The withdrawal of the right of condemnation violated neither the Fourteenth Amendment nor the provision of the Kentucky constitution forbidding any interference by the legislature with judicial proceedings in court. P. 19.

Affirmed.

APPEAL from a decree of the District Court dismissing appellant's petition in condemnation. A former appeal in this case went to the Circuit Court of Appeals. 249 Fed. 385. In an ancillary proceeding, an injunction was granted by the District Court, 201 Fed. 946, and sustained by the Circuit Court of Appeals, but on a subsequent appeal that court decided that it should be dissolved because of the repealing statute here in question. See 268 Fed. 4, 13.

Mr. Alexander Pope Humphrey and *Mr. Rush Taggart,* with whom *Mr. Francis R. Stark* and *Mr. W. Overton Harris* were on the briefs, for plaintiff in error.

Mr. Helm Bruce, with whom *Mr. Edward S. Jouett* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error, herein called the Telegraph Company, brought this proceeding to condemn an easement upon the right of way of defendant in error, herein called the Railroad Company, in exercise of a right conferred by a Kentucky statute of 1898 (Ky. Stats., § 4679c).[1]

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[1] "§ 4679c. 1. Right of to erect and operate lines. That a telegraph company chartered or incorporated by the laws of this or any other State, shall, upon making just compensation, as hereafter provided, have the right to construct, maintain and operate telegraph lines through any public lands of this State, . . . and on, along and upon the right of way and structures of any railroad in this State: . . . in such manner as not to interfere with the ordinary use or the ordinary travel and traffic on such . . . railroads, . . .

"7. Judgment, form of. . . . 'Now upon payment of said award either to the defendant or to the clerk of this court, and all costs in this behalf expended, said ——— Telegraph Company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition.'"

The purpose is to condemn as a right under the sanction of the statute so much of the right of way of the Railroad Company as was occupied at the time of suit by the Telegraph Company under a contract with the Railroad Company, which was about to expire.

After pleadings in addition to the petition and answer, the case was tried to a jury, which returned a verdict fixing the compensation and damages at $500,000. The verdict was received and entered and it was adjudged by the court that the Telegraph Company have the right it petitioned for.

A new trial was ordered, and the court reserved to itself the decision of the necessity of the easement, and whether, if adjudged, it would "interfere with the ordinary use by" the Railroad Company "of its right of way, or with the ordinary travel and traffic on the railroad." Both questions were ultimately resolved in favor of the Telegraph Company and a jury having been duly impaneled, and instructed by the court, assessed the damages and compensation to be paid at five thousand dollars.

It was then adjudged that the Telegraph Company should have the right of way prayed for. There were specific details of the manner of acquisition and use, and explicit description of the location, with provisions for changes in location according to the necessities of the Railroad Company.

On March 8, 1916, the Telegraph Company paid into the court the amount of the award and costs.

The Railroad Company prosecuted error to the Circuit Court of Appeals. The court after an elaborate consideration of the case said that it inferred "from the record (the specific question has not been argued) that there are comparatively small fractions of the desired right of way as to which it may be reasonably claimed that the interference with the railroad use is too serious to permit condemnation." It was intimated, however, that "an award

of damages" might "meet the case", but that it might be that another telegraph line could not be so placed as not to substantially obstruct the use by the Railroad Company of its right of way for some railroad purpose. The court, therefore, concluded that the verdict of the jury and the judgment entered thereon must be set aside, and the case remanded for new trial upon the question of amount of compensation, and for such further hearing and decision upon the question of the forbidden interference in specific places as the opinion indicated might be open. 249 Fed. 385. As we construe the decision there was a reversal not only on the question of damages but on the question of the interference by the easement petitioned for with the use by the railroad of its right of way. And hence there might be brought into consideration a conflict between the uses, the resolution of which would determine for or against the right of the Telegraph Company under the law of 1898.

On March 14, 1916, the legislature of the State repealed the Act of March, 1898.[1]

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[1] "An Act to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*:

"§ 1. That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings, or without the consent of such railroad company, for the use or occupancy of any part of such right of way, on, over, and along such right of way longitudinally, by any telegraph, telephone, electric light, power, or other wire company, with its poles, cables, wires, conduits, or other fixtures; provided, that nothing in this section shall be construed as preventing any such wire company from obtaining the right to cross the right of way of a railroad company, under existing laws in such manner as not to interfere with the ordinary use or ordinary travel and traffic of such railroad company's railroad.

"§ 2. That all acts and parts of acts in conflict with this act be and the same are hereby repealed."

Upon the return of the case to the District Court, the Railroad Company, in an amended answer, pleaded the Act of March 14, 1916, and moved a dismissal of the petition upon the ground that that act had withdrawn the right to prosecute it. To this answer the Telegraph Company replied that the Act of March 14, 1916, did not affect the litigation, and, that if it be given that effect, it would be void under the constitution of the State because of legislative interference with "proceedings pending in a judicial tribunal". And, further, that under a proper construction of the statutes of the State the present proceedings were not affected by them, and if so applied they would violate the constitution of the State and the Fifth and Fourteenth Amendments to the Constitution of the United States.

The court denied the motion to dismiss the petition, deciding that the repealing act, taken in connection with § 465 [2] was not intended to affect pending cases, and that if so intended, the repealing act was void under the constitution of the State which precludes interference with judicial proceedings, the courts having the "exclusive right to determine the law of existing cases."

The ruling was contrary to that subsequently made by the Circuit Court of Appeals, the latter court holding, reversing the District Court's action in refusing to dissolve the injunction that had been granted against the Railroad Company in a suit brought for that purpose, that within the meaning of § 465 the Telegraph Company had not acquired any vested right when the repealing act was passed and that, therefore, that act terminated the right of eminent domain conferred upon the Telegraph

[2] Section 465. "No new law shall be construed to repeal a former law as to . . . any right accrued or claim arising under the [a] former law, or in any way whatever to affect . . . any right accrued or claim arising before the new law takes effect. . . ."

Company by the law of 1898. A petition for rehearing was denied. 268 Fed. 4, 13.[1]

The District Court, no doubt regarding the decision of the Circuit Court of Appeals as an authoritative construction of the statutes (repealing act and § 465), on motion of the Railroad Company, notwithstanding the invocation of the constitution of Kentucky and the Constitution of the United States by the Telegraph Company, reversed its former ruling, and dismissed the petition.

From this statement of the case it is clear that the constitutionality of the repealing act is the determining question in the case—its "storm-center," to use the words of counsel, and to the ruling of the court sustaining its constitutionality this writ of error is directed. And it was not introduced into the cause until the cause was sent back for a new trial on all of the issues by the Circuit Court of Appeals.

The assignments of error of the Telegraph Company are in effect repetition of its contentions in the District Court (and we may say of its contentions in the Circuit Court of Appeals) and are all based on the asserted immutability of the judgment of the District Court, the effect of the award of damages and the payment of the latter into court. The contentions repel almost immediately upon their utterance. To yield to them would practically take away the virtue of an appeal, give it right and procedure but accord it only partial effect. The present case illustrates this. The Circuit Court of Appeals reversed the judgment of the District Court in favor of the Telegraph Company, not only because of errors in amount of the award but because of errors in the judg-

[1] The injunction suit was brought to restrain the Railroad Company from disturbing the Telegraph Company's occupancy of the right of way of the Railroad Company pending this proceeding. The injunction was granted February 7, 1913, 201 Fed. 946. The order granting it was affirmed by the Circuit Court of Appeals. 207 Fed. 1.

ment of conditions essential to a grant of the easement. 249 Fed. 385. There was something more, therefore, to be inquired into upon the return of the case to the District Court than the amount of compensation to be paid, as we have pointed out.

The Telegraph Company insists that § 465 of the Kentucky Statutes precludes the application of the Act of March 14, 1916, to the case, and such was the original view. We can not accede to it. We agree with the Circuit Court of Appeals that no right had accrued or claim arisen under the judgment of the District Court within the meaning of § 465. Besides, as also pointed out by the Circuit Court of Appeals, the Act of March 14, 1916, is general and absolute. It takes away the power to condemn the right of way of a railroad company by telegraph companies and it does not save proceedings commenced before its applicable date. Such reservation is usual, if intended (*Railroad Co.* v. *Grant,* 98 U. S. 398) and is illustrated by *Pannell* v. *Louisville Tobacco Warehouse Co.,* 113 Ky. 630.

The contention that if the repealing act be construed to apply to the pending litigation it is an interference by the legislature with judicial proceedings and, therefore, void under the constitution of the State, challenges to particular attention. It is sustained, the Company asserts, by the decisions of the State.

The principle relied upon was first expressed in *Gaines* v. *Gaines' Executor,* 9 B. Mon. 295, 301. We quote from a marginal note, using it as the expression of the principle of the case, as follows: "The Legislature have no power where a controversy is pending between individuals growing out of their respective rights, to so act as to cast off the rights of one of the parties and his remedy likewise . . ." It is expressed in another case as follows: "If the Legislature, during the pendency of litigation, were to pass an act having a retroactive effect in favor of

one of the litigants, it would be an invasion by one independent department of the government of another, and, therefore, unconstitutional." *Marion County* v. *Louisville & Nashville R. R. Co.*, 91 Ky. 388; *Thweatt* v. *Bank of Hopkinsville*, 81 Ky. 1. In another case it is succinctly said that legislation pending suit cannot affect rights which existed before suit and upon which suit was brought. *Turner* v. *Town of Pewee Valley*, 100 Ky. 288.

We have considered the cases and their incidents. It is not necessary to review them. There is a marked distinction between them and the case at bar. They all concerned the litigation of private rights and relations, and legislation which attempted to change those rights and relations by changing the conditions upon which they depended. The legislation in the case at bar has different purpose. It is directed to that which is conceived to concern the public interest; an exertion of power in the public interest of which the companies are the instruments or agents. It is not, therefore, within the principle of the cases cited against it. And, as we have seen, no rights had so far vested in the Telegraph Company as to preclude a change of policy or legislation which affected it.

Of the effect of a reversal on appeal of a judgment and award in a condemnation proceeding and a repealing act, *Treacy* v. *Elizabethtown, Lexington & Big Sandy R. R. Co.*, 85 Ky. 270, is of pertinent reference. It is there held that if a judgment in condemnation proceedings be reversed on appeal (the conditions requisite to legal condemnation of the land not having been established) the case upon reversal stands upon the petition or application alone, and the proceedings being thus *in fieri* the law under which they were instituted could be repealed, and if repealed, the subsequent proceedings must be under the new law. The principle was announced to sustain the repeal of the charter of a railroad company under which upon the rendition of the verdict assessing damages for

the property taken the railroad had the right to enter upon the land and construct its road, and upon payment or tender of payment was clothed with title to the property. And it was said, "The State has the right to say on what terms it will allow its right of eminent domain to be exercised, so long as any thing remains to be done by the corporation in order to complete the condemnation of the land." And necessarily, we may add, the State has a right to say upon what property or to what extent the right of eminent domain shall be exercised. The case seems a complete answer to the contentions of the Telegraph Company. See also *Pannell* v. *Louisville Tobacco Warehouse Co.*, 113 Ky. 630; *Commonwealth* v. *Ewald Iron Co.*, 153 Ky. 116; 1 Lewis on Eminent Domain, 3rd ed., § 380; Cooley's Constitutional Limitations, 6th ed., pp. 143, 343; Endlich on Interpretation of Statutes, §§ 480–486.

Cases in which it is decided that upon payment or tender of the award of damages the condemning company has a right to take possession of the land it seeks to condemn are not inconsistent with *Treacy* v. *Elizabethtown, Lexington & Big Sandy R. R. Co., supra.* In that case there was not only under the railroad's charter a right of entry, but upon payment or tender of payment of the damages awarded the actual title could have been acquired and yet the repealing statute was given effect because the conditions of condemnation had not been established.

The same comment is applicable to § 7 of the Act of 1898 which provides that telegraph companies upon the payment of the award may enter upon the land they seek to condemn. The Telegraph Company in the present case was not put to exercise the privilege. It had possession having received it under the contract with the Railroad Company. The contract having expired the Telegraph Company was put to confirm the possession

and fix it as a right. The accomplishment of this the repealing act prevented.

Our conclusion, therefore, is that as the State could have withheld the power from telegraph companies to condemn the right of way of railroad companies, the State could withdraw the power before its exercise, and it could not be exercised before the conditions of condemnation were established and adjudicated, and this not preliminarily or dependently, but in final and unreviewable determination. To this situation the condemnation in the present case had not attained. The grant of power to the Telegraph Company, therefore, was subject to legislative control, and the Act of March 14, 1916, was not an "interference by the Legislature with judicial proceedings in court" and does not offend the Fifth or Fourteenth Amendments.

Judgment affirmed.

GOOCH *v.* OREGON SHORT LINE RAILROAD COMPANY.

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

No. 90. Argued January 13, 16, 1922.—Decided February 27, 1922.

1. An agreement in a drover's railroad pass, made pursuant to a tariff filed with the Interstate Commerce Commission and conditioning his right to recover for personal injuries upon the giving of a written notice of claim, within thirty days after injury, to the general manager of the carrier upon whose line the accident occurs, is valid, at least where his injuries do not disable him from complying with the condition. P. 24.
2. Actual knowledge on the part of the railroad's employees is no excuse for not giving the notice. P. 24.
3. The action of Congress in fixing not less than 90 days for giving notice of claims in respect of goods (Cummins Amendment, March

4, 1915, c. 176, § 1, 38 Stat. 1196), is not a declaration of public policy against allowing a less, though reasonable, time in the case of personal injuries. P. 24.

264 Fed. 664, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of nonsuit in an action in the District Court for personal injuries.

Mr. J. H. Peterson, with whom *Mr. T. C. Coffin* was on the brief, for petitioner.

Mr. George H. Smith, with whom *Mr. Henry W. Clark* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries caused by a collision on the defendant's road. The plaintiff, the petitioner, shipped some cattle from Bancroft in Idaho to Omaha in Nebraska and got a drover's pass to go with them as caretaker, free from charge other than that made for carrying the cattle. In consideration of the pass the plaintiff agreed that the carrier should not be liable for any injury to him upon the trip unless he or his personal representative should within thirty days after the injury give notice in writing of his claim to the general manager of the carrier on which line the accident occurred. This agreement was required in pursuance of a regulation that was part of the defendant's tariff duly filed with the Interstate Commerce Commission. The collision happened on November 24, 1917, and the plaintiff was in a hospital for about thirty days under the care of a doctor employed by the defendant, but was not disabled from giving the notice. He failed to give it, however. The District Court directed a non-suit and its judgment was affirmed by the Circuit Court of Appeals. 264 Fed. 664. A writ of certiorari was granted by this Court. 254 U. S. 623.

The only question is whether the requirement of notice in writing was valid. The railroad company does not contend that it could have exonerated itself altogether from liability for negligence, *Norfolk Southern R. R. Co.* v. *Chatman,* 244 U. S. 276, but argues that a stipulation for written notice within a reasonable time stands on a different footing, and of this there is no doubt. *Southern Pacific Co.* v. *Stewart,* 248 U. S. 446, 449, 450. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592, 602, *et seq.* We perceive nothing in the form of the notice required to invalidate the requirement. It would have been sufficiently complied with if addressed to the railroad company, or to the general manager, care of the railroad company. Of course too, actual knowledge on the part of employees of the company was not an excuse for omitting the notice in writing. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592. The doubt that led to the granting of the writ of certiorari was whether the prohibition of a requirement fixing less than ninety days for giving notice of claims in respect of goods established a public policy that would affect the present case. Act of March 4, 1915, c. 176, § 1, 38 Stat. 1196. For although courts sometimes have been slow to extend the effect of statutes modifying the common law beyond the direct operation of the words, it is obvious that a statute may indicate a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. *Johnson* v. *United States,* 163 Fed. 30, 32.

We are satisfied, however, that in this case the requirement was valid and that the statute referred to should not affect what in our opinion would be the law apart from it. The decisions that we have cited show that the time would have been sufficient, but for the statute, in respect of damage to goods, and the reasons are stronger to uphold it as adequate for personal injuries. A record

is kept of goods, yet even as to them reasonably prompt notice is necessary as a check upon fraud. There is no record of passengers, and the practice of fraud is too common to be ignored. Less time reasonably may be allowed for a notice of claims for personal injuries than is deemed proper for goods, although very probably an exception might be implied if the accident made notice within the time impracticable. The statute cannot be taken to indicate a different view. On the contrary it is impossible to suppose that Congress when it was dealing with notices of claims, and even with the claims of passengers for baggage, Act of August 9, 1916, c. 301, 39 Stat. 441, 442, should not have thought of their claims for personal injuries, and, as it passed them by, we must suppose that it was satisfied to leave them to the Interstate Commerce Commission and the common law. See *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury,* 254 U. S. 357, 359. *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher,* 248 U. S. 359, 363. The fact that the form prescribed by the Interstate Commerce Commission in 1921 is silent upon the subject cannot affect the result.

Judgment affirmed.

MR. JUSTICE PITNEY was absent and took no part in the decision.

MR. JUSTICE CLARKE, with whom concurred the CHIEF JUSTICE and MR. JUSTICE MCKENNA, dissenting.

On November 24, 1917, petitioner, Gooch, when a passenger in the caboose attached to the train in which respondent company was carrying a carload of cattle for him, was seriously injured by a collision with another train. Gooch was traveling on what has long been known as a " Drover's Pass," which it is admitted in the answer (as it must be, *Norfolk Southern R. R. Co.* v. *Chatman,* 244 U. S. 276), entitled him to the rights and protection

of a passenger for hire. It is also either admitted, or not denied, that Gooch was so injured that in about an hour and a half after he was hurt agents of the company took him to a hospital about forty miles from the scene of the accident, where he was under the care of a physician employed by respondent for about thirty days, until he left the hospital, but he returned for two treatments by the company physician and was finally discharged by him on January 15, 1918 (52 days after the accident). Five days after Gooch entered the hospital, and while he was still in bed under the care of the company's physician, the claim adjuster of the company called upon him and asked him "if he was ready for a settlement." To this Gooch replied that, "He was not in a condition to talk with him; that he was not ready for a settlement." About ten days later, the claim agent called on him again at the hospital and found him sitting up in a wheeled chair and a conversation "similar to the first one was held." But his case was dismissed below and that judgment is affirmed by this court because he did not notify the company in writing within thirty days of the accident that he would claim damages for his injuries thus negligently caused.

The company alleged in its answer, and it is not denied, that pursuant to the provision of an effective tariff, when he delivered his cattle for transportation, Gooch signed a written stipulation that no claim for personal injury caused by its negligence should be valid or enforcible against the company unless notice in writing was given to the general manager thereof within thirty days after injury occurred.

It was admitted that the petitioner did not give the required notice in writing and the judgment of this court is that the rule requiring it was a valid and reasonable rule and that it must be enforced by affirmance of the judgment of the court below, notwithstanding the intimate knowledge which the company so certainly had of Gooch's

22. CLARKE, J., TAFT, Ch. J., and MCKENNA, J., dissenting.

injuries from an hour and a half after the accident, when it sent him to a hospital.

From this conclusion of the court I dissent: (1) Because such a rule, as to property claims, has twice within six years been specifically declared by acts of Congress to be contrary to a public policy which I think it is the duty of this court to recognize and accept with respect to injuries to passengers, and (2) because in practice the rule is gravely unjust and discriminatory and therefore unreasonable.

Of these in the order stated.

First. The petitioner claims the rule is unreasonable and void under *Boston & Maine Railroad* v. *Piper,* 246 U. S. 439, but the court holds it reasonable on two grounds: (1) Because the decisions of this court show that the time for notice was sufficient, and (2) because it is necessary to protect carriers from fraudulent claims.

It is true that like, and even shorter, limitations with respect to claims for property were sustained under special circumstances in the two cases cited in the opinion of the court and in several others, but those cases arose before the Cummins Amendment to the Interstate Commerce Act (38 Stat. 1196), which, after providing for the issuing of a receipt or bill of lading for property received for transportation by a carrier, contains this provision:

"*Provided further,* That it shall be *unlawful* for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The first proviso thus quoted was a second time re-enacted, in terms, (with an addition with respect to computations of time named therein) in the carefully considered Transportation Act, approved February 28, 1920, c. 91, 41 Stat. 456, 494, and the second proviso was left unchanged by that act.

These two acts of Congress providing that any rule, regulation or contract for limitation of notice to less than ninety days, shall be unlawful, are such unmistakable declarations of public policy as to a shorter notice limitation, under any circumstances, that in my judgment it should be applied to claims for personal injury, even though the statute, in terms, applies only to damages to property, unless there are cogent reasons for distinguishing the two classes of claims from each other. *Congress should not have a ninety-day reasonable standard in such matters and this court a thirty-day standard.*

The opinion of the court gives this as a sufficient reason for such distinction:

"The decisions that we have cited show that the time would have been sufficient, but for the statute, in respect of damage to goods, and the reasons are stronger to uphold it as adequate for personal injuries. A record is kept of goods, yet even as to them reasonably prompt notice is necessary as a check upon fraud. There is no record of passengers, and the practice of fraud is too common to be ignored."

With all deference, I submit that the reason thus given is unsound, because the likelihood is much greater that fraudulent claims will be made for injuries to goods than to persons, for the reason that most goods are packed for shipment and whether they are damaged or not cannot be discovered until they are unpacked after having left the custody of the carrier, but it must be rare indeed that a passenger can be injured except in the presence of some one or more of the carrier's agents. Such living and alert

22. CLARKE, J., TAFT, Ch. J., and MCKENNA, J., dissenting.

witnesses are a much better protection against fraud than the indefinite and hurried record that is kept of goods.

In addition, the fact that cases involving notice limitations with respect to goods have been appearing frequently in this court for fifty years,—ever since *Express Co.* v. *Caldwell*, 21 Wall. 264, was decided—while counsel agree that the case we are considering is the first of its kind with respect to passengers to find its way here or, so far as they can discover, into any court, is very strong evidence that fraudulent claims for damages to goods are more frequent than for injury to persons. If the carriers had needed and had used such limitations on personal injury claims as much as they needed and used them as to claims for damages to goods, some of them would have found their way into reported cases long ere this. As a matter of fact, however, this notice limitation upon passenger injury claims is a recent innovation. It appears for the first time in the livestock contract of the respondent, effective November 2, 1915,—as if in defiant response to the Cummins Amendment of the preceding March. And in the Uniform Live Stock Contract, prescribed by the Interstate Commerce Commission in its report of October 21, 1921, no such limitation is permitted. Interstate Commerce Reports, *In re Domestic Bill of Lading and Live Stock Contract.* Appendix F. Under this prescribed form of contract, the latest word on the subject, a thirty-day limit, such as the court is approving, would be as unlawful as it would have been under the statute had it been applied to a claim for injury suffered by Gooch's cattle in the same accident in which he was injured.

These considerations answer also the suggestion in the opinion of the court that Congress must have considered claims by passengers when considering claims for property and have decided that they deserved different treatment. Such a limitation on passenger claims had never

been heard of at that time, but we may be sure it will be found in every railroad ticket promptly upon the publication of the court's opinion in this case, unless prohibited by statute.

This court is passing for the first time upon such a rule as we have here, and believing that no sound reasons have been given for distinguishing between notice requirements for property and for passenger claims, I think it is the duty of the court to accept the rule of public policy prescribed by Congress and to apply it to personal injury claims by declaring this thirty-day rule too short to be reasonable and that it is therefore void under the *Piper Case, supra.*

Second. That the rule is unjust and discriminatory, and therefore unreasonable, is very clearly shown by the operation of a like rule in freight cases.

In *In the Matter of Bills of Lading,* 29 I. C. C. 417, 419, and *In re the Cummins Amendment,* 33 I. C. C. 682, 691, the Interstate Commerce Commission says that, while the uniform bill of lading had long contained *a four months' limitation* for presenting damage claims for freight, no effort had been made by carriers generally to enforce it until the *Croninger Case* was decided in January, 1913 (226 U. S. 491), but that in December of that year they began to enforce it literally and thereby "created multitudes of unjust discriminations." Only about one year of such enforcement was necessary to cause the enactment of the Cummins Amendment on March 4, 1915, which made an end of the matter where property was damaged in transit by negligence, and in any case rendered a limitation to less than ninety days unlawful.

That a notice rule so short as thirty days must result in discrimination seems to me clear, also, because of that characteristic of human nature, not sufficiently taken into account by many courts. Persons and property are

usually transported so safely by rail that thought of damage rarely enters the mind of the occasional shipper or traveler, and from this it results that rules, such as we have here, are not read, or if read are not understood, couched, as they usually are, in forms of expression about the meaning of which courts are in constant disagreement, with the result that, while the large shippers know of and keep within such rules and recover their losses, for the occasional small shippers they serve as a trap in which they are often caught and ruined. The Cummins Amendment is the protest of the country against the discrimination and hardship which many federal and state court decisions show resulted all over the country, from the enforcement of such a rule as to property claims.

To these reasons for holding the rule in this case unjust and discriminatory must be added the certainty, inherent in its form, that if enforced it will be an agency of grave injustice.

Not only is the requirement unusual and unreasonable that the notice shall be given only to the general manager of a great system of railway, remote and unknown as he must be to most of the patrons of the road, but, as a shipper seldom accompanies his property—a drover is almost the only instance in which he does—he is usually at least in physical condition to make prompt claim if his property is damaged, but many men are so badly injured in railway accidents that they are wholly incapable of making claim in writing within thirty days, and to prepare the way for a law suit is the last thought of a man who is seriously injured and suffering. It is true that the rule considerately permits the claim to be made by " the heirs and personal representatives " of one who may be killed—but if, unfortunately, he should die toward the end or very near the end of the thirty days, this astutely worded rule would cut out his dependents from all right

to recover. The rule is a novel and cunning device to defeat the normal liability of carriers and should not be made a favorite of the courts.

Believing, as I do, for the reasons thus stated, that the thirty-day notice really is much more unjust when applied to passenger than to property claims and also because its application will work as grave discrimination and injustice in other cases as it so palpably does in this case, I think the rule of public policy declared in the Cummins Amendment should be followed and that the judgment of the Circuit Court of Appeals should be reversed.

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

APPEAL FROM THE COURT OF CLAIMS.

No. 96. Argued January 19, 1922.—Decided February 27, 1922.

A railroad after accepting and transporting without protest, as mail matter, a shipment of gold in mail sacks consigned by the Treasury Department, and after receiving the amount fixed by readjustment for carrying mail matter under its contract therefor, has no claim for additional pay for carrying the gold and attendant railway mail guards, whether the shipment was properly mail matter and the requirements of the statute concerning postal service were technically complied with, or not. P. 33.

55 Ct. Clms. 536, affirmed.

APPEAL from a judgment of the Court of Claims dismissing appellant's petition.

Mr. S. S. Ashbaugh, with whom *Mr. E. G. Buckland* and *Mr. A. P. Russell* were on the brief, for appellant.

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

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for $5,020.65 as the claimant's proportion of joint through express rates for carrying $5,000,000 in gold from Philadelphia to Boston, and the passenger fares for seven men who accompanied the gold as guards from New York to Springfield, Massachusetts, that being the distance that the claimant carried the gold. The Court of Claims ordered the petition to be dismissed.

On October 23, 1914, the gold was delivered by the Treasury Department to the Postoffice Department in one thousand sealed bags, each weighing 18¾ pounds, which were placed in one hundred and sixty-seven locked mail pouches labelled "Boston, Mass." The Treasury prepaid the postage required for fourth class mail matter, at parcel post rates, amounting to $420. On reaching New York the gold was placed in a vault subject to the call of the chief clerk of Railway Mail Service. The next day the chief clerk and other railway officials took the pouches to the Grand Central Station where they were placed in a postal car attached to a regular passenger train of the claimant. The car with its contents was carried to Springfield and there delivered to the Boston and Albany road. It carried with the gold seven officials of the Railway Mail Service, all having the requisite travel commissions from the Postmaster General. No protest was made by any carrier and the claimant was paid and received without protest the amount fixed by readjustment orders for carrying the mail over its route.

The claimant admitting that it could not demand additional pay for hauling the mails, *New York, New Haven & Hartford R. R. Co.* v. *United States,* 251 U. S. 123, argues that the transaction was not "mail service" such as it had contracted to perform or within the classification of mail matter. It urges that in view of the weight limit,

eleven pounds, in force July 1, 1913, when its four-year term began; the weight of these bags, 18¾ pounds; of the contents, gold; and of the fact that the bags were sealed and placed in locked pouches, the Postmaster General could not make the service mail service if he tried. We think it unnecessary to discuss the argument, if there is anything in it. The service here, rightly or wrongly, was demanded as mail service, was rendered as mail service and was paid for without protest as mail service. Whether the Treasury technically complied with all the requirements of the statute concerning postal service did not matter to the claimant. By giving its claim a different name from that passed upon in *New York, New Haven & Hartford R. R. Co.* v. *United States,* 251 U. S. 123, 127, the claimant does not better its case.

Judgment affirmed.

MR. JUSTICE PITNEY was absent and took no part in the decision.

BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *v.* LOCOMOBILE COMPANY.

SAME *v.* RUSSELL, MILLER MILLING COMPANY.

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

Nos. 98, 99. Argued January 25, 26, 1922.—Decided February 27, 1922.

1. Massachusetts Statutes 1909, c. 490, Part III, §§ 70 and 71, provides, as the exclusive remedy for recovering a tax illegally exacted under the act, a petition to the Supreme Judicial Court and prompt repayment by the State of the sum there adjudged, and relieves the collector from liability to personal action. P. 37.
2. The time fixed for filing the petition—six months—is reasonable. P. 37.

3. In the absence of a controlling act of Congress, the right of a foreign corporation to recover taxes exacted under an unconstitutional state statute may be confined by the state law to the direct responsibility of the State and the collector of the taxes be thereby relieved of personal liability, even when sued in the federal court, at least where the remedy afforded is adequate. P. 37.
4. *Quaere:* Whether the proceeding given by the Massachusetts statute, *supra,* could be instituted in the Federal District Court? P. 39.
5. The Constitution, standing alone, does not create a paramount, unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates, but leaves the remedies to Congress and the States. P. 38.

Reversed.

ERROR to judgments for damages rendered by the District Court in actions to recover corporation excise taxes collected by the defendant and alleged and found to have been exacted by duress under an unconstitutional statute.

Mr. Wm. Harold Hitchcock for plaintiff in error.

Mr. William P. Everts, with whom *Mr. Edward E. Blodgett* and *Mr. Charles L. Favinger* were on the brief, for defendants in error.

The provision that the remedy by petition in the state court shall be exclusive, cannot affect the maintenance of this suit, where the federal court has jurisdiction, not only because of diverse citizenship, but also because the Federal Constitution is involved.

It is not necessary to treat at length the claim of the plaintiff in error that this provision ousts the jurisdiction of this court, which obviously has jurisdiction, both by reason of diverse citizenship of the parties and because of the federal constitutional questions which are involved.

It is clear that " a State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Smyth* v. *Ames,* 169 U. S. 466, 517;

Union Pacific R. R. Co. v. *Weld County,* 247 U. S. 282; *Nevada-California Power Co.* v. *Hamilton,* 235 Fed. 317, 339; *International Paper Co.* v. *Burrill,* 260 Fed. 664, 669; *Cunningham* v. *Macon &c. R. R. Co.,* 109 U. S. 446, 452, Distinguishing *Lamborn* v. *County Commissioners,* 97 U. S. 181, 185, and *Arkansas Building & Loan Association* v. *Madden,* 175 U. S. 269, 274. See *Ward* v. *Love County,* 253 U. S. 17.

Certainly the remedy must fall when the tax itself is declared unconstitutional. This special provision making the statutory remedy "exclusive" falls as a part of the unconstitutional statute. *Harrington* v. *Glidden,* 179 Mass. 486, 492.

Moreover, c. 724, Acts of 1914, including § 2, which contains the provision that the remedy "shall be exclusive," was expressly repealed by Acts of 1918, c. 76, and can have no application here. Since 1879 the Superior Court was given jurisdiction of all claims at law or in equity against the Commonwealth. Gen. Laws, c. 258, § 1.

The obvious purpose of the legislature was to provide that these tax questions should be determined by the Supreme Court in the County of Suffolk. The statute above referred to stated that the Superior Court "except as otherwise expressly provided" shall have jurisdiction, etc. It is clear that the suit in the Supreme Court provided for was one of the exceptions referred to in c. 258, § 1, Gen. Laws, and that it was not the intention of the legislature to abolish any remedies against public officers.

Mr. Justice Holmes delivered the opinion of the court.

These are suits by foreign corporations to recover taxes alleged to have been paid to the defendant, the Treasurer of Massachusetts, under duress, and in obedience to statutes held by this Court to be unconstitutional in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, and

Locomobile Co. v. *Massachusetts,* 246 U. S. 146. On the merits the defendant says that these taxes were collected under St. 1909, c. 490, Part III, § 56, held valid in *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; that the maximum limit to the tax fixed by that statute, which saved it, was supposed by this Court in the later decisions mentioned to have been removed by a later Act of 1914, c. 724, (246 U. S. 145); but that since that time the Supreme Judicial Court of Massachusetts has held that the Act of 1909 was independent of the statute of 1914 and remained valid and unaffected by the latter unconstitutional act. *Liquid Carbonic Co.* v. *Commonwealth,* 232 Mass. 19. *Lawton Spinning Co.* v. *Commonwealth,* 232 Mass. 28. He also says that by § 70 of the Act of 1909 any corporation aggrieved by the exaction of the tax may within six months after payment apply by petition to the Supreme Judicial Court, which shall be the exclusive remedy; that there is a provision in § 71 for prompt repayment of any sum adjudged to have been illegally exacted, and that these sections are a bar to a personal suit.

It is unnecessary to go farther than to say that we agree with the defendant upon the latter point. As to the construction of the words, they mean, we have no doubt, what was expressed more at length in an earlier statute on the same matter, that the petition " shall take the place of any and all actions which might otherwise be maintained by such corporation on account of the assessment and collection of such tax, and shall be the exclusive remedy." Stat. 1867, c. 52, § 4; continued with slight change in Pub. Stats. (1882), c. 13, § 66, and abridged to the present form in Rev. Laws (1902), c. 14, § 67. The words embodied a fixed policy of the State and must stand whether the levy of the tax is good or bad.

But it is said that a State cannot tie up the plaintiffs to suits in its own courts, and this objection coupled with the suggestion that the legislature might shorten the time

still farther or deny all remedy, if the defence is good, prevailed with the judge who decided these cases, as appears from *International Paper Co.* v. *Burrill,* 260 Fed. 664, 668, 669. We may dispose of the latter point first. The time for filing the petition is not unreasonably short for this class of cases, considering that the statute is dealing with taxes on the one side and business organizations on the other. And it by no means follows that a legislature may establish an unreasonable limitation because it may establish a reasonable one. We may lay on one side too the cases that show that States cannot confine parties to their own courts for the assertion of admitted rights. The question here is whether the State could not limit the right of foreign corporations coming into it and the liability of its own citizens in the way supposed. It is true that it cannot constitutionally impose certain taxes upon foreign corporations, but if the law of the United States stops there we do not perceive why the State may not provide that only the author of the wrong shall be liable for it, at least when, as here, the remedy offered is adequate and backed by the responsibility of the State. That it may do so is implied in *Arkansas Building & Loan Association* v. *Madden,* 175 U. S. 269, 274.

The Constitution standing alone without more does not create a paramount unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates. It leaves the remedies to Congress and the States. Congress acting under the Constitution has given to the courts of the United States a jurisdiction in equity that, speaking broadly, is the same in all the States and follows its own rules. Rev. Stats., § 913. *Boyle* v. *Zacharie,* 6 Pet. 648, 658. *McConihay* v. *Wright,* 121 U. S. 201. But as to trials at common law, except when the Constitution, treaties or statutes of the United States otherwise require or provide, the laws of the States are the rules of decision. Rev.

Stats., § 721. Congress has made no provision that governs the liability in this case and therefore has left it to the law of the State where the wrong is done. If there were no statute the common law of Massachusetts would supplement the Constitution as it would supplement the statutes of the State. But the common law of Massachusetts is not superior to its statutes and may be modified by them at the pleasure of the State, at least until in some substantial sense it impairs substantive constitutional rights, which it has not attempted to do. Whether in an otherwise proper case the proceeding given by the statute could be instituted in the District Court is not before us here. See *Ames* v. *Kansas,* 111 U. S. 449. *Madisonville Traction Co.* v. *Saint Bernard Mining Co.,* 196 U. S. 239.

Judgments reversed.

Mr. Justice Pitney, being absent, took no part in the decision.

JOHN L. WHITING—J. J. ADAMS COMPANY *v.* BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

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

No. 113. Argued January 26, 1922.—Decided February 27, 1922.

Decided upon the authority of *Burrill* v. *Locomobile Co., ante,* 34. Affirmed.

Mr. Charles L. Favinger, with whom *Mr. Edward E. Blodgett* and *Mr. William P. Everts* were on the brief, for plaintiff in error.

Mr. Wm. Harold Hitchcock for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit like the two just decided, *ante*, 34, to recover taxes paid under the Act of 1909 there mentioned and St. 1918, c. 253. In this case as in the other the statutes provided a remedy that excluded an action against the Treasurer at common law. St. 1909, c. 490, Pt. III, § 70. St. 1918, c. 253, § 4. St. 1918, c. 255, § 7. The District Court gave judgment for the defendant on the merits. Without going into them it follows that the judgment must be affirmed.

Judgment affirmed.

MR. JUSTICE PITNEY, being absent, took no part in the decision.

JONES *v.* UNITED STATES.

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

No. 103. Argued January 20, 1922.—Decided February 27, 1922.

1. One who, in pursuance of a scheme to acquire the land for himself, procures others to make homestead applications and entries, knowing that they have no intention to establish residence or otherwise comply with the law and that their proofs to the contrary, made with his connivance, and upon the faith of which the patents are issued, are false, is guilty of defrauding the United States of the value of the land. P. 47.
2. The right of the United States to recover damages for such a fraud is not defeated by the facts that the period of residence stated in the entry proofs was insufficient to comply with the statute and that, but for a mistake of law in that regard upon the part of the Land Department, the patents would not have issued. P. 46.
3. In an action for fraud by inducing fraudulent entries resulting in patents, evidence that the defendant induced other entrymen to file on other land and of his conduct touching contracts on similar claims, is admissible as bearing on his knowledge and intent, if

the judge in his discretion does not regard it as too remote or as raising too lengthy and complex collateral issues, even if afterwards explained by the defendant. P. 48.

4. Evidence of current rates for similar lands situate in adjacent townships, given by experts who learned the rates by experience and report, *held* admissible to prove value of the lands in question. P. 48.

5. In an action for defrauding the Government of public land by procuring false proofs upon which patents were issued, *held* that an instruction directing the jury, if they found for the plaintiff, to measure the damages at the market value with legal interest at 6 per cent. from the date of the final certificate to that of the trial, was not a ground for reversing the judgment rendered for the United States. P. 49.

265 Fed. 235, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment for the United States in the District Court in an action to recover the value of public lands patented as a result of fraudulent entries and proofs procured by the defendant.

Mr. John H. Hall and *Mr. Jay Bowerman,* for plaintiff in error, submitted.

Entrymen unable to make improvements by reason of age or poverty may contract with another to build dwellings, clear land and furnish money to buy stock and provisions, without violation of the homestead laws. *Conway* v. *United States,* 95 Fed. 615; *Grubbs* v. *United States,* 105 Fed. 314, 319.

Mortgaging the homestead by entryman is not alienation where the mortgage is given to procure money to improve the land. *Fuller* v. *Hunt,* 48 Idaho, 163; *Dickerson* v. *Bridges,* 147 Mo. 235; *Orr* v. *Ulyatt,* 23 Nev. 134; *Stock* v. *Duvall,* 7 Okla. 213; *Hafeman* v. *Gruss,* 199 U. S. 342, 345.

After final proof a homestead claimant may, before patent issues, contract, sell or convey, as though patent had

issued. *Williamson* v. *United States,* 207 U. S. 425; *United States* v. *Biggs,* 211 U. S. 507.

Fraud is never presumed, and when alleged must be clearly made out. Where cancellation of a patent is sought on the ground of fraud, the proof of the fraud must be clear and convincing.

It is conceded that the statute specially required that the entrymen should have actually resided on the land three years. Therefore, proof that the entryman in any of the cases had resided on the land but one year, or one and one-half years, was immaterial, because, if true, it would not furnish to the officers any excuse for issuing a final receipt or patent; and it therefore became immaterial whether the representations made by the entrymen as to the time and character of their residence, and as to their intent to make the land their home, were true or false. *Slaughter's Administrator* v. *Gerson,* 13 Wall. 379, 383, 385; *King* v. *Lamborn,* 186 Fed. 21, 28; *Ming* v. *Woolfolk,* 116 U. S. 599, 602; 14 Am. & Eng. Enc. of Law, 59; Bigelow on Fraud, p. 139; *First National Bank* v. *Osborne,* 18 Ind. App. 442; *Furneaux* v. *Webb,* 33 Tex. Civ. App. 560; *Russell* v. *Branham,* 8 Blackf. 304; *Prince* v. *Oberholser,* 75 Wis. 646; *Platt* v. *Scott,* 6 Blackf. 389; *Robbins* v. *Hope,* 57 Cal. 496; 2 Kent Com., 4th ed., pp. 484, 485; *Silver* v. *Frazier,* 85 Mass. 382; *Missouri Lincoln Trust Co.* v. *Third National Bank,* 154 Mo. App. 89; *Hall* v. *Johnson,* 41 Mich. 286; *Conway* v. *United States* 95 Fed. 615, 618.

In some jurisdictions, evidence of sales of land of like quality in the immediate neighborhood is permitted, while other courts refuse to allow testimony of this character,—among the latter, California, Iowa, Kansas, Minnesota, Nebraska, New York, Ohio, and Pennsylvania. See *Neely* v. *Western Allegheny R. R. Co.,* 219 Pa. St. 349; *Pittsburgh & Western R. R. Co.* v. *Patterson,* 107 Pa. St. 461; *Kansas City &c. R. R. Co.* v. *Weidenmann,* 77 Kan.

300. This question has not been directly passed on by this court; the nearest approach is the case of *Kerr* v. *South Park Commissioners,* 117 U. S. 379.

In order to support the allegations in the complaint, the action of the entrymen must have been intentionally wrong and fraudulent. If they were acting under an honest mistake of the law, they were not endeavoring to deceive the Government.

A period of about eighteen years had expired from the time of the issuance of the final certificates until the trial of the case. The Government had allowed the six years to go by without bringing a suit to cancel the patents, although it was fully advised, as shown by the record, very shortly after the patents were issued, when it canceled the entries of other settlers to land entered and proved up at or about the same time. To permit it to collect interest as a matter of right would be inequitable and unjust. In any event, this question of interest should have been submitted to the jury, and it was error for the court to direct them to return interest upon any sum that they might determine was the value of the land taken. *Eddy* v. *Lafayette,* 163 U. S. 456, 467; *White* v. *United States,* 202 Fed. 501.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. H. L. Underwood* were on the brief, for the United States.

It is not necessary that the false representation should have been the sole inducement. *Safford* v. *Grout,* 120 Mass. 20, 25; *Windram* v. *French,* 151 Mass. 547, 553; *Jordan* v. *Pickett,* 78 Ala. 331, 338, 340; *Winter* v. *Bandel,* 30 Ark. 362, 373; *Addington* v. *Allen,* 11 Wend. 374, 381; *Fishback* v. *Miller,* 15 Nev. 428, 442; *James* v. *Hodsden,* 47 Vt. 127, 137; *Clarke* v. *Dickson,* 6 Com. Bench (N. S.) 452; *Sioux National Bank* v. *Norfolk State Bank,* 56 Fed. 139, 141; *Tooker* v. *Alston,* 159 Fed. 599, 603, 604; *Cabot* v. *Christie,* 42 Vt. 121, 127.

There was ample evidence to support the finding of the jury that defendant was guilty of the fraud charged against him.

Defendant's action as to other matters of like nature was relevant in establishing his motive or intent in this case. Moreover, a reasonable discretion is allowed the trial court in letting in such evidence. *Wood* v. *United States,* 16 Pet. 342, 347, 349, 360; *New York Mutual Life Insurance Co.* v. *Armstrong,* 117 U. S. 591, 598, 599; *Moore* v. *United States,* 150 U. S. 57, 60, 61; *Exchange Bank* v. *Moss,* 149 Fed. 340, 341.

In establishing the value of land, evidence may be received of the value of nearby similar land, or of sales of such land not too remote in point of time, and evidence regarding sales is not incompetent because based upon hearsay, or knowledge obtained by one in the course of business, or through such sources as are commonly relied upon in such transactions. *Cliquot's Champagne,* 3 Wall. 114, 141; *Montana Ry. Co.* v. *Warren,* 137 U. S. 348, 352, 353; *Virginia* v. *West Virginia,* 238 U. S. 202, 212; *Sanitary District* v. *Boening,* 267 Ill. 118, 121, 122; *Whitney* v. *Thacher,* 117 Mass. 523, 527; *Fourth National Bank* v. *Commonwealth,* 212 Mass. 66, 68; *Erk* v. *Simpson,* 137 Ga. 608, 613; *Betts* v. *Southern California Exchange,* 144 Cal. 402, 409; *Lynch* v. *United States,* 138 Fed. 535, 538, 539.

Interest may be allowed in cases of tort. *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *Eddy* v. *Lafayette,* 163 U. S. 456, 467; *District of Columbia* v. *Robinson,* 180 U. S. 92, 107, 108; *Bates* v. *Dresser,* 251 U. S. 524, 531. That the question of its allowance is for the discretion of the jury, is undoubtedly supported by the decisions of this court cited; but it is not clear that the court did not by its charge intend to indicate to the jury that interest was to be allowed in its discretion. *Wilson* v. *Troy,* 135 N. Y. 96, 103.

Moreover, interest is allowable as a matter of right in a case of conversion, and we can perceive no valid reason why it should not be allowed when one's real property is wrongfully taken.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the United States to recover the value of lands that it alleges it was induced to part with through the defendant's fraud. The lands concerned had been in the Siletz Indian Reservation in Oregon and had been thrown open to homestead entry by the Act of August 15, 1894, c. 290, § 15, 28 Stat. 286, 326. In addition to the usual fees a payment of $1.50 per acre was required, and three years' actual residence on the land was to be established by such evidence as was required in homestead proofs. The complaint alleges that the defendant, with intent to acquire title to the lands mentioned for himself and associates, procured certain old soldiers, named, to make homestead applications and entries upon land pointed out by him, each previously signing an agreement with him by which for his information and services in drawing papers and affidavits the entryman was to pay him $185; the entryman was to employ him to build a home upon the land, paying him for that $100, and to clear or cultivate the land so far as required by the laws in order to perfect title, paying him for that $175. The entryman agreed to comply with the laws as to residence and the defendant agreed to do all the work required. The defendant agreed to advance, if required, not exceeding $60 for the fees of the land office, and, after final proof, at the option of the entryman, to procure a loan not to exceed $720, to be secured by a first mortgage on the claim, all payments stipulated from the entryman then to become due and to be payable out of the loan, or if there was no loan to be paid upon final

proof, which was to be made as soon as the laws had been complied with.

It is alleged that the agreement was intended by the defendant to conceal his intent to acquire title to the land; that the entryman did not intend to establish a residence upon the lands so entered and that the defendant knew that they did not intend to and intended that they should not. The complaint goes on to allege fraudulent proofs made by the defendant's procurement, the issue of final certificates and subsequently of patents, in ignorance of the fraudulent character of the entries, the defendant in each case having received a mortgage as agreed. The answer admits the contract, denies all fraud and sets up that the final proof of the entrymen disclosed that they had not resided for three years upon the land as required by the Act of August 15, 1894, it then being supposed by everyone that soldiers were allowed to count their time of service, as by Rev. Stats., §§ 2304, 2305. The facts are admitted, and it is pleaded and argued that the issue of patents by officers of the United States with knowledge of these facts was due to a mistake of law for which the defendant could not be held responsible. The defendant pleaded some other matters to which it is not necessary to refer, including the fact that the causes of action did not accrue within six years—a defence that is not pressed here. See *United States* v. *Jones,* 218 Fed. 973; 242 Fed. 609, 616.

After the skirmishes reported in the two volumes of the Federal Reporter the case came on for trial and resulted in a verdict for the plaintiff for $18,204.84. The judgment of the District Court was affirmed by the Circuit Court of Appeals. 265 Fed. 235. The first question argued there, as here, was whether the knowledge attributable to the United States that the entrymen had not been upon the land three years is a bar to a recovery. We agree with the Circuit Court of Appeals that it is not

necessarily a bar. If the defendant is responsible for fraudulent representations of intent to establish a residence and to fulfill in good faith the other requirements for a homestead, and those representations induced the issue of the patents, knowledge of another fact that also would have prevented the issue but for a mistake of law does not take the right to recover away. We can see no reason why failure through ignorance of law to insist upon an independent ground for refusal should deprive a party to a bargain of its rights upon other grounds, or of its right to require good faith in regard to them. An express waiver would have no such effect.

The defendant presents the case as if the only fraudulent representations charged were that the entrymen had been upon the land for a year or year and a half whereas in fact they were there much less, and then presses the argument that the falsity of such statements was immaterial because the statement as made disclosed the entrymen's want of right. But as we have implied, the charge of the Government goes much farther, and if the evidence as a whole tended to show the fraud that was charged, perjury as to the duration of residence would be a fact to be considered, especially if the time of residence fixed in the affidavits satisfied what everyone then thought were the requirements of the law.

We may assume for the purposes of decision that the agreement and mortgage were not unlawful on their face and that the defendant took pains to make them known to the authorities; but obviously they might be made an instrument for the scheme alleged. They were prepared in contemplation of a plan to collect old soldiers for the purpose of making entries, the defendant paying an agent five dollars a piece for every contract brought in. The defendant admitted that he looked to the land not to the soldiers as his security and that he supposed the soldiers would sell the land to pay their debt to him. The

land was timber land. There was evidence that the soldiers were not intending to make their residence upon it; that the agent employed to get their contracts knew that they were not intending to; that the defendant treated the intent as matter of indifference, and in his conversations with the agent indicated an expectation to get the land for himself or his nominees without the need of a preliminary contract to sell to him. He did get four of the nine parcels. Without going into details it is evident from the way in which the whole business was transacted that all hands proceeded on the notion that if the entrymen put in a periodical appearance on the land they would get it, and that no one troubled himself about actual intent provided the affidavits were in due form. It is impossible to say that the evidence did not warrant finding the defendant guilty of fraud.

Some questions are raised as to the admissibility of evidence. The first concerns the introduction by the Government of similar arrangements with soldiers' widows to file claims on land in the Siletz Indian Reservation without settlement. If the Court in its discretion did not regard the evidence as too remote or as raising too lengthy or complex collateral issues, it properly might admit the facts as bearing on knowledge and intent, even if afterwards the defendant gave an explanation that the jury might deem satisfactory. So as to similar transactions with other soldiers. So as to the defendant's conduct with regard to contracts upon similar claims, although the evidence upon this point can have had but little weight on either side. The other question is upon the admission of certain testimony as to value. The land as we have said was timber land. There seems to have been no sales in the township where it lay, and timber experts knowing by experience and report current rates in adjoining townships were allowed to state them. Without

going into the specific questions asked it is enough to say that we have examined them and find them all to have been well within the discretion of the Court. See *Virginia* v. *West Virginia,* 238 U. S. 202, 212. As the value found by the jury was very near to that set by the defendant, if not the same, we hardly see why the objection should have been pressed.

The only occasion for difficulty or doubt is an instruction by the Court to the jury that if they found for the plaintiff the measure of damages was the market value "with legal interest at six per cent." from the date of the final certificates to that of the trial. The Circuit Court of Appeals disposed of this by saying that the attention of the Court was not called to the question of interest. The bill of exceptions states that the defendant excepted to that part of the instruction, while on the other hand the transcript of the proceedings in Court so far as intelligible would indicate that the Circuit Court of Appeals was right. The usual rule in tort cases has been to leave the question of interest to the jury. *Lincoln* v. *Claflin,* 7 Wall. 132, 139. *Eddy* v. *Lafayette,* 163 U. S. 456, 467. But when the wrong consists of depriving the owner of property having a definite or ascertainable value there would seem to be the same reason for allowing interest as if there had been a misappropriation of money. The discretion of the jury does not mean the right to gratify a whim or a personal fancy. An indication of opinion on the part of the judge certainly would have been allowable, *Graham* v. *United States,* 231 U. S. 474, 480, and the tendency of late cases in this country is to sustain the ruling. *Shaw* v. *Gilbert,* 111 Wisc. 165, 196. *Fell* v. *Union Pacific Ry. Co.,* 32 Utah, 101. *New York, Chicago & St. Louis Ry. Co.* v. *Roper,* 176 Ind. 497, 509. *Wilson* v. *Troy,* 135 N. Y. 96, 104. *Drumm-Flato Commission Co.* v. *Edmisson,* 208 U. S. 534, 539. See *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 596. *New York, Lake*

Erie & Western R. R. Co. v. *Estill*, 147 U. S. 591, 619, 622. St. 3 & 4 Wm. IV, c. 42, § 29. In the circumstances of this case we are of opinion that the judgment must stand.

Judgment affirmed.

MR. JUSTICE PITNEY was absent and took no part in the decision.

LEMKE, AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, ET AL. *v.* FARMERS GRAIN COMPANY OF EMBDEN, NORTH DAKOTA.

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

No. 456. Argued November 14, 1921.—Decided February 27, 1922.

1. In a suit in the District Court which arises under a law of the United States as well as under the Constitution, in that the bill attacks a state statute both as violative of the Constitution directly and as in conflict with an act of Congress, the judgment may be reviewed by the Circuit Court of Appeals. P. 52.
2. In the general and usual course of its trade, a North Dakota association bought grain in that State, placed it in its elevator, loaded it promptly on cars and shipped to other States for sale. The grain, even after loading, was subject to be diverted and sold locally if the price was offered, but local sales were unusual, the company's entire market, practically, being outside North Dakota. *Held:* (a) That the business, including the buying of the grain in North Dakota, was interstate commerce. P. 54. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. (b) As applied to this business, a North Dakota statute, c. 138, Laws 1919, requiring purchasers of grain to obtain a license and pay a license fee, and to act under a defined system of grading, inspection and weighing, and subjecting the prices paid and profits made to regulation, was a direct burden on interstate commerce. P. 55.
3. Even when the particular subject remains unregulated by Congress, a State cannot lay burdens on interstate commerce in the guise of police regulations to protect the welfare of her people. P. 58. *Merchants Exchange* v. *Missouri*, 248 U. S. 365, distinguished.

4. A state statute unconstitutional in a part essential and vital to its whole scheme, can not be enforced by this court in its other provisions. P. 60.

273 Fed. 635, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, reversing a decree of the District Court and directing a permanent injunction in a suit against officials of North Dakota, brought to restrain them from enforcing, against the appellee, the North Dakota Grain Grading and Inspection Act. See also the next case, *post*, 65.

Mr. Seth W. Richardson, with whom *Mr. William Lemke,* Attorney General of the State of North Dakota, *Mr. Karl Knox Gartner* and *Mr. George K. Foster* were on the briefs, for appellants.

Mr. David F. Simpson, with whom *Mr. W. A. McIntyre, Mr. O. B. Burtness, Mr. Sveinbjorn Johnson, Mr. William A. Lancaster, Mr. John Junell, Mr. James E. Dorsey* and *Mr. Harold G. Simpson* were on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by the complainant, a coöperative association incorporated under the laws of North Dakota, and engaged in the business of operating a public elevator and warehouse for the purchase, sale, distribution and storage of wheat, oats, rye, barley, seeds and flax at the village of Embden in that State. The association retains no profit. If there is a surplus over operating expenses at the close of the season, such surplus is distributed among the grain growers according to the amount sold by each. The purpose of the suit is to enjoin the enforcement of the North Dakota Grain Grading and Inspection Act, passed February 11, 1919, c. 138, North Dakota Laws, 1919. The bill, omitting allegations

as to certain federal statutes which have become obsolete, is based upon two grounds: 1st. That the state statute is an unlawful regulation of and burden upon interstate commerce and, therefore, violates the Commerce Clause of the Federal Constitution. 2nd. That the state statute is in conflict with the Federal Grain Standards Act of August 11, 1916, c. 313, 39 Stat. 482, 485.

Upon filing its bill, complainant moved for a temporary injunction, which application was heard before three federal judges. A motion to dismiss the suit was also filed. The court denied this motion and granted a temporary injunction, finding that the North Dakota law imposed a substantial burden upon interstate commerce, and was in conflict with the Federal Grain Standards Act. Afterwards an answer was filed by the Attorney General of North Dakota on behalf of all the defendants, and later a separate answer was filed on behalf of Ladd and McGovern, officials charged with the execution of the state laws. Upon trial the District Court denied the injunction, and held that the state statute did not place a burden upon interstate commerce, and was not in conflict with the Federal Grain Standards Act, and entered a decree accordingly, from which appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the decree of the District Court, held the state statute unconstitutional, and invalid as in conflict with the federal statute, and directed the issuance of a permanent injunction to prevent the enforcement of the state law. 273 Fed. 635.

At the threshold we are met with a question of the jurisdiction of the Circuit Court of Appeals to review the decree of the District Court. It is well settled that when the jurisdiction of the District Court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to this court is the only method of review. § 238, Judicial Code.

Carolina Glass Co. v. *South Carolina,* 240 U. S. 305, and cases cited. It is equally well settled that where the jurisdiction is invoked upon other federal grounds, as well as the one attacking the constitutionality of a statute of a State, an appeal may be taken to the Circuit Court of Appeals, with ultimate review in this court if the cause is within a class within our jurisdiction. In our view the case falls within the class permitting appeal to the Circuit Court of Appeals. Section 24, Judicial Code, gives to the District Court jurisdiction of cases arising under the Constitution or laws of the United States. The attack upon the state statute because of its repugnancy to the federal statute required a consideration and construction of both statutes, and their application to the facts found. These considerations presented a ground of jurisdiction arising under a law of the United States, and was not dependent solely upon the application and construction of the Federal Constitution. *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 407; *City of Pomona* v. *Sunset Telephone Co.,* 224 U. S. 330. We, therefore, hold that the Circuit Court of Appeals had jurisdiction of the cause.

We pass to a consideration of the merits. The record discloses that North Dakota is a great grain-growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota to be shipped to and sold at terminal markets in other States, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his "spread," or margin, of profit. The

purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain, Minneapolis, Duluth or elsewhere. This method of purchasing, shipment and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under federal law.

That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282. In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into Kentucky and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This court rejected the conclusion of the state court, and held that the buying, no less than the selling, of grain under such circumstances was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions

of this court cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce.

Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co.* v. *United States,* 196 U. S. 375; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; and *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277.

In view of this state of facts we come to inquire whether the North Dakota statute is a regulation of interstate

commerce, and, therefore, beyond the legislative power of the State. Pertinent parts of the act are stated in the margin.[1]

This act shows a comprehensive scheme to regulate the buying of grain. Such purchases can only be made by those who hold licenses from the State, pay state charges for the same, and act under a system of grading, inspect-

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[1]Authority is given to a State Inspector appointed by the Governor,—

(*a*) To appoint a Chief Deputy State Inspector of Grades, Weights and Measures; a Chief Elevator Accountant; Deputy Inspector of Grades, Weights and Measures; State Deputy Inspector of Grades, Weights and Measures, and Warehouse Inspectors;

(*b*) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

(*c*) To establish uniform grades for grain, etc., for the State of North Dakota; to alter and modify such grades;

(*d*) To establish uniform grade certificates used in marketing the grain, etc.;

(*e*) To hear and determine appeals from State Deputy Inspectors and from Deputy Inspectors of Grades, Weights and Measures;

(*f*) To conduct investigations in regard to marketing, grading and weighing of grain, etc.;

(*i*) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

(*j*) To fix and determine all charges for grading, inspecting and weighing grain, etc.;

(*k*) To make rules, etc., to carry out the provisions of the act.

Sec. 3. It is made the duty of the Inspector of Grades, Weights and Measures to define and establish uniform grades and weights for grain, etc. In establishing such grades, dockage shall be considered as being of two classes: (1st) that having value, (2nd) that having no value, the former to be paid for at its market value.

Sec. 4. The term "Deputy Inspector of Grades, Weights and Measures" under this act means any firm, person, company, corporation or association that buys, weighs and grades grain, etc., and holds a license issued therefor by the State Inspector of Grades, Weights and Measures.

Sec. 5. The term "State Deputy Inspector of Grades, Weights and Measures" within the meaning of this act is defined as one who is

ing and weighing fully defined in the act. Furthermore, the grain can only be purchased subject to the power of the state grain inspector to determine the margin of profit which the buyer shall realize upon his purchase. This authority is conferred in § 23, and the margin of profit is defined to be the difference between the price paid at the North Dakota elevator and the market price,

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in the employment of the State of North Dakota and has received an appointment from the State Inspector of Grades, Weights and Measures.

Sec. 10. Deputy Inspectors shall weigh, inspect and grade grain that shall be offered for sale or shipment at their market place, according to the provisions of this act and the rules and regulations established by the State Inspector. They shall issue a certificate stating the kind of grain, etc., giving the grade, test-weight per bushel and the reason for all grades below number 1, and shall deliver to the owner or agent of such grade said certificate; it is also made their duty to accurately sample grain, etc., in wagon loads, carloads or other containers and forward samples thereof to the State Inspector of Grades, Weights and Measures when instructed by him to do so.

Sec. 11. The State Inspector may issue a license to any person engaged in buying, weighing and inspecting or grading grain, etc., or to the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill, provided they pass an examination as to their competency as may be prescribed by the State Inspector; the license requires such Deputy Inspectors to fix grades and dockage of grain, etc., inspected at their respective places of business—and to weigh same according to this act and the regulations promulgated thereunder. The State Inspector may issue licenses to persons soliciting or procuring assignments of grain, etc., after they have passed an examination as to their competency; the State Inspector may suspend or revoke licenses when he determines licensee is incompetent, or has knowingly or carelessly graded grain improperly, or has issued any false certificate of grading, or violated the act or rules made thereunder, etc.

Sec. 14. Makes it unlawful for any person to buy or grade grain, etc., without a license as a Deputy Inspector of Grades, Weights and Measures; or for any person, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, etc., without first obtaining a Deputy Inspector's license, provided that

with an allowance for freight, at the Minnesota points to which the grain is shipped and sold. That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce, is obvious from its mere statement.

Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. *Pennsylvania R. R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456, 468.

It is contended that these regulations may stand upon the principles recognized in decisions of this court which permit the State to make local laws under its police power in the interest of the welfare of its people, which are valid

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this section shall not prohibit State Deputy Inspectors from inspecting, weighing and grading grain, etc., under the direction and supervision of the State Inspector; and shall not prohibit producers from buying and selling grain, etc., to one another.

Sec. 16. The State Inspector after cancellation or suspension of license may permit the business of the licensee to be completed and closed out under the inspection and supervision of a State Deputy Inspector who shall be stationed at the place of business of such licensee; all expenses to be paid by the licensee;

Sec. 18. The State Inspector may establish central markets for the display of samples of grain, etc., at cities or towns within or without the State of North Dakota. Such markets shall be open to any and all persons desiring to buy or sell on said market and shall be operated and conducted under such rules and regulations as the State Inspector may establish.

Sec. 20. Makes it the duty of all Deputy Inspectors to keep a record showing: names and addresses of patrons of their respective warehouses, elevators, or mills; prices paid for agricultural products; the grades given; prices received and the grades received at terminal markets or within the State.

Sec. 23. The State Inspector is authorized, upon complaint of a producer of grain, etc., that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish a reasonable margin to be paid such producer for grain, etc.

although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States. This principle has no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it. This court stated the principle and its limitations in the discussion of the subject in the *Minnesota Rate Cases,* 230 U. S. 352. In the course of the opinion in that case, we said (p. 400):

"The principle, which determines this classification [between federal and state power], underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains.

"Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it (*State Freight Tax Case,* 15 Wall. 232; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489; *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Leloup* v. *Mobile,* 127 U. S. 640; *McCall* v. *California,* 136 U. S. 104; *Brennan* v. *Titusville,* 153 U. S. 289; *Galveston, Harrisburg & San Antonio Railway Co.* v. *Texas,* 210 U. S. 217; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298; *Crenshaw* v. *Arkansas,* 227 U. S. 389). . . ."

Applying the principle here, the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce.

It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sustained if not contrary to valid federal regulations of the same subject. But the features of this act, clearly regulatory of interstate commerce, are essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold. It is apparent that without these sections the state legislature would not have passed the act. Without their enforcement the plan and scope of the act fails of accomplishing its manifest purpose. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it. *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 113, and cases cited.

Nor is the appellants' contention upheld by the decision of this court in *Merchants Exchange* v. *Missouri,* 248 U. S. 365. In that case this court sustained the constitutionality of a statute of Missouri providing that in cities having more than seventy-five thousand inhabitants buildings used for the storage of grain shall be deemed public warehouses; and prohibiting the issue of weight certificates by other than authorized bonded state weighers. We held that the state statute did not violate the due process clause or the interstate commerce clause of the Federal Constitution. Furthermore, it was held that the act, under the facts of that case, did not violate the United States Grain Standards Act, as the latter did not regulate weighing; and, for reasons stated, did not violate the United States Warehouse Act. The act, there in question, did not undertake to regulate the buying of grain in interstate commerce, nor to levy a license tax upon the privilege, nor to fix the profit which could be realized on grain bought, shipped, and sold in interstate commerce.

It is alleged that such legislation is in the interest of the grain growers and essential to protect them from

fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control.

We agree with the Circuit Court of Appeals that this legislation is beyond the power of the State, as it is a regulation of interstate commerce when applied to complainant's business. This conclusion renders it unnecessary to consider whether the provisions of the state act are in contravention of the regulations provided in the Federal Grain Standards Act as was held by the Circuit Court of Appeals.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur.

The United States Grain Standards Act of August 11, 1916, c. 313, Part B, 39 Stat. 482, 483, authorizes the Secretary of Agriculture to establish standards (or grades) of quality and condition for different kinds of grain and provides that, when such standards shall have been established, shipment of any such grain for sale by grade in interstate commerce is prohibited, unless the grain has either been inspected before shipment or is to be inspected en route or at destination, by an inspector licensed under the federal act. Shipment without such inspection is permitted whenever the sale is by sample or by some description other than the official grade. The act does not purport to deal in any way with sales in intrastate commerce.

In 1919 the Legislature of North Dakota concluded that its farmers were being systematically defrauded in purchases of their grain made within the State. The buyers were largely local mills, of which there are 160, and local elevators, of which there are 2,200. The fraud was perpetrated, in part, by underweighing and undergrading in the unofficial inspection of the grain made locally by or on behalf of the purchasers. In part, the fraud was perpetrated by means of unconscionable bargains made locally, through which valuable dockage was obtained from the farmer without any payment therefor or by which the grain itself was bought at less than its fair value. Against such frauds the federal act did not purport to afford any protection. So far as the transactions were wholly intrastate, Congress was without power to do so. So far as the sales were part of transactions in interstate commerce, the power was ample; but Congress did not see fit to exert it. And the Secretary of Agriculture did not even exercise his authority to provide for federal inspection and grading within North Dakota of such grain as was shipped from there in interstate commerce. That was left by him to be done after the grain reached Minnesota or other States.

To protect the North Dakota farmer against these frauds practiced by local buyers its Legislature enacted c. 138 of the Laws of 1919. The statute seeks to effect protection (a) by establishing a system of state inspection, grading and weighing; (b) by prohibiting anyone from purchasing grain before it is inspected, graded and weighed (except that one producer may buy from another); (c) by ascertaining in the course of inspection, grading and weighing, the amount of dockage, and requiring a purchaser of the grain either to pay separately for the dockage or to return the same to the farmer; (d) by requiring payment to the farmer of the fair value of grain—the value to be

ascertained by fixing the so-called margin; (e) by ensuring compliance with the above provisions through the further provision that only persons or concerns licensed to inspect, grade and weigh may buy grain before it has been officially inspected. The standards of quality and condition established by the Secretary of Agriculture were adopted under regulations issued by the State Inspector of Grades, Weights and Measures; and all state inspectors (including licensed buyers) were required to observe those grades.

Ordinarily when a State's police power is exerted in connection with sales it is the buyer whom the law seeks to protect; and the seller is licensed as part of the machinery to enforce the regulations prescribed. I cannot doubt that the State has power as broad to protect the seller and, to that end, to license the buyer. Compare *House* v. *Mayes,* 219 U. S. 270. Ordinarily the function of inspection, grading and measurement is committed to a public official or other impartial person. But I am not aware of any constitutional objection to imposing the duty upon the buyer, where conditions demand it. The requirement that the amount of the dockage shall be ascertained and that it shall be paid for separately or be returned, does not differ in principle from the requirement upheld in *McLean* v. *Arkansas,* 211 U. S. 539, that coal shall be measured before screening, or the requirement upheld in *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, that store orders shall be redeemed in cash, or that upheld in *House* v. *Mayes, supra,* which prohibited, in the purchase of grain, making arbitrary deductions from the actual weight. The requirement that the buyer shall take only a proper margin for graded grain is, in effect, requiring that he pay a fair price. Laws designed to prevent unfair prices are ordinarily enacted to protect consumers. But there is no constitutional objection to protecting producers against unconscionable bargains, if con-

ditions are such that it is they who require protection. Nor can there be any constitutional objection to using, as a factor in determining what is fair, the price prevailing in terminal markets—even if they happen to be located in another State.

Whether the purchases involved in this case were intrastate or interstate commerce we need not decide. For the fact that a sale or purchase is part of a transaction in interstate commerce does not preclude application of state inspection laws, unless Congress has occupied the field or the state regulation directly burdens interstate commerce. That neither of these exceptions applies here appears from the description of the operation of the federal and the state laws given below in the opinion of Judge Amidon. Compare *Savage* v. *Jones,* 225 U. S. 501; *Merchants Exchange* v. *Missouri,* 248 U. S. 365; *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129, and *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 156, note 1. The requirement of a license and the payment of a $10 license fee, if applied to non-residents not regularly engaged in buying grain within the State, might perhaps be obnoxious to the Commerce Clause. But the objection, if sound, would not afford this plaintiff ground for attacking the validity of the statute. *Lee* v. *New Jersey,* 207 U. S. 67. It is a North Dakota corporation, owner of an elevator within the State, and is carrying on business there under the laws of the State as a public warehouseman. Compare *Brass* v. *Stoeser,* 153 U. S. 391, 394, 396. It is possible also that some provision in the license or some regulation issued by the State Inspector is obnoxious to the Commerce Clause. If so a licensee may disregard it. *Cargill Co.* v. *Minnesota,* 180 U. S. 452. Even if the margin clause should be held a burden upon interstate commerce, still that would not invalidate the whole statute. The margin clause is separable from the other pro-

visions of the act; and it could be eliminated without affecting the operation of any other feature of the state system. Compare *Presser* v. *Illinois,* 116 U. S. 252; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642. And it is clear that the Legislature would have wished to secure the protection afforded by the other provisions, if this one should be held to be beyond the power of the State. That it was not the purpose of Congress to supersede state inspection and grading acts is made manifest by § 29 of the United States Grain Standards Act (p. 490). *Merchants Exchange* v. *Missouri, supra,* p. 368.

To strike down this inspection law, instead of limiting the sphere of its operation, seems to me a serious curtailment of the functions of the State and leaves the farmers of North Dakota defenseless against what are asserted to be persistent, palpable frauds.

LEMKE, AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, ET AL. *v.* HOMER FARMERS ELEVATOR COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 604. Submitted November 14, 1921.—Decided February 27, 1922.

Decided on the authority of *Lemke* v. *Farmers Grain Co., ante,* 50. Affirmed.

Mr. William Lemke, Attorney General of the State of North Dakota, *Mr. Seth W. Richardson* and *Mr. Karl Knox Gartner* for appellants. *Mr. George K. Foster* was also on the briefs.

Mr. David F. Simpson, Mr. William A. Lancaster and *Mr. Harold G. Simpson* for appellees. *Mr. W. A. McIntyre, Mr. O. B. Burtness, Mr. Sveinbjorn Johnson, Mr.*

John Junell and *Mr. James E. Dorsey* were also on the briefs.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by companies representing 692 elevators in the State of North Dakota to enjoin the enforcement of the North Dakota Grain Grading and Inspection Act, c. 138 of the Laws of North Dakota of 1919. This act was considered and passed upon in No. 456, just decided, *ante,* 50.

The matter was heard before three judges, and a temporary injunction was granted upon the authority of the decree of the Circuit Court of Appeals which we have just reviewed, and affirmed. Appeal from that order was taken to this court. The facts are not materially different from those presented in the former case, and the reasons therein stated for the conclusion reached are controlling here, and need not be repeated.

The order of the District Court is

Affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE CLARKE dissent.

CRICHTON *v.* WINGFIELD.

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

No. 312. Submitted December 16, 1921.—Decided February 27, 1922.

1. As a basis for service upon an absent defendant under Jud. Code, § 57, personal property must be properly localized within the district of suit. P. 74.
2. Promissory notes, secured on land in Mississippi and payable there, were claimed by C as legatee, under wills of the payees of which she had been made executrix by a Mississippi probate court which had found, upon her representations, that the deceased were

citizens of that State and that the personal property bequeathed was located within its jurisdiction. Before qualifying as executrix, C removed the notes to New York, of which she was a citizen, and there, while the probate proceedings were pending, brought suit in a federal court to quiet her title to them against a citizen of Mississippi who claimed under assignment from one of the decedents. *Held* that the notes had not such a status as personal property in New York as would justify foreign service under Jud. Code, § 57.

Affirmed.

DIRECT appeal from a judgment of the District Court quashing a service of process and dismissing the bill of the appellant, for want of jurisdiction.

Mr. John W. Cutrer and *Mr. Thomas B. Felder* for appellant.

The statute uses words of ordinary meaning. The term " personal property " was designed to mean what it means in the several States, where the exercise of the jurisdiction might be sought. It includes all personal property of all kinds. At any rate, it embraces securities like the mortgage or deed of trust involved in this case, with the accompanying negotiable obligations described therein. *De Ganay* v. *Lederer,* 250 U. S. 376. In New York, the appellant's residence, the term embraces such securities. New York General Construction Law, 1919, c. 27, §39. So in Mississippi, Code 1906, §1591.

This recognition by the statutes of both States indicates that the common-law notion that pecuniary obligations like these are the evidence only of a debt, has passed away in both States, as it has in many others where similar statutes have been enacted. *Wheeler* v. *Sohmer,* 233 U. S. 434; *Jellenik* v. *Huron Copper Mining Co.,* 177 U. S. 1; *Matter of Bronson,* 150 N. Y. 1; *Westbrook* v. *Board of Trustees,* 48 N. Y. 390; *Jefferson* v. *Smith,* 88 N. Y. 576. Any reasonable doubt would be resolved in favor of the construction of the state statute which has been adopted by the court of last resort of the State.

Yazoo & Mississippi Valley R. R. Co. v. *Adams,* 181 U. S. 580.

New York, like Mississippi, has also recognized these obligations as personal property by permitting their attachment, their replevin, and their sale under execution, all irrespective of the domicile of the maker or holder. They are, also, in both States, declared to be personal property for the purpose of conferring jurisdiction upon a Surrogate's Court. *Johrer* v. *Roscoe,* 62 Miss. 699; *Walden & Co.* v. *Yates,* 111 Miss. 631. See also *Blackstone* v. *Miller,* 188 U. S. 189; *New Orleans* v. *Stempel,* 175 U. S. 309; *Fishburn* v. *Londershausen,* 50 Ore. 363.

The question whether securities like these come within the definition of "personal property" under this statute, has several times been before the federal courts, and jurisdiction has been maintained. *Manning* v. *Berdan,* 132 Fed. 382; *Pensacola State Bank* v. *Thornberry,* 226 Fed. 611; *Thompson* v. *Emmett Irrigation District,* 227 Fed. 560; *Hodgman* v. *Atlantic Refining Co.,* 274 Fed. 104; *Jones* v. *Rutherford,* 26 App. D. C. 114.

This court, in *Chase* v. *Wetzlar,* 225 U. S. 79, refused to consider bonds as constructively in the State of New York where executors, appointed in New York, had taken them to Germany. The actual presence of the securities within the jurisdiction is essential to the maintenance of an action to cancel liens thereon, or to remove clouds from the title. *Cocke* v. *Brewer,* 68 Miss. 775. Distinguishing *McIlvoy* v. *Alsop,* 45 Miss. 365. See also 3 Beale Conflict of Laws, p. 507.

The action is not personal but *in rem. Ampro Mining Co.* v. *Fidelity Trust Co.,* 76 N. J. Eq. 555, 557; *N. Y. & N. H. R. R. Co.* v. *Schuyler,* 17 N. Y. 592.

Under § 57, Jud. Code, a cloud on the title to personal property was removed in *Thompson* v. *Emmett Irrigation District,* 227 Fed. 560. Similar relief was granted in *Citizens' Savings & Trust Co.* v. *Illinois Central R. R. Co.,* 205

U. S. 46. See *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.,* 234 U. S. 369; *Freeman* v. *Alderson,* 119 U. S. 185; *Arndt* v. *Griggs,* 134 U. S. 316; *Hamilton* v. *Brown,* 161 U. S. 256; *Wilson* v. *Graham,* 30 Fed. Cas. No. 17804.

Distinguishing *McDonald* v. *Mabee,* 243 U. S. 90; *Chase* v. *Wetzlar,* 225 U. S. 88.

In this proceeding we are not resolving an obligation into its ultimate solution by payment, through the processes of a court. The opinion of the court below places its adverse decision on that assumption.

Mr. Louis Marshall and *Mr. James Marshall* for appellee.

No property was located in the Southern District of New York, within the meaning of § 57, Jud. Code, which affords a basis for the exercise of jurisdiction by the District Court, with respect thereto, as against the appellee, as resident and citizen of Mississippi, who was not found or served with process in that district and who did not voluntarily appear therein.

This is not a case for the removal of a cloud upon the title to personal property within the meaning of that phrase as employed in § 57.

The plaintiff wrongfully removed the notes from Mississippi, where they rightfully belong, in violation of the statute of that State, and taking advantage of her own wrong, is seeking to bestow upon the District Court of the Southern District of New York a jurisdiction which it does not possess.

The plaintiff's case is entirely devoid of equity, because she has not come into court with clean hands.

Mr. Justice Day delivered the opinion of the court.

Appellant, a citizen of the State of New York and a resident of the southern district thereof, brought this suit

in the District Court of the United States against the appellee, a citizen of the State of Mississippi, residing in the City of Clarksdale, County of Coahoma in that State. Appellant is the daughter of Ephraim H. and Eva W. Lombard, appellee is a sister of Ephraim H. Lombard. From the bill it appears that a controversy arose concerning the ownership of certain notes, fourteen in number, executed by W. D. Corley at Clarksdale, Mississippi, on January 1, 1917, and made payable to Eva W. and E. H. Lombard or bearer at the Bank of Clarksdale, Clarksdale, Mississippi. Seven of the notes were for $31,480 each, and seven were interest notes given for sums aggregating $39,664.80. The bill alleges that these notes were held in the State of New York within the jurisdiction of the District Court. From the bill it appears that appellant claims to own the notes by bequests under the wills of Eva W. and E. H. Lombard, respectively.

The complaint sets forth that E. H. Lombard when in feeble health executed a certain paper assigning one-half of all the principal notes, numbered from four to nine inclusive, and one-half of the interest notes, numbered from four to nine inclusive, to the appellee. The notes are alleged to be deferred payments on the sale of a plantation in the State of Mississippi. It is set out that at the time of the alleged assignment to appellee E. H. Lombard was of unsound mind, memory and understanding, and incapable of executing the assignment; that the same was obtained by the appellee by undue influence exercised upon appellant's father, and that it was without consideration. The assignment is alleged to constitute a cloud upon appellant's title to the notes in controversy. The notes are secured by deeds of trust upon real estate conveyed in Mississippi, which are duly recorded in the record of mortgages and trust deeds in that State.

The appellee could not be served with process in the Southern District of New York, and an order was made

under § 57 of the Judicial Code for service. Service was made upon the appellee at Clarksdale, Mississippi. She thereupon made special appearance for the purpose of a motion to quash the service upon the ground that she is a resident, citizen and inhabitant of the State of Mississippi and had not been within the New York District; and she moved for a dismissal of the bill. Upon hearing the District Court sustained the motion, set aside the service, and dismissed the bill.

The question here only concerns the jurisdiction of the District Court. There is much controversy in the record, embodied in affidavits, as to the manner in which possession of the notes was obtained by the appellant, and the assignment made to the appellee. So far as we deem them necessary to be considered, the facts are: The notes are secured by deeds of trust on lands in Mississippi. It appears without contradiction that Eva W. Lombard, the mother, died May 25, 1919. Upon petition of appellant the will was admitted to probate and she was appointed and qualified as executrix in the Chancery Court of Mississippi. The decree in the Chancery Court finds that the last will and testament was fully and legally established as the last will of Eva W. Lombard, who at the time of her death was a resident of Coahoma County, Mississippi; that the lands devised by the will are situated in Bronxville, New York, and that the personal property bequeathed by the will is all located in the second district of Coahoma County, Mississippi, the place of residence of the deceased at the time of her death. It was before the qualification of appellant as executrix under her mother's will that she took the notes to New York.

After the death of her father, which occurred in New York after the death of the mother, appellant filed a petition in the Chancery Court of Mississippi, and a decree was entered upon her petition, establishing the last will and testament of her father. In that decree there are

findings like those establishing the will of her mother, namely, that her father was at the time of his death a resident of Coahoma County, Mississippi; that the personal property bequeathed and devised by the will is located in the second district of Coahoma County, Mississippi, the place of residence of decedent at the time of his death. The decree established the last will and testament of E. H. Lombard, admitted the same to probate, and appointed the appellant executrix.

It further appears that neither of the estates had been settled in the Chancery Court of Mississippi, the court of probate, and as to both administration was pending when this suit was brought. From these recitals it appears that by the decrees of probate, invoked and obtained by the appellant, it was found that the decedents had been and were residents of Coahoma County, Mississippi, and that the personal property bequeathed under each will was located in the second district of that county, and hence subject to the jurisdiction of the court of probate.

By a law of Mississippi, set forth in the record (§ 2102, Code of Mississippi), it is provided: that an executor or administrator shall not remove any of the property of the estate out of the State; and the court is authorized, when it appears that the property is about to be removed, to issue a precept to the sheriff commanding him to seize the same and hold it until legally disposed of, and the letters of such executor or administrator may be revoked, on due notice, and administration *de bonis non* granted to some other person, and suit may be instituted by creditors or distributees of the estate on the bond, and judgment rendered accordingly.

With these facts beyond dispute, did § 57 of the Judicial Code authorize service in Mississippi to call upon the respondent to answer in the District Court in New York where the notes were physically held, and there litigate the controversy which had arisen concerning them?

Section 57 provides:

"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, 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 . . ."

The purpose of this section is to authorize service of process in suits to remove clouds upon title, liens, and incumbrances, upon property within the district by bringing in adverse claimants who cannot be reached by the ordinary methods of personal service. The language used is primarily applicable to titles to realty. It is true that the statute also embraces personal property. Used in this connection, personal property undoubtedly refers to such as is lawfully localized within the district, and there held and enjoyed, and thus made subject to the court's jurisdiction to clear its title from clouds and liens, notwithstanding personal service within the district cannot be obtained upon those setting up adverse interests. It is the presence of property real or personal within the district which confers the limited jurisdiction conferred in § 57 upon the District Court. *Chase* v. *Wetzlar,* 225 U. S. 79.

This court had occasion to consider the statute in *Jellenik* v. *Huron Copper Mining Co.,* 177 U. S. 1, where it was held in a suit involving title to shares of stock, that foreign service might be obtained in the Circuit Court of the United States for the District of Michigan on adverse claimants to bring in certain alleged owners of shares of stock held by Massachusetts defendants. This was held to be so because the company was organized under the laws of Michigan whose statutes declared that the stock of the company was to be deemed to be personal property. For the purpose of the suit it was decided that the property was within the State of Michigan, as the habitation or domicile of the company was within that State, which created the corporation, and made the property subject to its laws.

The appellant insists that the principles declared in that case control here, and cites statutes of New York and Mississippi defining personal property in terms broad enough to include written instruments creating pecuniary

obligations. The appellant also relies upon cases decided in this court such as *Wheeler* v. *Sohmer,* 233 U. S. 434, in which it was held that the New York inheritance tax imposed upon the transfer of property within the State, belonging to a non-resident thereof, was not void under the due process clause of the Federal Constitution as applied to promissory notes held in a non-resident's safety deposit box in New York. In discussing the character of such property we held that the State might tax such notes as property having a local situs within its borders. In *De Ganay* v. *Lederer,* 250 U. S. 376, this court sustained a federal tax upon the income from stock, bonds and mortgages owned by alien non-residents, but in the hands of an agent in this country, with full authority over them. In that case, as in the *Wheeler Case,* the previous decisions in this court were cited, which have held that notes, bonds, and mortgages may acquire a situs at a place other than the domicile of the owner, and be reached and taxed as localized property by the taxing authority.

We have no disposition to depart from the principle of those cases, but are of opinion that they do not control the present controversy. In our view § 57 of the Judicial Code cannot, under the facts of this case, be made the basis of a departure from statutory enactments which require personal service within the district in order to subject a person to the jurisdiction of a federal court.

In this cause the appellant derives her title, as she sets forth in her bill, from the bequests made to her by her father and mother which, subject to the settlement of the estates, would give her title to the notes in controversy. Upon her petition she was appointed executrix of the wills. Upon her representation as to residence of decedents she obtained letters testamentary in each of the estates. The decree of probate declared the personal property to be within the jurisdiction of the Mississippi court. A statute of the State forbade its removal beyond the

borders of the State. These estates at the time the bill was filed remained open and unsettled. Under such circumstances it would be doing violence to the purpose and provisions of § 57 to hold that the mere physical presence of the notes in New York, complainant having seen fit to take them there, made them personal property of that localized character lawfully within the Southern District of New York which would justify foreign service upon a non-resident and bring him or her to the local jurisdiction to contest title to the notes.

While the District Court put its decision upon different grounds, we are of opinion that it rightly held that a case for foreign service was not made out, and did not err in setting aside the service, and dismissing the bill.

Affirmed.

MR. JUSTICE PITNEY concurs in the result.

SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *v.* J. C. FAMECHON COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 91. Argued January 16, 1922.—Decided February 27, 1922.

A decision of a state court, denying a carrier's right to make a charge for refrigerator cars not provided for in tariffs filed at the stations where the shipments originated, and based wholly on an interpretation of the Interstate Commerce Act and the rules of the Interstate Commerce Commission, without questioning their validity, does not deny the validity of an authority exercised under the United States and is therefore not reviewable by writ of error under § 237, Jud. Code, as amended. P. 80.

Writ of error to review 145 Minn. 108, dismissed.

ERROR to review a judgment of the Supreme Court of Minnesota, which denied the right of a carrier to recover charges for refrigerator cars employed in interstate shipments.

Mr. Charles W. Bunn for plaintiff in error.

The court below held Circular No. 12, Western Trunk Lines, which was on file at the originating stations, not applicable to shipments destined by Southwestern Lines to Oklahoma and Texas, unless made applicable by Southwestern Lines Tariff, and that this tariff, while adopting Circular No. 12 by reference, was not valid as to the shipments in question because not filed at stations where those shipments originated.

The judgment is reviewable by writ of error. Act of September 6, 1916, 39 Stat. 726; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Alabama & Vicksburg Ry. Co.* v. *Journey,* 257 U. S. 111; *Buck* v. *Colbath,* 3 Wall. 334. Distinguishing, *New York Central & Hudson River R. R. Co.* v. *York & Whitney Co.,* 256 U. S. 406; *Yazoo & Mississippi Valley R. R. Co.* v. *Nichols & Co.,* 256 U. S. 540; *Northern Pacific Ry. Co.* v. *Solum,* 247 U. S. 477, 481; *Ireland* v. *Woods,* 246 U. S. 323, 328; *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 450. This case meets the requirement laid down in *United States* v. *Lynch,* 137 U. S. 280, 285, and *Baltimore & Potomac R. R. Co.* v. *Hopkins,* 130 U. S. 210.

In the *Journey Case, supra,* the court could not have intended, without discussion, to hold that there was no jurisdiction on writ of error, for, like the *North Dakota Case, supra,* it clearly involved the validity of an authority exercised under the United States. As pointed out in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, some cases may be subject both to writ of error and certiorari, under Jud. Code, § 237. It is difficult to conceive a case where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, the decision being against their validity (in which case writ of error lies under the first clause of § 237), which does not also fall under the class of cases described in the last clause of that section (in which case certiorari is the proper writ). Such cases are subject to both writs.

Cases of writ of error or appeal from the District of Columbia and the Territories under the Act of March 3, 1885, and under § 250, Jud. Code, are in point as defining the cases where writ of error lies under the Act of 1916. *Steinmetz* v. *Allen,* 192 U. S. 543; *McLean* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, 47; *Smoot* v. *Heyl,* 227 U. S. 518, 522.

As to the merits: The court, construing the Interstate Commerce Act, held it required filing of every tariff at the shipping station and that a tariff was invalid for any purpose if not so filed, though otherwise duly filed and published as required by the act.

The contrary rule has been repeatedly decided by this court. *Berwind-White Coal Mining Co.* v. *Chicago & Erie R. R. Co.,* 235 U. S. 371; *American Express Co.* v. *U. S. Horse Shoe Co.,* 244 U. S. 58; *Illinois Central R. R. Co.* v. *Henderson Elevator Co.,* 226 U. S. 441; *Texas & Pacific Ry. Co.* v. *Cisco Oil Mill,* 204 U. S. 449.

How far one circular or tariff may be incorporated into another by reference is a question for the Interstate Commerce Commission, and its discretion is controlling. As to this particular tariff, the Commission, after full hearings, has held that the car rental charge is properly referred to and therefore a part of the Southwestern Lines Tariff. *Hale-Halsell Grocery Co.* v. *Missouri, Kansas & Texas Ry. Co.,* 42 I. C. C. 491; 45 I. C. C. 523.

Mr. Charles Burke Elliott, for defendant in error, submitted.

Mr. Justice Day delivered the opinion of the court.

Plaintiff in error, as receiver of the Missouri, Kansas & Texas Railway Company, brought suit against J. C. Famechon Company, in the Municipal Court of the City of Minneapolis, to recover for charges for rental of re-

frigerator cars used in shipping potatoes in 1914 and 1915 from various points in Minnesota over connecting lines to points in Oklahoma and Texas. The initial carriers were the Northern Pacific and Great Northern Railways, and the terminal carrier the Missouri, Kansas & Texas Railway Company, for which plaintiff in error was receiver. The terminal carrier received the potatoes, delivered them at their destinations, and collected from the shipper in excess of the regular line haul rate the sum of five dollars for the use of each refrigerator car in four shipments in 1915. Upon one refrigerator car, shipped in 1914, the excess was not collected. Famechon Company made claim against the railway company for an overcharge of five dollars on each of the four shipments so made in 1915. The railway company refunded twenty dollars to Famechon Company, for which sum the receiver brought suit, claiming the refund was made by mistake and through a misunderstanding of the tariff and schedules; he also brought suit to recover five dollars rental for the refrigerator car shipped in 1914.

Famechon Company, in its answer, put in issue the allegations of the complaint and pleaded a counterclaim for the rental paid on two cars shipped in 1916. In the Municipal Court of Minneapolis defendant in error had judgment for ten dollars with interest and costs, and the receiver for the railway company appealed to the Supreme Court of Minnesota, which affirmed the judgment. 145 Minn. 108. A writ of error was allowed bringing the case to this court.

From the facts found by the Supreme Court of Minnesota, and shown by evidence and stipulation, it appears that the established freight rate on potatoes in carloads from points of origin to points of destination, named in the pleadings, was contained in tariffs known as "Southwestern Lines' Tariffs". These tariffs were subject to the "Southwestern Lines' Classifications, Exceptions and

Rules Circulars." Neither such circular nor the Southwestern Lines' Tariffs was on file or published at any of the stations of origin of shipment, but they were on file in certain designated offices of the Northern Pacific and Great Northern Railways in Minneapolis and St. Paul, and at various points in other States. At the time the shipments were made, Western Trunk Line Circular No. 12, specifically referred to in Southwestern Lines' Classifications, Exceptions and Rules, was on file at the points of origin of shipment and destination; and it was the only tariff issued by any of the carriers participating in the transportation of the shipments in question which contained a five-dollar rental provision for refrigerator cars; that circular was printed and filed with the Interstate Commerce Commission, and contained a rule to the effect that, when the shipper ordered a refrigerator or other insulated car to be heated by him or to move without heat, a charge of five dollars per car per trip would be made for use of car which would accrue to the owner thereof.

The Supreme Court of Minnesota recited the provisions of § 6 of the Interstate Commerce Act, 34 Stat. 586, requiring the filing of rates and charges with the Interstate Commerce Commission and the posting thereof at stations, and the rule of the Interstate Commerce Commission, adopted June 2, 1908, requiring the filing of rates and schedules, and held that the additional charges could not be collected under that statute and rule because neither the Southwestern Lines' Tariffs, nor the Southwestern Lines' Classification, Exceptions and Rules circulars making reference to Circular No. 12 were on file at the point of origin of shipment, and that there were no tariffs on file at such points to which shippers could refer to ascertain the rates of transportation.

The case is brought here by writ of error. We are of opinion that we cannot acquire jurisdiction by that

method under § 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Counsel for plaintiff in error contends that a writ of error is the proper method of review because there was drawn in question the validity of an authority exercised under the United States, and that the effect of the State Supreme Court decision was to deny such validity. The argument is that the Interstate Commerce Act confers on carriers the right to receive the revenues defined in the tariffs, and is a command with penalties that carriers collect those revenues, and that, as the decision turns on the issue directly raised, and necessarily involved, whether the tariff was or was not valid, there was drawn in question the validity of an authority exercised under the United States; that the question really decided by the Supreme Court of Minnesota was not the interpretation of the tariff, nor the extent or nature of the rights claimed under it, but the validity of a tariff filed with the Interstate Commerce Commission. But we cannot accept this contention.

We have recently had occasion to consider the meaning of the phrase " validity of an authority " as used in § 237 of the Judicial Code as amended September 6, 1916. *Jett Brothers Distilling Co.* v. *Carrollton,* 252 U. S. 1, 6, and cases cited. We held that the validity of an authority was drawn in question when the power to create it is fairly open to denial, and is denied. In that case we cited with approval the same conclusion reached by this court in its opinion rendered by Mr. Chief Justice Fuller in *Baltimore & Potomac R. R. Co.* v. *Hopkins,* 130 U. S. 210. We see no occasion to depart from that definition of the phrase.

In the instant case the Supreme Court of Minnesota did not question the federal power to enact the statute as to rates with its requirements concerning the filing and posting thereof, nor the authority of the Interstate Commerce

Commission to make the rule quoted in its opinion. What the court did was to so interpret the statute and rule as to render essential the filing of the tariffs at stations at the points of origin of shipment. Such interpretation, whether right or wrong, did not involve the validity of an authority exercised under the United States, and the review in this court should have been sought by a petition for writ of certiorari.

The writ of error must be

Dismissed

JOHN SIMMONS COMPANY *v.* GRIER BROTHERS COMPANY.

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

No. 57. Argued November 8, 1921.—Decided February 27, 1922.

1. A bill of review is called for only after a final decree adjudicating upon the entire merits and leaving nothing further to be done except the execution of it. P. 88.
2. An interlocutory decree may be modified or rescinded by the court at any time before final decree. P. 88.
3. Whether a decree is final or interlocutory depends upon its essential purport and effect and not upon its characterization in pleadings. P. 89.
4. A decree in a suit for patent infringement and unfair competition, dismissing the bill as to the former ground and granting a permanent injunction as to the latter, but leaving the case pending for an accounting before a master, is interlocutory as an entirety, permitting the plaintiff, if diligent, to seek a rehearing of the dismissal. P. 89. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, and *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52, distinguished.
5. A proceeding to reopen by rehearing or bill of review a decree entered on a mandate of an appellate court should first be referred to that tribunal. P. 91.
6. The fact that a party, to carry on his suit, moved execution of a mandate directing a decree partly adverse to himself, after his right of appeal was exhausted, did not make the resulting decree a decree by consent. P. 91

7. A decision of this court upholding a patent claim is ample ground for rehearing in a pending suit between other parties in which the same claim has been adjudged void. P. 91.
8. Omission to apply to this court for certiorari to an interlocutory decree, *held* not laches. P. 91.
9. *Abercrombe & Fitch Co.* v. *Baldwin,* 245 U. S. 198, upholding claim 4 of Baldwin lamp patent, *followed.* P. 91.

265 Fed. 481, reversed.

CERTIORARI to review a decree of the Circuit Court of Appeals, reversing a decree entered by the District Court after a rehearing, in a suit for patent infringement and unfair competition, and directing reinstatement of another previously entered under its mandate.

Mr. James Q. Rice for petitioner.

Mr. C. P. Byrnes and *Mr. David A. Reed,* with whom *Mr. Geo. H. Parmelee* and *Mr. Geo. E. Stebbins* were on the briefs, for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

In October, 1913, Frederic E. Baldwin, a citizen of New York, together with the present petitioner John Simmons Company, a corporation and citizen of that State, brought suit in the United States District Court for the Western District of Pennsylvania against The Grier Brothers Company, a corporation and citizen of the latter State, charging infringement of reissued letters patent No. 13,542, issued to and owned by Baldwin and under which the Simmons Company was sole licensee, for certain improvements in acetylene gas lamps intended for various uses, especially that of miners' lanterns. The bill charged also unfair competition with plaintiffs by the sale of lamps made to resemble the Baldwin lamp manufactured under the patent. The District Court granted a preliminary injunction as to unfair competition but reserved the question of patent infringement for final hear-

ing. 210 Fed. 560. Upon that hearing the court held claim 4 of the Baldwin reissue patent valid and infringed and awarded a permanent injunction upon both grounds, July 24, 1914, with an interlocutory decree for an accounting. 215 Fed. 735. Upon appeal by defendant (the present respondent), the Circuit Court of Appeals for the Third Circuit affirmed the decree as to unfair competition but reversed it as to patent infringement, holding the reissue to be void as to claim 4 upon the ground that this broadened the original patent. 219 Fed. 735, 739. This decision was rendered January 22, 1915, and the mandate went down about a month later setting forth the decree of the appellate court that the decree of the District Court be "affirmed as to so much thereof as refers to the subject of unfair competition, but the rest of the decree must be modified in accordance with the opinion of this court," and that the appellant recover costs and have execution therefor; and thereupon commanding that execution and further proceedings be had according to right and justice. No decree was entered upon this in the District Court until January 5, 1916, when on motion of plaintiffs an order was entered that the decree of the Circuit Court of Appeals be made the decree of the District Court, that plaintiffs recover from defendant their damages sustained by reason of unfair trade to be ascertained and reported by a master to whom reference was made for the purpose, that a perpetual injunction be issued restraining defendant from further unfair competition in trade; and that the bill of complaint as to infringement of the reissue patent be dismissed. The accounting before the master is still pending.

In May, 1913, Baldwin had brought suit (John Simmons Company intervening) upon the same reissue patent in the United States District Court for the Southern District of New York against Abercrombie & Fitch Company (Justrite Company, intervening), and that court

adjudged the patent valid and infringed. 227 Fed. 455. On appeal this decree was affirmed by the Circuit Court of Appeals for the Second Circuit, November 9, 1915. 228 Fed. 895. On December 20, 1915, defendants in that suit presented to this court a petition for a writ of certiorari; January 10, 1916, this writ was granted (239 U. S. 649); and under it, on December 10, 1917, the decision of the Circuit Court of Appeals for the Second Circuit was affirmed, this court holding, in direct opposition to the decision of the Circuit Court of Appeals for the Third Circuit, that claim 4 of the reissue was valid. 245 U. S. 198. A mandate was sent down January 15, 1918, to the District Court for the Southern District of New York, and the proper decree was promptly entered thereon.

Soon after this, plaintiffs herein petitioned the District Court for the Western District of Pennsylvania for leave to file what was called a "bill of review" against its decree of January 5, 1916. The court in the first instance refused, but without prejudice to an application to the Circuit Court of Appeals for the Third Circuit for leave to file such bill. Upon application that court granted plaintiffs leave to make the application to the District Court, and authorized the latter court to take action thereon. Under this leave, application was renewed to the District Court, the proposed "bill of review" being at the same time presented, and with leave of the court filed. This bill sets out the original bill and the proceedings had thereunder, as above recited; also the proceedings in the suit in the Second Circuit and the final decision of this court therein; alleging these as "new facts" that had arisen since the decree entered in the District Court for the Western District of Pennsylvania on the 5th of January, 1916, and as showing that that decree was erroneous and contrary to law, in so far as (pursuant to the opinion of the Circuit Court of Appeals for the Third Circuit) it dismissed the bill as to infringement of the re-

issue patent and failed to decree a perpetual injunction and ascertainment of damages as to infringement; prayed that the cause might be reopened and the decree rescinded and set aside, in so far as it dismissed the patent cause of action, and a new decree entered granting the relief prayed for in the original bill. Defendant answered admitting in the main, or at least not denying, the allegations of the so-called bill of review as to the former proceedings and decrees in the courts of the two circuits, but denying that the lamp involved in the Abercrombie & Fitch Company suit (the "Justrite lamp") corresponded in essential features of construction with the "Grier lamp" involved in the present suit; averring that the decisions of the Circuit Courts of Appeals of the two circuits were not rendered on the same state of facts; that the bill was "in fact only a petition for rehearing because of the decision of the Supreme Court referred to therein;" and that the decision of this court in the Abercrombie & Fitch Company suit formed no basis for a bill of review.

Afterwards, John Simmons Company by leave filed a supplemental bill setting up that it had acquired from Baldwin all his rights in the reissue patent including all claims for damages and profits on account of the infringement. Defendant having answered this, testimony was taken to show the structural identity of the "Justrite" and the "Grier" lamps, and the cause came to hearing, with the result that the District Court found substantial identity between the two lamps in all essential features of construction, sustained the right of plaintiffs to maintain the bill of review, and held that its former decree, entered pursuant to the mandate of the Circuit Court of Appeals, so far as it held the reissue patent invalid, should be vacated and set aside and a decree entered sustaining the validity of claim 4 of the reissue, finding defendant guilty of infringement thereof, and plaintiffs entitled to an accounting of profits and a perpetual injunction.

From the decree thus entered an appeal was taken to the Circuit Court of Appeals, which reversed it and remanded the cause with directions to reinstate the decree of January 5, 1916. 265 Fed. 481. To review this decision, the present writ of certiorari was allowed. 253 U. S. 482.

The District Court, as will appear from an excerpt from its opinion reported in a note to the opinion of the Circuit Court of Appeals, 265 Fed. 483, treated the case as one based upon a true bill of review, and this as resting not upon new matter that had arisen since the decree but upon error of law apparent on the face of the record without further examination of matters of fact.

The Circuit Court of Appeals, upon a recital of the different steps in the litigation, regarded the situation as one of plaintiffs' own creation, for the reason that after that court's decision on the original bill but before the mandate went down, although apprised of the contrary decision of the District Court for the Southern District of New York in a cause to which they were parties, plaintiffs made no request to the Circuit Court of Appeals for the Third Circuit to withhold its mandate; that, after the mandate went down and before a decree pursuant to it was entered in the court below, they knew of the affirmance of the decision of the District Court of New York by the Circuit Court of Appeals for the Second Circuit, yet made no request to either court in the Third Circuit to have the entry of a decree withheld; that on the contrary, with knowledge that this court had under consideration a petition for certiorari in the Second Circuit case, they prepared and of their own motion caused to be entered on January 5, 1916, the decree dismissing their suit as to the patent infringement; and after this court on January 10, 1916, granted the certiorari, they allowed the term to end without moving to suspend, open, or vacate the decree of Jaunary 5. The court held that in effect, so far as plaintiffs were concerned, that decree was a consent de-

cree, and while not going to the extent of holding that this was sufficient to bar them from maintaining the bill of review, did declare that the anomalous situation and consequent hardship, arising from the fact that a patent adjudged valid in one circuit by this court at the same time had been adjudged invalid by the Circuit Court of Appeals in another circuit, was due not to any fault of the law or of the patent system but to the failure of plaintiffs to take steps that might have avoided it. Proceeding to consider the legal question whether the decision of this court in 245 U. S. 198, either showed an error of law apparent on the face of the record without further examination of matters of fact, or constituted a new fact discovered since the decree and materially affecting it, the court held on the authority of *Scotten* v. *Littlefield,* 235 U. S. 407, 411; *Tilghman* v. *Werk,* 39 Fed. 680; and *Hoffman* v. *Knox,* 50 Fed. 484, that the bill of review could not be maintained.

The cases cited are to the effect that, in the application of the ancient rule of practice in equity, based upon Lord Bacon's first ordinance (Story Eq. Pl., 6th ed., § 404), a change in the authoritative rule of law, resulting from a decision by this court announced subsequent to the former decree, neither demonstrates an "error of law apparent" upon the face of that decree nor constitutes new matter *in pais* justifying a review.

But a bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it. If it be only interlocutory, the court at any time before final decree may modify or rescind it. Story Eq. Pl., §§ 408, a, 421, 425. In the so-called bill of review herein, it is in terms alleged that the decree of the District Court for the Western District of Pennsylvania, entered July 24, 1914, was an interlocutory decree. The same is alleged as to the decree of January 5, 1916. Both allega-

tions are admitted by the answer, which at the same time asserts that the " bill of review " is in fact only a petition for rehearing. Obviously, the nature of the decree is to be determined by its own essential purport and effect not by the statements of the pleaders about it. But an examination of the record demonstrates that they correctly described the decree as interlocutory.

The decree of July 24, 1914, although following a "final hearing ", was not a final decree. It granted to plaintiffs a permanent injunction upon both grounds, but an accounting was necessary to bring the suit to a conclusion upon the merits. An appeal taken to the Circuit Court of Appeals, whose jurisdiction, under § 129 Judicial Code, extended to the revision of interlocutory decrees granting injunctions, followed by the decision of that court reversing in part and affirming in part, did not result in a decree more final than the one reviewed. The prayer for relief based upon infringement of patent and that based upon unfair competition in trade were but parts of a single suit in equity. The decree entered pursuant to the decision of the appellate court, did not bring the suit to a conclusion for either purpose. As to unfair competition, it evidenced a *quasi*-definitive decision in plaintiffs' favor, but an inquiry before a master still was necessary before final decree could pass; an inquiry not formal or ministerial but judicial, in order to ascertain the amount of the damages to be awarded. As to the claim of patent infringement, the decree evidenced a *quasi*-definitive decision adverse to plaintiffs, which, if nothing occurred to prevent, would in due course be carried into the final decree. But it did not constitute a separation of the cause, nor dismiss defendant from the jurisdiction for any purpose; necessarily this decision remained in abeyance until the cause should be ripe for final decree; there was nothing to take the case out of the ordinary rule that there can be but one final decree in a suit in equity.

Smith v. *Vulcan Iron Works,* 165 U. S. 518, 525, where it was held by this court, after some diversity of opinion among the Circuit Courts of Appeals of the different circuits, that an appeal to one of those courts under § 7 of the Act of 1891, from which § 129 Judicial Code was derived, taken from an interlocutory decree granting an injunction and awarding an accounting in a patent case, conferred jurisdiction upon the appellate court to consider and decide the case upon its merits, and thereupon direct a final decree dismissing the bill, if in its judgment it had no equity to support it, differed vitally from the case before us, since there an adverse decision upon the patent disposed of the entire merits, the suit having no other object. Nor was the situation presented in the present case analogous to that passed upon by this court in *Hill* v. *Chicago & Evanston R. R. Co.,* 140 U. S. 52, which arose out of its decision in 129 U. S. 170. There a decree was held final for the purposes of an appeal, which dismissed the bill as to certain parties and denied relief "upon all matters and things in controversy," although it left undetermined a severable matter in which those parties had no interest. The test of finality here to be applied is rather that exemplified by *Keystone Manganese & Iron Co.* v. *Martin,* 132 U. S. 91, and cases cited. In *Ex parte National Enameling & Stamping Co.,* 201 U. S. 156, 165, it was pointed out that the rule of the *Hill Case* cannot apply to a case in which there is but a single defendant.

Regarding, therefore, the decree of January 5, 1916, as an interlocutory not a final one, there is neither technical nor substantial ground for applying to it the rules pertaining to a bill of review, and the bill herein called such is to be treated as essentially a petition for rehearing. By the 69th Equity Rule (226 U. S. 669) such a petition is in order at the term of the entry of the final decree; and, of course, if an interlocutory decree be involved, a

rehearing may be sought at any time before final decree, provided due diligence be employed and a revision be otherwise consonant with equity.

As the decree in question was entered pursuant to the mandate of an appellate court, proper deference to its authority required that a proceeding to reopen it, whether by rehearing or review, should be first referred to that tribunal. *Southard* v. *Russell,* 16 How. 547, 570–571; *In re Potts,* 166 U. S. 263, 267; *National Brake & Electric Co.* v. *Christensen,* 254 U. S. 425, 430–431.

That having been done in this case, and leave for the purpose obtained (leave to grant a "review" fairly included any step short of that), what obstacle stood in the way of correcting the decree? The suit was still pending; plaintiffs applied promptly after the decision of this court in the *Abercrombie & Fitch Co.* suit, 245 U. S. 198. It was eminently proper that the decree in the present suit should be made to conform to that decision, in the absence of some special obstacle. We cannot assent to the view of the court below that plaintiffs may be regarded as consenting to the decree of January 5, 1916; they simply accepted an adverse decision as to a part of their suit, not open to further appeal at their instance, and proceeded in the orderly mode to pursue their suit as to the rest. They were not guilty of laches for omitting at that stage to make application to this court for allowance of a writ of certiorari. That mode of review is not a right of the party, but lies in this court's discretion; peradventure the very fact that a final decree had not yet been entered might have been deemed a sufficient ground for refusing the writ. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 254, 257–258.

Our decision in *Abercrombie & Fitch Co.* v. *Baldwin,* 245 U. S. 198, must be taken as not only demonstrating that the Circuit Court of Appeals erred in its disposition of this case upon the first appeal (219 Fed. 735), but that

the error, even though not amounting to "error apparent," within the meaning of Lord Bacon's first ordinance, afforded ample ground for setting matters right upon a rehearing before final decree, as was in effect done by the District Court. No sufficient ground is shown for the reversal of its latest decree.

Decree of the Circuit Court of Appeals reversed, and that of the District Court affirmed; and the cause remanded to that court for further proceedings in conformity to this opinion.

REED, ADMINISTRATRIX OF REED, *v.* DIRECTOR GENERAL OF RAILROADS, UNITED STATES RAILROAD ADMINISTRATION, OPERATING PHILADELPHIA & READING RAILROAD.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 78. Argued January 13, 1922.—Decided February 27, 1922.

In actions under the Federal Employers' Liability Act, the doctrine of assumption of risk has no application when the negligence of a fellow servant which the injured party could not have foreseen is the sole, direct and immediate cause of the injury. P. 95.

267 Pa. St. 86, reversed.

CERTIORARI to a judgment of the Supreme Court of Pennsylvania, reversing a judgment for the plaintiff, the present petitioner, in an action under the Federal Employers' Liability Act, and directing entry of judgment for the respondent, *non obstante veredicto.*

Mr. John J. McDevitt, Jr., with whom *Mr. Frederick S. Tyler* was on the brief, for petitioner.

Mr. Wm. Clarke Mason for respondent.

The case is determined by *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492, and *Boldt* v. *Pennsylvania R. R.*

Co., 245 U. S. 441. These are not in conflict with *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward*, 252 U. S. 18, where the movement of the train on which the brakeman was riding involved no danger of collision with a known obstacle upon the track, and no hazard would have resulted from his position if the train had been permitted to continue on its way according to the usual method of operation.

In the present case, there was within the vision of Reed a fixed obstacle on the track, bound to cause derailment unless coöperation between him and the engineer could stop the car. Its presence was known to him and was one of the hazards of "a dangerous yard movement" which he assumed. The case is like *Boldt* v. *Pennsylvania R. R. Co., supra.* See also *Baugham* v. *New York, Philadelphia & Norfolk R. R. Co.*, 241 U. S. 237; *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 663.

Mr. Justice McReynolds delivered the opinion of the court.

The petitioner brought an action in the Court of Common Pleas at Philadelphia, alleged that her husband was negligently killed while employed in interstate commerce by the Philadelphia & Reading Railroad and demanded damages. She claimed under the Federal Employers' Liability Act. Verdict and judgment having been entered for her, an appeal was taken to the Supreme Court of the State, and reversal sought upon several grounds. That court considered only one question—Did decedent's death result from a risk which he assumed as the result of his employment? And, concluding that he had assumed such risk, it reversed the judgment of the trial court and entered one for respondent *non obstante veredicto.* 267 Pa. St. 86. As found and stated by the Supreme Court the facts are these:

"Decedent was a member of a crew which had brought a train from Philadelphia to South Bethlehem. Some of the cars contained goods shipped in interstate commerce. When all the cars were released at their appropriate places, the engine went back to get the caboose for the purpose of taking it to the point where it was to stay until wanted for further traffic, and then itself go to the roundhouse where it was to remain until again needed. This movement was through defendant's yard, where there were a number of tracks upon which cars and locomotives were being shifted constantly. Through the yard ran also the main passenger tracks of defendant, and, at the points where other tracks crossed over or connected therewith, derailing devices had been wisely installed for the purpose of preventing locomotives and cars using the other tracks from running on to or over the passenger tracks, at a time when passenger trains were standing or traveling thereon, and thereby possibly causing collision and serious loss of life.

"The engine and caboose which had reached South Bethlehem were moving over a track which had one of those derailing devices where it connected with the passenger tracks. The caboose being in front of the locomotive, the engineer could not see the device when operating the engine from his cab and hence decedent was directed to and did locate himself on the front of the caboose, with a duty to signal the engineer in time for him to safely stop if the derailing device was set against further passage. It was so set on this occasion, but either through the negligence of decedent himself, or of the engineer in failing to notice or heed the signalling of decedent, the locomotive did not stop in time, the caboose was derailed and decedent was crushed to death between it and cars on an adjoining track."

Accepting the view that the engineer's negligence was the proximate cause of the fatal injury, the court below

held the decedent had assumed the risk of such negligence and the master was not liable, citing among other cases *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492. This we think was error.

Seaboard Air Line Ry. v. *Horton*—often followed—ruled that the Federal Employers' Liability Act did not wholly abolish the defense of assumption of risk as recognized and applied at common law. But the opinion distinctly states that the first section "has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employé of the plaintiff." The *Second Employers' Liability Cases,* 223 U. S. 1, 49, declared that "the rule that the negligence of one employé resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employé." And in *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward,* 252 U. S. 18, we said: "The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk." See *New York Central & Hudson River R. R. Co.* v. *Carr,* 238 U. S. 260; *Chesapeake & Ohio Ry. Co.* v. *DeAtley,* 241 U. S. 310, 313.

In actions under the Federal Act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected is the sole, direct and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents or employees of such carriers.

For the reasons indicated, the judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

NEW BEDFORD DRY DOCK COMPANY *v.* PURDY, CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

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

No. 131. Argued January 27, 1922.—Decided February 27, 1922.

A contract for the wood-work involved in converting a car-float into an amusement steamer by removing the car tracks, relaying the decks as dancing floors and adding a superstructure, steering apparatus and steam propulsion plant, is a maritime contract for repairs as opposed to original construction, within the Maritime Lien Act of June 23, 1910, and within the admiralty jurisdiction of the District Court. P. 99.

266 Fed. 562, reversed.

APPEAL from a decree of the District Court dismissing a libel to recover damages and enforce a lien for repairs.

Mr. George R. Farnum, with whom *Mr. Lee M. Friedman* was on the briefs, for appellant.

Mr. George L. Dillaway for appellee.

The identity of the car-float was completely lost by the conversion into an amusement steamer. Mere identity of hull is not sufficient to preserve the identity of the vessel. *McMaster* v. *One Dredge,* 95 Fed. 832; *The Dredge A,* 217 Fed. 617, 629, 630; *Thames Towboat Co.* v. *The "Francis McDonald,"* 254 U. S. 242.

The work done was not to repair, reconstruct, or furnish anything to the steamer "Jack-O-Lantern," the vessel which the libelant has libeled in this case. Such a craft

was not in existence. The work done was not necessary to the repair of the original car-float. It was only necessary to bring the steamer which was libeled into existence. The car-float itself was destroyed and disappeared as a craft by means of the very work which the libelant did, and a new and entirely different type of vessel came into existence. This was construction of a steamboat and not repairs to a car-float.

The Act of June 23, 1910, gives a lien for "repairs, supplies, or other necessaries," etc. Even if the contract in this case were maritime in its nature, the libelant must show that the work done comes within the description of "repairs." The distinction between repairs and reconstruction is drawn in *The Susquehanna,* 267 Fed. 811; and *The Harvard,* 270 Fed. 668. The statute, so far as it applies, only removes the distinction between foreign and domestic vessels, making no change in general principles of the law of maritime liens. *Piedmont Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, 11; *The Oceana,* 244 Fed. 82; *The Hatteras,* 255 Fed. 518; *The Muskegon,* 275 Fed. 348. It does not include reconstruction. *The Schuylkill,* 267 Fed. 811.

It does not create new classes of liens or make maritime what was not maritime before. *The J. Doherty,* 207 Fed. 997; *The Sinaloa,* 209 Fed. 287; *The Hatteras, supra; Thames Towboat Co.* v. *The "Francis McDonald,"* 254 U. S. 242; *Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra; The "United States,"* 193 Fed. 552. It does not include all services, even though the contract be maritime. *The Hatteras, supra; The Convoy,* 257 Fed. 843.

"Repairs" may be very extensive. *Hardy* v. *Ruggles,* Fed. Cas. No. 6,062; *North Pacific S. S. Co.* v. *Hall Bros. Co.,* 249 U. S. 119; *The Harvard, supra; Donnell* v. *The Starlight,* 103 Mass. 227. But they must not change the identity of the vessel.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Claiming a lien under Act of Congress approved June 23, 1910, c. 373, 36 Stat. 604,[1] and seeking to recover for work done and supplies furnished in pursuance of a contract with the owner of the "Jack-O-Lantern," appellant libeled the vessel. The libel was dismissed for lack of jurisdiction. If the agreement between the parties is maritime there was jurisdiction, otherwise there was none.

The facts are not in dispute. They were stated as follows by the District Court:

"The Jack-O-Lantern was originally a car float of the usual type, something over 200 feet long, with neither motive power nor steering gear, and having two lines of track on her single deck. The claimant bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, a large house, or superstructure, was built, inclosing most of the deck, and containing a dance hall, rooms, balconies, etc. Steering apparatus and a steam plant of the propeller type for propulsion were also installed.

"For the purpose of carrying out these changes the contract now before the court was made between the claimant and the libelant. It covers, generally speaking, all the woodwork involved in the changes above outlined. The

[1] Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That 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.

libelant did not install the power plant, but it did prepare the vessel for it. The scow was towed to the libelant's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left the libelant's yard, she was towed away."

Upon these facts it held that the contract was not one for repairs or supplies, but for original construction, and therefore non-maritime within the doctrine of *Thames Towboat Co.* v. *The "Francis McDonald,"* 254 U. S. 242. "In rebuilding operations the test is whether the identity of the vessel has continued, or has been extinguished." "The matter turns, as I view it, upon a question of fact; and upon the facts stated I think it clear that the identity of the car float which was delivered to the libelant was completely lost by the conversion into an amusement steamer under the contract in suit. It is true that the hull is substantially unchanged; but mere identity of hull is not sufficient to preserve the identity of the vessel." "The Jack-O-Lantern, with her dance hall, rooms, and power plant, self-propelled and able to maneuver, is an essentially different vessel from the car float, which furnished the hull." In support of this conclusion *McMaster* v. *One Dredge,* 95 Fed. 832, and *The Dredge A,* 217 Fed. 617, 629, 630, were cited.

It is not always easy to determine what constitutes repairs as opposed to original construction. A contract for the former is maritime; if for the latter, it is not. We are not disposed to enlarge the compass of the rule approved in *Thames Towboat Co.* v. *The "Francis McDonald,"* under which contracts for the construction of entirely new ships are classed as non-maritime, or to apply it to agreements of uncertain intendment—reasonable doubts concerning the latter should be resolved in favor of the admiralty jurisdiction. Nor do we think that in

cases like the instant one any refined distinction should be made between reconstruction and repairs—the latter word as used in the statute has a broad meaning.

As pointed out in *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11, 12, the Act of June 23, 1910, 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."

This court has not undertaken and will not now essay to announce rigid definitions of repairs and new construction; but we do not accept the suggestion that the two things can be accurately differentiated by consideration of the ultimate use to which the vessel is to be devoted. The view expressed by Judge Hughes in *United States* v. *The Grace Meade,* Fed. Cas. No. 15,243, is both sound and helpful. "And generally, it may be held as a principle, that, where the keel, stem, and stern-posts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel. But where no piece of the timber of an old vessel is used without being first dislocated and then replaced, where no set of timbers are left together intact in their original positions, but all the timbers are severally taken out, refitted, and then reset, there we have a very different case. That is a case of a vessel rebuilt."

There was jurisdiction in the court below to determine and enforce the rights of the parties. Its judgment to the contrary must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

TERRITORY OF ALASKA ET AL. *v.* TROY, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF ALASKA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.

No. 392. Argued December 14, 15, 1921.—Decided February 27, 1922.

1. Alaska has been incorporated into and is part of the United States; and the Constitution, so far as applicable, is controlling upon Congress when legislating in respect thereto. P. 110.
2. Section 27 of the Merchant Marine Act, forbidding, with exceptions, transportation of merchandise over routes between points within the United States in vessels not built in the United States or documented under its laws and owned by its citizens, is a regulation of commerce and not within § 8 of Art. I of the Constitution requiring uniformity throughout the United States of duties, imposts and excises. P. 110.
3. Alaska is not a State, within § 9 of Art. I of the Constitution, declaring "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." P. 111. *Downes* v. *Bidwell*, 182 U. S. 244, considered.

Affirmed.

APPEAL from a decree of the District Court of the United States for the District of Alaska sustaining a demurrer to, and dismissing, the amended complaint, in a suit brought by the Territory and the Juneau Hardware Company to restrain the local Collector of Customs from confiscating merchandise, shipped or to be shipped by the Hardware Company or others in Alaska, from points in the United States over Canadian Railroads to Canadian ports, and thence to Alaska by British vessels not authorized under § 27 of the Merchant Marine Act, or merchandise to be shipped in like manner from Alaska to the United States.

Mr. John Rustgard, Attorney General of the Territory of Alaska, for appellants.

Equal rights to trade and commerce and the equal right of access to the ports and markets of the various States are among property rights of citizens of the United States guaranteed to the people of Alaska by the treaty of cession. They are "privileges and immunities." Arts. of Confederation IV; Const., Art IV, § 2; *Slaughter-House Cases,* 16 Wall. 36; *Crandall* v. *Nevada,* 6 Wall. 35; *Lochner* v. *United States,* 198 U. S. 45.

When the people of the Territory of Alaska were admitted to the rights, privileges and immunities of American citizens, and when it was guaranteed to them that they should be maintained and protected in the free enjoyment of their property, it comprehended, not only the equal right to life and liberty, but the equal right to trade and commerce, the equal right of ingress and egress to and from the several States,—these being indispensable property rights. Nothing less is meant by the right to equal protection of the laws.

Independently of the treaty, Congress has expressly extended the Constitution to Alaska, first by § 1891, Rev. Stats., and later by § 3 of the Act of August 24, 1912, and this court has declared in several decisions that Alaska has been incorporated into the United States and forms an integral part thereof.

For this reason cl. 6, § 9, Art. I, of the Constitution protects the ports of Alaska to the same extent that it protects the ports of a State. *Loughborough* v. *Blake,* 5 Wheat. 317; *Rassmussen* v. *United States,* 197 U. S. 516; *Binns* v. *United States,* 194 U. S. 486.

It is conceded that the prohibition of this clause against discrimination by regulation of revenue applies to and protects an incorporated Territory. This protection would be futile unless it was accompanied by an inhibition against discrimination by regulation of commerce, and for

that reason the two are joined in the same clause. The history of the adoption of this clause of the Constitution demonstrates that, like the clause requiring uniformity of duties, it was intended to apply to the entire "American Empire." *Knowlton* v. *Moore,* 178 U. S. 107.

In the Insular Cases this court held that the clause in question would have operated to protect Porto Rico had that Territory been incorporated into the United States, the same as is Alaska, or had Congress expressly extended the Constitution to that island. *Downes* v. *Bidwell,* 182 U. S. 244, 249, 288, 292, 352, 354.

The word " State " as employed in the Constitution is frequently interpreted by this court to include a Territory. For instance, in the cl. 3 of § 8 where authority is given " to regulate commerce with foreign nations and among the several States, and with the Indian tribes," this court has held it applies to commerce between a State and a Territory. Similar results have been obtained from construction of cl. 5, § 9, Art. I; cl. 1 and 2, § 10; cl. 1, § 2, Art. IV, and the Fourteenth Amendment. In dealing with an incorporated Territory, Congress may act as a federal legislature or as a local legislature. Acting as a federal legislature it is bound by the general limitations of the Constitution. Acting as a local legislature it has such powers as are possessed by a state legislature, but no more.

The law here in question was enacted by Congress in its federal capacity and under the commerce clause. Laws enacted under that power must be uniform and deal equally with all.

Whether acting as a federal or a territorial legislature, Congress has no power to deny the people of any Territory to which the Constitution has been extended the same rights of commerce accorded to the people of other parts of the country. See *Passenger Cases,* 7 How. 492; *Downes* v. *Bidwell,* 182 U. S. 360; *Dred Scott* v. *Sandford,* 19 How. 393; *United States v. Morris,* Fed. Cas. No.

15,815; *Murphy* v. *Ramsey,* 114 U. S. 15; *Dooley* v. *United States,* 183 U. S. 151, 168, 171, 172, 173; *Pope* v. *Williams,* 193 U. S. 632; *United States* v. *Anthony,* Fed. Cas. No. 14,459; *Stone* v. *Smith,* 159 Mass. 414; *Stoutenburgh* v. *Hennick,* 129 U. S. 141.

Clause 2 of § 3, Art. IV, was not intended to in any manner deny to the people of a Territory the rights of American citizens, but was intended to give Congress power to deal with internal affairs of the embryo States until they were able to assume the duties of their own sovereignty. This section of the Constitution must be read in conjunction with the Ordinance of 1787 which remained in full force and effect after the Constitution was adopted, and has been construed as applicable to all the Territories incorporated into the Union after the adoption of the Constitution. Meigs, The Growth of the Constitution in the Federal Convention of 1787; *Spooner* v. *McConnell,* Fed. Cas. No. 13,245; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390; *Choisser* v. *Hargraves,* 2 Ill. 317; *Palmer* v. *Cuyahoga County,* Fed. Cas. No. 10,688.

It is not necessary to allege in the complaint that the rate tariffs had been filed with the Interstate Commerce Commission or that the latter has established through rates.

The entire § 27 of the Act of 1920 is void because it discriminates in favor of that part of the United States which is on the continent and situated between Canada and Mexico. The executive departments can not render it valid by extending the law to the Territories which it expressly excludes. Nor can the courts render the law constitutional by giving it an interpretation which Congress expressly provides that it should not have.

Mr. Solicitor General Beck for appellee.

An examination of each reference in the Constitution to the States shows that with but few exceptions the word

" State " was intended to be construed literally. It must be admitted that in the commerce clause " among the several States " imported a sphere of power that was in part beyond the State, and the words " with the Indian tribes," most of which then lived in the Territories, clearly show that power was given to the Congress to regulate all commerce, except that which was wholly within a State. Hence, commerce with the Territories is expressly included in this grant of power. And it must also be admitted that in the matter of the fundamental personal rights of the individual, his rights were safeguarded by the pertinent provisions of the Constitution and the amendments, no matter where he might be under our flag.

But, in general, it is clear that the term " State," or " the several States," has a precise and definite signification, and that the word " Territory " has a similar precise meaning.

There is also a clear and distinct difference between the meaning of the word " State " in the original Constitution, which concerned itself almost wholly with the distribution of powers between the Federal Government and the States, and the amendments to the Constitution, the first ten of which were intended as a Bill of Rights to guarantee the liberty of the individual.

If in the clause of the Constitution which provides that no preference shall be given " to the ports of one State over those of another " it had been intended to refer to the Territories, would not the clause have read " no preference shall be given by any regulation of commerce or revenue to any port in the United States "?

It is quite obvious that the economic question as to how Congress shall regulate foreign and interstate commerce by regulating ports of entry is not, in any true sense, a question of personal right. It is an economic and political question, which concerns States and not individuals. " What is forbidden, is not discrimination

between individual ports within the same or different States, but discrimination between States." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421, 435.

The remainder of the clause—" Nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another "—shows also that this clause of the Constitution was placed there for the protection of the States. The immunity from discrimination is a reserved right on the part of the constituent States and does not pertain to individual ports, much less to individual persons.

Outside of the States and in the Territories and colonial dependencies of the United States, the question of uniform treatment of ports of entry is one of governmental policy. It is well known that the purpose of this provision was to allay the alarm of the various States, if the plenary power over foreign commerce was granted to the Federal Government.

There was an obvious reason why they did not extend this assurance of equal terms to the ports of a Territory. They did not have in mind ports of a Territory, for none such existed. The " Territory " contained no " port " in the sense of the word in which the framers used the term. This becomes the more obvious if it be recalled that the original conception of the commerce clause related only to commerce by vessels, whether trans-Atlantic or coastwise. It is quite clear that internal land transportation was not at first regarded as a part of the commercial power of the Union. *Perrin* v. *Sikes,* 1 Day (Conn.) 19; 2 McMaster, History of the American People, p. 60. Cf. *Conway* v. *Taylor's Executor,* 1 Black, 603.

Moreover, the clear distinction of governmental power between States and Territories must constantly be borne in mind. As to the States, there was only a limited delegation of power, subject to many reservations and quali-

fications. As to the Territory, there was a plenary power to deal with it as the property of the United States, to the extent even of disposing of it at the pleasure of the Federal Government.

The reason which impelled the framers of the Constitution to separate the clause now under consideration, with respect to preferential treatment of ports, from that which refers to uniformity of taxation, and the addition of the words " of revenue " in the former clause, when the latter provision, by its requirement of uniformity of taxes throughout the United States, effectually prevented the imposition by the Federal Government of different duties at different ports, are explained when due consideration is given to the fundamental distinction, which the framers of the Constitution always had in mind, between a tax that was levied as a mere regulation of commerce and not for revenue and a pure revenue tax. Today, that distinction has been almost wholly lost sight of in discussing the constitutional questions which underlay the American Revolution; and yet no distinction was more clearly recognized by the men of that era or more tenaciously adhered to.

The phrase " taxation without representation " had reference to taxes, which were levied upon the colonists for the purpose of revenue. Chief Justice Marshall referred to this distinction in *Gibbons* v. *Ogden,* 9 Wheat. 1, 12. His remarks are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary War. We may refer to the journals of the Continental Congress, vol. I, pp. 28, 175, 176; vol. II, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776, 1 Bigelow's Life of Franklin, pp. 478, 479; John Dickinson's Letters from a Farmer, published in 1768, pp. 15, 18–19, 37–42, 43, note, 60, 61, 66; Dr. Franklin's letter to

Joseph Galloway of February 25, 1775, 8 Spark's Franklin's Works, p. 147; John Adams' letter to Jay of July 19, 1785, Works of John Adams, vol. 8, pp. 282, 283. The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. 1 Story on the Constitution, § 963; 2 *id.*, 1080, *et seq.;* James Madison's letter to Joseph C. Cabell of March 22, 1827, Writings of James Madison, Lippincott ed., vol. 3, p. 571; his letter to Cabell of September 18, 1828, *id.*, p. 636; Henry Clay's reply to Barbour, March 31, 1824, Annals of Congress, p. 1994; Gulian C. Verplanck's Letter to Drayton, New York, 1831, pp. 21–23; Speech of Thomas Smith Grimké, etc., Charleston, 1829, p. 51.

In the proceedings of the Constitutional Convention, the clause in controversy was removed from the clause which required uniformity of taxation and attached to the clause which forbade any State to impose an export duty. It seems clear that they separated the two clauses because of the distinction referred to. Would it not be most inadvisable to hold that the Constitution requires that the United States, in whatever exercise of world power it may hereafter assume, shall deal with all ports of entry which are subject to its jurisdiction with absolute equality?

If the Fathers had anticipated the control of the United States over the far-distant Philippine Islands, would they, whose concern was the reserved rights of the States, have considered for a moment a project that any special privilege which the interests of the United States might require for the ports of entry of the several States should, by compulsion, be extended to ports of entry of colonial dependencies, living in a different civilization and having economic interests which might be wrecked by the application of the rule of equality?

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In the court below appellants' bill was dismissed upon demurrer. It attacks the validity of § 27, Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988,[1] upon the ground that the regulation of commerce prescribed therein gives a preference to ports of the Pacific Coast States over those of Alaska, contrary to § 9, Art. I, Federal Constitution—" No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

The act purports among other things " to provide for the promotion and maintenance of the American merchant marine," and § 27 forbids transportation of mer-

[1] Act of June 5, 1920.—To provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

Sec. 27. That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further*, That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic.

chandise over any portion of the route between points in the United States *including* Alaska "in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act," *provided* that under certain conditions this limitation shall not apply to merchandise transported between points within the United States, *excluding* Alaska, over through routes by Canadian rail lines and connecting water facilities.

The bill assumes that the preference is obvious upon a consideration of the statute without more. And although by fostering lines of boats which afford frequent, regular and speedy service, and otherwise, the practical effect may be highly beneficial to Alaskan ports, nevertheless, in view of the record, we will assume that the act does give preference to ports of the States over those of the Territory.

Alaska has been incorporated into and is part of the United States, and the Constitution, so far as applicable, is controlling upon Congress when legislating in respect thereto. *Rassmussen* v. *United States,* 197 U. S. 516, 525, 528. It has been organized and is governed under appropriate congressional action. For present purposes, therefore, we need not inquire into the object and scope of the treaty of cession.

The questioned regulation relates directly to commerce and clearly is not within the usual meaning of the words of § 8, Art. I, of the Constitution—"All duties, imposts and excises shall be uniform throughout the United States." That such regulations are not controlled by the uniformity clause was pointed out in *Cooley* v. *Board of Wardens of Port of Philadelphia,* 12 How. 299, 314:

"But, having previously stated that, in this instance, the law complained of does not pass the appropriate line

which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; and, if so, it also follows, that this law is not repugnant to the first clause of the eighth section of the first article of the Constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable."

The appellants insist that "State" in the preference clause includes an incorporated and organized territory. This word appears very often in the Constitution and as generally used therein it clearly excludes a "Territory." To justify the broad meaning now suggested would require considerations more cogent than any which have been suggested. Obviously, the best interests of a detached territory may often demand that its ports be treated very differently from those within the States. And we can find nothing in the Constitution itself or its history which compels the conclusion that it was intended to deprive Congress of power so to act. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421; *Knowlton* v. *Moore,* 178 U. S. 41, 107.

Great weight is attributed to certain statements concerning the preference clause found in the several opinions announced in *Downes* v. *Bidwell,* 182 U. S. 244, 249, 288, 352, 354, 355. But none of these opinions was accepted by a majority of the court and statements therein are not binding upon us. That controversy grew out of a revenue measure and the point now presented was not directly involved. The writers used the language relied upon in arguments intended to support their particular views concerning the fundamental points. Without attempting to ascertain the exact purport of these expressions it suffices to say that they afford no adequate support for appellants' position.

A quotation from the opinion of the court in *Rassmussen* v. *United States,* 197 U. S. 516, 520, is apposite:

"In *Dorr* v. *United States,* 195 U. S. 138, the question was whether the Sixth Amendment was controlling upon Congress in legislating for the Philippine Islands. Applying the principles which caused a majority of the judges who concurred in *Downes* v. *Bidwell,* 182 U. S. 244, to think that the uniformity clause of the Constitution was inapplicable to Porto Rico, and following the ruling announced in *Hawaii* v. *Mankichi,* 190 U. S. 197, it was decided that, whilst by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States and were subject to its control as a dependency or possession, those Islands had not been incorporated into the United States as a part thereof, and therefore Congress, in legislating concerning them, was subject only to the provisions of the Constitution applicable to territory occupying that relation."

The judgment below is

Affirmed.

BANK OF JASPER *v.* FIRST NATIONAL BANK OF ROME, GEORGIA.

FIRST NATIONAL BANK OF JASPER, FLORIDA, *v.* STATE BANK OF ROME, GEORGIA.

FIRST NATIONAL BANK OF JASPER, FLORIDA, *v.* FIRST NATIONAL BANK OF ROME, GEORGIA.

BANK OF JASPER *v.* STATE BANK OF ROME, GEORGIA.

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

Nos. 76, 73, 74, 77. Argued January 12, 1922.—Decided February 27, 1922.

1. Under the law of Florida, an appeal to the State Supreme Court, taken solely to review an interlocutory order overruling a motion

to quash a pretended service by publication for want of jurisdiction, does not operate as a general appearance. P. 117.

2. By an arrangement between a corporation, its agent and a bank, purchasers of the corporation's shares were allowed to discount their notes at the bank, the resulting credits were transferred by the bank to the account of the agent in payment for the shares, and negotiable certificates of deposit were issued by the bank to the agent. *Held* that the certificates of deposit did not represent funds in the bank which as *res* could sustain service by publication upon a nonresident purchaser of the certificates in suits brought by the shareholders in the state court against such purchaser, the bank, the vendor corporation and its agent to have the proceeds of the notes impressed with a trust in plaintiffs' favor and annul their purchases and notes and the certificates on the ground of fraud in selling the shares; and that judgments based on such service, were void. P. 118.

264 Fed. 83, affirmed.

These were actions in the District Court for the Southern District of Florida, brought by the present respondents, respectively, as indorsees of certificates of deposit issued by the respective petitioners. The petitioners pleaded *res judicata*, based on judgments rendered by the Florida courts in suits to which it had been sought to make the respondents parties through service by publication. The District Court held the service valid and the judgments conclusive; but the Circuit Court of Appeals held otherwise, and its judgments, reversing those of the District Court, are here by certiorari.

Mr. F. P. Fleming, with whom *Mr. C. Seaton Fleming* was on the briefs, for petitioner in Nos. 76 and 77.

Mr. William Wade Hampton, for petitioner in Nos. 73 and 74, submitted. *Mr. Hilton S. Hampton* and *Mr. S. S. Sanford* were also on the briefs.

Mr. Henry C. Clark and *Mr. W. E. Kay,* with whom *Mr. J. L. Doggett* and *Mr. L. A. Dean* were on the briefs, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These cases were argued and submitted together. They involve the same questions of law and the essential facts are the same in each. Reference will, therefore, be made only to No. 76.

The First National Bank of Rome, Georgia, endorsee of five certificates of deposit made by the Bank of Jasper, a Florida corporation, sued the maker at law in the federal court for the Southern District of that State. The defendant pleaded in bar seven decrees of the Circuit Court for Hamilton County, Florida, entered in suits in which the Georgia bank had been named as one of the respondents. The plaintiff replied that the suits in which these decrees were entered were *in personam;* that it was and is a non-resident of Florida, had not been found within the State, and had not appeared in those suits except specially to move to quash the pretended constructive service upon it by publication; and that the decrees are as to it of no legal effect. The District Court sustained the plea of *res judicata* and entered judgment for defendant. The judgment was reversed by the Circuit Court of Appeals. See *First National Bank of Rome* v. *First National Bank of Jasper,* 264 Fed. 83. The case comes here on writ of certiorari. 254 U. S. 622. Whether on the facts hereinafter set forth the state court acquired jurisdiction and the legal effect of the decrees are the matters presented for our consideration.

The Rome Insurance Company of Georgia wished to raise capital by selling shares of its stock. To aid it in so doing the American Bank and Trust Company, also of Rome, was appointed agent or trustee. These two companies selected Jasper, Florida, as the field of operations for the stock selling campaign; and they secured the Bank of Jasper as an ally. Then, to facilitate sales the

three devised the following plan: Purchasers of the stock were enabled to discount at the Jasper bank their one year notes for an amount equal to the purchase price, giving the stock as collateral; and the American Company as trustee for the Insurance Company agreed to deposit with the Jasper bank an amount equal to each discount, taking that bank's negotiable certificate of deposit in the usual form, payable in one year with interest at four per cent. Thus the stock purchased was paid for; the Jasper bank made discounts and received deposits; the Insurance Company raised capital and had it paid up—all without anybody parting with a cent in cash. Under this arrangement many citizens of Jasper bought stock in the Insurance Company. In time their notes, and likewise the corresponding certificates of deposit, matured. The purchasers of the stock discovered that it was worthless, and that they had been defrauded; the Bank of Jasper that it, also, had been defrauded and that its certificates of deposit had been transferred to the First National Bank of Rome. There was default on the certificates of deposit; and the First National Bank brought this action against the Bank of Jasper in the federal District Court. But a few days before it did so, each purchaser of stock had filed a bill in equity in the state Circuit Court against the Jasper bank and the three Rome corporations. It is the final decrees entered in these suits eighteen months later which are pleaded in bar of this action on the certificates of deposit.

Each bill recited, in substance, the above facts and alleged that the note given by the complainant was in the hands of the Jasper bank, that the proceeds [of the discount] were deposited with it, that the certificate of deposit issued to the American Company covers such proceeds, and that they have ever since remained in the bank. The bill prayed that these proceeds be impressed with a trust in favor of the complainant; that the First National

Bank of Rome be declared not to have any interest therein; that the certificate of deposit, the note and the contract to purchase the stock be declared void; that the American Company, the Insurance Company and the Jasper bank be restrained from bringing suit against the complainant; that the Jasper bank be restrained from making any payment to the First National Bank out of the proceeds of the complainant's note; and that the latter bank be restrained from withdrawing any part of such proceeds.

None of the three Rome corporations was domiciled or found in the State of Florida. Constructive service by publication in a newspaper was made under the Florida law. General Statutes, § 1866. Then the three corporations entered their "appearance specially, solely and only for the purpose" of moving to quash the service. The motion was overruled; the defendants were given time to plead, but did not do so; and again, appearing "specially, solely and only" for that purpose, entered their appeal to the Supreme Court of Florida from the order overruling the motion to quash the pretended service by publication. And also appearing "specially, solely and only" for that purpose, they applied to the Circuit Court for an order fixing the terms of the supersedeas on the appeal. That the notice of this application given counsel for complainant "shall in no sense operate as a general appearance" was stipulated by them; and, thereupon, the order of supersedeas was made and the required bond given. It was suggested in the Supreme Court that the appeal operated as a general appearance and, therefore, rendered the question submitted moot; but the court did not pass upon this objection. It declared that "the purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit [in equity] so that they may, if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this notice; he has

his right if not waived, to object should the court thereafter commit an error against him." And it affirmed the order of the lower court. *Rome Insurance Co.* v. *Corbett* 66 Fla. 438.

The three Rome corporations took no further part in the suits in the state courts. But in the Circuit Court a decree *pro confesso* was entered as against all the respondents, which declared that the sale and purchase of the stock was void; that the proceeds of the complainant's note "included in said certificate of deposit No. 319 now held by the First National Bank of Rome are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him"; that the Bank of Jasper be enjoined from paying any part of these proceeds to the First National Bank; and that the certificate of deposit "in so far as it covers and includes the proceeds derived from the said note" was void. The Bank of Jasper insists that these decrees are *res judicata* of its alleged liability to the First National Bank on the certificates of deposit, first, because they are valid judgments *in personam* against the latter bank; and, secondly, because the certificates of deposit represent the proceeds of the notes, and these proceeds were a *res* within the jurisdiction of the court, and there was thus jurisdiction *in rem* to adjudicate the alleged liability on the certificates of deposit.

The contention that the decrees constitute personal judgments against the First National Bank rests upon the assertion that under the law of Florida an appeal operates necessarily as a general appearance, although the appeal is taken solely from an interlocutory order asserting jurisdiction, and, although in taking it, the appellant declares in terms that his appearance is special, and solely for the purpose of the appeal. It may be assumed that if such were the settled law of Florida, it would be accepted by this court as controlling. *York* v. *Texas,* 137 U. S. 15. But our attention has not been called to any Florida

statute or rule of court or decision which so declares. There is confessedly no statute or rule of court to that effect; and none of the cases relied upon support the proposition that such is the common law of Florida. This contention seems to have been made in the equity suits here under consideration; but the Supreme Court did not there pass upon the question. *Rome Insurance Co.* v. *Corbett, supra,* p. 439. It is clear that in Florida an appearance entered in the trial court specially for the purpose of moving to quash a summons does not operate as a general appearance. *Standley* v. *Arnow,* 13 Fla. 361, 368; but that if, after such a motion is made and overruled, the cause proceeds to final decree, a defendant who prosecutes an appeal therefrom will be held to have appeared generally. The appeal here in question was not from a final decree. It was from an interlocutory order overruling the objection to the jurisdiction. The right to review an interlocutory order by a separate appeal is conferred broadly by § 1908 of the General Statutes of Florida; and there is nothing to indicate that the right does not extend to orders concerning jurisdiction. It certainly may not be assumed that the legislature intended that exercise of the right conferred should operate as a general appearance and thus render moot a consideration of the ruling alone sought to be reviewed. Moreover, in none of the cases from the Supreme Court of Florida relied upon was it shown that the appearance on appeal was in terms special and limited to the review of the question of jurisdiction.[1]

The contention that the proceeds of the discounts of the notes constitute a *res* within the State, of which

[1] *Tunno* v. *Robert,* 16 Fla. 738, 751; *Shrader* v. *Shrader,* 36 Fla. 502, 518; *Wylly* v. *Sanford Loan & Trust Co.,* 44 Fla. 818, 820; *Drew Lumber Co.* v. *Walter,* 45 Fla. 252, 255; *Rumeli* v. *Tampa,* 48 Fla. 112, 114; *Hayman* v. *Weil,* 53 Fla. 127, 132; *Barwick* v. *Rouse,* 53 Fla. 643, 646; *Busard* v. *Houston,* 65 Fla. 479, 482; *Henry* v. *Spitler,* 67 Fla. 146, 150.

the certificates of deposit were merely evidence, rests upon a misapprehension. No specific fund was ever set apart by the Jasper bank. Its discounts resulted in general credits by the bank to the makers of the notes. These credits were applied in making payment for their stock. The payment was made by transferring to the credit of the American Company the amount which stood to the credit of the makers of the notes. The credits—called deposits—so transferred became an indebtedness of the Jasper bank to the American Company. That indebtedness, if it had rested in open account, would have been property of the creditor within the State of Florida. In an appropriate proceeding it might have been reached to satisfy a claim against its owner. *Pennington* v. *Fourth National Bank,* 243 U. S. 269. But the suits in the state court were not proceedings of that character. In them the complainant asserted that, by reason of the fraud alleged, the Jasper bank was indebted not to any of its corespondents, but to the complainant. Moreover, there was no indebtedness on open account to any of the Georgia corporations; for this account had been closed by giving certificates of deposit; and these had been transferred to the First National Bank. Such certificates are merely promissory notes of the Jasper bank, payable like unsecured notes of individuals, out of general assets. Like other notes they are negotiable and are payable only upon surrender of the instrument properly endorsed. There is not even an allegation either that the transfer to the First National Bank had been made after maturity of the certificates or that the endorsee took them with notice of the fraud.

As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder.

Affirmed.

WOOD ET AL., TRADING AS PHILADELPHIA STEAM HEATING COMPANY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 100. Argued January 20, 1922.—Decided February 27, 1922.

Where a public building contract provides that no claim shall be made or allowed for damages which may arise out of any delay caused by the Government, damages due to delays caused by the Government's suspensions of the work cannot be recovered, even though suspensions were not expressly authorized by the contract. So *held,* where the contractor acquiesced in the first suspension and thereafter made no protest, nor any claim until the suit was brought. P. 121.

55 Ct. Clms. 533, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for damages arising from suspension of work under claimants' contract.

Mr. Edwin C. Brandenburg, with whom *Mr. Clarence A. Brandenburg* was on the brief, for appellants.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox* were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Philadelphia Steam Heating Company made a contract with the United States, approved April 5, 1897, to furnish and install the boiler plant, heating system and other apparatus for the post-office building at Washington then under construction. The price fixed was $111,373; the time for completion 250 working days; with a forfeiture of $100 a day for each day's delay. The contract provided that for each day's delay " in the execution of the work " caused " through any fault " of the Govern-

ment one additional day was to be allowed for its completion; but "that no claim shall be made or allowed for damages which may arise out of any delay caused by the" Government. The right to make additions to or omissions from the work was reserved by the United States, allowance therefor to be determined by the Supervising Architect; and it was provided "that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed."

The work was entered upon promptly both at the factory in Philadelphia and at Washington. About a month thereafter the Secretary of the Treasury requested suspension of certain work, in view of contemplated changes, and notified the contractor that he would be entitled to "one day additional for each day's delay caused by the Government, as provided for by your contract." Radical changes in plan were made. There was a suspension for ten months of part of the work which had to be done in the building; and later another suspension was ordered. The whole work was not completed until eighteen months after the expiration of the contract period. This delay was attributable mainly, if not wholly, to the Government. To recover for the expenses and loss which resulted from this delay, as well as for extra work, this suit was brought in the Court of Claims. Judgment was entered for the value of the extra work; but the court, following its decision in *Merchants' Loan & Trust Co.* v. *United States,* 40 Ct. Clms. 117, denied recovery for damages due to the suspension.

The appeal to this court was taken before our decision in *Wells Brothers Co.* v. *United States,* 254 U. S. 83. There the contract gave to the United States in terms "the right of suspending the whole or any part of the work." The absence of such a provision in the contract here under consideration is mainly relied upon to distinguish this case. But here, as there, the contract pro-

vided that no claim shall be made or allowed for any damages which may arise out of any delay caused by the United States. Suspension by the Government is one of several possible causes of delay—and not an uncommon one.

Moreover, when the contractor was first directed to suspend work, he replied: "We are not objecting to this, but we desire to call the department's attention to the matter in order that we may be entitled to extra time should we be unable to complete the work within the time named in our contract." So far as appears no protest was ever made against the prolonged suspension; nor was there any claim made of a right to damages arising therefrom until it was asserted in this suit.

Affirmed.

KEOKUK & HAMILTON BRIDGE COMPANY *v.* SALM ET AL.

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

No. 130. Argued January 27, 1922.—Decided February 27, 1922.

1. A bridge owned by a bridge company and used for railroad purposes is assessable in Illinois as real estate by the assessor of the county in which it lies and not by the State Board of Equalization as a railroad. P. 123.
2. A bill in the District Court to enjoin enforcement of a state tax on real property, as based on a discriminatory overvaluation, which fails to show that the plaintiff availed himself of presumably adequate legal remedies afforded by the state law, or, the amount being the only matter in dispute, that he paid or tendered the amount confessedly due, and which does not offer to pay such amount as the court may find to be equitably due, should be dismissed for want of equity. P. 124.

Affirmed.

APPEAL from a decree of the District Court dismissing the bill, for want of equity, in a suit brought by the ap-

pellant to restrain the appellees, county officials, from collecting a tax on the appellant's bridge, alleged to discriminate, in violation of the Fourteenth Amendment.

Mr. F. T. Hughes for appellant.

Mr. Lee Siebenborn and *Mr. Clifton J. O'Hara,* with whom *Mr. Earl W. Wood* was on the briefs, for appellees.

Mr. Justice Brandeis delivered the opinion of the court.

The Keokuk & Hamilton Bridge Company, an Illinois corporation, owns a bridge across the Mississippi River. That part of it which lies within the State of Illinois was assessed by the county assessors for purposes of taxation as real estate and was valued at $100,000. To prevent collection of the tax the company brought, in the federal court for Southern Illinois, this suit for an injunction against the county treasurer and other state officials. It is claimed that the tax is void; first, because the bridge is a railroad and as such is assessable only by the State Board of Equalization; secondly, because the property was deliberately assessed at one hundred and fifty per cent. of its actual value, whereas the property of other corporations and individuals was assessed at only forty per cent. of its value; and that, thus, the company is deprived of property without due process of law and is denied equal protection of the laws in violation of the Fourteenth Amendment. A motion to dismiss was sustained by the District Court on the ground that the complainant has a plain, adequate and complete remedy at law. The case comes here on appeal under § 238 of the Judicial Code because of the constitutional question raised. That such property is assessable by the county officials as real estate and not by the State Board of Equalization as a railroad was settled by *People* v.

Keokuk & Hamilton Bridge Co., 287 Ill. 246; 295 Ill. 176, 181.[1] Whether the bill sets forth a case for equitable relief is the only question requiring consideration.

Since the appellant asserted a claim arising under the Federal Constitution, the District Court had jurisdiction although there was no diversity of citizenship. Discrimination in taxation effected by systematic inequality of assessment may violate the Fourteenth Amendment. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 502. But the bill failed to show that plaintiff was being deprived of property without due process of law or was being denied equal protection of the laws or that there was any danger that it would be. Compare *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165, 168. The law of Illinois affords ample opportunity to question the amount and the validity of an assessment both before administrative tribunals and in its courts.

The provisions relating to the assessment and taxation of real estate apply to the assessment and taxation of bridge structures like that of the appellant. Hurd's Revised Statutes of Illinois, 1919, c. 120, § 354. Every such assessment made by the county assessors is subject to revision by them. §§ 319, 320. Moreover, upon complaint in writing that an assessment is incorrect, a board of review is required to give a hearing, and to correct the assessment "as shall appear to be just." § 329; *Standard Oil Co.* v. *Magee*, 191 Ill. 84. Payment of taxes as finally assessed and extended against real estate is enforced, in the first instance, not by distraint or levy, but by legal proceedings. §§ 185–193. An application is made by the collector to the county court for judgment against the property. Compare *Keokuk & Hamilton Bridge Co.* v. *People*, 145 Ill. 596; 161 Ill. 514; 167 Ill. 15; 176 Ill. 267.

[1] That so much of the bridge as lies within the State of Illinois is taxable there, although used in interstate commerce, was held in *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626.

The proceeding in the county court is a civil suit for the collection of a debt. *People* v. *St. Louis Merchants Bridge Co.,* 282 Ill. 408. The owner may appear and defend on any legal ground; among others, that the assessment was deliberately or fraudulently discriminatory and that, hence, the tax is void. *People* v. *Keokuk & Hamilton Bridge Co.,* 287 Ill. 246; 295 Ill. 176. From the judgment of the county court an appeal may be taken to the Supreme Court of the State upon giving a bond to pay the amount of the assessment and costs; and the appeal will operate as a supersedeas if the appellant deposits with the county collector an amount of money equal to the amount of the judgment and costs. If upon final hearing judgment for sale of the lands for taxes is refused, the deposit is returned by the collector to the appellant. § 192. Moreover, where it is claimed that a tax is void because of overvaluation which is fraudulently discriminatory, the courts of the State will grant relief in equity, if the plaintiff has sought correction from the board of review and failed to secure redress. *Sanitary District* v. *Young,* 285 Ill. 351, 367. Here the alleged invalidity consists wholly in discriminatory overvaluation; and, so far as appears, appellant did not even apply to the board of review to correct the assessment. There is thus no basis for the contention that resort to a suit such as this was necessary to prevent, either a sale for an illegal tax creating a cloud upon title, or multiplicity of suits to recover back the tax, or other irreparable injury. See *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481; *Ohio Tax Cases,* 232 U. S. 567, 587; *Farncomb* v. *Denver,* 252 U. S. 7.

The bill fails, also for another reason, to state a case entitling plaintiff to relief. Before the suit was begun it had been decided that the taxing statute was valid, that the property was subject to taxation, that it was assessable as real estate, and that the assessment should be made, as

was done, by the county assessor and not by the State Board of Equalization. The amount of the tax payable was, therefore, the only matter in controversy. Under such circumstances a plaintiff seeking an injunction must aver payment or tender of the amount of taxes confessedly due, or at least offer to pay such amount as the court may find to be justly and equitably due. *People's National Bank* v. *Marye,* 191 U. S. 272; *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 38. The bill contains no such allegation.

Decree affirmed.

FAIRCHILD *v.* HUGHES, AS SECRETARY OF STATE OF THE UNITED STATES, ET AL.

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

No. 148. Argued January 23, 1922.—Decided February 27, 1922.

1. The general right of a citizen to have the government administered according to law and the public moneys not wasted does not entitle him to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment about to be adopted, will be valid. P. 129.
2. Though in form a suit in equity, this is not a case within Art. III, § 2, of the Constitution. P. 129.

Affirmed.

APPEAL from a decree of the court below affirming a decree of the Supreme Court of the District of Columbia, which dismissed a bill by which the appellant sought to have the Nineteenth Amendment declared unconstitutional and to enjoin the Secretary of State from proclaiming its ratification and the Attorney General from taking steps to enforce it.

Mr. William L. Marbury and *Mr. Thomas F. Cadwalader,* with whom *Mr. Everett P. Wheeler* and *Mr. Waldo G. Morse* were on the briefs, for appellant.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder* and *Mr. W. Marvin Smith* were on the brief, for appellees.

Mr. Justice Brandeis delivered the opinion of the court.

On July 7, 1920, Charles S. Fairchild of New York brought this suit in the Supreme Court of the District of Columbia against the Secretary of State and the Attorney General. The prayers of the bill are that "the so-called Suffrage Amendment [the Nineteenth to the Federal Constitution] be declared unconstitutional and void"; that the Secretary of State be restrained from issuing any proclamation declaring that it has been ratified; and that the Attorney General be restrained from enforcing it. There is also a prayer for general relief and for an interlocutory injunction. The plaintiff, and others on whose behalf he sues, are citizens of the United States, taxpayers and members of the American Constitutional League, a voluntary association which describes itself as engaged in diffusing "knowledge as to the fundamental principles of the American Constitution, and especially that which gives to each State the right to determine for itself the question as to who should exercise the elective franchise therein."

The claim to relief was rested upon the following allegations: The legislatures of thirty-four of the States have passed resolutions purporting to ratify the Suffrage Amendment; and from one other State the Secretary of State of the United States has received a certificate to that effect purporting to come from the proper officer. The proposed Amendment cannot, for reasons stated, be made a part of the Constitution through ratification by the legislatures; and there are also specific reasons why the resolutions already adopted in several of the States are inoperative. But the Secretary has declared that he is

without power to examine into the validity of alleged acts of ratification, and that, upon receiving from one additional State the customary certificate, he will issue a proclamation declaring that the Suffrage Amendment has been adopted. Furthermore, "a force bill" has been introduced in the Senate which provides fine and imprisonment for any person who refuses to allow women to vote; and if the bill is enacted, the Attorney General will be required to enforce its provisions. The threatened proclamation of the adoption of the Amendment would not be conclusive of its validity, but it would lead election officers to permit women to vote in States whose constitutions limit suffrage to men. This would prevent ascertainment of the wishes of the legally qualified voters, and elections, state and federal, would be void. Free citizens would be deprived of their right to have such elections duly held; the effectiveness of their votes would be diminished; and election expenses would be nearly doubled. Thus irremediable mischief would result.

The Supreme Court of the District granted a rule to show cause why an interlocutory injunction should not issue. The return was promptly made; and the defendants also moved to dismiss the bill. On July 14, 1920, the rule was discharged; a decree was entered dismissing the bill; and an appeal was taken to the Court of Appeals of the District. The Secretary, having soon thereafter received a certificate of ratification from the thirty-sixth State, proclaimed, on August 26, 1920, the adoption of the Nineteenth Amendment. The defendants then moved to dismiss or affirm. The Court of Appeals affirmed the decree on the authority of *United States* v. *Colby*, 49 App. D. C. 358; 265 Fed. 998, where it had refused to compel the Secretary to cancel the proclamation declaring that the Eighteenth Amendment had been adopted. The grounds of that decision were that the validity of the Amendment could be in no way affected by an order

of cancellation; that it depended on the ratifications by the States and not on the proclamation; and that the proclamation was unimpeachable, since the Secretary was required, under Rev. Stats., § 205, to issue the proclamation upon receiving from three-fourths of the States official notice of ratification and had no power to determine whether or not the notices received stated the truth. But we have no occasion to consider these grounds of decision.

Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case within the meaning of § 2 of Article III of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." See *In re Pacific Railway Commission,* 32 Fed. 241, 255, quoted in *Muskrat* v. *United States,* 219 U. S. 346, 356. The alleged wrongful act of the Secretary of State, said to be threatening, is the issuing of a proclamation which plaintiff asserts will be vain but will mislead election officers. The alleged wrongful act of the Attorney General, said to be threatening, is the enforcement, as against election officers, of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional. But plaintiff is not an election officer; and the State of New York, of which he is a citizen, had previously amended its own constitution so as to grant the suffrage to women and had ratified this Amendment. Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the

federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid. Compare *Giles* v. *Harris,* 189 U. S. 475; *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405.

Decree affirmed.

LESER ET AL. *v.* GARNETT ET AL.

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

No. 553. Argued January 23, 24, 1922.—Decided February 27, 1922.

1. A suit by qualified voters of Maryland to require the Maryland Board of Registry to strike the names of women from the register of voters upon the grounds that the state constitution limits the suffrage to men and that the Nineteenth Amendment to the Federal Constitution was not validly adopted, is maintainable under the Maryland law and raises the question whether the Nineteenth Amendment has become part of the Constitution. P. 136.
2. The objection that a great addition to the electorate, made without a State's consent, destroys its political autonomy and therefore exceeds the amending power, applies no more to the Nineteenth Amendment than to the Fifteenth Amendment, which is valid beyond question. P. 136.
3. The Fifteenth Amendment does not owe its validity to adoption as a war measure and acquiescence. P. 136.
4. The function of a state legislature in passing on a proposed amendment to the Federal Constitution, is federal, and not subject to limitation by the people of the State. P. 137. *Hawke* v. *Smith,* 253 U. S. 221, 231.
5. Official notice from a state legislature to the Secretary of State, duly authenticated, of its adoption of a proposed amendment to the Federal Constitution, is conclusive upon him, and, when certified to by his proclamation, is conclusive upon the courts. P. 137. *Field* v. *Clark,* 143 U. S. 649, 672, 673.

139 Md. 46, affirmed.

CERTIORARI to a decree of the court below affirming a decision of the state trial court dismissing a petition by

which the plaintiffs in error sought to require the members of the Maryland Board of Registry to strike the names of specified woman voters from the registration list.

Mr. Thomas F. Cadwalader and *Mr. William L. Marbury,* with whom *Mr. George Arnold Frick* was on the briefs, for plaintiffs in error and petitioners.

The only power to amend the Constitution is contained in Article V, and is a delegated power. *Hawke* v. *Smith,* 253 U. S. 221, 227; *Dodge* v. *Woolsey,* 18 How. 348. It is a power to "amend," granted in general terms.

In a series of decisions rendered soon after the Civil War, this court established the doctrine propounded by Mr. Lincoln in his first inaugural address, that the Union was intended to be a perpetual Union,—"an indestructible Union of indestructible States,"—and that no power was conferred upon any of the agencies of government provided for in the instrument to defeat that intention,—that "great and leading intent" of the people, *Ex parte Yerger,* 8 Wall. 85, 101,—by destroying any of the States, by taking away in whole or in part any one of the "functions essential to their separate and independent existence" as States. *Lane County* v. *Oregon,* 7 Wall. 71; *Texas* v. *White,* 7 Wall. 700, 724–725. Obviously Article V must be so construed as not to defeat the main purpose of the Constitution itself.

A "State" within the meaning of the Constitution is not merely a piece of territory, or a mere collection of people. It is, as this court has said, "a political community." Who constitute the State in that sense? Clearly the people who exercise the political power. That is to say, the electorate and those whom the electors of a State choose to clothe with the governmental power of the State. When an amendment is adopted, therefore, which changes the electorate, the original State is destroyed and a new State created.

Questions of power do not depend upon degree. *Brown* v. *Maryland,* 12 Wheat. 419, 439; *Keller* v. *United States,* 213 U. S. 138, 148.

The power to amend is granted in no broader language than that in which the taxing power is granted in § 8, Art. I. Yet this court held, in *Collector* v. *Day,* 11 Wall. 113, that it would not construe that language, broad as it was, as sufficient to authorize Congress to levy a tax upon the salary of a state judge, for the same reason we urge here. If the power to maintain a judiciary whose salaries shall be exempt from taxation by Congress be one of the " functions essential to the existence " of a State of the Union, a power without which it would not be an indestructible State, surely the power to determine for itself, by the voice of its own voters, who shall and who shall not vote in the election of that judiciary is not less so.

It is argued that there is no provision in the Constitution forbidding the submission or the ratification of such an amendment. But even so, as said in *Collector* v. *Day,* exemption from such an amendment " rests upon necessary implication, and is upheld by the great law of self-preservation."

It may be argued, perhaps, that the fact that there are two express limitations upon the amending power contained in Article V indicates that that power was intended to be unlimited in other respects. It might be a sufficient answer to that contention to say that the maxim *expressio unius exclusio alterius,* while sometimes very persuasive, is never conclusive as a rule of interpretation, and that, before adopting it in so doubtful a matter as this, the courts would certainly look to the consequences which might follow such an interpretation. *Slaughter-House Cases,* 16 Wall. 36, 78. But perhaps a more conclusive answer will be found in the fact that the same argument was rejected as applied to the taxing clause. *Collector* v. *Day, supra; Evans* v. *Gore,* 253 U. S. 245.

The decision of this court in the *National Prohibition Cases,* 253 U. S. 350, constitutes no precedent for holding valid the Nineteenth Amendment. The Eighteenth Amendment did not attack or interfere with the government of the State—"the structure of the state government"—or deprive it of any function "essential to its separate and independent existence."

The prohibition against the adoption of any amendment whereby a State is deprived of its equal suffrage in the Senate without its consent involves two things—first, that if the State chooses to consent it may be deprived of its equal suffrage in the Senate; and, second, that it may not by any amendment be deprived of its power to give or refuse its consent.

It is easy to see that, if any interference with the electorate of a State be permitted, its power to refuse its consent to any amendment which may hereafter be proposed, including an amendment reducing the number of its Senators, may be taken away.

The consent of the State cannot be given or refused except by the will expressed either directly or indirectly of the State's own voters. Therefore it follows necessarily that the right of the State's own electorate to vote is a right reserved and withheld from the scope and operation of the amending power altogether. Hamilton, The Federalist, No. 59, pp. 238, 239.

The various cases decided by this court since the Civil War, including *Myers* v. *Anderson,* 238 U. S. 368, in which, without going at all into the question of the scope and limits of the amending power granted in Article V, this court nevertheless then recognized the Fifteenth Amendment as being in effect valid as a part of the Constitution, constitute no precedents for holding the Nineteenth Amendment valid, for the reason that any amendment, however radical, which has received the unanimous assent of the States—has been, in fact, consented to, how-

ever reluctantly, by each and all of them,—is valid, and must be accepted by this court as being valid when the question of its validity was raised for the first time, forty-five years after its adoption, no State nor any citizens of any State having ever disputed its validity prior to that case.

While it may be true that no formal treaty of peace was entered into by the Government of the United States and the Confederate States, or any of them, the substance of a treaty was enacted in the Thirteenth, Fourteenth, and Fifteenth Amendments. *Slaughter-House Cases,* 16 Wall. 36, 67, 71.

It may be true that this involves the contention that the effect of war and the necessity of taking measures to prevent the recurrence of war expands the amending power, but it is submitted that there is nothing unreasonable in that contention. The same effect would undoubtedly be produced by the same causes upon the treaty-making power.

If, after the expiration of a period of forty-five years, the validity of a treaty, by which this country made the best terms it could to end a disastrous war, were called in question as the validity of the Fifteenth Amendment was called in question for the first time in *Myers* v. *Anderson,* would not this court deal with the objections to its validity in the same way in which it dealt with the objections urged against the validity of the Fifteenth Amendment in that case, viz: ignore them altogether and decide all other questions raised with the tacit assumption that the treaty was valid?

After the Fifteenth Amendment had been proclaimed, the States which had refused ratification, and their people, evidenced their consent and acquiescence in the clearest possible way, by not only refraining from challenging its validity for forty-five years, but in passing laws either for the enforcement of the amendment or in recognition of its validity.

The Nineteenth Amendment has never been legally ratified by the requisite number of States. Tennessee and West Virginia, both of which must be counted to make the requisite three-fourths, in fact refused to ratify the Amendment. The votes upon which the certifications were based were illegal under the local law. The proceedings are subject to judicial inquiry under that law, and by this court.

The legislatures of five States, Missouri, Tennessee, West Virginia, Texas and Rhode Island, were, by the provisions of their respective state constitutions, expressly forbidden to adopt amendments of the character of the Nineteenth, and were therefore incompetent to ratify that amendment.

Mr. Alexander Armstrong, Attorney General of the State of Maryland, with whom *Mr. Lindsay C. Spencer* was on the briefs, for defendants in error and respondents.

Mr. George M. Brady, with whom *Mr. Roger Howell* and *Mr. Jacob M. Moses* were on the brief, for Caroline Roberts et al., defendants in error and respondents.

Mr. Solicitor General Beck, by leave of court, filed a brief as *amicus curiae* on behalf of the United States.

Mr. Justice Brandeis delivered the opinion of the court.

On October 12, 1920, Cecilia Streett Waters and Mary D. Randolph, citizens of Maryland, applied for and were granted registration as qualified voters in Baltimore City. To have their names stricken from the list Oscar Leser and others brought this suit in the court of Common Pleas. The only ground of disqualification alleged was that the applicants for registration were women, whereas the constitution of Maryland limits the suffrage to men. Ratification of the proposed Amendment to the Federal

Constitution, now known as the Nineteenth, 41 Stat. 362, had been proclaimed on August 26, 1920, 41 Stat. 1823, pursuant to Rev. Stats., § 205. The Legislature of Maryland had refused to ratify it. The petitioners contended, on several grounds, that the Amendment had not become part of the Federal Constitution. The trial court overruled the contentions and dismissed the petition. Its judgment was affirmed by the Court of Appeals of the State, 139 Md. 46; and the case comes here on writ of error. That writ must be dismissed; but the petition for a writ of certiorari, also duly filed, is granted. The laws of Maryland authorized such a suit by a qualified voter against the Board of Registry. Whether the Nineteenth Amendment has become part of the Federal Constitution is the question presented for decision.

The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extend to this Amendment, because of its character. The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six States including Maryland, has been recognized and acted on for half a century. See *United States* v. *Reese,* 92 U. S. 214; *Neal* v. *Delaware,* 103 U. S. 370; *Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368. The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.

The second contention is that in the constitutions of several of the thirty-six States named in the proclamation

of the Secretary of State there are provisions which render inoperative the alleged ratifications by their legislatures. The argument is that by reason of these specific provisions the legislatures were without power to ratify. But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State. *Hawke* v. *Smith, No. 1,* 253 U. S. 221; *Hawke* v. *Smith, No. 2,* 253 U. S. 231; *National Prohibition Cases,* 253 U. S. 350, 386.

The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective States. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other States—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field* v. *Clark,* 143 U. S. 649, 669–673, is applicable here. See also *Harwood* v. *Wentworth,* 162 U. S. 547, 562.

Affirmed.

LEACH, DOING BUSINESS AS ORGANO PRODUCT COMPANY, *v.* CARLILE, POSTMASTER.

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

No. 105. Submitted January 18, 1922.—Decided February 27, 1922.

Whether the advertising of a medicinal preparation, through the mails, so grossly overstates its true virtue as to work a fraud upon the public, is a question of fact committed to the decision of the Postmaster General, and his conclusion will not be reviewed by the courts when fairly arrived at and supported by substantial evidence. P. 139.

267 Fed. 61, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decision of the District Court dismissing the bill in appellant's suit to enjoin enforcement of a postal fraud order.

Mr. Lee D. Mathias for appellant. *Mr. P. W. Sullivan* was also on the brief.

Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim and *Mr. H. S. Ridgely* for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, doing business in the name of "Organo Product Company," in his bill prayed for an injunction restraining the Postmaster at Chicago from giving effect to a "fraud order" against him, issued by the Postmaster General on August 15, 1919, pursuant to authority of Rev. Stats., § 3929 and § 4041. The order was in the usual form, prohibiting the delivery of mail or payment of money orders to appellant, and directing the disposition of mail which should be addressed to him. The District Court, refusing the injunction, dismissed the bill, and the Circuit Court of Appeals affirmed its decree. *Leach* v. *Carlisle,* 267 Fed. 61.

The appellant was engaged in selling what he called "Organo Tablets," which he advertised extensively through the mails as "Recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline or weakened manhood and urinary disorders . . . sleeplessness and run-down system," and various other ailments.

Appellant is an old offender, a prior fraud order having been issued against him, under another name, in April, 1918, as a result of which he changed his trade name and modified in a measure his advertising matter.

The order complained of was entered after an elaborate hearing, of which the appellant had due notice and at which he was represented by counsel, and introduced much evidence.

The only error assigned in this court is the affirming by the Circuit Court of Appeals of the decree of the District Court, refusing the injunction and dismissing the bill. In argument it is contended that the question decided by the Postmaster General was that the substance which the appellant was selling did not produce the results claimed for it, that this, on the record, was a matter of opinion as to which there was conflict of evidence, and that therefore the case is within the scope of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public. This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the

conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary. *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108, 109; *Smith* v. *Hitchcock,* 226 U. S. 53, 58; *Houston* v. *St. Louis Independent Packing Co.,* 249 U. S. 479, 484; *Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 413, and cases cited.

An examination of the record fully justifies the conclusion of the Circuit Court of Appeals that it not only fails to show that the Postmaster General had no warrant of law for his order but that, on the contrary, it shows there was abundant ground for it. The decree of the Circuit Court of Appeals must be

Affirmed.

MR. JUSTICE HOLMES, with whom concurred Mr. Justice Brandeis, dissenting.

The statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid so many times that it may be too late to expect a contrary decision. But there are considerations against it that seem to me never to have been fully weighed and that I think it my duty to state.

The transmission of letters by any general means other than the postoffice is forbidden by the Criminal Code, §§ 183–185. Therefore, if these prohibitions are valid, this form of communication with people at a distance is through the postoffice alone; and notwithstanding all modern inventions letters still are the principal means of speech with those who are not before our face. I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. Therefore I cannot

understand by what authority Congress undertakes to authorize anyone to determine in advance, on the grounds before us, that certain words shall not be uttered. Even those who interpret the Amendment most strictly agree that it was intended to prevent previous restraints. We have not before us any question as to how far Congress may go for the safety of the Nation. The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the postoffice. If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so.

Even if it should be held that the prohibition of other modes of carrying letters was unconstitutional, as suggested in a qualified way in *Ex parte Jackson,* 96 U. S. 727, it would not get rid of the difficulty to my mind, because the practical dependence of the public upon the postoffice would remain. But the decision in that case admits that possibly at least the prohibition as to letters would be valid. That case was not dealing with sealed letters. The decisions thus far have gone largely if not wholly on the ground that if the Government chose to offer a means of transportation which it was not bound to offer it could choose what it would transport; which is well enough when neither law nor the habit that the Government's action has generated has made that means the only one. But when habit and law combine to exclude every other it seems to me that the First Amendment in terms forbids such control of the post as was exercised here. I think it abridged freedom of speech on the part of the sender of the letters and that the appellant had such an interest in the exercise of the right that he could avail himself of it in this case. *Buchanan* v. *Warley,* 245 U. S. 60.

CRANE, ADMINISTRATRIX OF SAUER, *v.* HAHLO ET AL., CONSTITUTING THE BOARD OF REVISION OF ASSESSMENTS OF THE CITY OF NEW YORK, ET AL.

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

No. 107. Argued January 20, 23, 1922.—Decided February 27, 1922.

1. A purely statutory right of a landowner to recover damages resulting to his property from a change in the grade of a street upon which it abuts is not a right of contract within the meaning of the Contract Clause of the Constitution. P. 145.
2. In determining whether due process of law has been denied, the character of the proceeding involved and the practice at common law and in this country, in like cases, must be considered. P. 147.
3. The determination of the amount of damage to abutting property caused by changing the grade of a city street may be properly left to a board of assessors, and the property owner is not deprived of due process if, pending the proceeding, his right to a general review by a court is limited by an amendatory law making the award final as to amount but leaving it reviewable for lack of jurisdiction, fraud, or the wilful misconduct of the members of the board. P. 147.
4. Equal protection of the laws is not denied the claimant in such a case by vesting the final power to assess the amount of the damages in a board composed of officials of the city against which the claim is made, appointed by its mayor. P. 148.

228 N. Y. 309, affirmed.

WRIT of error to review a judgment of the Supreme Court of New York, Appellate Division, entered on remittitur from the Court of Appeals of the State. The effect of the judgment was to dismiss for want of jurisdiction an application previously entertained by the Supreme Court of the State, and by the Appellate Division on appeal, where the plaintiff in error here sought a writ of certiorari to review an award made by the Board of Assessors of the City of New York and confirmed by the Board of Revision of Assessments, fixing the damages

suffered by the plaintiff's intestate as abutting property owner, due to a change of a street grade resulting from the construction of a viaduct by the city.

Mr. John M. Harrington, with whom *Mr. Archibald R. Watson* and *Mr. Herbert H. Gibbs* were on the brief, for plaintiff in error.

Mr. Charles J. Nehrbas, with whom *Mr. John F. O'Brien* was on the brief, for defendants in error.

Mr. Justice Clarke delivered the opinion of the court.

Pursuant to authority of an act of the legislature of the State, the City of New York, in 1890, began the construction of an elevated viaduct in 155th Street, which was completed in 1893. Before and during the construction of the viaduct George W. Sauer, the intestate of the plaintiff in error, was the owner of property fronting upon the part of the street improved and in due time instituted suit to recover damages, which he claimed he had suffered. After many vicissitudes, sufficiently indicated in *Sauer* v. *City of New York,* 206 U. S. 536, and *People ex rel. Crane* v. *Ormond,* 221 N. Y. 283, the litigation resulted in a decision by the Court of Appeals of New York in 1917, that the construction of the viaduct effected a change of grade in the street, that the administratrix of Sauer's estate was entitled to recover such damages as had been caused to the property, and that the Board of Assessors of the City of New York had jurisdiction to make award of such damages. 221 N. Y. 283, *supra.*

With the right to damages thus established, the plaintiff in error in due time filed her claim with the Board of Assessors and was awarded a substantial sum as compensation. While her claim for damages was pending with the Board of Assessors "The Greater New York Charter" was amended in many respects affecting the powers and

duties of the Board of Assessors and of the Board of Revision of Assessments (Laws of New York, 1918, c. 619). The Comptroller, Corporation Counsel and President of the Department of Taxes and Assessments of the City, had constituted the Board of Revision of Assessments since 1901, and as such were given power to review any award of damages made by the Board of Assessors, and the only essential change made by the amendment of 1918 consisted in the provision that:

"The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

The plaintiff in error, not being satisfied with the amount of the award in her favor by the Board of Assessors, filed objections thereto, which were overruled, and thereupon, pursuant to law, the proposed award with the objections was presented to the Board of Revision of Assessments and was by it confirmed.

The plaintiff in error, continuing dissatisfied, thereupon appealed to the Supreme Court of New York for, and procured, a writ of certiorari to review the determination of the award by the Board of Assessors and the confirmation of it by the Board of Revision of Assessments. The ground of this application was that the quoted provision of the act of the New York Legislature of 1918, making the confirmation of the award by the Board of Revision of Assessments final and conclusive "with respect to the amount of damage sustained," was repugnant to the Constitution of the United States and void, and that the right to such review by certiorari, theretofore existing, was not affected by it.

A motion by the city to dismiss the writ on the ground that plaintiff in error's right to it was cut off by the amendment to the statute was denied by the Supreme Court and by the Appellate Division of the Supreme

Court, but this decision was reversed by the Court of Appeals in the judgment which is now under review.

It is conceded that at the time the viaduct was erected and until the Act of 1918, under the practice of New York, the plaintiff in error had the right to a general review in the Supreme Court, a court of general jurisdiction, of the proceedings before the Board of Assessors until 1901 and of the Board of Revision of Assessments until the amendment in 1918. The holding of the Court of Appeals in this case (228 N. Y. 309, 316) is that the provision of the act, making the confirmation of the award by the Board of Revision of Assessments final and conclusive, would not prevent "the consideration on certiorari of questions of jurisdiction, fraud and willful misconduct on the part of the officials composing the boards", but that it was conclusive against the right to a general review of questions relating to the subject of damages such as the plaintiff in error was presenting to it. *Matter of Southern Boulevard R. R. Co.,* 143 N. Y. 253, 259, is cited as a precedent for this holding.

Thus the contention of the plaintiff in error, pursued through all the state courts and now presented in this court, is, that the modification by the Act of 1918 of the remedy available to her intestate when the viaduct was constructed and his right to damages became complete, offends: (1) Against the contract impairment clause (Art. I, § 10); (2) against the equal protection clause; and (3) against the due process of law clause of the Fourteenth Amendment to the Federal Constitution.

As to the first of these contentions.

While, under the holdings in *People ex rel. Crane* v. *Ormond,* 221 N. Y. 283, and *Ettor* v. *City of Tacoma,* 228 U. S. 148, the decedent of the plaintiff in error had a vested property right to compensation after the completion of the viaduct, very clearly this was not a contract right in a constitutional sense.

It has long been settled by decisions of this court that the word "contracts" in § 10 of Article I of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. "Mutual assent" [express or implied] "to its terms is of its very essence." *State of Louisiana ex rel. Folsom* v. *Mayor and Administrators of New Orleans,* 109 U. S. 285, 288; *Freeland* v. *Williams,* 131 U. S. 405, 414; *Essex Public Road Board* v. *Skinkle,* 140 U. S. 334, 340; *Morley* v. *Lake Shore & Michigan Southern Ry. Co.,* 146 U. S. 162, 169; *Garrison* v. *City of New York,* 21 Wall. 196, 203.

The Court of Appeals held that at common law the intestate of the plaintiff in error did not have any right of action for the damage done to his property (*Sauer* v. *City of New York,* 180 N. Y. 27), and this court affirmed that judgment in 206 U. S. 536, *supra.* In the later case, 221 N. Y. 283, *supra,* by treating the construction of the viaduct as a change of grade of the street, a statute (not noticed in the earlier decision) was made applicable and from it was derived the right to recover asserted in this case. The origin of the right is thus wholly statutory, an act of grace by the legislature, as if "consulting the interests of morality," so that there is nothing in the nature of a contract in it, and therefore there is nothing in the case for the contract impairment clause of the Constitution to operate upon. The first contention of the plaintiff in error cannot be sustained.

The statement of the case shows that, stripped of nonessentials, the second contention of the plaintiff in error is that the cutting down by the amendment of 1918 of her remedy from a general review in the State Supreme Court to a review limited to "questions of jurisdiction, fraud and willful misconduct on the part of the officials composing the boards," deprived her of her property without due process of law.

In determining whether or not due process of law has been denied regard must always be had to the character of the proceeding involved for the purpose of determining what the practice at common law was and what the practice in this country has been in like cases. *Twining* v. *New Jersey,* 211 U. S. 78, 100.

The right of the plaintiff in error to damages having been established by the decision in 221 N. Y. 283, *supra,* there remained only the problem of determining the amount of the award which should be made and the manner of making it, and the reference of such a question, especially in eminent domain proceedings, to a commission, or board, or sheriff's jury, or other non-judicial tribunal, was so common in England and in this country prior to the adoption of the Federal Constitution that it has been held repeatedly that it is a form of procedure within the power of the State to provide and that when opportunity to be heard is given it satisfies the requirements of due process of law, especially when, as in this case, a right of review in the courts is given. *Custiss* v. *Georgetown & Alexandria Turnpike Co.,* 6 Cranch, 233; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 569; *United States* v. *Jones,* 109 U. S. 513, 519; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 688; and *Bauman* v. *Ross,* 167 U. S. 548, 593.

No one has a vested right in any given mode of procedure (*Railroad Co.* v. *Grant,* 98 U. S. 398, 401; *Gwin* v. *United States,* 184 U. S. 669, 674) and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change. *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 439.

The amendment of 1918, following an earlier amendment in 1901, gave to the plaintiff in error the right to have the award of the Board of Assessors reviewed by the Board of Revision of Assessments, which her intestate did not have when the viaduct was constructed, and while the

amendment of 1918 made the finding of the latter conclusive as to the "amount of damage sustained," it retained the right to review in the courts the entire finding, whenever lack of jurisdiction, or fraud, or wilful misconduct on the part of the members of the Board should be asserted. This afforded ample protection for the fundamental rights of the plaintiff in error, and the taking away of the right to have examined mere claims of honest error in the conduct of the proceeding by the Board did not invade any federal constitutional right. Even courts have been known to make rulings thought by counsel to be erroneous. *McGovern* v. *City of New York,* 229 U. S. 363.

The Court of Appeals declares that the theory of the amendment is well understood to be "the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him."

It may not be an undiluted evil to the real parties in interest to this litigation, which has been pending in various forms for nearly thirty years, to have it brought to an end and to have the large award allowed in 1918 divided among them.

Plainly this second claim of the plaintiff in error must be denied.

The final contention is that the amendment of 1918 to the act denies to the plaintiff in error the equal protection of the laws.

It is argued, far from confidently, that this invasion of constitutional right arises from the fact that the Board of Revision of Assessments, having final jurisdiction over the amount of the damages suffered by the intestate of the plaintiff in error, is composed of three city officials, appointed by the mayor, with power to pass on claims against it and that this denies to her an impartial tribunal. This membership of the Board had existed since 1901.

The disposition of this contention by the Court of Appeals is quite sufficient, saying:

"The officials who heard her claim were not disqualified because selected by the city. Her claim was not against the city but if allowed was collected by assessment. Officials acting really as an auditing board are not condemned because they have been selected by the municipality or other division against which the claim is made. If it were otherwise a great many bodies passing in a judicial capacity on claims from the Board of Claims down, would be disqualified."

The judgment of the Supreme Court, Appellate Division, First Judicial Department of the State of New York, entered on remittitur from the Court of Appeals is

Affirmed.

STATE OF MINNESOTA *v.* STATE OF WISCONSIN.

IN EQUITY.

No. 11, Original. Motion for final decree submitted January 30, 1922.—Decree entered February 27, 1922.

Decree reciting report of commissioners heretofore appointed to run, locate and designate the boundary between Minnesota and Wisconsin involved in this case; confirming the report; establishing the boundary as set forth in said report and upon the maps accompanying the same; and allowing the expenses and compensation of said commissioners as part of the costs of the suit to be borne equally by the parties.

See also, *Minnesota* v. *Wisconsin*, 252 U. S. 273; 254 U. S. 14.

Mr. Clifford L. Hilton, Attorney General of the State of Minnesota, *Mr. W. D. Bailey* and *Mr. H. B. Fryberger* for complainant.

Mr. William J. Morgan, Attorney General of the State of Wisconsin, and *Mr. Ralph M. Hoyt* for defendant.

BY THE COURT:

The State of Minnesota having made a motion before the court for a final decree, confirming the report of the Commissioners appointed by the decree in this cause on the 11th day of October, A. D. 1920, to run, locate and designate the boundary line between the State of Minnesota and the State of Wisconsin, in and through Lower Saint Louis Bay, Upper Saint Louis Bay and the Saint Louis River, from Upper Saint Louis Bay to the falls in said river, which report is in words and figures, as follows:

"To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We, Samuel S. Gannett, Washington, D. C.; William B. Patton, Duluth, Minn., and John G. D. Mack, Madison, Wisconsin, Commissioners appointed, under decree of the court rendered October 11th, 1920, 'to run, locate and designate the boundary line between the State of Minnesota and the State of Wisconsin, 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,' have the honor to submit the following report, with accompanying maps, which maps are marked Exhibit No. 1, entitled, Supreme Court of the United States, October Term, 1920, No. 13, Original, *Tracing of Parts of Original Map of St. Louis Bay and St. Louis River, Made under Direction of Captain George G. Meade, T. E. 1861, Showing Boundary Line Between Minnesota and Wisconsin as Surveyed in Accordance with Terms of Above Decree in 1921,* and Exhibit No. 2, entitled, Supreme Court of the United States, October Term, 1920, No. 13, Original, *Map Showing Boundary Line Between Minnesota and Wisconsin Through St. Louis Bay and up St. Louis River to the Falls as Surveyed in Accordance with Terms of Above Decree in 1921.*

149. Final Decree.

Organization.

The Commissioners held their first meeting on October 29th, 1920, in suite 612, Palladio Building, in the City of Duluth, Minnesota, and organized by electing Samuel S. Gannett, Chairman.

Meade Chart.

In carrying out the decree of the court, that the 'boundary line must be ascertained upon a consideration of the situation existing in 1846, and accurately described by the Meade Chart,' the Commission made a careful study of the Meade Chart, filed as Minnesota's Exhibit No. 1, and found that the scale of said chart, 1: 32000, was too small for practical use in determining a line which could be laid out and properly monumented; and that the triangulation points of the original Meade survey, shown on the original Meade Map (the location of which was absolutely essential in transferring to the ground points determined on the map), were omitted from the chart.

Meade Map.

An attempt was then made to use the photographic copies of the original Meade map, being Wisconsin's Exhibits Nos. 46C and 46D, but it was found that the process of production had caused unequal shrinkage in the several sheets composing the map, and that no accurate scalings could be made therefrom.

Under instructions of the Commission, Mr. S. S. Gannett went to the office of the U. S. Lake Survey, in the City of Detroit, Michigan, the repository of the original Meade map, and under his personal supervision, caused an accurate tracing to be made of so much of the said Meade map, and the soundings and triangulation points shown thereon, as pertains to the case under considera-

tion. An accurate copy of this tracing, showing in addition the boundary line, as fixed on said map by the Commission, is filed herewith as Exhibit No. 1.

Triangulation Points.

The triangulation points, heretofore noted as being platted on the original Meade map by triangles, and shown in red ink on the aforesaid tracing, are located, in the records of the Lake Survey, by rectangular coordinates referred to the primary triangulation station of the U. S. Lake Survey, known as Minnesota Point North Base, drawn in red ink on aforesaid tracing, and described hereinafter in detail under the heading, 'Descriptions and Geographic Positions of Triangulation and Reference Points.' Commissioner Gannett secured an accurate copy of said coordinates from the official records of the U. S. Lake Survey, and they are correctly given in Table No. 1, attached to this report.

The original Meade triangulation points have not been in existence for some years, but the Corps of Engineers, U. S. Army, in later surveys of the St. Louis Bays and River, has established new triangulation points and referred the same by rectangular coordinates to aforesaid 'Minnesota Point North Base.' An accurate copy of the official coordinates of these later triangulation points was also secured by Commissioner Gannett, and a true copy of same is hereto attached and marked Table No. 2.

With these coordinates, it is possible to accurately relocate the original Meade triangulation points, or to show the new ones on the Meade map in their true positions; and the last mentioned points are thus shown on Exhibit No. 1, being marked by triangles in black ink.

Having the existing, or new, triangulation points platted in their true positions on the Meade map, it is possible to 'tie in' by scale any points or lines on said map to these triangulation points, and to transfer said points

or lines to the ground by similar measurements from said triangulation points.

Office Procedure.

With this information at hand, the Commission laid down on the tracing of the original Meade map, Exhibit No. 1, the boundary line between the States of Minnesota and Wisconsin, in accordance with the decree of the court, namely: '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, approximately one mile to the deep channel and immediately west of the bar therein, thence with such channel north and west of Big Island upstream to the "Falls."'

The center of the pivot pier of the Inter-State Bridge was found to be the point midway between Rice's Point and Connor's Point, and was designated by the Commission as Station No. O. From this point, as a beginning, a series of straight lines was laid out to conform with the decree of the court, special care being taken to have the lines over water not less than eight feet deep as shown by the Meade map, and the angle points between said lines numbered consecutively.

From such of these angle points as were convenient, 'ties' were scaled to the best situated triangulation points on the map, and by means of rectangular coordinates from each angle point on the lines between the 'ties,' to triangulation points, the lengths and angles of deviation of the several lines were calculated, and closed polygons formed. These polygons were then checked as

to closure by the method of latitudes and departures, and any errors found were balanced so as to secure closure. By this means your Commissioners were enabled, with a close approach to accuracy, to determine the lengths and angles of deviation of the several lines composing the projected boundary line.

The lengths and angles thus determined and the 'ties' to the several triangulation points, were used as preliminary field notes by the surveying party employed to 'run out the boundary line and to locate same by proper monuments, courses and distances.'

Boundary Line Above Fond Du Lac.

For that portion of the St. Louis River beyond Fond Du Lac, and extending to the 'Falls,' and which is not shown on the Meade Chart or map, the Commission established the center line of the river, as a medial line between the shore lines, as surveyed by the Commission, and designated said medial line as the boundary line.

The Survey.

As the boundary line, except in a few instances, runs over water from 8 feet to over 20 feet in depth, the most convenient time for surveying it was after ice had formed to a safe thickness. The winter proved to be mild and the ice conditions unfavorable, adding greatly to the danger and difficulty of the work, and increasing the time necessary to finish it.

The surveying party was organized early in January, 1921, and the necessary equipment was rented or purchased. Starting at Station O, heretofore described, the approximate position of the boundary line was laid out on the ice, in the bay and river, from the preliminary field notes, and the 'ties' to the triangulation points, measured. Such discrepancies, due to the curvature of the earth, or to errors in scaling from the map, as were

shown by measuring the 'ties,' were allowed for and distributed in the angles and distances of all the lines back to the preceding 'tie.' If any important discrepancy was discovered, the lines involved were re-run before any adjustments were made. From the final field notes of the adjusted survey, a description of the boundary line by courses and distances was obtained, and is incorporated herein. This work was completed March 19, 1921.

Detailed Description of Boundary Line.

[Here follow lengthy and detailed descriptions of the boundary line, as determined, the monuments, and of triangulation and reference points, with geographic positions, which are omitted by the Reporter as not being of general interest. Persons interested in these may consult the original decree in the clerk's office, obtain certified copies, or consult the copies forwarded to the Governors of the two States.]

Map of Boundary Line.

The Commission has prepared, and transmits herewith as Exhibit No. 2, a map of St. Louis Bays and River on the scale of 1: 24000, showing their present conditions, improvements along the harbor front, the U. S. Government Harbor Lines and channels, and the relative position of the boundary line. There are also shown as sub-maps, on larger scale, improved or partly improved properties which are crossed by the boundary line; also detailed drawings of the concrete monuments as constructed.

Tables.

The rectangular coordinates, referred to Minnesota Point North Base, of all monuments, reference point[s] and line points are shown in Tables Nos. 2, 4 and 5, hereto attached.

The geographic positions of the angle points in the boundary line are shown in Table No. 6.

Instruments.

The instrument used in making the survey was a Transit Theodolite with 6½-inch circle and reading to 10 seconds of arc. The measurements were made on the surface of the ice with a steel tape 300 feet in length, under a tension of twenty pounds, and corrected to temperature of 62° F.

Personnel.

The Commission employed as assistants the following named persons, namely:

Gordon F. Daggett, Madison, Wisconsin, Consulting Engineer.

Lyonel Ayres, Duluth, Minnesota, Consulting Engineer.

D. W. Van Vleck, Superior, Wisconsin, Consulting Engineer.

Paul Lillard, Madison, Wisconsin, Transit Man, in charge of field party.

Edwin O. Anderson, Duluth, Minn., Chainman.

Frank Kieserling, Duluth, Minn., Chainman.

Frank Suech, Jr., Duluth, Minn., Rodman.

Robert Case, Duluth, Minn., Rodman.

Robert Sansted, Duluth, Minn., Rodman.

Ray Mapp, Duluth, Minn., Draughtsman.

Eusebe J. Blais, Duluth, Minn., Draughtsman.

Finances.

We return herewith a financial statement showing in detail the money actually expended in carrying out the terms of the decree of the court.

Record Books.

All field, computation and record books have been placed in the custody of the chairman of the Commission,

and filed by him in the office of the Geological Survey, Interior Department, Washington, D. C.

Respectfully submitted.

SAMUEL S. GANNETT,
WILLIAM B. PATTON,
JOHN G. D. MACK,
Commissioners."

June 25th, 1921.

The cause coming on to be heard upon said motion of the said State of Minnesota.

It is hereby ordered, adjudged and decreed, that said report of said Commission, filed in the office of the clerk of this court on August 5, 1921, is in all respects confirmed.

It is further ordered, adjudged and decreed that the line as delineated and set forth in said report and upon the two maps accompanying said report being marked respectively Exhibits 1 and 2 by said Commission and which line has been marked by permanent monuments as stated in said report, be and the same is hereby established, declared and decreed to be the true boundary line between the States of Minnesota and Wisconsin and said maps so marked as aforesaid as Exhibits 1 and 2 are directed to be filed as a part of this decree and it appearing that the expenses and compensation of the Commissioners attendant upon the discharge of their duties amounts to fifteen thousand six hundred twenty-six dollars and six cents ($15,626.06), it is ordered that the same be allowed and approved as a part of the costs of this suit, to be borne equally by the parties. And that the sum of two thousand five hundred sixty dollars ($2,560), the expense of printing the record in this case, and the sum of two hundred thirty ($230) dollars, the expense of printing the report of the Commissioners in this case, amounting in the aggregate to two thousand seven hundred ninety dollars ($2,790), are allowed and approved as a part of the costs

of this suit to be borne equally by the parties and if one of them has paid more than one-half of such sums, it shall be reimbursed by the other for such excess.

It is further ordered, that the clerk of this court do transmit to the respective governors of the States of Minnesota and Wisconsin copies of this decree, duly authenticated under the seal of this court, omitting from said copies the two maps filed with the report.

STATE OF TEXAS *v.* INTERSTATE COMMERCE COMMISSION AND RAILROAD LABOR BOARD.

IN EQUITY.

No. 24, Original. Argued on motions to dismiss December 7, 8, 1921.—Decided March 6, 1922.

1. Regarded as corporate entities created for governmental purposes, the Interstate Commerce Commission and the Railroad Labor Board are not citizens of any State. P. 160.
2. Abstract questions of the power of Congress to enact specified legislation do not present a case or controversy within the judicial power as defined by the Constitution. P. 162.
3. A suit by a State against the Railroad Labor Board and the Interstate Commerce Commission, seeking to annul action taken by them under the Transportation Act of 1920, as an unconstitutional invasion of the rights of the State, injurious to her citizens, *held* not to be entertained by this court in the exercise of its original jurisdiction where the decisions and orders complained of had been put in execution and their annulment would directly and unavoidably affect resulting interests of carriers and carrier employees who were not parties or represented in the litigation. P. 163.
4. That the citizenship of such necessary parties prevents their being joined will not justify proceeding in their absence. P. 163.
5. A suit by a State to set aside orders of the Interstate Commerce Commission must be brought in the District Court and the United States must be made a defendant. P. 164. *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485.

Bill dismissed.

On motions to dismiss an original bill in this court, brought by the State of Texas against the Interstate Commerce Commission and the Railroad Labor Board, and seeking to have declared unconstitutional certain portions of the Transportation Act of 1920, to annul all action taken thereunder by either defendant in respect of railroad carriers in Texas, and to restrain the defendants from taking any further action thereunder in respect of those carriers.

Mr. Tom L. Beauchamp, with whom *Mr. C. M. Cureton,* Attorney General of the State of Texas, *Mr. W. A. Keeling, Mr. Walace Hawkins* and *Mr. John E. Benton* were on the brief, for complainant.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder* was on the brief, for the Railroad Labor Board.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Alfred P. Thom, for the Association of Railway Executives, as *amicus curiae,* by special leave of court.

Mr. N. A. Stedman, Mr. E. B. Perkins and *Mr. Daniel Upthegrove,* by leave of court, filed a brief on behalf of the St. Louis Southwestern Railway Company, as *amici curiae.*

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

This is a bill in equity brought in this court by the State of Texas against the Interstate Commerce Commission and the Railroad Labor Board. The relief sought is, first, a declaration that the main provisions [1] of Titles III and IV of the Transportation Act of 1920, c. 91, 41 Stat. 456, 469, 474, are unconstitutional and void,

[1] Particularly §§ 300–316, subdivisions 18–22 of § 402, §§ 407 and 416, subdivison 1 of § 418, and §§ 422 and 439.

secondly, an annulment of all action heretofore taken thereunder, by either defendant, in respect of railroad carriers in Texas, and, thirdly, an injunction restraining the defendants from taking any further action thereunder in respect of those carriers. The right of the State to bring the suit, our power to entertain it and the merits of the case made by the bill are all challenged by motions to dismiss.

In the bill and supporting brief the defendants are spoken of as citizens of States other than Texas and this is treated as bringing the suit within our original jurisdiction. But both defendants are sued as corporate entities created by the United States for governmental purposes; and, if that be their status,[2] they are not citizens of any State,[3] but have the same relation to one State as to another. So, to entertain the suit we should have to find some ground of jurisdiction other than the one suggested. But we need not stop to consider the possible grounds whereon a State may invoke our original jurisdiction, because an examination of the bill discloses insuperable obstacles to our entertaining it on any ground.

The provisions of Titles III and IV which are drawn in question are all in terms confined to matters pertaining to railroad carriers engaged in interstate or foreign commerce, and evidently were enacted in what Congress regarded as an exercise of its power to regulate such commerce.

Those relating to the Railroad Labor Board—they are in Title III—may be summarized as clothing the Board with authority to entertain and decide disputes between carriers and their employees in respect of wages, grievances, rules or working conditions; as directing that all parties to such a dispute be accorded a hearing either in

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[2] See *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 203–204.

[3] *Bankers Trust Co.* v. *Texas & Pacific Ry. Co.*, 241 U. S. 295, 309.

person or by counsel, and as requiring that the decisions be entered in an appropriate record and that they and all violations of them be given such publicity as the Board may indicate.

The provisions relating to the Interstate Commerce Commission—these are in Title IV—may be summarized as investing the Commission with a substantial measure of control or supervision over interstate rates and fares; over the removal of any undue or unreasonable advantage, preference or prejudice, as between persons or localities in intrastate commerce on the one hand and in interstate commerce on the other, arising from intrastate rates and fares; over the removal of any undue, unreasonable or unjust discrimination against interstate commerce caused by intrastate rates and fares; over the division of the carriers of the country into territorial groups for valuation and rate making purposes; over what shall be regarded as a fair return on the aggregate value of the property of the carriers in each group; over the maintenance and use of certain reserve and contingent funds to be set apart from any revenues in excess of such fair return; over the construction and acquisition of new lines and the extension and abandonment of old ones; over the pooling of traffic or earnings; over the consolidation of carriers; over the issue of stocks, bonds and other securities by carriers, and over making the same person a director or officer of more than one carrier. These provisions contemplate and require in respect of most of the matters recited that the State wherein the carrier's line lies shall be notified and accorded a hearing before a finding or order is made by the Commission.

Other statutes prescribe that orders of the Commission, other than for the payment of money as reparation, may be enforced in the district courts at the suit of the United States, or may be annulled, set aside or suspended in the district courts at the suit of any aggrieved party

in interest, but that all suits of the latter class shall be brought against the United States as the principal defendant.

The bill is of unusual length, sixty-five printed pages. Much of it is devoted to the presentation of an abstract question of legislative power—whether the matters dealt with in several of the provisions of Titles III and IV fall within the field wherein Congress may speak with constitutional authority, or within the field reserved to the several States. The claim of the State, elaborately set forth, is that they fall within the latter field, and therefore that the congressional enactment is void. Obviously, this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power. *Georgia* v. *Stanton,* 6 Wall. 50, 73, *et seq.; Muskrat* v. *United States,* 219 U. S. 346, 361; *Stearns* v. *Wood,* 236 U. S. 75, 78.

The portion of the bill particularly directed against the action of the Railroad Labor Board alleges, in effect, that the Board, proceeding under Title III, has heard and decided divers disputes over working conditions and wages between carriers in Texas and their employees; that conformably to these decisions the working conditions have been changed and the wages of the employees materially raised; and that as a result the operating expense of the carriers has been greatly increased, necessity for a larger operating income has arisen, rates and fares have been raised accordingly, and producers, shippers and consumers have been and are being injuriously affected.

Even if these allegations, in connection with other parts of the bill, could be regarded as presenting a concrete

controversy turning on the validity of Title III, this would not enable us to entertain the suit. The bill makes it plain that the carriers and employees have put the Board's decisions into effect and have adjusted their relations on that basis. There are none to whom the controversy would be of such immediate concern as to them; and, should it be resolved against the validity of Title III and the Board's action annulled, their interests would be directly and unavoidably affected. They are not parties to the bill; nor do any of those who are parties represent them. The Board does not claim to do so; and the attitude of the State is antagonistic to them. To take up and solve the controversy without their presence and without their being represented would be quite inadmissible, considering the exceptional nature of our original jurisdiction. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 257; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 245. If their citizenship be such that they cannot be brought into the suit consistently with the limitations on our original jurisdiction, this does not justify us in proceeding in their absence. The cases just cited leave no doubt on this point.

The portion of the bill particularly directed against the action of the Interstate Commerce Commission charges, in substance, that the Commission, proceeding under Title IV, has placed the carriers of Texas in a territorial rate group with carriers of other States where railroad construction and operation are attended with greater cost, has approved a general increase in the interstate rates and fares of carriers in that group, has directed a corresponding increase in the intrastate rates and fares of carriers in Texas, has authorized the abandonment by certain carriers of their lines within the State, and has exercised a supervision over the issue of stocks, bonds and other securities by carriers chartered by the State;—all of which orders, it is alleged, impinge on the powers

reserved to the State and subject its citizens to unnecessary expense and great inconvenience.

If the State have a right to sue to annul these orders, a familiar rule requires that it shall proceed with due regard for the rights of the carriers who have put the orders into effect and are conforming to them. On the question whether the orders are invalid and should be annulled, or are valid and should be upheld, the carriers are entitled to be heard. Their interests are directly involved and will be necessarily affected by the outcome. They are not parties to the bill, and as to all but one the bill makes it clear that their citizenship is an obstacle to making them such. This, without more, would preclude us from awarding any relief on this portion of the bill. *California* v. *Southern Pacific Co., supra; Minnesota* v. *Northern Securities Co., supra.* Besides, there are statutory provisions, before noticed, which direct that all suits to set aside, annul or suspend orders of the Commission be brought in the District Courts and the United States made a defendant. Jud. Code, §§ 207, 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219–220. These provisions were recently considered by us in a related case and it was there held that the public policy which they reflect requires that a State aggrieved by such an order be remitted to the remedy which they afford—a suit in the District Court in which the United States is made a party. *North Dakota* v. *Chicago & Northwestern Ry. Co.,* 257 U. S. 485.

Some emphasis is laid on two statements in the bill—one that the State owns an intrastate railroad 33.55 miles in length and operates the same as a common carrier, and the other that it is a shipper of freight and user of passenger transportation over other lines in both interstate and intrastate commerce. Apparently the only purpose of these statements is to show that the State has such an interest as entitles it to call in question the orders of the Commission dealing with rates and fares. At all events,

the bill does not connect them with any of the other questions sought to be presented or predicate any other claim to relief on them. They therefore are covered by the ruling that suits to set aside, annul or suspend the Commission's orders should be brought in the District Courts where all proper parties, including the United States, may be made defendants and accorded an appropriate hearing.

What has been said suffices to show that we are not at liberty to entertain the bill in the exercise of our limited original jurisdiction.

In passing it should be observed that some of the provisions of the Transportation Act, assailed by the bill, have recently been upheld in other cases brought before us in regular course on appeal from decrees in the District Courts. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591.

Bill dismissed.

NEWTON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL. *v.* CONSOLIDATED GAS COMPANY OF NEW YORK.

CONSOLIDATED GAS COMPANY OF NEW YORK *v.* NEWTON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.

CONSOLIDATED GAS COMPANY OF NEW YORK *v.* NEWTON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.

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

Nos. 257, 258 and 288. Argued November 17, 18, 1921.—Decided March 6, 1922.

1. The copying into the record, contrary to Equity Rules 75 and 76, of voluminous stenographic reports of proceedings before a master, useless exhibits and other matter irrelevant to the appeal, is an

indefensible practice which the court hereafter will feel at liberty to punish to the limit of its discretion—possibly by dismissing the appeal. P. 173.

2. Evidence *held* sufficient to support conclusions of the master and trial court that the eighty-cent gas rate fixed by New York Laws 1906, c. 125, and upheld in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, had become confiscatory when this suit was begun and decided due to increased costs of labor and materials, and would so continue. P. 174.
3. There is a presumption that profits realized by a gas company while subject to supervision by a commission empowered to prohibit unreasonable rates were lawfully acquired. P. 175.
4. The public interest in the property of a public service corporation dedicated to a public use, and the past success of its enterprise, will not support a demand that it operate indefinitely at a loss. P. 175.
5. The fact that a gas company may not have supplied gas of the candle power required by statute, will not debar it (as coming with unclean hands) from equitable relief from a confiscatory rate, when its conduct has been subject to official control and it has endeavored to meet its customers' requirements. P. 175.
6. Books of a gas company, kept in ordinary course, under supervision of a public commission, and free from suspicion, *held* admissible as *prima facie* evidence of the confiscatory effect of a statutory gas rate. P. 176.
7. As a condition to an injunction against a gas rate found confiscatory, the court has discretionary power, which, however, should be exercised very cautiously, to prescribe a maximum future rate for a specified period as a limitation in favor of consumers. P. 177.
8. But a requirement that future collections made by the gas company above the confiscatory rate shall be impounded for ultimate distribution in accordance with a rate to be fixed by state authority in the indefinite future is erroneous. P. 177.
9. The District Court has discretion to make orders pending appeal to preserve the *status quo* until decision by the appellate court. P. 177.

267 Fed. 231; 274 Fed. 986, modified and affirmed.

Appeals and cross appeals from decrees of the District Court in a suit to enjoin the enforcement of a statutory gas rate.

Mr. John A. Garver and *Mr. William L. Ransom,* with whom *Mr. Charles A. Vilas* and *Mr. Jacob H. Goetz* were on the briefs, for Consolidated Gas Company.

Mr. Wilber W. Chambers, with whom *Mr. Charles D. Newton,* Attorney General of the State of New York, *Mr. Clarence R. Cummings* and *Mr. John Holley Clark, Jr.,* were on the briefs, for Newton, Attorney General.

Appellants have not had their day in court as is guaranteed them by the Constitution; and for this reason the case should be reversed and remanded for a new trial.

Respondent enjoyed an adequate return upon the fair value of its property from its inception to the end of the year 1917. The evidence showed that not only did it enjoy such a fair return but it made enormous profits throughout this entire period.

In the years of 1918 and 1919, on which the finding of confiscation was based by the court below, the respondent earned more than a fair return.

The period selected by respondent in its bill of complaint, viz, from the time the statute took effect in 1906 to 1918, inclusive, should be adopted in this case, and the statute should not be considered confiscatory merely upon the financial result obtained in one abnormal year (1918) and part of another (10 months of 1919).

The respondent has accumulated a fund amounting to $11,801,659.48 for "contingencies". The statute should not be declared confiscatory until this fund is exhausted. Temporary losses due to abnormal conditions should be debited against it.

The statute in question should not be declared unconstitutional unless the court finds that the average rate of return has been less than 6% for a considerable period of time.

The sum of $7,781,000 allowed by the master and the court below for franchises should be excluded from the

property upon which the respondent is entitled to a return.

The master and the court below have included in the property upon which respondent is entitled to a return, various properties which are not used and useful in respondent's gas business, and should be excluded.

The Fifty-seventh street office building was not an adequate improvement upon the land upon which it was erected and should not be included in the rate base. Moreover, had respondent rented equivalent office space nearby, there would have been an annual saving of at least $36,000 which should be credited in this case to operating expenses.

Power to regulate gas rates is a sovereign power; one legislature may not bind a succeeding legislature, and any act of a corporation under a general or special law does not of itself establish a property or a contract right which limits the legislature's power to regulate rates.

The master and the court below erred in failing to follow the rule laid down by this court that, in determining the fair value of respondent's property, depreciation should be deducted.

Respondent has an unliquidated claim against the United States because the Government extracted light oils from its gas during a part of 1918. Until this has been decided there can be no safe basis for disposing of this case.

The master erred in refusing to admit any testimony showing the tests made by the City of New York concerning the quality of gas furnished by respondent to its consumers prior to 1916. Furthermore, there were many other errors committed by the master in the admission and exclusion of evidence relating to a compliance with the statute in regard to the quality of gas. The evidence allowed was sufficient to establish that respondent repeat-

edly violated the statute in regard to candle power; and for this reason alone the bill of complaint should have been dismissed.

Reversible error was committed in the admission of respondent's books.

The master erred repeatedly in admission and exclusion of evidence, which errors were not corrected in the court below.

Mr. John P. O'Brien, with whom *Mr. James A. Donnelly, Mr. Harry Hertzoff* and *Mr. Alex I. Hahn* were on the briefs, for Swann, District Attorney.

The defendants have not had a fair trial.

The period found is altogether too brief.

The burden was upon the plaintiff of proving the statute unconstitutional.

The plaintiff's books of accounts were not *prima facie* proof of their contents.

Distinguishing, *Rowland* v. *St. Louis & San Francisco R. R. Co.,* 244 U. S. 106, 108; *Boyle* v. *St. Louis & San Francisco R. R. Co.,* 222 Fed. 546, 547; *Northern Pacific Ry. Co.* v. *Keyes,* 91 Fed. 47, 58; *Kings County Lighting Co.* v. *Nixon,* 268 Fed. 143; *Chesapeake & Ohio Ry. Co.* v. *Stojanowski,* 191 Fed. 720; *Parker* v. *United States,* 203 Fed. 950; *Wilson* v. *United States,* 190 Fed. 430; *American Surety Co.* v. *Pauly,* 72 Fed. 470; *Grace* v. *Brown,* 86 Fed. 155; *Bacon* v. *Conroy,* 172 Fed. 532; *Barber Co.* v. *Forty-second Street Ry. Co.,* 180 Fed. 648. Relying on: 17 Cyc. 394, 395; *Collins* v. *Collins,* 102 App. Div. 204; *Consolidated Safety Pin Co.* v. *Humbert,* 128 N. Y. S. 710, 711; *Mayor* v. *Second Avenue R. R. Co.,* 102 N. Y. 572; *Blum* v. *Davis,* 95 Misc. 140; *Pneumatic Signal Co.* v. *Texas & Pacific R. R. Co.,* 216 N. Y. 374; *The Norma,* 68 Fed. 509; Wigmore on Evidence, § 1530; *Wells Whip Co.* v. *Tanners Mutual Fire Ins. Co.,* 209 Pa. St.

488; *Pelican Lumber Co.* v. *Johnson,* 44 Tex. Civ. App. 206, 207; *Reyburn* v. *Queen City Savings Bank Co.,* 171 Fed. 609, 615, 616; *State* v. *Stephenson,* 69 Kans. 405; *San Pedro Lumber Co.* v. *Reynolds,* 121 Cal. 74; *Meyer* v. *Brown,* 130 Mich. 449; *Stolz* v. *Scott,* 28 Idaho, 417; *Stuart* v. *Camp Carson Mining Co.,* 84 Ore. 702.

The plaintiff's proof of the cost of manufacturing its gas is defective.

There was no competent proof of plaintiff's distribution expenses; nor proof that the amounts alleged to be paid for oil were reasonable, and they should not be allowed.

Franchises should not be included in the rate base. *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 43; *Cumberland Tel. Co.* v. *Louisville,* 187 Fed. 637, 647; *Lincoln Gas Co.* v. *Lincoln,* 182 Fed. 928; *Public Service Gas Co.* v. *Utility Commissioners,* 84 N. J. L. 463; *Duluth Street Ry. Co.* v. *Railroad Commission,* 161 Wisc. 245; *Spring Valley Waterworks* v. *San Francisco,* 192 Fed. 137; *Home Telephone Co.* v. *Carthage,* 235 Mo. 644; *Bronx Gas Co.* v. *Public Service Commission,* 190 App. Div. 13, 25.

The court erred in fixing the value of the plaintiff's property.

The statute is not unconstitutional unless the plaintiff is unable to earn a return which is security for its investment. *San Diego Land Co.* v. *National City,* 174 U. S. 739, 754; *San Diego Land Co.* v. *Jasper,* 189 U. S. 439; *Southern Pacific Co.* v. *Bartine,* 170 Fed. 725; *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256.

The production cost found was based on an erroneous conception of the evidence.

The plaintiff should have adopted the coke-oven system.

Even on the District Judge's findings, the statute should not be held confiscatory.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Consolidated Gas Company was organized in 1884 by consolidation of six corporations then manufacturing, distributing and selling gas in New York City and has continued to carry on the business, making additions and extensions as required by the increasing demand. Chapter 125 Laws of New York 1906 required it to sell gas with illuminating power of twenty-two candles, at no more than eighty cents per thousand cubic feet. A suit brought soon after this act became effective to enjoin its enforcement, because confiscatory, was finally dismissed without prejudice, *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, and for many years thereafter the Company supplied gas at the prescribed rate. January 16, 1919, it instituted the present proceeding against the Attorney General and other public officers. The bill alleges that the statutory rate is confiscatory—prevents and will continue to prevent a fair return on the property used—and prays for an injunction.

A Master, appointed in May, 1919, heard testimony from day to day for eight months—about twenty thousand printed pages—and presented this to the court with his report and opinion, May 5, 1920. Having considered the results of actual operations during all of 1918 and the first eight months of 1919, and well known subsequent conditions, he concluded:

"On the basis of the prices, rates of pay, and costs prevailing during the eight months beginning January 1, 1919, the cost of making and distributing gas has been such as to allow a very small, if any return, on even the actual investment; and since September 1, 1919, the cost of making and distributing gas has been increased in a number of respects so that the fair inference is that the complainant company now finds itself without any return upon the in-

vestment. The conditions found by me have existed for more than a year last past, and to a lesser degree for at least a year before that time, and will continue for at least a considerable period of time, the end of which cannot now be forecast. Upon such a situation and such a prospect, I think that the complainant company has shown itself, clearly and beyond all reasonable doubt, entitled to relief from the statutory limitation on its rates, but that its rate of return should be calculated, not upon the present high reproduction cost of its property, with or without the deduction of observed or actual depreciation, in whatever manner computed, but upon the actual, reasonable investment in the property devoted to the service of the complainant's consumers."

In a carefully prepared opinion, while disagreeing with the Master concerning some valuations and resolving all doubts against the Company, the court held the prescribed rate had been confiscatory since January 1, 1918, and would continue so to be. 267 Fed. 231; 274 Fed. 986.

An amended decree—entered August 11, 1920—enjoined enforcement of the act upon condition "that until March 1, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of one dollar and twenty cents per thousand cubic feet." And also upon the further condition that it should impound, or adequately secure, collections above eighty cents per thousand cubic feet, for ultimate distribution in accordance with any rate so established.

A broad appeal was allowed in No. 257, September 9, 1920. In No. 258 an appeal, allowed November 10, 1920, brings up those parts of the August decree which imposed conditions upon continuation of the injunction.

February 28, 1921, the trial court undertook to modify the August decree by directing that the excess derived from sales above eighty cents per thousand feet should be impounded until three months after determination of the appeal here or until a rate should be fixed by competent state authority; and further, that such sums should be subject to ultimate distribution "as nearly as may equitably be done" in accordance with that rate and the approved principles and findings relative thereto. The appeal from this order is No. 288.

Equity Rules 75 and 76[1] direct that records on appeal shall not set forth the evidence fully but in simple condensed form and require omission of non-essentials and mere formal parts of documents. Without apparent attempt to comply with these rules and with assent of appellee's counsel, appellants in No. 257 have filed a record

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[1] Equity Rule 75. . . . (b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. . . .

Equity Rule 76. In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties. . . .

of 21 volumes—twenty thousand printed pages—made up largely of stenographic reports of proceedings before the Master with hundreds of useless exhibits and many thousand pages of matter without present value. This is indefensible practice which we shall hereafter feel at liberty to punish to the limit of our discretion—possibly by dismissal of the appeal. These rules were intended to protect the courts against useless, burdensome records and litigants from unnecessary costs and delay. Counsel ought to comply with them, and trial courts should enforce performance of this plain duty.

The fundamental question presented for determination was whether the eighty-cent rate had been confiscatory under conditions existing during 1918 and 1919 and probably would continue so to be. Considering the rulings here in *Willcox* v. *Consolidated Gas Co.* and other cases, the answer required little more than an appreciation of facts not very difficult to ascertain. The Master's report and opinion disclosed careful and intelligent consideration of the whole matter. "Resolving all doubts against the plaintiff" and using valuations "pared down unsparingly," the trial court agreed with the Master's ultimate findings and ruled that to enforce the statute would result in confiscation. Since March 30, 1921, the Public Service Commission has had power to prescribe rates for appellee unrestricted by the maximum specified in the Act of 1906; but no such action has been taken. It did, however, authorize a rate of one dollar and forty cents, instead of eighty cents, for another company operating in New York City, effective after August 1, 1920, and has thus indicated its informed judgment. See *Morrell* v. *Brooklyn Borough Gas Co.*, 231 N. Y. 398. We are, of course, aware of the enormous increase in cost of labor and materials since this court declared that appellee might possibly earn six per centum under the eighty-cent rate. In view of all these things, only very cogent reasons would

justify complete reversal of the challenged decree. The points relied upon by appellants in No. 257 and their supporting arguments have been considered, and we think no such reasons are shown. To discuss all of these would subserve no sufficient purpose—only a few present questions of general interest.

Appellants earnestly insist that they were denied fair and impartial trial both by the Master and the court. So far as it relates to the court, we dismiss the suggestion as frivolous. Undoubtedly during the many months devoted to hearings the Master talked too much and often unwisely; but, manifestly, appellants' counsel made the situation unnecessarily difficult and failed to support the Master's earnest efforts promptly to ascertain the essential facts. Looking at all the circumstances we are unable to conclude that any substantial right was denied. The size of the record, eight months of almost daily hearings and the Master's reiterated offers to hear properly prepared and helpful evidence show that abundant opportunity was given for presentation of appellants' cause. The Master wisely sought to exclude ill-advised cross examinations and other unimportant matter.

Since 1907 the Gas Company has been subject to supervision by a Commission empowered to prohibit unreasonable rates and the presumption is that any profits from its business were lawfully acquired. *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 99. Mere past success could not support a demand that it continue to operate indefinitely at a loss. The public has no such right in respect of private property although dedicated to public use. When it became clear that the prescribed rate had yielded no fair return for more than a year and that this condition would almost certainly continue for many months the Company was clearly entitled to relief.

The claim that appellee had failed to supply gas of the prescribed candle power and therefore came into court

with unclean hands and should not be heard, is without merit. The Company was subject to official control; the facts as to candle power of the gas actually furnished are in dispute; the calorific quality had become more important to most consumers than the illuminating one; the Master reached the conclusion that the statutory standard had been substantially complied with; it had earnestly tried under very difficult circumstances to meet its customers' requirements. It sought relief from an unlawful burden—the fundamental wrong arose from the statute—and we find nothing which could justify refusal to consider its demand.

Complaint is also made because the Master admitted appellee's books in evidence. These books were kept in the ordinary course under general supervision of the Commission, appeared free from suspicion of dishonesty, were submitted to appellants' experts and were the only readily available sources of detailed information concerning the Company's affairs. In the circumstances we think no harm resulted from admitting them as *prima facie* evidence. *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108.

The general doctrine applicable when rates are alleged to be confiscatory has been so often stated that present discussion of it is unnecessary. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178; *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S. 256.

In No. 258 the Gas Company complains of the limit of one dollar and twenty cents per thousand cubic feet up to March 1, 1921, as a condition to continuation of the injunction, and also because sums above eighty cents per thousand were impounded for ultimate distribution in

accordance with any rate which might be fixed thereafter by competent state authority.

It was within the court's discretion to grant the injunction upon terms and we cannot now say that the limitation upon charges amounted to abuse. But grave injustice may result from action of this kind and the power should be very cautiously exercised. See *Morrell* v. *Brooklyn Borough Gas Co.,* 231 N. Y. 398. It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate. Rate making is no function of the courts and should not be attempted either directly or indirectly. After declaring the eighty-cent rate confiscatory, the court should not have attempted, in effect, to subject the Company for an indefinite period to some unknown rate to be proclaimed in the future upon consideration of conditions then prevailing.

The amendatory decree of February was obtained long after appeals from the August decree had been granted and when the court had very limited power over the litigation. "One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause." Undoubtedly, after appeal the trial court may, if the purposes of justice require, preserve the *status quo* until decision by the appellate court. *Hovey* v. *McDonald,* 109 U. S. 150, 157. But it may not finally adjudicate substantial rights directly involved in the appeal. *Merrimack River Savings Bank* v. *Clay Center,* 219 U. S. 527, 534. See *First National Bank* v. *State National Bank,* 131 Fed. 430. The precise result of the February decree is somewhat doubtful, but we may treat it as an attempt to preserve the *status quo* in order that this court might finally and completely dispose of the whole matter. Thus interpreted the decree (No. 288) was within the court's

discretion and as there was no abuse of this discretion it must be affirmed.

All impounded funds should be promptly released to the Gas Company subject only to deductions for such costs as are clearly assessable to the prevailing party. Costs of appeal No. 257 will be taxed to appellants; in No. 258 to the appellees. Modified as here indicated the decree below is affirmed. The cause will be remanded for further proceedings in conformity with this opinion.

It seems proper to add that we do not intend by anything said herein to intimate what would have been a reasonable rate for the sale of gas under the circumstances disclosed. The eighty-cent rate was confiscatory; the one dollar and twenty-cent maximum imposed by the court during a specified period as a condition to the injunction was a limitation in favor of the consumers.

Modified and Affirmed.

MR. JUSTICE CLARKE concurs in the result.

NEWTON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL. *v.* NEW YORK & QUEENS GAS COMPANY.

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

No. 296. Argued January 6, 1922.—Decided March 6, 1922.

Approving the conclusion of the master and the District Court that a gas rate fixed under Laws New York, 1906, c. 125, had become confiscatory.

269 Fed. 277, affirmed.

APPEAL from a decree enjoining enforcement of a statutory gas rate as confiscatory. See also the cases, *ante*, 165, and *post*, 180.

Mr. Wilber W. Chambers, with whom *Mr. Charles D. Newton,* Attorney General of the State of New York, and *Mr. Clarence R. Cummings* were on the brief, for Newton, Attorney General.

Mr. M. Maldwin Fertig, with whom *Mr. John P. O'Brien* and *Mr. James A. Donnelly* were on the brief, for Wallace, District Attorney.

Mr. William L. Ransom, with whom *Mr. John A. Garver, Mr. Charles A. Vilas* and *Mr. Jacob H. Goetz* were on the briefs, for appellee.

Mr. Justice McReynolds delivered the opinion of the court.

This appeal brings up for review a final decree entered November 19, 1920, which adjudged that in so far as c. 125, Laws of New York of 1906, prohibited appellee from charging and receiving more than $1.00 per thousand cubic feet for gas delivered and sold in the Third Ward, Borough of Queens, New York City, it was and had been confiscatory since January 1, 1919. 269 Fed. 277.

After taking a great mass of evidence the Master reported that the actual cost to appellee of manufacturing and distributing gas exceeded $1.00 per thousand cubic feet and that the challenged act was confiscatory. With this conclusion the trial court agreed and entered an appropriate decree. We find no sufficient ground for disapproving the action so taken, and it is accordingly

Affirmed.

NEWTON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL. *v.* KINGS COUNTY LIGHTING COMPANY.

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

No. 295. Argued January 5, 6, 1922.—Decided March 6, 1922.

Approving the conclusion of the master and of the District Court, that the gas rate imposed on appellee under New York Laws, 1906, c. 125; 1916, c. 604, had become confiscatory.
268 Fed. 143, affirmed.

APPEAL from a decree enjoining enforcement of a statutory gas rate as confiscatory. See also the preceding cases, *ante,* 165, 178.

Mr. Wilber W. Chambers, with whom *Mr. Charles D. Newton,* Attorney General of the State of New York, and *Mr. Charles E. Buchner* were on the briefs, for Newton, Attorney General.

Mr. Samuel F. Moran, with whom *Mr. John D. Monroe* was on the brief, for appellee.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the court.

This is an appeal from a final decree entered October 19, 1920, which enjoined the enforcement of c. 125, Laws of New York of 1906, and also the Act of New York Legislature approved May 9, 1916, c. 604, Laws of 1916. 268 Fed. 143. The first of these statutes fixed the price which appellee might charge for gas distributed in New York City at $1.00 per thousand cubic feet, and the second amended the earlier one by reducing the maximum price to eighty cents.

The original bill filed in May, 1920, alleges that the actual cost to appellee of manufacturing and distributing gas during 1919 and the first three months of 1920 had exceeded eighty cents per thousand cubic feet; that such cost would not be less than $1.00 for an indefinite period thereafter; and that the statutory rate was confiscatory.

The matter was referred to a Master who took proof and made a report which supported appellee's claim. With some unimportant modifications this was confirmed by the court. An appropriate decree followed which we are asked to reverse for sundry specified reasons commented upon orally and in the brief.

We are satisfied that the court below reached a correct conclusion and that none of the points relied upon for reversal are adequate to justify such action. So far as substantial all were adequately disposed of by the opinion of the trial court, and we need not comment further upon them.

The judgment below is

Affirmed.

HOWAT ET AL. *v.* STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Nos. 154 and 491. Argued February 27, 28, 1922.—Decided March 13, 1922.

1. The constitutionality of a state statute presenting very important questions should not be decided unless the case before the court so requires. P. 184.
2. Whether the Kansas Industrial Relations Act (Laws 1920, c. 29), in providing in effect for compulsory arbitration of labor controversies in certain industries before an administrative body whose orders it makes reviewable and enforceable through the State Supreme Court, violates the Federal Constitution, is not determinable upon a review of a judgment of that court sustaining, as a separable feature of the act, the power it gives the administrative body to call witnesses to testify in a general investigation of indus-

trial conditions and the power of the State District Court, of general jurisdiction, to order their attendance and to enforce their obedience through contempt proceedings. P. 185.

3. An injunction issued by a court of general jurisdiction and equity powers upon proper pleadings, and served upon parties within the jurisdiction, must be obeyed, even if erroneous and based upon an invalid statute, until set aside by orderly review. P. 190.
4. Where a sentence imposed by the Kansas District Court for contempt in disobeying an injunction issued in a suit brought by the State to prevent execution of a conspiracy to cause a general strike and cessation of work in coal mines contrary to the state laws, including the Industrial Relations Act, *supra*, was affirmed by the State Supreme Court independently of that act (though its constitutionality was drawn in question) upon the ground that the District Court had general power to grant the injunction and that the validity of the injunction could not be questioned collaterally in the contempt proceeding, *held* that the judgment of affirmance, having a non-federal basis, was not reviewable by this court. P. 189.

Writs of error to review 107 Kans. 423; 109 Kans. 376, dismissed.

WRITS of error to review two judgments of the Supreme Court of Kansas affirming sentences to confinement for contempt.

Mr. Redmond S. Brennan, with whom *Mr. John F. McCarron* and *Mr. Frank B. Hegerty* were on the briefs, for plaintiffs in error.

Mr. John G. Egan, Mr. Moorfield Storey and *Mr. F. Dumont Smith,* with whom *Mr. Richard J. Hopkins,* Attorney General of the State of Kansas, *Mr. Baxter D. McClain* and *Mr. Harold S. Davis* were on the briefs, for defendant in error.

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

These are two writs of error to the Supreme Court of Kansas sued out (§ 237, Judicial Code) with the hope and purpose of testing the validity, under the Federal Consti-

tution, of the act of the Legislature of Kansas creating a Court of Industrial Relations. C. 29, Special Session, Laws of Kansas of 1920.

In No. 154, the plaintiffs in error were defendants in proceedings taken in the District Court of Crawford County, Kansas, to compel them to attend and give testimony under subpoena before the Court of Industrial Relations. They had refused to appear. After arrest and a hearing, they were sentenced to confinement in jail until they should comply with the order. *State v. Howat,* 107 Kans. 423.

In No. 491, the plaintiffs in error were sentenced to imprisonment for a year as punishment for violation of an injunction issued by the same District Court forbidding them to call or cause a strike among the employees in certain coal mines in Crawford County. *State* v. *Howat,* 109 Kans. 376.

We are of opinion that in neither case is the Kansas Industrial Relations Act presented in such way as to permit us to pass upon those features which are attacked by the plaintiffs in error as violative of the Constitution of the United States.

The main purpose of the act is to create an administrative tribunal to arbitrate controversies between employers and employees in certain industrial, mining and transportation businesses which the act declares to be affected with such a public interest that their continuity is essential to the public peace, the public health and the proper living conditions and general welfare of the people. The board, miscalled a court, is given power to make investigations on its own initiative or upon complaint of interested persons to consider the wages, the return to capital, and the conditions surrounding the workers in any such employment and business, to summon all necessary parties in interest, to call and examine witnesses, and, after hearing, to make its findings and orders stating specifically

the terms and conditions, including wages, upon which such industry or employment shall be carried on in the future. In case the parties do not obey the orders the board is given authority to apply to the Supreme Court of Kansas to compel compliance, and the Supreme Court is authorized to review the orders upon the evidence already heard, and such other new evidence as that court shall permit, and enter and enforce a proper judgment. The board is also authorized, with the consent of the Governor, to make general investigations into industrial and economic conditions to familiarize itself with industrial problems as they may arise. In effect, the act provides for compulsory arbitration between labor and capital in certain industries and employment. It forbids an injunction against a workman or employee to prevent his quitting his employment. It is directed against strikes and lockouts and their declared wasteful and destructive effect, and conspiracies, picketing and intimidation to induce them. Obviously we should not pass upon the constitutional validity of an act presenting such critical and important issues unless the case before us requires it.

In No. 154, Howat and the other plaintiffs in error were subpoenaed to appear before the so-called Court of Industrial Relations to testify in an investigation into conditions existing in the mining industry in Cherokee and Crawford Counties. They failed to appear. The powers of the tribunal in such a case are set forth in § 11 of the act, reading in part as follows:

"Said Court . . . shall have the power and authority to issue summons and subpoenas and compel the attendance of witnesses and parties . . . and to make any and all investigations necessary to ascertain the truth in regard to said controversy. In case any person shall fail or refuse to obey any summons or subpoena issued by said court after due service then and in that event said court is hereby authorized and empowered to take proper

proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena."

Under this section, the board made application to the District Court of Crawford County, the court of first instance of general jurisdiction in that county, to issue an order directing the plaintiffs in error to attend the board and testify. This order was issued, duly served and disobeyed. The contemnors were then brought into court by attachment. Their plea that the legislation under which they were subpoenaed was void was held to be insufficient and they were committed to jail until they should comply with the subpoena. The contemnors appealed to the Supreme Court of the State, which affirmed the action of the District Court, holding that, without regard to the validity of the particular provisions of the Industrial Relations Act of which they complained, they were under legal obligation to obey the subpoena and were in contempt for not doing so. The court invited attention to § 28 of the act, which provides that, "If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court;" and pointed out that, even if the compulsory features of the act, to the constitutionality of which the plaintiffs in error objected, were invalid, there still remained in the act provision for investigation and findings by the Industrial Relations Court, in respect to which the power of the Legislature was indisputable and in furtherance of which the machinery for compelling the attendance and testimony of witnesses was appropriate. The court relied on the decision of this court in respect to a similar provision in the Interstate Commerce Law in which the Interstate Commerce Commission was author-

ized to secure attendance of witnesses at any investigation by it, through a proceeding before a Circuit Court of the United States. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 448, 449. It would seem to be sustained also by the decision of this court in *Blair* v. *United States,* 250 U. S. 273, wherein it was held that a witness summoned to give testimony before a grand jury in the District Court of the United States was not entitled to refuse to testify, when ordered by the court to do so, upon the plea that the court and jury were without jurisdiction over the supposed offense under investigation because the statute denouncing the offense was unconstitutional.

But even if we did not agree with the state court on this point, what we have said shows that the case was decided and disposed of by that court without any consideration of the application of the Federal Constitution to the features of the Kansas statute of which complaint is made. Even if those features are void, these contempt proceedings the state court sustains on general law. We can not, therefore, consider the federal questions mooted and assigned for error. *Southern Pacific Co.* v. *Schuyler,* 227 U. S. 601, 610; *Leathe* v. *Thomas,* 207 U. S. 93, 98; *Giles* v. *Teasley,* 193 U. S. 146, 160; *Hopkins* v. *McLure,* 133 U. S. 380, 386; *Hale* v. *Akers,* 132 U. S. 554, 564.

In No. 491 the State of Kansas on the relation of its Attorney General and the County Attorney of Crawford County, filed a petition in the District Court of Crawford County asking an injunction against Howat and others, one hundred and fifty in number, members of local unions of the United Mine Workers of America, District No. 14. The petition averred that defendants were conspiring, threatening, and about to direct the officers to call a general strike in the coal mines of Crawford, Cherokee and Osage Counties, Kansas, and cause a cessation of work in them, thereby endangering the peace and order of the communities in which said mines were located with in-

tent to violate the laws of Kansas and particularly the Court of Industrial Relations Act, that in pursuance thereof they were intimidating their co-workers and other employees of the operators of the mines, that the purpose of the conspiracy was to stop the operation of the railroads, and of the buildings, institutions and industries of the State in the conduct of its government affairs and to cut off the supply of coal for household and other uses throughout the State, that all of said acts would seriously affect and injure the public welfare and the public health of the people; that a similar conspiracy a year before had been carried out resulting in great suffering and loss to the people, and endangered their lives and health to such a degree that the state authorities were compelled to take possession of the mines and operate the same, and that, in the light of this result, the present conspiracy was being set on foot. The petition further averred that this conspiracy was directed especially to a nullification of the statute creating the Court of Industrial Relations and its purposes. It was alleged that the plaintiff was without adequate remedy at law and that irreparable loss and injury to the State and the people thereof would ensue unless the conspiracy of defendants was enjoined. The defendants pleaded in answer to these charges that, "whatever cessation of work, or intent to cease work, there may have been, was solely and only in the exercise of their lawful rights, for the purpose of improving their working conditions and increasing their wages; and whatever effect their ceasing work may have had upon the production of coal, was incidental to and in the exercise of their legal and constitutional rights; and the stoppage in the operation of the production of coal, if any, was not the primary purpose, but merely the incidental effect incident to the exercise of their lawful rights." They further alleged that the Industrial Court Act was void because in violation of the Federal Constitution and the

rights of defendants thereunder, and so the court was without power to issue an injunction, as prayed.

The case came on for hearing, the State introduced evidence, and the defendants demurred to the evidence. The demurrer was overruled. The defendants declined to introduce evidence and rested. The court found the averments of the petition true and made permanent the temporary injunction already awarded. By this, the defendants were enjoined "from directing, ordering or in any manner bringing about the hindering, delaying, interference with or suspension of the operation of any coal mines in the counties of Crawford, Cherokee or Osage, in the State of Kansas, and of the mining of coal at any of said mines, and from causing the miners and members of said labor union to quit their work at said mines for the purpose or purposes of hindering, delaying, interfering with or suspending the operation of any coal mines in said counties, and from intimidating by threats, abuse, or in any other manner, any person or persons with intent to induce such person or persons from accepting employment or remaining in employment at said mines, and from in any way whatsoever carrying out any conspiracy for the execution of any of said purposes." In other clauses of the injunction, defendants are enjoined from maintaining and carrying on a conspiracy with the intent to evade the provisions of the Industrial Court Act, and to prevent persons from appearing before it by picketing or otherwise. The order expressly excluded from its purpose and effect the enjoining of any person against quitting his employment. Thereafter the Attorney General filed an affidavit charging that the defendants had violated the injunction by combining to order and compel a strike at two mines in Crawford County. At a hearing at which defendants were represented by counsel, the court found reasonable ground for believing that those of defendants who are plaintiffs in error here had violated

the injunction. They were arrested and brought before the court, whereupon the court directed the filing of a formal accusation of contempt against them. The defendants answered attacking the validity of the Industrial Court Act and of the permanent injunction, averring that they had not done anything unlawful, and denying that the accusation stated facts sufficient to constitute a violation of the injunction. The court found that the averments of the accusation were sustained, that defendants had directed the strike at the mines in question, that a cessation of work ensued, that it was done wilfully in disobedience to the injunction, and sentenced each of them to imprisonment for a year and to payment of the costs and confinement till the costs were paid.

On appeal, the Supreme Court of Kansas held that the District Court, a constitutional court of general jurisdiction (Constitution of Kansas, § 6, Art. III; General Statutes of Kansas 1915, § 2957), had general power to issue injunctions in equity and that, even if its exercise of the power was erroneous, the injunction was not void, and the defendants were precluded from attacking it in this collateral proceeding; that, aside from the Industrial Court Act, the District Court had power in this case to issue the injunction on principles identical with those applied in abatement of public nuisances. The court relied on the case of *In re Debs,* 158 U. S. 564. It held that, if the injunction was erroneous, jurisdiction was not thereby forfeited, that the error was subject to correction only by the ordinary method of appeal, and disobedience to the order constituted contempt, citing *State* v. *Pierce,* 51 Kans. 241. An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the

court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450; *Toy Toy* v. *Hopkins*, 212 U. S. 542, 548. See also *United States* v. *Shipp*, 203 U. S. 563, 573.

It is to be observed, moreover, that the injunction suit in the District Court was not the enforcement of the Industrial Relations Court Act. It was a proceeding wholly independent of that act and the District Court in entertaining it did not depend on the constitutionality of that act for its jurisdiction or the justification of its order. The State Supreme Court, it is true, did go into an extended discussion of the constitutional principles upon which the Industrial Court Act could in its opinion validly rest, but, as the court itself had before intimated, the discussion was not necessary to the conclusion which it had reached in sustaining the sentence for contempt.

As the matter was disposed of in the state courts on principles of general, and not federal law, we have no choice but to dismiss the writ of error as in No. 154.

Writs of error dismissed.

ATCHAFALAYA LAND COMPANY, LIMITED, ET AL. *v.* F. B. WILLIAMS CYPRESS COMPANY, LIMITED.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 106. Argued March 3, 1922.—Decided March 13, 1922.

A statute limiting the time within which actions may be brought to annul state patents for land and which, applied to a given case,

prevents a senior grantee or contractee from asserting his rights, accrued before the passage of the statute, against a junior patentee of the same land, does not deprive him of property without due process or impair the obligation of his contract if it allows a reasonable time after its enactment within which his suit may be begun. P. 197.

146 La. 1047, affirmed.

ERROR to a judgment of the Supreme Court of Louisiana reversing a judgment in favor of the present plaintiffs in error in a suit to have the Land Company's title adjudged superior and the Cypress Company's patents annulled.

Mr. Walter J. Burke, with whom *Mr. Ventress J. Smith, Mr. F. Ernest Delahoussaye, Mr. Charles F. Consaul* and *Mr. Jacob H. Morrison* were on the briefs, for plaintiffs in error.

The grant by the State to the Board of Commissioners was a grant *in praesenti.* The terms of this grant further left it entirely at the option of the grantee when to require a title deed to be executed to it.

Decisions of the State Supreme Court interpreting this very contract in two cases as withdrawing the lands from sale by the State and conveying a continuing title deed became a part of the contract.

After the grant by the State to the Board, the Register of the State Land Office was deprived of any authority to sell the lands in the name of the State.

After the Board, under the specific legislative authority to sell the lands granted it, did sell all of its rights, with the right to secure title deed in the same manner as the Board might do, the legislature could not, directly or indirectly, impair the contract by changing the term of its execution, or rights of enforcement, from a continuing one, to one limited by a statute of limitation.

A legislative provision to the effect that, whenever a patent issued by the Register of the State Land Office is

signed by the Governor and is recorded in the manner prescribed, it is unassailable after six years, must be interpreted to refer to such lands as the State owns and for which it might authorize the issuance of patent. The statute is one of repose for the benefit of owners of patent lands where the right of the officer to issue might be doubted. It cannot be interpreted to prevent the owners of property rights from contesting a wrongful divestiture of title. Such an application in the instant case would be a divestiture of vested rights without due process of law, and an impairment of the contract.

While the parties to a contract must contract with knowledge that the legislature may change the remedy, may even change the prescriptive term within which the parties may sue to enforce contracts, this rule does not apply to clauses written in the contract, of its substance and nature, either as to the mode of executing the contract between the parties, or as to the time within which it must be executed. That which is written in the contract, as part thereof, is so much of the essence of the obligation that it cannot be affected by legislation.

Mr. Charles F. Borah, Mr. J. Blanc Monroe and *Mr. Monte M. Lemann,* for defendant in error, submitted.

Mr. Justice McKenna delivered the opinion of the court.

Suit by the Atchafalaya Land Company to have declared null and void certain patents issued by the Register of the State Land Office of Louisiana to a partnership composed of John N. Pharr and Frank B. Williams, of which the F. B. Williams Cypress Company became grantee May 23, 1903; and that the lands of the patents be adjudged to have been included in the grant of the State to the Board of Commissioners of the Atchafalaya

Basin Levee District anterior to the patent to Pharr and Williams, and by the Board of Commissioners transferred to Edward Wisner and J. M. Dresser, under a contract dated July, 1900, confirmed April 11, 1904, and by them to the Land Company.

It was prayed that the Board of Commissioners be cited to join in the vindication of the Land Company's rights. The Board responded to the citation by intervening, answering and joining in the prayer of the bill. The other plaintiff in error also intervened.

The answer of the Cypress Company brought into the case a statute of limitations of the State approved July 5, 1912, Act No. 62, that prescribes the time of bringing suits which attack patents from the State, or any transfer of property by any subdivision of the State.[1]

This suit was not brought within the time prescribed.[2]

The following are the other facts, stated narratively:

The State of Louisiana is the grantee under the Acts of Congress of 1849 and 1850 of the swamp and overflowed lands in the State.

The State in 1890 [Act No. 97] created the Board of Commissioners of the Atchafalaya Basin Levee District

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[1] "Be it enacted by the General Assembly of the State of Louisiana, etc., That all suits or proceedings of the State of Louisiana, private corporations, partnerships or persons to vacate and annul any patent issued by the State of Louisiana, duly signed by the Governor of the State and the Register of the State Land Office, and of record in the State Land Office, or any transfer of property by any sub-division of the State, shall be brought only within six years of the issuance of patent, provided, that suits to annul patents previously issued shall be brought within six years from the passage of this Act."

[2] It was not brought until April 26, 1919, that is, six years and nearly ten months after the passage of the statute, nearly nineteen years after Wisner and Dresser acquired the claim of the Board of Commissioners, and more than twenty-eight years after the Pharr and Williams patents were recorded.

and constituted it a corporate body. The act created the Levee District and declared that all lands in the District then belonging to the State or that might thereafter be acquired, were thereby granted to the Board of Commissioners of the District. And it was further provided, to accommodate the time for redemption of the lands sold for taxes, even those forfeited for non-payment, after the expiration of six months from the passage of the act, that it should be the duty of the State Auditor and the Register of the State Land Office to convey the lands to the Board of Commissioners whenever requested to do so by the Board or its president; and that after the recording of the instruments of conveyance the title and possession of the lands should vest absolutely in the Board, its successors or grantees.

This request was not made but the Board nevertheless sold to Edward Wisner and John M. Dresser the lands in controversy and bound itself in the instrument of conveyance "to lend itself, with all its rights, powers and privileges and prerogatives to perfect its title or the title acquired under this agreement to all lands which it could have and [Wisner and Dresser] can now justly lay claim to and to do so whenever so requested, . . ."

The Land Company has become the assignee and representative of Wisner and Dresser with their rights. The Lumber Company has acquired rights to the timber on the land and to that extent claims to be entitled to call for a conveyance.

The Board of Commissioners in view of having bound itself to make deed to Wisner and Dresser unites with the Land Company and the Lumber Company, as we have said, to seek the relief desired by them, which includes the cancellation of patents issued to the partnership composed of John N. Pharr and F. B. Williams (of which the Williams Cypress Company is grantee) and the recognition of title in the Land and Lumber Companies.

To the cause of action thus stated, the Cypress Company pleaded the statute of the State heretofore referred to limiting the time of suit.

In reply to the plea of the statute the Land Company and interveners averred that its application would violate the Constitution of the United States in that it would deprive them of their property without due process of law, and would impair the obligation of the contract entered into between the State and the Board of Commissioners of the Levee District and Wisner and Dresser and their assignees.

The specification of this effect is that the grant from the State to the Board of Levee Commissioners took from the State the right to otherwise dispose of the lands, and further, that the right to acquire by transfer from the State was perpetual, and that this right constituted a contract, and the right to demand perfection of the title was in the Board of Commissioners or its assignees, and that these rights were the obligation of the contract, and would be violated by the prescription act.

The trial court (19th Judicial District Court in and for the Parish of Iberia) accepted this view and adjudged to the Land Company and interveners the relief and judgment prayed for.

Upon appeal of the Cypress Company the Supreme Court reversed the decree and adjudged that the plea of prescription should have been sustained, and that the demands of the Land Company and interveners should have been denied and rejected.

The court recited the facts, as we have stated them, and that, within six months after the statute was passed (July 8, 1890) granting the lands to the Board of Commissioners, Pharr and Williams made cash purchases of the lands now in controversy and obtained the patents in contest which were promptly recorded. The court stated further that Pharr sold his interest in the lands to Williams in 1892

and Williams sold the lands to the Cypress Company in 1903 and the deed was duly recorded, and that the Company immediately went into possession of the lands and exercised ownership upon them, and has ever since exercised ownership in various ways to the date of filing its answer, and it and its grantors have since 1890 paid the taxes on the lands. The court pointed out that no instrument of conveyance was ever made to the Board of Commissioners nor was there any request made for the same as provided for in the Act of 1890.

The court decided these were indispensable conditions and, they not having been performed, no indefeasible title passed or could pass to the Board or its assignees. Or, to quote the court, it quoting a state decision, " the board of commissioners of the levee district could not convey a perfect title, or title indefeasible at the instance of the state, for any land in the district, before the board had obtained and recorded an instrument of conveyance of the land, in the manner required by the statute creating the levee district," and that until such time " the lands remained under legislative control by the state, as well after as before the board of commissioners contracted with Wisner and Dresser." The conclusion of the court was that " the Legislature, therefore, had power, at any time, to limit the time within which the board of commissioners of the levee district could lay claim to lands that had been disposed of by the state directly in favor of individuals or private corporations ", and that this power was exercised by the act of prescription. It was the decision of the court, therefore, that the Land Company's predecessors, Wisner and Dresser, did not acquire a vested interest in the lands as plaintiffs in error contend.

Plaintiffs in error vigorously contest the conclusions of the court and contend that they are contrary to prior decisions. The exigencies of the case do not call for an arbitration of the contest. We are concerned alone with the

power of the State to pass the statute of limitations of 1912, and we agree with the Supreme Court that such statutes are valid if they allow a reasonable time after their enactment for the assertion of an existing right or the enforcement of an existing obligation, and certainly the condition was satisfied by the statute of 1912. Besides having over six years after its enactment to assert their rights, plaintiffs in error, adding their time and that of their predecessors, had nearly a quarter of a century to confirm and fix whatever rights they had to the lands in controversy.

Passing, however, all considerations of details and local aspects of the case, we are of the opinion that none of the invoked provisions of the Constitution of the United States is offended even under the construction plaintiffs in error give to the asserted grant to the Board of Commissioners and its conveyance to Wisner and Dresser. The act of prescription was a proper exercise of sovereignty. The State could recognize, as it did recognize, that there might be claims derived from it, asserted or to be asserted, rightfully or wrongfully, involving conflicts which should be decided and quieted in the public interest, and therefore, enacted the statute. And such is the rationale of statutes of limitations. They do not necessarily lessen rights of property or impair the obligation of contracts. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate, the requirement is legal, and its justice and wisdom have the testimony of the practices of the world.

Decree affirmed.

LEVINSON *v.* UNITED STATES ET AL.

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

No. 145. Argued March 3, 1922.—Decided March 13, 1922.

1. A suit in the nature of interpleader by the United States against one to whom it had given a bill of sale of a vessel and another whose bid had been overlooked, to determine their rights, *held* cognizable in equity (all parties consenting) although the plaintiff did not stand indifferent but sought to maintain the higher bidder's claim and thus get the higher price. P. 200.
2. Under the Act of March 3, 1883, c. 141, § 5, 22 Stat. 599, governing sales of vessels not needed for the Navy, the President is empowered to direct a departure from the prescribed manner of sale, and his direction to the Secretary of the Navy to sell "for such price as he shall approve," empowered the latter to sell to the lower of two bidders, notwithstanding the advertisement was that the sale would be to the highest bidder. P. 201.
3. The Secretary, overlooking a higher bid by mistake, approved a lower one as the highest and issued a bill of sale of the vessel accordingly. *Held*, that his action was conclusive in favor of the lower bidder and that the mistake, not attributable to the latter, gave the competitor no equitable claim to the title. P. 201.
4. An appeal here from a decision of the Circuit Court of Appeals adjudging property to one of two interpleaded defendants, *held* not affected by entry of decree, under that court's mandate, in the District Court, and the act of the plaintiff in delivering the property under it. P. 202.

267 Fed. 692, reversed.

APPEAL from a decree of the Circuit Court of Appeals which reversed a decree of the District Court in favor of Levinson and adverse to Johnson in a suit in the nature of an interpleader brought against them by the United States to determine their respective rights in a vessel.

Mr. John A. McManus for appellant.

Mr. Henry Amerman for Johnson, appellee.

The Secretary of the Navy, acting under due authority, advertised and offered to sell on July 11, 1919, the steam

yacht "Wadena", for cash to the highest bidder, and he was bound by his written offer of sale.

The words "for such price as he shall approve," appearing in the executive order, did not give to the Secretary an unlimited discretion to dispose of government property on his mere approbation or sanction, unless he expressly so announced in his offer of sale.

Under the facts appearing in the record, the Secretary was obliged to sell the "Wadena" to Johnson.

A mistake was made, and whether it was mutual or otherwise, equity will relieve. The acceptance of Levinson's bid was based on the belief that it was the highest. The action of the Secretary was taken under a complete misapprehension of fact on his part, and on the part of Levinson, that there was no higher bid. Both parties were unaware of Johnson's bid. *United States* v. *Walsh,* 115 Fed. 697, 702; *Williams* v. *United States,* 138 U. S. 514, 517; *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U. S. 373.

The Secretary's refusal to deliver the "Wadena" to Levinson was necessary in the interest of public policy. *McKnight* v. *United States,* 98 U. S. 179, 186.

Mr. Solicitor General Beck and *Mr. Blackburn Esterline,* Special Assistant to the Attorney General, by leave of court, filed a brief on behalf of the United States, as *amici curiae.*

Mr. Justice Holmes delivered the opinion of the court.

This is a controversy between the appellant, Levinson, and Johnson, one of the appellees, as to which of the two is entitled to the steam yacht Wadena. The yacht had been taken for the purposes of the late war and subsequently was offered for public sale by the Secretary of the Navy in pursuance of an Executive Order of January 7,

1919, authorized by the Act of March 3, 1883, c. 141, § 5, 22 Stat. 599. Levinson sent in a bid complying with the terms of the offer, was declared the highest bidder and sent his check for the residue above the required deposit. Thereupon he received a bill of sale under the seal of the Department dated September 3, 1919, acknowledging that he had become the legal purchaser and had paid the price, and stating that the vessel "is hereby delivered to and declared to be the property of said Morris Levinson." On September 8 it was discovered that Johnson had sent in a higher bid which had been misplaced and overlooked. After making the discovery the Navy Department refused to give up the Wadena to Levinson and attempted to rescind the transaction with him. He insisted on his rights and Johnson on his side offered to pay the amount of his bid and also demanded delivery of the yacht. The United States thereupon brought the present bill to determine the rights of the parties, and although it did not stand indifferent and has endeavored to maintain Johnson's right and so to get the higher price, not to speak of Levinson's claim in contract, still as all parties consented to the jurisdiction we do not feel called upon to raise a question upon that score. See *McGowan* v. *Parish,* 237 U. S. 285, 295, *et seq.*

The District Court decided in favor of Levinson. Both Johnson and the United States appealed. The Circuit Court of Appeals dismissed the appeal of the United States on the ground that it was a mere stakeholder, but, one Judge dissenting, reversed the decree of the District Court and decided in favor of Johnson, on the ground that the Secretary of the Navy had no authority to accept any other than what was the highest bid in fact. 267 Fed. 692.

We are of opinion that the Circuit Court of Appeals construed the authority of the Secretary of the Navy too narrowly and that the decision of the District Court was right. The Act of 1883, § 5, provides for an appraisal

and an advertisement for three months setting forth the appraised value and that the vessel will be sold to the offerer of the highest price above the appraised value, &c. The section concludes " But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing." The power of the President to direct a departure from the statute is not confined to a sale for less than the appraised value but extends to the manner of the sale. The word " unless " qualifies both the requirements of the concluding clause. The executive order seemingly so construes the statute, for it merely provides that if the former owner of the vessel will not purchase at the appraised value the Secretary of the Navy shall sell at public sale " for such price as he shall approve." The Secretary construed the order to like effect. He did not advertise for three months and he allowed a variation from the statute in the form of deposit required.

It seems to us that the practices of ordinary business dealing ought so far to bind the United States that the ostensible authority given by the executive order, the Secretary's declaration that Levinson's bid was the highest, his approval of the price, and his execution of a bill of sale, should be held conclusive in favor of Levinson. The fact that the Secretary advertised that he would sell to the highest bidder could not limit his authority or diminish the effect of his acts. Even if Johnson's bid had made a contract automatically by being the highest, it would not follow that Levinson's title was bad. But a bid had no such effect, as the right to reject it was reserved. We can see no justification beyond the wish to secure a higher price, for the refusal to allow the appellant to remove his yacht. The title passed to him upon the execution of the bill of sale. *Hatch* v. *Oil Co.,* 100 U. S. 124, 128.

It is suggested that there is no longer a question before the Court because it is said that the District Court entered a decree in pursuance of the decision of the Circuit Court of Appeals and that the Navy Department thereupon delivered the yacht to Johnson. This was a further departure from the position of stakeholder assumed by the United States but cannot affect the decree to be entered upon its bill. It is urged for Johnson that there was a mistake that relieved the Government. There was no mistake that Levinson had anything to do with or that would warrant a court of equity in requiring him to give up the title that he acquired.

Decree of Circuit Court of Appeals reversed.

Mr. Justice Clarke was absent and took no part in the decision.

Mr. Justice McKenna, dissenting.

The opinion, in my view, gives too much prominence to the action of the Navy Department and, in effect, determines the case by it as if the controversy were between the Department and Levinson, and not between him and Johnson. It caused the controversy, indeed, and by its mistake gave a right to Levinson to which Johnson was entitled. Has the law no redress for the injury thus inflicted? It would be a reproach to it if it have not.

Let me repeat the facts. In pursuance of a statute, and in the manner directed by it, the Navy Department offered the yacht Wadena for sale. It was the duty of the Department to the Government of which it was an instrument to accept the highest bid, and it owed a duty as well to him who should be the highest bidder. Johnson responded to the offer of sale and his bid was the highest. By mistake, however, the bid was assigned to a boat of similar name. In consequence of the mistake Levinson was considered the highest bidder and a bill of sale was issued to him. Before the delivery of the yacht, however,

the mistake was discovered and the yacht was retained by the Department. This being the situation, the Department, not in its own interest, not in partiality to either claimant, caused this suit to be brought that the rights of the claimants could be adjudicated. The suit is a disclaimer of interest or favor; it is in the nature of a bill of interpleader and the contest is remitted to the interpleaded, Levinson and Johnson, and the law of their rights. And that law is dependent upon what they did, not upon what the Navy Department did,—upon the priorities between them, not upon a chance advantage. These are the elements that should determine judgment, whether we assign to accident or mistake the action of the Department in declaring Levinson to be the purchaser of the yacht. I need not dwell upon the sufficiency of either as a ground of relief.

Accident is said to be one of the oldest heads of equity jurisdiction, and a learned authority says its first and principal requisite is, that, by an event not expected nor foreseen, one party has without fault and undesignedly undergone some legal loss while another party has acquired a legal right which it is contrary to good conscience for him to retain and enforce. 2 Pomeroy, § 824.

The requisites and consequences are in this case, and exhibit the relative situations and rights of Levinson and Johnson. Levinson has acquired a right to which Johnson was entitled and which Johnson lost by an accident to which he was not a contributor. The law in its sufficiency and prudence meets such contingent happening and gives a remedy to prevent or redress its injury. That Levinson was given a bill of sale is not a serious deterrent. As the bill of sale could have been refused it can be disregarded as an element of decision.

Mistake as well as accident (mistake may be considered a corollary of accident) is a ground of relief which the law's remedial consideration furnishes for the redress of

injustice. And that a mistake was made cannot be denied, and to which no act or negligence of Johnson was accessory. He responded to the solicitation of the Navy Department executing the law, and he was entitled to the preference that the law commanded. It was given to another by mistake. The law will not permit him to retain it, and this is a necessary deduction, I confidently believe and, therefore, confidently express, though it is opposed by the judgment of my brethren. I repeat, that there was a mistake cannot be disputed, and I cannot think that its consummation protects it from correction and that a remedy should be denied because it is needed, all of its conditions existing.

It was the view of the Circuit Court of Appeals in a well reasoned opinion that the Secretary of the Navy had "no authority to deliver the bill of sale to Levinson" but was "bound to deliver it to Johnson." There is much to sustain the decision; I, however, base my dissent upon the views that I have expressed, and think that the judgment of the Circuit Court of Appeals should be affirmed.

STATE OF TEXAS *v.* EASTERN TEXAS RAILROAD COMPANY ET AL.

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

STATE OF TEXAS ET AL. *v.* UNITED STATES, McCHORD ET AL., CONSTITUTING THE INTERSTATE COMMERCE COMMISSION, ET AL.

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

Nos. 298 and 563. Argued November 15, 16, 1921.—Decided March 13, 1922.

1. Where a statute is susceptible of two constructions, one raising grave and doubtful constitutional questions and the other not, it is the duty of the court to adopt the latter. P. 217.

2. Paragraphs 18–20 of § 1 of the Act to Regulate Commerce, added by § 402 of the Transportation Act of 1920, which regulate the construction and acquisition of new lines of railroad and the extension and abandonment of old lines, are not to be construed as clothing the Interstate Commerce Commission with authority over the discontinuance of the purely intrastate business of a railroad whose situation and ownership are such that interstate and foreign commerce will not be affected by that business. P. 218.

Reversed.

THE first of these cases is an appeal from a decree of the District Court for the Western District of Texas dismissing a suit removed from a court of that State, in which the State of Texas sought to enjoin the above-named railroad company and some of its officers from ceasing to operate its road in intrastate commerce. The other is an appeal from a decree of the District Court for the Eastern District of Texas dismissing the bill in a suit brought by the State and its Attorney General, in that court, against the United States, the members of the Interstate Commerce Commission, the United States Attorney General, and the above-named and two other railroad companies, to annul an order and certificate of the Interstate Commerce Commission purporting to permit the abandonment of the same railroad line upon certain conditions.

Mr. Tom L. Beauchamp, with whom *Mr. C. M. Cureton,* Attorney General of the State of Texas, *Mr. Bruce W. Bryant* and *Mr. Walace Hawkins* were on the briefs, for appellants.

Under the authority given by the statute, it may be said that the power of the State to forbid extensions has been superseded. It may with good reason be argued that extensions become necessary to interstate commerce whether agreeable to the State in which they are made or not, and this may be given as a reason for the insertion of paragraph 21, authorizing the Commission to require them. If that same argument applied to abandonments,

paragraph 21 should then have included abandonments, as well as extensions, but it does not.

Congress did not intend by the act to exclude the authority of the State. The full purpose is served and the language of the law has been complied with when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating the corporation and to which it owes its existence and with which it has a charter contract and obligation.

If the acts of the Commission under paragraphs 18–22 are judicial, the paragraphs are unconstitutional. This is determined by the matter at issue before them and its nature and not the nature of the Commission.

A State may control the physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of their charter contracts, and the laws of the State which enter into and become a part of them, so long as such action does not become a direct burden on interstate commerce or embarrass Congress in the exercise of any power with which it is invested by the Constitution. *Baltimore & Ohio R. R. Co.* v. *Maryland,* 21 Wall. 456, 473; *Northern Securities Co.* v. *United States,* 193 U. S. 347; *Gibbons* v. *Ogden,* 9 Wheat. 1, 206, 208.

When the Federal Government, acting through Congress or its committee or commission, designated the Interstate Commerce Commission, withdraws the patronage of interstate commerce from the Eastern Texas Railroad, it has reached the limit of its authority. *Louisville & Nashville R. R. Co.* v. *Kentucky,* 161 U. S. 677, 702; *Northern Securities Co.* v. *United States, supra; Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262. Is it conceivable that the State, having a commerce over which it exercises exclusive control, cannot control a corporation engaged in such commerce?

Though the Eastern Texas retains its corporate name, it has lost its corporate identity; though its obligations to the State of Texas have not been fulfilled, it has nevertheless become a part of the system of the St. Louis Southwestern Railway Company and is subject to all of the laws of the State and of the United States governing it as a part of the system of the St. Louis Southwestern Railway Company. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic & Commerce Association,* 247 U. S. 490.

The Interstate Commerce Commission has no authority under the statute to grant to a railroad company a certificate of public convenience and necessity authorizing it to abandon a part of its main line track in the absence of a showing that the entire system was losing money. *Puget Sound Traction Co.* v. *Reynolds,* 244 U. S. 574.

Mr. E. B. Perkins, with whom *Mr. Daniel Upthegrove* and *Mr. E. J. Mantooth* were on the briefs, for appellee railroad companies.

Mr. Solicitor General Beck for the United States, in No. 563. *Mr. Robert P. Reeder* was on the brief.

If the construction advanced by Texas be accepted, this portion of the Transportation Act loses its chief efficacy, because of the unified character of the business of transportation for most practical purposes. If the Interstate Commerce Commission only had power to authorize the carrier to abandon its interstate business and were impotent to give like authority to abandon its intrastate commerce, then in most cases the certificate of authority would not be worth the paper it was written on. For a railroad corporation does not abandon its railway unless the business has ceased to be profitable and, if the business be unprofitable when the railroad has the advantage of revenue from both interstate and intrastate traffic, it

would be even more so if it abandoned only one part of its business. In such event its income would be lessened but its expenses would not be appreciably diminished.

To require the consent of both the Interstate Commerce Commission and the State Railroad Commission would mean the very conflict of authority which the law sought to avoid by explicitly providing that the carrier may act upon the certificate of the Commission.

Having given the State, as it were, its day in court, the act (paragraph 20) provides that the Commission in issuing the certificate "may attach . . . such terms and conditions as in its judgment the public convenience and necessity may require." It was evidently intended that the Commission should take into account the just claims of the State. Indeed, the question of public convenience and necessity is left to the Commission. The act does not say that the certificate may contain such terms and conditions as the interest of the interstate commerce or even of the Federal Government may require; it is the public convenience and necessity that the Commission is to consider.

Then follows the significant statement that the carrier may, without securing approval other than such certificate, comply with the terms and conditions and proceed with the construction, operation, or abandonment covered thereby.

What can this mean except the authority to go ahead with the extension or abandonment without consulting any other authority?

The State may not seriously claim that the Eastern Texas Railroad should continue operations at a loss. *Bullock* v. *Railroad Commission,* 254 U. S. 513; *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396.

If Congress may directly or through appropriate agencies condemn defective or inadequate equipment and facilities of interstate carriers irrespective of the nature of

the traffic, whether interstate or intrastate, *a fortiori,* it may authorize a railroad engaged in interstate transportation, which consists mainly of an accumulation of all or many of these things, to cease operations.

If the commerce power be not broad enough to determine whether an interstate carrier, even though incorporated under the laws of the State, may abandon its business for lack of public patronage as an entirety, and without respect to the division between interstate and intrastate commerce, then it is obvious that our political institutions are not in harmony with the present conditions of human society.

The banks, in loaning their credit and furnishing the necessary means of constructing the railroad, take no account of the legal distinction between interstate and domestic commerce. The contractors, engineers, and builders of the road are also unable to regulate their operations by such distinction. So of organized labor; it deals with a system as a whole.

The very act of transportation again illustrates the indivisibility from a practical standpoint and not as a legal abstraction of this indivisible thing that we call commerce.

If, therefore, this legal distinction which seeks to make a duality of an essential unity does not conform to the nature of these economic forces, then it is obvious that our political institutions are lagging behind the economic forces which they are designed to protect and promote. Fortunately, there is no such rigidity.

This court has always recognized that, as human society became more concentrated and complicated, all powers, federal and state, have a necessary reaction upon each other. With or without political institutions, steam and electricity have woven the commercial intercourse of the country into substantial unity, and this unity is therefore an indivisible unity. Therefore, it was futile for the

political government in solving many practical problems to attempt to make any division. A full century after the Constitution was adopted Congress, yielding not merely to the so-called granger movement but to the widespread desire of citizens of all classes, passed the first interstate commerce law; and from that time to the passage of the Transportation Act, legislation has been a series of advancing steps whereby Congress, in behalf of the whole Nation, seeks to end the abuses of transportation and to regulate the commerce of the Nation. To legislate with reference to interstate commerce without assuming an incidental but necessary control over intrastate commerce, had become impracticable with the progress of human society.

This court has recognized in many cases as a concrete proposition that Congress has full and plenary power to regulate interstate carriers as instrumentalities of commerce and that this power can not be lessened, hampered or obstructed by the consideration that, of necessity, these interstate carriers are likewise engaged in intrastate business, and that intrastate business is necessarily affected. If the duality of interstate and intrastate commerce be longer a fact, then they are as the Siamese twins, two bodies and yet united by a common ligature.

The Government, apart from its power under the commerce clause, owes to these corporate instrumentalities of commerce a direct obligation, due to the fact that they were taken by the Government for public use, and all the obligations that arise under that public use must be met by the power under which they were taken over, the war power.

This power was assumed not merely to carry on the war, but at the present time the Government, because it utilized the railroads to carry on the war, has become a creditor to the extent of many millions of dollars of the corporate instrumentalities which it operated. It has the

power, like any other lien creditor, before it releases the property, to which it must look as security for the amounts due it, to see that that property is not sacrificed by undue regulation.

The Government's claim rises higher than that of a mere creditor. Under the Transportation Act it has guaranteed for a period of six months the standard return to the railroads as measured by prewar experience, and it has further directed the Commission, in order to rehabilitate the railroads, that it shall authorize rates that will enable the railroads to secure for a period of years an adequate return upon their investment. If, during such period of rehabilitation, Congress provides that a railroad should not increase its obligations by extending its lines, or, on the other hand, should not lessen the value of the security by abandoning its road, or should not increase the guaranty of the Government by running the road at a loss, why is not such an exercise of power the exercise of the war power and as such an appropriate means to discharge the important duty of rehabilitating the railroads, which suffered such grievous injury during the period of governmental control?

If Congress has power to provide adequate transportation for interstate commerce and to that end may protect the credit of the carriers by supervising and regulating the issue of their securities and the expenditure of the capital funds, why may it not for the same purpose prevent unwise expenditures for unnecessary extensions and the absorption of their means and the destruction of their credit through the continued operation of unnecessary lines? The power to regulate presupposes the existence of the thing to be regulated and would be void without the power to "foster" and "protect" it. If a State may prevent an abandonment of a line within its borders which is in the opinion of Congress sapping the resources of an instrumentality of commerce, or is reducing its

capacity and usefulness, the State may impair or destroy this instrumentality of interstate commerce and thus destroy interstate commerce itself.

Mr. Walter McFarland, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

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

By § 402 of the Transportation Act of 1920, c. 91, 41 Stat. 456, 477, several new paragraphs were added to § 1 of the Act to Regulate Commerce as theretofore amended. Paragraphs 18, 19 and 20 are copied in the margin.[1] By

[1](18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and

them Congress has undertaken to regulate the construction and acquisition of new or additional lines of railroad and the extension and abandonment of old lines, and to invest the Interstate Commerce Commission with important administrative powers in that connection. Like the act of which they are amendatory, these paragraphs are expressly restricted to carriers engaged in transporting persons or property in interstate and foreign commerce.[2]

Our present concern is with the provisions relating to the abandonment of existing lines. They declare that

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said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

[2] See amended paragraphs (1) and (2) of the Act to Regulate Commerce as set forth in § 400 of the Transportation Act of 1920.

" no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment " (par. 18); that when application for such a certificate is received the Commission shall cause notice thereof to be given to the Governor of the State wherein the line lies and published in newspapers of general circulation in each county along the line, and shall accord a hearing to the State and all parties in interest (par. 19); that the Commission may grant or refuse the certificate in whole or in part and impose such terms and conditions as in its judgment the public convenience and necessity require; and that when the certificate is issued, and not before, the carrier may, " without securing approval other than such certificate," comply with the terms and conditions imposed and proceed with the abandonment covered by the certificate (par. 20).

The Eastern Texas Railroad Company, a Texas corporation, owns and operates in that State a line of railroad 30.3 miles in length. Approximately three-fourths of the traffic over the road is in interstate and foreign commerce and the rest is in intrastate commerce. The company neither owns nor operates any other line. The road was constructed in 1902 to serve extensive lumber industries, but in subsequent years the adjacent timber was removed and the mills dismantled. The company claims that since 1917 the road has been operated at a loss.

On June 3, 1920, the company filed with the Commission an application for a certificate authorizing it to abandon and cease operating its road, full notice of the application being regularly given. The State declined to appear before the Commission, but others, who were being served by the road, appeared and opposed the application. A full hearing was had and, on December 2, 1920, the

Commission made and filed a report concluding as follows: "Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of the applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of $50,000. A certificate and order to that effect will be issued." The certificate and order were issued and the railroad company indicated its assent to the condition imposed, but, so far as appears, no one sought to purchase under the condition.

While the application was pending before the Commission and before the certificate was issued, the State brought a suit in one of its courts against the railroad company and some of its officers to enjoin them from ceasing to operate the road in intrastate commerce. The bill was brought on the theory that under the laws of the State the company was obliged to continue the operation of the road in intrastate commerce; that the provisions of the Transportation Act were unconstitutional and void, if and in so far as they authorized the abandonment of such a road as respects intrastate commerce, and that the company in asking the Commission to sanction such an abandonment was proceeding in disregard of its obligations to the State. At the instance of the defendants the suit was removed to the District Court of the United States for the Western District of Texas. During the pendency of the suit the Commission issued the certificate and the defendants then sought the benefit of it by a supplemental answer. The court held that the certificate constituted a complete defense, and without a hearing on other issues dismissed the suit. The State appealed directly to this court. That appeal is No. 298.

After the Commission granted the certificate the State brought a suit in the District Court of the United States

for the Eastern District of Texas against the United States, the railroad company and others to set aside and annul the Commission's order and certificate on the grounds, first, that the provisions of the Transportation Act, rightly interpreted, did not afford any basis for granting a certificate sanctioning the abandonment of the company's road as respects intrastate commerce, and, secondly, if those provisions purported to authorize such a certificate, they were to that extent in excess of the power of Congress and an encroachment on the reserved powers of the State. The defendants moved to dismiss the bill as ill founded in point of merits, and the court sustained the motions and entered a decree of dismissal. The State appealed directly to this court. That appeal is No. 563.

Counsel attribute to these cases a breadth which they do not have; and for obvious reasons we shall deal with them as they are, not as they might be.

Up to the time the Commission made the order granting the certificate a part of the commerce passing over the road was interstate and foreign, that is, was bound to or from other States and foreign countries. It is not questioned that Congress could, nor that it did, authorize the Commission to sanction a discontinuance of this interstate and foreign business. Neither is it questioned that the Commission's certificate was adequate for that purpose. The only matters in controversy are whether, by paragraphs 18, 19 and 20, Congress has assumed to clothe the Commission with authority to sanction the entire abandonment of a road such as this, and, if so, whether the power of Congress extends so far.

The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will

any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.

If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408.

Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce. *Minnesota Rate Case*, 230

U. S. 352, 418; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done.

These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business.

Whether, apart from the Commission's certificate, the railroad company is entitled to abandon its intrastate business is not before us, so we have no occasion for considering to what extent the decisions in *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 U. S. 396, and *Bullock* v. *Railroad Commission of Florida,* 254 U. S. 513, may be applicable to this road.

As the District Courts both accorded to the Commission's certificate a wider operation and effect than can be given to it consistently with the provisions of paragraphs 18, 19 and 20 as we interpret them, the decrees must be reversed and the causes remanded for further proceedings in conformity to this opinion.

Decrees reversed.

IRWIN *v.* WRIGHT, COUNTY TREASURER OF MARICOPA COUNTY, STATE OF ARIZONA, ET AL.

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

No. 110. Submitted January 24, 1922.—Decided March 20, 1922.

1. A suit to enjoin a public officer from enforcing a statute is personal and, in the absence of statutory provision for continuing it against his successor, abates upon his death. P. 222.
2. The Act of February 8, 1899, c. 121, 30 Stat. 822, does not authorize such revivor against state officers, nor does § 461 of the Arizona Civil Code. P. 222.
3. A suit against the members of a continuing public board, such as a board of county supervisors in Arizona, does not abate when members retire, and their successors may be substituted. P. 224.
4. Injunctive relief against collection of taxes unlawfully assessed on lands in Arizona and against future assessments, may be obtained in a suit against the Board of Supervisors of the county, in view of their functions under the Arizona law. P. 226.
5. Lands entered within a reclamation project are not subject to state taxation before the equitable title has passed to the entryman; and that title does not pass until the conditions of reclamation and payment of water charges due at time of final proof, imposed by the amended Reclamation Act, have been fulfilled in addition to the requirements of the Homestead Act. P. 226.
6. The Act of June 23, 1910, which permits entrymen within reclamation projects who have proved full compliance with the Homestead Law to assign in whole or in part to other persons, subject to the requirements of the Reclamation Act, was designed to enable entrymen, whose entries were cut down to smaller farm units prescribed by the Secretary of the Interior, to dispose of their surplus to others who would pursue the requirements of the Reclamation Act, and did not operate to subject such entries to state taxation. P. 231.
7. With respect to taxation, mining claims differ from other claims to public lands, in that the mining interest, with the right to appropriate the mineral, arises from discovery and location and is independent of patent. P. 231.

8. Reclamation entries are not taxable by the State as "equities" before the size of farm units has been fixed, or before the final certificates have been issued to the entrymen by the Government. P. 232.

Reversed.

APPEAL from a decree of the District Court dismissing a bill filed by the appellant, on behalf of himself and others in like situation, to enjoin the assessment and collection of state taxes on lands within a federal reclamation project.

Mr. Patrick H. Loughran and *Mr. Ernest W. Lewis* for appellant. *Mr. M. J. Dougherty, Mr. G. A. Rodgers* and *Mr. F. H. Swenson* were also on the brief.

Mr. James M. Sheridan, Mr. Geo. D. Christy, Mr. R. E. L. Shepherd and *Mr. Joseph E. Noble* for appellees.

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

The appellant Irwin, a citizen of California, filed his bill of complaint in the District Court against the Treasurer, the Assessor, the Attorney, the Sheriff, and the members of the Board of Supervisors, of Maricopa County, Arizona, citizens of Arizona. He averred that he had an interest, as a homestead entryman, under the General Homestead Act of Congress of May 20, 1862, c. 75, 12 Stat. 392, and the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388, in land included within the Salt River Reclamation project in Maricopa County, that he had not fulfilled many of the conditions by him to be performed before the title to the land would vest in him, that meantime it was the property of the United States and not subject to taxation by a State, that he brought the suit in behalf of himself and also in behalf of other reclamation homestead entrymen within the Salt River Project in Maricopa County, and their assigns, similarly situated, desiring to

avail themselves of the benefits of it, that the defendants had levied and assessed taxes against these homestead premises of plaintiff and the others in whose interest he sues, for several years, and had demanded payment of them, and threatened to collect them by suit and sale of such lands, and to assess them in the future, that such action was in contravention of Article IV, § 3, of the Federal Constitution, deprived him and his fellow entrymen of a privilege and immunity secured to them as citizens of the United States, deprived them of property without due process of law, and denied them the equal protection of the laws, all under the Fourteenth Amendment. He prayed for an injunction against the defendants and their successors in office and each of them as taxing authorities of Maricopa County from further assessing said lands, collecting the taxes already assessed, or bringing suit to collect the taxes as delinquent or to sell such interests. After answer and reply, the case was heard on an agreed statement of facts. The District Court dismissed the bill on its merits without opinion. This is a direct appeal from the District Court under § 238 of the Judicial Code, as amended January 28, 1915, c. 22, 38 Stat. 804, because the suit is one involving the construction or application of the Constitution of the United States.

On January 24th last, the cause was submitted to the court by counsel for the appellant upon brief, counsel for appellees not appearing. Since that day, a brief has been filed on behalf of appellees and considered by the court. When the case was called, counsel for appellant submitted a motion, suggesting that all the appellees, county officers of Maricopa County, Arizona, who at the time of bringing, hearing and deciding the suit below were charged with the duty of assessing and collecting taxes therein, had, with exception of the sheriff and one of the three members of the Board of Supervisors, retired from office, and that

their successors had been elected and qualified. These successors, the present officers of the county, the appellant asked to have substituted as appellees in this case. The motion was inadvertently granted. The order granting it must be in part vacated.

A suit to enjoin a public officer from enforcing a statute is personal and in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. *Pullman Co.* v. *Croom,* 231 U. S. 571. In *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, substitution was refused, although consent was given by the successor in office. This court said (p. 605):

"In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

In response to the suggestion, Congress passed the Act of February 8, 1899, c. 121, 30 Stat. 822, under which successors of United States officers who have been sued may be substituted for them upon proper showing. In *Caledonian Coal Co.* v. *Baker,* 196 U. S. 432, 442, it was held that the statute authorized such procedure in the case of a territorial judge appointed under a law of the United States. But no authority exists for the substitution of successors of state officers in such cases. We have examined the statutes of Arizona and find none in them. The Arizona Civil Code, 1913, contains the following:

"Sec. 461. An action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on

motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

This does not permit the substitution of a successor for a public official sued personally.

In the *Butterworth Case, supra,* it was sought to justify substitution under an act which read as follows:

" No action, brought or to be brought, in any court of this State shall abate by the death of either of the parties to such action, but upon the death of any defendant, in a case where the action by such death would have abated before this act, the action shall be continued, and the heir, devisee, executor or administrator of the defendant, as the case may require, or other person interested on the part of the defendant, may appear to such action."

This court said (p. 605):

" . . . We are unable to perceive that this statute, either in its terms or its spirit, is applicable to cases like the present one. Neither the heir, devisee, executor or administrator of a deceased official would have any legal interest in such a controversy. Nor, in the case of a resignation, could the successor be said to be 'a person interested on the part of the defendant.' "

What we have said applies to the motion for substitution so far as it relates to Sam F. Webb, sued as County Treasurer, C. W. Cummins, sued as County Assessor, and L. M. Laney, sued as County Attorney, and the order granting the motion as to them is vacated, the motion is denied and the cause is dismissed as against them without prejudice, of course, to new suits against their successors.

It may not be improper to say that it would promote justice if Congress were to enlarge the scope of the Act

of February 8, 1899, so as to permit the substitution of successors for state officers suing or sued in the federal courts, who cease to be officers by retirement or death, upon a sufficient showing in proper cases. Under the present state of the law, an important litigation may be begun and carried through to this court after much effort and expense, only to end in dismissal because, in the necessary time consumed in reaching here, state officials, parties to the action, have retired from office. It is a defect which only legislation can cure.

J. G. Montgomery, county sheriff, still remains as appellee in the case but, as his taxing duties are only connected with the service of process in tax suits, it is doubtful whether, were he the only party here, an injunction against him would give the relief sought. It is not necessary to decide this, however, as will be seen from what follows.

So far as the order already entered substitutes for C. W. Peterson and W. K. Bowen sued as County Supervisors, C. S. Steward and Guy F. Vernon, who have been elected to be their successors, as appellees, it will stand, for the principle to be applied in their case is different. The rule requiring abatement of such suits against officials on their retirement and forbidding substitution of their successors, does not apply when they constitute a board, having a continuing existence. *Marshall* v. *Dye,* 231 U. S. 250; *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Murphy* v. *Utter,* 186 U. S. 95. An examination of the statutes of Arizona as to the composition and duties of this board leaves no doubt that it is a continuing one. A county in Arizona is a body politic and corporate. Section 2388 of the Arizona Civil Code of 1913 provides that " its powers can be exercised only by the board of supervisors or by lawful agents and officers acting under their authority and authority of law." The Board has three members and is vested with very wide and varied powers, acting as a

Board. Code, Title 10, c. IV. Its members exercise official duties only as members of the Board, and a quorum of two may act. Code, § 2408. Every two years, either one or two members are elected, but the retiring members hold until their successors are elected and qualified. Code, §§ 2399, 2400. The motion should be granted so far as it asks the substitution in case of the two supervisors, unless it appears that under the averments and prayer of the bill an injunction against the Board of Supervisors alone will not aid the plaintiff. *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 35, 36. The bill prays an injunction against the collection of taxes already assessed for each of twelve years and against future assessments. Are the functions of the Board of Supervisors such that an injunction against them would prevent such collection and assessment?

Under the Arizona statutes the procedure in the assessment and collection of taxes is that the county assessor makes the original assessment roll against the owners, and files it with the Board of Supervisors. Code, §§ 4860, 4874. The Supervisors or a majority of them constitute a board of equalization, and revise the assessment roll and send it to the State Board of Equalization. Upon its return from the state board, § 4892 provides that the Board of Supervisors shall then proceed to assess taxes according to the valuation specified in the assessment roll, and upon completion of such assessment, the chairman of the Board of Supervisors shall annex to the roll a warrant commanding the county treasurer to collect from the several persons named in the roll the total taxes set opposite their respective names.

It is the duty of the Board of Supervisors to levy the taxes, to direct all suits to which the county is a party, to supervise the official conduct of all county officials charged with assessing and collecting the public revenues, to see that they discharge their duties faithfully, to di-

rect prosecutions for delinquencies (Code, § 2418), to receive report of the treasurer and ex officio tax collector each year of delinquent lists of real estate taxes, to examine and compare them, and to correct them if any property therein reported is not subject to taxation, and to return them to the treasurer for collection (Code, §§ 4909, 4912), and to exercise the same authority with respect to the "back tax book" for previous years.

In view of these various duties of the Board of Supervisors not only in respect of the levying of future assessments but in the matter of correction and collection of delinquent taxes, it is clear that an injunction restraining the Board from future assessments on the lands in question, or from taking any steps to collect the back taxes, would be substantially to secure the relief the plaintiff seeks.

Coming now to the merits of the controversy, the point at issue is whether when the plaintiff and his fellows completed all that they had to do under the original Homestead Act to perfect their right to a patent, they had an equity against the Government which was taxable by the Territory of Arizona and its successor the State. On the pleadings and the agreed statement of facts, it is admitted that the plaintiff and his associates performed all the conditions under the Homestead Act and that they duly took all the preliminary steps enjoined under the Reclamation Act; but it is averred, and not denied in the answer of the defendants, that a number of important steps remained to be taken by plaintiff and those for whom he sues in perfecting their claims under the Reclamation Act at the times these taxes were levied, and in the case of the plaintiff and some of the class, at the time of bringing this suit.

Under the Homestead Act, Rev. Stats., § 2291, every person making a homestead entry was required among other things to establish a residence upon the tract of

land entered and maintain a residence thereon and cultivate it for a period of not less than five years, and to submit final proof thereof upon which patent ultimately issued in due course, within seven years after the date of entry. The act was amended June 6, 1912, c. 153, 37 Stat. 123, to reduce residence to three years. Under the third section of the Reclamation Act, 32 Stat. 388, the Secretary of the Interior is authorized to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from the works he is about to initiate, and all homestead entries on such lands are made subject to all the provisions, limitations, charges, terms and conditions of the Reclamation Act. The act further provides (§ 5) that the entryman upon lands to be irrigated from the government works shall, in addition to compliance with the homestead laws, reclaim at least half of the total irrigable area of his entry for agricultural purposes, and before receiving a patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract as contribution to the cost of the works. The Secretary is authorized to fix a limit of area of land per entry representing the acreage which may reasonably support a family. The Secretary is given full power in § 10 to make rules and regulations needed to carry the act into effect. He has done so. Under the act and the regulations contained in the General Reclamation Circular, each entryman is required to conform his entry to a "farm unit" established by the Secretary within each reclamation project and this has forced many relinquishments and cancellations of surplus land in homestead entries, leading to remedial legislation hereafter mentioned. The entryman is required to clear the land entered of brush and other encumbrances, to provide the same with lateral ditches for its effective irrigation, to grade the same and put it into proper condition for crop growth, and to plant, water,

and cultivate, during the two years next preceding the time of filing his final affidavit, half of the irrigable area of his entry and to grow satisfactory crops thereon, *i. e.*, crops equal to crops raised upon lands similarly situated. Upon final proof, a final certificate is issued to the entryman showing that he has performed all conditions precedent to acquiring the title. The patent which is the formal grant follows at the convenience of the Land Office and often is delayed. By the Reclamation Act, homestead reclamation entrymen were obliged to pay all water charges before a patent would issue, but the effect of subsequent legislation, in Acts of August 9, 1912, c. 280, 37 Stat. 267, of August 13, 1914, c. 247, 38 Stat. 686, and of February 15, 1917, c. 71, 39 Stat. 920, is to divide the water charges into instalments of varying percentages, falling due during a period of twenty years, from and after public notice by the Government that the water is ready for use, and to allow a patent upon payment of all instalments due at time of submitting final proof. If proof is satisfactory, a patent then issues, conveying a full legal title but reserving a prior lien to the Government, superior to all others, for all instalments unpaid.

The rule established by the decisions of this court is that, by virtue of its sovereignty and the constitutional power of Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, no State can tax the property of the United States within its limits. This was recognized and enforced by the Enabling Act of June 20, 1910, c. 310, 36 Stat. 557, under which Arizona was, on February 14, 1912, admitted to the Union, for that act contained an express declaration that lands and property belonging to the United States or reserved for its use were exempted from taxation. *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 168; *Wisconsin Central R. R. Co.* v. *Price County,* 133 U. S. 496, 504. An exception to this prin-

ciple, or rather its non-application, is recognized where the Government has by final certificate parted with the equitable title to a person subject to state taxation and retains only the legal title by its delay in issuing the patent. Not until the equitable title passes can the State tax the entryman, except in the case of mining claims (the reason for which we shall presently consider), and in cases in which express authority to tax is given in the statute. *Bothwell* v. *Bingham County,* 237 U. S. 642, 647; *Sargent* v. *Herrick,* 221 U. S. 404, 407; *Stearns* v. *Minnesota,* 179 U. S. 223, 251; *Northern Pacific Ry. Co.* v. *Myers,* 172 U. S. 589; *Hussman* v. *Durham,* 165 U. S. 144, 147, 150; *Wisconsin Central R. R. Co.* v. *Price County, supra; Northern Pacific R. R. Co.* v. *Traill County,* 115 U. S. 600; *Colorado Co.* v. *Commissioners,* 95 U. S. 259; *Railway Co.* v. *McShane,* 22 Wall. 444; *Railway Co.* v. *Prescott,* 16 Wall. 603.

The county authorities in this case were in error in supposing that an equitable title passed from the Government to the entrymen here, when the latter had fulfilled the requirements of the Homestead Act. Had their entries been controlled solely by that act, they would have been right. But, as we have seen, their entries were made under that act as supplemented and qualified by the Reclamation Act; and the latter expressly entails on such entrymen additional conditions which must be performed before an equitable title or a right to a patent is secured.

We are cited by counsel for appellees to an opinion of Judge Dietrich of the District Court of Idaho in a suit brought by the United States to enjoin Canyon County, Idaho, and its taxing officers from taxing lands or the interests of settlers therein in the Boise Reclamation project. *United States* v. *Canyon County,* 232 Fed. 985. The case involved two classes of lands. The first was of lands in which a patent had issued, conveying a fee in the land subject to a lien of the United States, superior to all

others, for future instalments of water rents. The second was of lands in which the conditions of the original homestead law had been complied with, but the entrymen had not paid in full for their water rights and they had not brought the requisite acreage under cultivation and irrigation. The court held that the interests of the patentees in the first, and of the entrymen in the second class of lands were taxable by the State. In the first ruling, we concur. The patent vested the full legal title in the entrymen. The fact that a lien was reserved on the face of the patent prior in right to all other liens for instalments of water charges to fall due in the future did not prevent this, and the giving patents indicated an intention on the part of the Government that it should be land of the entrymen and of course it became taxable as such. *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375.

With the second ruling, in which the District Court was sustained by a decision of the Supreme Court of Idaho, *Cheney* v. *Minidoka County,* 26 Id. 471, we can not agree. We can not reconcile it with the cases in this court which we have cited above. The District Judge relies on the Act of June 23, 1910, c. 357, 36 Stat. 592, which permits entrymen within reclamation projects, after having made satisfactory proof of residence, improvement and cultivation for the period originally required under the homestead law, to assign such entries or any part thereof to other persons. Such assignees, upon subsequently submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the Reclamation Act may receive a patent, "*Provided,* That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation Act." By circular of the Secretary of the Interior, the entryman may mortgage his interest also. The argument is that this puts such an interest as the entryman has in the lands

in the same category as mining claims which have always been taxable. *Elder* v. *Wood,* 208 U. S. 226. We do not think that mining claims present a convincing analogy. The basis of the mining interest is discovery and location. These give full opportunity to the locator of the claim to take out the mineral, and, since the beginning, this right and interest never has been dependent for its enjoyment on patent, and so it has been taxable. *Forbes* v. *Gracey,* 94 U. S. 762. The rule has always been different in respect to other public lands as the numerous decisions of this court cited above show.

Even before the statute of 1910, a homesteader could mortgage his interest to help him in performing the conditions of earning his patent. *Mudgett* v. *Dubuque & Sioux City R. R. Co.,* 8 L. D. 243. The care with which the Government has thus framed its land policy to protect and encourage the homesteader is shown further in *Ruddy* v. *Rossi,* 248 U. S. 104, 105. The Government incurs heavy liability in providing water for these lands. It relies on the entrymen to reclaim them, thus finally achieving its sole object of adding arid tracts to the productive area of the country. In pursuit of this purpose, it has found the requirement that the entryman shall pay all his apportioned cost of the irrigation work before he gets title, too burdensome, and, as we have seen, the sum has been spread in instalments over twenty years, and his title is given him after he has reclaimed the land and paid the few early instalments due at that time. The Act of 1910 does not purport to subject these lands to taxation while the title is as yet unearned and its terms show that it is not intended to permit anything beyond what fairly falls within its express provisions. Its evident and sole purpose was to enable entrymen whose entries were cut down in area by the Secretary of the Interior in prescribing farm units to dispose of their surplus to others who would be able to hold it, fulfill conditions and secure a

patent, and avoid a relinquishment or cancellation of the surplus which had been the consequence before the act. This is apparent from an amendment to the Act of 1910 passed May 8, 1916, c. 114, 39 Stat. 65, and from the Report of the Committee or Irrigation of Arid Lands of the House of Representatives of the 64th Congress, 1st session, No. 127, upon which the amendment was adopted. To construe this remedial legislation, including the Act of 1910, which is only intended to lighten the task of the entryman in reclaiming the land and acquiring title, so as to impose on him the new burden of state taxation, is contrary to its plain policy. We think, therefore, that the reason for the rule, making the acquisition of the equitable title the line between non-taxability and taxability, is stronger in case of reclamation homestead entrymen than in the instances where, before the Reclamation Act, it always applied. Moreover, the confusion caused in the past by the taxation, when specifically permitted, of indefinite and inchoate interests of the beneficiaries of government land grants, should prevent an inference of the congressional intention to depart from the rule requiring an equitable title in the entryman before state taxation, unless a purpose to permit earlier taxation is express or strongly implied.

It is argued that it is not government property which is sought to be taxed here before final certificate, but only the interest of the entryman. In the case at bar, the taxes were in the first instance assessed against the land, but later the Board of Supervisors changed the form of the assessment so as to insert the word "equity" in the record. The power of the Supervisors, under the Arizona statutes, to order such a change in past assessments, is challenged. We do not think it necessary to decide this. It is enough to say that the entrymen did not have the equitable title until they received the final certificate and their interest in the Government's land, until that issued,

was, for the reasons given, not taxable. Whether an interest like that of the entrymen in land not belonging to the Government would be taxable property, we have no occasion to consider.

Of the taxes here complained of, those from 1907 until 1916 were levied before the Secretary of the Interior, in January, 1917, had fixed for this project a farm unit of 40 acres to which each entry must conform. Certainly until the area which the entryman could receive was ascertained, no equitable title could pass.

After the farm unit was established, the entryman had two years in which to fulfil the requisites of the statute. One of these, and as important as any, was the filing of the final affidavit showing that he had performed the conditions precedent to getting a patent, which he had to present to the land office for approval and final certificate, which, as we have said, gave him equitable title. From an exhibit to the bill, the accuracy of which is not controverted, it appears that of the class of forty-nine entrymen for whom the plaintiff sues, twenty-four received a final certificate in 1919, and that twenty-five, including the plaintiff, had not received a final certificate when the bill was filed. As to the former, assessment of all taxes assessed against them for the years 1907 to 1918, inclusive, was illegal, and the defendants, J. G. Montgomery, Sheriff, and J. W. Bradshaw, Guy F. Vernon and C. S. Steward, members of the Board of Supervisors, should be enjoined from taking any steps to enforce collection. As to the latter, collection of all taxes assessed prior to filing the bill, and all future assessments for taxes on their interests as entrymen until final certificate shall have been issued to them by the United States Government, will be illegal and the foregoing defendants should be enjoined accordingly.

The decree of the District Court is reversed, with directions to enter a decree in conformity with this opinion.

Reversed.

OKLAHOMA NATURAL GAS COMPANY *v.* STATE OF OKLAHOMA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 37. Argued March 7, 1922.—Decided March 20, 1922.

A gas company whose franchise obliges it to render efficient service to the public and whose rates and service are subject, under the state law and constitution, to regulation by a public commission, and which has charged its customers the maximum rate allowed, on the basis of the quantities of gas furnished, is not deprived of property without due process of law by an order of the commission reducing bills to compensate for poor service (insufficient gas pressure) and requiring corresponding refunds to consumers. P. 239.

78 Okla. 5, affirmed.

ERROR to a judgment affirming an order of a commission by which the bills of a company engaged in distributing gas supplied by plaintiff in error were reduced and refunds to consumers were required.

Mr. C. B. Ames for plaintiff in error.

Mr. Charles H. Ruth, with whom *Mr. S. P. Freeling,* Attorney General of the State of Oklahoma, and *Marie S. Ruth* were on the briefs, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of the Supreme Court of Oklahoma sustaining an order of the Corporation Commission of the State directing, on account of the failure of the Gas Companies to furnish adequate gas service, a refund in certain districts of Oklahoma City of from eight to twenty-five per cent. of the bills rendered by the companies during December, 1917, and January, 1918.

The initial steps in the proceedings against the Gas Companies were petitions filed before the Corporation

Commission of the State, and numbered 3188, 3192 and 3197. They charged that the Oklahoma Gas and Electric Company was a corporation of Oklahoma, and was granted a franchise by Oklahoma City to supply the latter and its inhabitants with natural gas for light, heat and power, and, as such corporation, exercised the right of eminent domain. And they alleged that the Oklahoma Natural Gas Company was also a corporation of Oklahoma for the purpose of transporting gas from Cushing, Oklahoma, to Oklahoma City, and was under contract to deliver gas to the pipe lines of the Gas and Electric Company.

The petitions represented in various ways in what the two companies were deficient and delinquent in the execution of the purpose of their incorporation in the supply of gas at certain times to those entitled to be served, and the prayers of the petitions varied according to the respective standpoints of the petitioners and their conceptions of remedies.

In No. 3188 it was prayed that the companies reveal their relationship and contracts in regard to supplying Oklahoma City with gas, and that the Electric Company show the daily consumption of gas by the city, the volume and pressure in ounces necessary to provide adequate service. There was the further prayer that the companies be required to provide and maintain gas storage facilities.

In No. 3192 it was prayed that the Electric Company be restrained from forcing collection of gas bills before the determination of the issue presented, the charge being that, notwithstanding the insufficiency of the gas supply, the company was threatening to require prompt payment of bills and in default thereof to discontinue service.

In No. 3197 (it was presented by the county attorney and his assistants) the relief asked was that the Commission take charge and management of the corporations,

they being delinquent in their duties. It was also prayed that the companies be declared in contempt of an order of the Commission previously rendered which required such efficiency in the distributing systems as to render adequate service, and dealt with accordingly.

Separate answers were made by the companies in Nos. 3188 and 3197. In No. 3192 the Electric Company alone answered.

Each company averred the exertion of all means within its power to supply the needs and requirements of the City with gas and was specific in the enumeration of its facilities and powers and their exertion, and denied faults and delinquencies.

The Corporation Commission by the constitution and laws of the State is given power and authority, and is charged with the duty, of supervising and regulating transportation companies and other public utilities, and given the same authority to prescribe rates which the State might prescribe or make. And the Supreme Court decided that any of the orders of the Commission prescribing rates and regulating the service of such utilities is as much a law of the State as if enacted by the legislature, and that a public utility in furnishing natural gas is as much subject to the provisions of such orders as if they had been made an integral part of the contract between the consumer and the public utility.

It was in view of the jurisdiction and powers of the Commission that the petitions in this case were presented to it. They were consolidated and testimony taken for and against them and the Commission set forth its conclusion in an opinion of great length—too long, we may say, to make even a summary of it practicable.

We can only say that the Commission found the quality of the gas deficient but otherwise found for the companies. For instance, the Commission found that storage facilities for a reserve supply as prayed were impossible. It found

also against the charge that the companies had been guilty of negligence for failure to extend their lines to other and more abundant sources of supply. Indeed, the Commission, intimating a doubt of its power to do so, refused to exercise the power against the companies, circumstances not demanding it.

The final order of the Commission was that discounts of various amounts from the payments made by consumers in certain districts (they were named) should be allowed. The discount, it was ordered, should be applied to bills for domestic consumption of gas only, and this consumption was considered to mean only gas used for physical comfort or for cooking in residences.

The prayer in No. 3197 that the Commission take charge and operate the property of the Oklahoma Gas and Electric Company was denied; also that fines for contempt be imposed was denied.

There were modifications of the order not necessary to mention. On error to the Supreme Court by the Oklahoma Natural Gas Company the order of the Commission was affirmed.

The Supreme Court in its opinion stated the points in litigation and said it was not controverted that the service was inadequate; the contention of the Gas Company being that " natural gas is a commodity for which the utilities are entitled to payment on a quantum basis, as shown by meter readings, and the adequacy or inadequacy of service does not enter into the payment of bills." The court rejected the contention and affirmed the order of the Commission, expressing its understanding of it to be that it proceeded " upon the theory that, inasmuch as the maximum compensation of the gas company is allowed upon the basis of adequate service, where the service is not kept to this standard the rate charged the public should be graded in proportion to the falling off in effici-

ency." Stating a further contention of the company in resistance to the order of the Commission, the court said it seemed to be that the company was entitled to the maximum rate "regardless of the efficiency of the service." The court rejected the contention, considering that the rule announced by the Commission was "entirely just and reasonable, provided a practical basis for its application" could "be established", and the court said it could "see no insuperable barrier in the way of doing" that. And the court further decided that the Commission had correctly solved the problem by basing the proportion of the maximum rate the company could justly collect from the public upon the quality of the service rendered as well as upon the quantity of gas furnished. And this solution of the problem, the court was of the view, the evidence supported.

The company assails the reasoning and conclusions of the court and Commission and asserts that they penalize the company "for failing to supply gas which nature had not produced." It supplied, is the contention, the maximum amount which it could produce and the Commission found that it was not negligent in failing to supply more. It is the contention, therefore, that the order of the Commission and the action of the Supreme Court in sustaining it, are offensive to the Constitution of the United States.

The contention is based on a wrong estimate of the action of the Commission and that of the court. Neither was based on deficiency in the volume of gas, but upon the failure of the company to transport it under sufficient pressure to render efficient service. It was the view of the Commission and the court that the company owed efficient service and for failing to supply it there should be a deduction in the compensation charged in proportion to the deficiency.

The company assails both conclusions as depriving it of property without due process of law. We cannot assent.

Both the Commission and the Supreme Court decided, construing the charter of the company, that the company was required to render efficient service, and we concur in that view, and that it was competent for the State to compensate the deficiency in the service—deficiency in the supply of gas—by a rebate of the payments to the company. The percentage of reduction and its adequate relation to a deficiency in service were necessarily determined by the Commission from the case as presented to it, and the Supreme Court upon consideration affirmed the determination as a just and supported relation. In the judgments of the Commission and the court we are unable to see error, certainly not an infringement of the Fourteenth Amendment.

We repeat, therefore, the action of the Commission and court were not, as represented by the company, a requirement of the impossible. It was simply and clearly the determination of what the franchise of the company required and the obligation to perform it, and the failure to perform justified a reduction of the fees charged or, if paid, a proportionate repayment.

We are not called upon, therefore, to review or answer the interesting argument of the company based upon the contention that the order of the Commission imposed upon the company the impossible or the unreasonable. It imposed, we repeat, the performance of the service that the Gas Company had agreed to perform.

Judgment affirmed.

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

FIRST NATIONAL BANK OF AIKEN *v.* J. L. MOTT IRON WORKS.

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

No. 159. Argued March 10, 1922.—Decided March 20, 1922.

A national bank, having advanced money to one who had contracted to supply labor and material for a building, on the security of his assignment of the contract and of payments to be made under it, guaranteed payment of goods afterwards sold to the contractor, on the faith of the guaranty, and used in the work. *Held:* (a) That whether or not the guaranty was valid as an incident of banking, the bank was liable to the seller, up to its amount, for moneys subsequently arising under the assigned contract which were paid to it or, with its consent, to the contractor; and (b) that, the case having been tried on its merits, the distinction between a recovery on the guaranty and a recovery of the amount so directly or indirectly received on account of it, was purely formal. P. 241.
Affirmed.

CERTIORARI to a judgment affirming a recovery obtained by the respondent on a guaranty made by the petitioner.

Mr. John F. Williams, with whom *Mr. William S. Nelson* was on the brief, for petitioner.

Mr. P. F. Henderson, with whom *Mr. A. M. Lumpkin* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit against the petitioner upon a written guaranty of payment to the respondent of $2,363.50 for goods sold to the Kaiser Company. The plaintiff, (the respondent,) had a verdict and judgment and the judgment was affirmed by the Supreme Court of the State. The case comes here on the question of the liability of the bank, upon the facts that we shall state.

They are simple. A firm of McGhee and McGhee was building a hospital in Aiken. The firm had contracted with the Kaiser Company for the heating and plumbing, at the price of $7,800, the firm agreeing to pay eighty-five

per cent. of the labor and materials furnished each month and the remaining fifteen at the completion of the system. The Kaiser Company assigned this contract to the bank and the firm agreed to make all checks under the contract payable to the bank. This was done as security to the bank for advances the validity of which is not contested. In the course of performance the Kaiser Company ordered the goods concerned from the respondent, but the respondent required security before it would send them. Thereupon the bank in order to enable the company to complete its contract and thereby to repay the advances that the bank had made gave the guaranty in question. Subsequently the bank received $1,105.28 and might have received much more than the amount of its guaranty although in fact it allowed the McGhees to pay checks for $5,468 to the Kaiser Company, with the result that the Kaiser Company still owes it some money. Therefore the bank is in the position of having realized the benefit to acquire which the guaranty was made, and of having realized it out of the proceeds of the goods that it induced the Iron Company to sell.

In such circumstances, whether the contract is valid or not, the contractor is accountable to the contractee, up to the amount of his undertaking, for the proceeds coming to his hands from the contractee upon the inducement of the contract. *Citizens' Central National Bank* v. *Appleton,* 216 U. S. 196. In this case therefore the plaintiff is entitled to recover the amount for which it has declared, and as the case was fully tried upon the merits, the distinction between a recovery on the guaranty, as having been necessarily incident to the business of banking, and a recovery of the amount received by petitioner on account of the guaranty, becomes purely formal.

Judgment affirmed.

Mr. Justice Clarke was absent and took no part in the decision.

EDGAR A. LEVY LEASING COMPANY, INC. *v.* SIEGEL.
810 WEST END AVENUE, INC. *v.* STERN.

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

Nos. 285 and 287. Argued January 24, 25, 1922.—Decided March 20, 1922.

1. Chapters 942 and 947 of the New York Housing Laws, which suspend the landlord's right of action to recover possession from his tenant, except under specified conditions, and c. 944, providing that, in an action for rent under an agreement for premises occupied for dwelling purposes it shall be a defense that the rent is unjust and unreasonable and the agreement oppressive, but permitting the landlord to plead, prove and recover a fair and reasonable rent, are constitutional. P. 245. *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170.
2. The obligation to pay specified rent can not be said to be impaired by a limitation on the recovery to what is fair and reasonable, made by a statute existing when the lease was made and carried into a subsequent statute. P. 248.
3. A statute making it a defense in an action for rent that the rent agreed is unjust and unreasonable and the agreement oppressive, provides a standard sufficiently definite to satisfy the due process clause of the Constitution. P. 249. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, distinguished.

194 App. Div. 482, 521; 230 N. Y. 634, 652, affirmed.

ERROR to two judgments entered in the Supreme Court of New York pursuant to remittiturs from the Court of Appeals and dismissing actions brought by the present plaintiffs in error, in the first case to recover rent under a lease and in the second to eject a tenant holding over after the expiration of his lease. The premises leased were apartments in New York City. In both cases there were appeals in the first instance to the Appellate Division, and thence to the Court of Appeals. A summary of the New York Housing Laws, the provisions of which as

applied in favor of the tenants were questioned on constitutional grounds, will be found in a note to the report of *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170.

Mr. Louis Marshall, with whom *Mr. Lewis M. Isaacs* was on the briefs, for plaintiffs in error.

Mr. William D. Guthrie and *Mr. Julius Henry Cohen,* with whom *Mr. Elmer G. Sammis* and *Mr. Bernard Hershkopf* were on the briefs, for the Joint Legislative Committee on Housing of the New York Legislature.

Mr. Raymond L. Wise, Mr. David L. Podell, Mr. Martin C. Ansorge, Mr. Benjamin S. Kirsh and Mr. J. J. Podell filed a brief on behalf of the defendant in error in No. 287.

Mr. Justice Clarke delivered the opinion of the court.

These two cases were argued and will be disposed of together.

A motion to dismiss or affirm was filed in each case, on the ground that each is ruled by the decision in *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170, and both were postponed to the hearing on the merits.

The essential question presented for decision in the *Marcus Brown Case* was, and in these cases is, the constitutional validity of the Emergency Housing Laws of the State of New York, approved by the Governor September 27, 1920, cc. 942 to 953, inclusive, Laws of New York, 1920.

By these acts a number of changes were made in the substantive law, and a number of amendments to remedial statutes of the State, for the purpose of securing to tenants in possession of houses or apartments, occupied for dwelling purposes, in described cities, the legal right to continue in possession until November 1, 1922, by the payment, or securing the payment, of a reasonable rental, to be determined by the courts, and for the purpose also

of encouraging the building of dwellings by providing under specified conditions for their exemption from local taxation.

In No. 285 it is alleged: That a described apartment was leased to the defendant from October 1, 1918, to October 1, 1920, at the stipulated rental of $1,450 per annum, payable in equal monthly installments in advance; that while in possession under that lease, in May, 1920, the defendant executed a new lease for two years, beginning on the expiration of the former one on October 1, 1920, at a rental increased to $2,160, payable in equal monthly installments in advance; and that he refuses to pay the installment due on October 1, 1920. Judgment for the one month's rent is prayed for.

The defendant admits the execution of the leases, as stated in the complaint, but avers that the second one was signed under the coercion and duress of threats of eviction and that the rent stipulated for is "unjust, unreasonable and oppressive." He offers to pay the same amount of rent as was paid for the preceding month and asserts the right to continue in possession under the emergency acts. A motion for judgment on the pleadings presented the question of the constitutionality of c. 944 of the Emergency Housing Laws and the state courts all held the chapter a constitutional and valid exercise of the police power.

In No. 287 it is averred: That the defendant is a tenant holding over after expiration of his lease; that he refuses to surrender possession as he stipulated in his lease to do, and that he claims the right to retain possession under cc. 942 and 947 of the Emergency Housing Laws, which suspend the right of action to recover possession except under specified conditions, which are not applicable. A general demurrer to this complaint presented the question of the constitutionality of cc. 942 and 947 of the laws assailed and the state courts all sustained them as valid.

In terms the acts involved are "emergency" statutes and, designed as they were by the legislature to promote the health, morality, comfort and peace of the people of the State, they are obviously a resort to the police power to promote the public welfare. They are a consistent inter-related group of acts essential to accomplish their professed purposes.

The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power.

In the enactment of these laws the Legislature of New York did not depend on the knowledge which its members had of the existence of the crisis relied upon. In January, 1919, almost two years before the laws complained of were enacted, the Governor of the State appointed a "Reconstruction Commission" and about the same time the Legislature appointed a committee known as the "Joint Legislative Committee on Housing," to investigate and report upon housing conditions in the cities of the State, and a few months later the Mayor of New York appointed a similar committee. The membership of these committees comprised many men and women representative of the best intelligence, character and public service in the State and Nation, their investigations were elaborate and thorough and in their reports, placed before the Legisla-

ture, all agree: that there was a very great shortage in dwelling house accommodations in the cities of the State to which the acts apply; that this condition was causing widespread distress; that extortion in most oppressive forms was flagrant in rent profiteering; that, for the purpose of increasing rents, legal process was being abused and eviction was being resorted to as never before; and that unreasonable and extortionate increases of rent had frequently resulted in two or more families being obliged to occupy an apartment adequate only for one family, with a consequent overcrowding, which was resulting in insanitary conditions, disease, immorality, discomfort and widespread social discontent.

If this court were disposed, as it is not, to ignore the notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all large cities of this and other countries, resulting from the cessation of building activities incident to the war, nevertheless, these reports and the very great respect which courts must give to the legislative declaration that an emergency existed would be amply sufficient to sustain an appropriate resort to the police power for the purpose of dealing with it in the public interest.

The argument heard in these cases and further examination of the subject confirms us in the assumption made in the *Marcus Brown Case,* 256 U. S. 170, 198, that the emergency declared existed when the acts were passed.

It is strenuously argued, as it was in *Block* v. *Hirsh,* 256 U. S. 135, and in the *Marcus Brown Case,* that the relation of landlord and tenant is a private one and is not so affected by a public interest as to render it subject to regulation by the exercise of the police power.

It is not necessary to discuss this contention at length, for so early as 1906, when the Tenement House Act of New York, enacted in 1901, was assailed as an unconstitutional interference with the right of property in land,

on substantially all of the grounds now urged against the Emergency Housing Laws, this court, in a *per curiam* opinion affirmed a decree of the Court of Appeals of New York (179 N. Y. 325), sustaining regulations requiring large expenditures by landlords as a valid exercise of the police power. *Moeschen* v. *Tenement House Department,* 203 U. S. 583. To require uncompensated expenditures very certainly affects the right of property in land as definitely, and often as seriously, as regulation of the amount of rent that may be charged for it can do. Many decisions of this court were cited as sufficient to justify the summary disposition there made of the question, as one even then so settled by authority as not to be longer open to discussion.

In the opinion in *Block* v. *Hirsh, supra,* this court cites in support of this same conclusion, under the circumstances there disclosed, which are not to be distinguished from those presented in this case, the later cases following: *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527; *Welch* v. *Swasey,* 214 U. S. 91; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531; *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269; *Perley* v. *North Carolina,* 249 U. S. 510.

These authorities show that from time to time for a generation, as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases, and in both the *Marcus Brown* and *Block Cases, supra,* it was held, in terms, that the existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them to the extent provided for in the laws in those cases objected to.

In the opinion in the *Marcus Brown Case* it is said, that the defendant-tenants, holding over after their lease

had expired, relied upon cc. 942 and 947 of the New York Housing Laws and that the landlord challenged their validity. But this court held them valid. We have seen that in No. 287, here under consideration, the defendant-tenant is holding over after the expiration of his lease, and that he justifies under cc. 942 and 947. Thus this No. 287 presents precisely the same questions of fact and law as the *Marcus Brown Case* presented, and must be ruled by it.

No. 285 is a suit against a tenant who, during the term of a lease, which he avers was executed under the coercion and duress of a threat of eviction, refuses to pay the amount of rent stipulated therein, which he alleges is "unjust, unreasonable and oppressive." He offers to pay the same rent that he paid for the next preceding month. Such a case falls within the precise terms of c. 944 of the Emergency Housing Laws, providing that:

"It shall be a defense to an action for rent accruing under an agreement for premises in a city," etc., "occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive."

Section 4 of this chapter provides that nothing therein contained shall prevent a plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor.

It is contended that the validity of this c. 944 was not directly presented in the *Marcus Brown Case,* and that the impairment of contracts clause of the Constitution was not considered or decided in that case as it must be in this one.

To this there are two answers, either of which is sufficient.

The first is that the defense sustained in this case, by the court below, was provided for by c. 136 of the Laws of New York in effect when the lease involved was exe-

cuted. The provision was simply carried into c. 944 when that chapter was amended in September, 1920, and, of course, a lease made subsequent to the enactment of a statute can not be impaired by it. *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 446.

The second answer is that reference to the report of the *Marcus Brown Case* shows that this constitutional objection was urged in the briefs and the court says, in its opinion:

"The chief objections to these acts have been dealt with in *Block* v. *Hirsh.* In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be. *Manigault* v. *Springs,* 199 U. S. 473, 480. *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 482. *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 67, 76, 77. *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372, 375. *Producers Transportation Co.* v. *Railroad Commission of California,* 251 U. S. 228, 232."

Palpably, as to this constitutional objection to c. 944, the prior decision is ruling.

It is also urged that c. 944 is invalid because the provision that, "It shall be a defense to an action [by a landlord] that such rent [demanded] is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive," is too indefinite a standard to satisfy the due process of law clause of the Constitution.

The report of the *Marcus Brown Case* shows that this contention was urged in briefs by the same counsel presenting it here, and it is apparent that the standard was impliedly approved as valid in that case, as it was very

clearly approved in the *Block Case, supra,* the court saying: "While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word." The standard of the statute is as definite as the "just compensation" standard adopted in the Fifth Amendment to the Constitution and therefore ought to be sufficiently definite to satisfy the Constitution. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, dealing with definitions of crime, is not applicable.

Several other contentions are pressed upon the attention of the court, chiefly with respect to the modifications of the remedial statues, but such as were not specifically dealt with in the *Marcus Brown* and *Block Cases,* impress us as quite unimportant. Given a constitutional substantive statute, enacted to give effect to a constitutional purpose, the States have a wide discretion as to the remedies which may be deemed necessary to achieve such a result and it is very clear that that discretion has not been exceeded in this instance by the State of New York.

It results that the judgments of the state court must be affirmed.

Affirmed.

Dissenting: Mr. Justice McKenna, Mr. Justice Van Devanter and Mr. Justice McReynolds.

UNITED STATES *v.* BALINT ET AL.

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

No. 480. Argued March 7, 1922.—Decided March 27, 1922.

1. Whether *scienter* is a necessary element of a statutory crime, though not expressed in the statute, is a question of legislative intent to be answered by a construction of the statute. P. 251.

2. Punishment for an illegal act done by one in ignorance of the facts making it illegal, is not contrary to due process of law. P. 252.
3. To constitute the offense of selling drugs contrary to § 2 of the Anti-Narcotic Act, it is not necessary that the seller be aware of their character. P. 253.

Reversed.

ERROR to an order sustaining a demurrer to and quashing an indictment.

Mr. William C. Herron, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

No appearance for defendants in error.

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

This is a writ of error to the District Court under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246. Defendants in error were indicted for a violation of the Narcotic Act of December 17, 1914, c. 1, 38 Stat. 785. The indictment charged them with unlawfully selling to another a certain amount of a derivative of opium and a certain amount of a derivative of coca leaves, not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue, contrary to the provisions of § 2 of the act. The defendants demurred to the indictment on the ground that it failed to charge that they had sold the inhibited drugs knowing them to be such. The statute does not make such knowledge an element of the offense. The District Court sustained the demurrer and quashed the indictment. The correctness of this ruling is the question before us.

While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did

not in terms include it (*Reg.* v. *Sleep,* 8 Cox C. C. 472), there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide " that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se. Commonwealth* v. *Mixer,* 207 Mass. 141; *Commonwealth* v. *Smith,* 166 Mass. 370; *Commonwealth* v. *Hallett,* 103 Mass. 452; *People* v. *Kibler,* 106 N. Y. 321; *State* v. *Kinkead,* 57 Conn. 173; *McCutcheon* v. *People,* 69 Ill. 601; *State* v. *Thompson,* 74 Ia. 119; *United States* v. *Leathers,* 6 Sawy. 17; *United States* v. *Thomson,* 12 Fed. 245; *United States* v. *Mayfield,* 177 Fed. 765; *United States* v. *36 Bottles of Gin,* 210 Fed. 271; *Feeley* v. *United States,* 236 Fed. 903; *Voves* v. *United States,* 249 Fed. 191. So, too, in the collection of taxes, the importance to the public of their collection leads the legislature to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends and meeting it at the peril of punishment. *Regina* v. *Woodrow,* 15 M. & W. 404; *Bruhn* v. *Rex,* [1909] A. C. 317. Again where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the

policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells. *Hobbs* v. *Winchester Corporation,* [1910] 2 K. B. 471, 483.

The question before us, therefore, is one of the construction of the statute and of inference of the intent of Congress. The Narcotic Act has been held by this court to be a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs. *United States* v. *Doremus,* 249 U. S. 86, 94; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 402.

Section 2 of the Narcotic Act, 38 Stat. 786, we give in part in the margin.[1] It is very evident from a reading of

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[1] Part of § 2 of an act entitled An Act To provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes, approved December 17, 1914, 38 Stat. 785, 786:

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. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion. We think the demurrer to the indictment should have been overruled.

Judgment reversed.

MR. JUSTICE CLARKE took no part in this decision.

PONZI *v.* FESSENDEN ET AL.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 631. Argued March 8, 9, 1922.—Decided March 27, 1922.

1. Our system of state and federal jurisdiction requires a spirit of reciprocal comity between courts to promote due and orderly procedure. P. 259.
2. The fact that a man is serving a sentence of imprisonment imposed by a federal court for a federal offense, does not render him immune to prosecution in a state court for offenses committed against the State. P. 264.
3. A federal prisoner may, with the consent of the United States, be brought before a state court, for trial on indictment there, by a writ of *habeas corpus* issued by that court and directed to the warden having him in charge as federal agent, then to be returned and serve out the federal sentence. P. 261.

4. The Attorney General, in view of his statutory functions, has implied power to exercise the comity of the United States in such cases, provided enforcement of the sentence of the federal court be not prevented or the prisoner endangered. P. 262.
5. Upon trial and conviction of one already sentenced for another crime, execution of the second sentence may begin when the first terminates. P. 265.

THIS case comes here for answer to the following question of law:

"May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a state court, in the custody of said master and there put to trial upon indictments there pending against him?"

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court for Suffolk County, Massachusetts, charging him with certain larcenies.

October 1, 1920, two indictments charging violation of § 215 of the Federal Penal Code were returned against him in the United States District Court for the District of Massachusetts. November 30, 1920, he pleaded guilty to the first count of one of these, and was sentenced to imprisonment for five years in the House of Correction at Plymouth, Massachusetts, and committed.

April 21, 1921, the Superior Court issued a writ of habeas corpus directing the master of the House of Correction, who, as federal agent, had custody of Ponzi by virtue of the mittimus issued by the District Court, to bring him before the Superior Court and to have him there from day to day thereafter for trial upon the pending indictments, but to hold the prisoner at all times in his custody as an agent of the United States subject to the sentence imposed by the Federal District Court. Blake,

the master of the House of Correction, made a return that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

Thereafter the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the Superior Court and that the Attorney General had directed Blake to comply with the writ. Blake then produced the prisoner, who was arraigned on the state indictments and stood mute. A plea of not guilty was entered for him by the court.

May 23, 1921, Ponzi filed in the District Court a petition for a writ of habeas corpus directed against the Justice of the Superior Court, and against Blake, alleging in substance that he was within the exclusive control of the United States, and that the state court had no jurisdiction to try him while thus in federal custody. His petition for writ of habeas corpus was denied. An appeal was taken to the Circuit Court of Appeals, the judges of which certify the question to this court on the foregoing facts. § 239, Judicial Code.

Mr. William H. Lewis for Ponzi.

If the petitioner could not be tried in the state court, pending his sentence, without the consent of the Attorney General of the United States, he could not be tried at all.

The Attorney General of the United States is a statutory officer, and has no authority over prisoners of the United States except such as is expressly given him by some statute of the United States, or as may be necessarily implied from some express statute.

He has no control over a prisoner in a state jail or penitentiary. Rev. Stats., § 5539.

A federal prisoner is entitled to protection. *Beavers* v. *Henkel,* 194 U. S. 83; *Logan* v. *United States,* 144 U. S. 295.

The Attorney General has neither express nor implied authority to intervene in a *habeas corpus* case of this character.

If the situation were reversed, and Ponzi had been first tried in the state court and sentenced to serve a term in a state jail or prison, and the United States desired to try him upon indictments pending against him in the United States District Court, neither the court, nor any judge thereof, could issue a writ of *habeas corpus* to bring him into that court for trial. Rev. Stats., § 753; *Ex parte Burrus,* 136 U. S. 586; *Re Dorr,* 3 How. 103; *Ex parte Bollman,* 4 Cranch, 75.

It would seem, therefore, that the United States ought not to permit a state court to try a prisoner of the United States where, under the same circumstances, a United States court could not try a state prisoner. There is no comity in it.

In all the judicial history of the Commonwealth, from *Sims's Case,* (1851) 61 Mass. 285, down to the present, Massachusetts has never attempted to assert the right which is now being asserted in this case.

The proceeding of the state court is practically forbidden by the laws of the Commonwealth upon the subject of *habeas corpus.* Gen. Laws, c. 248, § 34.

This writ was used in the English law to bring in prisoners from one court to another in the same jurisdiction. That was the use of the writ in the *Bollman Case, supra.* It is used here as a substitute for removal, or an extradition proceeding. Obviously, this writ could not be used to take a prisoner from one State to another, from one jurisdiction to another jurisdiction. The jurisdiction of the United States, where Ponzi is, is just as foreign to Massachusetts as Rhode Island is to Georgia, and the writ

of the Massachusetts court can not cross the line between the two jurisdictions.

The mittimus itself forbids interference with the body of Ponzi by the state court. It is fundamental that, after the term of the court has expired at which sentence was rendered, the court itself cannot interfere with its own mittimus. *In re Jennings,* 118 Fed. 479; *Commonwealth* v. *Foster,* 122 Mass. 317; *Goddard* v. *Ordway,* 101 U. S. 752; *Basset* v. *United States,* 9 Wall. 38; *Ex parte Lange,* 18 Wall. 167.

In all cases of concurrent jurisdiction or otherwise, the court that first acquires jurisdiction holds it to the exclusion of all others, until its judgment is satisfied. *McCauley* v. *McCauley,* 202 Fed. 280, 284; *State* v. *Chinault,* 55 Kans. 326; *Ex parte Earley,* 3 Oh. Dec. 105; *Commonwealth* v. *Fuller,* 8 Metc. 318; *Hill Mfg. Co.* v. *Providence & New York S. S. Co.,* 113 Mass. 495; *Ayers* v. *Farwell,* 196 Mass. 350; *Wayman* v. *Southard,* 10 Wheat. 1; *Covell* v. *Heyman,* 111 U. S. 176; *Taylor* v. *Taintor,* 16 Wall. 366; *Felts* v. *Murphy,* 201 U. S. 123; *Harkrader* v. *Wadley,* 172 U. S. 163; *In re Johnson,* 167 U. S. 120; *Opinion of the Justices,* 201 Mass. 609.

Can the state court try Ponzi without jurisdiction over his person; in other words, without custody of the prisoner? Ponzi, as a prisoner of the United States, is "within the dominion and exclusive jurisdiction" of the United States. *Ableman* v. *Booth,* 21 How. 506. See also *Robb* v. *Connoly,* 111 U. S. 624; *In re Johnson,* 167 U. S. 120; *Logan* v. *United States,* 144 U. S. 263; Willoughby, Const., c. 9, § 72; Bailey, Habeas Corpus, p. 68; 6 Ops. Atty. Gen. 103; 12 *id.* 258.

Upon the principles of natural justice, the state court should not be permitted to try Ponzi under the circumstances, because he would be subject to double punishment for the same acts.

Is it the "due process of law" to which the petitioner is entitled under § 1 of the Fourteenth Amendment to

be set to trial in a state court while serving sentence as a federal prisoner? *Twining* v. *New Jersey,* 211 U. S. 103; *Frank* v. *Mangum,* 237 U. S. 348; *Pennoyer* v. *Neff,* 95 U. S. 714, 733; *Scott* v. *McNeal,* 154 U. S. 34; *Old Wayne Mutual Life Association* v. *McDonough,* 204 U. S. 8.

The contention is that the court, being without custody of Ponzi's body, cannot try him in a criminal case. Const. Mass. Art. XXVI; Gen. Laws Mass., c. 276, § 42.

The principle contended for by the respondents is a dangerous one, in that it will lead to confusion, frequent clashes, and conflicts of jurisdiction, where now none exists.

Mr. J. Weston Allen, Attorney General of the State of Massachusetts, with whom *Mr. Edwin H. Abbot, Jr.,* was on the brief, for Fessenden et al.

Mr. Solicitor General Beck and *Mr. W. Marvin Smith,* by leave of court, filed a brief on behalf of the United States, as *amici curiae.*

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

We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. *In re Andrews,* 236 Fed. 300; *United States* v. *Marrin,* 227 Fed. 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

One accused of crime, of course, can not be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense. *Frank* v. *Mangum,* 237 U. S. 309, 341; *Lewis* v. *United States,* 146 U. S. 370. If that is accorded him, he can not complain. The fact that he may have committed two crimes gives him no immunity from prosecution of either.

The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in *Covell* v. *Heyman,* 111 U. S. 176, as follows:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility

which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

The *Heyman Case* concerned property, but the same principle applies to jurisdiction over persons as is shown by the great judgment of Chief Justice Taney in *Ableman* v. *Booth,* 21 How. 506, quoted from, and relied upon, in *Covell* v. *Heyman.*

In the case at bar, the Federal District Court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment and was detained under United States authority to suffer the punishment imposed. Until the end of his term and his discharge, no state court could assume control of his body without the consent of the United States. Under statutes permitting it, he might have been taken under the writ of habeas corpus to give evidence in a federal court, or to be tried there if in the same district, § 753, Rev. Stats., or be removed by order of a federal court to be tried in another district, § 1014, Rev. Stats., without violating the order of commitment made by the sentencing court. *Ex parte Bollman,* 4 Cranch, 75, 98; *Ex parte Lamar,* 274 Fed. 160, 164. This is with the authority of the same sovereign which committed him.

There is no express authority authorizing the transfer of a federal prisoner to a state court for such purposes.

Yet we have no doubt that it exists and is to be exercised with the consent of the Attorney General. In that officer, the power and discretion to practice the comity in such matters between the federal and state courts is vested. The Attorney General is the head of the Department of Justice. Rev. Stats., § 346. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences, be faithfully executed. *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273; *In re Neagle,* 135 U. S. 1; *Kern River Co.* v. *United States,* 257 U. S. 147; Rev. Stats., § 359; Act of June 30, 1906, c. 3935, 34 Stat. 816; Rev. Stats., §§ 360, 361, 357, 364. By § 367, Rev. Stats., the Attorney General is authorized to send the Solicitor General or any officer of the Department of Justice "to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

The prisons of the United States and the custody of prisoners under sentence are generally under the supervision and regulation of the Attorney General. Act March 3, 1891, c. 529, 26 Stat. 839. He is to approve the expenses of the transportation of United States prisoners by the marshals under his supervision to the wardens of the prisons where they are to be confined, 26 Stat. 839. He makes contracts with managers of state prisons for the custody of United States prisoners. Rev. Stats., § 5548. He designates such prisons. Rev. Stats., § 5546, amended 19 Stat. 88, and 31 Stat. 1450. Release of United States prisoners on parole whether confined in federal prisons or in state prisons is not made save with the approval of the Attorney General. Act of June 25, 1910, c. 387, 36 Stat. 819. The Attorney General is authorized to change the place of imprisonment of United

States prisoners confined in a state prison when he thinks it not sufficient to secure their custody, or on their application, because of unhealthy surroundings or improper treatment. Rev. Stats., § 5546, as amended 19 Stat. 88, and 31 Stat. 1450. One important duty the Attorney General has to perform is the examination of all applications for pardon or commutation, and a report and recommendation to the President.

This recital of the duties of the Attorney General leaves no doubt that one of the interests of the United States which he has authority and discretion to attend to, through one of his subordinates, in a state court, under § 367, Rev. Stats., is that which relates to the safety and custody of United States prisoners in confinement under sentence of federal courts. In such matters he represents the United States and may on its part practice the comity which the harmonious and effective operation of both systems of courts requires, provided it does not prevent enforcement of the sentence of the federal courts or endanger the prisoner. *Logan* v. *United States,* 144 U. S. 263.

Counsel for appellant relies on § 5539, Rev. Stats., which directs that when any criminal sentenced by a federal court is imprisoned in the jail or penitentiary of any State or Territory " such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory." This section it is said prevents the Attorney General or any other federal officer from ordering the superintendent of a state prison to produce a federal prisoner for trial or testimony. But it is clear that the section has no such effect. The section is only one of many showing the spirit of comity between

the state and national governments in reference to the enforcement of the laws of each. To save expense and travel, the Federal Government has found it convenient with the consent of the respective States to use state prisons in which to confine many of its prisoners, and the Attorney General is the agent of the Government to make the necessary contracts to carry this out. In order to render the duty thus assumed by the state governments as free from complication as possible, the actual authority over, and the discipline of, the federal prisoners while in the state prison are put in the state prison authorities. If the treatment or discipline is not satisfactory, the Attorney General can transfer them to another prison, but while they are there, they must be as amenable to the rules of the prison as are the state prisoners. But this does not have application to the procedure or the authority by which their custody may be permanently ended or temporarily suspended.

The authorities, except when special statutes make an exception, are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. One of the best considered judgments on the subject is *Rigor* v. *State,* 101 Md. 465. The Supreme Court of Maryland said (p. 471):

"The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt."

Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offence is to postpone trial on many others, it furnishes the criminal an opportunity to avoid the full expiation of his crimes. These

considerations have led most courts to take the same view as that expressed in the case just cited. Other cases are *State* v. *Wilson,* 38 Conn. 126; *Thomas* v. *People,* 67 N. Y. 218, 225; *Peri* v. *People,* 65 Ill. 17; *Commonwealth* v. *Ramunno,* 219 Pa. St. 204; *Kennedy* v. *Howard,* 74 Ind. 87; *Singleton* v. *State,* 71 Miss. 782; *Huffaker* v. *Commonwealth,* 124 Ky. 115; *Clifford* v. *Dryden,* 31 Wash. 545; *People* v. *Flynn,* 7 Utah, 378; *Ex parte Ryan,* 10 Nev. 261; *State* v. *Keefe,* 17 Wyo. 227, 252; *Re Wetton,* 1 Crompt. & J. 459; *Regina* v. *Day,* 3 F. & F. 526.

It is objected that many of these cases relate to crimes committed in prison during service of a sentence. The Maryland case did not, nor did some of the others. But the difference suggested is not one in principle. If incarceration is a reason for not trying a prisoner, it applies whenever and wherever the crime is committed. The unsoundness of the view is merely more apparent when a prisoner murders his warden, than when he is brought before the court for a crime committed before his imprisonment. It is the *reductio ad absurdum* of the plea.

Nor, if that be here important, is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. *Kite* v. *Commonwealth,* 11 Metc. 581, 585, an opinion by Chief Justice Shaw; *Ex parte Ryan,* 10 Nev. 261, 264; *Thomas* v. *People,* 67 N. Y. 218, 226.

But it is argued that when the prisoner is produced in the Superior Court, he is still in the custody and jurisdiction of the United States, and that the state court can not try one not within its jurisdiction. This is a refinement which if entertained would merely obstruct justice. The prisoner when produced in the Superior Court in compliance with its writ is personally present. He has full opportunity to make his defense exactly as if he were brought before the court by its own officer. *State* v.

Wilson, 38 Conn. 126, 136. The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.

The question must be answered in the affirmative.

PACIFIC MAIL STEAMSHIP COMPANY *v.* LUCAS.

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

No. 160. Submitted March 10, 1922.—Decided March 27, 1922.

Where a seaman went ashore at a port of call for hospital treatment, and, being asked only to sign for his past wages without mention of a discharge, executed with the master a mutual release under Rev. Stats., § 4552, but was not given a certificate of discharge as required by § 4551, and the purport of the overt acts in the circumstances was not to release his claim for future wages, maintenance and cure during the remainder of the ship's voyage, *held* (considering also the power given by c. 153, 38 Stat. 1165, to set aside such releases and "take such action as justice shall require,") that the release was not a bar to the assertion of such claim in a libel in admiralty. P. 267.

264 Fed. 938, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court in admiralty awarding the libelant the amounts he was compelled to pay for subsistence and medical treatment at a port of call where he left the ship for hospital treatment, and the amount of his wages from that time until the ship completed her voyage.

Mr. Charles J. Heggerty for petitioner.

Mr. Frederick Clayton Peterson for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel brought by the respondent to recover $219 for wages, subsistence and medical attendance, the libellant having been left at Honolulu, ill, in the course of a voyage from San Francisco to the Orient and return. The defence is that he was not ill, that ill or well he should have remained upon the vessel, and further that he was discharged, and signed the mutual release required by Rev. Stats., § 4552, and by that section made a bar. The Circuit Court of Appeals confirmed the finding of the District Court that the libellant was not malingering, and, as we take it, although it is argued otherwise, also in finding that the doctor and master of the ship were willing that the libellant should go to the Marine Hospital. The only question that we see reason for considering is whether the two Courts were right in holding that the libellant was not concluded by the release.

Both Courts have found that the respondent was only asked to sign for his wages, that a discharge was not mentioned, and to put it in our own way, that the purport of the overt acts in the circumstances was not to release the libellant's claim. The petitioner cites the words of Rev. Stats., § 4552, and *Rosenberg* v. *Doe,* 146 Mass. 191, to show that such a position is impossible. But the same case at a later stage, 148 Mass. 560, admitted a different result where the sailor knew too little English to understand the nature of the document and there was evidence that it was misstated to him. In the present case we have the further very important fact, which does not appear in the report of *Rosenberg* v. *Doe,* that the master did not give the respondent a certificate of discharge, as he was required to, under a penalty of fifty dollars, by Rev. Stats., § 4551, if the respondent really was discharged. Moreover, by a statute later in its present form than *Rosenberg* v. *Doe,* it is provided that notwithstanding the statutory

release "any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require." Act of March 4, 1915, c. 153, § 4, 38 Stat. 1164, 1165. We are not prepared to say that the finding of the two Courts was wrong.

Decree affirmed.

UNITED ZINC & CHEMICAL COMPANY *v.* BRITT ET AL.

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

No. 164. Submitted March 13, 1922.—Decided March 27, 1922.

1. A landowner owes no general duty to keep his land safe for children of tender years, or even free from hidden danger, if he has not directly or by implication invited them there. P. 275.
2. A road is not an invitation to leave it elsewhere than at its end. P. 276.
3. Defendant owned a tract, on the outskirts of a town, on which was an open and abandoned cellar wherein water had accumulated, clear in appearance but dangerously poisoned with chemicals resulting from manufacturing operations formerly conducted there by the defendant. A traveled way passed within 120 feet of the pool and paths crossed the tract. Children came upon the land, entered the water, were poisoned and died. Defendant knew the condition of the water; but the pool, if visible to the children without trespass, was not proven to have caused their entry, nor were children in the habit of going to it. *Held*, that no license or invitation could be implied and that the defendant was not liable. P. 274.

264 Fed. 785, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals, which affirmed a judgment against the above petitioner in an action brought in the District Court for Kansas, by the above respondents, to recover damages for the death of their two children. See Kans. Gen. Stats., 1915, §§ 7323, 7324.

Mr. Henry D. Ashley and *Mr. William S. Gilbert* for petitioner.

The maxim *sic utere tuo* is not a principle of use in the solution of difficult legal questions but a moral precept, which "teaches nothing but a benevolent yearning." Holmes, J., in 8 Harv. Law Rev. 3; Terry, Lead. Prin. Anglo-Amer. Law, §§ 10, 11; *Bonomi* v. *Backhouse,* 96 E. C. L. 641; *Frost* v. *Eastern R. R. Co.,* 64 N. H. 220; *Ratte* v. *Dawson,* 50 Minn. 450; *Walker* v. *Railroad Co.,* 105 Va. 226; *Deane* v. *Clayton,* 7 Taunt. 489; *Knight* v. *Abert,* 6 Pa. St. 472.

At common law, in force in Kansas by statutory enactment, there is no obligation on the part of landowners to maintain fences about their land, and no statute in Kansas requires it. *Union Pacific Ry. Co.* v. *Rollins,* 5 Kans. 177. Owners of unenclosed land are not required to make them safe for trespassing cattle, *Knight* v. *Abert,* 6 Pa. St. 472; *Hughes* v. *Railroad Co.,* 66 Mo. 325; or for children, *Felton* v. *Aubrey,* 74 Fed. 356.

The fact that there was a path through the land by which the children entered for their convenience in reaching their father's camp, did not authorize them to stray from this pathway. And the defendant by merely suffering or permitting such voluntary use, did not insure that its premises were safe.

That children of tender years under no circumstances are classed with idlers, licensees or trespassers is contrary to the decisions of the Court of Appeals in the *Aubrey Case, supra;* and in *Duree* v. *Wabash Ry. Co.,* 241 Fed. 454; *McCarthy* v. *Railroad Co.,* 240 Fed. 602; *Ellsworth* v. *Metheney,* 104 Fed. 119; *Hastings* v. *Railroad Co.,* 143 Fed. 260; *Heller* v. *Railroad Co.,* 265 Fed. 192; *Hardy* v. *Railroad Co.,* 266 Fed. 860. Distinguishing, *Pekin* v. *McMahon,* 154 Ill. 141, limited by *McDermott* v. *Burke,* 256 Ill. 401. See also, *Fincher* v. *Railroad Co.,* 143 La. 164; Elliott on Railroads, 2d ed., § 1259.

Distinguishing *Northern Pacific Ry. Co.* v. *Curtz,* 196 Fed. 367, and the other cases cited by the court below.

See also *Railroad Co.* v. *Bockoven,* 53 Kans. 279; Smith, in 11 Harv. Law Rev. 349; *Wilmot* v. *McPadden,* 79 Conn. 367; *Keffe* v. *Railroad Co.,* 21 Minn. 207; *Ryan* v. *Towar,* 128 Mich. 463; *Friedman* v. *Snare Co.,* 71 N. J. L. 605; *Railroad Co.* v. *Harvey,* 77 Oh. St. 235, 250; *Bottum's Admr.* v. *Hawks,* 84 Vt. 370; *Walsh* v. *Fitchburg R. R. Co.,* 145 N. Y. 301; *Fitzmaurice* v. *Connecticut R. & L. Co.,* 78 Conn. 406.

Bird v. *Holbrook,* 4 Bing. 626; *Loomis* v. *Terry,* 17 Wend. 496; *Wright* v. *Ramscott,* 1 Saund. 83; *Johnson* v. *Patterson,* 14 Conn. 1; and *State* v. *Moore,* 31 Conn. 479, are all cases where there was a wilful intent to injure trespassers and are obviously inapplicable. The difference between these cases and the *Stout Case,* 17 Wall. 652, is so plain as to need no discussion. *Salladay* v. *Old Dominion Copper Co.,* 12 Ariz. 124; *Stendal* v. *Boyd,* 73 Minn. 53.

The cases cited by Mr. Justice Hunt in rendering the opinion of the court in the *Stout Case,* except *Daley* v. *Railroad Co.,* 26 Conn. 591, (since overruled,) come within other well-defined exceptions to the general rule as is clearly pointed out in *Daniels* v. *Railroad Co.,* 154 Mass. 349, and in *Walker* v. *Railroad Co.,* 105 Va. 226, and therefore do not add anything to the authority of the *Stout Case.*

The remarkable confusion which exists today among the federal courts of the several circuits and among the courts of the several States over the question of liability of landowners to trespassing children, which has followed the decision of the *Stout Case,* is probably due to the fact that the *Stout Case* is an exception to the rules of nonliability of a landowner for accidents from visible causes to trespassers on his premises, at common law, and the uncertainty as to what actually was decided in the *Stout Case,* caused by the citation of such cases as *Bird* v. *Holbrook, supra,* and other spring gun cases. That

such is the fact can be seen from *Union Pacific Ry. Co.* v. *McDonald, supra,* approving the *Stout Case,* and citing *Townsend* v. *Wathen,* 9 East, 277, 299.

The landowner owes no duty to trespassers or volunteers going upon his land for their own purposes, to maintain it in any particular condition for their benefit. *Sweeney* v. *Railroad Co.,* 10 Allen, 372; *Kelly* v. *Benas,* 217 Mo. 9.

The case does not fall within the turntable doctrine because: (1) this was not a dangerous and attractive machine; (2) children were not accustomed to play at or near this basement; (3) the Zinc Company had no knowledge of any danger to children; (4) no license can be implied to children to play at this spot.

The case does not fall within the attractive nuisance doctrine because: (1) it does not appear that this basement was attractive to children; (2) the evidence does not establish the fact that the basement was visible from off the premises; (3) no invitation to enter can be implied.

Nor does the case fall within the theory of the trap or spring gun cases because: (1) the Zinc Company had no knowledge of the existence of this basement so filled with water; (2) the element of wilful intent is completely lacking.

In the following cases the turntable doctrine was not accepted: *Daniels* v. *Railroad Co.,* 154 Mass. 349; *Ryan* v. *Towar,* 128 Mich. 463; *Fusselman* v. *Yellowstone Valley Co.,* 53 Mont. 254; *Frost* v. *Railroad Co.,* 64 N. H. 220; *Delaware, Lackawanna & Western R. R. Co.* v. *Reich,* 61 N. J. L. 635; *Friedman* v. *Snare & Triest Co.,* 71 N. J. L. 605; *Walsh* v. *Railroad Co.,* 145 N. Y. 301; *Gillespie* v. *McGowan,* 100 Pa. St. 150; *Thompson* v. *Baltimore & Ohio R. R. Co.,* 218 Pa. St. 444; *Paolino* v. *McKendall,* 24 R. I. 432; *Bottum's Administrator* v. *Hawks,* 84 Vt. 370; *Walker* v. *Railroad Co.,* 105 Va. 226,

Conrad v. *Railroad Co.,* 64 W. Va. 176; *Ritz* v. *Wheeling,* 45 W. Va. 262; *Uthermohlen* v. *Bogg's Run Co.,* 50 W. Va. 457.

The following cases followed the *Stout Case* and adopted the turntable doctrine: *Barrett* v. *Southern Pac. Co.,* 91 Cal. 296; *Daley* v. *Railroad Co.,* 26 Conn. 591; *Ferguson* v. *Railroad Co.,* 75 Ga. 637; *Pekin* v. *McMahon,* 154 Ill. 141; *Edgington* v. *Railroad Co.,* 116 Ia. 410; *Kansas Central Ry. Co.* v. *Fitzsimmons,* 22 Kans. 686; *Bransom* v. *Labrot,* 81 Ky. 638; *Keffe* v. *Railroad Co.,* 21 Minn. 207; *Koons* v. *Railroad Co.,* 65 Mo. 592; *A. & N. R. Co.* v. *Bailey,* 11 Neb. 332; *Harriman* v. *Railroad Co.,* 45 Oh. St. 11; *Bridger* v. *Railroad Co.,* 25 S. Car. 24; *Evansich* v. *Railroad Co.,* 57 Tex. 126; *Railroad Co.* v. *Cargille,* 105 Tenn. 628.

The following cases, taken from jurisdictions which in earlier cases approved the turntable cases, show that the tendency in them is to limit the doctrine strictly to turntable cases and not to extend it so as to embrace the so-called "attractive nuisance" doctrine: *Peters* v. *Bowman,* 115 Cal. 345; *Wilmot* v. *McPadden,* 79 Conn. 367; *Railroad Co.* v. *Beavers,* 113 Ga. 398; *Stendal* v. *Boyd,* 73 Minn. 53; *Kelly* v. *Benas,* 217 Mo. 1; *Wheeling R. R. Co.* v. *Harvey,* 77 Oh. St. 235; *Dobbins* v. *Railroad Co.,* 91 Tex. 60.

The question here presented is one of first impression notwithstanding *Union Pacific Ry. Co.* v. *McDonald, supra,* because what was said in that case on the subject of attractive nuisances was *dicta.*

Mr. F. J. Oyler and *Mr. Fred Robertson* for respondents.

This case is governed by the rule of the turntable, attractive nuisance and hidden danger cases, now firmly established by the law of Kansas as well as by this court. *Railroad Co.* v. *Stout,* 11 Wall. 657; *Union Pacific Ry. Co.* v. *McDonald,* 152 U. S. 262; *Baltimore & Potomac R. R. Co.* v. *Cumberland,* 176 U. S. 232.

The decisions of the Supreme Court of Kansas directly in point are *Roman* v. *Leavenworth,* 95 Kans. 513; *Price* v. *Water Co.* 58 Kans. 551; *Biggs* v. *Wire Co.,* 60 Kans. 217; *Electric Co.* v. *Healy,* 65 Kans. 798; *Harper* v. *Topeka,* 92 Kans. 11; *Kansas City* v. *Siese,* 71 Kans. 283.

This pond was attractive. The plaintiff in error had knowledge of its danger, and left no barriers, warnings or danger signals of any kind. The boys had no knowledge whatever of the hidden danger, and, being of tender years, would have been unable to appreciate the danger had they even known that the pond had once been used as a part of an acid plant. This pool could readily be seen by the boys while they were on a well traveled road, running north and southwest of it.

The rule we are contending for is upheld in *Heller* v. *New York, N. H. & H. R. R. Co.,* 265 Fed. 192; and *American Ry. Express Co.* v. *Crabtree,* 271 Fed. 287.

Even though the boys were trespassers, which they were not, the plaintiff in error would be liable. They were not trespassers because of their tender age and because the plaintiff in error maintained three well traveled roads over its premises, which were as many invitations to the public and these boys to enter, with assurance that if they did they would encounter no danger. *Paolino* v. *McKendall,* 24 R. I. 432; *Hobbs* v. *Blanchard & Sons Co.,* 74 N. H. 116; *Scheuerman* v. *Scharfenberg,* 163 Ala. 337; *Walsh* v. *Fitchburg R. R. Co.,* 145 N. Y. 301.

The poisons were as much of a hidden danger and as fatal a death trap as a spring gun; and hence come under the rule announced in *Palmer* v. *Gordon,* 173 Mass. 410.

The statute of Kansas under which this action was brought and prosecuted is Gen. Stats., 1915, §§ 7323, 7324.

There was sufficient evidence to justify the court in giving the instruction complained of. *Clark* v. *Powder Co.,* 94 Kans. 268. No exception was taken to the court's refusal to give instructions requested.

It is not sufficient to challenge the charge given by the court as a whole. *Lincoln Savings Bank Co.* v. *Allen,* 82 Fed. 148. No exception was taken to the overruling of the motion for a directed verdict.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the respondents against the petitioner to recover for the death of two children, sons of the respondents. The facts that for the purposes of decision we shall assume to have been proved are these. The petitioner owned a tract of about twenty acres in the outskirts of the town of Iola, Kansas. Formerly it had there a plant for the making of sulphuric acid and zinc spelter. In 1910 it tore the building down but left a basement and cellar, in which in July, 1916, water was accumulated, clear in appearance but in fact dangerously poisoned by sulphuric acid and zinc sulphate that had come in one way or another from the petitioner's works, as the petitioner knew. The respondents had been travelling and encamped at some distance from this place. A travelled way passed within 120 or 100 feet of it. On July 27, 1916, the children, who were eight and eleven years old, came upon the petitioner's land, went into the water, were poisoned and died. The petitioner saved the question whether it could be held liable. At the trial the Judge instructed the jury that if the water looked clear but in fact was poisonous and thus the children were allured to it the petitioner was liable. The respondents got a verdict and judgment, which was affirmed by the Circuit Court of Appeals. 264 Fed. 785.

Union Pacific Ry. Co. v. *McDonald,* 152 U. S. 262, and kindred cases were relied upon as leading to the result, and perhaps there is language in that and in *Railroad Co.* v. *Stout,* 17 Wall. 657, that might seem to justify it; but the doctrine needs very careful statement not to make an unjust and impracticable requirement. If the children had been adults they would have had no case.

They would have been trespassers and the owner of the land would have owed no duty to remove even hidden danger; it would have been entitled to assume that they would obey the law and not trespass. The liability for spring guns and mantraps arises from the fact that the defendant has not rested on that assumption, but on the contrary has expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it. *Chenery* v. *Fitchburg R. R. Co.,* 160 Mass. 211, 213. Infants have no greater right to go upon other peoples' land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied.

In *Railroad Co.* v. *Stout,* 17 Wall. 657, the well-known case of a boy injured on a turntable, it appeared that children had played there before to the knowledge of employees of the railroad, and in view of that fact and the situation of the turntable near a road without visible separation, it seems to have been assumed without much discussion that the railroad owed a duty to the boy. Perhaps this was as strong a case as would be likely to occur of maintaining a known temptation, where temptation takes the place of invitation. A license was implied and liability for a danger not manifest to a child was declared in the very similar case of *Cooke* v. *Midland Great Western Ry. of Ireland* [1909], A. C. 229.

In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully

were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty. There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there. The difficulties in the way of implying a license are adverted to in *Chenery* v. *Fitchbury R. R. Co.,* 160 Mass. 211, 212, but need not be considered here. It does not appear that children were in the habit of going to the place; so that foundation also fails.

Union Pacific Ry. Co. v. *McDonald,* 152 U. S. 262, is less in point. There a boy was burned by falling into burning coal slack close by the side of a path on which he was running homeward from other boys who had frightened him. It hardly appears that he was a trespasser and the path suggests an invitation; at all events boys habitually resorted to the place where he was. Also the defendant was under a statutory duty to fence the place sufficiently to keep out cattle. The decision is very far from establishing that the petitioner is liable for poisoned water not bordering a road, not shown to have been the inducement that led the children to trespass, if in any event the law would deem it sufficient to excuse their going there, and not shown to have been the indirect inducement because known to the children to be frequented by others. It is suggested that the roads across the place were invitations. A road is not an invitation to leave it elsewhere than at its end.

Judgment reversed.

MR. JUSTICE CLARKE, with whom concurred THE CHIEF JUSTICE and MR. JUSTICE DAY, dissenting.

The courts of our country have sharply divided as to the principles of law applicable to "attractive nuisance" cases, of which this one is typical.

At the head of one group, from 1873 until the decision of today, has stood the Supreme Court of the United States, applying what has been designated as the "Humane" doctrine. Quite distinctly the courts of Massachusetts have stood at the head of the other group, applying what has been designated as a "Hard Doctrine"—the "Draconian Doctrine." Thompson on Negligence, vol. I, §§ 1027 to 1054 inclusive, especially §§ 1027, 1047 and 1048; Cooley on Torts, 3d ed., pp. 1269, *et seq.*

In 1873, in *Railroad Co.* v. *Stout,* 17 Wall. 657, this court, in a turntable case, in a unanimous decision, strongly approved the doctrine that he who places upon his land, where children of tender years are likely to go, a construction or agency, in its nature attractive, and therefore a temptation, to such children, is culpably negligent if he does not take reasonable care to keep them away, or to see that such dangerous thing is so guarded that they will not be injured by it when following the instincts and impulses of childhood, of which all mankind has notice. The court also held that where the facts are such that different minds may honestly draw different conclusions from them, the case should go to the jury.

Twenty years later the principle of this *Stout Case* was elaborately reëxamined and unreservedly affirmed, again in a unanimous decision in *Union Pacific Ry. Co.* v. *McDonald,* 152 U. S. 262. In each of these cases the contention that a child of tender years must be held to the same understanding of the law with respect to property rights as an adult and that therefore, under the circumstances of each, the child injured was a trespasser, was considered and emphatically rejected. The attractiveness of the unguarded construction or agency—the temptation of it to children—is an invitation to enter the premises that purges their technical trespass. These have been regarded as leading cases on the subject for now almost fifty years and have been widely followed by state and federal

courts,—by the latter so recently as *Heller* v. *New York, N. H. & H. R. R. Co.*, 265 Fed. 192, and *American Ry. Express Co.* v. *Crabtree*, 271 Fed. 287.

The dimensions of the pool of poisoned water were about 20x45 feet. It was 2½ to 3 feet deep in part and in part 10 or more feet deep. A photograph in the record gives it the appearance of an attractive swimming pool, with brick sides and the water coming nearly to the top of the wall. The water is described by the witnesses as appearing to be clear and pure, and, on the hot summer day on which the children perished, attractively cool.

This pool is indefinitely located within a tract of land about 1,000 feet wide by 1,200 feet long, about which there had not been any fence whatever for many years, and there was no sign or warning of any kind indicating the dangerous character of the water in the pool. There were several paths across the lot, a highway ran within 100 to 120 feet of the pool, and a railway track was not far away. The land was immediately adjacent to a city of about 10,000 inhabitants, with dwelling houses not far distant from it. The testimony shows that not only the two boys who perished had been attracted to the pool at the time but that there were two or three other children with them, whose cries attracted men who were passing nearby, who, by getting into the water, succeeded in recovering the dead body of one child and in rescuing the other in such condition that, after lingering for a day or two, he died. The evidence shows that the water in the pool was highly impregnated with sulphuric acid and zinc sulphate, which certainly caused the death of the children, and that the men who rescued the boys suffered seriously, one of them for as much as two weeks, from the effects of the poisoned water.

The case was given to the jury in a clear and comprehensive charge, and the judgment of the District Court upon the verdict was affirmed by the Circuit Court of

Appeals. The court charged the jury that if the water in the pool was not poisonous and if the boys were simply drowned there could be no recovery, but that if it was found, that the defendant knew or in the exercise of ordinary care should have known, that the water was impregnated with poison, that children were likely to go to its vicinity, that it was in appearance clear and pure and attractive to young children as a place for bathing, and that the death of the children was caused by its alluring appearance and by its poisonous character, and because no protection or warning was given against it, the case came within the principle of the "attractive nuisance" or "turntable" cases and recovery would be allowed.

This was as favorable a view of the federal law, as it has been until today, as the petitioner deserved. The Supreme Court of Illinois, on the authority of the *Stout Case,* held a city liable for the death of a child drowned in a similar pool of water not poisoned. *City of Pekin* v. *McMahon,* 154 Ill. 141.

The facts, as stated, make it very clear that in the view most unfavorable to the plaintiffs below there might be a difference of opinion between candid men as to, whether the pool was so located that the owners of the land should have anticipated that children might frequent its vicinity, whether its appearance and character rendered it attractive to childish instincts so as to make it a temptation to children of tender years, and whether, therefore, it was culpable negligence to maintain it in that location, unprotected and without warning as to its poisonous condition. This being true, the case would seem to be one clearly for a jury, under the ruling in the *Stout Case, supra.*

Believing as I do that the doctrine of the *Stout* and *McDonald Cases,* giving weight to, and making allowance, as they do, for, the instincts and habitual conduct of children of tender years, is a sound doctrine, calculated to

make men more reasonably considerate of the safety of the children of their neighbors, than will the harsh rule which makes trespassers of little children which the court is now substituting for it, I cannot share in setting aside the verdict of the jury in this case, approved by the judgments of two courts, upon what is plainly a disputed question of fact and in thereby overruling two decisions which have been accepted as leading authorities for half a century, and I therefore dissent from the judgment and opinion of the court.

UNITED STATES *v.* BEHRMAN.

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

No. 582. Argued March 7, 1922.—Decided March 27, 1922.

1. An exception in a statute defining an offense is met in an indictment by alleging facts sufficient to show that the defendant was not within the exception. P. 287.
2. An indictment need only describe the crime with sufficient clearness to show the violation of law and to inform the defendant of the nature and cause of the accusation and enable him to plead the judgment, if any, in bar of further prosecution for the same offense. P. 288.
3. An indictment for a statutory offense need not charge *scienter* or intent if the statute does not make them elements. P. 288.
4. Under the Anti-Narcotic Act of December 17, 1914, c. 1, § 2, 38 Stat. 785, making it an offense to sell, barter, exchange or give away certain drugs except in pursuance of a written order of the person to whom such article is to be sold, etc., on an official form, and providing that nothing in the section shall apply to the dispensing or distribution of the drugs to a patient by a registered physician in the course of his professional practice only, or to their sale, dispensing or distribution by a dealer to a consumer in pursuance of a written prescription issued by a registered physician, such a physician commits the offense if, knowing a person to be habitually addicted to the use of such drugs, and not purposing to treat him for any other disease, he issues him prescrip-

tions for quantities sufficient to make a great number of doses, more than enough to satisfy his craving if all consumed at one time, intending that he shall use them by self-administration in divided doses over a period of several days, and thus enables the addict to obtain such excessive quantities, without other order, from a pharmacist, and to have them in his possession and control with no other restraint upon their administration or disposition than his own weakened will. P. 288.

Reversed.

ERROR to a judgment of the District Court sustaining a demurrer to an indictment.

Mr. William C. Herron, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

The main enacting part of § 2 contemplates merely an external standard and does not require either guilty knowledge or guilty intent. The question is whether the defendant's action can be called a dispensing or prescription of drugs to a patient in the course of defendant's professional practice only, within the meaning of the exceptions. The so-called "patient" in this case was suffering from no disease except drug addiction. It must be admitted that that is a disease, and that the defendant intended by his method of treatment to cure it, and honestly believed that he could, by this method. Nevertheless, it is a well known fact, of which this court has taken notice, that drug addicts as a class are persons weakened materially in their sense of moral responsibility and in their power of will, and this court also knows, as a matter of common knowledge, that, in any community where drugs are prescribed, there will be a large number of physicians to whom any construction of § 2 will be applicable. The question, therefore, is whether every physician licensed and registered under the act is at liberty, if he honestly believes such a course to be proper, to furnish to drug addicts the means to obtain the drugs without any supervision upon the part of the various doctors in-

volved of the manner or time of taking or other disposition of the drugs.

In so far as the revenue feature of the act is concerned, see *United States* v. *Rosenberg,* 251 Fed. 963; *United States* v. *Doremus,* 249 U. S. 86; *Webb* v. *United States,* 249 U. S. 96, 99, 100; *Jin Fuey Moy* v. *United States,* 254 U. S. 189, 194.

While no question in regard to the intent or belief of the physician was raised or was material in the cases referred to, the principles laid down in them, in so far as they relate to the revenue feature, seem to encourage the conclusion that, irrespective of the intent or knowledge, the transfer of drugs without any supervision whatsoever would not be, as a matter of law, the prescription of the drugs to a patient in the legitimate practice of a physician's profession. In regard to the aspect of the act as a measure aimed to prevent drug addiction, the case made by the indictment must be looked at in the same spirit in which this court looked at the third certified question in the *Webb Case.* As a matter of common sense, no drug addict can possibly be cured by any such method as this, and the whole method of treatment is a mere pretense, however honest the doctor may be in his belief and intentions, by which the addict obtains a store of drugs to suit his cravings and to dispose of them for money if he so desires. A drug addict might visit many doctors and obtain drugs from all of them. The result would be to transfer the distribution of the drugs from regular licensed dealers to physicians.

See *Hoyt* v. *United States,* 273 Fed. 792; *Barbot* v. *United States,* 273 Fed. 919.

Mr. Thomas C. Spelling, for defendant in error, submitted.

It requires a strained, indeed a nonpermissible, construction to bring the administration, direct or through

prescriptions, of the narcotics specified, within the terms or meaning of the act, even if exceptions (a) and (b) had not been inserted. A physician in treating a patient and prescribing for him does not either sell, barter, exchange or give away the medicine which he prescribes. The prescription embodies professional advice for which the patient pays. He does not buy the prescription, but pays for the advice. The order must not only be issued on an official blank, but it must be the order "of the person to whom such article is sold, bartered, exchanged, or given." The statute differentiates amply for our present purpose prescriptions from the commercial orders intended.

In exception (b), prescriptions are placed in a distinct category from such orders. That the "written order" required to be presented by an ordinary purchaser is in a category other than the prescription is further shown by the requirement of different modes of authentication. In exception (b) the written prescription which the purchaser uses and to which the statute does not apply, "shall be dated as of the day on which it is signed by the physician who shall have issued the same."

The statute says: "Nothing contained in this section shall apply: (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . registered under this act in the course of his professional practice only." The proviso which completes that exception is not relevant nor is any portion of exception (b) relevant, except that the latter furnishes conclusive evidence that Congress had in mind the common or uniform method by which the exempted classes practice their professions, namely, by delivering written prescriptions. In other words, Congress recognized that civilization embraces a profession of numerous and, for the most part, highly esteemed membership, upon whom afflicted, diseased, crippled and dying humanity leans in pain and anguish. And, now, with no justifying words in the stat-

ute, plaintiff would interpolate a meaning to exclude those constituting a large class designated as "addicts," where the purpose is merely relief from pain and not to effect a cure. But even if we conceded the correctness of that extreme view it would not save this indictment.

The statute contains not a word of limitation upon the words "professional practice only," nor does it use the term "addict", or any reference whatever to any class of patients or diseases, and the Government admits that addiction is a disease. Of course, a prescription could be resorted to by a regular licensed physician as a mere subterfuge for effecting a sale. But, here, not only is there a total absence of allegation of bad faith, unlawful intent and irregularity, but language is used clearly warranting a contrary presumption in each and all of these respects.

The Government argues that the amount of drugs is designated as "large", but the allegation that the drugs were to be self-administered in divided doses "over a period of several days" seems to negative or modify any such inference. The court might infer as a matter of common knowledge that the quantity would be excessive if a limited number of doses were specified, but in this case, owing to the indefiniteness of "several days" we have no data to justify an inference that the quantity was large.

The facts alleged do not constitute a crime, because they are consistent with defendant's innocence and an honest and sincere purpose to cure King of his addiction to the use of the drugs dispensed, or to permanently better his physical condition due to such addiction.

The Government's argument is an admission that the decisions so far rendered do not support the desired extension and that a precedent to accomplish it is now sought.

Though we are not required to go so far, yet for humane reasons, we urge that any construction which would for-

bid and penalize the giving of a prescription to afford temporary relief, even though a cure was not in immediate contemplation, would be a harsh construction not warranted by any language in the statute.

In this indictment there is not a word to indicate that the defendant gave the prescription merely that the addict might make himself comfortable or that negatives the presumption that it was given with the intention of effecting a cure. *Hoyt* v. *United States,* 273 Fed. 792; *Barbot* v. *United States,* 273 Fed. 919.

It was not necessary that King should have been under the direct control of the defendant to constitute him a "patient" within the meaning of the statute, as the term is there used. *Jin Fuey Moy* v. *United States,* 254 U. S. 189; *United States* v. *Balint,* D. C. So. Dist. N. Y., June 28, 1921, unreported. See s. c., *ante,* 250.

Mr. Justice Day delivered the opinion of the court.

This case is here under the Criminal Appeals Act, 34 Stat. 1246. The statute involved is the Narcotic Drug Act of December 17, 1914, c. 1, § 2, a, 38 Stat. 785, 786.

This statute in § 2, subdivision a, makes it an offense to sell, barter, exchange, or give away any of the narcotic drugs named in the act 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. It is further provided that nothing in the section shall apply to the dispensing or distribution of any of the drugs to a patient by a registered physician in the course of his professional practice only, or to the sale, dispensing or distribution of said drugs by a dealer to a consumer in pursuance of a written prescription issued by a physician registered under the act.

The indictment charges that the defendant did unlawfully sell, barter, and give to Willie King a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit, 210 grains of cocaine, not in pursuance of any written order of King on a form issued for that purpose by the Commissioner of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the act; and issued three written orders to the said King in the form of prescriptions signed by him, which prescriptions called for the delivery to King of the amount of drugs above described; that the defendant intended that King should obtain the drugs from the druggist upon the said orders; that King did obtain upon said orders drugs of the amount and kind above described pursuant to the said prescriptions; that King was a person addicted to the habitual use of morphine, heroin and cocaine, and known by the defendant to be so addicted; that King did not require the administration of either morphine, heroin, or cocaine by reason of any disease other than such addiction; that defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to King by the defendant or any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by King in the presence of the defendant, but that all of the drugs were put in the possession or control of King with the intention on the part of the defendant that King would use the same by self-administration in divided doses over a period of several days, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the craving of King therefor if consumed by him all at one

time; that King was not in any way restrained or prevented from disposing of the drugs in any manner he saw fit; and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor, and were adapted for such consumption.

The question is: Do the acts charged in this indictment constitute an offense within the meaning of the statute? As we have seen, the statute contains an exception to the effect that it shall not apply to the dispensing or distribution of such drugs to a patient by a registered physician in the course of his professional practice only, nor to the sale, dispensing or distribution of the drugs by a dealer to a consumer under a written prescription by a registered physician. The rule applicable to such statutes is that it is enough to charge facts sufficient to show that the accused is not within the exception. *United States* v. *Cook*, 17 Wall. 168, 173.

The District Judge who heard this case was of the opinion that prescriptions in the regular course of practice did not include the indiscriminate doling out of narcotics in such quantity to addicts as charged in the indictment, but out of deference to what he deemed to be the view of a local District Judge in another case announced his willingness to follow such opinion until the question could be passed upon by this court, and sustained the demurrer. In our opinion the District Judge who heard the case was right in his conclusion and should have overruled the demurrer.

Former decisions of this court have held that the purpose of the exception is to confine the distribution of these drugs to the regular and lawful course of professional practice, and that not everything called a prescription is necessarily such. *Webb* v. *United States*, 249 U. S. 96; *Jin Fuey Moy* v. *United States*, 254 U. S. 189.

Of this phase of the act this court said in the *Jin Fuey Moy Case,* p. 194:

"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."

It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution for the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent. *United States* v. *Smith,* 2 Mason, 143; *United States* v. *Miller,* Fed. Cas. 15,775; *United States* v. *Jacoby,* Fed. Cas. 15,462; *United States* v. *Ulrici,* Fed. Cas. 16,594, (opinion by Miller, Circuit Justice); *United States* v. *Bayaud,* 16 Fed. 376, 383–4; *United States* v. *Jackson,* 25 Fed. 548, 550; *United States* v. *Guthrie,* 171 Fed. 528, 531; *United States* v. *Balint, ante,* 250.

It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the act; but what is here charged is that the defendant physician by means of prescriptions has enabled one, known by him to be an addict, to obtain from a pharmacist the enormous number of doses contained in 150 grains of heroin, 360 grains of morphine,

and 210 grains of cocaine. As shown by Wood's United States Dispensatory, a standard work in general use, the ordinary dose of morphine is one-fifth of a grain, of cocaine one-eighth to one-fourth of a grain, of heroin one-sixteenth to one-eighth of a grain. By these standards more than three thousand ordinary doses were placed in the control of King. Undoubtedly doses may be varied to suit different cases as determined by the judgment of a physician. But the quantities named in the indictment are charged to have been entrusted to a person known by the physician to be an addict without restraint upon him in its administration or disposition by anything more than his own weakened and perverted will. Such so-called prescriptions could only result in the gratification of a diseased appetite for these pernicious drugs or result in an unlawful parting with them to others in violation of the act as heretofore interpreted in this court within the principles laid down in the *Webb* and *Jin Fuey Moy Cases, supra.*

We hold that the acts charged in the indictment constituted an offense within the terms and meaning of the act. The judgment of the District Court to the contrary should be reversed.

Reversed.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS, dissenting.

If this case raised a question of pleading I should go far in agreeing to disregard technicalities that were deemed vital a hundred or perhaps even fifty years ago. But we have nothing to do with pleading as such, and as the Judge below held the indictment bad it can be sustained only upon a construction of the statute different from that adopted below.

The indictment for the very purpose of raising the issue that divides the Court alleges in terms that the drugs

were intended by the defendant to be used by King in divided doses over a period of several days. The defendant was a licensed physician and his part in the sale was the giving of prescriptions for the drugs. In view of the allegation that I have quoted and the absence of any charge to the contrary it must be assumed that he gave them in the regular course of his practice and in good faith. Whatever ground for scepticism we may find in the facts we are bound to accept the position knowingly and deliberately taken by the pleader and evidently accepted by the Court below.

It seems to me impossible to construe the statute as tacitly making such acts, however foolish, crimes, by saying that what is in form a prescription and is given honestly in the course of a doctor's practice, and therefore, so far as the words of the statute go, is allowed in terms, is not within the words, is not a prescription and is not given in the course of practice, if the Court deems the doctor's faith in his patient manifestly unwarranted. It seems to me wrong to construe the statute as creating a crime in this way without a word of warning. Of course the facts alleged suggest an indictment in a different form, but the Government preferred to trust to a strained interpretation of the law rather than to the finding of a jury upon the facts. I think that the judgment should be affirmed.

HUMP HAIRPIN MANUFACTURING COMPANY *v.* EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 139. Argued March 2, 3, 1922.—Decided March 27, 1922.

1. Error of state authorities in treating interstate as intrastate business in computing a corporation excise tax under a statute meant to include the latter only in the computation, goes to the constitutionality of the tax and not of the statute. P. 293.

2. Business done by a corporation through orders approved in a State where its tangible property and business office were located and its manufacturing conducted, but first obtained by its salesmen from residents in other States, *held* interstate. P. 294.
3. Where a state law for taxing foreign corporations for the privilege of doing local business bases the tax upon the capital stock actually represented by property located and business transacted within the State, plainly intending not to tax interstate commerce, and is reasonable as to amount and free from discrimination in favor of local corporations, a tax assessed under it will not be unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. P. 295.

293 Ill. 387, affirmed.

ERROR to a judgment of the Supreme Court of Illinois in a suit brought by the plaintiff in error to recover the amount of a tax.

Mr. Colin C. H. Fyffe for plaintiff in error.

Mr. Clarence N. Boord, with whom *Mr. Edward J. Brundage,* Attorney General of the State of Illinois, was on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1918 the defendant in error, as Secretary of State, assessed a tax of $6,045 upon the plaintiff in error, a corporation organized under the laws of West Virginia, for the privilege of doing business in the State of Illinois. The tax was paid under protest and this suit was instituted to recover the amount of it, based upon the contention that the statute under which it was imposed offends against the Federal Constitution for various reasons, the only one argued in this court, however, being that, if given effect, it will constitute a regulation of, and impose a direct burden upon, interstate commerce.

The case was tried on stipulated facts, from which we derive these as essential to a disposition of it.

In 1918 the authorized capital stock of the company was $6,000,000, of which $5,500,000 was reported by the company to the State as paid in and issued. It was a manufacturing corporation, with all of its tangible property in Illinois. Its method of doing business was to send salesmen into Illinois and the various other States to solicit orders, which, however, were not accepted until approved at the Chicago office, after which they were filled from stocks maintained in that city. The company represented the potential value of its patent rights, licenses, trademarks, secret processes and good will as $5,124,126.72, and the total value of its real and personal property as $416,629.07,—making a total in Illinois of $5,540,755.79. It also represented the total sales made by it in 1917, on which year's business the tax was computed, as $263,334.96, and of these $25,814 were made to residents of Illinois.

The statute under which the tax was assessed reads:

"It shall be the duty of the Secretary of State to propound interrogatories from time to time to officers of such foreign corporations [with negligible exceptions] doing business in this State to ascertain the proportion of capital stock actually being represented by property located and business transacted in the State of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this State." (Hurd's Statutes, 1917, p. 719, § 67 fb.)

In a recent case, *American Can Co.* v. *Emmerson,* 288 Ill. 289, the Supreme Court of Illinois held that it has been the policy of that State since 1872 to accord precisely equal treatment to domestic and foreign corporations of like character (Hurd's Statutes, 1917, p. 703, § 26,) and that the fees for transacting business in the State are computed on the amount of the authorized capital stock

of domestic corporations and, at the same rate, on the amount of the capital stock of foreign corporations actually "represented by property located and business transacted" in the State, as determined by the Secretary of State under the statute. The basis for the computation was $50 for the first $5,000, and $1 upon each $1,000 over that amount.

Acting under these statutes, the Secretary of State concluded that, under the facts as we have stated them, all of the business of the company was "transacted" in the State of Illinois and, all of the tangible property of the company being in the State, he computed the tax on the entire authorized capital stock. The State Supreme Court sustained the assessment as valid.

The contention of the plaintiff in error in this court is that, notwithstanding the manner in which it was done, the business which the company did with residents of States other than Illinois was interstate business and that the treating of the amount of it as a part of the business of the company transacted in that State in determining the percentage of the total business of the corporation transacted therein, renders the act under which the computation was made unconstitutional and void for the reason that the tax assessed is a burden upon interstate commerce.

Plainly this contention cannot be sustained. The statute and the state Supreme Court both show a candid purpose to differentiate state from interstate business and to use only the former in determining the amount of the disputed tax. If the Secretary of State or the court, in computing the tax, erroneously treated as intrastate that which was really interstate business, such error would be reason in a proper case for correcting the computation, but would not justify declaring the act unconstitutional. The facts, that all of the property of the company was located in Illinois, that all of its manufacturing operations

were conducted in that State, and that all contracts of sale must be approved at Chicago, where the only business office of the company was maintained, certainly reduce the interstate element in its business to the lowest terms, but, nevertheless, we are constrained to hold that the business done with residents of States other than Illinois is interstate business, and therefore, there remains the question, Whether the use made of the amount of such interstate business, in determining the amount of the tax, renders it invalid?

While a State may not use its taxing power to regulate or burden interstate commerce (*United States Express Co.* v. *Minnesota,* 223 U. S. 335; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *United States Express Co.* v. *Minnesota,* 223 U. S. 335, 343; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles,* 242 U. S. 111; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 326–327. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon

it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.

No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of States other than Illinois be regarded as interstate.

Clearly the statute is not a disguised attempt to tax interstate commerce. On the contrary, its purpose plainly is to differentiate state from interstate business and to impose the tax only on the former. Construed with other statutes the act accords equal treatment to domestic and foreign corporations, and clearly in this case property of the company beyond the jurisdiction of the State is not taxed—all of its property is in Illinois. To require foreign corporations to pay for the privilege of doing business in a State is, of course, a familiar and often approved form of taxation, and in this case the fee imposed is reasonable in amount.

The tax is not imposed directly upon the proceeds of interstate commerce and is not computed upon it. The $235,000 of interstate business of the company is only one of three factors used in estimating or measuring "the amount of the capital stock represented by property and business transacted in Illinois," upon which the privilege tax in dispute was computed. The other two factors were $5,540,000 of property in Illinois and $25,000 of business stipulated as done with residents of that State. If the fee or privilege tax were computed at the statutory rate on the whole of the interstate business, it would be trifling in amount, but if computed on the property admitted to

have been in use in the State it would be but slightly less than the tax collected.

If this same amount of tax had been imposed upon such a manufacturing corporation as we have here without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of (142 U. S. *supra*, p. 229). Or if the State had imposed an income tax, a part of which would have been derived from the net profits on this same interstate business, no valid objection could have been made to it. (*United States Glue Co.* v. *Oak Creek, supra.*) At most the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant and it is therefore constitutional. The judgment of the Supreme Court of Illinois must be

Affirmed.

Mr. Justice Van Devanter dissents.

Mr. Justice McReynolds concurs in the result.

WALLACE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 118. Petition for rehearing and motion to remand for further finding.—Decided April 10, 1922.

The Senate, in confirming nominations to office, exercises, not a judicial, but an executive function; and, if it confirms a nomination to a place in the Army existing only through the President's removal of another officer, the legal effect is to sustain the removal no less where the nomination is taken as assurance that a vacancy exists than where the Senate investigates the facts. P. 298.

Petition for rehearing and motion to remand denied.

On a petition for rehearing and for a remand of the case to the Court of Claims for a further finding of fact. See s. c. 257 U. S. 541.

Mr. Frank S. Bright and *Mr. H. Stanley Hinrichs*, for appellant, submitted the petition and motion.

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

Counsel for the appellant object to the presumption we indulge in our opinion in this case that the Senate must have known of the dismissal of Wallace when it confirmed the nomination of Lieutenant Colonel Robert Smith, whose appointment and confirmation filled the place considered vacant by Wallace's dismissal. They insist that the absence of knowledge by the Senate of Wallace's removal was conceded by the Government in both the Court of Claims and here. What the Government brief in this court said was that it did not appear that the Senate was advised. But appellant's counsel produce evidence from the record in the Court of Claims upon which they ask that the case be remanded to the Court of Claims to make a finding on this point. Let us concede for the sake of the argument, without deciding, that it is properly a matter of evidence *de hors* the record, and of a finding thereon. The chief item of evidence on which the motion is based is a statement in the record below that

"On or before February 21, 1918, it was the practice of the Adjutant General's office to nominate an officer *vice* the particular officer whose promotion or separation from the service caused the vacancy; and that, after February 21, 1918, the practice of indicating the specific vacancy was discontinued on the recommendation of the Executive Clerk of the Senate."

The contention of the defendant on this showing is that the Senate adopted the practice of confirming appointments to vacancies made by the President without investigation into the cause of the vacancies because of the exigencies of war and the great number of appointments. We do not see that if such facts were found, it would alter

our necessary conclusion. The Senate in confirming nominations is not exercising a judicial but an executive function. It does not have to give a hearing or make an investigation before lawful action, and if it chooses to accept the President's nomination as assurance that there is a vacancy to which the appointment proposed can be made, and acts on that assurance, the legal effect of the confirmation is not affected.

Petition for rehearing and the motion to remand are denied.

BALZAC *v.* PEOPLE OF PORTO RICO.

ERROR TO THE SUPREME COURT OF PORTO RICO.

Nos. 178, 179. Argued March 20, 1922.—Decided April 10, 1922.

1. The Act of January 28, 1915, c. 22, 38 Stat. 803, amending § 246 of the Judicial Code, and providing that writs of error from this court may be prosecuted to the supreme courts of Porto Rico and Hawaii in the same classes of cases as to the courts of last resort of the States under Jud. Code, § 237, meant to assimilate the jurisdiction over those territorial courts to that over the state courts and is to be construed as embracing subsequent changes in § 237 not obviously inapplicable, such as the amendments made by the Act of September 6, 1916, c. 448, 39 Stat. 726. P. 300.
2. In prosecutions for criminal libel in a district court of Porto Rico, defendant demanded a jury under the Sixth Amendment, which was denied him upon a construction of local statutes, applicable to this and other misdemeanors. *Held,* that the demand drew in question the validity of the statutes, within the meaning of Jud. Code, § 237, as amended in 1916, and that judgments of the Supreme Court of Porto Rico affirming the convictions were reviewable here by writ of error. P. 302.
3. To present the constitutionality of a statute, it is not essential that an assignment of error should mention the statute in question, if the record definitely shows that its constitutionality was questioned and the assignment is clearly directed to that controversy. P. 303.
4. The provisions of the Constitution guaranteeing jury trial in all criminal prosecutions do not apply to a territory belonging to the

United States which has not been incorporated into the Union; and Porto Rico was not so incorporated by the Act of April 12, 1900, c. 191, 31 Stat. 77, which gave it a temporary government. P. 304. *Dorr* v. *United States,* 195 U. S. 138.

5. The Organic Act for Porto Rico of March 2, 1917, c. 145, 39 Stat. 951, known as the Jones Act, did not have the effect of incorporating Porto Rico into the United States. P. 305.
6. Since the Spanish War, an intention of Congress to incorporate new territory into the Union is not to be admitted without express declaration or an implication so strong as to exclude any other view. P. 306.
7. The provisions of § 5 of the Organic Act, *supra,* for extending federal citizenship to citizens and certain residents of Porto Rico, did not extend the jury system there. P. 307.
8. Neither can incorporation into the United States be implied from the organization of the United States District Court in Porto Rico, allowance of review of cases from its Supreme Court involving the Constitution, admission of Porto Ricans to the Military and Naval Academies, sale of United States stamps in the Island, or extension to it of federal revenue, navigation, banking, bankruptcy, employers' liability, safety appliance, extradition and census laws. P. 311.
9. Published reflexions on the Governor of Porto Rico, *held* libelous and not legitimate comment protected by the guaranty of free speech and free press in the First Amendment of the Constitution. P. 314.

28 P. R. 139, 141 affirmed.

REVIEW of two judgments of the Supreme Court of Porto Rico which affirmed judgments of the District Court for Arecibo imposing sentences to imprisonment based on convictions of criminal libel.[1]

Mr. Jackson H. Ralston, with whom *Mr. Stanley D. Willis* and *Mr. Wm. T. Rankin* were on the brief, for Balzac.

Mr. Grant T. Trent, with whom *Mr. Arthur W. Beer* was on the brief, for Porto Rico.

[1] The records were brought up in the form of appeals but are treated as here on writ of error.

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

These are two prosecutions for criminal libel brought against the same defendant, Jesus M. Balzac, on informations filed in the District Court for Arecibo, Porto Rico, by the District Attorney for that District. Balzac was the editor of a daily paper published in Arecibo, known as "El Baluarte", and the articles upon which the charges of libel were based were published on April 16 and April 23, 1918, respectively. In each case the defendant demanded a jury. The code of criminal procedure of Porto Rico grants a jury trial in cases of felony but not in misdemeanors. The defendant, nevertheless, contended that he was entitled to a jury in such a case, under the Sixth Amendment to the Constitution, and that the language of the alleged libels was only fair comment and their publication was protected by the First Amendment. His contentions were overruled, he was tried by the court and was convicted in both cases and sentenced to five months' imprisonment in the district jail in the first, and to four months in the second, and to the payment of the costs in each. The defendant appealed to the Supreme Court of Porto Rico. That court affirmed both judgments. *People* v. *Balzac,* 28 P. R. 139, Second Case, 28 P. R. 141.

The first question in these cases is one of jurisdiction of this court. By § 244 of the Judicial Code, approved March 3, 1911, it was provided that writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico might be prosecuted to this court in any case in which was drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an act of Congress was brought in question and the right claimed thereunder was denied, and this without regard to the

amount involved. By the Act of January 28, 1915, c. 22, 38 Stat. 803, § 244 of the Judicial Code was repealed, but § 246 was amended and made to apply to the appellate jurisdiction of this court in respect to the decisions of the Supreme Court not only of Hawaii, as before, but also Porto Rico, and it was provided that writs of error to those courts from this court could be prosecuted in the same class of cases as those in which this court was authorized under § 237 of the Judicial Code to review decisions of state courts of last resort. Section 237 at that time allowed a writ of error to final decisions in state courts of last resort where was drawn in question the validity of a treaty, or a statute of, or an authority exercised under, the United States, and the decision was against its validity; or where was drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity; or where any title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed by either party under such Constitution, treaty, statute, commission or authority. By Act of January 28, 1915, 38 Stat. 803, 804, amending § 246, this court was given power by certiorari to bring up for review all final judgments or decrees in civil or criminal cases in the supreme courts of Porto Rico and Hawaii, other than those reviewable here by writ of error because in the class similar to that described in § 237 of the Judicial Code. By Act of September 6, 1916, c. 448, 39 Stat. 726, the jurisdiction of this court to review by writ of error, under § 237, final judgments and decrees of state courts of last resort was cut down by omitting cases (other than those involving the validity of

a treaty, statute or authority exercised under the United States or any State) wherein a title, right, privilege, or immunity, was claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision was against such title, right, privilege or immunity, and such cases, it was provided, could only be examined on review in this court by certiorari.

The question now presented is whether the amendment to § 237 of the Judicial Code by the Act of 1916 applies to, and affects, the appellate jurisdiction of this court in reviewing decisions of the Supreme Court of Porto Rico. We think it does. We think that the manifest purpose of the Act of 1915, amending § 246 of the Code, in its reference to § 237 of the Judicial Code, was to assimilate the appellate jurisdiction of this court over the supreme courts of Porto Rico and Hawaii to that over state courts of last resort, and that the reference in amended § 246 to § 237 may be fairly construed to embrace subsequent changes in § 237 that are not obviously inapplicable.

This brings us to the question whether there was drawn in question in these cases the validity of a statute of Porto Rico under the Constitution of the United States. The Penal Code of Porto Rico divides crimes into felonies and misdemeanors. (Rev. Stats. and Codes of Porto Rico, 1911, Penal Code, § 13.) A felony is described as a crime punishable by death or by imprisonment in the penitentiary. Every other crime is declared to be a misdemeanor. Penal Code, § 14. Section 178 of the Porto Rican Code of Criminal Procedure provided that issues of fact in cases of felony should be tried by a jury when the defendant so elected, but gave no such right in the case of misdemeanors. This was construed by the Supreme Court to deny such right. *People* v. *Bird,* 5 P. R. 387.

By § 244 (5676) of the Penal Code (as amended by Act of March 9, 1911, p. 71), the publication of a libel is made

punishable by a fine not exceeding $5,000, or imprisonment in jail for a term not exceeding two years, or both such fine and imprisonment, and also the costs of the action in the discretion of the court. It is, therefore, plain that libel under the Porto Rican law is a misdemeanor, and a jury trial was not required therein. By the Act of July 22, 1919 (Laws of Porto Rico, 1919, No. 84, p. 684), a jury trial is now given in misdemeanors, but that did not come into force until after these libels were published and these trials had.

When the Penal Code and the Code of Criminal Procedure were first passed in 1901, they both contained the provision that in all cases of libel the jury should determine the law and the fact. It was held, however, by the Supreme Court of Porto Rico in *People* v. *Bird,* 5 P. R. 387, 405, that this did not give a jury trial but only made provision that, if and when a right of jury trial was given in such cases, the jury should have the power to determine the law and the fact. Thereafter the Act of March 10, 1904 (Laws of Porto Rico, 1904, p. 130), expressly repealed all reference to trials for libel in the jury act.

The effect of the Penal Code of Procedure, as construed by the Supreme Court of Porto Rico, and of the Act of March 10th, repealing the jury act as to libel cases, was a statutory denial of the right of jury trial in such cases. A demand for a jury trial in this case, therefore, drew in question the validity of the statutes upon which the court relied in denying the demand. This necessarily leads to the conclusion that these cases are in the same class as those which come to this court by writ of error under § 237, as amended by the Act of 1916, and that jurisdiction by writ of error exists.

Was the issue properly saved in the record by the defendant? We think it was. The demand for a jury trial, the statute to the contrary notwithstanding, was made at the trial. It was renewed in the assignments of error in

the Porto Rican Supreme Court and here. Those assignments did not mention the statutes whose validity was involved, but merely averred that the defendant had been denied his right as an American citizen under the Sixth Amendment to the Constitution. While this is informal, we think that it is sufficient when the record discloses the real nature of the controversy and the specification of the assignment leaves no doubt that it is directed to that controversy.

We have now to inquire whether that part of the Sixth Amendment to the Constitution, which requires that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, applies to Porto Rico. Another provision on the subject is in Article III of the Constitution providing that the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but, when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed. The Seventh Amendment of the Constitution provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States. *Webster* v. *Reid,* 11 How. 437, 460; *Reynolds* v. *United States,* 98 U. S. 145, 167; *Callan* v. *Wilson,* 127 U. S. 540, 556; *American Publishing Co.* v. *Fisher,* 166 U. S. 464; *Thompson* v. *Utah,* 170 U. S. 343, 347; *Capital Traction Co.* v. *Hof,* 174 U. S. 1; *Black* v. *Jackson,* 177 U. S. 349; *Rassmussen* v. *United States,* 197 U. S. 516, 528; *Gurvich* v. *United States,* 198 U. S. 581. But it is just as clearly settled that they do not apply to territory belonging to the

United States which has not been incorporated into the Union. *Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States,* 195 U. S. 138, 145. It was further settled in *Downes* v. *Bidwell,* 182 U. S. 244, and confirmed by *Dorr* v. *United States,* 195 U. S. 138, that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it; and that the acts giving temporary governments to the Philippines, 32 Stat. 691, and to Porto Rico, 31 Stat. 77, had no such effect. The *Insular Cases* revealed much diversity of opinion in this court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes* v. *Bidwell,* has become the settled law of the court. The conclusion of this court in the *Dorr Case,* p. 149, was as follows:

"We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

The question before us, therefore, is: Has Congress, since the Foraker Act of April 12, 1900, c. 191, 31 Stat. 77, enacted legislation incorporating Porto Rico into the Union? Counsel for the plaintiff in error give, in their brief, an extended list of acts, to which we shall refer later, which they urge as indicating a purpose to make the Island a part of the United States, but they chiefly rely on the Organic Act of Porto Rico of March 2, 1917, c. 145, 39 Stat. 951, known as the Jones Act.

The act is entitled "An Act To provide a civil government for Porto Rico, and for other purposes." It does not indicate by its title that it has a purpose to incorporate the Island into the Union. It does not contain any clause which declares such purpose or effect. While this is not conclusive, it strongly tends to show that Congress did not have such an intention. Few questions have been the subject of such discussion and dispute in our country as the status of our territory acquired from Spain in 1899. The division between the political parties in respect to it, the diversity of the views of the members of this court in regard to its constitutional aspects, and the constant recurrence of the subject in the Houses of Congress, fixed the attention of all on the future relation of this acquired territory to the United States. Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference. Before the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important, or at least it was not fully understood and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference from various legislative acts; but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.

Again, the second section of the act is called a "Bill of Rights", and included therein is substantially every one of the guaranties of the Federal Constitution, except those relating to indictment by a grand jury in the case of infamous crimes and the right of trial by jury in civil and criminal cases. If it was intended to incorporate Porto Rico into the Union by this act, which would *ex proprio vigore* make applicable the whole Bill of Rights

of the Constitution to the Island, why was it thought necessary to create for it a Bill of Rights and carefully exclude trial by jury? In the very forefront of the act is this substitute for incorporation and application of the Bill of Rights of the Constitution. This seems to us a conclusive argument against the contention of counsel for the plaintiff in error.

The section of the Jones Act which counsel press on us is § 5. This in effect declares that all persons who under the Foraker Act were made citizens of Porto Rico and certain other residents shall become citizens of the United States, unless they prefer not to become such, in which case they are to declare such preference within six months, and thereafter they lose certain political rights under the new government. In the same section the United States District Court is given power separately to naturalize individuals of some other classes of residents. We set out the section in full in the margin.[1] Unaffected by the con-

[1] Sec. 5. That all citizens of Porto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Porto Rico, and for other purposes", and all natives of Porto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States: *Provided,* That any person hereinbefore described may retain his present political status by making a declaration, under oath, of his decision to do so within six months of the taking effect of this Act before the district court in the district in which he resides, the declaration to be in form as follows:

"I, ..., being duly sworn, hereby declare my intention not to become a citizen of the United States as provided in the Act of Congress conferring United States citizenship upon citizens of Porto Rico and certain natives permanently residing in said island."

In the case of any such person who may be absent from the island during said six months the term of this proviso may be availed of by transmitting a declaration, under oath, in the form herein provided

siderations already suggested, perhaps the declaration of § 5 would furnish ground for an inference such as counsel for plaintiff in error contend, but under the circumstances we find it entirely consistent with non-incorporation. When Porto Ricans passed from under the government of Spain, they lost the protection of that government as subjects of the King of Spain, a title by which they had been known for centuries. They had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign. In theory and in law, they had it as citizens of Porto Rico, but it was an anomalous status, or seemed to be so in view of the fact that those who owed and rendered allegiance to the other great world powers were given the same designation and status as those living in their respective home countries so far as protection against foreign injustice went. It became a yearning of the Porto Ricans to be American citizens, therefore, and this act gave them the boon. What additional rights did it give them? It enabled them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political. A citizen of the Philippines must be naturalized before he can settle and vote in this country. Act of June 29, 1906, c. 3592, § 30, 34 Stat. 606. Not so the Porto Rican under the Organic Act of 1917.

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within six months of the taking effect of this Act to the executive secretary of Porto Rico: *And provided further,* That any person who is born in Porto Rico of an alien parent and is permanently residing in that island may, if of full age, within six months of the taking effect of this Act, or if a minor, upon reaching his majority or within one year thereafter, make a sworn declaration of allegiance to the United States before the United States District Court for Porto Rico, setting forth therein all the facts connected with his or her birth and residence in Porto Rico and accompanying due proof thereof, and from and after the making of such declaration shall be considered to be a citizen of the United States.

In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him. The citizen of the United States living in Porto Rico can not there enjoy a right of trial by jury under the Federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.

It is true that, in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union, in *Rassmussen* v. *United States,* 197 U. S. 516. But Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury. This court refers to the difficulties in *Dorr* v. *United States,* 195 U. S. 138, 148:

"If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice

and provoke disturbance rather than to aid the orderly administration of justice. . . . Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition."

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. Hence the care with which from the time when Mr. McKinley wrote his historic letter to Mr. Root in April of 1900, Public Laws, Philippine Commission, pp. 6–9—Act of July 1, 1902, c. 1369, 32 Stat. 691, 692, concerning the character of government to be set up for the Philippines by the Philippine Commission, until the Act

of 1917, giving a new Organic Act to Porto Rico, the United States has been liberal in granting to the Islands acquired by the Treaty of Paris most of the American constitutional guaranties, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it. We can not find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights.

We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that when such a step is taken it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction.

Counsel for the plaintiff in error also rely on the organization of a United States District Court in Porto Rico, on the allowance of review of the Porto Rican Supreme Court in cases when the Constitution of the United States is involved, on the statutory permission that Porto Rican youth can attend West Point and Annapolis Academies, on the authorized sale of United States stamps in the Island, on the extension of revenue, navigation, immigra-

tion, national banking, bankruptcy, federal employers' liability, safety appliance, extradition, and census laws in one way or another to Porto Rico. With the background of the considerations already stated, none of these nor all of them put together furnish ground for the conclusion pressed on us.

The United States District Court is not a true United States court established under Article III of the Constitution to administer the judicial power of the United States therein conveyed. It is created by virtue of the sovereign congressional faculty, granted under Article IV, § 3, of that instrument, of making all needful rules and regulations respecting the territory belonging to the United States. The resemblance of its jurisdiction to that of true United States courts in offering an opportunity to nonresidents of resorting to a tribunal not subject to local influence, does not change its character as a mere territorial court. Nor does the legislative recognition that federal constitutional questions may arise in litigation in Porto Rico have any weight in this discussion. The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. This has not only been admitted but emphasized by this court in all its authoritative expressions upon the issues arising in the *Insular Cases,* especially in the *Downes* v. *Bidwell* and the *Dorr Cases.* The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal rights declared in the Constitution, as for in-

stance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico. Indeed provision is made for the consideration of constitutional questions coming on appeal and writ of error from the Supreme Court of the Philippines, which are certainly not incorporated in the Union. Judicial Code, § 248.

On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow.

This court has passed on substantially the same questions presented here in two cases, *Porto Rico* v. *Tapia,* and *Porto Rico* v. *Muratti,* 245 U. S. 639. In the former, the question was whether one who was charged with committing a felonious homicide some twelve days after the passage of the Organic Act in 1917, could be brought to trial without an indictment of a grand jury as required by the Fifth Amendment to the Constitution. The United States District Court of Porto Rico on a writ of habeas corpus held that he could not be held to answer and discharged him. In the other case, the felony charged was alleged to have been committed before the passage of the Organic Act, but prosecution was begun afterwards. In that, the Supreme Court of Porto Rico held that an indictment was rendered necessary by the Organic Act. This court reversed the District Court in the *Tapia Case* and the Supreme Court in the *Muratti Case,* necessarily holding the Organic Act had not incorporated Porto Rico into the United States. These cases were disposed of by a *per curiam.* Counsel have urged us in the cases

at the bar to deal with the questions raised more at length in exposition of the effect of the Organic Act of 1917 upon the issue, and we have done so.

A second assignment of error is based on the claim that the alleged libels here did not pass the bounds of legitimate comment on the conduct of the Governor of the Island against whom they were directed, and that their prosecution is a violation of the First Amendment to the Constitution securing free speech and a free press. A reading of the two articles removes the slightest doubt that they go far beyond the "exuberant expressions of meridional speech," to use the expression of this court in a similar case in *Gandia* v. *Pettingill*, 222 U. S. 452, 458. Indeed they are so excessive and outrageous in their character that they suggest the query whether their superlative vilification has not overleapt itself and become unconsciously humorous. But this is not a defence.

The judgments of the Supreme Court of Porto Rico are *Affirmed.*

Mr. Justice HOLMES concurs in the result.

FERRY *v.* SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY ET AL.

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

No. 177. Argued March 20, 1922.—Decided April 10, 1922.

1. Dower is not a privilege or immunity of citizenship, state or federal, within the meaning of § 2 of Article IV of the Constitution or the Fourteenth Amendment, but at most a right attached to the marital relation and subject to regulation by each State respecting property within its limits. P. 318.
2. The Oregon law allowing a dower right in the lands of which the husband was seized of an estate of inheritance at any time during

the marriage, but restricting this, when the wife at the time of his death is a nonresident of the State, to the lands of which the husband died seized, does not deprive the nonresident widow of property without due process of law or deny her the equal protection of the laws in violation of the Fourteenth Amendment. P. 318.

268 Fed. 117, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a bill by which the appellant asserted a dower right in land possessed by the appellee railway company.

Mr. Henry L. Brant, with whom *Mr. James G. Wilson, Mr. George B. Guthrie, Mr. Charles Haldane,* and *Mr. Frances L. Patton, Jr.,* were on the brief, for appellant.

Citizenship and residence, while not strictly synonymous, under all circumstances, are practically so, so far as they are used in the Oregon statutes and as they apply to the case at bar. Federal Constitution, Fourteenth Amendment, § 1; *Chalker* v. *Birmingham & Northwestern Ry. Co.,* 249 U. S. 522; *Travis* v. *Yale & Towne Manufacturing Co.,* 252 U. S. 60.

The right to succeed to property in one State by a citizen residing in another State is protected by Art. IV, § 2, of the Constitution and by the Fourteenth Amendment. *Magill* v. *Brown,* 16 Fed. Cas. 408; *Estate of Stanford,* 126 Cal. 112; *Estate of Mahoney,* 133 Cal. 180; *Estate of Johnson,* 139 Cal. 532.

It is conceded that a State has full power over matters of succession to property within its jurisdiction and may, as to aliens, discriminate, or deny such rights. *Mager* v. *Crima,* 8 How. 490.

A State has no right to penalize a person for removing from the State, either by fine or tax or the deprivation of any property right based merely on such removal. *Crandall* v. *Nevada,* 6 Wall. 36; *Slaughter-House Cases,* 16 Wall. 36; *Chalker* v. *Birmingham & Northwestern Ry.*

Co., 249 U. S. 522; *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U. S. 60.

The right of dower is just as fundamental and substantial as the right of inheritance or succession to property; and the States may not discriminate against citizens of other States in applying laws of dower, inheritance or succession. Rev. Stats., § 1978; *Magill* v. *Brown*, 16 Fed. Cas. 408; *Estate of Stanford*, 126 Cal. 112; *Estate of Mahoney*, 133 Cal. 180; *Estate of Johnson*, 139 Cal. 532.

Mr. Charles H. Carey and *Mr. James B. Kerr*, for appellees, submitted. *Mr. Omar C. Spencer* was also on the brief.

The statute, adopted in 1854 (now § 10,073, Oreg. Laws), has been construed in both federal and state courts of Oregon to the effect that a woman not a resident of the State is not entitled to dower in the lands therein of which her husband did not die seized. *Thornburn* v. *Doscher*, 32 Fed. 810; *Cunningham* v. *Friendly*, 70 Ore. 222; *Woolsey* v. *Draper*, 103 Ore. 103. See also *Pratt* v. *Tefft*, 14 Mich. 191; *Ligare* v. *Semple*, 32 Mich. 438; *Bear* v. *Stahl*, 61 Mich. 203; *Bennett* v. *Harms*, 51 Wis. 251; *Ekegren* v. *Marcotte*, 159 Wis. 539; *Atkins* v. *Atkins*, 18 Neb. 474; *Miner* v. *Morgan*, 83 Neb. 400; *Burr* v. *Finch*, 91 Neb. 417; *Buffington* v. *Grosvenor*, 46 Kans. 730.

The right of a State to define marital property rights as between residents and nonresidents is directly recognized in *Conner* v. *Elliott*, 18 How. 591.

There is a just ground for the distinction between residents and nonresidents in the statute, and therefore § 2, Art. IV, of the Constitution, does not apply. *La Tourette* v. *McMaster*, 248 U. S. 465; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60; *Shaffer* v. *Carter*, 252 U. S. 37; *Citizens National Bank* v. *Durr*, 257 U. S. 99.

The statute of limitations as to the right of a dower claimant as against the husband's grantee in possession would begin to run from the time of the husband's death. *Britt* v. *Gordon,* 11 Am. & Eng. Ann. Cas. 407, and note.

Mr. Justice McKenna delivered the opinion of the court.

By a bill filed in the District Court of the United States for the District of Oregon, appellant asserted a dower right in one-half part of certain land in possession of the Railway Company.

The bill was dismissed on motion of the Railway Company and the Company was awarded judgment for costs. On appeal by the complainant in the suit, the judgment was affirmed. Against the affirmance this appeal is prosecuted.

The law of Oregon provides, " The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-half part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." Lord's Oregon Laws, § 7286.

"A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seised, and the same may be assigned to her, or recovered by her, in like manner as if she and her deceased husband had been residents within the state at the time of his death." § 7306.

Appellant adduces against the validity of § 7306, the provision of § 2 of Article IV of the Constitution of the United States, that " the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and the provisions of the Fourteenth Amendment, which declare that no State shall " make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States," or " deprive any person of life, liberty, or property, without due process of law," or " deny to any person within its jurisdiction the equal protection of the laws."

Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each State as respects property within its limits. *Conner* v. *Elliott,* 18 How. 591. Neither § 2 of Article IV nor the Fourteenth Amendment takes from the several States the power to regulate this subject; nor does either make it a privilege or immunity of citizenship. *Maxwell* v. *Bugbee,* 250 U. S. 525, 537, 538, and cases cited; *United States* v. *Wheeler,* 254 U. S. 281, 296.

The further contention based on the Fourteenth Amendment necessarily is, as counsel urge, that dower is " fundamental and substantial "—" a property right, being, while inchoate, a chose in action, of which no citizen of the United States, wherever he [she] may be resident, can be deprived without ' due process of law,' and as to which every person is entitled to the ' equal protection of the laws,' as provided in the Fourteenth Amendment of the Constitution."

The Court of Appeals considered this contention, and it is difficult to add anything to its opinion. It pointed out that the Oregon statute was taken from the laws of Michigan adopted in 1846 and sustained.[1] The example of Michigan was followed in Wisconsin, Kansas and Nebraska and sustained by the courts of those States.[2]

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[1] *Pratt* v. *Tefft,* 14 Mich. 191; *Ligare* v. *Semple,* 32 Mich. 438; *Bear* v. *Stahl,* 61 Mich. 203.

[2] *Bennett* v. *Harms,* 51 Wis. 251, *Ekegren* v. *Marcotte,* 159 Wis. 539; *Atkins* v. *Atkins,* 18 Neb. 474; *Miner* v. *Morgan,* 83 Neb. 400; *Buffington* v. *Grosvenor,* 46 Kan. 730.

To the decisions of those courts we may add *Thornburn* v. *Doscher,* U. S. Circuit Court for Oregon, 32 Fed. 810, which sustained the Oregon statute as did the Supreme Court of Oregon in *Cunningham* v. *Friendly,* 70 Ore. 222. And we may add also *Richards* v. *Bellingham Bay Land Co.,* 54 Fed. 209, which decided to be legal a like statute of the State of Washington. And Blackstone speaks of dower as having become " a great clog to alienation " and " otherwise inconvenient to families." 1 Washburn on Real Property, 5th ed., 278, in note.

The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives. And such is the purpose of the Oregon statute, and the means of executing the purpose appropriate, and a proper exercise of classification. It satisfies, therefore, the constitutional requirement of the equal protection of the laws; and we proceed to the inquiry whether the statute is otherwise valid.

Appellant's contention is that, though she be living in New York, it is her privilege under the Fourteenth Amendment to resist the law of Oregon as a limitation of her dower rights, that is a limitation of rights in property situated in Oregon. The contention might be tenable if the legislature of a State was required to grant dower rights. As repellent of that proposition, the difference the laws of the States exhibit in the rights that attach to the marriage relation may be adduced. The States greatly differ as to what lands are dowable, and as to what claims are paramount to dower, and to some extent, how it will be barred. 4 Kent, p. 35, *et seq.*

The granting of dower, therefore, is a matter of statutory regulation. It was so decided by the United States Circuit Court of Oregon in 1887 (*Thornburn* v. *Doscher, supra*), Judge Deady expressing it as follows: " It rests with the legislature to say what interest, if any, married

persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may for the security of titles, and the protection of innocent purchasers, provide that a nonresident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man." The law thus declared has been the law of Oregon for 65 years.

There is a distinction between dower created by the parties and that given by law, and the latter "is believed to be the only kind which ever obtained in this country." *Randall* v. *Kreiger,* 23 Wall. 137, 148. Expressing the power of the legislature over it, the court said, "during the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature."

The ruling is a deduction or incident of the more general principle expressed in *Kerr* v. *Moon,* 9 Wheat. 565, 570, "that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated." And this was so considered and the case cited in *Thomas* v. *Woods,* 173 Fed. 585, 593, along with a number of other cases, to sustain the court in the declaration and decision that "the right of dower in real property is determined by the laws of the state in which the property is situated."

From these cases it results, as said by the Circuit Court of Appeals, that "the legislature having this power to give or withhold dower, it follows that it has the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and, if so, it has the right to provide that it may be barred by the wife's nonresidence in the State."

The action of the court affirming the decree of the District Court is

Affirmed.

UNITED STATES *v.* BETHLEHEM STEEL COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 127. Argued March 16, 1922.—Decided April 10, 1922.

1. A contract of the United States to pay for its use of a patented invention is to be implied rather than a tortious appropriation by the officers acting for the Government. P. 326.
2. When the Government uses a patented invention with the permission of the owner and does not repudiate his title, an implied contract to pay reasonable compensation for the use arises. P. 327.

53 Ct. Clms. 348, affirmed.

APPEAL by the United States from a judgment sustaining a claim against it.

Mr. Daniel L. Morris, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. Harry E. Knight* and *Mr. Lucius E. Varney,* Special Assistants to the Attorney General, were on the brief, for the United States.

There must be a definite intention to take private property for public use before a contract, other requirements being satisfied, will be implied. *Bedford* v. *United*

States, 192 U. S. 217, 224; *United States* v. *Lynah,* 188 U. S. 445; *Tempel* v. *United States,* 248 U. S. 121; *Sanguinetti* v. *United States,* 55 Ct. Clms. 107, 144.

There was no intention, on the part of the Government, to use the Leibert invention. All the circumstances surrounding the use of the Stockett mechanism indicate that the officers of the Bureau of Ordnance had no idea that they were using a mechanism covered by the Leibert patent. *Corning* v. *Burden,* 15 How. 252; *Ney Mfg. Co.* v. *Superior Drill Co.,* 56 Fed. 152; *Russell* v. *United States,* 182 U. S. 516; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156 U. S. 552.

The Government believed it had a proprietary right to use the Stockett mechanism. *Harley* v. *United States,* 198 U. S. 229; *Schillinger* v. *United States,* 155 U. S. 163; *United States* v. *Palmer,* 128 U. S. 262; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156 U. S. 552.

Mr. George W. Dalzell and *Mr. Clarence P. Byrnes,* with whom *Mr. Robert C. Hayden* was on the brief, for appellee.

The claimant's case fulfills the requirements of an implied contract with the Government, as laid down by this court. *Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.,* 246 U. S. 28, 40; *United States* v. *Société Anonyme, etc.,* 224 U. S. 309; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156 U. S. 552; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *Hollister* v. *Benedict & Burnham Mfg. Co.,* 113 U. S. 59; *Bigby* v. *United States,* 188 U. S. 400; *United States* v. *Palmer,* 128 U. S. 262; *United States* v. *Lynah,* 188 U. S. 445.

Russell v. *United States,* 182 U. S. 516; *Schillinger* v. *United States,* 155 U. S. 163; *Harley* v. *United States,* 198 U. S. 229; *Bedford* v. *United States,* 192 U. S. 217; *Horstmann Co.* v. *United States,* 257 U. S. 138; and *Tempel* v. *United States,* 248 U. S. 121, 131, distinguished.

When an implied promise to pay has once arisen, a later denial by the Government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. *Tempel* v. *United States,* 248 U. S. 121, 131.

The argument that the Government used the Leibert patent unwittingly is negatived both by the transactions of the parties and by the patent situation.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit by the Steel Company to recover royalties for the use by the United States of a patented invention owned by the Company.

On November 7, 1891, the United States by and through the Ordnance Bureau of the War Department contracted with the Bethlehem Iron Company for the manufacture of 100 guns of 8-inch, 10-inch and 12-inch calibre, which were to be equipped with the usual breech mechanism then known as "Model 1888 M 2".

On November 1, 1893, and pending the execution of the contract, Owen F. Leibert, an employee of the Bethlehem Iron Company, made application for an improvement in breech mechanism for ordnance. The Company notified the Bureau of the invention and of an application for a patent. It suggested that the Bureau have the application made special. This the Bureau did and a patent was issued to Leibert on March 20, 1894.

In February, 1894, the Bureau requested full information as to the patent and that it be permitted to use the same at the Watervliet Arsenal in an experimental test on a 12-inch gun. The request was granted and the Bureau prepared drawings for the test.

On December 23, 1895, while the Leibert mechanism was in course of construction the Chief of Ordnance forwarded to the Commanding Officer of the Arsenal a com-

munication showing a form of mechanism, saying that it seemed to possess marked merit and that it was a modification of the Leibert design, from which it differed "mainly in the mode of operating the withdrawal of the block, and in the pitch of the segmental rack to give increased power for rotation."

The Commanding Officer reported that the design was deemed superior to the other designs and that he had ordered its manufacture, as suggested by the Chief of Ordnance he should do in such case. It was thereafter manufactured and used by the United States on a number of guns.

The design that was used was prepared by John W. Stockett, a draftsman in the Ordnance Bureau, and was known and referred to as the "Stockett design", and the "Department design", but more generally as "Model 1895". Stockett applied for and received a patent for the design.

From time to time during 1894 to 1896 the Ordnance Bureau considered different forms of mechanism, and the Company notified the Bureau that work under the contract had reached a point that it was necessary to know the mechanism to be used, and requested that if any change was to be made the Company be notified. The Bureau replied that it had no objection to the use of the "Model 1895". The Company answered that it had no objection to conforming to that design, provided no modification be made in the price to be paid for the guns named in the contract on account of change in the breech mechanism. March 3, 1898, the Ordnance Bureau indicated its assent to that proposition.

On August 16, 1901, the Bethlehem Iron Company assigned all of its rights and franchises to the Bethlehem Steel Company and the latter Company asked that it be recognized as the successor to the Iron Company.

This was refused and the Bureau entered into an independent contract with the Steel Company and Congress subsequently (June 6, 1902) authorized the Steel Company to be the successor to the Iron Company.

On November 5, 1902, the Steel Company reported that it was proceeding with its contracts using the compound gear wheel shown in its prints 7374 and 7381, copies of which it enclosed, also a copy of the Leibert patent, and said, "We believe that the wheel we are now putting on the guns, as stated and which we understand the department is also using on its guns built elsewhere, of several calibers, is the same as that described in claim 1, et seq., of the said patent. We should be glad if the department, at its convenience, would give us an opportunity to lay before it more fully our views in this regard."

In reply to the above quoted letter, the Chief of Ordnance, on February 25, 1903, wrote the Steel Company as follows: "Referring to your communication of November 5, 1902, upon the subject of breech mechanism for guns of 1895 model, I have the honor to state that the claims in the patent of Owen F. Leibert, owned by you, are so much involved with the original designs of Farcot and the patents of F. F. Fletcher and John W. Stockett that this department does not feel that it is in a position to pass on the legal aspect of the case. If the Bethlehem Steel Company will bring suit to establish the points involved, this office will lend its assistance in bringing before the court all documents on hand pertaining to the subject."

On February 27, 1903, the Steel Company responded to the above letter of the Ordnance Bureau as follows: "In accordance with your suggestion we have instructed our attorney to bring suit against the department, to establish the points involved."

The findings contain a detail of the mechanisms of the Leibert patent and the Stockett patent with copies of the letters patent.

The findings also give a list of patents constituting the prior art at the time of Leibert's application, in which was included the patent of F. F. Fletcher mentioned in the last letter (February 25, 1903) of the Chief of Ordnance to the Steel Company. And it was found that none of the patents of the prior art anticipated the Leibert design and that it was a patentable advance upon them, and it was further found that the combination of claims 1, 2 and 3 of it were found in "Model 1895."

From its findings the court deduced the ultimate facts: (1) That the breech mechanisms of the Leibert patent possessed patentable novelty, utility and invention and, (2) that those mechanisms were used by the United States "in and as a part of the said 'Model 1895.'" And it ordered and adjudged that the Steel Company have and recover from the United States the sum of sixty-seven thousand dollars.

There is but one question in the case and that is the attitude of the Ordnance Bureau, representing the United States, toward the Leibert patent, whether in recognition of it, as contended by the Steel Company, or in opposition to, or, it may be said, in tortious use of it, as contended by the United States.

We have in other cases expressed our aversion to the latter conclusion except upon explicit declaration or upon a course of proceedings tantamount to it. A contract, express or implied in fact, must, it is true, be established, but one to pay for a mechanism used will be implied rather than a tortious appropriation of it—rather than the exercise by the United States of its sovereignty in aggression upon the rights of its citizens.

The Court of Claims so construed our cases; Mr. Justice Booth, speaking for the court, said the difficulty was

more in the application of the determining rule than in its ascertainment. And further, " from cases heretofore adjudicated upon similar principles it may be safely asserted that where the Government uses a patented invention ' with the consent and express permission of the owner ' and does not ' repudiate the title of such owner, ' an implied contract to pay a reasonable compensation for such usage arises. " *United States* v. *Berdan Fire-Arms Manufacturing* Co., 156 U. S. 552, and *United States* v. *Société Anonyme, etc.*, 224 U. S. 309, 320, were cited. We think the cases sustain the principle announced and we concur in it. And the findings demonstrate that it is sustained in the present case. There can be no doubt that the Ordnance Bureau knew that the Stockett design could only be used with the Leibert mechanism, and though declining, as it said, to pass " on the legal aspect " of such use, it would " lend its assistance in bringing before the court all documents on hand pertaining to the subject." This necessarily means that it would accept the decision as a determination of the right of the Company and the obligation of the United States. In other words, its attitude was not that of repudiation, not that even of antagonism, but that of submission to and acceptance of the right as it should be declared; and certainly consideration for the rights of inventors, instead of aggression upon them, is a policy of wisdom regarding the purpose of the War Department and, it may be, its necessities. It gives incentive to the inventive genius of the country by assuring recognition and reward to its work, if its work have merit. It is to be remembered that the Government is the only user of heavy ordnance and must encourage, not deter its improvement, if the Government would keep ready for whatever emergency may come to it.

We think, therefore, that the judgment of the Court of Claims should be, and it is

Affirmed.

BANKERS TRUST COMPANY *v.* CITY OF RATON AND RATON WATER WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

No. 167. Argued March 16, 17, 1922.—Decided April 10, 1922.

1. Where there were two statutes, an earlier empowering cities to erect water works, if authorized by a majority of the voters, or to grant the right to private individuals for a term not exceeding 25 years, and a later for the incorporation of water companies to supply water to municipalities, with power to occupy the streets subject to regulation by the municipal authorities, and a company entered a municipality under an ordinance, ratified by the citizens, limiting its term to 25 years, *held,* that it was estopped by its contract from claiming a perpetual franchise under the later statute, and that, upon the expiration of the term, the municipality, as against the trustee for the company's bondholders, could require that the pipes, etc., be removed from the streets. P. 334.
2. A bill which sought to enjoin a city from enforcing an ordinance revoking the rights of a water company under a prior ordinance and requiring removal of its plant from the streets, and which prayed also a money recovery for damages to its contract rights and trespass upon its real property, *held* not multifarious. P. 337.
3. In a suit in the District Court by a trustee for the bondholders of a corporation to protect the corporate property, in their interest, against destruction by a third party, the corporation properly may be joined as a defendant. P. 337.

Affirmed.

APPEAL from a decree of the District Court dismissing, for want of equity, the appellant's amended bill, in a suit brought by it, as trustee for bondholders of the appellee Water Company, to restrain the other appellee, the City of Raton, from revoking the company's rights in the city and ousting it from the streets, and to recover damages.

Mr. Alva B. Adams, with whom *Mr. Robert S. Gast* was on the brief, for appellant.

The Raton Water Works Company was incorporated under an Act of the Territory of New Mexico, passed February 24, 1887, c. 12, Laws 1887.

By virtue of incorporation under that act and the provision of the articles of incorporation declaring that the company was formed for the purpose of supplying water to the Town of Raton and the inhabitants thereof, the company became vested with the right to lay its mains and pipes in any of the streets or alleys of Raton. This right is unlimited in time but is subject to such regulations as may be provided by the corporate authorities of the town.

Even if the Act of April 1, 1884, granting cities power to grant franchises, had been subsequent to that of 1887, the original statutory grant would not have been impaired. It is not material whether these acts conflict, as in case of conflict the 1884 statute must yield; but an examination will show but slight, if any, conflict.

Acceptance of the provisions of Ordinance No. 10 has not estopped the Water Company to rely upon the statutory grant. The statute does not give an exclusive right. It provides that the laying of pipes may be regulated by the City and that the terms upon which water is supplied may be agreed upon. The law of 1884 gave the City power to enter into a contract for the furnishing to it of water. All of these things were covered by the ordinance. The City in order to induce the company to give it an adequate water supply contracted that for a period of 25 years it would not enter into competition with the company,—an agreement it did not keep as is pointed out in the bill. The ordinance further provided regulations as to laying pipes and a schedule of rates for both city and private consumers. There is thus no inconsistency in accepting the added benefits and privileges of this ordinance and in retaining the unlimited franchise upon which the company could rely and under which it could operate

after the period of 25 years had expired and it was no longer entitled to the beneficial provisions of the ordinance. *Northwestern Telephone Co.* v. *Minneapolis,* 81 Minn. 140; *Abbott* v. *Duluth,* 104 Fed. 833; *Wichita* v. *Old Colony Trust Co.,* 132 Fed. 641.

A trustee for bondholders not only has the power but it is its duty to invoke the aid of a court of equity to protect the trust estate whenever the necessity arises.

Ordinance No. 197 is a law impairing the obligation of the contract between the Raton Water Works Company and New Mexico, and the bill clearly presents a question over which the federal court has jurisdiction under § 10, Art. I, of the Constitution. The cancelation of the company's franchise and the destruction of its easements and valuable business rights is a taking of property without compensation and without due process of law in violation of the Fourteenth Amendment.

The bill also alleges that the City is taking the water rights, reservoirs, and other property without compensation and without due process of law. The mortgagor is not an indispensable party to the suit and a decree in another action to which the trustee was not a party is not res judicata against the trustee even though the same issues were involved. *Old Colony Trust Co.* v. *Omaha,* 230 U. S. 100, 122; *Keokuk Co.* v. *Missouri,* 152 U. S. 313; *Louisville Trust Co.* v. *Cincinnati,* 76 Fed. 296.

The bill is not multifarious.

Mr. John H. Fry for appellees.

Mr. Justice McKenna delivered the opinion of the court.

The Water Works Company is a corporation of New Mexico and was incorporated to furnish the City of Raton with water. Its system is constituted of pipes, mains, conduits, sources of water, reservoir sites, and reservoirs.

(These accessories are to be understood when we use the word " system.")

The Bankers Trust Company, alleging itself to be the successor of the original trustee in a deed of trust or mortgage executed by the Water Works Company to secure an issue of bonds, brings this suit, (1) to enjoin the City from enforcing an ordinance requiring the removal of the Water Works Company's system from the City, (2) to enjoin the disturbance of the system and to protect the enjoyment of the Water Works Company of its water rights, (3) that the City be required to pay the Trust Company such sum as will compensate the bondholders for the loss and injury to the trust property through the impairment and breach of the contract through which, it is alleged, the City gave exclusive rights to the Water Company to furnish water to the City.

To justify the relief prayed and to establish the jurisdiction of the District Court (and we may say of the appeal to this court) the Trust Company alleged that the value of the matter in controversy exceeds $3,000, and involves the Constitution of the United States because the acts of the City produced the results from which relief is prayed by violating the contract the City entered into with the Water Works Company, and will deprive the Trust Company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The bill is very long and replete with repetitions but, as it constitutes the case, we give a summary of it as follows:

The Town of Raton (it was then a town) having no water supply the Raton Water Company was incorporated and constructed a system to furnish water to the town.

The town grew and its officials and citizens induced the incorporation of the Raton Water Works Company and selected its present source of the supply of water. The Company then began and completed its water system

and subsequently purchased the property and rights of the Raton Water Company.

On or about July 20, 1891, the Water Works Company and the City entered into a contract evidenced by an ordinance by which the Company agreed to furnish water to the City for a period of 25 years and the City agreed that it would not operate or maintain water works in or near the town for the same period from July 25, 1891, and also agreed to pay a rental for fire hydrants for the same time at a rate fixed in the ordinance.

The ordinance was known as Ordinance No. 10. It was ratified by a vote of the citizens of the town and accepted by the Company.

The Company constructed a system in accordance with the contract and the act of its incorporation, and has performed its terms and conditions. And it has become the owner of valuable and extensive water rights, reservoirs, and reservoir sites.

On February 1, 1905, the Water Works Company executed and delivered to the Manhattan Trust Company of New York a deed of trust conveying all of its property, rights, privileges and franchises to secure an issue of bonds to the amount of $300,000. "The Bankers Trust Company . . . has duly succeeded to all the rights, duties and obligations of the Manhattan Trust Company under and by virtue of the provisions of said deed of trust and now is the duly qualified and acting trustee under said mortgage or deed of trust." The bonds are outstanding in the hands of holders in due course and for value, and none have been paid or otherwise cancelled or satisfied.

The City in 1912 began steps with intention to impair the contract between it and the Water Works Company and, after an election authorizing an issue of bonds for the purpose of constructing a water works system, proceeded, in accordance with an ordinance passed July 16, 1913, to the construction of a water works system and erected fire

hydrants, prior to the expiration of the Company's exclusive contract, which caused the revenues and income from the latter to be impaired and reduced to the extent of over $30,000.

The City ordered the Company to remove its system, and on August 6, 1915, by an ordinance, repealed Ordinance No. 10 and revoked all the rights conferred by it and ordered the Company to immediately remove its system, and the Mayor, Clerk, and City Attorney were directed to enforce the ordinance, which took effect five days after its passage and repealed all other ordinances. The ordinance was known as Ordinance No. 197.

The only source of supply for the City's system is that of the Water Works Company, and the City has taken possession of a portion of the reservoirs of the Company, and such taking is a deprivation of the property of the Company without due process of law.

Other deprivations are alleged, and that the City has occupied with some of its works the lands of the Company more than two miles from the exterior boundaries of the City.

The only source of income to the Company is the system and lands thus taken.

At the time of filing the original bill there were pending two actions between the Water Works Company and the City, one of which was in the United States court and the other in the state court—in each of which there were matters pertinent and material to the cause of the complainant in this action. By stipulation, this case was delayed to await the final determination of those actions and the bill here has been amended to present the issues as they may have been changed or affected by those decisions and the lapse of time and events since filing the original bill.

The City moved to dismiss the bill on the ground, among others, (the others will be considered later), that

it did not state facts sufficient to constitute a valid cause of action in equity. The motion was granted. This appeal attacks that action. The grounds of the attack seem to have for their principal basis the Act of New Mexico passed February 24, 1887, § 24 of which authorized the incorporation of water companies to supply water to towns and cities, with the power to lay mains or pipes in, along, and upon the public streets or alleys of the town or city, subject to such regulations as may be provided by the corporate authorities of the city or town, and to furnish and supply such city or town or the inhabitants thereof with water, upon such terms and conditions as may be fixed by such corporations or as may be agreed to by the consumers and such corporations.

It is contended that the act gave a franchise unlimited in duration, subject, however, to regulation by the town or city.

And it is further contended, in opposition to a contention of the City, that a prior act (April 1, 1884) which gave a city the power to erect water works if authorized by a majority of the voters of the city, or the right to grant private individuals such power for a term not exceeding 25 years, was repealed by the Act of February 24, 1887.

The contentions of the parties are, therefore, in sharp contrast. Appellant contends that the Water Company had a perpetual right in the City, not subject to interference by the City,[1] and, though not exclusive, by the contract with the City evidenced by Ordinance No. 10 it was preserved from competition by the City, and that the Act of 1887 and the ordinance constituted a contract

[1] *Wichita* v. *Old Colony Trust Co.*, 132 Fed. 641; *Michigan Telephone Co.* v. *Benton Harbor*, 121 Mich. 512; *Wisconsin Telephone Co.* v. *Oshkosh*, 62 Wis. 32; *Northwestern Telephone Exchange Co.* v. *Minneapolis*, 81 Minn. 140; *New Castle* v. *Lake Erie & Western R. R. Co.*, 155 Ind. 18.

with the State that was inviolable under the Constitution of the United States, and, therefore, invulnerable to Ordinance No. 197 repealing Ordinance No. 10 and ordering the Company from the City.

The opposing contention of the City is that there is no inharmony between the Act of 1884 and the Act of 1887, that they have coördinate purpose—the Act of 1887 giving a company incorporated under it the capacity to receive a grant from a city with power of regulation by the city. It is further contended the Water Company recognized this and applied to the City for a grant, and that, in response to the application, the City enacted Ordinance No. 10, and exercised the power of regulation conferred by the Act of 1887 by fixing the duration of the grant at twenty-five years from July 25, 1891. It was accepted by the Company with that limitation and, it is the contention, by the application and acceptance it is estopped to deny that its right to furnish water to the City was derived from the contract with the City.

We are not called upon to review in detail the contentions and consider their various elements. We concur in the view of the City that the Water Works Company is estopped by its contract with the City, evidenced by Ordinance No. 10 (which we may remark was ratified by a vote of the citizens of the City), and we construe it as the City construes it. From what act the power to enact it was derived we need not pronounce. We may say, however, that the Supreme Court of the State in *Raton Waterworks Co.* v. *City of Raton,* 22 N. Mex. 464, said the franchise of the Company was granted by an ordinance of the City, and certainly the bill in this case shows that its term was fixed at twenty-five years from July 25, 1891. The term, therefore, had expired when the amended bill was filed. The term of the rights having expired, necessarily the rights granted expired, and the City cannot be enjoined from requiring the removal of the Company's

system from the streets of the City. Whatever rights of property appellant may have in its reservoirs and in the land upon which they are located may be the subject of other actions if the City asserts rights to them that have not been adjudicated. Some of them, it may be all of them, have been adjudicated.

One of the suits referred to in our summary of the bill as pending when the original bill was filed (October 27, 1915), was brought by the Water Works Company against the City in the District Court from which this appeal is taken. From the opinion of the court, annexed to the City's brief, about the same questions here presented were there presented, and it was decided that the repeal of Ordinance No. 10 was justified because of the failure of the Water Works Company to furnish pure and wholesome water. And it was decided that the ordinance gave the City the power of revocation and the power was legally exercised by the enactment of Ordinance No. 197 and it should not be enjoined.

The relief prayed by the Company on account of the occupation of its reservoir sites by the City was denied because of a condemnation suit in a state court which was proceeding, it was said, in due course. And we may observe that in *City of Raton* v. *Raton Ice Co.*, 191 Pac. 516, it is decided that the City has power of eminent domain and can exercise it more than two miles from the city limits. The case passed on the condemnation of one of the reservoir sites mentioned in the bill in this case. The decision seems to be a refutation of some of the contentions of appellant.

The judgment of the District Court was appealed to the Circuit Court of Appeals and dismissed on stipulation. 232 Fed. 1020.

We do not refer to the case as binding upon appellant here but to present clearly that the principal question presented by the present bill is the right of the Trust

Company under a prior trust deed covering the rights of the Water Company to occupy the streets of the City notwithstanding the expiration of the time given to the Company by Ordinance No. 10. The time having expired, the conduct of the City prior to its expiration is not important to consider.

The other grounds of dismissal were: (1) There was misjoinder of parties defendant in that the Water Works Company, the owner of the system, should have been joined with the Trust Company as complainant, and that there was no allegation that it refused to join as complainant. (2) There was a misjoinder of parties defendant in that the Water Works Company is made defendant when it should have been made complainant. (3) There was a misjoinder of causes of action in that the bill set forth at least three independent causes of action: (a) action for damages, (b) action to enjoin the enforcement of Ordinance No. 197, (c) trespass by the City upon certain real property of the Water Works Company. As to the latter grounds, that is, the union of independent causes of action, it is not very substantial. They are but the specifications of the elements of the right of suit, that is, the equity that appellant has. In other words, they are the enumeration of the elements of the asserted aggression upon the Company and in emphasis of it. The other grounds of the motion to dismiss are untenable. *Old Colony Trust Co.* v. *Omaha,* 230 U. S. 100.

Decree affirmed.

FORBES PIONEER BOAT LINE *v.* BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 188. Argued March 23, 1922.—Decided April 10, 1922.

1. Plaintiff, having been required by the defendant Board to pay charges for passage through a canal lock the use of which was then by law free, its right to recover the amount was protected by the Federal Constitution against destruction by the State, and could not be defeated by an act of the legislature purporting to validate the collection retroactively. P. 339. *United States* v. *Heinszen & Co.*, 206 U. S. 370, a tax case, distinguished.
2. Generally a ratification of an act is not good if attempted when the ratifying authority could not lawfully do the act. P. 339.

80 Fla. 252, reversed.

ERROR to a judgment of the Supreme Court of Florida which reversed a judgment recovered by the present plaintiff in error in its action to recover sums of money it had paid to the defendant Board as tolls for the passage of its boats through locks in one of the canals of a drainage system supervised and controlled by the Board under the state law.

Mr. James M. Carson for plaintiff in error.

Mr. William Glenn Terrell for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit, begun in 1917, to recover tolls unlawfully collected from the plaintiff, the plaintiff in error, for passage through the lock of a canal. The Supreme Court of Florida sustained the declaration, 77 Fla. 742, but on the day of the decision the Legislature passed an act, c. 7865, Acts of 1919, that purported to validate the collection. The act was pleaded. The plaintiff demurred setting up

Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States, but the Supreme Court rendered judgment for the defendant on the ground that the plea was good. 80 Fla. 252.

Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of *United States* v. *Heinszen & Co.,* 206 U. S. 370, (*Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226,) which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. *Wagner* v. *Baltimore,* 239 U. S. 207, 216, 217. *Stockdale* v. *Atlantic Insurance Co.,* 20 Wall. 323. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. *Bird* v. *Brown,* 4 Exch. 786, 799. If we apply that principle this statute is invalid. For if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

It is true that the doctrine of ratification has been carried somewhat beyond the point that we indicate, in regard to acts done in the name of the Government by those who assume to represent it. *Tiaco* v. *Forbes,* 228 U. S. 549, 556. It is true also that when rights are asserted on the ground of some slight technical defect or contrary to some strongly prevailing view of justice, Courts have

allowed them to be defeated by subsequent legislation and have used various circumlocutions, some of which are collected in *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 477. *Dunbar* v. *Boston & Providence R. R. Co.*, 181 Mass. 383, 385. In those cases it is suggested that the meaning simply is that constitutional principles must leave some play to the joints of the machine.

But Courts can not go very far against the literal meaning and plain intent of a constitutional text. Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation. It would seem from the first decision of the Court below that the transaction was not one for which payment naturally could have been expected. To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot.

Judgment reversed.

WHITE OAK TRANSPORTATION COMPANY *v.* BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

NORTHERN COAL COMPANY *v.* BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

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

Nos. 116, 124. Argued March 1, 1922.—Decided April 10, 1922.

Where a large steamship, heavily laden and awkward to steer, traversing a canal, sheered to one bank and then the other, grounded, sprang a leak, and despite efforts first to hold and lighten and then to tow her through, sheered again to the other bank and sank, becoming a total loss with her cargo, *held*, upon the findings and evidence—

(1) That the master was not to blame for not displacing a canal pilot after the first accident and for permitting the vessel to proceed, before slack water, not fully pumped out and with her cargo unadjusted, in view of the canal company's regulations, the directions of its superintendent and the situation and consensus of opinion existing at the time. P. 344.

(2) That the loss was attributable to the joint negligence of the canal company and the master in attempting to pass such a vessel through the canal. P. 345.

(3) That all the damages, arising from the loss of the vessel and its cargo, injury to the canal and obstruction of the canal business, should be divided equally between the canal company and the vessel owner. P. 345.

(4) The cargo owner, having proceeded only against the canal company, was entitled to a decree for the full amount of its loss against that company. P. 345.

265 Fed. 538; 267 Fed. 176, reversed.

CERTIORARI to decrees of the Circuit Court of Appeals, the one holding the petitioner Transportation Company liable to the respondent Canal Company for damages found to have resulted from negligence of the petitioner in the management of its vessel in the respondent's canal;

the other exonerating the respondent Canal Company from liability to the petitioner Coal Company for the loss of a cargo contained in the same vessel.

Mr. Edward E. Blodgett, with whom *Mr. Foye M. Murphy* was on the brief, for petitioner in No. 116.

Mr. Henry E. Warner, with whom *Mr. John G. Palfrey* was on the brief, for petitioner in No. 124.

Mr. Thomas H. Mahony, with whom *Mr. Guy W. Currier* was on the brief, for respondent.

Mr. Samuel Park, with whom *Mr. Henry E. Mattison* was on the brief, for the T. A. Scott Company, Inc., impleaded with respondent.

Mr. Justice Holmes delivered the opinion of the court.

On December 13, 1916, the steamer Bay Port, while passing through the Cape Cod Canal, ran ashore on the south bank and the next day sank diagonally across it. In January, 1917, the Canal Company filed a libel against the White Oak Transportation Company, the owner of the steamer, to recover for damages suffered by the canal and the obstruction of traffic through it. It also filed a libel against the T. A. Scott Company, Inc., a wrecking company, for negligence in dealing with the steamer after it had grounded; but this company has been exonerated and is not before us. In May, 1917, the Transportation Company filed a libel against the Canal Company, to charge it with a total loss of the steamer and freight, and in March, 1918, the Northern Coal Company intervened seeking to hold the Canal Company for a total loss of the cargo, which was coal. The causes were heard together below and were consolidated by agreement for hearing and determination upon one record here. The District Court found no negligence on either side and dismissed all the

libels. 251 Fed. 356. The Circuit Court of Appeals held the Transportation Company liable to the Canal Company, and reversed the decree in that cause. 265 Fed. 538. It also dismissed the intervening petition of the owner of the coal. 267 Fed. 176.

We agree with the Circuit Court of Appeals that the owners of the Bay Port and the Canal Company both ought to have known that it was unsafe to take the vessel through the canal. We agree with the dissenting Judge in the Circuit Court of Appeals that the loss of the cargo must be attributed to the joint negligence of the two; and we are of opinion that the amount of that loss, that suffered by the vessel and that suffered by the canal should be added together and divided between the Bay Port and the Canal.

The Bay Port was a lake built steamer of the whaleback type, 265 feet long and of 38 feet beam, which had been brought to the Atlantic. When deeply laden she steered somewhat awkwardly but as well as other vessels of the type. She was loaded with 2393 tons of coal and had a draft of eighteen feet two inches aft and seventeen feet eight inches forward, when soon after noon on December 13, 1916, she appeared at the western or Wing's Neck entrance to the canal. Her captain was a man of experience and had gone through the canal twice with the Bay Port when empty, never when loaded. He had been solicited by the Canal Company to go by way of the canal, the Company representing the canal to be twenty-five feet deep throughout as its charter required. Mass. Act of 1899, c. 448, § 3.

Having got permission the Bay Port started in tow of a tug with a competent pilot. The tide was about half out, running west at about three knots an hour. After proceeding halfway through the canal the vessel passed over a shoal where there was not more than twenty-one or

twenty-two feet of water, and soon after sheered toward the north bank and then toward the south bank where she grounded, at about a thousand feet from the shoal. It is strongly argued that this and the shoal next to be mentioned caused the trouble, but, notwithstanding *The Pennsylvania,* 19 Wall. 125, we will accept the finding of the two Courts that they were not the proximate cause. Two tugs and the superintendent of the canal came to the help of the Bay Port but could not get her off as the tide was falling. The tugs kept her upon the bank and the next morning a hole was discovered in her bottom, but was plugged. Arrangements had been made to lighten the cargo when unexpectedly, about 10.15 a. m., she slid into the channel. The pilot with whom she started had left but another canal pilot who seems to have taken his place ran upon the bridge and directed the captain to start his engines at full speed to prevent her drifting upon the opposite bank. She was down at the head from 18 to 30 inches with a list to port of from 15 to 24 inches. Since 6 a. m. the tide had been running to the east, the direction in which the steamer was going, and the pilot ordered a tug to take her in tow and started toward the east. The Bay Port proceeded about a mile; but after she had passed another shoal spot by some two thousand feet, sheered again two or three times and stranded on the north bank, the bow came clear and swung down stream and then she sank and became a total loss.

The Circuit Court of Appeals thought that the master was responsible for the loss because he did not displace the pilot and prevent the vessel proceeding before she was fully pumped out, the cargo adjusted and slack water had come, which he might have done by holding her in the channel by the tugs that were present or by tying up to some dolphins that he passed. Upon this point we agree with the reasoning of the District Court. The emergency was serious. The canal regulations provided

that in the event of grounding the canal authorities should have the right to direct all operations for floating the vessel. The superintendent of the Canal while present had told the pilot that he wanted to get the vessel out of the canal as soon as possible. The captain regarded that as the understanding of all concerned. The wreckers called out to the pilot: "She is yours." The pilot assumed command and started to carry out the superintendent's wish. Everybody at the time thought that the proper course, and we cannot think that the master was to blame for not overriding the judgment of the local experts, with which his own concurred, on general grounds. On the other hand, as we have said, we agree with the Circuit Court of Appeals, and in any event we find that the evidence recited by it shows that the Company had notice and that the master of the vessel ought to have known that it was unsafe and improper to try to carry this vessel, loaded as it was, through the canal. Both parties, therefore, are responsible for all the damages including the loss of cargo and they should be divided between the two. The cargo owner, however, having proceeded only against the Canal Company, is entitled to a decree against that company for the full amount. *The Atlas,* 93 U. S. 302. *The New York,* 175 U. S. 187, 209, 210.

Decree of Circuit Court of Appeals reversed.

Decree to be entered that the Northern Coal Company recover its damages and costs from the Boston, Cape Cod & New York Canal Company; that the White Oak Transportation Company exonerate the Boston, Cape Cod & New York Canal Company from one-half of the above damages and costs, and that the damages and costs of the White Oak Transportation Company and the Boston, Cape Cod & New York Canal Company be equally divided between those two companies.

STANDARD FASHION COMPANY *v.* MAGRANE-HOUSTON COMPANY.

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

No. 20. Argued January 25, 1921; restored to docket for reargument April 11, 1921; reargued January 16, 1922.—Decided April 10, 1922.

1. A contract for a term of two years from its date and from term to term thereafter until terminated by either party by giving three months' notice within thirty days after the expiration of any contract period, the contract to continue in effect during such three months, *held,* where notice was not given after the first two years, to have remained effective for two years longer and three months thereafter. P. 353.
2. A suit to restrain a violation of a contract does not become moot with the expiration of the contract if the bill also prays for damages capable of ascertainment. P. 353.
3. Under the General Laws of Massachusetts, c. 155, § 51, the existence of a corporation which has gone out of business and wound up its affairs is continued for three years thereafter for the purpose of prosecuting and defending suits. P. 353.
4. A contract between a manufacturer and a retailer creating an "agency" for the retailing of goods made by the former but to be purchased by the latter, with provisions for periodical exchange of old goods for new of less valuation, and for repurchase by the manufacturer of stock on hand at termination of the contract, *held* a contract of sale, within § 3 of the Clayton Act. P. 354.
5. In a contract between a manufacturer and a retailer granting the latter the "agency" for the sale at its store of goods bought by it from the former and stipulating that the retailer shall not assign or transfer the agency or remove it from its original location without the manufacturer's consent, a covenant of the retailer not to sell on its premises goods of the manufacturer's competitors during the term of the contract, *held,* a general restriction not confined to the particular shop. P. 354.
6. The Clayton Act was intended to supplement the Sherman and other antitrust acts, by reaching agreements in their incipiency. P. 355.

7. The purpose of § 3 of the Clayton Act in forbidding contracts of sale, made upon the agreement or understanding that the purchaser shall not deal in goods of the seller's competitors, which "may substantially lessen competition or tend to create a monopoly", was not to prohibit the mere possibility of those consequences, but to prevent agreements which, in the circumstances, will probably lessen competition or create an actual tendency to monopoly. P. 356.

8. When the meaning of an act of Congress is plain on its face, there is no occasion to resort to the reports of congressional committees concerning it. P. 356.

259 Fed. 793, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a suit brought by the petitioner to restrain the respondent from violating a contract and for damages.

Mr. Herbert Noble, with whom *Mr. Charles E. Hughes, Mr. Robert G. Dodge,* and *Mr. James B. Sheehan* were on the briefs, for petitioner.[1]

The court below decided practically on the ground that within the four corners of the contract and without reference to the evidence, there had been provided means for lessening competition, irrespective of the use made of those means. It did not consider the undisputed evidence that there had been no lessening of competition and no tendency to create a monopoly, but that, on the contrary, the system was keenly competitive, extremely advantageous to the public and in the opinion of a competent witness economical.

There was no testimony showing that any deception, misrepresentation or oppression had been practised; no

[1] At the first hearing the case was argued by *Mr. Charles E. Hughes* on behalf of the petitioner. There was no appearance for the respondent. On April 11, 1921, the court ordered the case restored to the docket for reargument and directed the clerk to notify the Attorney General of its pendency.

complaint of any competitor or other person of any unfairness; nor any suggestion that the public had suffered injury or that competitors had reasonable ground for complaint.

The words " may be " in § 3 of the Clayton Act are not a license to the imagination. Congress meant to deal with the discernment and suppression of practices in the course of commerce which, in connection with an accomplished sale or lease, were bringing about conditions adverse to its policy to prevent restraints of trade and establishment of monopolies, whether accomplished or in their earlier stages.

The court must consider all the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect actual or probable, the history of the restraint, the evil believed to exist, the reason for the adoption of a particular remedy, and the purpose or end sought to be obtained, because they are all relevant facts. Where a record discloses the facts, a conclusion of the actual effect or tendency can be found, and, from that, probabilities considered. *Chicago Board of Trade* v. *United States,* 246 U. S. 231. Section 3 of the act would naturally be interpreted as contended for by the District Court if the proviso at the end were omitted; but by the introduction of that proviso Congress meant to deal with facts as they are and to afford an opportunity to ascertain the conditions before and after the restraint complained of. *United States* v. *United States Steel Corporation,* 251 U. S. 417, 444.

The Clayton Act is not intended to change the law in any way with respect to the right of a manufacturer so to market his goods as will prevent the buyer from using them in competition with the business retained by the seller, of selling direct to the public, where it appears, as the uncontradicted evidence here shows, that without such

restriction the business of the seller would suffer injury. *United States* v. *Addyston Pipe Co.*, 85 Fed. 271; *Hartman* v. *Park & Sons Co.*, 153 Fed. 24, 42, appeal dismissed 212 U. S. 588.

The contract is a method for the plaintiff to market its own goods, the principal part of which it markets through contracts similar to the one here, and the balance of which it markets through its own salesrooms and through the mail. The scheme of the contract requires the agent, in conserving at all times the best interests of the agency, to protect the plaintiff's goods, sell them only at retail, and to return in bulk all that are not so sold, so that out-of-date patterns may not get on the market, and the plaintiff's own retained business as well as its reputation may not be injured. The object of establishing the agency is to sell patterns through the local dealer to the public, and not to the local dealer. The facts that defendant was required at all times to keep a minimum amount of stock, and at the end of the contract to return this minimum amount, and that by reason of the exchange privilege it could not be determined until the end of the contract and the return of the unsold patterns what the plaintiff would receive for its patterns or what the defendant would pay, show that it could not have been intended to sell the patterns to defendant. An unqualified title never vested in the defendant. It was intended to secure the exclusive services of defendant in selling plaintiff's patterns; and to allow the sale of other makes on the same premises would interfere with defendant's giving such exclusive service; and it was not intended to injure competitors or the public, and, as a fact, it did not, as appears from the record.

The negative covenant is not such a condition as is prohibited by § 3; because it is specifically limited to the premises described in the contract on which defendant was to sell plaintiff's patterns, leaving defendant free to

sell other makes in any other store it had or might have in the same or any other city; and because the actual facts show that it did not interfere with competition.

Before the passage of the Clayton Act, contracts of this character were frequently assailed as being in restraint of trade, either at common law or under the Sherman Act or state anti-monopoly statutes, and the view taken by the courts with practical unanimity was that they did not restrain trade. *Wilder Mfg. Co.* v. *Corn Products Refg. Co.,* 236 U. S. 165; *Cole Motor Car Co.* v. *Hurst,* 228 Fed. 280, 284; *Tillar* v. *Cole Motor Car Co.,* 246 Fed. 831, 832; *Whitwell* v. *Continental Tobacco Co.,* 125 Fed. 454; *In re Green,* 52 Fed. 104.

The validity, at least prior to the Clayton Act, of such pattern agency contracts cannot be questioned. State courts of the highest repute have not hesitated to sanction the issue of injunctions restraining the local agent or dealer from selling the patterns of other manufacturers than the one to whom he was bound by contract. *Butterick Publishing Co.* v. *Fisher,* 203 Mass. 122; *Standard Fashion Co.* v. *Siegel Cooper Co.,* 30 App. Div. 564; 157 N. Y. 60; 44 App. Div. 121; *Butterick Publishing Co.* v. *Rose,* 141 Wisc. 533; *Peerless Pattern Co.* v. *Gauntlett Dry Goods Co.,* 171 Mich. 158; Davies' Trust Laws and Unfair Competition, pp. 410 *et seq.;* see *Brown* v. *Rounsavell,* 78 Ill. 589; *Southern Fire Brick & Clay Co.* v. *Garden City Sand Co.,* 223 Ill. 616; *Ferris* v. *American Brewing Co.,* 155 Ind. 539; *J. W. Ripy & Co.* v. *Art Wall Paper Mills,* 41 Okla. 20; *Walsh* v. *Dwight,* 40 App. Div. 513, 517; *Weiboldt* v. *Standard Fashion Co.,* 80 Ill. App. 67; *Sullivan* v. *Rime,* 35 S. Dak. 75; *Wood Co.* v. *Greenwood Hardware Co.,* 75 S. Car. 378; *Staroske* v. *Pulitzer Publishing Co.,* 235 Mo. 67; *Rawleigh Co.* v. *Osborne,* 177 Ia. 208; *Rose* v. *Gordon,* 158 Wisc. 414.

Decisions heretofore made under § 3 of the Clayton Act sustain the petitioner's position. *Sperry & Hutchinson*

Co. v. *Fenster,* 219 Fed. 755; *Elliott Machine Co.* v. *Center,* 227 Fed. 124; *United States* v. *United Shoe Machinery Co.,* 227 Fed. 507; 234 Fed. 127; *Coca-Cola Co.* v. *Butler & Sons,* 229 Fed. 224; *Motion Picture Patents Co.* v. *Universal Film Co.,* 235 Fed. 398; *Pictorial Review Co.* v. *Curtis Publishing Co.,* 255 Fed. 206; *Curtis Publishing Co.* v. *Federal Trade Commission,* 270 Fed. 881; *Texas Co.* v. *Federal Trade Commission,* 273 Fed. 478; *Standard Oil Co.* v. *Federal Trade Commission,* 273 Fed. 478; *Canfield Oil Co.* v. *Federal Trade Commission,* 274 Fed. 571.

Mr. Solicitor General Beck, with whom *Mr. La Rue Brown* and *Mr. Elias Field,* Special Assistants to the Attorney General, were on the brief, (by special leave) for the United States, as *amicus curiae.*

Mr. Justice Day delivered the opinion of the court.

Petitioner brought suit in the United States District Court for the District of Massachusetts to restrain the respondent from violating a certain contract concerning the sale of patterns for garments worn by women and children, called Standard Patterns. The bill was dismissed by the District Court and its decree was affirmed by the Circuit Court of Appeals. 259 Fed. 793.

Petitioner is a New York corporation engaged in the manufacture and distribution of patterns. Respondent conducted a retail dry goods business at the corner of Washington Street and Temple Place in the City of Boston. On November 25, 1914, the parties entered into a contract by which the petitioner granted to the respondent an agency for the sale of Standard Patterns at respondent's store, for a term of two years from the date of the contract, and from term to term thereafter until the agreement should be terminated as thereinafter provided. Petitioner agreed to sell to respondent Standard Patterns

at a discount of 50% from retail prices, with advertising matter and publications upon terms stated; and to allow respondent to return discarded patterns semiannually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped from time to time thereafter. The contract provided that patterns returned for exchange must have been purchased from the petitioner and must be delivered in good order to the general office of the seller in New York. Respondent agreed to purchase a substantial number of standard fashion sheets, to purchase and keep on hand at all times, except during the period of exchange, $1,000 value in Standard Patterns at net invoice prices, and to pay petitioner for the pattern stock to be selected by it on terms of payment which are stated. Respondent agreed not to assign or transfer the agency, or to remove it from its original location without the written consent of the petitioner, and not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell Standard Patterns except at label prices. Respondent agreed to permit petitioner to take account of pattern stock whenever it desired, to pay proper attention to the sale of Standard Patterns, to conserve the best interests of the agency at all times, and to reorder promptly as patterns were sold. Either party desiring to terminate the agreement was required to give the other party three months' notice in writing, within thirty days after the expiration of any contract period, the agency to continue during such three months. Upon expiration of such notice respondent agreed to promptly return to petitioner all Standard Patterns, and petitioner agreed to credit respondent for the same on receipt in good order at three-fourths cost. Neglect to return the pattern stock within two weeks after the expiration of the three months' notice to relieve the petitioner from all obligation to

redeem the same. It was further stipulated that in the event the business property of the respondent, or a substantial part thereof, should be disposed of by respondent for business other than that of dry goods or as a general department store, the respondent should have the privilege of terminating the contract by giving the petitioner due notice of such change. Two weeks after the change in the premises had been made the respondent might deliver its stock of Standard Patterns to the petitioner for repurchase under the repurchase clause of the contract.

We agree with the courts below that, the notices not having been given as required by the contract, the same continued in force until three months from November 25, 1918, to wit, to February 25, 1919. It is contended in the brief for the Government, filed by it as *amicus curiae*, that as the date last mentioned had elapsed pending the suit, the case has become moot, but we are unable to agree with such contention. The bill prayed an assessment of damages as far as capable of ascertainment. The record shows that such damages were capable at least of partial ascertainment.

The suggestion that the respondent had wound up its affairs, and had gone out of business on March 27, 1920, is met by the General Laws of Massachusetts, c. 155, § 51, continuing its corporate existence for the period of three years for the purpose of prosecuting or defending suits by or against it.

The principal question in the case and the one upon which the writ of certiorari was granted involves the construction of § 3 of the Clayton Act, 38 Stat. 731. That section, so far as pertinent here, provides:

"It shall be unlawful . . . to lease or make a sale or contract for sale of goods, . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the

lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The contract contains an agreement that the respondent shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns. It is shown that on or about July 1, 1917, the respondent discontinued the sale of the petitioner's patterns and placed on sale in its store patterns of a rival company known as the McCall Company.

It is insisted by the petitioner that the contract is not one of sale, but is one of agency or joint venture, but an analysis of the contract shows that a sale was in fact intended and made. It is provided that patterns returned for exchange must have been purchased from the petitioner. Respondent agreed to purchase a certain number of patterns. Upon expiration of the notice of termination the respondent agreed to promptly return all Standard Patterns bought under the contract. In the event of the disposition of the business property of the respondent at Washington Street and Temple Place, the respondent might deliver its stock of Standard Patterns to the petitioner for repurchase under the repurchase clause of the contract.

Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale. *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490.

The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The pur-

chaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the third section of the Clayton Act because the covenant not to sell the patterns of others "may be to substantially lessen competition or tend to create a monopoly."

The Clayton Act, as its title and the history of its enactment disclose, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890. The latter act had been interpreted by this court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce. The construction since regarded as controlling was stated in *Standard Oil Co.* v. *United States,* 221 U. S. 1, 58, wherein this court construed the act as intended to reach combinations unduly restrictive of the flow of commerce or unduly restrictive of competition. It was said that the act embraced:

"All contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." See also *United States* v. *American To-*

bacco Co., 221 U. S. 106; *United States* v. *Terminal Railroad Association*, 224 U. S. 383; *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 226 U. S. 324; *Nash* v. *United States*, 229 U. S. 373; *Straus* v. *American Publishers' Association*, 231 U. S. 222.

As the Sherman Act was usually administered, when a case was made out, it resulted in a decree dissolving the combination, sometimes with unsatisfactory results so far as the purpose to maintain free competition was concerned.

The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which may "substantially lessen competition or tend to create a monopoly."

Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, and previous decisions of this court therein cited.

Section 3 condemns sales or agreements where the effect of such sale or contract of sale "may" be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described.

It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.

Both courts below found that the contract interpreted in the light of the circumstances surrounding the making of it was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly. These courts put special stress upon the fact found that, of 52,000 so-called pattern agencies in the entire country, the petitioner, or a holding company controlling it and two other pattern companies, approximately controlled two-fifths of such agencies. As the Circuit Court of Appeals summarizing the matter pertinently observed:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

We agree with these conclusions, and have no doubt that the contract, properly interpreted, with its restrictive covenant, brings it fairly within the section of the Clayton Act under consideration.

Affirmed.

ESSANAY FILM MANUFACTURING COMPANY *v.* KANE.

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

No. 70. Submitted November 10, 1921.—Decided April 10, 1922.

A suit in the District Court to enjoin the defendant from further prosecuting a suit against the plaintiff in a state court, upon the ground that the process served in the state court was void and was not due process of law within the meaning of the Fourteenth Amendment, is forbidden by Jud. Code, § 265. (Rev. Stats., § 720). P. 360.

264 Fed. 959, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court, which dismissed the bill in a suit brought by the appellant to restrain the appellee from prosecuting an action in a state court.

Mr. William M. Seabury for appellant.

No appearance for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

The appellee William R. Kane, a citizen and resident of New Jersey, having in the year 1917 commenced in the Supreme Court of that State an action at law against appellant, a corporation of Illinois, seeking recovery of $20,000 damages for conversion of certain personal property, and having sought to acquire jurisdiction over defendant *in personam* by service of the summons and complaint upon the Secretary of State, under a statute that made him the proper official to be served, in the absence of a person designated by the company itself in the year 1910 as its agent upon whom process against the corporation might be served; and appellee having proceeded in the action to the extent of causing an interlocutory judgment to be entered against the company

in default of its appearance to answer the complaint, and being thereupon entitled under the state practice, in the absence of objection, to take further proceedings and through an assessment of damages to procure a final judgment, appellant brought this suit in equity in the United States District Court for New Jersey, praying an injunction to restrain further prosecution of the action at law by appellee, upon the ground that his alleged cause of action, if any, arose outside the State; that appellant did not then or at any time transact business within the State; that it had designated an office and named a local representative in 1910, and made a proper statement to enable it lawfully to transact business in that State in compliance with the state law, for a temporary purpose which had expired; that while such agency for receipt of process against appellant continued, it related only to actions arising out of business transacted in the State; that the attempted service of process upon the Secretary of State, as appellant's agent, was void and of no effect and was not due process of law within the meaning of the Fourteenth Amendment; and that appellee's threatened prosecution of his suit to final judgment would result in a taking of appellant's property without due process of law, to its irremediable injury.

Appellee answered, alleging in substance (among other things) that he had a good cause of action arising out of a conversion of personalty intrusted to appellant in the course of business transacted by it; that appellant had made itself subject to the laws of New Jersey by voluntarily filing a certificate enabling it to transact business in that State, and could not limit the effect of such filing; and that under the laws of that State the service of the summons and complaint upon the Secretary of State was good service and conferred upon the Supreme Court jurisdiction over appellant.

The cause came on for final hearing upon the bill and answer and a stipulation of the parties that the matters set forth in those pleadings should be taken as the facts in the case; whereupon the District Court held that the proceedings in the state court were within the letter and spirit of the prohibition of § 265, Judicial Code, which reënacted § 720, Rev. Stats.: "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." 256 Fed. 271. The Circuit Court of Appeals affirmed the decision upon the same ground, 264 Fed. 959; and an appeal brings the case here.

In this court, as in the courts below, appellant's chief reliance is upon *Simon* v. *Southern Ry. Co.*, 236 U. S. 115. Without intimating that in other respects the cases are parallel, it is a sufficient ground of distinction that this is an attempt to use the process of the federal court to restrain further prosecution of an action still pending in a state court, while that cited was a case of enjoining a successful litigant from enforcing a final judgment of a state court held void because procured without due process. As was pointed out in that case, pp. 123 *et seq.*, the prohibition originated in the Act of Congress of March 2, 1793, c. 22, § 5, 1 Stat. 334, was based upon principles of comity, and designed to avoid inevitable and irritating conflicts of jurisdiction. But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of 1793 to avoid.

That appellant's objection to the action sought to be restrained rests upon a fundamental ground and one based upon a provision of the Constitution of the United States, does not render the effort to stay proceedings in the state court any the less inconsistent with § 265, Judicial Code. That section would be of little force did it not apply to cases where, save for its prohibition, good ground would exist for enjoining the prosecution of a pending suit. And, as to the federal question involved, Congress at all times, commencing with the first Judiciary Act (September 24, 1789, c. 20, § 25, 1 Stat. 73, 85), has maintained upon the statute book such provisions as it deemed needful for reviewing judicial proceedings in the state courts involving a denial of federal rights, but has confined them to a direct review by this court, and deferred this until final judgment or decree in the state court of last resort. At the same time, since 1793, the prohibition of the use of injunction from a federal court to stay proceedings in a state court has been maintained continuously, and has been consistently upheld. *Hull* v. *Burr,* 234 U. S. 712, 723, and cases cited. In exceptional instances the letter has been departed from while the spirit of the prohibition has been observed; for example, in cases holding that, in order to maintain the jurisdiction of a federal court properly invoked, and render its judgments and decrees effectual, proceedings in a state court which would defeat or impair such jurisdiction may be enjoined. *French* v. *Hay,* 22 Wall. 250; *Dietzsch* v. *Huidekoper,* 103 U. S. 494, 497; *Julian* v. *Central Trust Co.,* 193 U. S. 93, 112; *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239, 245; *Looney* v. *Eastern Texas R. R. Co.,* 247 U. S. 214, 221. The effect of this, as will be observed, is but to enforce the same freedom from interference on the one hand, that it is the prime object of § 265 to require on the other.

Besides a challenge of the jurisdiction of the state court for want of due process over defendant *in personam,* to be

interposed in that court, and, if overruled, followed by invoking the revisory jurisdiction of this court, the final judgment may be questioned collaterally, if in truth there be a want of due process, either defensively, as in *Pennoyer* v. *Neff*, 95 U. S. 714, 723–733; see, also, *York* v. *Texas*, 137 U. S. 15, 20–21; *Western Indemnity Co.* v. *Rupp*, 235 U. S. 261, 273; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401–403; or by adopting the more aggressive method pursued in *Simon* v. *Southern Ry. Co., supra;* see, also, *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183–185. In short, observance by the federal courts, towards litigants in the state courts, of the comity prescribed by § 265, requires orderly procedure but involves no impairment of the substance of constitutional right.

The case before us presents no exceptional feature, and the courts below correctly disposed of it.

Decree affirmed.

FIRST NATIONAL BANK OF GULFPORT, MISSISSIPPI, *v.* ADAMS, REVENUE AGENT OF THE STATE OF MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 136. Argued March 2, 1922.—Decided April 10, 1922.

1. A state tax upon a national bank, based on its capital stock, surplus, undivided profits and other property, is not equivalent to a tax upon the shareholders in respect of their shares and is invalid under Rev. Stats., § 5219. P. 364.
2. When the validity of an assessment by state officers is challenged here, the court must determine the effect of the thing actually done; what might have been done under the local statute is not controlling. P. 365.

123 Miss. 279; 84 So. 707, reversed.

CERTIORARI to a judgment sustaining a tax on the petitioner.

Mr. Wm. H. Watkins for petitioner.

Mr. J. B. Harris, for respondent, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Petitioner is a national bank located at Gulfport, Harrison County, Mississippi. The State Revenue Agent instructed the Tax Collector for that County as follows:

"The following described property, in said County, to-wit: Capital Stock, surplus, undivided profits, and any and all other property properly assessable to banks, amounting to $75,150, belonging to and owned by First National Bank of Gulfport has escaped taxation during each of the years 1902, 1903, 1904, 1905, 1906 and 1907, by reason of not being assessed.

"You are by virtue of the Annotated Code of Mississippi of 1906, Chapter 131, Sec. 4740, now notified and required to, within ten days hereafter, make the proper assessment of said property by way of an additional assessment, on the roll or tax list in your hands, and to give ten days' notice in writing to said First National Bank whose property is so assessed, and also notify in writing the Board of Supervisors of said County, of said assessment."

In obedience to this instruction, the Collector entered upon the rolls of his office an assessment to the Bank in these words—"Amount of all other personal property not otherwise mentioned, $174,000.00."

Objection was duly offered upon the ground that the corporation was assessed and not the stockholders as required by § 5219, Revised Statutes of the United States. The Harrison County Circuit Court overruled this and directed the Board of Supervisors:

"To assess the First National Bank of Gulfport, Mississippi, with capital stock, surplus, undivided profits, and any and all property assessable to said bank, in the sum of $75,150.00, for the years 1903, 1906 and 1907, which said property was at said time owned by said First National Bank and which had escaped taxation for each of the years as hereinbefore set out; and said Board of Supervisors is hereby directed to make such assessment by way of additional assessment on the roll and tax list of Harrison County, Mississippi."

The Supreme Court of the State approved this judgment. See *State Revenue Agent* v. *Bank,* 108 Miss. 346; *Adams* v. *First National Bank of Gulfport,* 116 Miss. 450; *First National Bank of Gulfport* v. *Adams,* 123 Miss. 279.

Section 5219[1] Revised Statutes, (copied below) prescribes the full measure of the power of the several States to impose taxes upon national banking associations or their stockholders. Any assessment not in conformity therewith is unauthorized and invalid. *Bank of California* v. *Richardson,* 248 U. S. 476, 483. "The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as the

[1] Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking assocations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

debt and in behalf of the shareholder, leaving to the corporations the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him." *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 518. But as pointed out in *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 676, 677, a tax levied upon a corporation measured by the value of its shares is not equivalent to one upon the shareholders in respect of their shares.

Where the validity of an assessment by officers of the State is properly challenged, and the matter comes here, this court must determine the effect of the thing actually done. What might have been done under the local statute is not controlling. We think it clear that the assessment in the present case was against the corporation and beyond the power of the State definitely delimited by § 5219.

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

Reversed.

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

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC. *v.* BUTTERWORTH-JUDSON COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 390. Argued March 14, 1922.—Decided April 10, 1922.

After expiration of the term of the District Court at which final judgment was entered and after expiration of an extension of the term provided by general rule, but before a day to which the parties,

after such expirations, stipulated the term should be extended for the purpose, a bill of exceptions was proposed to and settled and signed by the judge. *Held* that the consent gave no jurisdiction and the bill was unlawful. P. 368.

QUESTIONS certified by the court below under Jud. Code § 239.

Mr. Henry M. Ward for Exporters of Manufacturers' Products, Inc.

The validity of a stipulation for the settlement of a bill of exceptions made after the expiration of the term of the trial court, as extended by standing rule, has been repeatedly recognized by this court. *Ex parte Bradstreet,* 4 Pet. 102; *Hunnicutt* v. *Peyton,* 102 U. S. 333; *Jennings* v. *Philadelphia, Baltimore & Washington Ry. Co.,* 218 U. S. 255; *Michigan Insurance Bank* v. *Eldred,* 143 U. S. 293.

The District Court had the power on the stipulation to enter the orders by which the term was extended, and hence the trial judge had power to settle the bill of exceptions. *Hunnicutt* v. *Peyton,* 102 U. S. 333; *Life Insurance Co.* v. *Francisco,* 17 Wall. 672, 679; *United States* v. *Breitling,* 20 How. 252.

Defendant having entered into the stipulation is estopped from questioning its validity.

The plaintiff followed the well settled practice in the Circuit Court of Appeals for the Second Circuit. *Blisse* v. *United States,* 263 Fed. 961; *Exporters of Manufacturers Products* v. *Butterworth-Judson Co.,* 265 Fed. 907, 908.

The Circuit Court of Appeals in granting the motion to strike out, now before it on rehearing, misapprehended the decision of this court in *O'Connell* v. *United States,* 253 U. S. 142. In all the cases cited by this court in the *O'Connell Case* it is either assumed or expressly stated that a stipulation is valid even though made after the expiration of the term. *Davis* v. *Patrick,* 122 U. S. 138; *Waldron* v. *Waldron,* 156 U. S. 361.

Mr. William Wallace, Jr., for Butterworth-Judson Company.

Mr. Justice McReynolds delivered the opinion of the court.

Asking instruction as provided by § 239, Judicial Code, the Circuit Court of Appeals for the Second Circuit has sent up the statement and question which follow.

"This cause came here on a writ of error to a judgment in favor of the Butterworth-Judson Company in an action at law in the District Court for the Southern District of New York. Judgment resulted from the verdict of a jury and thereupon plaintiff-in-error took a writ.

"The stated terms of the trial court as prescribed by Act of Congress begin each month on the first Tuesday thereof; but a general rule of that court provides as follows: 'For the purpose of taking any action which must be taken within the term of the court at which final judgment or decree is entered, each term of court is extended for ninety days from the date of entry of the final judgment or decree.'

"In respect to this case the ninety day period above provided for, and therefore the Term at which the final judgment in question was entered expired on the 24th of February, 1920.

"On March 1, 1920, a written stipulation was executed between the attorneys for the parties hereto in the words following: 'It is hereby stipulated and agreed by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6, 1920, for the purpose of settling and filing the bill of exceptions herein.'

"On or before the 6th of April, 1920, but long after the 24th of February, 1920, the plaintiff-in-error proposed a bill of exceptions. Thereupon the trial Judge over the objection of defendant-in-error and on the faith of the

stipulation above quoted, settled and signed the bill of exceptions annexed to the writ of error herein and now in this court.

"Defendant-in-error then moved in this court for an order striking from the record the bill of exceptions so settled as above set forth, on the ground that the same had been settled, signed and made a part of the record herein in contravention of law, in that the term had expired.

"Upon consideration of this motion a question of law arises concerning which this court desires the instruction of the Supreme Court in order properly to decide the cause.

"*Question Certified.* Is the bill of exceptions so as above set forth settled, signed and certified to this court in contravention of law, in that the term had expired before the same was offered for settlement?"

In the recent case of *O'Connell* v. *United States,* 253 U. S. 142, 146, we reaffirmed the doctrine announced in *Michigan Insurance Bank* v. *Eldred,* 143 U. S. 293, 298—

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

And applying this rule we held the bill of exceptions, signed by the trial judge after expiration of the time allowed by the rule of court, was no part of the record.

In the present cause the term as extended had expired before any action concerning the bill of exceptions was taken by either court or counsel. In such circumstances the court had no power to approve it unless this could be conferred by mere consent of counsel. This they could not do.

Consent of parties can not give jurisdiction to courts of the United States. *Railway Co.* v. *Ramsey,* 22 Wall. 322, 327. The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties. See *United States* v. *Mayer,* 235 U. S. 55, 70. We think the better rule and the one supported by former opinions of this court requires that bills of exceptions shall be signed before the trial court loses jurisdiction of the cause by expiration of the term or such time thereafter as may have been duly prescribed. The certified question is accordingly answered in the affirmative.

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* C. C. WHITNACK PRODUCE COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 146. Argued March 3, 1922.—Decided April 10, 1922.

1. When goods moving in interstate commerce upon a through bill of lading are delivered in bad condition and the evidence shows that they were sound when received by the initial carrier but does not affirmatively establish where the loss occurred, there is a common-law presumption, applicable under the Carmack Amend-

ment, against the delivering carrier, that the injury occurred on the delivering carrier's line. P. 371.

2. There is no inconsistency between this rule and the provision of the amendment making the initial carrier also liable. P. 373.

104 Neb. 587, affirmed.

CERTIORARI to a judgment of the Supreme Court of Nebraska affirming a judgment against the present petitioner in an action by the respondent for damages to goods *in transitu*.

Mr. Wymer Dressler for petitioner.

There is no common-law presumption, applied in federal courts, that damage to an interstate shipment occurred on the line of the last carrier; on the contrary, federal courts hold that, since the enactment of the Carmack Amendment making the initial carrier liable for the entire transportation, all such presumptions heretofore applied by state courts are superseded, and recovery against a connecting carrier can only be had by affirmatively showing that it caused the damage. *Boston & Maine R. R.* v. *Hooker,* 233 U. S. 97; *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412, 420; *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.,* 237 U. S. 597; *Henderson* v. *Kansas City Southern Ry. Co.,* 147 La. 647.

Liability of a carrier on account of interstate shipments is to be determined by the laws of the United States, the provisions of the bills of lading, and the common law as applied in federal courts. State laws and policies have no application. *New York Central R. R. Co.* v. *Beaham,* 242 U. S. 148; *United Metals Selling Co.* v. *Pryor,* 243 Fed. 91; *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold,* 241 U. S. 371.

The Carmack Amendment covered the whole field of interstate commerce, and the remedy afforded is as much in favor of the consignee as of the shipper or anyone else who may be the lawful holder of the bill of lading.

Mr. Henry H. Wilson, with whom *Mr. Elmer J. Burkett, Mr. Elmer W. Brown* and *Mr. Ralph P. Wilson* were on the briefs, for respondent.

Mr. Justice McReynolds delivered the opinion of the court.

The respondent Produce Company recovered a judgment against petitioner, the delivering carrier, for damages to two carloads of apples transported during November, 1914, upon through bills of lading over connecting lines from points in New York State to one in Nebraska. The evidence tended to show that the apples were in good condition when received by the initial carrier, but were frozen when delivered at destination. Where the damage occurred was not shown.

Petitioner moved for a directed verdict claiming no recovery could be had against it without affirmative evidence that it caused the damage. Having denied this motion, the court instructed the jury that there was a presumption of damage upon the line of the last carrier, and the Supreme Court of Nebraska approved the charge.

The single question now presented for consideration is whether, since the Carmack Amendment, a presumption arises that the injury occurred on the delivering carrier's line, when goods moving in interstate commerce upon a through bill of lading are delivered in bad condition and the evidence shows they were sound when received by the initial carrier but does not affirmatively establish where the loss occurred.

It is established doctrine that the rights and liabilities in respect of damage to goods moving in interstate com-

merce under through bills of lading depend upon acts of Congress, agreements between the parties and common-law principles accepted and enforced in the federal courts. *New York Central & Hudson River R. R. Co.* v. *Beaham*, 242 U. S. 148, 151. While this court has not expressly approved it, we think the common-law rule, supported both by reason and authority, is correctly stated in § 1348, Hutchinson on Carriers, 3d ed.—

"A connecting carrier, who has completed the transportation and delivered the goods to the consignee in a damaged condition or deficient in quantity, will be held liable in an action for the damage or deficiency, without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them. The condition and quantity of the goods when they were delivered to the first of the connecting carriers, being shown, the presumption will arise that they continued in that condition down to the time of their delivery to the carrier completing the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession."

Some of the pertinent cases are collected in the note below.[1]

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[1] *Smith* v. *New York Central R. R. Co.*, 43 Barb. (N. Y.) 225; *Cote* v. *N. Y., N. H. & H. R. R. Co.*, 182 Mass. 290; *Laughlin* v. *Chicago & Northwestern Ry. Co.*, 28 Wis. 204; *Phila., Balt. & Wash. R. R. Co.* v. *Diffendal*, 109 Md. 494; *Blumenthal* v. *Central R. R. Co.*, 88 N. J. L. 254; *Pennsylvania R. R. Co.* v. *Naive*, 112 Tenn. 239; *Colbath* v. *Bangor & Aroostook R. R. Co.*, 105 Me. 379; *Willett* v. *Southern Ry. Co.*, 66 S. Car. 477.

The following cases hold that the presumption is not in conflict with the Carmack Amendment: *Erisman* v. *Chicago, B. & Q. R. R. Co.*, 180 Ia. 759; *Glassman* v. *Chicago, R. I. & P. Ry. Co.*, 166 Ia. 255; *Mewborn & Co.* v. *Louisville & Nashville R. R. Co.*, 170 N. Car. 205; *Chicago, R. I. & P. Ry. Co.* v. *Harrington*, 44 Okla. 41; *Eastover Mule Co.* v. *Atlantic Coast Line R. R. Co.*, 99 S. Car. 470.

The petitioner insists that this common-law rule conflicts with the Carmack Amendment to the Interstate Commerce Act, c. 3591, 34 Stat. 584, 595,[1] which requires issuance of a through bill of lading by initial carrier and declares it liable for damage occurring anywhere along the route, as interpreted and applied by this court. But we find no inconsistency between the amendment or any other federal legislation and the challenged rule. Properly understood, *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, especially relied upon, gives no support to the contrary view.

That cause involved the South Carolina statute which imposed a penalty of $50 upon the carrier for failure to pay within forty days for damages suffered by goods transported in interstate commerce. The opinion expressly states, "The defendant contended that the law imposing the penalty was invalid under the Act to Regulate Commerce, especially § 20, as amended by the Act of June 29, 1906, known as the Carmack Amendment;" refers to the penalty as "The only matter that we are considering;" and points out that "The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived." As the Supreme Court of South Carolina sustained the act and per-

[1] Carmack Amendment. "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

mitted recovery of the penalty, its judgment was necessarily reversed.

Here there is no question of conflict between a state statute and any federal policy; and nothing in the words of the amendment indicates a legislative purpose to abrogate the accepted common-law doctrine concerning presumption. The suggestion that by imposing additional liability upon the initial carrier the amendment provides an adequate remedy for shippers and thereby removes the necessity for any presumption against the terminal one and impliedly abrogates the rule, is unsound. There are adequate reasons why shippers should have the benefit of both; and we think Congress so intended.

The judgment of the court below is

Affirmed.

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

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 147. Argued March 3, 6, 1922.—Decided April 10, 1922.

The obligation of a land-grant-aided railroad to transport at reduced rates "troops" of the United States applies to the transportation of members of the Coast Guard when serving as part of the Navy but not when serving under the Treasury. P. 375.

55 Ct. Clms. 45, modified and affirmed.

APPEAL from a judgment rejecting a claim against the Government for railway transportation.

Mr. Benjamin Carter for appellant.

Mr. Solicitor General Beck and *Mr. William C. Herron,* for the United States, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Most of the congressional land-grant acts provide that railroads so aided shall be " free from toll or other charge upon the transportation of any property or troops of the United States." Two of the lines of railroad forming part of the Louisville and Nashville system were built with the aid of such grants. For all transportation to which that provision applies, the rates payable by the Government are now fixed at fifty per cent. of those charged private persons. See *United States* v. *Union Pacific R. R. Co.*, 249 U. S. 354. The company brought this suit in the Court of Claims to recover the balance of the full rate, alleging that the auditors and the Comptroller of the Treasury had erred in applying the land-grant rates to transportation of certain officers and men who were not " troops " of the United States, although in its service. That court dismissed the petition, 55 Ct. Clms. 45; and the case is here on appeal.

The persons transported were of ten different classes. Whether nine of these classes fall within the designation of " troops " we need not consider; as bills for their transportation had been rendered by the carrier and payment therefor had been accepted under conditions which, on the findings made by the lower court, preclude further claim. *Oregon-Washington R. R. & Navigation Co.* v. *United States,* 255 U. S. 339; *Western Pacific R. R. Co.* v. *United States,* 255 U. S. 349. There remains for our consideration the item of $252.70 alleged to be due for transportation of coast guards.

The Coast Guard was established by Act of January 28, 1915, c. 20, 38 Stat. 800, in lieu of the then existing Revenue-Cutter Service and Life-Saving Service, and was composed of those organizations. The Revenue-Cutter Service had been considered a civil service, 15 Ops. Atty.

Gen. 396; 16 Ops. Atty. Gen. 288; 8 Comp. Dec. 852; 15 Comp. Dec. 807. But to its primary function of an armed police force some characteristics of a military force had always been attached; and from time to time Congress had conferred upon it additional incidents of the military service.[1] See 28 Ops. Atty. Gen. 543, 547; 30 Ops. Atty. Gen. 75. When the Coast Guard was established it was constituted "a part of the military forces of the United States"; and § 1 provides that it "shall operate under the Treasury Department in time of peace and operate as a part of the Navy, . . . in time of war or when the President shall so direct. When subject to the Secretary of the Navy in time of war the expense of the Coast Guard shall be paid by the Navy Department." Congress further manifested its intention to class the Coast Guard with the Army, Navy and Marine Corps by the provisions of the Acts of August 29, 1916, c. 417, 39 Stat. 556, 600, 601, and c. 418, § 1, 39 Stat. 619, 649.

The military force of the United States is, and always has been a unit, although divided for purposes of administration into several branches; and there is nothing in the land-grant acts to indicate an intention on the part of Congress to differentiate between the several branches in respect to transportation charges. We are of opinion that the term "troops" is not confined to land forces, and that it includes men and officers in every branch. Since those in the Navy and Marine Corps are to be deemed troops within the meaning of those acts, members of the Coast Guard should also be deemed such when serving as part of the Navy. But at other times members of the Coast Guard are not troops; for then it operates under, and at the expense of, the Treasury Department.

[1] Acts of March 2, 1799, c. 22, § 98, 1 Stat. 627, 699; April 12, 1902, c. 501, § 4, 32 Stat. 100; May 26, 1906, c. 2556, 34 Stat. 200; April 16, 1908, c. 145, 35 Stat. 61; March 4, 1911, c. 285, § 1, 36 Stat. 1363, 1389.

The original petition was filed June 1, 1916, but an amended and supplemental petition was filed on February 12, 1919. The findings of fact indicate that the items proved may include some transportation furnished as late as December 31, 1917. They do not disclose whether the transportation of coast guards was furnished before or after the declaration of war on April 6, 1917. Appellant has moved that the case be remanded to the Court of Claims with directions, among other things, to find the facts in this respect. For that purpose and to that extent the motion to remand is granted, with direction to enter judgment for appellant for such part of the item of $252.70, if any, as represents transportation of coast guards furnished before the declaration of war. Except as it may be so modified, the decision of the Court of Claims is correct.

Motion to remand granted with directions to make a new finding of fact and modify the judgment, if need be, to accord with this opinion.

MR. JUSTICE CLARKE took no part in the decision of this case.

LAMBERT RUN COAL COMPANY *v.* BALTIMORE & OHIO RAILROAD COMPANY.

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

No. 153. Argued March 6, 7, 1922.—Decided April 10, 1922.

1. A suit by a shipper to enjoin a railroad company from following rules for car distribution which have been prescribed by the Interstate Commerce Commission under par. 15 of § 1 of the Act to Regulate Commerce as amended by the Transportation Act of 1920, is a suit to stay an order of the Commission, and can be brought only in the District Court, where the application must be heard by three judges and the United States is an indispensable

party. Act of October 22, 1913, c. 32, 38 Stat. 208, 220; Jud. Code, §§ 208, 211. P. 381.

2. Jurisdiction of a suit to restrain a railroad company from following rules for car distribution prescribed by the Commission can not be acquired by a state court, or by the District Court upon removal therefrom, through the plaintiff's concealment of the fact that the rules were so prescribed. P. 382. *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, distinguished.

267 Fed. 776, modified and affirmed.

APPEAL from a decree of the Circuit Court of Appeals reversing an order of the District Court, which granted an interlocutory injunction, and directing that the injunction be dissolved and the bill dismissed for want of jurisdiction, in a suit by the appellant to restrain the appellee from following certain rules of car distribution, and to require it to furnish cars upon another basis.

Mr. Frank E. Harkness and *Mr. Rush C. Butler,* with whom *Mr. Ernest S. Ballard* and *Mr. Herbert Pope* were on the briefs, for appellant.

Mr. A. G. Gutheim and *Mr. R. V. Fletcher,* with whom *Mr. Hugh L. Bond, Jr.,* and *Mr. W. S. Bronson* were on the brief, for appellee.

Mr. Solicitor General Beck and *Mr. Blackburn Esterline,* Special Assistant to the Attorney General, by leave of court, filed a brief on behalf of the United States, as *amici curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The distribution of coal cars in times of car shortage has been a fertile field of controversy. The subject has received much attention from Congress, the Interstate Commerce Commission and the courts. Definite rules for distribution were promulgated by the Commission; and they remained in force for many years. Among these

was the so-called assigned car rule declared by the Commission in *Railroad Commission of Ohio* v. *Hocking Valley Ry. Co.,* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton R. R. Co.,* 13 I. C. C. 451, and sustained by this court in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452.[1] As an incident of the war this rule was modified by the Railroad Administration acting in conjunction with the Fuel Administration; and the assignment of cars for railroad fuel was abandoned. When by the Transportation Act, 1920, provision was made for restoring the railroads to private control, § 1 of the Act to Regulate Commerce was amended, among other things, by inserting a paragraph numbered 12, which deals specifically with the distribution of coal cars. Act of February 28, 1920, c. 91, § 402, 41 Stat. 456, 476.

In June, 1920, the Lambert Run Coal Company, a West Virginia corporation, which owns and operates a mine in that State, brought, in the Circuit Court of Marion County, this suit against the Baltimore & Ohio Railroad Company, a Maryland corporation. The bill alleged that there was an acute car shortage; that the railroad had refused to make the distribution required by paragraph 12 of § 1 of the Act to Regulate Commerce and in violation thereof distributed cars in accordance with its own rules 8, 9 and 10, set out in the margin,[2] and that this course was resulting in irreparable injury to plaintiff. The bill

[1] See also *Rail & River Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 14 I. C. C. 86; *Hillsdale Coal & Coke Co.* v. *Pennsylvania R. R. Co.,* 19 I. C. C. 356; *In re Irregularities in Mine Ratings,* 25 I. C. C. 286; *Coal and Oil Investigation,* 31 I. C. C. 193, 217; *In re Assignment of Freight Cars,* 57 I. C. C. 760; *Southern Appalachian Coal Operators' Association* v. *Louisville & Nashville R. R. Co.,* 58 I. C. C. 348; *Corona Coal Co.* v. *Southern Ry. Co.,* 266 Fed. 726.

[2] "8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio et al.* v. *H. V. Ry. Co.,* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.,* 13 I. C. C.

prayed that the railroad be restrained from observing these rules and that it be required to furnish cars in accordance with the established ratings.

The defendant removed the case to the federal court for the Northern District of West Virginia and there filed in a single pleading a motion to dismiss and an answer. As grounds for the motion it alleged that the case was not one within the jurisdiction of the state court; that, since it did not appear that the Commission had taken any action in respect to the matter complained of, neither court had jurisdiction of the controversy; that the plaintiff had concealed the fact that the rules of the carrier complained of were, as plaintiff knew, rules which had been promulgated by the Commission; that the bill was thus one to restrain enforcement of an order of the Commission; and that the United States and the Commission were indispensable parties. The answer set forth the facts supporting these allegations and, among other things, that the rules promulgated by the Commission and adopted by the carrier had been issued on April 15, 1920, in pursuance of the emergency provision known as paragraph 15, inserted in § 1 of the Act to Regulate Commerce by the Transportation Act, 1920, *supra*, 41 Stat. 456, 476.

Plaintiff then moved in the District Court for an interlocutory injunction. The defendant, insisting that the

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451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

proceeding was one to stay an order of the Commission, objected to a consideration of the motion in the absence of two other judges as provided by Act of October 22, 1913, c. 32, 38 Stat. 208, 220. Both this objection and the motion to dismiss were overruled by the District Judge; and an interlocutory injunction in accordance with the prayer of the bill was issued. From this order defendant appealed to the Circuit Court of Appeals for the Fourth Circuit. That court stayed the injunction pending the determination of the appeal; and later reversed the decree below with directions to dissolve the injunction and dismiss the bill. 267 Fed. 776. The reasons given by the Circuit Court of Appeals for its decision are, in substance, that the car distribution rule complained of appeared on uncontroverted facts to be that prescribed by the order of the Commission issued April 15, 1920; that this order was issued under paragraph 15 of § 1 of the Act to Regulate Commerce; that it was within the emergency powers there conferred; that the rights and duties prescribed by paragraph 12 of that section were not absolute, but were subject to suspension or modification by the Commission in case of emergency, as provided in paragraph 15; and that, therefore, the bill should have been dismissed. It added that the District Court erred in issuing the injunction for the further reason that, since the relief sought was to enjoin an order of the Commission, it could be granted only by a court of three judges.

The decree of the District Court was properly reversed; but we are of opinion that the Circuit Court of Appeals had no occasion to pass upon the merits of the controversy and that the direction should have been to dismiss the bill for want of jurisdiction and without prejudice. The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect

sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges.

But there are in addition two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. Judicial Code, §§ 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 208, 219. *Illinois Central R. R. Co.* v. *State Public Utilities Commission,* 245 U. S. 493, 504; *North Dakota* v. *Chicago & Northwestern Ry. Co.,* 257 U. S. 485; *Texas* v. *Interstate Commerce Commission, ante,* 158. The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction. *Courtney* v. *Pradt,* 196 U. S. 89, 92; *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 258.[1] To the situation here presented,

[1] See also *Fidelity Trust Co.* v. *Gill Car Co.,* 25 Fed. 737, 738–740; *Swift* v. *Philadelphia, &c. R. R. Co.,* 58 Fed. 858, 861; *Summers* v. *White,* 71 Fed. 106, 109; *Auracher* v. *Omaha & St. L. R. R. Co.,* 102 Fed. 1, 2; *Crowley* v. *Southern Ry. Co.,* 139 Fed. 851; *Zikos* v. *Oregon R. R. & Nav. Co.,* 179 Fed. 893, 899; *R. J. Darnell, Inc.* v. *Illinois Central R. R. Co.,* 190 Fed. 656, 658; *Philadelphia & Reading Ry. Co.* v. *Sherman,* 230 Fed. 814.

cases like *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, relied upon by appellant, have no application. For, while it is true that a plaintiff by his first pleading determines what right he will sue on and that the defenses, set up either anticipatorily by him or in due course by the defendant, can not affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. And the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection. Compare *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Goldberg* v. *Daniels*, 231 U. S. 218; *Louisiana* v. *McAdoo*, 234 U. S. 627. The District Court should therefore have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission. *Robinson* v. *Anderson*, 121 U. S. 522; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 287; *Devine* v. *Los Angeles*, 202 U. S. 313, 338. And the Circuit Court of Appeals in remanding the cause to the District Court should have directed a dismissal for want of jurisdiction and without prejudice.

Decree modified and affirmed.

MR. JUSTICE CLARKE took no part in the decision of this case.

GREINER, EXECUTRIX OF KINGSLEY, *v.* LEWELLYN, COLLECTOR OF INTERNAL REVENUE.

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

No. 187. Argued March 22, 1922.—Decided April 10, 1922.

In imposing a tax on the transfer of an estate by death, Congress has power to require that state municipal bonds forming part of the estate be included in determining its net value, by which the tax is measured. Act of September 8, 1916, c. 463, 39 Stat. 756. P. 387. Affirmed.

ERROR to a judgment of the District Court, for the defendant, in an action to recover taxes alleged to have been illegally collected.

Mr. W. D. Stewart and *Mr. Levi Cooke,* with whom *Mr. Charles M. Thorp* and *Mr. R. G. Bostwick* were on the brief, for plaintiff in error.

The Federal Government cannot tax municipal securities directly or indirectly. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 583.

It is true that in *United States* v. *Perkins,* 163 U. S. 625, and *Plummer* v. *Coler,* 178 U. S. 115, it was held in the one case that an inheritance tax of the State of New York could be taken out of a bequest to the United States, and in the other that a bequest of bonds of the United States was subject to a state inheritance tax. It is also true that in *Knowlton* v. *Moore,* 178 U. S. 41, it was decided that the United States had the power to impose an inheritance tax. But the state taxes were upheld in the first two cases, not simply on the authority of the State to impose an inheritance tax, but upon its admitted right to regulate the transmission or receipt of property by death. On the other hand, the right of the United States to levy an inheritance tax, which was upheld in *Knowlton* v. *Moore,* was based solely upon the

general power of the United States to tax, and that case therefore conveys no intimation that there is authority in the United States to levy an inheritance tax upon an object which it has no power under the Constitution to tax at all, either directly or indirectly. The distinction between the two, that is, between the broader power of a State resulting from its authority not only to tax but also to regulate the transmission or receipt of property by death, and the narrower power, that is, of taxation alone vested in the Government of the United States, was explicitly pointed out in *Knowlton* v. *Moore, supra,* p. 58.

This court, in *United States* v. *Perkins,* 163 U. S. 625, 628, recognized that the inheritance tax of New York was not a tax at all, although it was levied in the form of a tax. *Orr* v. *Gilman,* 183 U. S. 278; *Mager* v. *Grima,* 8 How. 490; *Matter of Sherman,* 153 N. Y. 1; *Estate of Swift,* 137 N. Y. 77, 81; *Billings* v. *Illinois,* 188 U. S. 97, 104; *Strauss* v. *State,* 36 N. Dak. 594, 601; *People* v. *Griffith,* 245 Ill. 532, 537; *Matter of Hamilton,* 148 N. Y. 310, 313; *Warner* v. *Corbin,* 91 Conn. 536.

The power of testamentary disposition or succession to a decedent's estate is purely a matter of statutory grant, and if the State sees fit, it may withhold the privilege altogether, *Neilson* v. *Russell,* 76 N. J. L. 27; *United States* v. *Perkins, supra; Matter of Watson,* 226 N. Y. 384, 395; and it therefore becomes clear that it is entirely immaterial whether the estate of a decedent be composed of United States bonds or anything else, for to assert the contrary would be to hold that the State could be deprived of its indisputable sovereign right of regulation merely by the form of decedent's investment. The right of testamentary disposition is purely a matter of grace on the part of the various States. *Mager v. Grima, supra; Knowlton v. Moore, supra,* 55; *Uterhart v. United States,* 240 U. S. 598, 603; *Maxwell v. Bugbee,* 250 U. S. 525. A State can absolutely prohibit a devise to the

United States. *United States* v. *Fox,* 94 U. S. 315; *Chanler* v. *Kelsey,* 205 U. S. 466, 480.

In *Snyder* v. *Bettman,* 190 U. S. 249, involving the question whether the Federal Government could tax a legacy to a state municipality, the municipality could not assert that it was taking the property in its governmental capacity. It was simply taking a bequest of the testator's property and the tax was upon the testator's property. *Plummer* v. *Coler, supra.* There was therefore no interference with any governmental function. The municipality took solely by virtue of the testator's act and the legacy paid the tax.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

This action was brought in the federal court for Western Pennsylvania against the Collector of Internal Revenue to recover part of an amount assessed as estate tax under the Act of September 8, 1916, c. 463, Title II, 39 Stat. 756, 777, and paid by the plaintiff as executrix of the estate of Kate B. Kingsley. In determining the net value of the estate upon the transfer of which the tax was imposed, the Collector had included bonds issued by political subdivisions of the State of Pennsylvania. The executrix claimed that to include these municipal bonds was in effect to tax them—which the Federal Government is under the Constitution without power to do. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 583, 654; 158 U. S. 601, 618, 693. The District Court overruled this claim and entered judgment for defendant. The case comes here on writ of error under § 238 of the Judicial Code. Whether Congress has power to require that state

municipal bonds held by a decedent be included for the purpose of determining the net value on which the estate tax is imposed is the sole question presented for decision.

That the Federal Government has power to tax the transmission of legacies was settled by *Knowlton* v. *Moore,* 178 U. S. 41; and that it has the power to tax the transfer of the net assets of a decedent's estate was settled by *New York Trust Co.* v. *Eisner,* 256 U. S. 345. The latter case has established also that the estate tax imposed by the Act of 1916, like the earlier legacy or succession tax, is a duty or excise, and not a direct tax like that on income from municipal bonds. *Pollock* v. *Farmers' Loan & Trust Co., supra.* A State may impose a legacy tax on a bequest to the United States, *United States* v. *Perkins,* 163 U. S. 625, or on a bequest which consists wholly of United States bonds, *Plummer* v. *Coler,* 178 U. S. 115; *Orr* v. *Gilman,* 183 U. S. 278. Likewise the Federal Government may impose a succession tax upon a bequest to a municipal corporation of a State, *Snyder* v. *Bettman,* 190 U. S. 249, or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a State as inheritance tax, for the estate tax is the antithesis of a direct tax, *New York Trust Co.* v. *Eisner, supra.* Municipal bonds of a State stand in this respect in no different position from money payable to it. The transfer upon death is taxable, whatsoever the character of the property transferred and to whomsoever the transfer is made. It follows that in determining the amount of decedent's net estate municipal bonds were properly included.

Affirmed.

GALVESTON ELECTRIC COMPANY *v.* CITY OF GALVESTON ET AL.

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

No. 455. Argued December 15, 16, 1921.—Decided April 10, 1922.

1. The fact that a public utility, such as a street railway, may reach financial success only in time, or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether a rate fixed is confiscatory. P. 395.
2. A so-called "going concern value and development cost" based on calculations, for various periods, of past deficiencies of net income, allowing 4 per cent. for annual depreciation and 8 per cent. compound interest on the value of the property used as a fair return, should not be included in the base value of appellant's street railway in determining whether an existing rate is confiscatory. P. 395.
3. Neither should an allowance for hypothetical brokerage fees based on a percentage customarily obtained by bankers for financing such enterprises. P. 397.
4. In determining the sufficiency of such rates, the amount normally required for maintenance, not necessarily the amount expended, annually, should be allowed; and many items included in overhead cost of original construction may be excluded in calculating depreciation annuity. P. 398.
5. Appellant's request that prospective cost of maintenance deferred during the war at the wish of the Government be allowed from earnings of future years, in testing the rate, was an attempt to capitalize past losses and rightly refused. P. 399.
6. In calculating whether a rate fixed will yield an adequate return, income taxes which would be payable if a fair return were earned are appropriate deductions from gross revenue. P. 399.
7. But, where the federal corporate income tax, (Act of February 24, 1919, c. 18, §§ 230–238, 40 Stat. 1057, 1075–1080,) is thus deducted, the exemption of the stockholder from the "normal" tax on dividends received from the corporation must be taken into consideration in determining what rate of return to the corporation shall be deemed fair. P. 399.

8. An ordinance rate inadequate when adopted will be valid when, through change of conditions, it yields a fair return. P. 400.
9. The court knows judicially that prices, in general, and current rates of return on capital have declined since the conclusion of the war, but not the extent to which the economic changes occurring have affected the gross revenues or the net return of the appellant company. P. 402.
10. A decree of the District Court dismissing without prejudice the bill of a street railway company to restrain enforcement of an ordinance rate as confiscatory, *affirmed*, where an operation test of more than a year and a half was inconclusive because of abnormal economic conditions then existing, and where the lower court's view of the probable future adequacy of the rate was necessarily based largely on prophecy, and was free from substantial error as to the elements to be considered, and where the actual facts were substantially undisputed and the evidence did not compel a contrary conviction. P. 401.

272 Fed. 147, affirmed.

APPEAL from a decree of the District Court, dismissing, without prejudice, a bill brought by the appellant to restrain the appellees from enforcing a rate fixed for its street railway.

Mr. William E. Tucker for appellant.

Mr. Frank S. Anderson and *Mr. James W. Wayman* for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The street railway system of Galveston was started as a horse-car line in 1881. It was electrified about 1890; and after the hurricane of 1900 was largely rebuilt. Upon sale on foreclosure the railway passed in 1901 to a new company; and in 1905 it was purchased by the Galveston Electric Company which supplies to the inhabitants of that city also electric light and power. At no time has the full fare on the railway been more than five cents—

except during the period of eight months, from October 1, 1918, to June 5, 1919, when six cents was charged. This higher fare was authorized by ordinance of the municipal Board of Commissioners which possesses regulatory powers; and on June 5, 1919, the same Board reduced the maximum fare to five cents. The latter ordinance was passed after a hearing and a finding by the Board that with the reduced rate the company would continue to earn a fair return. Under the 1919 ordinance the company operated for eleven months. Then it brought this suit, in the federal court for southern Texas, to enjoin its enforcement. The company contends that the fare prescribed is confiscatory in violation of the Fourteenth Amendment; the city that it is sufficient to yield a return of 8 per cent. on the value of the property used in the public service.

A temporary injunction having been denied, the court appointed a master to take the evidence and make advisory findings. There was substantially no dispute concerning the facts past or present. It was assumed, in view of then prevailing money rates, that 8 per cent. was a fair return upon money invested in the business. The experts agreed on what they called the estimated undepreciated cost of reproduction on the historical basis; that is, what the property ought to have cost on the basis of prices prevailing at the time the system and its various units were constructed. They agreed also on the amount of gross revenue, and on the expenditures made in operation and for taxes, except as hereinafter stated. The differences between the parties resulted mainly, either from differences in prophecy as to the future trend of prices or from differences in legal opinion as to the elements to be considered in determining whether a fair return would be earned. These differences affected both the base value and the amount to be deemed net revenues. The master, who heard the case in October, 1920, and

filed his report in November, made findings on which he advised that the fare was confiscatory. The District Judge, who heard the case in January, 1921, found a much smaller base value and much larger net revenues; stated that he did not deem it necessary to determine whether the ordinance will "produce exactly 8 per cent., or a little more or a little short of it"; declared that he was "not satisfied that the ordinance produces a return so plainly inadequate as to justify this court in interfering with the action of the municipality in the exercise of its rate-making function"; and in March, 1921, entered a decree dismissing the bill without prejudice. In April he denied a petition for rehearing. 272 Fed. 147. The case comes here on appeal under § 238 of the Judicial Code.

The undepreciated reproduction cost on the historical basis [1]—which seems to be substantially equivalent to what is often termed the prudent investment [2]—was agreed to be $1,715,825. The parties failed to agree in their estimates of the depreciation accrued up to 1921. The master estimated that, based on the 1913 price level, it was $390,000; and this estimate the court accepted. Thus measured, the value of the property, less depreciation, was $1,325,825. The court found that the net earnings under the five-cent fare for the year ending June 30, 1920,

[1] That is "the estimated undepreciated cost of reproduction of railway property of the company on the historical basis, exclusive of franchise value, going concern value, bond discount and brokerage fee," but with land and right of way which cost about $15,000 estimated at their present value of $58,836. It was also agreed, for the purpose of dividing joint items, that one-fifth of the property of the company was devoted to its light and power business.

[2] See Richberg, 31 Yale Law Journal, 263, 266, 279; Hale, 30 Yale Law Journal, 710, 720; Henderson, 33 Harvard Law Review, 902 and 1031; Friday, 36 Quarterly Journal of Economics, 197, 211.

had been $90,159, and for the year ending December 31, 1920, $109,286; and estimated that for the year ending June 30, 1921, they would be at least $111,285. The return so found for the year ending June 30, 1920, is 6.8 per cent. of $1,325,825; for the calendar year 1920, 8.2 per cent.; and for the year ending June 30, 1921, 8.4 per cent. The master made calculations only for the year ending June 30, 1920, and, mainly [1] because he allowed an amount for maintenance and depreciation equal to nearly 18 per cent. of the prudent investment for the depreciable property (less accrued depreciation), found the net earnings to be only $50,249.60. This sum is 3.8 per cent. on the prudent investment value, less depreciation. But neither the District Judge nor the master reached his conclusion as to net return by a calculation as simple as that indicated above.

First. As the base value of the property, master and court took—instead of the prudent investment value—the estimated cost of reproduction at a later time less depreciation; and in estimating reproduction cost both refused to use as a basis the prices actually prevailing at the time of the hearings. These had risen to 110 per cent. above those of 1913. The basis for calculating reproduction cost adopted by all was prophecy as to the future general price level of commodities, labor and money. This predicted level, which they assumed would be stable for an indefinite period, they called the new plateau of prices. As to the height of this prophesied plateau there was naturally wide divergence of opinion. The company's expert prophesied that the level would be 60 to 70 per cent. above 1913 prices; the master that an increase of 33 1/3 per cent. would prove fair; and the court accepted

[1] He allowed also on account of federal income taxes a sum of $8,008 which the court disallowed.

the master's prophecy of 33 1/3 per cent.[1] Thus both master and court assumed a reproduction cost, after deducting accrued depreciation, of about $1,625,000. On this sum the net earnings found by the court yielded—after deducting a 4 per cent. depreciation annuity on property subject to depreciation, a maintenance charge. and a charge for taxes, other than the federal income tax—a net return of 5½ per cent. for the fiscal year ending June 30, 1920; of 6.7 per cent. for the calendar year 1920; and the promise of more for the fiscal year ending June 30, 1921. But to fix base value the master added, and the court disallowed, items aggregating nearly $600,000, which must now be considered.

The most important of these items is $520,000 for "development cost." The item is called by the master also "going concern value or values of plant in successful operation." He could not have meant by this to cover the cost of establishing the system as a physically going concern, for the cost of converting the inert railway plant into an operating system is covered in the agreed historical value by items aggregating $202,000. These included, besides engineering, supervision, interest, taxes, law expenses, injuries and damages during construction, the sum of $73,281 for the expenses of organization and business management. The going concern value for which the mas-

[1] From the agreed valuation of $1,715,825, the court deducted $425,117 for property not subject to this appreciation—land, already given its market value, and capital acquired recently (all acquisitions before January 1, 1915, being assumed to have been at the 1913 price level, all since that date at the new level). The balance was appreciated 1/3; the $425,117 was added again; and accrued depreciation, likewise appreciated 1/3, was subtracted. The court thus obtained a base value of $1,626,061. The master's figure was slightly smaller (but for his inclusion of development cost and brokerage) for he excepted more property from this 33 1/3 per cent. appreciation.

ter makes allowance is the cost of developing the operating railway system into a financially successful concern. The only evidence offered, or relied upon, to support his finding is a capitalization of the net balance of alleged past deficits in accordance with what was said to be the Wisconsin Rule.[1] The experts calculated this sum in various ways. One estimate placed the development cost at $2,000,000; a more moderate estimate by the company's expert was $575,300; and the city's expert made a calculation by which he estimated this so-called cost at $212,452.

If the rule were that a prescribed rate is to be held confiscatory in case net earnings are not sufficient to yield 8 per cent. on the amount prudently invested in the business, there might be propriety in counting as part of the investment such amount, if any, as was necessarily expended at the start in overcoming initial difficulties incident to operation and in securing patronage. But no evidence of any such expenditure was introduced; and the claim of the company does not proceed upon that basis. What was presented by the witnesses are studies, on various theories, of what past deficiencies in net income would aggregate, if 4 per cent. were allowed as a depreciation annuity and 8 per cent. compound interest were charged annually on the value of the property used. These calculations covered, on one basis, the period of 39 years since the original horse-car line was built; on another, the period of 15 years since the appellant purchased the property as a going concern. If net deficits so estimated were made a factor in the rate base, recognition of 8 per cent. as a fair return on the continuing investment would imply substantially a guarantee by the community that the

[1] *Hill* v. *Antigo Water Co.*, 3 Wis. R. R. Com. Rep. 623, 705–723. But see *Cunningham* v. *Chippewa Falls Water Co.*, 5 Wis. R. R. Com. Rep. 302, 315; *Appleton* v. *Appleton Water Works Co.*, 5 Wis. R. R. Com. Rep. 215, 277; *In re Purchase Racine Water Works Plant*, 19 Wis. R. R. Com. Rep. 83, 140.

investor will net on his investment ultimately a return of 8 per cent. yearly, with interest compounded on deferred payments; provided only that the traffic will in course of time bear a rate high enough to produce that amount.[1]

The fact that a utility may reach financial success only in time or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether the rate is confiscatory. A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise, or of errors in management, or of omission to exact proper prices for its output, cannot erect out of past deficits a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 14.

Nor is there evidence in the record to justify the master's finding that a business brought to successful operation "should have a going concern value at least equal to one-third of its physical properties." Past losses obviously do not tend to prove present values. The fact that a sometime losing business becomes profitable eventually through growth of the community or more efficient management, tends to prove merely that the adventure was

[1] On the other hand, if what is to be considered in determining the net deficit is not the result of operations from the beginning of the enterprise, but the result of operations since the present owner acquired it—in other words, the return on its investment—we are left without the data necessary to determine the fact. For the record does not disclose what the present company paid when it purchased the property in 1905 as a going concern. For aught that appears, appellant has received full 8 per cent. annually on that amount and later additions to capital.

not wholly misconceived. It is doubtless true, as the master indicated, that a prospective purchaser of the Galveston system would be willing to pay more for it with a record of annual losses overcome, than he would if the losses had continued. But would not the property be, at least, as valuable if the past had presented a record of continuous successes? And shall the base value be deemed less in law if there was no development cost, because success was instant and continuous? Or, if the success had been so great that, besides paying an annual return at the rate of 8 per cent., a large surplus had been accumulated, could the city insist that the base value be reduced by the amount of the surplus? Compare *Newton* v. *Consolidated Gas Co., ante,* 165.

In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances. *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202, 203; *National Waterworks Co.* v. *Kansas City,* 62 Fed. 853, 865. And they, like past losses, should be considered in determining whether a rate charged by a public utility is reasonable. Compare *Venner Co.* v. *Urbana Waterworks,* 174 Fed. 348, 352. But in determining whether a rate is confiscatory, goodwill and franchise value were excluded from the base value in *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655, 669, and *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 169; and the expressions in *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 184, 191, and in *Lincoln Gas & Electric Light Co.* v. *Lincoln,* 250 U. S. 256, 267, are not to be taken as modifying in any respect the rule there declared. Going concern value and development cost, in the sense in which the master used these terms,

are not to be included in the base value for the purpose of determining whether a rate is confiscatory.

The other item included by the master in determining base value, but disallowed by the court, is $67,078 for brokerage fees. There is no evidence that any sum was in fact paid as brokerage, and there was included, as above shown, the sum of $73,281 for organization and business management in calculating the historical reproduction cost. The finding of the master rests upon testimony that bankers customarily get, in some form, compensation equal to 4 per cent. on the money procured by them for such enterprises.[1] But compensation for bankers' services is often paid in the lessened price at which they take the company's securities, and is thus represented in the higher rate of interest or dividend paid on the money actually received by the company as capital. The reason given by the master for including the allowance for an assumed brokerage fee, is that a brokerage fee is "a normal incident of large industrial investments, and has not been amortized," since "the record shows that . . . the plant has been operated at a loss." If base value were to be fixed by the money expended, brokerage fees actually paid might with propriety be included, as are taxes paid pending construction. But as the base value considered is the present value, that value must be measured by money; and the customary cost of obtaining the money is immaterial. We cannot say that the court erred in refusing to include in base value an allowance for hypothetical brokers' fees.

The appellant insisted also that the base value should be raised by assuming that the future plateau of prices would be 60 to 70 per cent. above the historical reproduc-

[1] The record cost of the property was originally used as the base for this calculation. But the figure $67,078 was tacitly agreed by both parties to be the amount, if any, that should be allowed for brokerage.

tion value instead of 33 1/3 per cent. as the master and the court assumed. The appellees insisted, on the other hand, that an item of $142,281 for grade raising included by master and court in the historical cost should be eliminated. We cannot say that there was error in overruling these contentions.

Second. Concerning deductions to be made from gross revenue in order to determine net earnings, the court differed from the master in regard both to the yearly charge for maintenance and to the depreciation annuity. It appeared that in the fifteen years since appellant acquired the system in 1905, the average annual expenditure for maintenance had been $42,771; that during the war the property had been admittedly undermaintained; that the expenditure was $64,108 in the calendar year 1919; $80,322 in the fiscal year ending June 30, 1920, and $90,-861.28 in the calendar year 1920. The court estimated the proper charge for current maintenance at $70,000, and allowed, in addition, a depreciation annuity of $45,245 (that is, 4 per cent. on property subject to depreciation) to provide a fund out of which annual replacements and renewals could be made. Thus the court allowed for the year's depreciation and maintenance $115,245, which is nearly 14 per cent. of the historical reproduction value, and about 10 per cent. of the assumed reproduction cost, of the depreciable part of the system. The master allowed $147,146.40 for maintenance and depreciation during the year ending June 30, 1920. This larger figure was arrived at, partly by charging as cost of maintenance the full $80,322 expended during that year, and partly by including as depreciable property expenditures for overhead items which the court excluded. The proper annual charge for maintenance is the amount normally required for that purpose during the period; it is not necessarily the amount actually expended within the year. Many items included in the overhead cost of original construc-

tion may properly be excluded in calculating the amount of the depreciation annuity. We cannot say that the court erred in limiting the year's maintenance and depreciation allowances to an aggregate of $115,245.

The company asked to have allowed as a further charge $29,500 a year on account of what it called deferred maintenance. The contention is that, during the war and two years following, the company had deferred maintenance, pursuant to a policy established at the express request of the Government to the end that material and labor might be released for war purposes; that to make good this deferred maintenance would cost $197,000; and that in order to amortize this amount an annual allowance from earnings of $29,500 should be made for five years. This is an attempt, in another form, to capitalize alleged past losses; and the request was properly refused both by the master and the court.

Third. The remaining item as to which the master and the court differed relates to the income tax. The company assigns as error that the master allowed, but the court disallowed, as a part of the operating expenses for the year ending June 30, 1920, the sum of $16,254 paid by the company during that year for federal income taxes. The tax referred to is presumably that imposed by the Act of February 24, 1919, c. 18, §§ 230–238, 40 Stat. 1057, 1075–1080, which for any year after 1918 is 10 per cent. of the net income. In calculating whether the five-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income taxes and others. But the fact that it is the federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under § 216 the stock-

holder does not include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment.[1]

It is thus clear that both in the year ending June 30, 1920, and in the calendar year 1920, the net earnings of the system were less than 8 per cent. of its value, whether the value be estimated on the basis of prudent investment or on the basis of the reproduction cost actually adopted. When the court rendered its decision the ordinance had been tested for more than a year and a half—a period ample in ordinary times to test the current effect of the rate prescribed and to indicate its probable effect in the near future. The times here involved were, however, in a high degree abnormal. It did not follow that, because the system had earned less than 8 per cent. in 1919 and in 1920, it would earn less than 8 per cent. in 1921. A rate ordinance invalid when adopted may later become valid, just as an ordinance valid when made may become invalid by change in conditions. *Municipal Gas Co.* v.

[1] It is difficult to see how, on the facts presented, so large a sum as $16,254 could have been paid on account of the year's operation. Indeed the court, in disallowing the item of federal income tax, deducted not $16,254, but $8,008. Even this seems too large, for the net earnings, without deduction of the $16,254 attributed to income tax, for the year ending June 30, 1920, as found by the master, were $66,503.60. From this, interest paid or accrued on indebtedness is to be deducted before computing the net income on which the tax is payable. A large part of the capital of utility companies is ordinarily represented by interest-bearing bonds and notes; and there is evidence that such indebtedness of the appellant was "in the neighborhood of $1,400,000." The interest on this debt chargeable to the railway system would be at least $50,000. There is further an exemption from tax of $2,000 of the net income. So a 10 per cent. tax on the balance would amount to less than $1,500.

In the record and briefs elsewhere the income tax is reckoned at between $8,000 and $10,000, which is a proper figure if there be an 8 per cent. return on $1,626,061.

Public Service Commission, 225 N. Y. 89, 96. Compare *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Newton* v. *Consolidated Gas Co., ante,* 165.

The District Judge was obliged to form an opinion as to the probable net earnings in the future. All relevant facts, except as stated, and all applicable arguments were fully and clearly presented by the parties and were carefully considered by the court. Although the District Judge treated the master's report as advisory merely, he passed upon the numerous exceptions taken to the master's findings in order to indicate his view on the precise points raised. He allowed some exceptions and disallowed others. Upon petition for rehearing further careful consideration was given to the case. Views expressed in the first opinion on some matters were modified; but these changes did not call for any change in the decree. The District Judge had before him some evidence not before the master; for the company's expert was recalled and testified both to the result of operations of later months in which there was a large increase in travel and to the heavy decline in prices which occurred after October. Concerning actual facts there was substantially no controversy. On the elements to be considered in determining whether the rate would be confiscatory no error was made which could substantially affect the result. His determination whether the prescribed rate would be confiscatory was necessarily based largely on a prophecy, for normal conditions had not been restored. He found that gross revenues were steadily increasing; and that they were larger under the five-cent fare than they had been during the preceding year when the six-cent rate was in effect. He was convinced that operating costs would decrease largely during the year. His two opinions show that every element upon which his prophecy should be based received careful consideration. We cannot say that the evidence compelled a conviction that the rate would

prove inadequate. Compare *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739, 754. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 17.

The occasion for the suit was solely the extraordinary rise in prices incident to the war. There was no suggestion that the action of the Board evidenced hostility to the utility, or that the Board was arbitrary or hasty. It had been theretofore considerate of the company's rights and needs. When prices rose rapidly in 1918, it raised the fare limit to six cents, although the franchise ordinance prescribed the five-cent fare. And this was before our decision in *San Antonio* v. *San Antonio Public Service Co.,* 255 U. S. 547. Its reduction of the fare by ordinance of June 5, 1919, was made after hearing, and was doubtless due to the conviction, shared by many, that, with the cessation of hostilities and the negotiation of the Peace Treaty, prices and operating cost would fall abruptly. This prophecy, if such there was, proved false. But nearly three years have elapsed since the Board adopted the ordinance; and more than a year since entry of the decree below. We know judicially that the period has, in general, been one of continuous price recession, and that the current rates of return on capital are much lower than they then were.[1] But we cannot know to what extent the important changes occurring have affected either gross revenues or the net return. There is no reason to believe that the Board would not give full and fair consideration to a proposed change in rate if application were now made to it. And the District Judge stated in his opinion (272 Fed. 147), that the decree to be entered would be vacated or amended in case it should later appear that the regulating board declined such adjustment of rates as the ac-

[1] See Federal Reserve Bulletin, January, 1922, pp. 5, 79, 113; February, 1922, pp. 156–7.

tual experience of the utility might show it entitled to; and the decree was thereupon entered without prejudice.

The District Judge refused a temporary injunction and did not exact a bond. Hence the only relief we can grant is such as operates *in futuro*. Compare *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464. An injunction should not issue now, unless conditions are such that the prescribed rate is confiscatory. As by the reservation in the decree appellant may secure protection against the ordinance if under existing conditions the five-cent rate appears to be inadequate, the decree should be affirmed. Compare *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S. 256, 268; *Ex parte Lincoln Gas & Electric Light Co.*, 256 U. S. 512; 257 U. S. 6.

Decree affirmed.

VIGLIOTTI *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 530. Argued March 14, 1922.—Decided April 10, 1922.

The law of Pennsylvania of May 13, 1887, known as the Brooks Law, which prohibits sale of spirituous liquor without a license, is not at variance with but rather in aid of the prohibitions of the Eighteenth Amendment and the National Prohibition Act, and was not superseded by them. P. 408.

271 Pa. St. 10, affirmed.

ERROR to a judgment of the Supreme Court of Pennsylvania affirming a conviction and sentence of the plaintiff in error for a violation of a law of the State against selling liquor without a license.

Mr. Frank Davis, Jr., and *Mr. H. S. Dumbauld*, with whom *Mr. E. C. Higbee* and *Mr. A. E. Jones* were on the brief, for plaintiff in error.

The Brooks Law is a regulation of the sale of intoxicating liquors. *Schlaudecker* v. *Marshall,* 72 Pa. St. 200, 206; *Raudenbusch's Petition,* 120 Pa. St. 328; *Venango County Liquor License,* 58 Pa. Super. Ct. 277; *Gregg's License,* 36 Pa. Super. Ct. 633.

So much of the law as relates to liquors not intoxicating in fact is only incidental to this primary object. Construed otherwise than as a regulation of the sale of intoxicating liquors, the law violates the Fourteenth Amendment.

The law therefore conflicts with the Eighteenth Amendment, *National Prohibition Cases,* 253 U. S. 350; and such parts as do not are not separable and the statute must fall as a whole, *Employers' Liability Cases,* 204 U. S. 463; *Warren* v. *Mayor,* 2 Gray, 84; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 564.

The purpose of the Eighteenth Amendment and the Volstead Act is to annihilate the traffic in intoxicating liquors and thereby eliminate the evils that flow from it.

The purpose of the Brooks Law was not to destroy this traffic. It undertook to minimize the evils attendant upon the unregulated sale of intoxicating liquors by establishing a system where such sales could be made only by persons and at places licensed for that purpose by the Courts of Quarter Sessions, to the extent that was necessary for the accommodation of the public.

The two systems are diametrically opposite. *United States* v. *Yuginovich,* 256 U. S. 450; *State ex rel. Rose* v. *Donahey,* 100 Oh. St. 104; *Draper* v. *State,* 6 Ga. App. 12; *State* v. *Tonks,* 15 R. I. 385.

Section 1 of the Eighteenth Amendment is an absolute prohibition throughout the entire territorial limits of the United States. *National Prohibition Cases,* 253 U. S. 350. In and of itself it conferred upon Congress a power to legislate for its enforcement. Concurring opinion White, Ch. J., 253 U. S. 390; Const., Art. I, § 8, cl. 18.

The Thirteenth Amendment, § 1, is closely analogous. *Civil Rights Cases,* 109 U. S. 3. The whole subject-matter of the manufacture, importation, exportation, transportation and sale of intoxicating liquors for beverage purposes is lifted out of the control of the States and by the fundamental law of the United States absolutely prohibited. The Amendment transferred this subject-matter from the sovereignty of the respective States to the sovereignty of the United States.

The object of the Amendment was to destroy the governmental power of the several States in respect of the subject-matter embraced in it. The police power of the State is actually abolished so far as intoxicating liquors for beverage purposes are concerned. *Katz* v. *Eldredge,* 117 Atl. 841.

Since the prohibition of § 1 of the Amendment is national, Congress, the agency of national power, has the right in virtue of that section to define prohibited beverages and enact suitable regulations and provide adequate penalties to effectuate and enforce it.

The right of the States is to enforce the Amendment, as defined and sanctioned by Congress, by appropriate legislation. Section 2 of the Amendment is: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Since the same power is lodged in the States by the same words that confer it upon Congress, the fair inference is that it was in like manner conferred upon the States and not reserved to them.

Since § 1 in and of itself destroyed the police powers of the States so far as intoxicating liquors for beverage purposes are concerned, the only power of the States in connection therewith must be that granted by the Amendment itself.

The power thus granted is limited to enforcement of the Amendment, but as Congress had power and right

independently of § 2, to prescribe definitions of intoxicating liquors for beverage purposes and to make regulations and provide penalties, the power conferred by § 2 is additional or supplemental to that, and the States have no greater or different power from that specifically conferred upon Congress. *National Prohibition Cases, supra,* 391.

In legislating for the enforcement of the Amendment, the States do not act in virtue of their police powers inherently possessed as sovereigns, but in virtue of a power conferred upon them by the people of the United States. In this respect they are administrative agents or mandataries of the United States. *National Prohibition Cases, supra,* 387, conclusions 7 and 8.

In enacting legislation for the enforcement of § 1 of the Eighteenth Amendment, Congress could have provided that, like the naturalization laws, it might be enforced in the state courts, even if § 2 did not exist, but it would not be required to do so. Section 2 does not leave it optional with Congress. Each State may determine for itself, whether it will enforce the Amendment. If it determines to do so, it is the Amendment as already made completely operative by congressional action that is to be enforced.

These questions have been considered by the Supreme Courts of a number of States. *Commonwealth* v. *Nickerson,* 236 Mass. 281; *State* v. *District Court,* 58 Mont. 684; *State* v. *Fore,* 180 N. Car. 744; *People* v. *Foley,* 184 N. Y. S. 270; *Allen* v. *Commonwealth,* 129 Va. 723; *Jones* v. *Hicks,* 150 Ga. 657; *State* v. *Green,* 148 La. 376; *Hall* v. *Moran,* 81 Fla. 706; *Burrows* v. *Moran,* 81 Fla. 662; *Johnson* v. *State,* 81 Fla. 783.

Mr. George E. Alter, Attorney General of the State of Pennsylvania, with whom *Mr. William A. Miller* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In the Court of Quarter Sessions of Fayette County, Pennsylvania, Vigliotti was found guilty of selling, during the spring of 1920, spirituous liquor without a license, in violation of § 15 of the Act of May 13, 1887, P. L. 108, known as the Brooks Law. The liquor so sold was a preparation called Jamaica Ginger containing 88 per cent. of alcohol. The defendant claimed seasonably that the state law as applied deprived him of rights guaranteed by the Federal Constitution, because the sales complained of had been made after January 16, 1920, when the Eighteenth Amendment became effective, after which the Volstead Act was the only law applicable to sales of intoxicating liquors. This claim was overruled by the trial court; the defendant was sentenced; the judgment was affirmed by both the Superior Court, 75 Pa. Super. Ct. 366, and the Supreme Court of the State, 271 Pa. St. 10; and the case comes here on writ of error under § 237 of the Judicial Code as amended. The question presented for our decision is whether the provision of the Brooks Law here applied had been superseded by the Eighteenth Amendment and the Volstead Act.

The Brooks Law, as construed by the courts of the State, prohibits every sale of spirituous liquor without a license, excepting only such sales as are made by druggists; and these are forbidden to sell intoxicating liquors except on prescription of a regular physician. The law applies however small the percentage of alcohol and although the liquor is not intoxicating. It applies to liquor sold solely for industrial uses. It does not purport to confer upon anyone anywhere the right to a license; nor does it authorize the sale of liquor in any city or county having a special prohibitory law. It merely grants to the appropriate officials, where such authority exists, discretion to

give or to withhold the license under the conditions prescribed. In case of an indictment for selling without a license, a sale is presumed to be unlawful and the burden is on the defendant to show the authority on which he acted. It is thus primarily a prohibitory law; and its prohibitory features are not so dependent upon those respecting license as to be swept away by the Eighteenth Amendment and the Volstead Act. The Supreme Court declared further that "the Brooks Law still survives, as Pennsylvania's own police power method of officially listing and adequately controlling the customary sources of general supply and distribution, to the peoples within her borders, of those kinds of liquors among which intoxicating beverages are usually found, and she may thus assist in prohibiting their illegal use as such." 271 Pa. St. 15. We, of course, accept as controlling the construction given to the statute by the highest court of the State. The question before us is whether so construed the statute violates the Federal Constitution.

The Brooks Law as thus construed does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the State supplies in the effort to make prohibition effective. That the State may by appropriate legislation exercise its police power to that end was expressly provided in § 2 of the Amendment which declares that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." *National Prohibition Cases*, 253 U. S. 350, 387. That the Brooks Law as construed is appropriate legislation is likewise clear. To prohibit every sale of spirituous liquors except by licensed persons may certainly aid in preventing sales for beverage purposes of liquor containing as much as one-half of one per cent. of alcohol; and that is what the Volstead Act

prohibits. If the Brooks Law as construed had been enacted the day after the adoption of the Amendment it would obviously have been "appropriate legislation." It is not less so because it was already in existence.

Affirmed.

MR. JUSTICE DAY and MR. JUSTICE MCREYNOLDS dissent.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY *v.* McGINN.

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

No. 170. Argued March 17, 1922.—Decided April 10, 1922.

1. In the absence of a statute or special contract, the liability of a connecting carrier on a through route for the safety of freight begins when it receives it and is discharged by its delivery to and acceptance by the succeeding carrier or its authorized agent. P. 413.
2. The Cummins Amendment deals with and modifies the common-law liability only of the initial carrier, rendering that carrier liable for loss or damage of property committed to its care until delivered to the consignee, but leaving the relation of all connecting carriers, including the terminal carrier, to the shipper or consignee or to each other, entirely unaffected. P. 413.
3. Where a bill of lading for a through shipment of livestock provided that no carrier, except the initial carrier, should be liable for loss or injury not caused by it, *held* that the terminal carrier was not liable to the consignee for an injury on the line of an intermediate carrier. P. 412. *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, distinguished.

265 Fed. 81, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court adverse to the plaintiff and present respondent, in an action to recover from the present petitioner for damages to livestock while *in transitu.*

Mr. William R. Harr, with whom *Mr. A. C. Spencer, Mr. C. E. Cochran* and *Mr. John F. Reilly* were on the brief, for petitioner.

Mr. R. L. Edmiston, for respondent, submitted.

While neither the statute nor the bill of lading contract, in express words, makes the delivering carrier liable for all loss and damage to the shipment, as it does the receiving carrier, yet both necessarily imply this. And the contract, in this case, provides for notice, in case of loss, to be given "to the station agent at point of delivery or at point of origin," thus distinguishing the initial and delivering carriers from all others and making the delivering carrier equal to the initial carrier as a source to whom the owner or holder of the bill may look to claim and recover damage for loss or failure to deliver a shipment in good condition and in due time.

The 1916 amendment, c. 415, § 19, 39 Stat. 54, provides: "No right or title of a third person, unless enforced by legal process, shall be a defense to an action, brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand." Manifestly, this does not mean that a consignee in San Francisco, of goods in the hands of a carrier there which were shipped from New York, must make his demand and institute his action for relief against the initial carrier in a New York court. This would not be a just and adequate remedy for a consignee. In *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, this court said that "the aim was to establish unity of responsibility . . . for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation, which, as defined in the Federal Act, includes delivery."

This statutory "unity of responsibility" necessarily brings about "unity of contract" for each interstate ship-

ment, in which the consignee or holder is an important party and must be accorded a just and adequate remedy, from his standpoint.

MR. JUSTICE CLARKE delivered the opinion of the court.

The respondent shipped two carloads of horses from Grand Island, Nebraska, to Spokane, Washington, for which the initial carrier, the Union Pacific Railroad Company, issued a through bill of lading, in the form of the customary livestock contract, and routed the shipment over its own lines to Granger, Wyoming, thence over the line of the Oregon Short Line Railroad Company to Huntington, Oregon, and thence over the lines of petitioner to Spokane, Washington.

While in transit the animals developed disease, which resulted in the death of several and in such condition of the others that they were delivered to the shipper-consignee on the line of the petitioner before reaching the destination to which they were billed. The illness is alleged to have been caused by the stock having been given unwholesome food and water at Pocatello, Idaho, a station on the line of the intermediate carrier, the Oregon Short Line Railroad Company.

This suit to recover damages is against the delivering, the terminal, carrier, the allegation of the complaint, however, being that the unwholesome food and water were given to the stock while in transit over the route of the intermediate carrier, the Oregon Short Line Railroad Company. Thus, we have presented for decision the question, Is a terminal carrier liable to a shipper who, in this case, is also the consignee, for injury to horses caused by the negligence of a prior and independent carrier from which they were received?

The livestock contract, under which the shipment moved, contained the following provisions:

"1. Except as otherwise provided by statute law, the carrier undertakes to transport said shipment only over its own line, and acts only as the agent of the shipper with respect to the portion of the route beyond its own line. No carrier shall be liable for damages for loss, death, injury or delay to said animals, or any thereof, not caused by it, but nothing contained in this contract shall be deemed to exempt the initial carrier in case of a through interstate transportation from any liability for loss, death, damage or injury caused by it or any common carrier, railroad or transportation company to which the live-stock may be delivered under this contract."

It is plain that this paragraph was framed to comply with the requirements of the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act (c. 3591, § 20, 34 Stat. 593, 595; c. 176, 38 Stat. 1196), but, except as therein provided, the initial carrier limits its undertaking to its own line, declares that it acts only as the agent of the shipper with respect to the route beyond its own line, and the express contract is that "no carrier shall be liable for damages for loss, death, injury or delay to said animals, or any thereof, not caused by it."

A verdict was rendered in favor of the shipper-consignee, subject to the court's action on a question reserved by stipulation of the parties; and the court, acting thereunder, set aside the verdict and rendered judgment for the defendant. The Circuit Court of Appeals reversed the District Court and held that *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, required that under the Carmack (now Cummins) Amendment, the terminal carrier should be bound by the contract of the initial carrier to deliver, precisely as the initial carrier is bound, and was therefore liable for any loss or damage to the property that had been occasioned in transit through the conduct of any of the carriers.

In this we think the Circuit Court of Appeals fell into error.

The settled federal rule is that, in the absence of statute or special contract, each connecting carrier on a through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier, *Myrick* v. *Michigan Central R. R. Co.,* 107 U. S. 102, 107; *Railroad Co.* v. *Manufacturing Co.,* 16 Wall. 318, 324, and the liability of a connecting carrier for the safety of property delivered to it for transportation, commences when it is received and is discharged by its delivery to and acceptance by a succeeding carrier, or its authorized agent. *Pratt* v. *Railway Co.,* 95 U. S. 43.

The Cummins Amendment deals with and modifies the common-law liability only of the initial carrier. It renders that carrier liable for loss or damage to the property committed to its care throughout the entire route by which it is billed until delivered to the consignee, but it leaves the relation of all connecting carriers, including the terminal carrier, to the shipper or consignee and to each other, entirely unaffected, (*Atlantic Coast Line R. R. Co.* v. *Riverside Mills,* 219 U. S. 186, 195, 196, 197; *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 511), and therefore their liability is as we have stated it unless modified by contract, and in this case, as we have seen, the livestock contract, under which the shipment moved, by expressly providing that "no carrier [other than the initial carrier] shall be liable for damages for loss, death, injury or delay to said animals, or any thereof, not caused by it" leaves the common-law liability of the intermediate carrier entirely unaffected, just as the statute leaves it.

The *Blish Case, supra,* was against the terminal carrier, and one contention in that case was that under the Carmack (now Cummins) Amendment the shipper's remedy against the initial carrier was exclusive, even where the

default claimed was mis-delivery by the terminal carrier. In denying this, this court said:

"The connecting carrier is not relieved from liability by the Carmack [Cummins] Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and thus fixes the obligations of all participating carriers *to the extent that the terms of the bill of lading are applicable and valid.*"

We have seen that the Amendment did not alter the common-law liability of other than the initial carrier, and in this case the "applicable and valid" terms of the bill of lading expressly negative liability of any connecting carrier for damage not caused by it.

The other contention in the *Blish Case, supra,* was that the action was barred because notice of claim, in writing, had not been given within the time required by the bill of lading.

In the discussion of this question this court used the language following, by which the Circuit Court of Appeals was misled:

"When it [the initial carrier] inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms; . . . and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal

carrier which in the contemplation of the parties was to make the delivery."

From this language the Circuit Court of Appeals concludes, that under the Amendment the terminal carrier is bound, by the bill of lading and the contract of the initial carrier, to deliver as the initial carrier is bound and is therefore liable for any loss or damage to the property which has been occasioned through the conduct of any of the carriers while in transit, and this led the court to the holding that the terminal carrier was liable for the loss and injury " although occasioned while in transit over the Oregon Short Line."

We think the Circuit Court of Appeals misinterpreted the only relevant expression in the above quotation from the language by this court, viz: The terminal carrier " takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms; . . . and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery."

What was decided in the *Blish Case* was that the terminal carrier was liable for failure to make delivery, just as the initial carrier would have been if it had been sued for mis-delivery, because by the terms of the bill of lading each was under obligation to make final delivery. The suit before us is not for mis-delivery or other fault of the carrier sued, but for the fault, as alleged, of a prior connecting carrier. In express terms the bill of lading we have here declares that no carrier shall be liable for loss or damage not caused by it, and, therefore, the statute not providing otherwise, the petitioner cannot be liable for the damage alleged to have been caused before the stock reached its line.

The Carmack and Cummins Amendments were enacted to enable the holder of a bill of lading to sue the initial carrier for any loss or damage to property suffered on any part of a through route, and thereby to relieve him from the necessity of searching out and proving a case against a terminal or intermediate carrier. 219 U. S. 186, *supra*, p. 200. Having regard to the customary methods of doing a through business in this country it may have been important to have given like rights against others of connecting carriers, but plainly, either from design or accident, the terms of the Amendment limit its application to the initial carrier.

We think that the Circuit Court of Appeals was mistaken in its interpretation of the language used in the *Blish Case* opinion, and its judgment must be reversed and the judgment of the District Court affirmed.

Reversed.

COLLINS ET AL. *v.* McDONALD, COMMANDANT OF DISCIPLINARY BARRACKS OF THE UNITED STATES, ALCATRAZ ISLAND, NORTHERN DISTRICT OF CALIFORNIA.

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

No. 150. Submitted March 2, 1922.—Decided April 10, 1922.

1. In a proceeding in *habeas corpus* on behalf of a person imprisoned under sentence of a court-martial, the inquiry must be limited to the jurisdiction of the court-martial over the offense charged and the punishment inflicted. P. 418.
2. To sustain the jurisdiction of a court-martial in a collateral attack by *habeas corpus*, the facts essential to its existence must appear. P. 418.
3. Taking property "from the presence of" another feloniously and by putting him in fear is equivalent to taking it from his personal protection, and is, in law, a taking from the person—a robbery, as defined by § 284 of the Criminal Code. P. 419.

4. It is not necessary that a charge in court-martial proceedings should be framed with the technical precision of a common-law indictment. P. 420.
5. In *habeas corpus,* objections to a court-martial trial which are mere conclusions not supported by the record, or concern merely errors in the admission of testimony, cannot be considered. P. 420.

Affirmed.

APPEAL from an order of the District Court sustaining a demurrer to a petition for *habeas corpus* and refusing the writ.

Mr. George D. Collins for appellants.

Mr. Solicitor General Beck and *Mr. Blackburn Esterline,* Special Assistant to the Attorney General, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

In February, 1920, Roy Marshall, a private in the United States Army, serving at Vladivostok, Siberia, was tried for robbery by a court martial there convened, was found guilty and was sentenced to imprisonment in the penitentiary at McNeil's Island.

Five months later, when Marshall was at the Disciplinary Barracks on Alcatraz Island, awaiting transportation to McNeil's Island, a petition for a writ of *habeas corpus* was filed in his behalf by his attorney, G. D. Collins, in the District Court for the Northern District of California.

In response to a rule to show cause why the writ should not be issued, Colonel J. D. McDonald, Commandant of the Disciplinary Barracks, filed a demurrer to the petition on two grounds: (1) That the petition did not state facts sufficient to entitle petitioner to the writ, and (2) That the court did not have jurisdiction to entertain the petition.

This demurrer was sustained, without opinion, and the case is here for review on direct appeal from the District Court, based on sufficient constitutional grounds.

If the District Court had issued the writ as prayed for, the only questions it would have been competent for it to hear and determine would have been, "Did the court martial which tried and condemned the prisoner have jurisdiction, of his person, and of the offense charged, and was the sentence imposed within the scope of its lawful powers?" "The single inquiry, the test, is jurisdiction. That being established, the *habeas corpus* must be denied and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged." *In re Grimley,* 137 U. S. 147, 150; *Johnson* v. *Sayre,* 158 U. S. 109, 118; *Carter* v. *McClaughry,* 183 U. S. 365, 368; *Mullan* v. *United States,* 212 U. S. 516, 520; *Ex parte Reed,* 100 U. S. 13, 23. But, the court martial being a special statutory tribunal, with limited powers, its judgment is open to collateral attack, and unless facts essential to sustain its jurisdiction appear, it must be held not to exist. *McClaughry* v. *Deming,* 186 U. S. 49, 62, 63; *Givens* v. *Zerbst,* 255 U. S. 11, 19.

Thus, the question for decision here is, Does the petition show want of jurisdiction in the court martial over the person of the accused and over the offense with which he was charged and for which he was sentenced?

Neither the constitution, the convening, nor the regularity of the proceedings, of the court martial in this case, is assailed, and that the prisoner was a private in the Army of the United States is admitted. The only allegation in the petition of sufficient substance to deserve notice is, that the judgment is void for want of jurisdiction in the court to render it, because the specifications do not charge any crime known to the laws of the United States, in that it does not appear therein that the property alleged to have been taken was not the property of

the accused, and also because it is not averred therein that the property was in the care, possession and custody or control of the person from whose possession it is alleged to have been taken.

The only part of the charge appearing in the petition is a copy of three specifications, the first of which reads:

"Specification 1: In that Private Roy W. Marshall, Company 'K', 31st Infantry, Private Gilbert Frey, Company 'K', 31st Infantry, Private Gerald E. Troxler, Company 'K', 31st Infantry, and Private James F. Hyde, Company 'K', 31st Infantry, acting jointly and in pursuance of a common intent, did, at Vladivostok, Siberia, on or about the 14th day of January, 1920, by putting him in fear, feloniously take from the presence of Van Fun Un, 40 Koreaskays Street, Vladivostok, Siberia, the sum of about ten thousand (10,000) Roubles, value about Fifty Dollars ($50.00)."

The second and third specifications differ from the first only in the name and place of residence in Vladivostok of the person robbed and as to the value of the property taken.

The argument in support of the contention of the petitioner is that the allegation that the property was taken "from the presence of" the persons named does not imply that it was taken unlawfully from the presence, possession or custody of another or that it was not at the time the property of the accused.

The jurisdiction of the court martial was derived from the act of Congress embodying the Articles of War which, it is declared, shall, at all times and in all places, govern the Armies of the United States (39 Stat. 650, 670), and the charge of robbery was certainly framed under Article 93 thereof, providing that: "Any person subject to military law who commits . . . robbery shall be punished as a court-martial may direct."

The sufficient answer to this contention that the specifications do not charge any crime known to the laws of the United States is that § 284 of the Federal Criminal Code, providing for the punishment of robbery, reads: "Whoever, by force and violence, or by putting in fear, shall feloniously take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."

This has been accepted as an accurate and authoritative definition of robbery from Blackstone, Book IV, p. 243 (Cooley's ed.), to Bishop's New Criminal Law, Vol. II, §§ 1177, 1178. Taking property from the presence of another feloniously and by putting him in fear is equivalent to taking it from his personal protection and is, in law, a taking from the person. Men do not feloniously put others in fear for the purpose of seizing their own property.

It is not necessary that the charge in court martial proceedings should be framed with the technical precision of a common-law indictment, and we cannot doubt that the one in this case clearly shows jurisdiction in the court over the accused and over the offense with which he was charged, and that the latter was sufficiently described to advise defendant of the time and place and circumstances under which it was claimed he had committed the crime, to enable him to make any defense he may have had.

It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record and, at most, was an error in the admission of testimony,

which cannot be reviewed in a *habeas corpus* proceeding. Cases, *supra.*

The remaining allegations are trivial.

For the reason that the petition did not state facts sufficient to entitle petitioner to the writ of *habeas corpus,* the judgment of the District Court is

Affirmed.

DAHN *v.* DAVIS, AGENT, ETC.

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

No. 166. Argued March 10, 13, 1922.—Decided April 10, 1922.

A postal employee of the United States, injured while in the performance of his duty on a railroad operated at the time by the Director General of Railroads under the Federal Control Act, c. 25, 40 Stat. 451, and who elected to accept, and received, compensation therefor under the Federal Employees' Compensation Act, c. 458, 39 Stat. 742, was thereby debarred from an action against the Director General for negligence causing the injury. P. 428.

267 Fed. 105, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court for the present petitioner in his action for damages against John Barton Payne, as Director General of Railroads. James C. Davis, successor of Mr. Payne as Director General, was substituted as respondent by order of this court, he having been designated by the President as agent for the defense of such actions under § 206 of the Transportation Act, 1920, c. 91, 41 Stat. 456, 461.

Mr. Walter C. Clephane, with whom *Mr. J. Wilmer Latimer* was on the brief, for petitioner.

The receipt of benefit under the Compensation Act does not constitute an election barring the plaintiff of

his remedy. If this were a suit against the United States in the ordinary sense, so that a judgment would have to be paid out of its public moneys derived through its taxing power and other ordinary sources of revenue, then it would follow that the judgment in this case would be paid out of the public moneys generally, the same source from which beneficiaries under the Compensation Act derive their compensation. This, however, is not the case. The railways while under federal control were never considered to be an integral part of the governmental system. In consenting that the Director General might be sued, Congress provided in the Control Act an elaborate scheme whereby judgments should be paid out of the railway operating income under the rules of the Interstate Commerce Commission. Federal Control Act, § 12; *Johnson* v. *McAdoo,* 257 Fed. 757.

The compensation to be paid by the United States to a railroad is an amount "not exceeding a sum equivalent as nearly as may be to its average annual operating income for the three years ended June thirtieth, nineteen hundred and seventeen," and it is only such operating income "in excess of such just compensation" as remains the property of the United States. 40 Stat. 452. In determining the "average annual railway operating income" which is to be the basis of payment, judgments against the roads have, under the rules of the Interstate Commerce Commission, been deducted. *Johnson* v. *McAdoo, supra.* The act also puts federal taxes on the same basis, and provides a similar deduction for them. 40 Stat. 452. So far as known, it has never been contended that the federal taxes assessed against the railroads are paid from the Government's own treasury. *Haubert* v. *Baltimore & Ohio R. R. Co.,* 259 Fed. 361.

If executive construction of the Control Act be resorted to, there is ample support for this position. There

is not the same reason for a statutory application of the doctrine of election under these circumstances as exists in the case of the ordinary private employer. Possibly partly for this reason, Congress has not seen fit to require an election to be made.

The Compensation Act was passed before the Control Act, and at a time when a postal clerk unquestionably had a right of action against a railway company by whose negligent act he was injured, but had no redress of any kind against the United States for its negligent act. *Bigby* v. *United States,* 188 U. S. 400.

The mind at once leaps to the question whether it can be possible that Congress intended that, by the mere act of taking the railroads under federal control as an emergency measure, a railway mail clerk should thereby be deprived of his theretofore unquestioned property right to sue and recover for injuries received through negligence such as was charged and proved in this case.

When the Compensation Act was passed the United States could not be sued for torts committed by it. Obviously, therefore, there was no occasion to insert in the act any provision to the effect that the reception of benefits under it was a waiver of any right of action against the United States. The act did, however, carefully preserve the rights of beneficiaries thereunder to present claims and to institute suits against defendants "other than the United States," even to the extent of permitting the commission to require the beneficiary to assign to it any such claim, and conferring authority upon such commission to thereafter prosecute or compromise such claims. (§ 26, 39 Stat. 747.) There is no peculiar significance in the language "other than the United States." This is substantially the phrase which is almost universally used in the compensation acts of the various

States, providing, as they do, for the assignment to the employer of claims by the employee against third parties, so that the employer may be subrogated *pro tanto* to the extent of payments made by him.

Section 7 of the Compensation Act does not prevent a claim being made against the United States, because it only precludes the making of such a claim "so long as the employee is in receipt of compensation under this act," or "until the expiration of the period during which such installment payments would be continued." At the end of these periods he is left free to pursue any remedy he might have, if any such exists.

Furthermore, the meaning of the word "remuneration" as used in the act is clearly limited by the words "salary" and "pay" which are used in conjunction with it in the enumeration. The clear intention here seems to be that while receiving the compensation provided by the act, the employee is to receive nothing in the nature of salary; he is to be cut off the payroll except as to the pay already accrued for services performed. The act is pensional in character and is in the nature of accident insurance furnished by the Government to its employees.

The language of § 41 is significant. The Panama Railroad Company was the only railroad owned and controlled entirely by the Federal Government when the Compensation Act was passed, and the language of § 41 is eloquent proof that Congress recognized the right of action on behalf of a government employee, notwithstanding such absolute government control and ownership. It is clear from this language that Congress had no thought that the right to compensation provided by the act was exclusive of any other remedy against the railroad company, even though the Government did absolutely own and control it.

If the language of § 10 of the Control Act is ambiguous, the history of the legislation can be resorted to. This

shows that an election was never intended. Hearings, 65th Cong., 2d sess., on H. R. 8172.

From the omission in the Control Act of a provision similar to the one relating to the Panama Railroad in the Compensation Act, the conclusion seems unescapable that Congress deliberately chose not to subject plaintiffs to the doctrine of election.

It is clear that at the time the Federal Control Act was passed, the petitioner, a railway mail employee, had the right to sue the Illinois Central Railroad Company for any injury which might have resulted to him from its negligence. Any cause of action in his favor created a legal liability against some party "other than the United States." Section 10 definitely allowed actions to be brought against carriers and "judgments rendered as now provided by law;" and enacted that "in any action at law or suit in equity against the carrier, no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government." This section indicates that the rights theretofore existing in federal employees to sue railroad companies were not affected by the Railroad Control Act. Unless, therefore, there is something in the general purpose of the Employees' Compensation Act, or something which by necessary implication is read into that act, to bar the petitioner's remedy by reason of his acceptance of benefits thereunder, it is submitted that the court below erred in its conclusions.

The Federal Employees' Compensation Act differs in important particulars from the state and English and Scotch acts, cited by the court below.

Must the claimant refund to the Government the amount recovered? The act (§§ 26, 27) provides for two situations: (1) The resort by the beneficiary to the Compensation Act prior to suit, in which case the commission may require him to assign his right of action to

the United States; and (2) the resort to the Compensation Act after recovery by suit, compromise or otherwise. It expressly requires the United States, in the first case to refund to the beneficiary all the recovery except the amount paid him under the Compensation Act, and in the second case, permits the beneficiary to retain all except the amount which has been paid or may be payable to him under the Compensation Act.

With the exception of a very few States, it is believed that the customary legislation permits the claimant to receive and retain the benefit of any excess; and this, petitioner contends, is what the Federal Compensation Act has done. Bulletin, U. S. Bureau of Labor Statistics, Jan. 1921, No. 272, pp. 193 *et seq.; Houlihan* v. *Sulzberger & Sons Co.,* 282 Ill. 76; *Otis Elevator Co.* v. *Miller & Paine,* 240 Fed. 376.

The court below appears to have been impressed with the idea that if recovery were allowed in this case, the employee would recover double compensation. It is believed that the error of this view has been clearly demonstrated, and that this court will be convinced, from the terms of the act itself, that petitioner must reimburse the Compensation Commission from the amount recovered in this suit for the amount paid him by it, and that petitioner would retain only the surplus.

This decision, if unreversed, will have the effect of revolutionizing the practice in two of the Government Bureaus, viz: the Veterans' Bureau and the Federal Employees' Compensation Commission. The beneficiaries of the War Risk Insurance Act, the provisions of which in this respect are almost identical with the Compensation Act, are likewise affected by the decision.

Mr. A. A. McLaughlin, with whom *Mr. Solicitor General Beck, Mr. F. H. Helsell* and *Mr. Albert Ward* were on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

The petitioner, a railway mail clerk in the employ of the United States, was injured on May 29, 1918, when the car in which he was working was wrecked on the line of the Illinois Central Railroad, then being operated by the Director General of Railroads under the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451. He brought this suit to recover for his injuries against the Illinois Central Railroad Company and the Director General of Railroads, but the former was dismissed from the case on demurrer. Among other defenses, the Director General of Railroads alleged in his answer that the petitioner, as an employee of the United States, had made application for, and pursuant to its provisions had been paid, compensation under the provisions of the Federal Employees' Compensation Act (39 Stat. 742), and that thereby this further action, which is, in effect, against the United States, was barred. A demurrer to this last defense was sustained and the petitioner obtained a verdict on which the District Court entered judgment. On error this judgment was reversed by the Circuit Court of Appeals, that court holding that the petitioner had his option under the law to apply for compensation under the Employees' Compensation Act, as he did, or to sue for damages under the Federal Control Act (c. 25, 40 Stat. 451), and that, by electing to accept the benefits of the former, he was barred from prosecuting this action for negligence against the United States under the latter.

Thus, the writ of certiorari brings up for review the question whether, when a government employee, injured on a railroad, operated at the time by the Director General of Railroads, had elected to accept payment under the Federal Employees' Compensation Act, he was thereby barred from prosecuting a suit against the Director Gen-

eral of Railroads for negligence causing the injury for which he had been compensated.

James C. Davis, the Agent designated by the President under § 206 of the Transportation Act 1920, c. 91, 41 Stat. 456, has been substituted for the Director General of Railroads as respondent.

It was definitely held in *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, that, at all of the times here involved, § 10 of the Federal Control Act permitted the Government, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railway in his custody, precisely as a common carrier corporation operating such road might have been sued, and that recovery, if any, would be from the United States.

Thus, plainly the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and if successful his recovery must have been from the United States.

The Federal Employees' Compensation Act, approved September 7, 1916, c. 458, 39 Stat. 742, provides that the United States shall thereafter pay, as therein specified, for the disability or death of any government employee resulting from personal injury sustained while in the performance of his duty. The act provides for a commission to investigate claims and to make awards, but no compensation may be allowed to any person unless he, or some one in his behalf, shall make written claim therefor. Thus, the petitioner, injured, as he was, while in the performance of his duty, was entitled to compensation under the act upon making claim for it.

This reference to the two acts shows that the petitioner had two remedies, each for the same wrong, and both against the United States, and therefore the question for decision takes the form, May the petitioner, after having pursued one of his remedies to a conclusion and payment,

pursue the other for a second satisfaction of the same wrong against the Government?

That this question must be answered in the negative we think clear from various provisions in the Compensation Act, showing that Congress intended that payments made under it should be regarded as full and final and that no payment in addition thereto would be made by the Government to an injured employee.

Section 7 of the act specifically declares that so long as any employee is receiving installment payments under the act, or if he has been paid a lump sum in commutation of installment payments, then until the expiration of the period during which installment payments would have continued, "he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed," and except pensions for service in the Army or Navy.

It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act.

Section 26 provides that, "if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person *other than the United States* to pay damages therefor," the Commission may require an assignment to the United States of the right to enforce such liability or to share in any money received in satisfaction thereof, or it may require the beneficiary to prosecute an action for damages in his own name. Refusal to make such assignment or to prosecute such action, when requested by the Commission, shall forfeit all right to compensation. This section also provides that if the Commission shall realize on such claim against third persons, either by suit or settlement, it shall apply the net proceeds to reimbursing the "Employees' Compensation Fund" for pay-

ments theretofore made, and any surplus remaining shall be paid to the beneficiary and credited on future compensation payable for the same injury. If the amount of recovery exceeded the payments made and to be made, obviously the beneficiary would be entitled to the excess.

Section 27 also provides for cases in which death or injury, for which compensation is payable under the act, is caused under circumstances "creating a legal liability in some person *other than the United States* to pay damages" but in which the beneficiary, instead of the Commission, receives the proceeds of suit or settlement. Here it is required that such beneficiary shall refund to the United States from such proceeds the amount of any compensation that has been paid to him by the Government or shall credit the money so received upon any compensation payable to him for the same injury.

Plainly, by these two sections Congress deals with the liability of persons "*other than the United States*" to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.

But § 41 is even more convincing to the point we are considering. A special proviso in this section declares that if the injury or death for which compensation is payable under the act is caused under circumstances creating a legal liability in the Panama Railroad Company to pay damage therefor "no compensation shall be payable until the person" shall release to the Railroad Company any right of action he may have against it or until he assigns to the United States any rights

which he may have to share in any money or other property received in satisfaction of such liability.

When the Compensation Act was passed the United States was the owner of all the capital stock of the Panama Railroad Company and as such was ultimately liable for the torts of that company just as it became liable for the torts of the Director General of Railroads under the Federal Control Act, and, therefore, this manner of dealing with the liability of that company to employees negligently injured is highly persuasive as to the congressional intent.

This Compensation Act is the expression of a slowly developed purpose on the part of the United States (1908,—35 Stat. 556; 1912,—37 Stat. 74; 1916,—39 Stat. 742), to give compensation to its employees, who otherwise would be without remedy when injured by fault of the Government, and the provisions of it which we have discussed convince us that the congressional purpose was that when the compensation was accepted no further payment should be made by the Government. The act does not contemplate or provide for suits against the Government. On the contrary, it is essentially an act of justice or of grace on the part of the United States, elaborately and carefully worked out, and designed to compensate, promptly, without litigation or expense, all employees injured while in discharge of duty, in an amount, which, on the average, was thought adequate and just. The amount of the award in each case is determined by a specially constituted commission, without cost to the claimant, and it is allowed wholly without regard to the negligence of the Government or its employees.

On the other hand, the right to sue the United States under the Federal Control Act, applicable to all persons alike, is on the basis of negligence, precisely as if the Government were an operating common carrier corporation,

and it is subject to all of the expense, delay and hazard usual in cases of that character. The Compensation Act deals only with, and confers rights only upon, employees of the Government, who must necessarily be but a small percentage of those authorized to sue under the Federal Control Act, and it is impossible for us to conclude that Congress intended by the enactment of the latter law to allow an employee to claim and receive the compensation specially provided for him under the former and then, while enjoying that benefit, to institute suit against the Government under the Federal Control Act, which might require it to make further payment for the same injury and which must, in all cases, subject it to expensive, harrassing and often long protracted litigation.

We find no language in the Federal Control Act inconsistent with the distinct expression of purpose on the part of Congress which we have found in the Compensation Act, to treat the payments under it as sufficient and final, and for the reasons stated in the discussion herein of the latter act and because the petitioner elected to pursue to payment the remedy given him thereunder, we agree with the Circuit Court of Appeals that his right of action asserted in this case was barred and the judgment of that court is therefore

Affirmed.

UNITED STATES *v.* MORELAND.

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

No. 629. Argued March 9, 10, 1922.—Decided April 17, 1922.

1. Imprisonment at hard labor, whether in a penitentiary or elsewhere, is an infamous punishment within the meaning of the Fifth Amendment, and prosecution for a crime so punishable must be by indictment or presentment by a grand jury. P. 435. *Wong Wing* v. *United States,* 163 U. S. 228, and *Ex parte Wilson,* 114 U. S. 417, followed; *Fitzpatrick* v. *United States,* 178 U. S. 304, distinguished.
2. Hence, a prosecution in the Juvenile Court of the District of Columbia for the crime of wilfully neglecting or refusing to provide for the support and maintenance of minor children, defined by the Act of March 23, 1906, and thereby made punishable by a fine or by imprisonment at hard labor in the workhouse of the District, or by both, can not be by information. P. 438.
3. It is the punishment which may be, and not that which actually is, imposed under the statute, that determines the right to prosecute otherwise than through a grand jury. P. 441.
4. Where an act defining a misdemeanor provides for punishment by fine or imprisonment at hard labor, the provision as to hard labor can not be treated as severable to sustain a prosecution by information. P. 441.

276 Fed. 640, affirmed.

CERTIORARI to review a judgment of the Court of Appeals of the District of Columbia, which reversed a judgment of the Juvenile Court of the District sentencing the respondent to six months' imprisonment in the workhouse for the misdemeanor of wilfully neglecting to support his minor children, in violation of the Act of March 23, 1906, c. 1131, 34 Stat. 86. The sentence was based on the verdict of a jury finding respondent guilty of this offense. The judgment under review directed that the complaint in the Juvenile Court be dismissed. The Act of March 19, 1906, c. 960, § 12, 34, Stat. 73, creating the Juvenile Court, provided that prosecutions therein should be on informa-

tion of the corporation counsel or his assistant. The Act of June 18, 1912, c. 171, § 8, 37 Stat. 134, conferred upon that court concurrent jurisdiction with the Supreme Court of the District in all cases arising under the Act of March 23, 1906, *supra.*

Mr. George P. Barse and *Mr. F. H. Stephens,* with whom *Mr. Solicitor General Beck* and *Mr. Lewis B. Perkins* were on the brief, for the United States.

Mr. Foster Wood for respondent.

Mr. Justice McKenna delivered the opinion of the court.

The question in the case is what procedure, in the prosecution and conviction for crime, the Fifth Amendment of the Constitution of the United States makes dependent upon the character of punishment assigned to the crime. The Amendment provides that " no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . ."

The respondent Moreland was proceeded against in the Juvenile Court of the District of Columbia by information, not by presentment or indictment by a grand jury, for the crime of wilfully neglecting or refusing to provide for the support and maintenance of his minor children. The statute prescribes the punishment to be " a fine of not more than five hundred dollars or by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelve months, or by both such fine and imprisonment." Act of March 23, 1906, c. 1131, 34 Stat. 86.

He was tried by a jury and found guilty and, after certain proceedings with which we have no concern, he

was sentenced to the workhouse at hard labor for six months.

The Court of Appeals reversed the judgment and remanded the case to the Juvenile Court with directions to dismiss the complaint. The court considered that it was constrained to decide that the judgment was in violation of the Fifth Amendment, and, therefore, to reverse it on the authority of *Wong Wing* v. *United States,* 163 U. S. 228.

The United States resists both the authority and extent of that case by the citation of others, which, it asserts, modify or overrule it. A review of it, therefore, is of initial importance.

Certain statutes of the United States made it unlawful under certain circumstances for a Chinese laborer to be in the United States, and provided for his deportation by certain officers, among others a Commissioner of a United States court. And one of them (Act of 1892) provided that, if a Chinese person or one of that descent was "convicted and adjudged to be not lawfully entitled to be or remain in the United States," he should "be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States."

Wong Wing, a Chinese person (there were others arrested but for the purpose of convenience of reference we treat the case as being against him only), was arrested and taken before a Commissioner of the Circuit Court for the Eastern District of Michigan and adjudged to be unlawfully within the United States and not entitled to remain therein. It was also adjudged that he be imprisoned at hard labor at and in the Detroit House of Correction for the period of sixty days.

The court, considering the statutes, said they operated on two classes—one which came into the country with its consent, the other which came in without consent and in disregard of law, and that Congress had the constitu-

tional power to deport both classes and to commit the enforcement of the law to executive officers.

This power of arrest by the executive officer and the power of deportation were sustained; but the punishment provided for by the act, and which was pronounced against Wong Wing, that is, imprisonment at hard labor, was decided to be a violation of the Fifth Amendment, he not having been proceeded against by presentment or indictment by a grand jury.

The court noted the argument and the cases cited and sustained the power of exclusion, but said that when Congress went further and inflicted punishment at hard labor it "must provide for a judicial trial to establish the guilt of the accused". And this because such punishment was infamous and prohibited by the Fifth Amendment, the conditions prescribed by the Amendment not having been observed. The necessity of their observance was decided, because, to repeat, imprisonment at hard labor was an infamous punishment. In sanction of the decision, *Ex parte Wilson,* 114 U. S. 417, 428, was cited and quoted from. The citation was in point. Both propositions were presented in that case, and both were decided upon elaborate consideration and estimate of authorities. See also *Mackin* v. *United States,* 117 U. S. 348, 350.

The United States urges against the *Wong Wing Case* that four years after its decision the question of the infamy attached to punishments came up for consideration and decision in *Fitzpatrick* v. *United States,* 178 U. S. 304, and that the *Wong Wing Case* was not referred to. The immediate answer is that a case is not overruled by an omission to mention it. Besides, it was based on *Ex parte Wilson* and that case was cited. The *Wilson Case* was elaborate in the exposition of the law—its evolution and extent. The various punishments or, we may say, the various imprisonments to which infamy had been ascribed were detailed, with citation of cases. In these were in-

cluded as certain, imprisonment in a penitentiary. But it was decided that the quality of infamy could attach to any imprisonment if accompanied by hard labor. It was said, and it was necessary to say, in passing on Wilson's situation, that "imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the provision of the Ordinance of 1787, and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished." In other words, it was declared that if imprisonment was in any other place than a penitentiary and was to be at hard labor, the latter gave it character, that is, made it infamous and brought it within the prohibition of the Constitution.

There is nothing in *Fitzpatrick* v. *United States* that gives aid to the contention which counsel make, that it is the place of imprisonment, that is, imprisonment in a penitentiary, which makes the infamy, the accompaniment of hard labor being but an incident. It is true in that case it was said that "the test is not the imprisonment which *is* imposed, but that which *may be* imposed under the statute." This manifestly was said to distinguish the character of the crime, as capital, and not to assign a quality to the punishment. To assign a quality to the punishment was a necessity in *Wong Wing* v. *United States* and in *Ex parte Wilson,* and it was responded to by discussions pertinent to it, and by decisions which were required by it. We can add nothing to the fullness of the discussions or their adequacy, and the decisions pronounced as their consequence we are not disposed to overrule. They necessarily determine, therefore, the present case and require the affirmance of the judgment of the Court of Appeals so far as it decides that the sentence upon Moreland was void because of the inclusion therein of the punishment of hard labor, he not having been presented or indicted by a grand jury. And because of their authority we do not review the cases cited by the United States nor consider that they can be modified in

accommodation to the practice that is said to exist of creating workhouses as places of punishment.

Some further comment becomes necessary. An attempt is made to modify the case or to remove it as authority for that at bar. The means and pains taken to accomplish it are somewhat baffling to representation. We have cited the case for the proposition that imprisonment with the accompaniment of hard labor is an infamous punishment, made so by the accompaniment of hard labor, and declared illegal because not upon presentment or indictment by a grand jury.

Doubt is cast upon our right to so cite it, and it is, in effect, asserted that the infamy of the imprisonment to which Wong Wing was sentenced was not constituted by the accompaniment of hard labor but was the attribute of the imprisonment, the Detroit House of Correction being, it is said, a penitentiary. And this is attempted to be established by the assertion of a fact extraneous to the opinion of the court and the record in the cause. It is true certain isolated sentences used by a Justice concurring in part and dissenting in part are referred to as to what the court must have implied.

The assertion calls for reply. We have relied on the case as authority and, regarding it as authority, we have naturally refrained from the idleness, or, as it may be said, the ostentation of general reasoning. We might, indeed, leave the case to speak for itself to those who may need to refer to its ruling and the ruling in the present case, but some comment, though it may not be necessary, is justified.

It is to be kept in mind that the case concerned the Constitution of the United States and necessarily had a purpose beyond its incident and time. Its precept became a part of the Constitution and in realization of this the court took care that the grounds of its decision were neither obscure nor uncertain. Its opinion demonstrates this, and that there was no misunderstanding of the points

of counsel nor ambiguity in passing upon them. What was not in controversy, of course, received no attention, and the infamy of imprisonment in a penitentiary was not in controversy; that was of universal acceptance then, as now, and an intimation of its existence would have been enough to have caused Wong Wing's delivery from custody on the instant; nor would the United States have resisted. There was in controversy, however, the question whether imprisonment in any prison or place, at hard labor, as a sentence for crime, was infamous. Upon that counsel were in opposition, and it was submitted for decision. The court contrasted the contentions.

Wong Wing's was recognized as a claim that his sentence to imprisonment at *hard labor* inflicted an infamous punishment and hence conflicted with the Fifth and Sixth Amendments of the Constitution of the United States, he not having been presented or indicted by a grand jury.

"On the other hand," the court said, "it is contended on behalf of the Government that it has never been decided by this court that in all cases where the punishment may be confinement at hard labor the crime is infamous, and many cases are cited from the reports of the state Supreme Courts, where the constitutionality of statutes providing for summary proceedings, without a jury trial, for the punishment by imprisonment at hard labor of vagrants and disorderly persons has been upheld."

The comment was an anticipation of some things that are urged in this case. At any rate, the contrast of contentions shows unmistakably upon what the court's decision was invoked,[1] and, while it decided, as we have seen,

[1] We may quote, in corroboration, that even the concurring Justice said the question involved was whether a Chinese person could "be lawfully convicted and sentenced to *imprisonment at hard labor* for a definite period by a commissioner without indictment or trial by jury." The italics are the Justice's and we copy their emphasis as it demonstrates that the fact of *hard labor* was that which determined the case.

that the Commissioner had power under the Act of 1892 to order Wong Wing deported and to sentence him to imprisonment, Congress could not legally invest the Commissioner with power to make hard labor an adjunct of the imprisonment. It was, in effect, said that the adjunct made the imprisonment infamous and beyond the power of legislation to direct without making provision "for a judicial trial to establish the guilt of the accused." Wong Wing was, therefore, discharged from custody.

That the place of imprisonment was not considered either pertinent or determinative is established by the fact that the Detroit House of Correction was not a penitentiary nor regarded as such. It was, and is, what its name implies—a place of correction and reformation; not of condemnation to infamy and, it might be, to a perpetual criminal career. Howell's Mich. Stats. Anno., 2nd ed., c. 430, p. 5915, *et seq.;* Mich. Laws 1861, p. 262, Act No. 164; Compiled Laws of Mich. 1897, c. 76.

It is an institution of the City of Detroit and the act creating it designated its use to be "for the confinement, punishment and reformation of criminals or persons sentenced thereto. . . ." How this use is regulated and its purpose accomplished are detailed in too much legislation to be reproduced. The House of Correction stands in a unique relation to the state prison and while it may under circumstances, and in the discretion of a condemning court, be a place of imprisonment for offenders that might be committed to the state prison, yet always it is kept distinct from the state prison. It does not, therefore, make its use as a place of confinement for other offenses a penitentiary with its attachment of infamy. Its purpose is reformation, instruction in conduct, and diversion from a criminal career. To make it, therefore, a penitentiary would defeat the purpose of its creation.

We have dwelt on this matter at length because we think more is involved than the power to deport aliens, or

to punish them for illegal entry into the country—more than to deliver one from punishment who has defied the orders of a court, that enjoined upon him the manifest duty of supporting his minor children. It concerns the recognition and enforcement of a provision of the Constitution of the United States expressing and securing an important right. And the right, at times, must be accorded one whose conduct tempts to a straining of the law against him.

The ultimate contention of the United States is that the provisions of the Act of March 23, 1906, for punishment by fine or imprisonment are severable, and that, therefore, it was error in the Court of Appeals in holding the act unconstitutional to direct the dismissal of the case instead of sending it back for further proceedings.

The contention is untenable. It is what sentence can be imposed under the law, not what was imposed, that is the material consideration. When an accused is in danger of an infamous punishment if convicted, he has a right to insist that he be not put upon trial except on the accusation of a grand jury. *Ex parte Wilson* and *Mackin* v. *United States, supra.*

Judgment affirmed.

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

MR. JUSTICE BRANDEIS, with whom concurs MR. CHIEF JUSTICE TAFT and MR. JUSTICE HOLMES, dissenting.

On January 18, 1921, an information, under the Act of March 23, 1906, c. 1131, 34 Stat. 86, was filed against Moreland in the Juvenile Court of the District of Columbia for wilfully neglecting to provide support for his minor children—girls aged eight and thirteen. He was tried by a jury and found guilty. The court suspended sentence and ordered him to pay each month for their

support the sum of thirty dollars. Having failed to make any payment under this order, Moreland was sentenced on April 19, 1921, to be committed to the workhouse at hard labor for six months, the superintendent to pay to the mother for the support of the children fifty cents for each day's hard labor performed by him. Moreland had insisted that the offense with which he had been charged was an infamous crime, since the statute prescribes as punishment imprisonment at hard labor; and he claimed that rights guaranteed by the Fifth Amendment had been violated, because he had been made to answer to the charge without having been indicted by the grand jury. His claim was overruled by the Juvenile Court. Upon writ of error the Court of Appeals of the District, 276 Fed. 640, relying upon *Wong Wing* v. *United States,* 163 U. S. 228, reversed the judgment of the Juvenile Court and directed that the complaint be dismissed. The case came here on writ of certiorari. 257 U. S. 631.

The Fifth Amendment declares: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." Whether a crime is infamous within the meaning of the Fifth Amendment may be determined by the character of the punishment or by other incidents of the sentence prescribed. *Ex parte Wilson,* 114 U. S. 417, 426. In the *Wong Wing Case* the commitment was to an institution which was named the Detroit House of Correction, but served also as a state prison or penitentiary.[1] Im-

[1] It seems clear that the court had this fact in mind. In his concurring opinion Mr. Justice Field said, p. 241: "It does not follow that, because the Government may expel aliens or exclude them from coming to this country, it can confine them at hard labor in a penitentiary before deportation or subject them to any harsh and cruel punishment." In *Ex parte Wilson,* 114 U. S. 417, 428, strongly relied upon by the court, pp. 234, 237, 242, Mr. Justice Gray said: "For more than a century, imprisonment at hard labor in the State prison

prisonment in a state penitentiary is an infamous punishment whether it be with or without hard labor. *In re Claasen,* 140 U. S. 200, 205. Moreover, the commitment in the *Wong Wing Case* was not under sentence of a court or after conviction by a jury. It was by direction of a commissioner of the United States. The punishment by imprisonment was thus imposed under an executive order, and, hence, was clearly void under the Constitution, whatever its character or incidents, its duration or the place of confinement. The question here involved is different. It is whether the mere fact that the act prescribes hard labor as an incident of the sentence of confinement in the workhouse, renders the offence (which the statute describes as a misdemeanor) an infamous crime within the prohibition of the Fifth Amendment.

The Act of March 23, 1906, declares that any person in the District of Columbia who shall wilfully neglect to provide for his minor children under the age of sixteen in destitute circumstances, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment in the workhouse of the District at hard labor for not more than twelve months, or by both such fine and imprisonment. If a fine is imposed, the court may direct that it be paid

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or penitentiary or other similar institution has been considered an infamous punishment in England and America." In the *Wilson Case* the prisoner had been sentenced to the Detroit House of Correction for the term of fifteen years for having passed counterfeit bonds. In 1892, when Wong Wing was sentenced, there were about 1700 United States prisoners, other than those serving jail sentences, who were confined in about sixty state and territorial institutions. The institution having the largest number, 432 on July 1, 1892, was the Detroit House of Correction, these prisoners having been received from various districts in the south and west, as well as from the Michigan districts. Reports of Attorney General: for 1891, p. XI; for 1892, pp. X, 270, 272. See Michigan Compiled Laws, 1897, §§ 2165, 2176, 2179–81, 11985.

to the wife or other person in whose care the children are. If the father is confined to the workhouse, the superintendent is required to pay toward their support a sum equal to fifty cents for each day's hard labor performed by him. Either before trial or after conviction the father may be released upon giving recognizance for the payment of a weekly allowance for the support of the children. These provisions may be enforced by proceedings in the Juvenile Court, Act of June 18, 1912, c. 171, § 8, 37 Stat. 134, 136; and if so, they are commenced by information. The accused is entitled to trial by jury, as the penalty which may be imposed for the offence charged is a fine of more than fifty dollars or imprisonment for more than thirty days. Act of March 19, 1906, c. 960, § 12, 34 Stat. 73, 75.

The workhouse of the District of Columbia is at Occoquan in the State of Virginia. It is an industrial farm of 1150 acres, bordering on the Occoquan River. On the farm, in healthful and attractive surroundings, are many small, well equipped buildings appropriate for the residence and occupation of the inmates. These are employed on the premises, partly in agricultural, partly in industrial, pursuits. In cultivating hundreds of acres of land and in clearing, from time to time, more; in fruit orchards and dairy; in chicken and hog raising; in brick manufacturing and stone crushing plants; in sawmill operations and a small shipyard; in the repair and construction of farm implements, of roads and of buildings required for the development of the institution; and in transporting its products by water or otherwise. The work is such as is ordinarily performed under favorable conditions on farms, in factories and in the mechanical trades; and it is not harder. The eight-hour work day prevails. There is a school, a library and a hospital. And there is no wall, cell, lock or bar to restrain the inmates. Nor are they subjected to a distinctive dress such

as marks offenders.[1] By § 934 of the Code of the District, persons sentenced by its courts to imprisonment for not more than six months may ordinarily be committed either to the workhouse or to the jail; if sentenced for more than six months and not more than one year, the commitment must be to the jail; if sentenced for more than one year, the commitment must be to a penitentiary. The dominant purpose of Occoquan is not punishment, but rehabilitation. The compulsory labor is in a larger sense compulsory education. In the case of those who are committed for non-support, it serves also the purpose of compelling the performance of a parental duty imposed by the common law.[2]

Confinement at hard labor in a workhouse or house of correction for periods of less than a year was a punishment commonly imposed in America in the colonial period, at the time of the adoption of the Constitution and since, for offences not deemed serious—that is, for delinquencies as distinguished from serious crimes. Thus by the Great Law of the Province of Pennsylvania of December 7, 1682, the penalty for clamorous scolding, railing or lying was three days' imprisonment in the house of correction at hard labor; for cursing, playing at cards or dice, and for the first offence of drunkenness, it was five. For stage plays, bull baiting and cock fighting, it was at least ten. And for dueling it was three months. The duty to establish such a house "for restraint, correction, labour and punishment" was imposed upon every county of Pennsylvania at the same time.[3] A similar

[1] Reports of Superintendent of the Workhouse, in Annual Reports of the Commissioners of the District of Columbia, 1911 to 1921, inclusive.

[2] See *Dunbar* v. *Dunbar*, 190 U. S. 340, 351–2; William H. Baldwin, Family Desertion and Non-Support Laws (Washington, D. C., 1904), p. 5.

[3] Charter and Laws of the Province of Pennsylvania, 1682–1700, edition of 1879, pp. 107–123, 192–208 (reënactment of 1693).

law had been enacted in Plymouth Colony in 1658;[1] in Massachusetts Colony earlier;[2] and like provision was made in other colonies.[3] By the Law of New York of February 9, 1788, c. 31, confinement in the house of correction at hard labor was prescribed as the punishment for all disorderly persons. And those "who threaten to run away and leave their wives and children to the city or town" were classed as disorderly persons, with vagrants, beggars, idlers, fortune-tellers and common prostitutes. The period of imprisonment, limited ordinarily to sixty days or until the next general sessions of the peace, could be extended by the general sessions for a further period of six months. In the counties or cities in which there was no workhouse (bridewell) or house of correction, the jails were to be used and considered as such.[4] A single institution often served as almshouse, insane asylum, workhouse, house of correction and jail.[5] And under all of these laws commitment to the workhouse at hard labor was made by a judge, justice of the peace, or magistrate, without presentment or indictment of a grand jury.

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[1] Plymouth Colony Laws (Boston, 1836), p. 120.

[2] The Colonial Laws of Massachusetts (Boston, 1887), pp. 66 and 127.

[3] Acts and Laws of His Majesty's English Colony of Connecticut in New England in America (New London, 1750), pp. 204–207; Acts and Laws of the State of Connecticut in America (Hartford, 1786), pp. 206–210; Laws of the Colony of Delaware, 1753, c. CXLVI; Laws of the Colony of Maryland, 1766, c. XXIX, § XV; Laws of the State of Maryland, 1811, c. 96.

[4] Jails were used mainly as places for detaining prisoners awaiting trial and for confining poor debtors. Committal to a jail as punishment was comparatively rare, except for religious or political offences, in many of the colonies. H. E. Barnes, The Historical Origin of the Prison System in America, XII Journal of Criminal Law and Criminology, 35, 36.

[5] See Statutes of Connecticut and Maryland cited in note 3, *supra*. Barnes, History of Penal Institutions of New Jersey, pp. 48–51.

433. BRANDEIS, J., TAFT, Ch. J., and HOLMES, J., dissenting.

Confinement at hard labor in a workhouse or house of correction did not imply infamy. Workhouses were not open to the reception of felons. Besides being refuges, they were in purpose correctional institutions in a true sense of those words. They were deemed training schools in which bad habits were to be eradicated and good ones formed. The medium of instruction adopted was regular, hard, productive work. The labor which inmates were required to perform was not imposed as punishment or as a means of disgrace. Nor was the confinement imposed primarily as punishment. That was administered rather by the whipping "not exceeding ten stripes" to which by some laws the newcomer was subjected on entering the institution.[1] The proceeds of the labor were deemed, in large part, payment for maintenance. But often part of the earnings were reserved for the inmate or were ordered to be paid for the support of his family.[2] It thus appears that the wilful neglect to provide for wife and children in destitute circumstances for which Congress sought to provide relief in 1906 was not a new social manifestation and that the method employed by it was not novel.[3]

It is not the provision for hard labor, but the imprisonment in a penitentiary which now renders a crime in-

[1] See Colonial Laws of Massachusetts (Boston, 1887), p. 127.

[2] By the Connecticut laws, which applied to a range of social delinquents as comprehensive as those of Pennsylvania and New York, it was provided that if the persons committed were "heads of families, then, and in such case, the whole profit and benefit of their labours, or so much thereof as the County Court of the county where such persons are committed shall think necessary, and direct; shall be for the relief, and support of their families." Acts and Laws of His Majesty's English Colony of Connecticut in New England in America (New London, 1750), p. 206.

[3] Nor was it then unusual. See William H. Baldwin, Family Desertion and Non-Support Laws (Washington, D. C., 1904).

famous. Commitment to a penitentiary, with or without hard labor, connotes infamy, because it is proof of the conviction of a crime of such a nature that infamy was a prescribed consequence. Confinement in a penitentiary is the modern substitute for the death penalty and for the other forms of corporal punishment which, at the time of the adoption of the Fifth Amendment, were still administered in America for most of the crimes deemed serious.[1] It was then believed that even capital punishment should be inflicted under conditions involving public disgrace. Largely for this reason hangings were public; as in earlier days men had been drawn and quartered. If the life of an offender was spared, it was then thought that some other punishment involving disgrace must be applied to render his loss of reputation permanent. When in 1786 Pennsylvania, shrinking from the physical cruelties inflicted under sentence of the courts, took the first step in reform by substituting imprisonment for death, as the penalty for some of the lesser felonies, the exposure to infamy was still deemed an essential of punishment. The measure then enacted provided specifically that the imprisonment should be attended by "continuous hard labor publicly and disgracefully imposed." Hard labor as thus prescribed and prac-

[1] H. E. Barnes, The Historical Origin of the Prison System in America, XII Journal of Criminal Law and Criminology, 35. The then statutes of New York, for instance, recited sixteen capital crimes: treason, murder, rape, buggery, burglary, robbery of a church, breaking and entry, robbery of person, robbery and intimidation in dwelling houses, arson, malicious maiming, forgery, counterfeiting, theft of a chose in action, second offense for other felonies, and abetting any of the above crimes. The punishment, other than death, then prescribed for serious crimes were mutilation, cutting off the ears or nailing them to the pillory, branding, whipping, the pillory, the stocks and the ducking stool. Laws of the Colony of New York, 1788, c. 37, § 1, Greenleaf edition, 1792, vol. II, pp. 78, 79. Philip Klein, Prison Methods in New York, pp. 19-35.

ticed was merely an instrument of disgrace. The statutory direction was carried out by employing the convicts in gang labor along the public roads, chained by fetters with bomb shells attached and iron collars, with shaved heads, and wearing a distinctive infamous dress.[1] The demoralizing influence both upon the community and the convict of these public manifestations of disgrace was soon realized, and led, shortly after the adoption of our Constitution, to their discontinuance in Pennsylvania and to the establishment in Philadelphia of America's first penitentiary.[2]

Hard labor was not considered an essential element of the penitentiary punishment; and experience proved that it was in fact an alleviation. The most severe punishment inflicted was solitary confinement without labor.[3] Hard labor regularly pursued and productively employed had for two centuries been applied as a corrective measure in the effort to deal with social delinquents.[4] Then the belief spread that it might be effectively employed also in the reformation of criminals—a class of persons theretofore generally considered incorrigible. And when reform and rehabilitation of those convicted of serious crimes became a chief aim of the penal system, the dignity of labor was proclaimed and the practices of the workhouse

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[1] Act of September 15, 1786, 12 Statutes at Large of Pennsylvania, p. 280, c. MCCXLI; Robert Vaux, Notices of the original and successive efforts to improve the discipline of the prison at Philadelphia, etc. (1826), pp. 8, 21, 22; William Crawford, Report on the Penitentiaries of the United States (London, 1835), pp. 8, 9.

[2] See Report of William Crawford on the Penitentiaries of the United States (London, 1835), p. 27.

[3] George Ives, A History of Penal Methods, p. 174.

[4] The law of Connecticut (see note 3, p. 446, *supra*,) was entitled "An Act for restraining, correcting, suppressing, and punishing rogues, vagabonds, common beggars, and other lewd, idle, dissolute, profane and disorderly persons, and for setting them to work."

were adopted and developed in the penitentiary.[1] Thus hard labor, which, in inflicting punishment for serious crimes, had first been introduced as a medium of disgrace, became the means of restoring and giving self-respect.

The purpose of the Fifth Amendment was stated by Chief Justice Shaw in *Jones* v. *Robbins*, 8 Gray, 329, 347–349; and his statement was quoted with approval by this court in *Ex parte Wilson, supra,* p. 428. It was " to make a marked distinction between crimes of great magnitude and atrocity, and to secure every person against accusation and trial for them without the previous interposition of a grand jury," but " to leave minor and petty offenses to be prosecuted without these formalities ". Imprisonment in a penitentiary where the convict is (or used to be) " subject to solitary confinement, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline " is a punishment deemed infamous; but commitment to a " house of correction, under that and the various names of workhouse and bridewell ", although some of the incidents of the confinement are identical, " has not the same character of infamy attached to it." There is thus no basis for the contention that sentence to hard labor as an incident of confinement necessarily renders a punishment infamous, or that commitment to a workhouse at hard labor can be made only upon indictment by a grand jury. This court did not hold in *Wong Wing* v. *United States,* nor has it, heretofore, ever decided or stated, that commitment to a workhouse at hard labor is an infamous punishment. The confinement in the *Wong Wing Case* was in an institution used as a

[1] H. E. Barnes, Historical Origin of Penal Institutions, XII Journal of Criminal Law and Criminology, 35, 37; F. H. Wines, Punishment and Reformation (1919 ed.), c. VI; Philip Klein, Prison Methods in New York, c. VIII.

state prison or penitentiary and the expression in the opinion concerning imprisonment at hard labor must be understood as referring to such.

But even if imprisonment at hard labor elsewhere than in a penitentiary had, in the past, been deemed an infamous punishment, it would not follow that confinement, or rather service, at a workhouse like Occoquan, under the conditions now prevailing should be deemed so. As stated in *Ex parte Wilson,* 114 U. S. 417, 427, and in *Mackin* v. *United States,* 117 U. S. 348, 351: "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another." Such changes may result from change in the conditions in which, or in the purpose for which, a punishment is prescribed. The Constitution contains no reference to hard labor. The prohibition contained in the Fifth Amendment refers to infamous crimes—a term obviously inviting interpretation in harmony with conditions and opinion prevailing from time to time. And today commitment to Occoquan for a short term for non-support of minor children is certainly not an infamous punishment.

UNITED SHOE MACHINERY CORPORATION ET AL. *v.* UNITED STATES.

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

No. 119. Argued March 7, 8, 9, 1921; restored to docket for reargument June 6, 1921; reargued January 17, 18, 1922.—Decided April 17, 1922.

1. A presumption of correctness attends the findings of fact made by the trial judge in an equity case after reading the evidence. P. 455.
2. In a suit under the Clayton Act to enjoin the use of restrictive covenants in leases of machinery, inserted for the benefit of the lessor, the lessees are *held* not indispensable parties. P. 456.

3. The appellant corporation controlled a large part of the trade of supplying certain classes of machinery used in the United States in the manufacture of shoes, which it furnished to the manufacturer under a system of leases in which were restrictive clauses providing, (1) that leased machines performing certain operations should not be used on shoes upon which certain other operations had not been performed by machines of the lessor; (2) that as to certain kinds, if the lessor's machines were not used exclusively, the leases should be forfeitable; (3) for purchase of supplies exclusively from the lessor; (4) that leased insole machines should only be used on shoes upon which certain other operations were done by lessor's machines; (5) that failure of the lessee to take additional machines of certain kinds from the lessor would forfeit the right to retain machines already leased; (6) for payment of a royalty on shoes operated upon by competing machines; (7) for a lower royalty where the lessee agreed not to use certain machines on shoes lasted on machines not leased from the lessor: the lessor reserving the right to cancel any lease for breach of any provision in that or any other lease or license agreement between the parties, irrespective of previous breaches, unnoticed, waived or condoned. *Held*, That, although there was no specific agreement not to use machinery of a competitor, the practical effect of these restrictive provisions, thus tied together, was to prevent such use and necessarily to lessen competition and to tend to create monopoly, in violation of § 3 of the Clayton Act. P. 456.
4. A decree is an estoppel between the same parties in a second suit only when rendered on the same cause of action; or where, the causes of action being different, a point or issue determined in the first suit is sought to be relitigated in the second. P. 458.
5. The effect of a former decree as an estoppel is ascertained from the issues made by the pleadings and the questions essential to the decision as shown by the record, and not from isolated expressions of the court's opinion. P. 460.
6. This being a suit to enjoin the use of restrictions in leases of machinery as violating § 3 of the Clayton Act, which expressly applies to patented as well as unpatented machines and prohibits leases the effect of which "may" be substantially to lessen competition or tend to create monopoly, the Government is not estopped by the adverse decree, in its former suit (247 U. S. 32) seeking to dissolve the defendant corporation as a combination and monopoly forbidden by the Sherman Act, wherein the leases here in controversy also were attacked as contracts violating that act and were held not so

in view of the patent law, but where their validity under the Clayton Act was not and could not have been involved. P. 459.

7. A patent secures the right to exclude others from making, using or vending the thing patented without the permission of the patent owner, but does not exempt him from regulations consistent with those rights, made by Congress in the public interest, forbidding agreements which may lessen competition or build up monopoly in interstate trade. P. 463.
8. Section 3 of the Clayton Act is consistent with patent rights antedating the act and does not deprive their owners of property without due process of law. P. 462.
9. In a suit to enjoin use of lease provisions found violative of the Clayton Act, *held* not a defense that an alternative form of lease, claimed to be unobjectionable, was offered the lessees or that the lessor after enactment of the statute adopted a form of temporary agreement not containing the clauses in controversy. P. 464.
10. Leases of machines made in connection with and as a part of a transaction involving shipment of the machines from one State to the user in another, are made in interstate commerce and subject to the control of Congress exerted in § 3 of the Clayton Act. P. 465.

264 Fed. 138, affirmed.

APPEAL from a decree of the District Court enjoining the appellants from the use of certain restrictive clauses, found violative of § 3 of the Act of October 15, 1914, c. 323, 38 Stat. 730, in leases of shoe machinery in interstate commerce, executed since the passage of that act, or to be made in the future.

Mr. Charles F. Choate, Jr., and *Mr. Frederick P. Fish*, with whom *Mr. Malcolm Donald* and *Mr. Henry W. Dunn* were on the briefs, for appellants.[1]

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[1]At the former hearing the case was argued for the appellants by *Messrs. Charles F. Choate, Jr., Frederick P. Fish* and *Cordenio A. Severance*, with *Messrs. Malcolm Donald, Frank W. Knowlton, Henry W. Dunn* and *James Garfield* on the briefs, and for the United States by *Messrs. La Rue Brown, Leo A. Rogers* and *Elias Field*, with *Solicitor General Frierson* on the brief.

The arguments can not be adequately represented within the small space allowable here.

Mr. La Rue Brown and *Mr. Elias Field,* Special Assistants to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Justice Day delivered the opinion of the court.

This suit was brought by the United States against the defendants, United Shoe Machinery Company (of Maine), United Shoe Machinery Corporation, United Shoe Machinery Company (of New Jersey), and the officers and directors of these corporations, under the provisions of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 731, 736, to enjoin them from making leases containing certain clauses, terms and conditions alleged to be violative of the act. Issues were made up, testimony taken, and a decree granted by the District Court enjoining the use of certain clauses in the leases. 264 Fed. 138. From that decree the present appeal was prosecuted to this court.

The record embraces twenty-seven volumes of printed matter and four volumes of exhibits. The summary of testimony compiled by the defendants contains more than one thousand pages. Much of it has but little bearing on the real issues to be decided, and so much as was essential might well have been embraced within a much narrower compass than is contained in the voluminous record now before us.

Section 3 of the Clayton Act, so far as pertinent, makes it unlawful for persons engaged in interstate commerce in the course of such commerce to lease machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States, or to fix a price therefor, or to discount from, or rebate upon, such price upon the condition, agreement or understanding that the lessee thereof shall not use or deal in the machinery, supplies or other commodities of the competitor or competitors of the lessor, where the effect

of such lease, agreement or understanding may be to substantially lessen competition or tend to create a monopoly.

The trial judge states that he took the time necessary to read and examine this voluminous record, and from it in the course of his opinion he makes certain findings of fact. These findings are entitled to the presumption of correctness which is given to the conclusions of a chancellor reached upon consideration of conflicting evidence, and we may add that in this case the opinion gives evidence of careful and painstaking research.

Our own examination of the testimony gives little occasion to modify the findings of fact made by the District Court. The record discloses that the United Shoe Machinery Corporation, hereinafter called the United Company, controlled a very large portion of the business of supplying shoe machinery of the classes involved in this case. The court below found that it controlled more than 95% of such business in the United States. Whether this finding is precisely correct it is immaterial to inquire. It is evident from this record that the United Company occupies a dominant position in the production of such machinery and makes and supplies throughout the United States a very large percentage of such machinery used by manufacturers.

It may be conceded at the outset, and was so found in the court below, that the company did not act oppressively in the enforcement of the forfeiture clauses of the leases. It is established that it furnishes machines of excellent quality; that it renders valuable services in the installation of machines, instructions to operators, promptness in furnishing machines when desired by manufacturers, and is expeditious in making repairs and replacements when necessary so to do. The machines of the United Company are protected by patents granted prior to the passage of the Clayton Act, and the validity of none of them is called in question here.

It is contended that the suit must fail for want of necessary parties in as much as the lessees were not brought into it; that they were necessary parties because their rights were necessarily adjudicated in enjoining the enforcement of the contracts involved. But we agree with the District Court that the lessees were not indispensable or even necessary parties. The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without injuriously affecting the rights of absent parties. 1 Street's Equity Practice, § 519, quoted with approval in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, in which case the former adjudications in this court are cited and considered. The covenants enjoined were inserted for the benefit of the lessor, and were of such restrictive character that no right of the lessee could be injuriously affected by the injunction which was prayed in the case. We are of opinion that their presence was not necessary to a decision.

Turning to the decree, it will be found that the court enjoined the use of (1) the restricted use clause, which provides that the leased machinery shall not, nor shall any part thereof, be used upon shoes, etc., or portions, thereof, upon which certain other operations have not been performed on other machines of the defendants; (2) the exclusive use clause, which provides that if the lessee fails to use exclusively machinery of certain kinds made by the lessor, the lessor shall have the right to cancel the right to use all such machinery so leased; (3) the supplies clause, which provides that the lessee shall purchase supplies exclusively from the lessor; (4) the patent insole clause, which provides that the lessee shall only use machinery leased on shoes which have had certain other operations performed upon them by the defendants' machines; (5) the additional machinery clause, which provides that the lessee shall take all additional machinery for

certain kinds of work from the lessor or lose his right to retain the machines which he has already leased; (6) the factory output clause, which requires the payment of a royalty on shoes operated upon by machines made by competitors; (7) the discriminatory royalty clause, providing lower royalty for lessees who agree not to use certain machinery on shoes lasted on machines other than those leased from the lessor. The defendant's restrictive form of leases embraces the right of the lessor to cancel a lease for the breach of a provision in such lease, or in any other lease or license agreement between the lessor and the lessee. The lessor in such case is given the right, by notice in writing to the lessee, to terminate any and all leases or licenses then in force to use the machinery and this notwithstanding previous breaches or defaults may have been unnoticed, waived, or condoned by or on behalf of the lessor. The District Court held that the United Company had the right to cancel a lease for a violation of the terms of the particular lease, but could not, without violating the act reserve the right to cancel a lease because the lessee had violated the terms of some other lease. This part of the decree must be read in the light of the circumstances shown as to the necessity of procuring shoe machinery from the United Company, and the danger of a lessee losing his ability to continue business by a forfeiture incurred from the breach of a single covenant in one lease.

While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all conditions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Com-

pany occupies a dominating position in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his business.

This system of "tying" restrictions is quite as effective as express covenants could be and practically compels the use of the machinery of the lessor except upon risks which manufacturers will not willingly incur. It is true that the record discloses that in many instances these provisions were not enforced. In some cases they were. In frequent instances it was sufficient to call the attention of the lessee to the fact that they were contained in the lease to insure a compliance with their provisions. The power to enforce them is omnipresent and their restraining influence constantly operates upon competitors and lessees. The fact that the lessor in many instances forebore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act.

It is contended that the decree in favor of the defendants affirmed in the former suit of the Government under the Sherman Act, 247 U. S. 32, between the same parties, is *res judicata* of the issues in the present case.

Perhaps the leading case in this court upon the subject of estoppel by former judgment is *Cromwell* v. *County of Sac,* 94 U. S. 351, 352, in which this court, speaking by Mr. Justice Field, laid down the general rule of law, which has been followed in subsequent cases:

". . . there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the

former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, . . . concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

In other words, to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit determinative of the matter in controversy in the second suit? To answer these questions we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy.

The Sherman Act suit had for its object the dissolution of the United Company, which had been formed by the union of other shoe machinery companies. It also attacked and sought to enjoin the use of the restrictive and tying clauses contained in the leases as being in themselves contracts in violation of the Sherman Act. The Sherman Act and the Clayton Act provide different tests of liability. This was determined in the recent case of *Standard Fashion Co.* v. *Magrane-Houston Co., ante,*

346. In that case we pointed out that the Clayton Act was intended to supplement the Sherman Act, and within its limited sphere established its own rule. Under the Sherman Act, as interpreted by this court before the passage of the Clayton Act, contracts were prohibited which unduly restrain the natural flow of interstate commerce, or which materially interrupt the free exercise of competition in the channels of interstate trade. In the second section monopolization or attempts to monopolize interstate trade were condemned. The Clayton Act (§ 3) prohibits contracts of sale, or leases made upon the condition, agreement or understanding that the purchaser or lessee shall not deal in or use the goods of a competitor of the seller or lessor where the effect of such lease, sale, or contract, or such condition, agreement or understanding "may" be to substantially lessen competition or tend to create monopoly. The cause of action is therefore not the same.

That the leases were attacked under the former bill as violative of the Sherman Act is true, but they were sustained as valid and binding agreements within the rights of holders of patents. The Clayton Act specifically applies to goods, wares, machinery, etc., whether "*patented or unpatented.*" This provision was inserted in the Clayton Act with the express purpose of preventing rights granted by letters patent from securing immunity from the inhibitions of the act. The determination of the questions now raised under the Clayton Act was not essential to the former decision. The defendants in their argument seize upon isolated passages in the opinion of the court in the former case, and contend that they are decisive here. But the effect of the former judgment as an estoppel is not to be thus determined. *Vicksburg* v. *Henson,* 231 U. S. 259, 269, and cases therein cited. In the Sherman Act case the issues were clearly stated in the prevailing opinion of this court (247 U. S. 35, 38): "The

charge of the bill is that defendants, not being satisfied with the monopoly of their patents and determined to extend it, conceived the idea of acquiring the ownership or control of all concerns engaged in the manufacture of all kinds of shoe machinery. This purpose was achieved, it is charged, and a monopoly acquired, and commerce, interstate and foreign, restrained by the union of competing companies and the acquisition of others. And that leases were exacted which completed and assured the control and monopoly thus acquired. . . .

"There are two accusations against the defendants. One is that at the very outset they combined competing companies and subsequently acquired others, § 1 of the Act of 1890 being thereby offended. The other is a monopolization of the trade in violation of § 2 of that act. And it is charged, as we have said, that certain leases and license agreements are the instruments which consummate both offenses."

After disposing of the charge adversely to the Government's contention that the union of the preëxisting companies, constituting the United Company, was a combination in restraint of trade, the court passed to a consideration of the leases and said (pp. 56, 57):

"There was complaint of them and the Government attacks them. . . . To the attacks of the Government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them it is the monopoly of the right. . . . We must not overestimate the right or give it a sinister effect—permit it to be the means, to use the words of the Government, 'to the building up and intrenchment' of an 'illegal monopoly.'

. . .

"Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose. This strength is the compensation

which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act. In other circumstances it may be, as in *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, to which case that at bar has no resemblance.

"The question, then, is, Was the patent right lawfully exerted in the leases? Were they anything more than the exercise of the patent monopoly?"

This question the court proceeded to answer in the negative.

The issue whether the restrictive clauses were valid in view of the provision of the Clayton Act concerning machinery patented or unpatented was not and could not have been involved or decided in the former suit. It is true that the court speaks of the excellence and efficiency of the United Company's machinery as a sufficient inducement for its installation by the lessees, and, we may add that there is much testimony in the record tending to show that it was the excellence of the United Company's machinery and the efficiency of its service which induced lessees to acquire its machinery, but these considerations are apart from the pertinent issues which here confront us. No matter how good the machines of the United Company may be, or how efficient its service, it is not at liberty to lease its machines upon conditions prohibited by a valid law of the United States. Congress has undertaken to deny the protection of patent rights to such covenants as come within the terms of the Clayton Act, and if the statute is constitutional, the sole duty of the court is to enforce it in accordance with its terms.

It is contended that the act is an unconstitutional limitation upon the rights secured to a patentee under the laws of the United States, and that it takes away from the patentees without due process of law property secured to them by the grant of the patent. The solution of this

contention depends upon the nature and extent of the rights secured under the grant of a patent.

From an early day it has been held by this court that the franchise secured by a patent consists only in the right to exclude others from making, using, or vending the thing patented without the permission of the patentee. *Bloomer* v. *McQuewan,* 14 How. 539. This definition of the rights of the patentee has been the subject of frequent recent decisions of this court, and has been approved and applied in *Bauer* v. *O'Donnell,* 229 U. S. 1; *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490; *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.,* 243 U. S. 502; *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8. The subject was given full consideration in *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co., supra,* in which the former decision of this court, *Henry* v. *Dick Co.,* 224 U. S. 1, holding that a mimeograph made under letters patent might be sold with a license agreement limiting its use to certain unpatented articles, was specifically overruled, and it was held that the patentee received from the law no more than the exclusive right to make, use and sell the invention. Undoubtedly the patentee has the right to grant the use of the rights or privileges conferred by his patent to others by making licenses and agreements with them which are not in themselves unlawful, but the right to make regulation in the public interest under the police power of the States or in the exertion of the authority of Congress over matters within its constitutional power is controlled by general principles of law, and the patent right confers no privilege to make contracts in themselves illegal, and certainly not to make those directly violative of valid statutes of the United States. It was held by this court in *Standard Sanitary Manufacturing Co.* v. *United States,* 226 U. S. 20, that the rights secured by a patent do not protect

the making of contracts in restraint of trade, or those which tend to monopolize trade or commerce in violation of the Sherman Act. That principle was followed with approval when applied to rights secured under the copyright laws of the United States. *Straus* v. *American Publishers' Association,* 231 U. S. 222. The same conclusion was reached in a well considered opinion in the Supreme Judicial Court of Massachusetts involving a state enactment. *Opinion of the Justices,* 193 Mass. 605. The same principle applies to the Clayton Act. The patent grant does not limit the right of Congress to enact legislation not interfering with the legitimate rights secured by the patent but prohibiting in the public interest the making of agreements which may lessen competition and build up monopoly.

It is further insisted that the suit must fail because the parties were offered an alternative lease alleged to be free from the objectionable conditions complained of. But this lease was only granted upon the lessee making an initial payment in cash instead of paying the lessor royalties throughout the term. There is some conflict in the testimony as to whether the effect of such requirement was so onerous as to compel the lessee to choose the restricted form of leases. The issue involved here is whether leases with the restricted clauses in them, the enforcement of which has been enjoined by the District Court, were such as to make them violative of the provisions of the Clayton Act. The fact that a form of lease was offered which is not the subject of controversy is not a justification of the use of clauses in other leases which we find to be violative of the act.

The defendants contend that the form of lease which they have adopted since the Clayton Act became effective is free from the restrictive and tying clauses, and is, therefore, unobjectionable, and hence no injunction should issue. These leases are terminable upon thirty

days notice, and are denominated temporary loan agreements. They were evidently framed in view of the Clayton Act, and litigation likely to arise over the former leases in view of that enactment. The court below so found, and expressed the opinion that should the defendants' contention be sustained, and the conditions in controversy be held legitimate, leases containing them would again be insisted upon. The earnestness and zeal with which the right to use these clauses has been insisted upon throughout, confirms the conclusion of the trial judge. The fate of these substituted forms of leases evidently depends upon the outcome of this suit.

It is insisted that the leases in controversy were not made in the course of interstate commerce, and, therefore, cannot be embraced within the terms of the Clayton Act. It is provided in the decree that it shall apply to all leases covering shoe machinery shipped from one State to the user or factory for use in another State in the course of or as a part of the transaction between the lessor and the lessee, resulting in the making of the lease. It is true that the mere making of the lease of the machines is not of itself interstate commerce. But where, connected with the making of such lease, a movement of goods in interstate commerce is required, we have no doubt of the authority and purpose of Congress to control the making of such leases by the enactment of the statute before us.

Other matters are urged, but we have noticed those deemed necessary to a decision of the case. We find no error in the decree of the court below, and the same is

Affirmed.

MR. JUSTICE MCKENNA dissents.

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

TEXAS COMPANY *v.* BROWN, INDIVIDUALLY AND AS COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL.

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

No. 126. Argued October 13, 14, 1921.—Decided April 17, 1922.

1. The Georgia laws, (Civil Code §§ 1800–1814 as amended; Penal Code §§ 639, 642) providing for inspection of oil and gasoline and collection of inspection fees, are to be construed as remaining applicable to products stored within the State or sold in internal commerce, even if invalid as applied to interstate commerce, in view of the declaration to that effect in the Act of August 17, 1920 (Ga. Laws 1920, No. 800). P. 473.
2. A statute bearing on the right to an injunction must be given effect by an appellate court though enacted pending the appeal. P. 474.
3. As applied to oil and gasoline in interstate commerce, state inspection fees imposed without the consent of Congress and so clearly exceeding the cost of inspection as to amount to a revenue tariff, are unconstitutional. P. 475.
4. Goods imported into one State from another, which have reached their destination and are held in storage in the original packages awaiting sale, are subject to nondiscriminatory state taxation. P. 475.
5. A tax levied in respect of goods of a particular kind is not to be held a discrimination against interstate commerce merely because goods of that kind are not produced locally but are all imported from other States. P. 476. *Askren* v. *Continental Oil Co.*, 252 U. S. 444.
6. Oil and gasoline imported from another State in tank cars not used for indefinite storage or as distributing tanks for local sales, remain in interstate commerce and not subject without the owner's consent to local inspection fees amounting to taxation until unloaded. P. 477.
7. The Georgia laws, *supra*, provide for inspection of illuminating oil and gasoline and for inspection fees, yielding revenue in excess of inspection cost, fixed at higher rates per gallon for small quantities than for large, and imposed once only, in connection with the

inspection, viz., upon dealers at the time of first domestic sale or during storage preliminary to such sale, and upon persons who buy or bring in these products for their own local consumption, the latter enjoying an exemption from paying more than a specified total annually which does not apply to dealers. *Held*, that the charge, as applied to local transactions, is an excise, and is

(a) Not arbitrary or unreasonable, in violation of the Fourteenth Amendment. P. 479.

(b) Nor contrary to Art. 7, § 2, par. 1, of the Georgia Constitution, which requires uniform valuation of all property subject to be taxed and that all taxation shall be uniform on the same class of subjects and levied and collected under general laws. P. 480.

266 Fed. 577, affirmed.

APPEAL from a decree of the District Court refusing, in part, an application for an interlocutory injunction in a suit brought by the appellant to restrain the appellees, officials of Georgia, from enforcing laws of that State imposing inspection fees, in respect of oil and gasoline brought in by the appellant from other States.

Mr. John M. Slaton and *Mr. Harry T. Klein*, with whom *Mr. James L. Nesbitt, Mr. Luther Z. Rosser, Mr. Benj. Z. Phillips* and *Mr. Stiles Hopkins* were on the brief, for appellant.

The Georgia legislation is to be construed as providing for inspection and not for a privilege or excise tax. If the inspection fees were intended as a general source of revenue, fairly imposed upon the business of selling oil, it is hardly conceivable that the legislature would have imposed them solely upon the first sale instead of upon every one selling oil and its products.

If the tax be a property tax, it is violative of the provision of the Georgia constitution requiring all property taxes to be ad valorem.

Under this legislation, the privilege of storage occasions no charge against any citizen who stores after inspection; the charge is only against the original importer. The

case is indistinguishable from *Standard Oil Co.* v. *Graves,* 249 U. S. 389.

The right to sell is an integral part of interstate commerce. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Brown* v. *Maryland,* 12 Wheat. 419; *Foote* v. *Maryland,* 232 U. S. 494; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380; *Neilson* v. *Garza,* 2 Woods, 287; *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158; *Standard Oil Co.* v. *Graves,* 249 U. S. 389; *Schollenberger* v. *Pennsylvania,* 171 U. S. 22; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197; *York Mfg. Co.* v. *Colley,* 247 U. S. 21.

As a tax, the excessive inspection fees constitute an arbitrary and discriminatory burden on interstate commerce. The tax is levied only on the first or original sale of these products and it is admitted in the pleadings that no oil is produced in Georgia.

The tax viewed as an excise or privilege tax is directed against the products of other States because all of such products must come from other States. *American Fertilizer Co.* v. *Board of Agriculture,* 43 Fed. 609. Neither is the tax rendered valid by the fact that it applies to internal as well as external commerce. Discriminatory taxes against articles from other States are void. *Webber* v. *Virginia,* 103 U. S. 344; *Leisy* v. *Hardin,* 135 U. S. 100; *Lyng* v. *Michigan,* 135 U. S. 161; *Welton* v. *Missouri,* 91 U. S. 275. When consignment is made direct to the customer for his own use the oil can not be at any time in intrastate commerce. *Walling* v. *Michigan,* 116 U. S. 446; *Schollenberger* v. *Pennsylvania,* 171 U. S. 1.

The Texas Company is entitled to invoke the protection of the Constitution, whether the tax falls on sales made by it or by its customers importing such oils; the burden on interstate commerce is the same. *Savage* v. *Jones,* 225 U. S. 501; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 328; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

The difference between the power of the State to tax goods and an authority of the State to interfere with the introduction and disposal of goods in interstate commerce is clearly drawn in *American Steel & Wire Co.* v. *Speed,* 192 U. S. 522. The power to tax the sale of an article in consummation of its interstate commerce shipment is very different from the power to tax that article together with all other property in the State upon which the burden of a valid law might equally fall. *York Mfg. Co.* v. *Colley,* 247 U. S. 21; (*Askren* v. *Continental Oil Co.,* 252 U. S. 444, distinguished); *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158.

The tax is violative of the Fourteenth Amendment. On its face the imposition of inspection fees amounting to five times the cost of inspection is arbitrary and unfair. It takes the same length of time to inspect 50 gallons as 8,000 gallons of oil, and yet the tax is in proportion to the amount. It is a tax only upon the first sale. It is an arbitrary assessment. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400. As only the first vendor is taxed, the law carefully excludes the citizens of Georgia from the payment of these excessive fees, although engaged in the same business.

Arbitrary selection cannot be justified by calling it a basis of classification. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540.

The tax is violative of the state constitution. *Beckett* v. *Savannah,* 118 Ga. 58.

Mr. Mark Bolding, with whom *Mr. Albert Howell, Jr., Mr. P. H. Brewster* and *Mr. Arthur Heyman* were on the brief, for appellees.

Mr. Justice Pitney delivered the opinion of the court.

This is a suit in equity by appellant, a corporation and citizen of Texas, against appellees, both individually and as officers of Georgia, to restrain enforcement of laws respecting fees for inspection of petroleum and petroleum products, especially kerosene oil and gasoline, so far as concerns products brought by plaintiff from other States into Georgia and there disposed of.

The laws in question, as they stood when suit was commenced (March, 1920), comprise provisions found in Georgia Civil Code, 1910, §§ 1800–1814, which originally referred only to illuminating oils; an amendatory Act of August 19, 1912 (Laws 1912, No. 570, p. 149), which extended the inspection system to gasoline; an amendatory Act of August 19, 1913 (Laws 1913, No. 258, p. 110); and certain sections of the Penal Code, 1910. They provide for official state inspection of petroleum and petroleum products; prescribe tests relating to their fitness for use—a flash test for illuminating oils, a specific gravity test for gasoline—and establish inspection fees dependent upon the quantity inspected but at a higher rate per gallon in small quantities than in large, the fees being fixed, however, upon a basis that has been found in practice to yield revenues substantially in excess of the cost of inspection. The officials in charge of enforcement of the system, here made defendants, are the commissioner of agriculture, a general inspector of oils, and numerous local inspectors, whose duties are set forth in the cited code sections and in the Act of 1912. Among other provisions for rendering the acts effective, § 639 of the Penal Code makes it a misdemeanor to sell or offer for sale illuminating fluids in violation of the pertinent provisions of the Civil Code, and § 642, to sell or keep for sale, or in storage, crude or refined petroleum, naphtha, kerosene, etc., without having the same inspected and approved by an authorized inspector.

The federal jurisdiction was invoked both because of diverse citizenship and because the suit arose under the Constitution of the United States. Upon the merits, questions of state law were and are raised, as they may be (*Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508), in addition to federal questions.

Enforcement of the inspection fees was and is resisted upon the ground that they constitute an arbitrary and unreasonable exaction, not sustainable as a fair exercise of the taxing power but invalid as violative of the guarantee of due process of law contained in the state constitution, as well as that in the Fourteenth Amendment.

A more specific objection is that the imposition of the fees is in conflict with Art. 7, § 2, par. 1, of the state constitution, which provides: "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

But the contention most emphasized is rested upon the commerce clause of the Constitution of the United States, the insistence being that inspection fees exceeding the cost of inspection, as imposed upon plaintiff's products, constitute a burden upon interstate commerce. As to this, defendants denied that the laws in question by proper construction applied, or as enforced by the state officers were made to apply, to plaintiff's products while in interstate commerce; they averred that inspections were not required to be made, nor fees to be paid, until after the products had arrived at destination in the State and were held in storage by the consignee for the purposes of sale in the State.

Upon amended bill and answer, and affidavits *pro* and *con*, an application for interlocutory injunction was heard before three judges pursuant to § 266 Judicial Code as amended March 4, 1913, c. 160, 37 Stat. 1013, and re-

sulted in a decision June 28, 1920 (one judge dissenting), pursuant to which an injunction *pendente lite* was granted restraining the collection of inspection fees in respect to kerosene oil, gasoline or other petroleum products of plaintiff brought into the State of Georgia from other States and intended to be sold in the original packages, and so sold; but injunction was refused, and restraining orders theretofore granted were dissolved, as to products brought in for indefinite storage within the State, or for sale after breaking the original package, after completion of the interstate transportation. 266 Fed. 577. An appeal was taken by plaintiff direct to this court, as authorized by § 266 Judicial Code.

The controlling facts are not in dispute. Plaintiff carries on in Georgia an extensive business in the distribution and sale of illuminating oil and gasoline. Neither commodity is produced in Georgia, and all plaintiff's supplies for that State are brought from points in other States, principally by rail in tank-cars owned by plaintiff, having a capacity of approximately 8,000 gallons each. Plaintiff has thirty-four local agencies or distributing stations at different points in the State, at which are stationary storage tanks for oil and gasoline respectively, pumps and other apparatus for transferring the products from tank-car to storage tank, and either a railroad siding, or (in a few cases) a private track in proximity to the storage tanks. Plaintiff also maintains wagons for the delivery of oil and gasoline from the stationary tanks to its customers. The principal part of its products comes to the distributing stations consigned to plaintiff or its manager or agent. As a rule, and as a part of plaintiff's own system, as soon as one of the tank-cars is started from the point of origin outside the State a request for inspection together with a check for the inspection fees is forwarded by plaintiff to the local inspector nearest the point of destination, notifying him that the shipment is en route and re-

questing him to give it immediate attention upon arrival. Upon its arrival the local agent notifies the inspector, who thereupon, in compliance with the previous request, inspects the oil or gasoline by taking a sample from the tank-car, after which its contents are conveyed to and into the storage tank, and then distributed and sold to patrons, either directly from the tank or by means of the delivery wagons. In some instances, involving substantial quantities but only a small proportion of the whole—less than 5 per cent.—plaintiff sells tank-cars of gasoline and kerosene direct to its customers in Georgia, making interstate shipment direct to customer's address.

The majority of the judges held that the provisions for inspection of petroleum products were a permissible exercise of the State's police power; that in so far as the fees yielded revenue in excess of the cost of inspection they were attributable to the taxing power of the State and not objectionable except as applied to interstate commerce, as to which they were invalid; that they were not in conflict with the uniformity clause of the state constitution; that so far as plaintiff's products were indefinitely stored within the State, or sold there after breaking bulk or original packages, they were subject not only to inspection but to the tax imposed, as soon as the interstate transportation was ended; and that the State should be permitted to enforce the inspection fees so soon as the products passed out of interstate commerce, although restrained with respect to products while in such commerce; citing *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411.

After the interlocutory decree and pending the appeal, evidently in view of the controversy raised in this case, the general assembly passed an Act, approved August 17, 1920 (Ga. Laws 1920, No. 800, p. 163), declaring that the laws relating to inspection and tests, and prescribing the fees therefor and the duties of the Commissioner of Agriculture

and general oil inspector and local inspectors, as set forth in §§ 1800 to 1814, both inclusive, of the Civil Code, and in Act of August 19, 1912, and the penalties provided in §§ 639 and 642 of the Penal Code, " shall never be held or construed to apply to oils and gasoline, benzine, or naphtha, or other articles mentioned in said laws, imported into this State in interstate commerce and intended to be sold in the original and unbroken tank cars or other original receptacles or packages, and so sold, while the same are in interstate commerce."

In view of the provisions of this act we need spend no time in discussing whether the judges were right in following the rule of practical separability in administration, applied by this court to a taxing law single on its face in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, a case followed, since the decision below, in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642. Any question whether the same or a different rule ought to be applied to an inspection law employed for the purpose of revenue taxation, based upon doubt as to the intent of the state legislature to permit the system to remain in force with respect to products stored within the State or sold in domestic commerce, when determined to be unenforceable as to the like goods while in interstate commerce, is set at rest by the new act, which under the circumstances must be accepted as manifesting an intent that the system shall remain in effect as to products that are subject to the taxing power of the State, as clearly as it declares a contrary purpose as to products still remaining in interstate commerce. Although passed after the decree below, this act must be given effect in deciding the appeal, since the case involves only relief by injunction, and this operates wholly *in futuro*. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464.

That a State is within its governmental powers in requiring inspection, including tests as to quality, as a

safeguard with respect to inflammable substances such as those here involved, when found within its borders, or even when moving in commerce from State to State (there being no legislation by Congress upon the subject), is well settled. *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158, 162. That with respect to such substances when they have passed out of interstate commerce and have come to rest within the State and become a part of the general mass of property or have become the subject of domestic commerce, the State may impose inspection fees substantially in excess of the cost of inspection, and thus make them a source of general revenue, is also free from doubt, other than any which may arise from its own constitution. But a State may not, without consent of Congress, impose this or any other kind of taxation directly upon interstate commerce; and inspection fees made to apply to such commerce, exceeding so clearly and obviously the cost of inspection as to amount in effect to a revenue tariff, are to the extent of the excess a burden upon the commerce amounting to a regulation of it, and hence invalid because inconsistent with the exclusive authority of Congress over that subject. *Standard Oil Co.* v. *Graves,* 249 U. S. 389, 394–395.

Plaintiff makes the broad contention that inspection charges amounting in effect to taxation cannot be imposed even upon that part of its product which has come to rest within the State, or is disposed of in domestic trade, in view of the fact that all of it has come from other States. But *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520, settles the principle that goods brought into a State, not from a foreign country but from another State, having reached their destination and being held in storage awaiting sale and distribution, enjoying the protection which the laws of the State afford, may without violation of the commerce clause be subjected to nondiscriminatory state taxation, even though still contained

in original packages. This decision is in line with the previous cases of *Woodruff* v. *Parham,* 8 Wall. 123, 140, and *Brown* v. *Houston,* 114 U. S. 622, 632–634; and it was pointed out that their authority was not overruled by *Leisy* v. *Hardin,* 135 U. S. 100, or other cases of like character.

Appellant insists that *Standard Oil Co.* v. *Graves,* 249 U. S. 389, is inconsistent with the imposition of inspection fees on a revenue basis upon goods brought from another State, however held or disposed of in Georgia. That decision, however, extended the exemption from such fees of goods brought from State to State, no further than "while the same are in the original receptacles or containers in which they are brought into the State" (pp. 394-395); and so it was interpreted in *Askren* v. *Continental Oil Co.,* 252 U. S. 444, 449.

Brown v. *Houston,* and *American Steel & Wire Co.* v. *Speed, supra,* sustain the power of a State to impose property taxes upon goods brought from another State, after they have come to rest in the taxing State. But this carries equally the power to tax, without discrimination, domestic sales made of personal property similarly freed from interstate commerce, as is illustrated in *Woodruff* v. *Parham,* 8 Wall. 123, 140; *Wagner* v. *City of Covington,* 251 U. S. 95, 102–103, and cases there cited. The fact that no goods of the like kind are produced within the taxing State, and that necessarily all have come from other States, is not of itself sufficient to show a discrimination against interstate commerce. The precise point was dealt with in *Askren* v. *Continental Oil Co., supra,* in that part of the opinion which treated of the excise tax imposed by New Mexico upon retail sales of gasoline, respecting which the court said (pp. 449–450): "A business of this sort, although the gasoline was brought into the State in interstate commerce, is properly taxable by the laws of the State. Much is made of the fact that New Mexico

does not produce gasoline, and all of it that is dealt in within that State must be brought in from other States. But, so long as there is no discrimination against the products of another State, and none is shown from the mere fact that the gasoline is produced in another State, the gasoline thus stored and dealt in, is not beyond the taxing power of the State." The ruling was reiterated in the same case at its final stage, *Bowman* v. *Continental Oil Co.,* 256 U. S. 642.

Something should be said as to the inspection of plaintiff's products, involving liability for fees, while the products yet remain in the tank-cars. A like question raised in *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158, concerning the oil inspection law of that State, was unnecessary then to be decided (p. 164); the court having found the inspection fees there imposed were not shown to be so largely in excess of the cost of inspection as to amount to a tax inadmissible as applied to subjects still in interstate commerce, and hence that they might be imposed while the products remained in such commerce. In this case, the fees concededly being a source of revenue, the question of so adjusting their application as to avoid taxing interstate commerce becomes important.

The practice, uniformly followed with plaintiff's consent, indeed at its request and for its convenience, has been to inspect the oil and gasoline arriving at its distributing stations while remaining in the tank-cars, with resulting immediate liability for the fees; otherwise as to direct deliveries to its customers buying in tank-car lots. In the normal course of the business, as shown by this record, the tank-cars are not only the vehicles but the original containers for interstate transportation, as well with respect to products consigned to plaintiff's own stations as to deliveries made direct to other interstate consignees. Ordinarily, unless a loaded car be used for indefinite storage, or as a distributing tank for local sales

(nothing of either kind appears in the case) it remains in interstate commerce until unloaded, and the agents of the State may not lawfully subject its contents to the inspection charges until transferred to the storage tank, unless with plaintiff's consent. Neither under a fair construction of the Act of 1920, nor (if that permitted) under the Constitution of the United States, may such inspection combined with taxation be imposed as a condition of admitting into the domestic market goods arriving at destination in interstate commerce. The mere fact that a loaded tank-car has been halted upon a siding, or even upon a private track, for the purpose of unloading, at a station either of plaintiff or of any other interstate consignee, does not, under the course of business here shown, amount to a "coming to rest within the State," authorizing state taxation. And although the State may tax the first domestic sale of the products, or tax them upon their storage in stationary tank awaiting sale, it may not, without consent of the owner, impose its power upon the products while yet in the tank-car, but must resort to other means of collection, if need be.

The evidence strongly tends to show that it may be more convenient to plaintiff that inspection before unloading of tank-cars, as heretofore practiced, be continued; and there is no legal objection to this, if done with plaintiff's free consent. Aside from this, the authority of defendants to tax the products or their storage or sale commences when they have come to rest; ordinarily when transferred from the tank-car to the storage tank and added to plaintiff's stock-in-trade kept therein for local distribution and sale.

We interpret the decree below as permitting no interference by defendants with the right of plaintiff freely to carry on its interstate commerce under the Constitution of the United States, as that right is here stated.

That matter being out of the way, plaintiff's objections to the inspection and taxing system as arbitrary and unreasonable, and not a fair exercise of the taxing power, though magnified by confused manner of statement, are easily disposed of. Considering not merely the terms but the practical operation and effect of the statutory provisions, which is the proper method (*St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362), we have here a combined inspection and revenue law applicable to petroleum products, not materially differing in main features (aside from the revenue derived from the fees), from those adopted by other States, and doubtless chosen for facility and economy in operation and equitable apportionment of the burdens according to the benefits. It has a two-fold object, first, that these inflammable substances be not stored or distributed among the people of Georgia without such assurance of quality and fitness as the prescribed inspection and tests may afford, secondly, that charges sufficient to defray the cost, with something additional for the general treasury, be imposed in a way to operate as an indirect tax upon the ultimate consumers of the products, approximately in proportion to the amounts consumed. That it combines regulation with revenue-raising is not a valid objection from the standpoint of the Fourteenth Amendment. *Gundling* v. *Chicago,* 177 U. S. 183, 189. The tax, to describe it according to its essential nature, is an excise upon domestic sale or storage, designed to affect the use of the products, a tax imposed at the time of inspection, the inspector acting also as tax-gatherer; inspection and tax-payment required but once, and that, ordinarily, from the dealer at the time of the first domestic sale, or during storage preliminary to such sale. The self-interest of the dealer and the customs of trade are relied upon to add the tax to the price of the product, and thus pass it on to the

ultimate consumer—a method appropriate in indirect taxation, and certainly a not unreasonable mode of distributing the burden among those who share in the benefits.

That the legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from the obviously inevitable result of requiring its payment, ordinarily, by the first domestic seller, but from the specific provisions of the amendatory Act of 1913, that the 1912 Act "shall apply not only to gasolines, benzines and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia, for consumption or use. Where such commodities or any of them may be purchased within the State, or without the State and brought into the State, by any person, firm or corporation, not for the purpose of selling or offering the same for sale, but for the purpose of use or consumption by the purchaser in manufacturing or other lawful uses, either as fuel or otherwise, the inspections herein prescribed shall be made, and the fees above fixed shall be paid therefor, except that no such purchaser shall be required to pay more than twelve hundred dollars per year for the inspection of all such commodities used or consumed by him as aforesaid, and such payments may, in the discretion of the Commissioner of Agriculture, be divided into equal monthly payments of one hundred dollars each."

No case is shown for the application of this act; the judges below found no occasion to pass upon it, plaintiff's products not being brought in for its own consumption. In this court there has been no discussion as to its proper construction, plaintiff's counsel insisting merely that it shows the inspection fees are not imposed as a privilege tax for the conduct of any particular kind of business.

Apparently, it was intended to cover the case of large consumers who otherwise might find it advantageous to bring in, and store until needed, quantities of oil or gasoline sufficient for their own consumption, thus escaping dealer's profit and inspection tax as well. We find in its provisions nothing to raise a question about the validity of the system.

We are unable to see in Article 7, § 2, paragraph 1, of the state constitution anything to prevent the application of these statutes to plaintiff's business. The requirement of uniform valuation upon all property subject to be taxed, manifestly refers to property taxes imposed by reason of ownership, which this is not. The clauses requiring that all taxation shall be uniform upon the same class of subjects, and levied and collected under general laws, are not violated by the tax in question. Classification is in terms permitted, and a law based on reasonable classification must be deemed a general law, in the sense of the constitution.

The decisions of the Supreme Court of Georgia hold that, while property taxes must be strictly on an *ad valorem* basis—without variance even as between real and personal property (*Verdery* v. *Village of Summerville,* 82 Ga. 138; *Mayor* v. *Weed,* 84 Ga. 683, 687;)—other subjects of taxation may be resorted to, and the taxes adjusted according to reasonable methods of classification. *Atlanta National Association* v. *Stewart,* 109 Ga. 80, 87. Thus, inheritance taxes, being not a tax upon property but an excise upon the privilege of transfer upon death of an owner, were held valid although not *ad valorem,* in *Farkas* v. *Smith,* 147 Ga. 503, 512.

The peculiar qualities of illuminating oils and gasoline seem to us a sufficient warrant for putting them in a class by themselves for excise taxation upon their sale or use. So we held, in *Bowman* v. *Continental Oil Co., supra,* with respect to an excise upon the sale or use of gasoline, under

a provision of the constitution of New Mexico not differing materially.

While some of the Georgia decisions indicate a rather strict view of the uniformity required (*Johnston* v. *Mayor, etc., of Macon,* 62 Ga. 645; *Beckett* v. *Mayor, etc., of Savannah,* 118 Ga. 58;) we have found none going so far as it would be necessary to go in order to overthrow the inspection tax now in question. That it is imposed, as a rule, only upon the dealer who makes the first domestic sale, not upon those who may make subsequent sales, is consistent with the nature of the tax and the purpose to distribute its burden among those who ultimately consume the product. To impose a like tax each time the commodity changed hands in retail trade might place so heavy a burden upon those purchasing other than at first hand as to render it impossible for the retailer to compete and thus seriously obstruct general distribution. The graduation of the inspection charges according to the quantity that may be inspected at one time—½ cent per gallon in lots of 400 gallons and upwards, 1 cent in quantities between 200 and 400 gallons, 1½ cents in quantities less than 200 gallons—speaks for itself, and plainly is sustainable on the ground that the travel, care, and responsibility of the inspector may be greater than uniform fees per gallon would compensate in the case of the smaller lots. The only other diversity we have noticed in the operation of the tax is that which may arise out of the Act of 1913 entitling a purchaser who buys not for resale but for his own use or consumption, to a limitation of inspection fees to $1,200 per annum. No point is made of this, but a rather obvious ground of classification suggests itself, in that the purchaser for his own use or consumption has no opportunity to make a profit out of resale, as plaintiff and other dealers who pay the full inspection fees may do.

Finally, our attention is called to an Act approved August 10, 1921 (Laws 1921, No. 173, p. 83), providing for an occupation tax upon all distributors selling gasoline and other motor fuels in the State, requiring them to register and make returns, and "(except those importing and selling it in the original packages in which it is brought into the State)" to pay an occupation tax based upon the quantities sold. It is conceded that this does not repeal or affect the inspection laws, and no argument is rested upon it except in support of contentions already disposed of.

The decree of the District Court must be, and it is

Affirmed.

FEDERAL TRADE COMMISSION *v.* WINSTED HOSIERY COMPANY.

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

No. 333. Argued March 13, 14, 1922.—Decided April 24, 1922.

1. Findings of fact made by the Federal Trade Commission are conclusive when supported by evidence. P. 491.
2. A manufacturer's practice of selling underwear and other knit goods made partly of wool but labeled as "natural merino," "natural worsted", "natural wool" and with other like terms taken by a substantial part of the consuming public and sometimes in the retail trade as indicating pure wool fabrics, with the result of misleading part of the public into buying, as all-wool, garments made largely of cotton and of aiding and encouraging misrepresentations by unscrupulous retailers and their salesmen, is an unfair method of competition as against manufacturers of like garments made of wool or wool and cotton, who brand their products truthfully, and is subject to be suppressed under § 5 of the Federal Trade Commission Act. P. 491.
3. Such a method of competition, inherently unfair, does not cease to be so because competitors become aware of it or because it

becomes so well known to the trade that retailers, as distinguished from consumers, are no longer deceived by it. P. 493.
272 Fed. 957, reversed.

CERTIORARI to review a decree of the Circuit Court of Appeals setting aside an order of the Federal Trade Commission under § 5 of the Act of September 26, 1914, c. 311, 38 Stat. 719.

Mr. Solicitor General Beck, with whom *Mr. W. H. Fuller, Mr. Adrien F. Busick* and *Mr. James T. Clark* were on the brief, for petitioner.

Both from the standard of general public morals and from the legal point of view, the practice of misbranding must be held to come within the category of acts "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud," etc. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427; *Curtis Publishing Co.* v. *Federal Trade Commission,* 270 Fed. 881, 908; *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307.

The legislative history of the Federal Trade Commission Act shows that it was the intention of Congress to make all unfair methods of competition unlawful, and to regulate competition rather than solely to prevent monopoly. The purpose to prevent unfair practices in trade enlarges the natural interpretation of "unfair methods of competition" to include whatever might be against the public interest as obstructing the channels of fair competition, on the preservation of which the policy of the Congress is firmly based.

The practice alleged in this proceeding has all the essential elements that make "passing off" or "unfair competition" an unfair method of competition.

The essential elements of unfair competition as known to the common law are deception of, or fraud on, the public and consequent injury to competitors. The cause

of action seems to be based primarily on the protection to be given to a producer's property right in a trade mark or name, or in the good will attached thereto, against one who simulates them so as to confuse the public and to pass off his goods for another's. It is essential, as the basis of the injury to the complainant, that the deception of the public, or the likelihood of such deception, be shown.

While in the form of the instant proceeding no individual producer is complainant, and no specific individual private injury to property right is set up, such injuries to competitors of the respondent collectively who do not misrepresent follow inevitably from the misrepresentation of respondent's labels. The practices complained of affect a class of competitors and not an individual competitor, whose trade mark or name or product is simulated.

In a proper case of unfair competition, or passing off, at common law, the public is involved, and its deception is essential to the action. The two cases involve the same elements, viz, misrepresentation and deception of the public and consequent injury to a competitor or competitors.

The manufacturer is responsible to the public. Deception of the dealer is immaterial. The deceptive character of the label being granted, its natural and reasonable effect will be presumed, and it is not necessary to show actual collusion of the manufacturer with the retailer to deceive the public. Nims, Unfair Competition, § 381, and authorities cited; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.,* 168 Mass. 154, 155; *Fuller* v. *Huff,* 211 Fed. 610; *Scriven* v. *North,* 134 Fed. 366, 375; *Coca Cola Co.* v. *Gay-Ola Co.,* 200 Fed. 720, 722, 723; *Rubber Co.* v. *Devoe & Reynolds Co.,* 233 Fed. 150, 157; 38 Cyc. 778; *Fairbanks Co.* v. *Bell Mfg. Co.,* 77 Fed. 868, 878; *Estes & Sons* v. *Frost Co.,* 176 Fed. 338, 340.

Only ordinary purchasers, including the unwary and ignorant, need be misled. *Bissell Chilled Plow Works* v. *Bissell Plow Co.,* 121 Fed. 357, 366. See also *Notaseme Hosiery Co.* v. *Straus,* 201 Fed. 99, 100; *Photo-Play Publishing Co.* v. *La Verne Publishing Co.,* 269 Fed. 730; *Samson Cordage Works* v. *Puritan Cordage Mills,* 211 Fed. 603, 610; *Winterton Gum Co.* v. *Autosales Gum Co.,* 211 Fed. 612, 617; *Royal Baking Powder Co.* v. *Donohue,* 265 Fed. 406; *Houston* v. *St. Louis Packing Co.,* 249 U. S. 479; *Thum Co.* v. *Dickinson,* 245 Fed. 609, 613.

The probable effect, not the intention, governs. It is a question of preventing, by the Commission's order, practices or methods which may in reason cause the results of unfair competition, before the effects are realized, and it is not necessary to show the accomplished fact of unfair competition. *Beech-Nut Co.* v. *Federal Trade Commission,* 264 Fed. 885, 890; *Federal Trade Commission* v. *Gratz,* 258 Fed. 314, 317; *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307, 311.

Proof of actual intention to deceive is not essential. *Rubber Co.* v. *Devoe & Reynolds Co.,* 233 Fed. 150, 157; *Van Houten* v. *Hooton Co.,* 130 Fed. 600; *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403, 413. This is the law in England. Kerly on Trade Marks, p. 482; *Cary Sons* v. *Crisp,* 19 R. P. C. 497; *Birmingham Small Arms Co.* v. *Webb,* 24 R. P. C. 27; *Powell* v. *Birmingham Vinegar Co.,* 2 Ch. 54.

Actual deception or damage need not be shown. *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307; *National Harness Manufacturers Assn.* v. *Federal Trade Commission,* 268 Fed. 705, 713; *Beech-Nut Packing Co.* v. *Federal Trade Commission,* 264 Fed. 885, 890; *Notaseme Hosiery Co.* v. *Straus,* 201 Fed. 99, 100; *Rubber Co.* v. *Devoe & Reynolds Co.,* 233 Fed. 150, 156; *International Silver Co.* v. *Rogers Corporation,* 66 N. J. Eq. 129; 38 Cyc. 775–777, 780.

The history of the law of unfair competition shows a steady broadening from the protection of the exclusive property right in a trade mark to the protection of the good will in a name against those who seek by borrowing the name to which it is attached to use it for themselves to the loss of the original user. As this development of the law has progressed, the importance of the element of the public's interest in not being imposed upon has increased as that of the individual who invokes the court's action has receded. *Estes & Sons* v. *Frost Co.,* 176 Fed. 338; *Trinidad Asphalt Co.* v. *Standard Paint Co.,* 163 Fed. 977, 980, affd. 220 U. S. 446; *Pillsbury-Washburn Flour Mills* v. *Eagle,* 86 Fed. 608; *Kinney* v. *Basch,* 16 Am. Law Reg. (N. S.) 596.

Misbranding is a defense, as a fraud on the public. *Worden* v. *California Fig Syrup Co.,* 187 U. S. 516, 528; *Church* v. *Proctor,* 66 Fed. 240.

The public is entitled to know what it gets. *Pillsbury* v. *Pillsbury-Washburn Flour Mills,* 64 Fed. 841, 848; *Prince Mfg. Co.* v. *Prince Metallic Paint Co.,* 135 N. Y. 24, cited with approval in *Worden* v. *California Fig Syrup Co., supra.*

Inveteracy of fraudulent practice is only an aggravation.

Mr. Melville J. France, with whom *Mr. Henry P. Molloy* was on the brief, for respondent.

Findings of fact, which are the basis of the conclusion of law of the Commission, are not supported by the evidence in some instances and in others omit vital matters contained in its proof, which the Commission conveniently seeks to ignore.

"Merino", as applied to underwear, has for more than half a century meant a combination of cotton and wool. Webster's New International Dictionary; Murray's New English Dictionary; Cole's Dictionary of Dry Goods (1892); Encyclopedia Britannica, 11th ed.; Treas. Dec.

No. 10736; *Greenleaf* v. *Worthington*, 26 Fed. 303; The Knit Underwear Industry, p. 16, Miscellaneous Series No. 32, Department of Commerce, Bureau of Foreign and Domestic Commerce; The Hosiery Industry, p. 14, Table 5, Miscellaneous Series No. 31, Bureau of Foreign and Domestic Commerce; Thirteenth Census, 1910, Vol. X, p. 79.

There is nothing in the case which can in any fairness sustain a finding that, as to a retailer, the term "merino" carried the representation that the garment was all wool.

To the same degree such a finding is unwarranted as to the ultimate consumer, with whom it must be remembered this petitioner had no dealings.

The Commission cannot ignore a matter which is vital to the determination of the issue. *Curtis Publishing Co.* v. *Federal Trade Commission*, 270 Fed. 881, 911.

The Commission found that the respondent is a knit underwear manufacturer; that it sells and ships its product to retailers throughout the United States and uses labels containing the word "merino" on its boxes but not on its garments, where the garment so sold is not composed wholly of wool but is part wool and part cotton; and that the word "merino" is used by manufacturers of yarn and knit underwear and generally by jobbers and retailers as a trade term meaning a combination of cotton and wool.

The Commission has therefore found as a fact that in the industry in which the respondent must find its competitors and among those to whom it sells its product, "merino" means and is used to define a garment made of cotton and wool. In so labeling its product, there is no fraud, no deception and absolutely nothing unfair. When a term is used, which is general in its use, which is generally used by manufacturers, jobbers and retailers in the knitwear industry, to describe exactly the kind of garment which the respondent makes, wherein lies the unfair method of competition?

The respondent and its competitors sell to retailers and jobbers. It is not engaged in competition in selling to the purchasing public—its field of operation is that of jobbers and retailers. They, according to the Commission's finding, " generally " used the term " merino " just as does this respondent. But further, can this respondent be penalized and condemned for the ignorance of those whom the Commission has discovered? The respondent was using the term " merino " in accordance with correct usage and definition. What authority has the Commission to brand this respondent as engaging in an unfair method of competition because of the ignorance of a salesman or the dishonesty of a tradesman?

The Commission is without jurisdiction over the facts of this case. Misbranding of goods is not " unfair competition."

The purpose behind the act was the regulation of competition. Report, Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 10.

The phrase " unfair methods of competition " has been interpreted and defined by the courts. *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 407; *Federal Trade Commission* v. *Gratz,* 258 Fed. 314; and the many cases cited in *Kinney-Rome Co.* v. *Federal Trade Commission,* 275 Fed. 665.

First and foremost, therefore, there must be actual competition before there can be any unfair competition. In the case at bar there is no competition in the use of the word " merino." It has been used in the knitgoods industry for more than half a century to define a fabric made of cotton and wool. It never has been used to define an all wool garment. See *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427.

While the argument has been based upon a consideration of the term " merino," it applies with full force and effect to every term which the petitioner employed and which the Commission has condemned.

Mr. Frank F. Reed and *Mr. Edward S. Rogers,* by leave of court, filed a brief as *amici curiae.*

Mr. Daniel Davenport, Mr. Morten Q. Macdonald and *Mr. Walter Gordon Merritt,* by leave of court, filed a brief as *amici curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Winsted Hosiery Company has for many years manufactured underwear which it sells to retailers throughout the United States. It brands or labels the cartons in which the underwear is sold, as "Natural Merino", "Gray Wool", "Natural Wool", "Natural Worsted", or "Australian Wool". None of this underwear is all wool. Much of it contains only a small percentage of wool; some as little as ten per cent. The Federal Trade Commission instituted a complaint under § 5 of the Act of September 26, 1914, c. 311, 38 Stat. 717, 719, and called upon the company to show cause why use of these brands and labels alleged to be false and deceptive should not be discontinued. After appropriate proceedings an order was issued which, as later modified, directed the company to "cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered to customers, the words 'Merino', 'Wool', or 'Worsted', alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (*e. g.*, 'Merino, Wool, and Cotton'; 'Wool and Cotton'; 'Worsted, Wool, and Cotton'; 'Wool, Cotton, and Silk'), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (*e. g.*, part wool)."

A petition for review of this order was filed by the company in the United States Circuit Court of Appeals for the Second Circuit. The prayer that the order be set aside was granted; and a decree to that effect was entered.[1] That court said: "Conscientious manufacturers may prefer not to use a label which is capable of misleading, and it may be that it will be desirable to prevent the use of the particular labels, but it is in our opinion not within the province of the Federal Trade Commission to do so." 272 Fed. 957, 961. The case is here on writ of certiorari. 256 U. S. 688.

The order of the Commission rests upon findings of fact; and these upon evidence which fills three hundred and fifty pages of the printed record. Section 5 of the act makes the Commission's findings conclusive as to the facts, if supported by evidence.

The findings here involved are clear, specific and comprehensive: The word "Merino" as applied to wool "means primarily and popularly" a fine long-staple wool, which commands the highest price. The words "Australian Wool" mean a distinct commodity, a fine grade of wool grown in Australia. The word "wool" when used as an adjective means made of wool. The word "worsted" means primarily and popularly a yarn or fabric made wholly of wool. A substantial part of the consuming public, and also some buyers for retailers and sales

[1] The original order of the Commission was based on findings which rested upon an agreed statement of facts. The petition for review urged, among other things, that the agreed statement did not support the findings. Thereupon the Commission moved in the Court of Appeals that the case be remanded to the Commission for additional evidence as provided in the fourth paragraph of § 5 of the act. Under leave so granted the evidence was taken; and modified findings of fact were made. The modified order was based on these findings. It is this modified order which was set aside by the Court of Appeals; and we have no occasion to consider the original order or the proceedings which led up to it.

people, understand the words "Merino", "Natural Merino", "Gray Merino", "Natural Wool", "Gray Wool", "Australian Wool" and "Natural Worsted", as applied to underwear, to mean that the underwear is all wool. By means of the labels and brands of the Winsted Company bearing such words, part of the public is misled into selling or into buying as all wool, underwear which in fact is in large part cotton. And these brands and labels tend to aid and encourage the representations of unscrupulous retailers and their salesmen who knowingly sell to their customers as all wool, underwear which is largely composed of cotton. Knit underwear made wholly of wool, has for many years been widely manufactured and sold in this country and constitutes a substantial part of all knit underwear dealt in. It is sold under various labels or brands, including "Wool", "All Wool", "Natural Wool" and "Pure Wool", and also under other labels which do not contain any words descriptive of the composition of the article. Knit underwear made of cotton and wool is also used in this country by some manufacturers who market it without any label or marking describing the material or fibres of which it is composed, and by some who market it under labels bearing the words "Cotton and Wool" or "Part Wool." The Winsted Company's product, labeled and branded as above stated, is being sold in competition with such all wool underwear, and such cotton and wool underwear.

That these findings of fact are supported by evidence cannot be doubted. But it is contended that the method of competition complained of is not unfair within the meaning of the act, because labels such as the Winsted Company employs, and particularly those bearing the word "Merino", have long been established in the trade and are generally understood by it as indicating goods partly of cotton; that the trade is not deceived by them; that there was no unfair competition for which another

manufacturer of underwear could maintain a suit against the Winsted Company; and that even if consumers are misled because they do not understand the trade signification of the label or because some retailers deliberately deceive them as to its meaning, the result is in no way legally connected with unfair competition.

This argument appears to have prevailed with the Court of Appeals; but it is unsound. The labels in question are literally false, and, except those which bear the word "Merino", are palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. That deception is due primarily to the words of the labels, and not to deliberate deception by the retailers from whom the consumer purchases. While it is true that a secondary meaning of the word "Merino" is shown, it is not a meaning so thoroughly established that the description which the label carries has ceased to deceive the public; for even buyers for retailers, and sales people, are found to have been misled. The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest.

The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value, does not prevent their use being an unfair method of competition.

A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived. The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.[1] And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby.[2] As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; and it was authorized to order that the practice be discontinued.

Reversed.

MR. JUSTICE MCREYNOLDS dissents.

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[1] *Von Mumm* v. *Frash*, 56 Fed. 830; *Coca Cola Co.* v. *Gay-Ola Co.*, 200 Fed. 720, 722; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154, 155.

[2] *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516, 538.

STAFFORD ET AL., COPARTNERS, DOING BUSINESS AS STAFFORD BROTHERS, ET AL. *v.* WALLACE, SECRETARY OF AGRICULTURE, ET AL.

BURTON ET AL. *v.* CLYNE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 687, 691. Argued March 20, 21, 1922.—Decided May 1, 1922.

1. Under the Packers and Stockyards Act of 1921, c. 64, § 316, 42 Stat. 159, an order of the District Court refusing a temporary injunction in a suit to enjoin the enforcement of orders made under the act by the Secretary of Agriculture, is appealable directly to this court. P. 512.
2. It is for Congress to decide from its general information and from the special evidence brought before it, the nature of evils, present or threatening, and to enact such legislation within its power as it deems necessary to remedy them; and this environment should be considered by the courts in interpreting the scope and effect of the act in order to determine its validity. P. 513.
3. Commerce among the States is not a technical legal conception but a practical one, drawn from the course of business. P. 518. *Swift & Co.* v. *United States,* 196 U. S. 375.
4. Streams of commerce among the States are under the national protection and regulation, including subordinate activities and facilities which are essential to such movements though not of interstate character when viewed apart from them. P. 519.
5. Such a current of interstate commerce is found in the uninterrupted movement of livestock from the West and Southwest into the great stockyards at Chicago and elsewhere, where it is sold by the consignee commission merchants to packers and livestock dealers at the stockyards, and in the movement thence into other States of the meat and other products of the animals slaughtered at the packing establishments and the live animals which are resold at the yards by the dealers for further feeding and fattening. P. 514.

6. The commission merchants who receive the livestock as consignees of the shippers and sell it to the packers and dealers at the stockyards, and the dealers in reselling there to stock farmers and feeders, are essential factors in this interstate movement; their sales, though local transactions in that they create a local change of title, do not interrupt the current but, on the contrary, are indispensable to its continuity. P. 516.
7. For the purpose of protecting this interstate commerce from the power of the packers to fix arbitrary prices for livestock and meat, through their monopoly, aided, as was thought, by their control of stockyards, and from exorbitant charges, duplication of commissions, and other deceptive practices in respect of prices, in the passage of livestock through the stockyards, made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other, Congress, in connection with regulation of the packers, had power to regulate business done in the stockyards. P. 514.
8. A reasonable fear upon the part of Congress that acts, usually lawful and affecting only intrastate commerce when occurring alone, will probably and more or less constantly be performed in aid of conspiracies against interstate commerce or constitute a direct and undue burden upon it, serves to bring such acts within the current of interstate commerce for federal restraint. P. 520.
9. It is primarily for Congress to consider and decide the danger of such acts or practices, and to meet it, and it is not for this court to substitute its judgment in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent. P. 521.
10. The Packers and Stockyards Act of 1921, which seeks to regulate the business of the packers done in interstate commerce and incidentally provides for supervision and control of facilities furnished in stockyards in connection with the receipt, purchase and sale of livestock and its care, shipment, weighing or handling in interstate commerce, requiring commission men and dealers as well as stockyard owners to register with the Secretary of Agriculture, and prescribing that all rates and charges for services and facilities in the yards and all practices concerning the livestock passing through them shall be just, reasonable, nondiscriminatory and nondeceptive, and that a schedule of such charges be kept open for public inspection, only to be changed upon notice to the Secretary of Agriculture, and empowering him to inquire into and regulate such charges and practices, to prescribe the forms of accounts and make rules and regulations for the enforcement of the act, etc.—is

not objectionable from the standpoint of the commission men and dealers upon the ground that their business is merely intrastate, but is within the power of Congress under the Commerce Clause. P. 513.

Affirmed.

THESE cases involve the constitutionality of the "Packers and Stockyards Act, 1921," approved August 15, 1921, c. 64, 42 Stat. 159, so far as that act provides for the supervision by federal authority of the business of the commission men and of the live-stock dealers in the great stockyards of the country. They are appeals from the orders of the District Court for the Northern District of Illinois refusing to grant interlocutory injunctions as prayed. The bills sought to restrain enforcement of orders of the Secretary of Agriculture in carrying out the act, directed against the appellants in No. 687, as the commission men in the Union Stockyards of Chicago, and against the appellants in No. 691, as dealers in the same yards. The ground upon which the prayers for relief are based is that the Secretary's orders are void, because made under an act invalid as to each class of appellants. The bill in No. 687 makes defendants the Secretary of Agriculture and the United States Attorney for the Northern District of Illinois, averring that the latter is charged with the duty of enforcing the severe penalties imposed by the act for failure to comply with orders of the Secretary thereunder. The bill in No. 691 makes the United States Attorney the only defendant, with the same averment.

The two bills in substance allege that the Union Stock Yards & Transit Company was incorporated by the State of Illinois in 1865, and given authority to acquire, construct and maintain enclosures, structures and railway lines for the reception, safekeeping, feeding, watering and for weighing, delivery and transfer of cattle and live stock of every description, and to carry on a public live-stock

market with all the necessary appurtenances and facilities; that it is the largest stockyards in the world, and in 1920 handled fifteen million head of live stock of all descriptions, including cattle, calves, hogs and sheep, shipped mainly from outside the State of Illinois; that the live stock are loaded at the point of origin and shipped under a shipping contract which is a straight bill of lading consigning them to the commission merchants at the yard, that on arrival the live stock are at once driven from the cars by the commission merchant, who is the consignee, to the pens assigned by the stockyards company to such merchant for his use, that they are then in the exclusive possession of the commission merchant, are watered and fed by the stockyards company at his request, that with the delivery to the commission merchant, the transportation is completely ended, that all the live stock consigned to commission merchants are sold by them for a commission or brokerage, and not on their own account, that they are sold at the stockyards and nowhere else; that the commissions are fixed at an established rate per head, that the commission men remit to the owners and shippers the proceeds of sale, less their commission and the freight and yard charges paid by them; that the live stock are sold (1) to purchasers who buy the same for slaughter at packing houses, located at the stockyards or adjacent thereto; (2) to purchasers who buy to ship to packing houses outside the State of Illinois for slaughter; (3) to purchasers who buy to feed and fatten the same; and (4) to dealers or traders; that about one-third of all the live stock received are sold to the dealers; that not until after the delivery of the live stock to the commission merchants and the transportation has completely ceased, does the business of the dealers begin; that they do not buy or sell on commission, but buy and sell for cash exclusively for their own profit, that the greater part of live stock received by commission men at

the yards are in carload or trainload lots and a substantial part are not graded or conditioned to meet the specific requirements of the buyers, that the dealers after purchase put the live stock in pens assigned to them by the stockyards owner and do the sorting and classification, that the dealers buy in open market in competition with each other, that they pay the expense of the custody, care and feeding and watering the stock while they hold them, that they sell promptly and have nothing to do with the shipment of the live stock they sell from the yards to points outside.

In the bill in No. 691, the appellants aver that they are members of the Chicago Live Stock Exchange and of the National Live Stock Exchange, the members of which are dealers in all the stockyards of the country numbering 2,000, and that they bring their bill for all of them who may choose to join and take the benefit of the litigation.

The chairman of the Committee of Agriculture in reporting to the House of Representatives the bill, which became the act here in question (May 18, 1921, 67th Cong., 1st sess., Report No. 77, to accompany H. R. 6320), referred to the testimony printed in the House Committee Hearings of the 66th Congress, 2nd session, Committee on Agriculture, vol. 220–2 and 220–3, as furnishing the contemporaneous history and information of the evils to be remedied upon which the bill was framed.

It appeared from the data before the Committee that for more than two decades it had been charged that the five great packing establishments of Swift, Armour, Cudahy, Wilson and Morris, called the "Big Five", were engaged in a conspiracy in violation of the Anti-Trust Law, to control the business of the purchase of the live stock, their preparation for use in meat products, and the distribution and sale thereof in this country and abroad. In 1903, a bill in equity was filed by the United States to enjoin further conduct of this alleged conspiracy, as a

violation of the Anti-Trust Law, and an injunction issued. *United States* v. *Swift & Co.*, 122 Fed. 529. The case was taken on appeal to this court, which sustained the injunction. *Swift & Co.* v. *United States*, 196 U. S. 375. In 1912, these same defendants or their successors in business were indicted and tried for such violation of the Anti-Trust Law, and acquitted. (See House Committee Hearings before Committee on Agriculture, 1920, vol. 220-2. Subject, Meat Packer Legislation, p. 718.) It further appeared that on February 7, 1917, the President directed the Federal Trade Commission to investigate and report the facts relating to this industry and kindred subjects. The Commission reported that the "Big Five" packing firms had complete control of the trade from the producer to the consumer, had eliminated competition, and that one of the essential means by which this was made possible was their ownership of a controlling part of the stock in the stockyards companies of the country. The Commission stated its conclusions as follows:

"The big packers' control of these markets is much greater than these statistics indicate. In the first place, they are the largest and in some cases practically the only buyers at these various markets and as such hold a whip hand over the commission men who act as the intermediaries in the sale of live stock.

"The packers' power is increased by the fact that they control all the facilities through which live stock is sold to themselves. Control of stockyards comprehends control of live stock exchange buildings where commission men have their offices; control of assignment of pens to commission men; control of banks and cattle loan companies; control of terminal and switching facilities; control of yardage services and charges; control of weighing facilities; control of the disposition of dead animals and other profitable yard monopolies; and in most cases control of all packing house and other business sites. Packer owned

stockyards give these interests access to records containing confidential shipping information which is used to the disadvantage of shippers who have attempted to forward their live stock to a second market." Summary of Report of the Federal Trade Commission on Meat Packing Industry, July 3, 1918.

Following the report of the Federal Trade Commission, and before the passage of this act, a bill in equity for injunction was filed in 1920, in the Supreme Court of the District of Columbia, in which, on February 27th of that year, was entered a decree against the same "Big Five" packers consented to by them, with the saving clause that it should not be considered as an admission that they had been guilty of violations of law. The decree enjoined the packers from doing many acts in pursuance of a combination to monopolize the purchase and control the price of live stock, and the sale and distribution of meat products and of many by-products in preparation of meats and in unrelated lines, not here relevant, and from continuing to own or control, directly or indirectly, any interest in any public stockyard market company in the United States, or in any stockyard market journal, or in any stockyard terminal railroad or in any public cold storage warehouse. (House Committee Hearings, Committee on Agriculture, 1920, vol. 220–2, p. 720, "Meat Packer Legislation.")

It appears from these committee hearings that the dealers do not buy fat cattle generally or largely compete with packers in such purchases. They buy either the thin cattle known as "stockers and feeders", which they dispose of to farmers and stockfeeders, to be taken to the country for farm use and fattening, or they buy mixed lots and cull out of them the fat cattle. These they dispose of to packers either directly or through commission men. The proportion of all the hogs passing through the yards in 1919 handled by these traders, speculators or scalpers, as they are indifferently called, was 30 per cent. Of all

the butcher cattle they handled 20 per cent., of the beef cattle 10 per cent., and of the "stockers and feeders" 80 per cent. At Kansas City, this last figure was higher, reaching 95 per cent. (Committee Hearings, p. 2140.)

It was conceded that of all the live stock coming into the Chicago stockyards and going out, only a small percentage, less than 10 per cent., is shipped from or to Illinois.

The complaints of the shippers of live stock against the charges and practices, working to their prejudice, in the conduct of the stockyards, the commission men and the dealers, were: First, suppression of competition in purchases through agreement by which one packer would buy a car load or train load of cattle and turn over half of it to the only other packer buying in the local market. Second, "wiring on." A shipper would send a car load or train load of stock to one stockyard. Finding the market unsatisfactory, he would ship them further east. The packers' agents were promptly advised at the second stockyards and, controlling the price there, they made it the same as at the first stockyards, though the shipper had paid the freight and had to stand the "shrink" of the cattle from the journey. Third, the charges in the stockyards for hay and other facilities were excessive. Fourth, the duplication of commissions through the collusion of the commission men and the dealers, by which commission men would sell at a lower price to dealers than to outside buyers and drive the latter to buying from dealers through commission men, forcing two commissions. Fifth, the monopoly conferred by the stockyards owner on a company in which packers were largely interested, of buying at a fixed price of $5.00 a head all dead cattle for rendering purposes, when they were worth more. Sixth, the frequency with which commission men reported to shippers that live stock had been crippled and had to be sold in that condition at a lower price, arousing suspicion as to the fact

and if it was a fact, as to the cause of the crippling. (Pages 22, 23, 24, also 466, *et seq.*, 1086; 2125, 2244, *et seq.* Committee of House Hearings—Committee on Agriculture, vols. 220–2 and 220–3, 66th Cong., 2nd sess.)

Mr. Elwood G. Godman, with whom *Mr. Edwin W. Sims, Mr. Albert G. Welch* and *Mr. Frederic R. De Young* were on the brief, for appellants, in No. 687.

The individual appellants are not engaged in interstate commerce. *Hopkins* v. *United States,* 171 U. S. 578; *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436.

The performance of the service of buying or selling livestock for the account of others in an open, public, competitive, market, upon a fixed per-head or per-car charge for such service, cannot be said to be a transaction in interstate commerce but is a thing separate and distinct. The character of service rendered, or the commission charged, is in no way affected by the origin of the shipment, whether within or without the State of Illinois. When the livestock reaches the possession of appellants the transportation has ceased, and it does not begin again, if ever, until after the services of appellants have been fully performed and their possession parted with.

The business of appellants is as distinctly separate from interstate commerce in livestock as is that of a broker who negotiates sales of merchandise between parties resident in different States but who has no control over the shipment of the commodities dealt in. *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1; *Williams* v. *Fears,* 179 U. S. 270; *Ware & Leland* v. *Mobile County,* 209 U. S. 405.

The business of appellants is not like that of solicitors who negotiate sales of goods in one State to be shipped from another State, because when the livestock come into the possession of appellants, the transportation has

ceased. The livestock are not shipped by the owners for delivery to any definite purchaser, nor is their shipment in interstate commerce induced by the appellants. *Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21.

Paraphrasing the language in the *Knight Case:* If the appellants are engaged in interstate commerce merely because they perform a service concerning livestock which may have been, or perhaps may thereafter become, subjects of interstate commerce, are also the men who unload the hay and corn into the troughs in the cattle pens engaged in interstate commerce, and likewise the man who opens the gates leading into the various alleys and pens to permit the animals to pass from one part of the stockyards to another? The same question may be asked of the men who pour water into drinking troughs and who look after the sanitary conditions of the pens, as well as those who drive the cattle from one pen to another; and if these questions are to be answered in the affirmative, the query of Justice Brewer comes naturally to mind, "Where will the limit be?" The line of distinction heretofore prevailing between state and national control over commerce will be obliterated. *Employers' Liability Cases,* 207 U. S. 463, 502; *Hammer* v. *Dagenhart,* 247 U. S. 251.

The power to regulate commerce among the States has never been construed to give authority to Congress to fix the prices at which commodities shipped in interstate commerce could be bought or sold. If such power were exerted, it would deny to the citizens of the various States the right freely to bargain and negotiate concerning the price of the fruits of their labors. It would enable the legislative department to destroy commerce, which would be contrary to the constitutional provision which confers power to regulate. Assuming that the owner of cattle shipped from some other State to the Union Stock Yards at Chicago for sale is engaged in interstate com-

merce, does it follow that Congress has the constitutional power to legislate as to the price at which his livestock must be sold? And if not, how can the power be claimed for Congress, as it has done in the Packers and Stockyards Act, 1921, to fix the price which should be paid by such shipper for services performed for him in selling his livestock by a livestock commission merchant whom he employs at the Chicago market for that purpose? And again, how can the power be claimed for Congress to fix the price which the commission man shall charge for his services in respect to livestock which he purchases or sells upon the market? To concede such power is to deprive the appellants of any individual right to appraise or value their own services. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 361; *In re Greene,* 52 Fed. 104. *Wilson* v. *New,* 243 U. S. 332, distinguished.

The Packers and Stockyards Act, 1921, does not deal with questions of combination or conspiracy in restraint of interstate commerce but is intended to regulate and control those at which it is aimed in the conduct of interstate commerce by them. Therefore, only those who are actually themselves engaged in interstate commerce in livestock and the other products named in the title of the act come within its regulatory provisions. *Swift & Co.* v. *United States,* 196 U. S. 375, distinguished.

The act violates the Fifth Amendment because of the arbitrary classification of stockyards subject to the act. *Giozza* v. *Tiernan,* 148 U. S. 657; Willoughby on the Constitution, p. 874; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79.

The act violates the Fourth and Fifth Amendments in authorizing unreasonable searches and seizures of appellants' papers and in compelling appellants to furnish evidence against themselves. *Boyd* v. *United States,* 116 U. S. 616; *Veeder* v. *United States,* 252 Fed. 414, 418; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, 445.

No immunity is conferred by the act, and, therefore, evidence secured by the Secretary and his subordinates under the statute and regulations of the Secretary might be used against the commission man as a basis for the recovery of the penalties imposed by the act or for a prosecution to enforce its criminal provisions. Such a search, even without seizure, would subject the commission man to the danger of prosecution and would in effect compel him to give evidence against himself if the statute applies to him, and is otherwise enforcible, contrary to the provisions of the Fifth Amendment. *Hale* v. *Henkel,* 201 U. S. 43, 71.

Mr. Levy Mayer, for appellants, in No. 691.

The decision below rests upon the syllogism that "the stockyards themselves are instrumentalities of interstate commerce" and the dealers in livestock at the yards are "engaged in or participating in that commerce within the stockyards;" *ergo,* the dealers are engaged in interstate commerce and subject to the regulatory power of Congress. We submit that both premise and conclusion are wrong. The dealers are not engaged in "commerce within the stockyards."

We do not read the decisions in *United States* v. *Union Stock Yard Co.,* 226 U. S. 286, and *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, as holding that stockyards in all their divisions and ramifications are "instrumentalities of interstate commerce." Very many services that the stockyards companies render at their yards are distinct from and not at all such as fall within the Commerce Clause. See *Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21.

In *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, this court quotes approvingly from *Kidd* v. *Pearson,* 128 U. S. 1, thus: "Buying and selling and the transportation incidental thereto constitute commerce." In

the present case the undisputed facts show that transportation is neither directly, indirectly nor incidentally connected with the buying or selling of livestock by the dealers.

Swift & Co. v. *United States,* 196 U. S. 375, is not applicable. The court below picks out from the body of the opinion a sentence which is descriptive of only one link in the entire scheme which was condemned by this court. Furthermore, this court did not modify the doctrine established in *Hopkins* v. *United States,* 171 U. S. 578, or in *Anderson* v. *United States,* 171 U. S. 604. See 196 U. S. 397. *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436.

As appellants are not engaged in interstate commerce, those parts of the Stock Yards Act which seek to control and regulate their business are unconstitutional. *In re Greene,* 52 Fed. 104, 113; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436; *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *United States Fidelity & Guaranty Co.* v. *Kentucky,* 231 U. S. 394; *Wagner* v. *Covington,* 251 U. S. 95; *Danciger* v. *Cooley,* 248 U. S. 319; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 233 U. S. 334; *Bacon* v. *Illinois,* 227 U. S. 504; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas,* 204 U. S. 403; *Hopkins* v. *United States,* 171 U. S. 578; *Winslow* v. *Federal Trade Commission,* 277 Fed. 206; *Ward Baking Co.* v. *Federal Trade Commission,* 264 Fed. 330.

To paraphrase the language of this court in *Hooper* v. *California,* 155 U. S. 648, 655: If Congress can apply the power to regulate interstate commerce to all the incidents connected with that commerce, that power will soon embrace the entire sphere of mercantile activity in any way connected with trade between the States, and will soon exclude state control over contracts and commerce that are purely domestic in their nature.

Mr. Solicitor General Beck, with whom *Mr. Blackburn Esterline,* Special Assistant to the Attorney General, and *Mr. Bayard T. Hainer* were on the brief, for appellees.

The power of Congress or its appropriate agencies to prescribe, regulate or control all instrumentalities, or parts thereof, by which interstate commerce is carried on or conducted is now thoroughly established.

That the Union Stock Yard & Transit Company of Chicago, which furnishes terminal facilities at the greatest livestock market in the world, is now embraced within, and constitutes a part of, those instrumentalities of interstate commerce as fully and completely as if they were an integral part of a great railroad system, and should be regulated as such, is beyond question. *United States* v. *Union Stock Yard Co.,* 226 U. S. 286, 303, 306. See also *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.,* 52 I. C. C. 209, 224; *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.,* 58 I. C. C. 164, 166, 168; *Live Stock Loading and Unloading Charges,* 61 I. C. C. 223; *Union Stock Yards Co.* v. *United States,* 169 Fed. 406; *United States* v. *Union Stock Yards Co.,* 161 Fed. 919; *United States* v. *Sioux City Stock Yards,* 162 Fed. 556; *Covington Stock Yards* v. *Keith,* 139 Fed. 128; *Walker* v. *Keenan,* 73 Fed. 755.

The commission merchants and traders or dealers operating in the Union Stock Yards are so completely identified with and so directly a part of the current of interstate commerce of livestock flowing through those yards as clearly to bring them and their transactions within the power of Congress to regulate under the Packers and Stockyards Act.

That act is a combination of the principles embraced within both the Act to Regulate Commerce as amended and the Sherman Anti-Trust Act. By a single statute Congress embraced both the transportation of livestock and the commercial transactions therein in interstate com-

merce, including the meat-packing industries—in all of their multitudinous aspects. Congress also embraced within the act the legal principles announced in many opinions of this court. See, e. g., *Swift & Co.* v. *United States,* 196 U. S. 375.

Congress, having legislated on a vast and vital subject and all of its ramifications as an entirety, the judicial review should go on lines no less extensive. See *United States* v. *Brigantine William* (Dist. Ct., Mass., 1808), 2 Hall's Law Journal, 255, 271. The present case is not one to be examined, as opposing counsel would argue, through the small end of a telescope.

The question here is not whether the commission merchants and dealers should be included within the act by judicial interpretation, as in *Hopkins* v. *United States,* 171 U. S. 578, but whether Congress had the power to designate them and their transactions as part of the "current of commerce" and as such within the act. Even in the absence of such specific designation, they might well be included, for they form as much a part of the "current of commerce" as the railroads or the stockyards company. *Swift & Co.* v. *United States, supra,* distinguishing *Hopkins* v. *United States, supra,* and *Anderson* v. *United States,* 171 U. S. 604.

Hopkins v. *United States* itself announced the principle on which the present legislation rests, when the court said (p. 597) that the term "interstate commerce," which is one of "very large significance," comprehends "intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri,* 91 U. S. 275; *Mobile County* v. *Kimball,* 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *Hooper* v. *California,* 155 U. S. 648, 653; *United States* v.

Knight Co., 156 U. S. 1." See also *Chicago Board of Trade* v. *United States*, 246 U. S. 231.

The shipper is a consignor of interstate commerce, who delivers to an interstate carrier livestock consigned to a consignee of interstate commerce; and during the entire time the livestock are in the stockyards they are in the custody of the Union Stock Yard & Transit Company, also an interstate carrier, which unloads, feeds, waters, and beds them in its chutes, pens and other facilities. The latter company deals with the railroads and the commission merchant who represents the consignor. If the relation of the Stock Yard Company and the consignor is that of shipper and carrier in interstate commerce, how may the commission merchant who conducts the sale and makes the payments to these common carriers of all their charges be eliminated? The commission merchants pay the carriers the full charges for freight, yardage, feed and service, and if the carriers should refund to certain merchants parts of these rates, could the charge of discrimination or rebating be defended on the ground that so far as the commission merchants were concerned the transactions were not in interstate commerce? It is useful to bear in mind that the entire "current of commerce" flows through the Union Stock Yards and that all transactions in connection therewith are conducted within the enclosure of the Union Stock Yards. That is likewise true of the purchases and sales of the traders. While this "current of commerce" is swirling around within the 550 acres of enclosure of the Union Stock Yards, it is the judgment of Congress that every person and transaction which constitutes a continuing part of that current is subject to the Packers and Stockyards Act. These appellants are in much the same position as if consignor, consignee, commission merchants and traders all got aboard the trains and traveled with the livestock, say from Denver to Chicago, and traded therein

en route. The recent decisions of the court abundantly sustain the power of Congress so to regulate such commerce. *United States* v. *Ferger,* 250 U. S. 199, 203; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50.

In exempting from its provisions stockyards of which the area normally available for handling livestock is less than 20,000 square feet, the act does not make an arbitrary classification in violation of the Fifth Amendment. *Wilson* v. *New,* 243 U. S. 332.

The provisions of the act requiring a commission merchant who falls within the classification of market agency to register by giving to the Secretary of Agriculture his name and the character of his business, and the kind of stockyard service, if any, which he furnishes at such stockyard (§ 303); file a schedule of rates and charges (§ 306); and keep such accounts, etc., as fully and correctly disclose all transactions involved in his business (§ 401), do not violate the Fourth Amendment, prohibiting unreasonable searches and seizures.

The form of the legislation is taken from the Interstate Commerce Act. Section 20 of the Act to Regulate Commerce (24 Stat. 379, 386; 34 Stat. 584, 593; 41 Stat. 456, 493) contains provisions for reports far more searching than any contained in this act. *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194.

The Packers and Stockyards Act provides that all rates, charges, and services shall be just, reasonable, and nondiscriminatory, and the provisions above referred to are merely supervisory or regulatory powers which have precedent in the Interstate Commerce Acts.

At this point it is noteworthy that Congress adopted for and wrapped around the Packers and Stockyards Act like

a cloak the same court procedure for the enforcement or annulment of the orders of the Secretary as obtains for the enforcement or annulment of the orders of the Commission (§§ 315, 316; see also House Committee Report, pp. 4–11).

Moreover, the court will not attempt to pass on the reasonableness of the rules and regulations of the Secretary of Agriculture, or to define his powers by a construction of the act, in advance of a concrete case raising a specific issue, as held in *Interstate Commerce Commission* v. *Goodrich Transit Co., supra,* and *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158.

Mr. Chief Justice Taft, after making the foregoing statement of the case, delivered the opinion of the court.

Section 316 of the Packers and Stockyards Act of 1921 makes applicable to suits for injunction against the orders of the Secretary of Agriculture, the same procedure, original and appellate, provided in the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220, for suits for injunction against the orders of the Interstate Commerce Commission. The latter act gives a right to a direct appeal to this court from the granting or refusing an interlocutory injunction. Hence the appeals herein are properly prosecuted.

In each bill the averments are sufficient, if the act be invalid, to show equitable grounds for injunction in the severe penalties incurred for failure to comply with the act before opportunity can be given to test its validity. *Ex parte Young,* 209 U. S. 123.

We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees on Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environ-

ment in which Congress passed it. It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Danciger* v. *Cooley,* 248 U. S. 319, 322.

The Packers and Stockyards Act of 1921 seeks to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice. An appeal is given to the Circuit Court of Appeals from these findings and orders. They are to be enforced by the District Court by penalty if not appealed from and if disobeyed. Title III concerns the stockyards and provides for the supervision and control of the facilities furnished therein in connection with the receipt, purchase, sale on commission basis or otherwise, of live stock and its care, shipment, weighing or handling in interstate commerce. A stockyards is defined to be a place conducted for profit as a public market, with pens in which live stock are received and kept for sale or shipment in interstate commerce. Yards with a superficial area of less than 20,000 square feet are not within the act. Stockyard owners, commission men and dealers are recognized and defined and the two latter are required to register. The act requires that all rates and charges for services and facilities in the stockyards and all practices in

connection with the live stock passing through the yards shall be just, reasonable, non-discriminatory and non-deceptive, and that a schedule of such charges shall be kept open for public inspection and only be changed after ten days' notice to the Secretary of Agriculture, who is made a tribunal to inquire as to the justice, reasonableness and non-discriminatory or non-deceptive character of every charge and practice, and to order that it cease, if found to offend, with the same provisions for appeal and enforcement in court as in the case of offending packers. The Secretary is given power to make rules and regulations to carry out the provisions, to fix rates or a minimum or maximum thereof and to prescribe how every packer, stockyard owner, commission man and dealer shall keep accounts.

The bills aver that the Secretary has given the notice which requires appellants to register and has announced proposed rules and regulations, prescribing the form of rate schedules, the required reports, including daily accounts of receipts, sales and shipments, forbidding misleading reports to depress or enhance prices, prescribing proper feed and care of live stock, and forbidding a commission man to sell live stock to another in whose business he is interested, without disclosing such interest to his principal.

The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to

the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper whose live stock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation to the prejudice of the absent shipper and owner in the neglect of the live stock, in the *mala fides* of the sale, in the exorbitant prices obtained, in the unreasonableness of the charges for services rendered.

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by

carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the live stock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn* v. *Illinois*, 94 U. S. 113. Nor is there any doubt that in the receipt of live stock by rail and in their delivery by rail the stockyards are an interstate commerce

agency. *United States* v. *Union Stock Yard Co.*, 226 U. S. 286. The only question here is whether the business done in the stockyards between the receipt of the live stock in the yards and the shipment of them therefrom is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. A similar question has been before this court and had great consideration in *Swift & Co.* v. *United States*, 196 U. S. 375. The judgment in that case gives a clear and comprehensive exposition which leaves to us in this case little but the obvious application of the principles there declared.

The *Swift Case* presented to this court the sufficiency of a bill in equity brought against substantially the same packing firms as those against whom this legislation is chiefly directed, charging them as a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they would sell, and to that end to restrict shipments of meat when necessary, to establish a uniform credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads to the exclusion of competitors, and all this in a conspiracy and single connected scheme to monopolize the supply and distribution of fresh meats throughout the United States. In holding the bill good, this court said (p. 396):

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. . . . It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound to-

gether as parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin*, 196 U. S. 194, 206. The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt."

Again (pp. 396 and 397):

"Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. . . . Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales."

Again (pp. 398 and 399), in answer to the objection that what was charged did not constitute a case involving commerce among the States, the court said:

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle."

The application of the commerce clause of the Constitution in the *Swift Case* was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great

central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

The principles of the *Swift Case* have become a fixed rule of this court in the construction and application of the commerce clause. Its latest expression on the subject is found in *Lemke* v. *Farmers Grain Co., ante,* 50. In that case it was held, on the authority of the *Swift Case,* that the delivery and sale of wheat by farmers to local grain elevators in North Dakota to be shipped to Minneapolis, when practically all the wheat purchased by such elevators was so shipped and the price was fixed by that in the Minneapolis market less profit and freight, constituted a course of business and determined the interstate character of the transaction. Accordingly a state statute which sought to regulate the price and profit of such sales and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause. Similar confirmation of the principle of the *Swift Case* is to be found in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 113; *United States* v.

Reading Co., 226 U. S. 324, 367, 368; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, 108; and *Loewe* v. *Lawlor*, 208 U. S. 274, 301.

It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the *Swift Case*. The recital in § 2, par. b of Title I of the act quoted in the margin leaves no doubt of this.[1] The act deals with the same current of business, and the same practical conception of interstate commerce.

Of course, what we are considering here is not a bill in equity or an indictment charging conspiracy to obstruct interstate commerce, but a law. The language of the law shows that what Congress had in mind primarily was to prevent such conspiracies by supervision of the agencies which would be likely to be employed in it. If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the *Swift Case*, certainly it may provide regulation to prevent their formation. The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably

[1] The first title, § 2, paragraph b, provides that "for the purpose of this Act . . . a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries, whereby live stock [and its products] are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of live stock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act."

and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.

In *United States* v. *Ferger,* 250 U. S. 199, the validity of an act of Congress punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce was in question. It was contended that there was and could be no commerce in a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the act, this court, speaking through Chief Justice White, answered the objection by saying:

"But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs,* 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate

commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

The Transportation Act of 1920 presents a close analogy to this case. It authorizes supervision by the Interstate Commerce Commission of intrastate commerce where it is so carried on as to work undue, unreasonable advantage or preference in favor of persons or localities in intrastate commerce, as against those in interstate commerce, or any undue, unjust or unreasonable discrimination against interstate commerce itself. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. That case followed the *Minnesota Rate Cases*, 230 U. S. 352, 432, 433; *Shreveport Case*, 234 U. S. 342, 351; *Illinois Central R. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, 223 U. S. 1, 48, 51. The principle of these cases is thus clearly stated by the court in the *Minnesota Rate Cases* (p. 399):

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In § 311 of the act, quoted in the margin,[1] Congress gives to the Secretary of Agriculture in respect to intrastate transactions that affect prejudicially interstate commerce under his protection, the same powers given to the Interstate Commerce Commission in respect to intrastate commerce which affects prejudicially interstate railroad commerce in paragraph 4, § 13 of the Interstate Commerce Act, as amended in § 416 of the Transportation Act of 1920. This was the paragraph and section which were enforced in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co., supra,* and the validity of which was upheld by this court.

Counsel for appellants cite cases to show that transactions like those of the commission men or dealers here are not interstate commerce or within the power of Congress to regulate. The chief of these are *Hopkins* v.

[1] Section 311 is as follows:

"Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of live stock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in live stock on the one hand and interstate or foreign commerce in live stock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in live stock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

United States, 171 U. S. 578, and *Anderson* v. *United States,* 171 U. S. 604. These cases were considered in the *Swift Case* and disposed of by the court as follows (p. 397):

"So, again, the line is distinct between this case and *Hopkins* v. *United States,* 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. In *Anderson* v. *United States,* 171 U. S. 604, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to recognize yard-traders, who were not members of their association. Any yard-trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act. The present case is more like *Montague & Co.* v. *Lowry,* 193 U. S. 38."

It is clear from this that if the bill in the *Swift Case* had averred that control of the stockyards and the commission men was one of the means used by the packers to make arbitrary prices in their plan of monopolizing the interstate commerce, the acts of the stockyards owners and commission men would have been regarded as directly affecting interstate commerce and within the Anti-Trust Act. Congress has found an evil to be apprehended and to be prevented by the act here in question, in the

use and control of stockyards and the commission men to promote a packers' monopoly of interstate commerce. The act finds and imports this injurious direct effect of such agencies upon interstate commerce just as the intent of the conspiracy charged in the indictment in the *Swift Case* tied together the parts of the scheme there attacked and imported their direct effect upon interstate commerce.

Again, if the result of the combination of commission men in the *Hopkins Case* had been to impose exorbitant charges on the passage of the live stock through the stockyards from one State to another, the case would have been different, as the court suggests. The effect on interstate commerce in such a case would have been direct. Similarly in the *Anderson Case* if the combination of dealers had been directed to collusion with the commission men to secure sales at unduly low prices to the dealers and to double commissions, or to practice any other fraud or oppression calculated to decrease the price received by the shipper and increase the price to the purchaser in the passage of live stock through the stockyards in interstate commerce, this would have been a direct burden on such commerce and within the Anti-Trust Act.

The other cases relied on by appellants are less relevant to this discussion than the *Anderson* and *Hopkins Cases*. Some of them are tax cases. As to them it is well to bear in mind the words of the court in the *Swift Case* (p. 400):

"But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."

Thus, take the case of *Bacon* v. *Illinois*, 227 U. S. 504. Bacon had purchased grain in transit from a western State to the east. He exercised the power under his con-

tract to stop the grain in Illinois and put it in a grain elevator there. He intended to send it on to some other State for sale. He might have changed his mind. He did, however, after a time, send it out of the State. The grain was taxed while it was in Illinois. The question was whether it was immune from taxation because in transit in interstate commerce. Following the cases of *Woodruff* v. *Parham,* 8 Wall. 123; *Coe* v. *Errol,* 116 U. S. 517; *Brown* v. *Houston,* 114 U. S. 622; *Pittsburgh & Southern Coal Co.* v. *Bates,* 156 U. S. 577; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82, 93, 96; *Kelley* v. *Rhoads,* 188 U. S. 1, 5, 7; *General Oil Co.* v. *Crain,* 209 U. S. 211; and *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, it was held that property in a State which its owner intends to transport to some other State, but which is not in actual transit and in respect to the disposition of which he may change his mind is not in interstate commerce just because of the intention of its owner, and may, therefore, be taxed by the State where it is. The court brought out the distinction between such cases and this in the remark (p. 516):

"The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority."

Moreover, it will be noted that even in tax cases where the tax is directed against a commodity in an actual flowing and constant stream out of a State from which the owner may withdraw part of it for use or sale in the State before it reaches the state border, we have held that a tax on the flow is a burden on interstate commerce which the State may not impose because such flow in interstate commerce is an established course of business. *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Eureka*

Pipe Line Co. v. *Hallanan,* 257 U. S. 265. In the former, the court summed up as follows:

"In short, the great body of the gas starts for points outside the State and goes to them. That the necessities of business require a much smaller amount destined to points within the State to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line. *Ohio R. R. Commission* v. *Worthington,* 225 U. S. 101, 108. *United States* v. *Reading Co.,* 226 U. S. 324, 367. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 113."

The case of *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436, is easily distinguished from the one at the bar. There it was merely held that an attempt of a publisher to monopolize the business of publishing advertising matter in magazines resulting in refusal of such publisher to accept advertisements in his magazines was too remote in its relation to the interstate commerce of circulating magazines. The court said:

"This case is wholly unlike *International Textbook Co.* v. *Pigg,* 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the sub-

ject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation."

Pennsylvania R. R. Co. v. *Knight,* 192 U. S. 21, relied on by counsel for appellants and said to be exactly applicable to the case at bar, was an effort by the Pennsylvania Railroad Company to secure immunity from city regulation for a cab system which it ran in New York to and from its station to points in New York City, on the ground that it was part of interstate commerce. This court held that because it was independent of the railroad transportation, and not included in the contract of railroad carriage, it did not come within interstate commerce. The case was distinguished in the *Swift Case* (p. 401) from cartage for delivery of the goods when part of the contemplated transit. There is nothing in the case to indicate that if such an agency could be and were used in a conspiracy unduly and constantly to monopolize interstate passenger traffic, it might not be brought within federal restraint.

As already noted, the word "commerce" when used in the act is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the act clearly within congressional power and valid.

Other objections are made to the act and its provisions as violative of other limitations of the Constitution, but the only one seriously pressed was that based on the Commerce Clause and we do not deem it necessary to discuss the others.

The orders of the District Court refusing the interlocutory injunctions are

Affirmed.

Mr. Justice McReynolds dissents.

Mr. Justice Day did not sit in these cases and took no part in their decision.

Counsel for Plaintiff in Error.

SHWAB, EXECUTOR OF DICKEL, *v.* DOYLE, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FOURTH COLLECTION DISTRICT OF MICHIGAN.

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

No. 200. Argued April 17, 1922.—Decided May 1, 1922.

1. Laws are not to be considered as applying to cases that arose before their passage unless that intention be clearly expressed. P. 534.
2. The Act of September 8, 1916, c. 463, § 202, 39 Stat. 777, imposed a tax on the transfer of the net estate of every decedent dying after its passage "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death," excepting *bona fide* sales for a fair consideration in money or money's worth, and further declared, that "any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death." *Held*, that the act does not apply to transactions consummated before its passage. P. 534.
3. The reënactment of these provisions with an added provision that the transfer or trust should be taxed whether made before or after the passage of the act (February 24, 1919, c. 18, § 402 (c), 40 Stat. 1097) is not a construction of the earlier act as retroactive but the expression of a new purpose. P. 536.
4. Tax measures are strictly construed. P. 536.

269 Fed. 321, reversed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment for the defendant in error in an action to recover a sum exacted by him as an estate tax.

Mr. Willard F. Keeney and *Mr. John J. Vertrees*, with whom *Mr. Julius H. Amberg*, *Mr. Roger C. Butterfield* and *Mr. William O. Vertrees* were on the briefs, for plaintiff in error.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for defendant in error.

The act is within the taxing power of Congress.

It plainly intends to cover transfers made before its passage.

The words "at any time" have often been construed and given a broad signification. *Appeal of Snyder,* 95 Pa. St. 174; *New Rochelle* v. *Clark,* 65 Hun, 140; *Raymond* v. *Wathen,* 142 Ind. 367; *Cohen* v. *Burgess,* 44 Ill. App. 206; *Slaughter* v. *Moore,* 2 Del. Ch. 350.

Statutes having a retroactive effect were familiar when this law was passed. See English Succession Duty Act of 1853, 16 and 17 Vict., c. 51, §§ 2, 10, as construed in *Wilcox* v. *Smith,* 4 Drew. 50; *Attorney General* v. *Fitzjohn,* 2 H. & N. 465; *Attorney General* v. *Lord Middleton,* 3 H. & N. 125; Succession Duty Act, passed by Congress in 1864, c. 173, §§ 126, 150, 13 Stat. 223, 287, 291, as construed in *Wright* v. *Blakeslee,* 101 U. S. 174; English Customs and Inland Revenue Act of 1881, 44 and 45 Vict., c. 12, § 38, subsec. (a), par. (a); 52 and 53 Vict., c. 7, § 11, subsec. (1), construed in *Attorney General* v. *Booth,* 63 L. J., Q. B. 356; *In re Foster,* 1 Ch. [1897] 484; *In re Beddington,* Ch. Div. [1900] 771; Finance Act of 1894, 57 and 58 Vict., c. 30; Finance Act of 1909–1910, Edw. VII, c. 8, § 59 (1).

A statute which clearly imposes a retroactive tax will be sustained. *Stockdale* v. *The Insurance Companies,* 20 Wall. 323, 331, 332; *Wright* v. *Blakeslee,* 101 U. S. 174, 176, 177; *Cahen* v. *Brewster,* 203 U. S. 543, 549; *Billings* v. *United States,* 232 U. S. 261; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 20; *Chanler* v. *Kelsey,* 205 U. S. 466, 473, 479.

The insertion in the Act of 1919, 40 Stat. 1057–1097, of the specific provision requiring that transfers made in contemplation of death shall be included "whether such

transfer or trust is made or created before or after the passage of this act," was intended as a legislative construction of the previous act, and was not intended to include a *casus omissus*. *United States* v. *Field*, 256 U. S. 257, and *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, do not apply, because the specific provisions of the later acts there construed were not embraced in the general provisions of the former act, while here the contrary is true. This case is governed by *Bailey* v. *Clark*, 21 Wall. 284, 288; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 68, 77; *United States* v. *Coulby*, 251 Fed. 982, 985; *Matter of Reynolds Estate*, 169 Cal. 600.

The statute did not contemplate that a fraudulent motive to avoid the payment of taxes was necessary for the transfer to be taxable. Ross on Inheritance Taxes, § 111.

The phrase "in contemplation of death" does not refer exclusively to gifts *causa mortis*, nor alone to gifts made under the apprehension of death arising from some present disease or some other impending peril.

The court did not err in directing the jury to consider the presumption declared by the statute that the trust was created in contemplation of death if made within two years before the death.

Mr. Garret W. McEnerney, by leave of court, filed a brief as *amicus curiae*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Augusta Dickel by a deed dated April 21, 1915, assigned and delivered to the Detroit Trust Company, stocks, bonds or securities of the declared value of $1,000,000—with all their unmatured coupons, and the proceeds to be derived therefrom, both principal and income, in trust to invest and reinvest and to pay the net income for life to

Victor E. Shwab or on his written order. After his death the net income was directed to be paid to six beneficiaries, his children. A power of delegating and selling or exchanging all securities was given to Shwab, and of reinvestment. During the life of Shwab the net income was to be paid to him or his order. After his death the trust was to continue during the lives of the beneficiaries and the net income was to be paid to them during their respective lives in equal shares.

There were other rights and powers given to plaintiff and the beneficiaries not necessary to mention.

The trust deed was accepted by the Detroit Trust Company on or before June 3, 1915.

Augusta Dickel died September 16, 1916, possessed of an estate of $800,000. Seven days before her death Congress passed an act entitled, "Estate Tax Act", 39 Stat. 777–780. The act provided that, according to certain percentages of the value of the net estate, a tax was to be imposed upon the transfer of the net estate of every decedent dying after the passage of the act, "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; . . ."

Under the assumption that the act was applicable to the deed made by Augusta Dickel to the Detroit Trust Company, a tax was assessed and exacted from plaintiff in error (here called plaintiff) in the sum of $56,548.41.

Plaintiff paid it under protest and then to recover it brought this action in the District Court of the United States for the Western District of Michigan, Southern Division.

A jury being impaneled to try the case, the plaintiff presented his contentions in requests for charges. These were: (1) To find for plaintiff. (2) Upon refusal of the court to so charge but not otherwise, that the deed of Mrs. Dickel to the Detroit Trust Company took effect more than a year before the enactment of the Act of September 8, 1916, that is, took effect immediately, not in possession or enjoyment at or after the death of Mrs. Dickel. (3) The words " in contemplation of death " do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril. (4) If Mrs. Dickel when she made the trust deed was not in that apprehension arising from that condition of body or of an impending peril, it was not made in contemplation of death within the meaning of the act of Congress. (5) Mrs. Dickel having made the deed before the act of Congress was passed, her purpose was not to defeat or evade the Federal Revenue Law.

There were other requests for instructions to the jury not material to be considered except that the act of Congress was not retrospective in character and, therefore, did not impose a tax on the deed from Mrs. Dickel to the Trust Company. And that if it could be considered to have that character and effect, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use without just compensation, contrary to the Fifth Amendment of the Constitution of the United States.

The court ruled against all of the requests so far as the court considered them as presenting questions of law, but considered that whether the trust deed was made in con-

templation of death was a question for the jury and submitted it to them, with aiding and defining explanations, and concluded by declaring, "the whole question is the question whether the transfer was made in contemplation of death; that is all there is to it."

The verdict of the jury was in favor of the defendant, upon which judgment was duly entered. It was affirmed by the Circuit Court of Appeals (269 Fed. 321), to the action of which this writ of error is directed.

Plaintiff urges against the judgment of the Circuit Court of Appeals all of the contentions presented in his requests made to the District Court for instructions to the jury, but so diverse and extensive consideration is only necessary if the act of Congress be of retrospective operation. To that proposition we shall, therefore, address our attention.

The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman* v. *Martinez,* 184 U. S. 578; *White* v. *United States,* 191 U. S. 545; *Gould* v. *Gould,* 245 U. S. 151; Story, Const., § 1398. The comment of Story is, "retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.

The Act of September 8, 1916, is within the condemnation.

There is certainly in it no declaration of retroactivity, "clear, strong and imperative", which is the condition expressed in *United States* v. *Heth,* 3 Cranch, 398, 413; also *United States* v. *Burr,* 159 U. S. 78, 82–83.

If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected.

The circumstances of this case impel to such selection. If retroactivity be accepted, what shall mark its limit? The Circuit Court of Appeals found the interrogation not troublesome. It said, "Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision." In other words, the sense of courts and juries, good or otherwise, might, against the words of the statute, and against what might be the evidence in the case, unhelped by the presumption declared, fix the years of its retrospect. This would seem to make the difficulty or ease of proof a substitute for the condition which the statute makes necessary to the imposition of the tax, that is, the disposition with which the transfer is made; and certainly whether that disposition exist at an instant before death or years before death, it is a condition of the tax.

The construction of the Government is more tenable though more unrestrained. It accepted in bold consistency, at the oral argument, the challenge of twenty-five years, and a ruling of the Commissioner of Internal Revenue, in bolder confidence, extends the statute to "transfers of any kind made in contemplation of death *at any time whatsoever* [italics ours] prior to September 8, 1916." The sole test in the opinion of that officer is

"the date of the death of the decedent." He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer. Indeed, its simplicity attracts anyone. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of courts or juries, in repugnance or revolt, taking liberties with the act to relieve from its exactions to satisfy the demands of revenue.

If Congress, however, had the purpose assigned by the Commissioner it should have declared it; when it had that purpose it did declare it. In the Revenue Act of 1918, 40 Stat. 1097, it reënacted § 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed whether "made or created before or after the passage of" the act. And we cannot accept the explanation that this was an elucidation of the Act of 1916, and not an addition to it, as averred by defendant, but regard the Act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it.

This we have seen is the declaration of the cases and this the basis of our decision, that is, has determined our judgment against the retroactive operation of the statute. There are adverse considerations and the Government has urged them all. To enter into a detail of them or of the cases cited to sustain them and of those cited to oppose them, either directly or in tendency, and the examples of the States for and against them, would extend this opinion to repellent length. We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of Congress, and have resolved that it should be not construed to apply to

transactions completed when the act became a law. And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916.

Judgment reversed.

UNION TRUST COMPANY OF SAN FRANCISCO ET AL., AS EXECUTORS OF LACHMAN, *v.* WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.

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

No. 236. Argued April 17, 18, 1922.—Decided May 1, 1922.

1. The Estate Tax Act of 1916, did not apply to transfers in contemplation of death made before its passage. P. 540. *Shwab* v. *Doyle, ante,* 529.
2. A collector of internal revenue is not liable to an action for recovery of a tax collected by his predecessor in office. P. 541. *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1.

273 Fed. 733, reversed.

ERROR to a judgment of the District Court sustaining a demurrer and dismissing the complaint in an action to recover a sum collected as an estate tax.

Mr. Garret W. McEnerney, with whom *Mr. William D. Guthrie, Mr. E. S. Heller, Mr. Isaac Frohman* and *Mr. Bernard Hershkopf* were on the brief, for plaintiffs in error.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for defendants in error.

Mr. Charles E. Hughes, Jr., and *Mr. Allen S. Hubbard*, by leave of court, filed a brief as *amici curiae*.

Mr. Mansfield Ferry, *Mr. C. Alexander Capron* and *Mr. Russell L. Bradford*, by leave of court, filed a brief as *amici curiae*.

Mr. J. Wallace Bryan and *Mr. Charles McH. Howard*, by leave of court, filed a brief as *amici curiae*.

Mr. Justice McKenna delivered the opinion of the court.

This case was argued at the same time and submitted with No. 200, *Shwab* v. *Doyle*, just decided, *ante*, 529. It involves, as that case did, the Estate Tax Act of September 8, 1916, 39 Stat. 777, and its different facts illustrate and aid the principle upon which that case was decided.

Plaintiffs in error are executors of the last will and testament of Henriette S. Lachman, deceased. They were also parties to a trust deed made by her during her lifetime. They sued defendant in error Wardell, he then being United States Collector of Internal Revenue for the First District of California, to recover the sum of $4,545.50, that being the amount of a tax assessed against the estate of Henriette S. Lachman upon the value of 4,985 shares of stock transferred in trust by Henriette S. Lachman to trustees, upon the assumption that the Act of Congress of September 8, 1916, was applicable to the trust.

The following is a summary of the facts stated narratively. On May 31, 1901, Henriette S. Lachman was the owner of 7,475 shares of the capital stock of the S. & H. Lachman Estate, a corporation. On that date she executed and delivered to Albert Lachman and Henry Lachman, her sons, the following instrument:

"Alameda, Cal., May 31, 1901.

" To Albert Lachman and Henry Lachman, my sons:

" This is to certify that I have delivered to you seven thousand four hundred and seventy-five (7,475) shares of

the capital stock of the S. & H. Lachman Estate, represented by certificates numbers eleven (11), twelve (12) and thirteen (13) respectively, however, upon the following trust:

"To pay to me during my lifetime, all the income earned and derived therefrom, and, upon my death, to deliver two thousand four hundred and ninety (2,490) shares, represented by certificates number eleven (11) unto Henry Lachman, thenceforth for his absolute property; two thousand four hundred and ninety-five (2,495) shares, represented by certificate number thirteen (13) unto Albert Lachman, thenceforth for his absolute property; and yourselves, to-wit, Albert Lachman and Henry Lachman, to hold two thousand four hundred and ninety (2,490) shares, represented by certificate number twelve (12) upon my death, in trust paying the income derived therefrom unto my daughter, Rebecca, wife of Leo Metzger, and upon the death of my said daughter, the income and earnings derived from said two thousand four hundred and ninety (2,490) shares shall be held, or expended, by you, according to your judgment, for the benefit of my grandchildren, the children of my said daughter, Rebecca Metzger, and upon the youngest of said children attaining the age of majority, all the then surviving children of my said daughter, Rebecca Metzger, shall be immediately entitled to said two thousand four hundred and ninety (2,490) shares in equal proportions.

Henriette Lachman."

The requirements of the deed were performed upon the contingencies occurring for which it provided.

On November 14, 1916, Henriette S. Lachman died, being then a resident of Alameda County, California, leaving an estate of the value of $302,963.64, which included 2,490 shares of the stock that passed to her upon the death of her husband and 25 shares of stock in a business that had been conducted by her husband, but did not include the transfer of the 4,985 shares included in the trust deed.

The will was duly probated and the tax under the Act of September 8, 1916, was paid on the property which passed under her will, but no tax was paid on the 4,985 shares transferred 15 years before by the trust deed.

The Commissioner having ruled that those shares were subject to a tax, assessed against them the sum of $4,545.50. It was paid under protest and this action was brought for its recovery.

Wardell demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him. The demurrer was sustained and judgment entered dismissing the complaint. 273 Fed. 733.

Stating the contention of the plaintiffs, the court said it was that "the act should not be construed as to include transfers made prior to its passage, and that, if so construed, the act is unconstitutional." The court observed that "both of these questions were determined adversely to the plaintiffs by the Circuit Court of Appeals for the Eighth Circuit in *Shwab, Executor,* v. *Doyle,* 269 Fed. 321." And it said further, "In that case the transfer was made in contemplation of death, whereas in the present case the transfer was intended to take effect in possession or enjoyment at or after death; but manifestly the same rule of construction will apply to both provisions, and the same rule of constitutional validity."

The court, while apparently relying on *Shwab* v. *Doyle,* declared that it entertained "no doubt that the act was intended to operate retrospectively, and a contrary construction could only be justified on the principle that such a construction would render the act unconstitutional."

The same contentions are made against and for the ruling of the court as were made in *Shwab* v. *Doyle, ante,* 529. It is not necessary to repeat them. They are, with but verbal variations, the same as in *Shwab* v. *Doyle,*

and the Collector so considering, submits this case upon the brief in that.

We have there stated them and passed judgment upon that which we think determines the case, that is, the retroactivity of the Act of September 8, 1916. The facts in this case fortify the reasoning in that. In this case the act is given operation against an instrument executed 15 years before the passage of the act.

The record exhibits proceedings that should be noticed. The demurrer of Wardell was sustained to the complaint, and a judgment of dismissal entered January 13, 1921.

On February 2, 1921, plaintiffs gave notice of a motion to substitute John L. Flynn as defendant in the place and stead of Wardell, in so far as the action was against Wardell in his official capacity, and to permit it to be continued and prosecuted against him so far as it was against him personally.

The grounds of the motion were stated to be that he had resigned and Flynn had been appointed his successor and was then the acting Collector.

On February 7, 1921, the motion was granted. The order of the court recited the resignation of Wardell and the succession of Flynn. And it being uncertain as to whether this was a proper case for the substitution of Flynn or was one which should proceed against Wardell, and it appearing to the court on motion of plaintiffs that it was necessary for the survivor to obtain a settlement of the questions involved, it was ordered that so far as the action was against Wardell in his official capacity, it might be sustained against Flynn as his successor, and that so far as it was against Wardell personally, it should be continued against him. And it was ordered that the action should thereafter proceed against Flynn and Wardell without further pleadings or process.

On February 9, 1921, Flynn filed an appearance by attorneys which recited that he had been substituted in

the place of Wardell in so far as the action was against Wardell in his official capacity, and thereby appeared in the action as such defendant.

It will be observed that there was no resistance to the motion of substitution of Flynn nor exception by him, and that he almost immediately appeared in the action in compliance with the order of the court. The subsequent proceedings were directed as much against him as against Wardell, the bond upon the writ of error running to both.

However, this court decided in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, that a suit may not be brought against a Collector of Internal Revenue for the recovery of a tax, in the collection and disbursement of which such officer had no agency. We think the bringing of Flynn into the case was error. Therefore, upon the return of the case to the District Court, he shall be permitted to set up the defense of non-liability, if he be so advised, and, if he set up the defense, it shall be ruled as sufficient for the reasons we have given.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

LEVY ET AL. *v.* WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.

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

No. 303. Argued April 18, 1922.—Decided May 1, 1922.

Decided upon the authority of *Shwab* v. *Doyle, ante,* 529, and *Union Trust Co.* v. *Wardell, ante,* 537.

Reversed.

ERROR to a judgment of the District Court sustaining a demurrer and dismissing the complaint in an action to recover a sum collected as an estate tax.

Mr. Edward F. Treadwell for plaintiffs in error.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for defendants in error.

Mr. Charles E. Hughes, Jr., and *Mr. Allen S. Hubbard,* by leave of court, filed a brief as *amici curiae.*

Mr. Justice McKenna delivered the opinion of the court.

The case was determined in the court below upon demurrer to the complaint. The complainant alleged that on the 19th day of December, 1902, and for sometime prior thereto, Henriette Levy was the owner of 22,014 shares of the capital stock of the Levy Estate Company, a corporation. On that date she conveyed to the plaintiffs Harriet L. Levy, Pauline Jacobs and Adeline Salinger, each 5,000 shares of that stock. On the 14th day of January, 1903, she conveyed to these plaintiffs 2,660 shares each.

On the 17th day of January, 1907, she and the plaintiffs entered into an agreement, which recited errors made in the issue of the stock, and agreed that the number of shares to which each was entitled was as follows: To Henriette Levy 10 shares, to Harriet L. Levy 7,328 shares, to Pauline Jacobs 7,338 shares, to Adeline Salinger 7,337 shares and to Ruth Salinger 1 share.

On the same date the agreement was carried out by the board of directors of the company, and on that date Henriette Levy conveyed her 10 shares to Harriet L. Levy.

The transfers of the stock to plaintiffs were complete and there were no agreements or stipulations by which Henriette Levy would be entitled to a return of the stock except that the plaintiffs promised and agreed to pay to her the dividends accruing thereon during her lifetime,

she, however, retaining no testamentary disposition or any legal right whatsoever over the stock or any of it, or any right of revocation.

Henriette Levy at the time of the transfers was in good health and made them to get rid of the care and worry of business and to vest in plaintiffs definite and irrevocable present rights of ownership in the stock, and the transfers were not in contemplation of, or intended to take effect in possession or enjoyment at or after her death.

She died on the 15th day of December, 1916, being at that time, and at the time of the transfers, a resident of Alameda County, California. Plaintiffs are her surviving children and were at such time, and are now, residents of the State.

She left no property or estate or assets whatever, and consequently, there was no estate to administer, nor any estate upon which any tax could be levied. Notwithstanding the facts, the Commissioner of Internal Revenue of the United States, assuming to act under the provisions of the Act of September 8, 1916, attempted to levy and assess a tax in the sum of $12,460.84, and demanded and threatened to enforce payment of the same. In consequence thereof the plaintiffs paid the tax. Subsequently they demanded a refund of the tax which demand was refused.

At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment, and would not be, besides,

a transfer tax or an indirect tax but would be a direct tax thereon in violation of Article I, § 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided.

Judgment was prayed for the sum of $12,460.84 with interest from the 26th day of December, 1917.

Wardell filed a demurrer to the complaint which was sustained, and the action dismissed. To that judgment this writ of error is directed. For the reasons stated in *Shwab* v. *Doyle, ante,* 529, we think the judgment was erroneous.

There was a proceeding in the case to which we must give attention. The judgment of dismissal was entered January 20, 1921. On February 14, 1921, an order of the court was made and entered which recited the resignation of Wardell as Collector and the appointment of John L. Flynn as Collector, and as doubts existed as to whether the case was proper for the substitution of Flynn as successor of Wardell, it was ordered that so far as the action was against Wardell in his official capacity, the same might be maintained against Flynn, and that so far as it was against Wardell personally, it might be continued against him personally without further pleadings or process.

On February 15, 1921, Flynn entered his appearance which, after reciting the fact of his substitution as defendant in place of Wardell, in so far as the action was against Wardell in his official capacity, declared that he, Flynn, appeared in the " action as such defendant."

It will be observed that there was no resistance by Flynn to his substitution and the subsequent proceedings were directed as much against him as against Wardell, the bond upon the writ of error running to both. As we have said, however, in *Union Trust Co.* v. *Wardell, ante,* 537, this court decided in *Smietanka* v. *Indiana Steel Co.,* 257

U. S. 1, that an action could not be maintained against a Collector of Internal Revenue for the recovery of a tax in the collection and disbursement of which he had no agency.

This was Flynn's situation and bringing him into the case was error. Therefore, upon return of the case to the District Court he shall be permitted to set up the defense of non-liability, if so advised, and, if he set up the defense, it shall be ruled as sufficient for the reasons we have given.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

KNOX, SURVIVING EXECUTOR OF KISSAM, ET AL. *v.* McELLIGOTT, LATE COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK.

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

No. 602. Argued April 18, 1922.—Decided May 1, 1922.

Decided upon the authority of *Shwab* v. *Doyle, ante,* 529. 275 Fed. 545, reversed.

ERROR to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court for the plaintiff, Knox, in an action to recover a sum collected as an estate tax.

Mr. Stark B. Ferriss for plaintiffs in error.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Richard S. Holmes* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the same principles and contentions passed on in Nos. 200, 236 and 303, *ante,* 529, 537, 542.

It, as they, is an action to recover a tax ($11,819.74) assessed by the Commissioner of Internal Revenue as an additional estate tax on the estate of Jonas B. Kissam, deceased, under the Act of September 8, 1916, as amended in 1917. The action was brought in the United States District Court for the Southern District of New York.

The complaint was a voluminous paper and contained at least four causes of action. As to the first, consisting of twenty-two paragraphs, McElligott filed a demurrer. Plaintiff made a motion for judgment on the pleadings. The motion was granted and a final judgment was awarded against "defendant on the merits for the relief prayed for in the first cause of action set forth" in the complaint.

The judgment was reversed by the Circuit Court of Appeals, 275 Fed. 545.

The following four paragraphs are a summary of the allegations of the complaint stated narratively:

In 1912 the decedent, Jonas B. Kissam, was the owner of certain bonds and mortgages and corporate bonds. In that year he conveyed the property to the plaintiff in error, John C. Knox who, shortly thereafter, reconveyed the same to Kissam and his wife Cornelia B. Kissam, as joint tenants. All of the parties resided in the State of New York.

In 1917 Kissam died leaving Mrs. Kissam surviving him. She was made one of the executors of the will as well as sole beneficiary thereunder.

On December 7, 1917, she as executrix and Knox as executor, made a return of the federal estate tax on the entire estate of Jonas B. Kissam. They included in the return the value of one-half of the jointly owned property

which was owned and enjoyed by decedent, but did not include the value of the one-half of the jointly owned property which had been owned and enjoyed by Mrs. Kissam since the creating of the joint estates in July and August of 1912.

A tax of $5,354.14 based upon the return was paid by the plaintiffs in error. On May 9, 1919, the Commissioner of Internal Revenue added to the estate the one-half interest of the value of the estate and assessed as a tax in addition to that which was paid, the sum of $13,668.60. The additional tax was paid under protest and to recover it is the purpose of the action.

The Circuit Court of Appeals stating the contention of the executors said, that " they claimed that the assessment was void as to the half of the joint property which vested in Cornelia [Mrs. Kissam] before the passage of the Act of September 8, 1916, as amended, and also that the act itself was unconstitutional as a direct tax upon property without apportionment among the several States as required by Article I, § 9, subdivision 4, of the Constitution."

But this contention was the alternative of the contention which plaintiffs in error also made, that the Act of September 8, 1916, as amended, was not intended to have retrospective operation. And this was the decision of the District Court, the court saying, " It is true that section 201 provides that the tax is imposed upon the transfer of the net estate of ' every decedent dying after the passage of this Act '; but the assumption must be that this relates to estates thereafter created and not to then existing vested property." And the court added "At the time the statute was passed Cornelia Kissam's interest belonged to her." The court further observed, "From the structure of the Act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or

control." The court rejected that conclusion and denied to the acts of Congress retroactive operation. To this the Circuit Court of Appeals was opposed and reversed the judgment based upon it.

It will be observed, therefore, that this case involves the same question as that decided in *Shwab* v. *Doyle, ante,* 529, and on the authority of that case the judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

SLOAN SHIPYARDS CORPORATION ET AL. *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION AND THE UNITED STATES.

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

ASTORIA MARINE IRON WORKS *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

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

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, REPRESENTING THE UNITED STATES, *v.* WOOD, TRUSTEE IN BANKRUPTCY.

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

Nos. 308, 376, 526. Argued March 15, 16, 1922.—Decided May 1, 1922.

1. The Emergency Fleet Corporation, as originally created, had the powers of corporations under the laws of the District of Columbia, where it was incorporated, and was liable to be sued, there and

elsewhere, upon its contracts and for its torts, notwithstanding the fact that it was a federal agency and that its stock was taken entirely by the United States. P. 565.

2. The extensive increase of the powers of this corporation made by later acts and by delegation from the President of large powers granted him by Congress, did not render the corporation in all cases immune to private suit. P. 566.

3. A bill alleged that the Fleet Corporation, having contracted, May 18, 1917, with a shipbuilding company for the construction of vessels, on December 1, 1917, unlawfully took possession of the property of the company and its subsidiaries and compelled it to make another contract, which the bill sought to set aside, praying also for restoration of the properties, an accounting under the earlier contract and other relief. *Held:*

(a) That the bill stated a cause of action against the Fleet Corporation, cognizable by a District Court, since

(b) It could not be assumed from the allegations that the taking was in pursuance of powers which had been delegated to the Fleet Corporation by the President, directly or through the Shipping Board, when the taking occurred, or that it was within the ratification of past acts of the Fleet Corporation made by the Executive Order of December 3, 1918; and, consequently,

(c) It did not appear that the special remedies of payment by and suit against the United States in the Court of Claims, for plants taken by the President, were applicable to the case. P. 567.

4. The Fleet Corporation is liable to be sued for its unlawful acts, even if a remedy also exists by suit against the United States. P. 567.

5. The general immunity of the United States to actions for torts does not extend to those who act in its name. P. 568.

6. The provision in the general incorporation law of the District of Columbia (Code D. C., § 607) that corporations formed under it may sue and be sued in the District does not mean that they may not be sued elsewhere. P. 568.

7. A contract made by the Fleet Corporation "representing the United States of America," is the contract of the Corporation and subject to be set aside in a suit against it, if wrongfully brought about. P. 568.

8. Transfer of the property of the Fleet Corporation to the Shipping Board by the Act of June 5, 1920, c. 250, § 4, 41 Stat. 988, did not affect the jurisdiction to entertain the present suits. P. 568.

9. A suit against the Fleet Corporation is removable from a state to a federal court. P. 569.
10. The Fleet Corporation *held* suable in a state court for breach of a contract executed by it February 1, 1919, as a corporation of the District of Columbia "representing the United States of America" in which certain necessities and rights of the United States were recognized but in which the Corporation was recognized throughout as the immediate party contracting. P. 569.
11. A claim in bankruptcy made by the Fleet Corporation in its own name as an instrument of the Government is not entitled to preference as a claim of the United States. P. 570.

268 Fed. 624; 272 Fed. 132; 270 Fed. 635, reversed.
274 Fed. 893, affirmed.

THE first of these cases is an appeal from a decree of the District Court dismissing on motion, for want of jurisdiction, a bill against the Fleet Corporation, (the general nature of the bill is described in the third headnote) upon the ground that the suit, involving more than $10,000, must be brought in the Court of Claims. The second is a writ of error to a judgment of the District Court which, upon the same ground, sustained a demurrer to the petition in an action for breach of contract brought against the Fleet Corporation, originally in a court of the State. The third comes here by certiorari to an order of the Circuit Court of Appeals affirming one of the District Court denying preference to a claim made by the Fleet Corporation in a bankruptcy proceeding.

Mr. Stephen V. Carey, with whom *Mr. Evan S. McCord* was on the brief, for appellants in No. 308.

Mr. W. M. Cake, with whom *Mr. Gibbs L. Baker, Mr. R. H. Cake* and *Mr. L. A. Liljeqvist* were on the brief, for plaintiff in error, in No. 376.

Mr. Assistant to the Attorney General Goff and *Mr. Wm. Marshall Bullitt,* with whom *Mr. Solicitor General Beck, Mr. Elmer Schlesinger* and *Mr. Henry M. Ward*

were on the brief, for the United States Shipping Board Emergency Fleet Corporation.

The Fleet Corporation is a valid incorporated instrumentality and agent of the United States; and all of its contracts and acts here involved were made and performed, not in its own corporate interest, but exclusively for the United States in the execution of the war powers of Congress.

In many cases corporations have been held to be instrumentalities of the Federal Government and, as such, exempt from even the great reserved powers of the States. *Farmers' & Mechanics' National Bank* v. *Dearing,* 91 U. S. 29, 33, 34; *Easton* v. *Iowa,* 188 U. S. 220, 230, 237; *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516, 524, 525; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292, 298; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 530; *Bank of California* v. *Richardson,* 248 U. S. 476, 483; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180. In none of them did the relation of the instrumentality to the execution of federal powers begin to approach in directness or in exclusiveness of purpose the immediate relation of the Fleet Corporation to the exercise of Congress's power to declare war and regulate commerce.

In determining whether or not a given corporation is an instrumentality of the United States, it is not material whether the United States owns all of the stock, *Smith* v. *Kansas City Title & Trust Co., supra; Ballaine* v. *Alaska Northern Ry. Co.,* 259 Fed. 183; none of the stock, *Farmers' & Mechanics' National Bank* v. *Dearing, supra; Luxton* v. *North River Bridge Co.,* 153 U. S. 525; *First National Bank* v. *Union Trust Co.,* 244 U. S. 416; or only a part of the stock, *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank,* 9 Wheat. 738; but the United States' complete ownership of the stock may

fairly be adverted to as indicating that the United States desired to have, and has, absolute and complete control over the instrumentality to which it has confided the execution of such vast governmental powers.

An agent of the Government is not liable upon contracts made by him on its behalf. *Hodgson* v. *Dexter,* 1 Cr. 345; *Sheets* v. *Selden's Lessee,* 2 Wall. 177, 187; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453, 460; *Belknap* v. *Schild,* 161 U. S. 10, 17; *Parks* v. *Ross,* 11 How. 362, 374; *Jones* v. *Le Tombe,* 3 Dall. 383; *Garland* v. *Davis,* 4 How. 131, 148.

Whatever the Fleet Corporation did, either in signing the contracts with the Astoria Company, the Eastern Shore, and the Sloan Shipyards, or in seizing the latter's plant, or in canceling its contracts with third parties, was done by it just as the same acts might have been done by any individual acting as the delegate of the President's war powers, pursuant to express authorization by Congress.

It is unnecessary to consider what the precise status of the Fleet Corporation would have been had it acted solely under its corporate powers as limited and defined by the Shipping Act 1916. The Corporation was not organized until after the United States had entered the war, and did not function otherwise than as the delegate of the President under the emergency war legislation, until after the passage of the Merchant Marine Act, 1920, 41 Stat. 988. It was not until after the declaration of war, and in response to the President's appeal for ships, that the machinery of the Shipping Act 1916 was utilized to create the Fleet Corporation as an instrumentality that might be used to execute the war powers of Congress.

The Fleet Corporation acquired, just as any private individual would have acquired, a special status as a federal instrumentality, when the President, under the Act of June 15, 1917, and subsequent legislation, delegated his war powers to it.

This is obvious when it is observed that neither the Shipping Act 1916, the District of Columbia corporation laws, nor the Fleet Corporation's certificate of incorporation authorized it: To condemn land or houses for employees; to build houses (40 Stat. 438); to take possession of, lease, or assume control of street railways or interurban railroads (40 Stat. 535); to extend or improve such street railways or interurban railroads (40 Stat. 1022); to condemn lumber camps, sawmills, standing timber, rights of way, etc. (40 Stat. 888); or to requisition dry docks, marine railways, discharging terminals, etc. (40 Stat. 1022)—all of which powers were conferred on the Fleet Corporation by Congress, either directly or by delegation of the President. It was under these delegated powers that the Corporation performed or committed each of the acts which are made the basis of the present suits.

Congress has, in various ways, recognized that the Fleet Corporation, at least in its existence and operations as delegate of the war powers of Congress, is but a governmental bureau, and not a private corporation in the ordinary sense.

It should be borne in mind that the Fleet Corporation, while technically incorporated under the laws of the District under the authority of the Shipping Act 1916, was a mere empty shell and never received its $50,000,000 capital until after the President had delegated to it his war powers; that the capital was all spent in administration expenses, and that whatever property it ever acquired, or now has, was acquired from appropriations made to carry out the war power delegations of Congress and the President, and is exclusively the property of the United States.

The Fleet Corporation could not acquire any beneficial or proprietary interest in any property obtained as the delegate of the President's war powers or as an agency

of the United States. It could only hold the property in trust for the United States. Hence, the provisions of the Merchant Marine Act 1920, § 4, 41 Stat. 990, transferring all vessels and other property acquired by the President through any agency whatsoever to the Shipping Board.

Whether the suit is one against the United States is determined, not by the fact of the party named as defendant on the record, but by the question of the effect of the judgment which can be rendered; and whether the United States is the real party in interest. *Louisiana* v. *McAdoo,* 234 U. S. 627, 629; *Kansas* v. *United States,* 204 U. S. 331, 341; *Oregon* v. *Hitchcock,* 202 U. S. 60, 68; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 384, 386, 387.

In determining whether a given suit is really one against the United States, exactly the same rules apply as obtain in determining whether a suit is against one of the several States. *Kansas* v. *United States,* 204 U. S. 331, 341; *Tindal* v. *Wesley,* 167 U. S. 204, 213.

The United States is the real party in interest because: In the Astoria Case a money judgment is asked against the Fleet Corporation as damages on a contract which it made as delegate of the President and in which it described itself as "representing the United States of America," and any judgment recovered, if ever paid, could only be paid out of a congressional appropriation; in the Sloan Shipyards Case the property sought to be impounded and restored is in the possession of the United States and was taken by seizure under requisition on December 1, 1917, and the mortgage sought to be canceled is also the property of the United States and was given to secure a $1,000,000 bond running to the Fleet Corporation "representing the United States of America" under a contract also entered into "representing the United States of America"; and in the Eastern Shore Case the claim of the Fleet Corporation is for moneys due under

a contract which it made "representing the United States of America", and the claim, while in the name of the Fleet Corporation, is for the United States, and priority of payment is demanded as a "debt due to the United States".

The United States is an indispensable party because in the Sloan Shipyards Case the United States is in possession of all the property and the actual owner of the $1,000,000 mortgage sought to be canceled, title thereto having been taken (if not already in it) by the Merchant Marine Act 1920; and it is inconceivable that a decree changing possession of property or canceling a mortgage can be rendered without the presence of the possessor of the property and the owner of the thing canceled. *Niles-Bement-Pond Co.* v. *Iron Molders' Union,* 254 U. S. 77, 80; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 456; *Bogart* v. *Southern Pacific Co.,* 228 U. S. 137, 147.

This court has held that a suit may be maintained against an officer or agent of a State or the United States, and that it is not a suit against the sovereign, in the following circumstances, none of which apply to the cases at bar, to wit:

(1) To enjoin a state officer from taking any threatened future action in the name of or for the State, under color of his office, to enforce, or in pursuance of, an unconstitutional statute, *Osborn* v. *Bank,* 9 Wheat. 738, 868; *Davis* v. *Gray,* 16 Wall. 203, 220; *Board of Liquidation* v. *McComb,* 92 U. S. 531, 541; *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10, 12; *In re Tyler,* 149 U. S. 164, 190; *Scott* v. *Donald,* 165 U. S. 107, 112; *Smyth* v. *Ames,* 169 U. S. 466, 519; *Prout* v. *Starr,* 188 U. S. 537, 543; *Ex parte Young,* 209 U. S. 123, 151–159; *Western Union Telegraph Co.* v. *Andrews,* 216 U. S. 165; *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146, 159, 163–4; *Herndon* v. *Chicago, R. I. & Pac. Ry. Co.,* 218 U. S. 135,

155; *Truax* v. *Raich,* 239 U. S. 33, 37; *Looney* v. *Crane Co.,* 245 U. S. 178, 191; *Terral* v. *Burke Construction Co.,* 257 U. S. 529. And the suit is equally maintainable where the threatened future action is to enforce or carry out an unconstitutional action (for example, confiscatory) of a state officer proceeding under a valid statute, *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499, 507; *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 38; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 390; *Louisville & Nashville R. R. Co.* v. *Greene,* 244 U. S. 522, 528; provided, of course, the threatened wrong be such as equity will enjoin; and the fact that the officer is threatening to commit the wrong in the name of the State and under the color of his office is of no significance whatever; for the wrong will be enjoined just as if he were acting in his individual capacity.

(2) To enjoin an officer (a) from doing a threatened future act (for example, canceling a patent, etc., which would cast a cloud on plaintiff's title) when such action was about to be taken through a mistaken conception of his authority, *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 110; *Lane* v. *Watts,* 234 U. S. 525, 540; *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, 238, and those cases are quite similar to the cases involving merely ministerial action presently to be noticed; or (b) from instigating criminal proceedings involving the same legal questions as those presented in a pending equity suit for the protection of property rights. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 621, 622.

(3) To compel by mandamus the performance by the officer of some plain, unmistakable, mere ministerial duty, prescribed by some special statute, and not affecting the general powers or functions of the Gov-

ernment, which unless performed would deprive the plaintiff of vested property rights. *Ballinger* v. *Frost,* 216 U. S. 221, 230; *Roberts* v. *United States,* 176 U. S. 221, 230, 231; *Butterworth* v. *Hoe,* 112 U. S. 50, 68; *United States* v. *Schurz,* 102 U. S. 378, 395, 404; *Kendall* v. *United States,* 12 Pet. 524, 610–618; *Marbury* v. *Madison,* 1 Cranch, 137; *arguendo* see *Ness* v. *Fisher,* 223 U. S. 683–694; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 452–453.

(4) To recover damages at law, for a past act of tort by a state official or instrumentality, done in good faith, in the name of the State under color of office, where the officer, having no personal interest, was mistaken in thinking he had the lawful right to take the action he did, *Bates* v. *Clark,* 95 U. S. 204, 209; *White* v. *Greenhow,* 114 U. S. 307; *Chaffin* v. *Taylor,* 114 U. S. 310; *Mitchell* v. *Harmony,* 13 How. 114, 137; *Scott* v. *Donald,* 165 U. S. 58, 67–70; *Hopkins* v. *Clemson College,* 221 U. S. 636, 645; *Johnson* v. *Lankford,* 245 U. S. 541, 546; *Belknap* v. *Schild,* 161 U. S. 10, 18, 23, 26 as to the damages at law; *arguendo* see *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 452; and *a fortiori* where the official's act was arbitrary, capricious and in disregard of the law. *Johnson* v. *Lankford,* 245 U. S. 541, 546.

(5) To recover specific property, real or personal, because of the present wrongful action of an official, in good faith, and under color of office, unlawfully withholding plaintiff's property under the erroneous belief that the law authorized such withholding. *United States* v. *Lee,* 106 U. S. 196; *Tindal* v. *Wesley,* 167 U. S. 204, 211, 218, 221, 222; *Scranton* v. *Wheeler,* 179 U. S. 141, 152; *Poindexter* v. *Greenhow,* 114 U. S. 270, 288; *Osborn* v. *Bank,* 9 Wheat. 738, 844, 845, 871.

The cases at bar fall within one or more of the follow-

ing classes of suits which have been held to be, in effect, suits against the State or the United States and, hence, not maintainable:

(1) Interference with the funds or property in the possession of the State. *Lankford* v. *Platte Iron Works,* 235 U. S. 461; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151; *Goldberg* v. *Daniels,* 231 U. S. 218, 221; *International Postal Co.* v. *Bruce,* 194 U. S. 601; *Belknap* v. *Schild,* 161 U. S. 10; *Christian* v. *Atlantic & North Carolina R. R. Co.,* 133 U. S. 233; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446; *Louisiana* v. *Jumel,* 107 U. S. 711; *Case* v. *Terrell,* 11 Wall. 199.

(2) Attempts to compel or restrain action regarding title to lands. *Knight* v. *Lane,* 228 U. S. 6; *Ness* v. *Fisher,* 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Oregon* v. *Hitchcock,* 202 U. S. 60; *Louisiana* v. *Garfield,* 211 U. S. 70; *Stanley* v. *Schwalby,* 147 U. S. 508. It is abundantly settled that suits cannot be brought against governmental officers the object of which is (a) to compel the execution of a contract, *International Construction Co.* v. *Lamont,* 155 U. S. 303; (b) to compel acts to be done, which, when done, would constitute performance by the State of a contract, or to enjoin things from being done which if done would constitute a breach by the State of a contract, *In re Ayers,* 123 U. S. 443; *Hagood* v. *Southern,* 117 U. S. 52; (c) to compel some affirmative official action in the performance of an obligation of the State, *Hagood* v. *Southern,* 117 U. S. 52, 69, 70; or (d) to collect money, *Smith* v. *Reeves,* 178 U. S. 436, 439; *Louisiana* v. *Jumel,* 107 U. S. 711, 726–8; *Belknap* v. *Schild,* 161 U. S. 10, 26; where, under the principles enunciated in the foregoing cases, the State being a necessary party, on account of the effect of the decree on its property or rights, the bill must be dismissed. *Wells*

v. *Roper,* 246 U. S. 335, 337; *Christian* v. *Atlantic & North Carolina R. R. Co.,* 133 U. S. 232, 241, 244, 245; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 451, 457.

(3) Injunctions to restrain executive officers or agents from the performance of their duty. *Wells* v. *Roper,* 246 U. S. 335; *Louisiana* v. *McAdoo,* 234 U. S. 627; *United States* v. *Black,* 126 U. S. 40, 48; *Decatur* v. *Paulding,* 14 Pet. 497, 515.

In the light of the foregoing authorities, the present suits against the Fleet Corporation are in substance and effect suits against the United States, because they relate only to acts performed by the Corporation, not under any general corporate power as derived from its incorporation, but as the specially selected agency to carry out the war powers of the President. To the same effect, see *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *Macleod* v. *New England Telephone Co.,* 250 U. S. 195; *Kansas* v. *Burleson,* 250 U. S. 188.

As the wrongs of which the Sloan Shipyards complains were all committed by the Fleet Corporation while acting under the Act of June 15, 1917, 40 Stat. 183, it is plain that the Shipyards' exclusive remedy is to follow the provisions of that statute, just as Congress provided with respect to a great number of other war-time requisitions. See *United States* v. *Pfitsch,* 256 U. S. 547.

When Congress undertook to authorize requisitioning, cancelation, etc., and to afford, as under the Fifth Amendment it was bound to afford, a provision for just compensation, its legislation on that point was necessarily exclusive, *Arnson* v. *Murphy* 109 U. S. 238, 243; *United States* v. *Babcock,* 250 U. S. 328, 331; and until the plaintiff shall have had an award by the President, it has no right to maintain any suit, even if it be conceded for the sake of argument that the Fleet Corporation is ordinarily suable

as any other corporation. There is no more reason to bring suit against the Fleet Corporation when it was acting as the authorized delegate of the President in the requisitioning of plants, ships, contracts, and materials, than there would be to bring suit against the President or the Secretary of the Navy when he was acting as such delegate of Congress' powers. *United States* v. *Babcock,* 250 U. S. 328, 331; *Geddes* v. *Anaconda Mining Co.,* 254 U. S. 590, 593.

The entire point of *United States Bank* v. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 2 Pet. 318, 324; and *United States* v. *Strang,* 254 U. S. 491, and similar cases, is that agents of a corporation are not generally agents of the stockholders and cannot contract for them by virtue of the mere relation of the stockholder to the corporation, but that is a very different thing from a stockholder affirmatively constituting the corporation his agent or instrumentality for carrying out his own purposes.

The general provision of the District of Columbia Code, § 607, that a corporation organized thereunder should "be capable of suing and being sued in any court of law or equity in the District," only intended to render this corporation capable of suing and being sued by its corporate name in any court in the District (see *National Volunteer Home* v. *Parrish,* 229 U. S. 494, 497), where the court had jurisdiction otherwise over the corporation. *Bankers Trust Co.* v. *Texas & Pacific Ry. Co.,* 241 U. S. 295, 305; *Porto Rico* v. *Rosaly,* 227 U. S. 270, 277.

In *Southern Bridge Co.* v. *Fleet Corporation,* 266 Fed. 747, 752, and *Commonwealth Finance Co.* v. *Landis,* 261 Fed. 440, 444, it was held that suits against the Corporation were suits against the United States, but that they were maintainable because the United States had consented to be sued in the District Courts for less than $10,000 (Jud. Code, § 24, subsec. 20) or in the Court of

Claims (*id.* § 145); but the learned judges delivering those opinions apparently overlooked the point that the United States had given a special consent to be sued only for any balance that might be claimed in excess of 75% of the President's award of "just compensation," and that such consent was exclusive and rendered inapplicable the general provisions of the Judicial Code cited.

Even conceding that the provision for "just compensation" is not exclusive and that actions may be maintained under Jud. Code, §§ 24, 145, there is certainly no jurisdiction to sue the Fleet Corporation in the state courts. *Smith* v. *Reeves,* 178 U. S. 436–445.

Just as, under some circumstances, the States may tax property used by agents of the United States in executing governmental powers, *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 382; and also the property of corporations chartered by Congress and engaged in performing federal services, *Thomson* v. *Pacific Railroad,* 9 Wall. 579; *Railroad Co.* v. *Peniston,* 18 Wall. 5, 30–35; while, on the other hand, the States cannot tax the property of other governmental instrumentalities, *Choctaw, Oklahoma & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292; *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664; so it is that many corporations chartered by Congress are ordinarily subject to suit, as the acts of incorporation usually provide that they may sue and be sued, while, on the other hand, such corporations may be immune from suit if the nature of the transaction is such that by established rules of law such a suit cannot be maintained.

When power is conferred upon a corporation to sue and be sued, it derives only the same power which each individual inherently possesses. Therefore, in many instances heretofore cited where individuals were immune from suit because the suit was really against the State or the United

States, such immunity would also have attached to any corporation, if it had been occupying the identical position of agency which the individual occupied.

The effect of the decision in *The Lake Monroe,* 250 U. S. 246, was simply to hold that under the Act of 1918 if, and when, the Shipping Board chartered a vessel to private parties for merchant use, such vessel, notwithstanding the United States' ownership or interest therein, became subject to the ordinary rules of admiralty law. The United States by this act simply waived the immunity which it otherwise had, which was a recognition that otherwise the Fleet Corporation, its property and operations were exempt—an admission that the Fleet Corporation occupied such a relation to the Federal Government as an instrumentality thereof that property in its possession or control was not its own private corporate property, but was that of the United States.

In order to do away with *The Lake Monroe* decision, Congress promptly adopted the Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, prohibiting the seizure of any vessel owned, possessed or operated by or for the United States or the Fleet Corporation, so long as the United States owned all its stock.

If the decision in *The Lake Monroe* be given the effect attributed to it by the District Courts in *Gould Coupler Co.* v. *Fleet Corporation,* 261 Fed. 716; *Lord & Burnham* v. *Fleet Corporation,* 265 Fed. 955, 958; *Perna* v. *Fleet Corporation,* 266 Fed. 896; and *American Cotton Oil Co.* v. *Fleet Corporation,* 270 Fed. 296, the result will be to subject the United States to liability in tort, affirmative relief in equity, and to suits for unlimited amounts in the state courts and for amounts in excess of $10,000 in the federal courts, to neither of which has it ever heretofore consented; and to give to persons having business relations with the Fleet Corporation a discriminatory advantage over all other persons having similar business relations with other government departments.

United States v. *Strang*, 254 U. S. 491, is not in point. The decision was based on the proposition that the agents of a corporation are not agents for the stockholders and can not contract for the stockholders. See *Krichman* v. *United States*, 256 U. S. 363.

The Fleet Corporation is entitled to a priority of payment in the Eastern Shore Case, as its claim is a "debt due to the United States." *Lewis* v. *United States*, 92 U. S. 618; *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152.

Mr. Godfrey Goldmark for respondent in No. 526.

Mr. Justice Holmes delivered the opinion of the court.

These cases present in different ways the question of the standing of the United States Shipping Board Emergency Fleet Corporation in the Courts—the first two, whether it so far embodies the United States that these suits should have been brought in the Court of Claims; the third whether it is entitled to a preference against a bankrupt which it is asserted would belong to the United States if the United States claimed in its own name. The facts material at this stage can be told in a few words. The Shipping Act of September 7, 1916, c. 451, 39 Stat. 728, passed no doubt in contemplation of the possibility of war, to create a naval reserve and merchant marine, established the United States Shipping Board and gave it power to form a corporation under the laws of the District of Columbia for the purchase, construction and operation of merchant vessels—the corporation to be dissolved "at the expiration of five years from the conclusion of the present European war." The stock was not to exceed $50,000,000, and the Board was authorized to purchase not less than a majority of such stock. War was declared on April 6, 1917, and the corporation was formed on the 16th of the same month.

The first case is a bill brought by the Sloan Shipyards Corporation, the Capital City Iron Works and the Anacortes Shipbuilding Company. According to the allegations, on May 18, 1917, the new corporation made an elaborate contract with the Sloan Shipyards Corporation for the building by the latter of sixteen wooden vessels. At that time the Emergency Fleet Corporation had only the powers given by the incorporation laws of the District. The work was begun by the Sloan Shipyards Corporation and by the two other complainants, which were subsidiary companies organized for the purpose of carrying out that contract, and went on until December 1, 1917, at which time the Fleet Corporation refused to make further payments required by the contract, unlawfully took possession of all the property of the three companies named, has retained it ever since, and has done a series of acts causing them great loss. It is alleged that the defendant having thus got the Sloan Shipyards Corporation wholly within its power compelled it to execute another contract set forth. The bill seeks to have this contract set aside, to have an accounting on the footing of the original contract of May 18, to have the defendant charged with all indebtedness incurred since December 1, 1917, and required to restore the properties described in the bill. The bill was dismissed by the District Court on the ground that as the claim was for more than $10,000 the suit must be brought in the Court of Claims. 268 Fed. 624; 272 Fed. 132.

The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. The United States took all the stock but that did not affect the legal position of the company. *United States* v. *Strang,* 254 U. S. 491. At that stage the original contract was made. Subsequently the powers of the corporation

were greatly enlarged. On July 11, 1917, the President delegated to it the powers that had been conferred upon him by the Act of June 15, 1917, c. 29, 40 Stat. 182, applicable to the construction, purchase and requisitioning of vessels in process of construction and of materials for ship construction, and delegated to the Shipping Board his powers to take by purchase or requisition constructed vessels and the operation of all vessels acquired by the United States, with authority to exercise these powers either directly or through the Fleet Corporation. Whether the Fleet Corporation did or could rely upon this delegation in its alleged acts of December, 1917, or whether it purported to be acting under powers conferred upon it by the contract does not appear from the allegations of the bill. Subsequently the Fleet Corporation by successive acts and proclamations was authorized to condemn various forms of property. Act of March 1, 1918, c. 19, 40 Stat. 438. April 22, 1918, c. 62, 40 Stat. 535. July 9, 1918, c. 143, 40 Stat. 845, 888. November 4, 1918, c. 201, 40 Stat. 1020, 1022. Executive Order of December 3, 1918, delegating all powers as to ship or plant construction and ratifying previous acts. Perhaps it is enough to add a reference to the Act of June 5, 1920, c. 250, 41 Stat. 988, 993, continuing the existence of the Fleet Corporation and its authority to operate vessels until all vessels are sold as directed by the act, § 11, but transferring the title to the Shipping Board. § 4.

These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any

person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v. *Bank of United States,* 9 Wheat. 738, 842, 843; *United States* v. *Lee,* 106 U. S. 196, 213, 221. The opposite notion left some traces in the law, 1 Roll. Abr. 95, Action sur Case, T., but for the most part long has disappeared.

If what we have said is correct it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law. The only serious question is whether special remedies have been provided by statute that displace those that otherwise would be at the plaintiff's command. The Acts of April 22, 1918, c. 62, § 3, 40 Stat. 535, and of July 18, 1918, c. 157, § 13, 40 Stat. 913, 916, give compensation for a plant taken by the President under the powers conferred by the Act of June 15, 1917, c. 29, 40 Stat. 182, and otherwise, with a resort for claims exceeding $10,000 to the Court of Claims; in the later act, by a suit against the United States. But the taking possession of the plaintiffs' plants on December 1, 1917, is alleged to have been unlawful and it cannot be assumed at this stage that the act of the Fleet Corporation was in pursuance of any powers then delegated to it or was within the ratification of December 3, 1918. The plaintiffs are not suing the United States but the Fleet Corporation, and if its act

was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take possession in certain events, but that the plaintiffs can show that the events had not occurred. The District Judge gave weight to the phrase in the general incorporation law of the District that corporations formed under it shall be capable of suing and being sued in any Court in the District. Code, D. C. § 607. But we do not read those words as putting District corporations upon a different footing from those formed under the laws of the States.

We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation "representing the United States of America." The Fleet Corporation was the contractor, even if the added words had any secondary effect. But the bill alleges that it was brought about by the wrongful act of the Fleet Corporation. The conclusion that we reach is that the District Court erred in dismissing the bill and we regard it as led up to and almost required by the decisions heretofore reached in *The Lake Monroe,* 250 U. S. 246, and *United States* v. *Strang,* 254 U. S. 491. See further *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163, 177, 178. *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152. The transfer of the property of the Fleet Corporation to the Shipping Board by the Act of June 5, 1920, c. 250, § 4, 41 Stat. 988, 990, may affect the value of the remedy afforded by the present suit but not the jurisdiction of the Court.

It is suggested that there will be lack of uniformity if suits can be brought in State Courts. This consideration cannot control our conclusion from the statutes. But it

is not very serious since such suits against this Corporation can be removed to the Courts of the United States, *Pacific Railroad Removal Cases,* 115 U. S. 1, and afterwards are subject to review here. *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246, 258. *Southern Pacific Co.* v. *Stewart,* 245 U. S. 359; *ibid.* 562. The change in the law by the Act of January 28, 1915, c. 22, § 5, 38 Stat. 803, 804, extends only to railroads. The decree of the District Court must be reversed.

In the next case the Astoria Marine Iron Works sued in a State Court for breach of a contract set forth. The suit was removed to the District Court and there dismissed upon demurrer on the same ground as the last—that the only remedy was in the Court of Claims. 270 Fed. 635. This contract was made on February 1, 1919, when the character of the Fleet Corporation had been more fully developed and determined than in the previous case, and purported to be made with the Fleet Corporation, " a Corporation organized and existing under the laws of the District of Columbia (herein called the ' Corporation '), representing the United States of America, party of the second part." Throughout the contract the undertakings of the party of the second part are expressed to be undertakings of the Corporation and it is this corporation and its officers that are to be satisfied in regard to what is required from the Iron Works. It is recognized that it may be necessary for the United States to exercise complete control over the furnishing of supplies to the Iron Works and it is agreed that if required by the Corporation " and/or the United States " the Iron Works will furnish schedules, &c., &c. The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdic-

tion of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. The judgment in this case also must be reversed.

The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the District Court for the Southern District of New York, under a contract similar to that last described, made by that Company with the Fleet Corporation "representing the United States of America" to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. It was denied successively by the referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed. 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed.

308. Decree reversed.
376. Judgment reversed.
526. Order affirmed.

MR. CHIEF JUSTICE TAFT, with whom concurred MR. JUSTICE VAN DEVANTER and MR. JUSTICE CLARKE, dissenting.

I differ with the majority in the first two of these three cases. The question presented is one of the interpretation of the will of Congress. No one can contend that Congress in using the Fleet Corporation for its purposes might not have given it express immunity from suit as a

representative of the United States. What we have to decide is whether in the mass of urgent legislation in respect to the Government's construction and operation of shipping made indispensable by the peculiar exigencies of the great war, Congress intended that this corporate agent should be subject to suit only as its principal is. I concede that the legislation originally creating this corporation, without express immunity from suit, naturally gives rise to the inference that Congress concluded that the greater freedom of action secured by carrying on business in corporate form was desirable and that in the absence of express provision for it, and in respect to what the corporation was originally intended to do, immunity can not be reasonably implied from the relation of the Government to the corporation and its interest in its business. As I read the record, however, the transactions in the two cases I am discussing, and which we have to consider, took place after the situation prompting the creation of this corporation had greatly changed and after much additional legislation. The power to do the things which were here done, and which are the subjects of these suits, is not to be found in the act creating the Fleet Corporation or in legislation expanding its original faculties. It was power vested directly in the President himself, the exercise of which he was given express authority to delegate to an agent, who might be the Fleet Corporation. The act conferring this Presidential power provided a specific remedy for compensation to those whose property rights were invaded by its exercise through award by the President and immediate payment of part due thereunder, with the right to the claimant to litigate the justice of the whole award in the Court of Claims. The Fleet Corporation in the arrangements which it forced upon the claimants in these two cases to their detriment expressly declared that it acted as a representative of the United States. I think the proper construction to be put upon

the facts and the law is that these suits are in fact against the United States and can not be brought except in the manner and under the procedure provided by the statute for claims for compensation for acts done by authority of the President under the act vesting him with it.

The opinion of the court is carefully drawn and if its conclusion is to rest merely on the nice distinction that it does not clearly appear from a proper construction of the pleadings that the acts here complained of were acts done under authority delegated by the President to the Fleet Corporation, as his agent, then the question I have been discussing and which seems to me to be in these cases is not here decided, and will only arise on answer and evidence.

I do not think that either the case of *The Lake Monroe*, 250 U. S. 246, or that of *United States* v. *Strang*, 254 U. S. 491, requires the conclusion reached herein by the majority of the court, and, indeed, their opinion is not clear and unqualified in reference to the effect of those cases.

I should not think it necessary to record a difference with my brethren of the majority but for considerations of high public expediency which may properly weigh with us in construing a doubtful statute of Congress because they must have been in the mind of Congress in the enactment of the legislation. We are made aware of the very great number of suits pending and likely to arise out of the work of the Fleet Corporation and the enormous total involved in them. This was to be expected. Can Congress be supposed to have intended that these suits might be brought in forty-eight different States and in courts of first instance of those States with the lack of uniformity in the findings of fact and the conclusions of law likely to be encountered where trials are had by courts and by courts and juries in so many varying jurisdictions? Did it propose to allow the United States to be made liable in litigation anywhere or under any form of procedure

without any regulation on its part to secure a reasonable limitation of its own as to the time within which such suits shall be brought? The court suggests that judgments thus obtained will be good only against the Fleet Corporation and the claimants must run the risk of getting a judgment against a debtor which can not pay. Congress has taken over all the assets of the Fleet Corporation so that such judgments will be valueless except as Congress shall conclude to pay them. If, in the judgments obtained in the various courts of the country, Congress shall find such variety of view as not to commend them to its sense of fairness, it will be slow to recognize its obligation to pay them, and we shall have a repetition of the history of the French Spoliation claims which for many decades occupied the attention of appropriation committees of Congress and wore out their patience with results that have put in the hearts of claimants a deep sense of the injustice of Governments. On the other hand, a construction which will bring into one tribunal, the Court of Claims, the hearing and decision of this class of cases, will secure uniformity and dispatch and these two elements will make for justice and peace, because Congress pays the judgments of the Court of Claims against the United States in due course. The result reached by the court if it is to go as far as I fear it must, even with the careful limitation of the language of the judgment, will make the existing confusion as to the claims against the Fleet Corporation worse confounded. It is to be hoped that, if the ultimate view of the court of the effect of the statutes under discussion is to spread this litigation all over the country with ineffective and doubtful results dependent on future approval of Congress, Congress itself may by further remedial legislation avoid such an undesirable condition, unfavorable both to the United States and the litigants.

As to the preference claimed against a bankrupt in No. 526 by the Fleet Corporation, I concur in the conclusion of the court that it can not be allowed under the statute as to preferences in bankruptcy, because I do not think it extends to claims of the United States except those for taxes.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 20, Original. Argued December 13, 14, 1921.—Decided May 1, 1922.

1. When this court, in an original suit involving title to land claimed by two States against each other and by the United States against both, has appointed a receiver who has possession of the land and of funds derived therefrom, its control over such subject-matter is exclusive and it has ancillary jurisdiction to determine particular claims thereto irrespective of whether, considered apart, they would lie within its original jurisdiction. P. 581.
2. The former decree (252 U. S. 372) having determined the boundary between Oklahoma and Texas to be along the south bank of the Red River, Texas and its grantees and licensees have no proprietary interests in the river bed or in the proceeds of oil and gas taken therefrom. P. 582.
3. Upon the creation of a new State, ownership of the beds of navigable streams within the boundaries passes from the United States to the State in virtue of the constitutional rule of state equality; but not so of the beds of streams not navigable. P. 583.
4. The Treaty of 1819, between the United States and Spain, by declaring that the navigation of the Sabine River to the sea and of the Red and Arkansas Rivers, throughout the extent of the boundary fixed by the treaty, should be common to the inhabitants of both nations, did not impress upon the Red River the legal character of a navigable stream where not navigable in fact. P. 583.
5. Officials of the United States Public Land Survey are not empowered to settle questions of navigability, and navigability in law can not be implied from their action in meandering a stream

and their failure to extend township and section lines across it. P. 585.

6. The fact that Congress, in permitting construction of bridges over the Red River in Oklahoma, required, out of precaution, that there should be no interference with navigation, does not justify an inference that the river within that State is navigable. P. 585.
7. Navigability in fact is the test of navigability in law; and whether a river is navigable in fact is determined by whether it is used or susceptible of use, in its natural and ordinary condition, as a highway of commerce for the conduct of trade and travel in the modes customary on water. P. 586.
8. In determining navigability, the actual condition of a river as disclosed in recent years must prevail over statements in early publications made upon inadequate data and loosely repeated. P. 586.
9. Any inference of navigability from the appropriation by Congress, and use, of money in an attempt to improve a river, *held* overcome by the conditions disclosed in the work. P. 590.
10. A river whose characteristics are such that its use for transportation has been and must be exceptional and confined to irregular and short periods of temporary high water, is not navigable. P. 591.
11. A decision of a State Supreme Court holding a river navigable, in a suit between private parties merely, does not bind the United States, and is not persuasive in the absence of a statement of the evidence. P. 591.
12. Upon the evidence in this case, *held* that no part of the Red River in Oklahoma is navigable. P. 591.
13. The Treaty of October 21, 1867, 15 Stat. 581, 589, reserved for the Kiowa and other Indians a tract described as the territory north of the "middle of the main channel" of Red River; the Act of June 6, 1900, c. 813, § 6, 31 Stat. 676, describing the south boundary in the same way, directed that part of the tract be allotted to the Indians in severalty, part reserved for their grazing uses, part reserved for the future State of Oklahoma, and the rest subjected to certain public land laws; a grazing reserve, so authorized, described in the executive order defining it as bounded south by the "mid-channel" of the river, was subjected by the Act of June 5, 1906, c. 2580, 34 Stat. 213, to further allotments, entries and sales. *Held:*

(a) That, as the river, opposite the tract, had no permanent channel other than a broad sandy bed extending from one cut bank to the

other, traversed only by shifting ribbons of water in dry seasons, but over which the water was well distributed in times of substantial flow, the medial line of this bed was the boundary of the Reservation and of the pasture reserve. P. 593.

(b) That disposal of parcels on the north bank, under the acts referred to, by allotment in severalty, entry and purchase under the land laws, or grant to Oklahoma for public purposes, carried with it the right to the river bed in front of them out to the medial line but no farther, the bed south of that line remaining the property of the United States. P. 594.

14. When the United States owns the bed of a non-navigable stream and the upland on one or both sides, it is free to retain all or any part of the bed while disposing of the upland. P. 594.

15. If by a treaty or statute or the terms of its patent the United States has shown its intention to restrict its conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance be construed and given effect in this particular according to the law of the State in which the land lies. P. 594.

16. These same rules apply where the land disposed of is the tribal land of Indians under guardianship. P. 594.

17. Tested by the common-law rule, in force in Oklahoma, conveyances by the United States of lands on a non-navigable stream, according to legal subdivisions established by the survey of the upland and shown on the official plat, carry title to the middle of the stream. P. 595.

18. The common-law rule in this respect is not displaced by state statutes modifying the common-law rule respecting the rights of riparian proprietors in the natural flow of the stream. P. 596.

19. A perfected allotment to an Indian of a tract of riparian land, to be held by the United States in trust for the sole use and benefit of the allottee or his heirs during a stated period and then to be conveyed to him or them, passes the equitable title and beneficial use of all that would have passed under a full patent. P. 596.

20. Tracts surveyed and platted as upland along the north bank of Red River were disposed of according to the survey and plat under the Acts of 1900 and 1906, *supra*, after changes due to floods had converted some into parts of the river bed and others from non-riparian to riparian land. *Held*, that the allottees or vendees of such last-mentioned tracts took title to the middle line of the stream bed where there were no earlier disposals of intervening

tracts in the bed, but that senior disposition of tracts in the bed carried title to that line. P. 597.

21. The claim of Oklahoma to portions of the bed of Red River based on ownership of riparian lands was not waived by its failure to assert it in its brief and argument wherein it relied upon the alleged navigability of the stream and claimed the entire bed upon that ground. P. 598.

22. The declaration of Rev. Stats., § 2319, that all valuable mineral deposits in lands belonging to the United States are open to exploration and purchase, must be read in view of its collocation in the Revised Statutes and with the entire statute of which it is a part. P. 599.

23. This section applies only where the United States has indicated that lands are held for disposal under the land laws, and never where the United States directs that the disposal be only under laws other than the mining laws. P. 599.

24. The general policy in respect of public lands in Oklahoma has been that the mining laws should not apply to them, and the exceptions to it do not embrace the land in the south half of the bed of Red River within the receivership area in this case. P. 600.

THE court having decided that the boundary between Oklahoma and Texas is along the south bank of Red River, 256 U. S. 70, 608, the cause was, on June 1, 1921, ordered set down for hearing on special issues touching the ownership of land in the bed of that stream, as between the United States, Oklahoma, and a number of private parties who were allowed to intervene and assert their claims as riparian owners or as claimants under the placer mining laws. See 256 U. S. 605. These matters were heard and are disposed of by the following opinion.

Mr. Frank Dale and *Mr. Jesse B. Roote* for Burke Divide Oil Company, Consolidated, et al.

Mr. T. P. Gore, with whom *Mr. J. I. Howard, Mr. A. M. Beets, Mr. Nestor Rummons, Mr. Garnett Hughes* and *Mr. Jos. H. Aynesworth* were on the briefs, for Melish Consolidated Placer Oil Mining Association.

Mr. Henry E. Asp, for the Indian allottees, and, with *Mr. George P. Rowell* and *Mr. Lucien H. Boggs,* for E. Everett Rowell et al.

Mr. W. A. Ledbetter, with whom *Mr. H. L. Stuart, Mr. R. R. Bell, Mr. F. W. Fisher* and *Mr. A. E. Pearson* were on the briefs, for A. E. Pearson et al.

Mr. Solicitor General Beck and *Mr. W. W. Dyar,* Special Assistant to the Attorney General, with whom *Mr. Assistant Attorney General Riter* and *Mr. John A. Fain,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. George Trice for D. D. Brunson.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, with whom *Mr. Geo. F. Short, Mr. W. A. Durant* and *Mr. J. L. Carpenter* were on the brief, for the complainant.

Mr. F. A. Williams and *Mr. F. Chatterton* filed a brief on behalf of the Pacific-Wyoming Oil Company et al.

Mr. Jesse B. Roote and *Mr. Paul M. Clark* filed a brief on behalf of Mark Denson et al.

Mr. T. P. Gore and *Mr. J. H. Cline* filed a brief on behalf of Burkburnett Placer Mining & Oil Company; Double Triangle Petroleum Development Association, et al.

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

This suit in equity was brought in this court by the State of Oklahoma against the State of Texas to settle a controversy between them over their common boundary along the course of the Red River and over the title to the southerly half of the river bed. The State of Texas answered the bill and joined in the prayer that the controversy be decided. Shortly thereafter the United

States, by the court's leave, intervened as a party in interest, and in its bill of intervention set up a claim to the river bed as against both States. Subsequent proceedings resulted in a decree recognizing and declaring that the true state boundary is along the south bank of the river, as claimed by Oklahoma and the United States, and not along the medial line of the stream, as claimed by Texas. 256 U. S. 70, and 608. The decree directed a further hearing to determine what constitutes the south bank, where along that bank the boundary is, and the proper mode of locating it on the ground. That hearing was had last week and disclosed that the parties differ widely as to what constitutes the south bank. A decision on the question will be given after it shall have been fully considered. The southerly cut-bank to which we shall refer presently may or may not be the bank along which the boundary extends. On this we intimate no opinion now.

Our present concern is with proprietary claims to the bed of the river and to the proceeds of oil and gas taken from 43 miles of the southerly half.

After we acquired jurisdiction of the suit it developed that the State of Oklahoma was claiming title to the entire river bed from one bank to the other; that the State of Texas was claiming title to the southerly half; that the United States was disputing the claims of both States and asserting full proprietorship of the southerly half and an interest (because of its relation to Indian allottees) in portions of the northerly half; that a part of the bed, particularly of the southerly half, had been but recently discovered to be underlaid with strata bearing oil and gas and to be of great value by reason thereof; that many persons were proceeding to drill for, extract and appropriate these minerals with uncertain regard for the dispute over the title and for the true ownership; that possession of parts of the bed was being taken and held by intimidation and force; that in suits for injunction the

courts of both States were assuming jurisdiction over the same areas; that armed conflicts between rival aspirants for the oil and gas had been but narrowly averted and still were imminent; that the militia of Texas had been called to support the orders of its courts and an effort was being made to have the militia of Oklahoma called for a like purpose; that these conflicting assertions of jurisdiction and the measures taken to sustain them were detrimental to the public tranquility, were of general concern and were likely to result in great waste of the oil and gas and in their extraction and appropriation to the irreparable injury of the true owner of the area in dispute, and that unless these minerals were secured and conserved by means of wells drilled and operated in that area there was danger that they would be drawn off through wells in adjacent territory pending the solution of the controversy over the state boundary and the title to the river bed.

In these circumstances, on the motion of the United States, fully supported by the State of Oklahoma and expressly approved by the State of Texas to the extent of its proprietary claim, we appointed a receiver to take possession of the part of the river bed between the medial line and a line on the south bank temporarily and provisionally designated, and within defined easterly and westerly limits, and to control or conduct all necessary oil and gas operations therein. As to that area there appeared to be urgent need for such action. The order provided in detail for ascertaining and holding the net proceeds of the oil and gas in such way that they could be awarded and paid to whoever ultimately should be found to be the rightful claimants, and also provided for such interventions in the suit as would permit all possible claims to the property and proceeds in the receiver's possession to be freely and appropriately asserted. 252 U. S. 372.

Numerous parties have since intervened for the purpose of asserting rights to particular tracts in the receiver's possession and are seeking to have the same and the net proceeds of the oil and gas taken therefrom surrendered to them. Many of these claims conflict one with another and all are in conflict with the claims of one or more of the three principal litigants.

Under the Constitution our original jurisdiction extends to suits by one State against another and to suits by the United States against a State.[1] In its first stage this was a suit by one State against another. When the United States intervened it became also a suit by the United States against those States. In its enlarged phase it presents in appropriate form the conflicting claims of the two States and the United States to the river bed and calls for their adjudication. The other claims, being for particular tracts and funds in the receiver's possession and exclusively under our control, are brought before us because no other court lawfully can interfere with or disturb that possession or control. It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised,—and this although independent suits to enforce the claims could not be entertained in that court.[2]

[1] See *United States* v. *Texas,* 143 U. S. 621; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 384–388; *United States* v. *Michigan,* 190 U. S. 379, 396; *Kansas* v. *United States,* 204 U. S. 331, 342.

[2] See *Freeman* v. *Howe,* 24 How. 450; *Minnesota Co.* v. *St. Paul Co.,* 2 Wall. 609, 632; *Stewart* v. *Dunham,* 115 U. S. 61, 64; *Phelps* v. *Oaks,* 117 U. S. 236; *Morgan's Louisiana & Texas R. R. & S. S. Co.* v. *Texas Central Ry. Co.,* 137 U. S. 171, 201; *Compton* v. *Jesup,* 68 Fed. 263; *Blake* v. *Pine Mountain Co.,* 76 Fed. 624; *Central Trust Co.* v. *Carter,* 78 Fed. 225, 233; *Sioux City Terminal Co.* v. *Trust Co.,* 82 Fed. 124, 128; Daniels Ch. Pl. & Pr., 6 Am. ed., pp. *1743–1745; Street's Fed. Eq. Pr., §§ 1229, 1245, 1246, 1364, et seq.

The decree recognizing and declaring that the boundary between the two States is along the south bank of the river, and not along its medial line, means that the entire river bed is within the State of Oklahoma and beyond the reach of the laws of the State of Texas, and therefore that the latter State and its grantees and licensees have no proprietary interest in the bed or in the proceeds of oil and gas taken therefrom. Of course, when the exact location of the boundary along the south bank is determined, it may develop that the receiver is holding some land on the southerly side of that line or proceeds arising therefrom, and, if so, the State of Texas and its grantees and licensees will be free to claim the same.

The other claims are all such as may be examined without awaiting an exact location of the boundary. They may be grouped and designated as (a) those of the State of Oklahoma and its grantees and licensees, (b) that of the United States, (c) those of Indian allottees and others based on the ownership of riparian lands on the northerly side of the river, and (d) those based on placer mining locations made in the river bed. The evidence bearing on these claims was taken and reported under an order entered at the last term, 256 U. S. 605, and the pertinent questions of fact and law have been recently presented in both oral and printed arguments.

The Red River rises in the Panhandle of Texas, near the New Mexico boundary, and takes an easterly and southeasterly course to the Mississippi, of which it is a tributary. Its total length is about 1,300 miles. The first 557 miles from its mouth are in Louisiana and Arkansas, the next 539 miles are in Oklahoma along the southern boundary, and the remainder is in the Panhandle of Texas. The receivership area embraces 43 miles of the southerly half of the river bed and lies 409 miles up stream from the eastern boundary of Oklahoma. In that State the river bed between the cut-banks, so-called, has

an average width of one-third of a mile,—the least width being in the vicinity of the 100th meridian and the greatest in the vicinity of the receivership area.

By the Treaty of 1803 with France and that of 1819 with Spain the United States acquired the full title to the bed of the river within what now constitutes the State of Oklahoma and to the adjacent lands on the north, and it still is their proprietor, save as in the meantime the title to particular areas, or some beneficial interest therein, has passed or been transferred from it to others in virtue of the Constitution or some treaty or law made thereunder. Recognizing that this is so, the claimants, other than the United States, severally have assumed, as they should, the burden of showing that the rights in the river bed which they are asserting were mediately or immediately derived from the United States. Whether they have successfully carried this burden is the matter for decision.

Oklahoma claims complete ownership of the entire bed of the river within that State, and in support of its claim contends that the river throughout its course in the State is navigable, and therefore that on the admission of the State into the Union, on November 16, 1907, the title to the river bed passed from the United States to the State in virtue of the constitutional rule of equality among the States whereby each new State becomes, as was each of the original States, the owner of the soil underlying the navigable waters within its borders. If that section of the river be navigable, its bed undoubtedly became the property of the State under that rule.[1] Those who oppose the State's claim recognize that this is so; and the State concedes that its claim is not tenable, if that section of the river be not navigable. So the real question in this connection is whether the river is navigable in Oklahoma.

The State relies on the third article of the Treaty of 1819 between the United States and Spain (8 Stat. 252)

[1] *Scott* v. *Lattig*, 227 U. S. 229, 242–243, and cases cited.

as conclusively establishing the navigability of that section of the river. The article says:

"The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or *Red River;* then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published in Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations."

The State's reliance is on the concluding words, but we think it ill-founded. At the date of the treaty the Red and Arkansas rivers were in a general way known to be navigable in their lower reaches and not navigable in their upper reaches, but how far up the streams navigability extended was not known. Both were of great length,

largely within a region occupied by wild Indians, and measurably unexplored. The words on which the State relies evidently were to apply alike to both streams. The international boundary was to run along the southerly banks of both,—along that of the Red for about 600 miles[1] east of the 100th meridian and along that of the Arkansas from the same meridian to the source of that river in the heart of the Rocky Mountains. To attribute to the parties a purpose to impress this entire stretch of the Arkansas with a navigable character, regardless of the actual conditions, is, in our opinion, quite inadmissible. And so of the 600-mile stretch of the Red. The entire article, examined in the light of the circumstances in which the treaty was negotiated, shows, as we think, that what really was intended in this regard was to provide and make sure that the right to navigate these rivers, wherever along the boundary they were navigable in fact, should be common to the respective inhabitants of both nations.

A legal inference of navigability is said to arise from the action of the surveying officers who, when surveying the lands in that region, ran a meander line along the northerly bank and did not extend the township and section lines across the river. But this has little significance. The same thing was done on the Platte and other large western streams known to be unnavigable. Besides, those officers were not clothed with power to settle questions of navigability.[2]

A like inference is sought to be drawn from the fact that Congress, in permitting the construction of certain bridges across the river within Oklahoma, provided in sub-

[1] The actual length of the international boundary along the south bank of the Red River was 587 miles. Of that boundary 48 miles are now in the Arkansas-Texas boundary and 539 miles are in the Texas-Oklahoma boundary.

[2] *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288, 320; *Gauthier* v. *Morrison*, 232 U. S. 452, 458; *Harrison* v. *Fite*, 148 Fed. 781, 784.

stance that there should be no interference with navigation.[1] But it is reasonably manifest that this provision was only precautionary and not intended as an affirmation of navigable capacity in that locality. The river was known to be navigable from its mouth to near the eastern boundary of Oklahoma and there had been, as will be seen presently, some light navigation above that boundary in the irregular times of temporary high water; so those who were about to construct the bridges at large expense deemed it prudent to secure the permission of Congress, and Congress merely took the perfectly safe course of qualifying its permission as indicated.

We find nothing in any of the matters relied on which takes the river in Oklahoma out of the settled rule in this country that navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[2]

The evidence bearing on this question is voluminous and in some respects conflicting. A large part of it deals directly with the physical characteristics of the river, comes from informed sources and is well in point. A small part consists of statements found in early publications, and repeated in some later ones, to the effect that the river is navigable for great distances,—some of them exceeding its entire length. These statements originated

[1] Examples of this are found in the Acts of May 15, 1886, c. 332, 24 Stat. 28; May 17, 1886, c. 354, 24 Stat. 63, and June 30, 1916, c. 200, 39 Stat. 251.

[2] *The Daniel Ball,* 10 Wall. 557, 563; *The Montello,* 20 Wall. 430, 439; *United States* v. *Rio Grande Co.,* 174 U. S. 690, 698; *United States* v. *Cress,* 243 U. S. 316, 323; *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 121.

at a time when there were no reliable data on the subject, and were subsequently accepted and repeated without much concern for their accuracy. Of course, they and their repetition must yield to the actual situation as learned in recent years.[1] The evidence also discloses an occasional tendency to emphasize the exceptional conditions in times of temporary high water and to disregard the ordinary conditions prevailing throughout the greater part of the year. With this explanatory comment, we turn to the facts which we think the evidence establishes when it is all duly considered.

The river has its source in the Staked Plains of northwestern Texas and from there until it gets well into Oklahoma is within a region where the rainfall is light, is confined to a relatively short period in each year and quickly finds its way into the river. Because of this the river in the western half of the State does not have a continuous or dependable volume of water. It has a fall of three feet or more per mile and for long intervals the greater part of its extensive bed is dry sand interspersed with irregular ribbons of shallow water and occasional deeper pools. Only for short intervals, when the rainfall is running off, are the volume and depth of the water such that even very small boats could be operated therein. During these rises the water is swift and turbulent and in rare instances overflows the adjacent land. The rises usually last from one to seven days and in the aggregate seldom cover as much as forty days in a year.

In 1910 Captain A. E. Waldron, of the Corps of Engineers, made an examination of this part of the river from the mouth of the Big Wichita eastward to the mouth of the Washita (185½ miles) pursuant to a congressional direction. From his report,[2] fairly portraying the normal

[1] *Missouri* v. *Kentucky*, 11 Wall. 395, 410.

[2] House Doc., No. 193, 63d Cong., 1st sess., p. 4.

condition of that stretch of the stream, we extract the following:

"5. The banks of the river are from one-fourth to 1½ miles in width [apart], and from 10 to 30 feet in height, with numerous high, rocky, and clayey bluffs. In the bends of the river the banks cave badly except where the rocky and clayey bluffs occur. This caving causes a continual shifting of the river bed, which moves from one side of the valley to the other.

"6. In places the channel is 1,000 feet wide, and has a depth of only about one-third of a foot. At other places, notably in the bends, it narrows down to a width of 30 feet with an increased depth.

"7. The examination of the river was made from a flat bottom bateau drawing 5½ inches when loaded. There was not a single day during the field examination upon which it was not necessary to remove part of the load and drag the boat over sand bars from 300 to 1,000 feet in length. On some days this would occur very often.

"8. The field work of examination was performed during the period from November 21 to December 19, 1910. During this period the river gauge at Denison, 11 miles below the mouth of the Washita River, ranged between zero and 1 foot. In reference to the gauge readings at the bridge near Denison, it might be well to state that there were only 42 days during the year 1910 on which this gauge read 2 feet or over, and only 81 days on which it read as much as 1 foot or over.

"9. At three places during the trip down the river in the bateau, solid rock bottom was encountered, ranging from 300 to 1,200 feet in length, and having a depth of only four-tenths of a foot of water in the deepest place."

We regard it as obvious that in the western half of the State the river is not susceptible of being used in its natural and ordinary condition as a highway for commerce; and there is no evidence that in fact it ever was so used. That section embraces the receivership area.

Of course, the conditions along that part of the river greatly affect the part in the eastern half of the State. But the latter receives additional waters from the Washita and other tributaries and has a practically continuous flow of varying volume, the extreme variation between high and low water being about thirty feet. When the water rises it does so very rapidly and it falls in the same way. The river bed has a fall of more than one foot to the mile and consists of light sand which is easily washed about and is carried down stream in great quantities at every rise of the water. At all times there is an almost continuous succession of shifting and extensive sand bars. Ordinarily the depth of water over the sand bars is from six to eighteen inches and elsewhere from three to six feet. There is no permanent or stable channel. Such as there is shifts irregularly from one side of the bed to the other and not infrequently separates into two or three parts. Boats with a sufficient draft to be of any service can ascend and descend only during periods of high water. These periods are intermittent, of irregular and short duration, and confined to a few months in the year.

Lanesport, Arkansas, which is near the Oklahoma boundary, has been the usual head of navigation; but for several years before railroads were extended into that section boats of light draft carried merchandise up the river to the mouth of the Kiamitia[1] and other points in that vicinity and took out cotton and other products on the return trip. This occurred only in periods of high water, and was accomplished under difficulties. In very exceptional instances boats went to the mouth of the Washita,[2] where some had to await the high water of the next season before they could return. When the railroads

[1] The Kiamitia is 83 miles up stream from the eastern boundary of Oklahoma.

[2] The Washita is 217 miles up stream from the eastern boundary of Oklahoma.

were constructed this high-water or flood navigation ceased. That was between 1875 and 1880.

According to many witnesses, whose knowledge of this part of the river reaches back for a long period, the depth of the water at ordinary stages has come to be less than it was from 1850 to 1870, when they first knew it. Portions of the banks have been swept away and sand in great quantities has been brought down stream, making the river wider and shallower than at the time of the navigation just mentioned.

Beginning in 1886 Congress made several appropriations looking to the improvement of the river from a point in Arkansas, not far from the Oklahoma boundary, westward to the mouth of the Washita, and about $500,000 was expended on the project. The officer in charge of the work several times recommended that it be discontinued, because not likely to result in any commercial navigation; and in 1916[1] that officer, the division engineer, the Board of Engineers and the Chief of Engineers concurred in recommending that the project be entirely abandoned, their reasons being that the small (high-water) commerce of an earlier period had disappeared; that the characteristics of the river rendered it impracticable to secure a useful channel except by canalization, the cost of which would be prohibitive; that the expenditures already made were practically useless, and that there was no reason to believe conditions would change in such way as to bring better results in the future. In 1921[2] that recommendation was repeated. No appropriations in furtherance of the project were made after 1916. Any inference of navigable capacity arising from the fact that this project was undertaken is much more than overcome by the actual conditions disclosed in the course of the work.

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[1] House Doc., No. 947, 64th Cong., 1st sess.

[2] House Doc., No. 87, 67th Cong., 1st sess.

While the evidence relating to the part of the river in the eastern half of the State is not so conclusive against navigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water;—in other words, that it is neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce. Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability.[1]

A decision by the Supreme Court of Oklahoma, in *Hale* v. *Record,* 44 Okla. 803, is relied on as adjudging that the river is navigable in fact. The opinion in the case is briefly to the effect that in the trial court the evidence was conflicting, that the conflict was there resolved on the side of navigability, and that this finding had reasonable support in the evidence and therefore could not be disturbed. It was a purely private litigation. The United States was not a party and is not bound.[2] There is in the opinion no statement of the evidence, so the decision hardly can be regarded as persuasive here.

We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union. If the State has a lawful claim to any part of the bed, it is only such as may be incidental to its ownership of riparian

[1] *United States* v. *Rio Grande Co.,* 174 U. S. 690, 698–699; *Leovy* v. *United States,* 177 U. S. 621; *Toledo Liberal Shooting Co.* v. *Erie Shooting Club,* 90 Fed. 680, 682; *Harrison* v. *Fite,* 148 Fed. 781, 784; *North American Dredging Co.* v. *Mintzer,* 245 Fed. 297, 300.

[2] *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 123.

lands on the northerly bank. And so of the grantees and licensees of the State.

The riparian claims pressed on our attention all relate to the river bed between the 98th degree of west longitude and the mouth of the North Fork.[1] They must be considered in the light of matters which we proceed to state.

By a treaty between the United States and the Kiowa, Comanche and Apache tribes of Indians, concluded in 1867, the territory north of the "middle of the main channel" of the Red River and between the 98th meridian and the North Fork was set apart as a reservation and permanent home for those tribes. 15 Stat. 581 and 589. That reservation was maintained until June 6, 1900, when Congress passed an act (c. 813, § 6, 31 Stat. 672, 676) directing that it be disposed of (a) by allotting in severalty to each member of the tribes one hundred and sixty acres; (b) by setting apart 480,000 acres of grazing lands for the common use of the tribes; (c) by reserving four sections in each township for the future State of Oklahoma for school and other public purposes, and (d) by subjecting the remaining lands to particular modes of entry and acquisition under designated land laws. Besides the allotments and grazing reserves, the Indians were to receive stated payments in money. The Indians assailed the validity of the act, but in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, this court sustained it as a legitimate exertion of the power of Congress over tribal Indians and their property, and the act was carried into effect. Like the treaty reservation, the provisions of the act were in terms limited to the territory north of the "middle of the main channel" of the river.

One of the grazing reserves created under that act contained 400,000 acres, and the order setting it apart made the "mid-channel" of the river its southern boundary.

[1] The 98th degree is 380 miles, and the mouth of the North Fork 477 miles, up stream from the eastern Oklahoma boundary.

That reserve came to be known as the Big Pasture and was maintained until June 5, 1906, when Congress passed an act (c. 2580, 34 Stat. 213) requiring that it be disposed of (a) by allotting in severalty to each child born into the tribes after the Act of 1900 one hundred and sixty acres, and (b) by subjecting the remaining lands to particular modes of entry and sale and placing the proceeds in the Treasury to the credit of the tribes. Subsequent amendments made some changes, not material here, in the modes of entry and sale, and directed the use of a part of the proceeds in maintaining a hospital which was open to and used by the members of the tribes. The last amendment was made June 30, 1913, c. 4, § 17, 38 Stat. 77, 92.

The lands on the northerly bank of the river between the 98th meridian and the North Fork were all disposed of under the Act of 1900, or that of 1906 and its amendments,—some as Indian allotments, some through entries or purchases in the designated modes, and some under the grant to Oklahoma for school and other public purposes. The riparian claims are all founded on these disposals. The river bed there is from 1500 to 6600 feet wide between what are called the cut-banks.

The receivership area lies immediately south of what was the Big Pasture and has the same easterly and westerly limits.

One of the questions involved in the riparian claims relates to what was intended by the terms "middle of the main channel" and "mid-channel" as used in defining the southerly boundary of the treaty reservation and of the Big Pasture. When applied to navigable streams such terms usually refer to the thread of the navigable current, and, if there be several, to the thread of the one best suited and ordinarily used for navigation.[1] But this

[1] *Iowa* v. *Illinois*, 147 U. S. 1.

section of Red River obviously is not navigable. It is without a continuous or dependable flow, has a relatively level bed of loose sand over which the water is well distributed when there is a substantial volume, and has no channel of any permanence other than that of which this sand bed is the bottom. The mere ribbons of shallow water which in relatively dry seasons find their way over the sand bed, readily and frequently shifting from one side to the other, cannot be regarded as channels in the sense intended. Evidently something less transient and better suited to mark a boundary was in mind. We think it was the channel extending from one cut-bank to the other, which carries the water in times of a substantial flow. That was the only real channel and therefore the main channel. So its medial line must be what was designated as the Indian boundary.

Other questions common to all the riparian claims are, whether the disposal of the lands on the northerly bank carried with it any right to the river bed in front of them, and, if so, whether this right extends to the medial line of the stream or to the Texas boundary along the opposite bank. On these questions the parties are far apart. The State of Oklahoma and the placer mining claimants insist that no right to the river bed passed with the upland; the United States that such a right did pass, but extends only to the medial line, and the several riparian claimants that the right passed and extends to the Texas boundary along the opposite bank.

Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the

river bed, that intention will be controlling;[1] and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies.[2] Where it is disposing of tribal land of Indians under its guardianship the same rules apply.

What has been said concerning the treaty reservation, the Big Pasture and the Acts of 1900 and 1906 shows that the United States intended to dispose of the upland and the northerly half of the river bed, but nothing more. The southerly half of the bed had not been included in the reservation or the Big Pasture and was not subjected to the operation of the Act of 1900 or that of 1906. This shows that the United States intended to retain that part of the bed. It follows that, while the disposals under those acts could extend southward to the medial line, they could not go beyond it.

In executing the acts there was no attempt to dispose of the river bed separately from the upland. The disposals were all according to the legal subdivisions established by the survey of the upland and shown on the official plat. In the patents there was no express inclusion or exclusion of rights in the river bed.

Tested by the common law these conveyances of riparian tracts conferred a title extending not merely to the water line, but to the middle of the stream. Possibly, if the river bed for its entire breadth had been subject to

[1] *Wilcox* v. *Jackson,* 13 Pet. 498, 516–517; *Irvine* v. *Marshall,* 20 How. 558; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404; *Kean* v. *Calumet Canal Co.,* 190 U. S. 452, 460.

[2] *Hardin* v. *Jordan,* 140 U. S. 371, 384; *Mitchell* v. *Smale,* 140 U. S. 406, 413–414; *Grand Rapids & Indiana R. R. Co.* v. *Butler,* 159 U. S. 87, 92; *Hardin* v. *Shedd,* 190 U. S. 508, 519; *Whitaker* v. *McBride,* 197 U. S. 510, 512, 515–516; and see *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 287, et seq.

disposal under the Acts of 1900 and 1906, the title would have extended to the Texas boundary along the other side; but this is a debatable question which need not be considered here, for no disposal under those acts could go beyond the medial line. That limitation inhered in all that was done.

But it is contended that the common-law rule, although formerly adopted in Oklahoma [1] and recently recognized by the Supreme Court of the State,[2] has been impliedly abrogated by the legislature. The contention is not sustained by any decision in the State and, in our opinion, is not tenable. It is based on statutes displacing or qualifying the common-law rule respecting the rights of riparian proprietors in the natural flow of a stream, which is a matter quite distinct from the ownership of the bed of the stream. The rule as to either could be displaced without affecting the other.

Our conclusion on the general questions is that the disposal of the lands on the northerly bank carried with it a right to the bed of the river as far as, but not beyond, the medial line.

Particular questions relating to some of the riparian claims and not to others are presented, and we now turn to them.

The Indian allotments were made in 1909 and 1910, but have not been carried to final patents. They are evidenced by trust patents, so-called, wherein the United States engages to hold the land for a period of twenty-five years "in trust for the sole use and benefit" of the allottee, or of his heirs in the event of his death, and at the end of the trust period to convey the same to him, or to his heirs if he be not then living. The contention is made that no right to the river bed could pass under these

[1] Rev. Laws Okla., 1910, § 4642.

[2] *Hale* v. *Record,* 44 Okla. 803.

allotments in advance of the issue of the final patent. Even if this were so, it well may be doubted that it would enable strangers to fasten any claim on or appropriate the bed in front of the allotments. But we think it is not so. The allotments when perfected passed the equitable title and beneficial use of all that would have passed under a full patent. The purpose of the holding in trust by the United States is to prevent allottees from improvidently alienating or encumbering the land, not to cut down or postpone their rights in other respects.

The lands along the north bank were surveyed and platted in 1874 and 1875. Afterwards, and before the disposals in question, portions of the bank were swept away in times of flood. This changed the relation to the river of several surveyed tracts. Some became part of the bed and others nonriparian before became riparian. But most of the tracts on which the riparian claims before us are founded remained unchanged and need not be specially noticed.

Of the tracts changed from riparian upland to river bed, a small number were disposed of as if they still were upland abutting on the river,—the disposal occurring while the adjacent land then actually riparian was unallotted and unsold. Evidently the disposal was intended to operate and have effect as if the tracts retained their former relation to the river; and, as nothing stood in the way, we think the title under the disposal reached to the middle of the stream.

Of the tracts which had been nonriparian but became riparian, all were disposed of in ordinary course. Generally the tracts in front of them which came to lie in the river bed were neither allotted nor sold. Where this was so, we think the right to the bed, out to the center line, passed with the tracts which had come to be riparian. But where there was a prior disposal of the tracts in the bed, that right, as just indicated, went with them.

Four legal subdivisions in township five south of range fourteen west were sold to Fred Capshaw and transferred by him to A. E. Pearson et al., who are interveners here. Two of these subdivisions, lots 1 and 2 of section 8, were riparian when surveyed, but in the river bed when sold. Another, the N. W. ¼ of the N. W. ¼ of the same section, lay immediately back of these lots. The fourth, the N. E. ¼ of the N. E. ¼ of section 7, lay to one side of the third. At the time of the survey the fourth was separated from the river by a tract which afterwards came to be largely, if not entirely, in the river bed. This tract was sold to Robert L. Owen before the others were sold to Capshaw. Pearson et al. claim the river bed in front of lots 1 and 2 of section 8 and also in front of the N. E. ¼ of the N. E. ¼ of section 7. Their rights are just what Capshaw's were, neither more nor less. We think the bed of the river in front of the two lots in section 8, out to the middle, passed to Capshaw, but that no part of the bed passed to him with the N. E. ¼ of the N. E. ¼ of section 7. All that could possibly have passed with that subdivision had already passed to Owen with the tract which lay in front of it.

The State of Oklahoma in its bill claimed riparian rights in portions of the bed by reason of its ownership of occasional school and other lands on the bank; but in its brief it has endeavored only to sustain the claim based on the asserted navigability of the river. As to the latter it has failed. According to the evidence, it owns riparian lands both within and without what was the Kiowa, Comanche and Apache reservation. As to such lands it is entitled to the same incidents of riparian ownership that any other owner would have. The fact that it has not pressed this right in its brief might be regarded by some as a waiver or renunciation of the right; but this hardly can have been intended. The State's riparian right will therefore be recognized in the decree.

What has been said indicates the disposition which must be made of all the riparian claims. It would serve no purpose to enumerate them here. All will be dealt with in the decree conformably to the views we have expressed.

We come next to the claims founded on placer mining locations. These locations were all made in that part of the southerly half of the river bed which is in front of what was the Big Pasture. It is objected that some are overlapped by others and that some were without a supporting mineral discovery. But we put these questions aside and come directly to one which is common to all the locations, namely, whether that part of the bed was subject to location and acquisition under the mining laws. The placer claimants insist that it was and the United States that it was not. No one doubts that when these locations were made lands valuable for oil, if within areas where the mining laws were operative, could be located and acquired as placer claims.

The claimants rely on § 2319 of the Revised Statutes, which declares:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard

for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western States. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws.

This part of the river bed was for many years in the Indian Territory, to which none of the land laws ever was extended. In 1890 it was made part of the Territory of Oklahoma by an act wherein Congress expressly indicated that the lands in that Territory should be disposed of under the homestead and townsite laws " only." [1]

A question arose under that act as to whether the exclusion of the mining laws relieved homestead applicants from offering proof that the land sought to be entered was agricultural and not mineral, such proof being required where the mining laws were in force; and Congress promptly answered that question by saying, in an Act of 1891, that " all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry." [2] In the many acts which followed wherein lands in Oklahoma were opened to disposal all but two exactly conformed to the policy announced in

[1] Act May 2, 1890, c. 182, §§ 1, 18, 20, 22, 26 Stat. 81.

[2] Act March 3, 1891, § 16, c. 543, 26 Stat. 989, 1026.

the Acts of 1890 and 1891. The two exceptional acts were one of 1895 dealing with the Wichita lands [1] and the one of 1900, before described, dealing with the Kiowa, Comanche and Apache lands.[2] The Act of 1895 expressly extended the mining laws over the limited area to which it related, which was remote from the one with which we are here concerned. The Act of 1900 expressly extended the mining laws to a part, but not all, of the lands to which it related,—that is to say, it extended them to such lands as were to be allotted and opened to settlement, but not to those set apart as grazing reserves. There never was any act subjecting the latter to the operation of the mining laws. On the contrary, the Act of 1906 and its amendments show that the Big Pasture and other grazing reserves were to be disposed of only in other modes specially defined.

Thus the general policy in respect of lands in Oklahoma has been that the mining laws should not apply to them, and to this there have been but two exceptions, each confined to a limited area and neither embracing the locality in question. Even the words of the exceptions, "are hereby extended over" the particular areas, plainly imply that but for them the mining laws would not have applied to those areas. The general policy is also reflected in the Act of 1906, providing for Oklahoma's admission into the Union, the eighth section of which distinctly recognized the right of the State to receive mineral lands under the grants to it for school and other purposes,[3]—a thing not permitted to a State where the mining laws are in force.[4]

This is the view which has been uniformly taken and enforced by the officers of the land department in the

[1] Act March 2, 1895, c. 188, 28 Stat. 876, 899.

[2] Act June 6, 1900, c. 813, 31 Stat. 672, 676–681.

[3] Act June 16, 1906, c. 3335, § 8, 34 Stat. 267.

[4] *United States* v. *Sweet*, 245 U. S. 563.

administration of these acts.[1] Those officers have not recognized or given any effect to these mining claims.

We conclude that this part of the river bed never was subject to location or acquisition under the mining laws,—nor, indeed, to acquisition under any of the land laws,—and therefore that these locations were of no effect and conferred no rights on the locators or their assigns.

The parties in interest will be accorded twenty days within which to submit a proper form of decree disposing of the several claims now before us in conformity with the views expressed in this opinion.

It is so ordered.

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[1] *Acme Cement and Plaster Co.*, 31 L. D. 125; Instructions, 31 L. D. 154; *E. A. Shirley*, 35 L. D. 113; Regulations, § 38, 35 L. D. 239; *Benjamin F. Robinson*, 35 L. D. 421; *Lenertz* v. *Malloy*, 36 L. D. 170; *Knight Placer Mining Assn.* v. *Hardin*, 47 L. D. 331.

DECISIONS PER CURIAM, FROM FEBRUARY 28, 1922, TO AND INCLUDING MAY 1, 1922, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. —, Original. *Ex parte:* IN THE MATTER OF JAMES C. CANTRILL ET AL., PETITIONERS. March 6, 1922. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Chapin Brown* and *Mr. Raymond Hudson* for petitioners.

No. —, Original. *Ex parte:* IN THE MATTER OF JAMES J. O'BRIEN, PETITIONER. March 6, 1922. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. James J. O'Brien* pro se.

No. —, Original. *Ex parte:* IN THE MATTER OF LINK-BELT COMPANY, PETITIONER. March 6, 1922. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Henry S. Robbins* and *Mr. Morris M. Townley* for petitioner.

No. 135. BANK OF STURGEON *v.* STANLEY PALMER. Error to the Supreme Court of the State of Missouri. Argued March 2, 1922. Decided March 6, 1922. *Per Curiam.* Dismissed for want of jurisdiction. § 237, 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, 5–6. *Mr. Don C. Carter,* with whom *Mr. N. T. Gentry* was on the brief, for plaintiff in error. *Mr. Major J. Lilly,* with whom *Mr. James P. McBaine* and *Mr. Boyle G. Clark* were on the brief, for defendant in error.

No. 143. ABO LAND COMPANY *v.* ROMAN TENORIO, SHERIFF, ETC. Error to the Supreme Court of the State of New Mexico. Submitted March 1, 1922. Decided March 6, 1922. *Per Curiam.* Dismissed for want of jurisdiction. § 237, 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, 5–6. *Mr. Bernard S. Rodey* and *Mr. Pearce C. Rodey* for plaintiff in error. No appearance for defendant in error.

No. 743. CHARLES L. CRAIG *v.* THOMAS D. MCCARTHY, UNITED STATES MARSHAL, ETC., ET AL. See *post,* 617.

Nos. 671 and 40. CHARLES D. NEWTON, AS ATTORNEY GENERAL OF NEW YORK, ET AL. *v.* BROOKLYN UNION GAS COMPANY. Appeals from the District Court of the United States for the Southern District of New York. Argued March 9, 1922. Decided March 13, 1922. *Per Curiam.* Affirmed with costs, upon the authority of the *New York Gas Cases, ante,* 165, 178, 180. *Mr. James A. Donnelly,* with whom *Mr. John P. O'Brien* and *Mr. Harry Hertzoff* were on the briefs, for Lewis, District Attorney. *Mr. Wilber W. Chambers,* with whom *Mr. Charles D. Newton, Mr. Clarence R. Cummings* and *Mr. Charles E. Buchner,* were on the briefs, for Newton, Attorney General. *Mr. William N. Dykman,* with whom *Mr. Jackson A. Dykman* and *Mr. Edward J. Crummey* were on the brief, for appellee.

No. 152. BOROUGH OF EDGEWOOD *v.* WILKINSBURG & EAST PITTSBURGH STREET RAILWAY COMPANY ET AL; and

No. 266. BOROUGH OF EDGEWOOD *v.* PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

ET AL. Error to the Supreme Court of the State of Pennsylvania. Argued March 6, 1922. Decided March 13, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178; *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394, 397; *Kansas City* v. *Public Service Commission of Missouri,* 250 U. S. 652; *Hillsboro* v. *Public Service Commission of Oregon,* point (3), 255 U. S. 562; *Groesbeck* v. *Detroit United Railway,* 257 U. S. 609; *Chicago* v. *Chicago Railways Co.,* 257 U. S. 617; *Avon* v. *Detroit United Railway,* 257 U. S. 618. *Mr. M. W. Acheson, Jr.,* with whom *Mr. Charles A. Jones, Mr. John D. Meyer, Mr. Roy G. Bostwick* and *Mr. James R. Sterrett* were on the brief, for plaintiff in error. *Mr. Edwin W. Smith,* with whom *Mr. John F. Weiss* and *Mr. Frank M. Hunter* were on the briefs, for defendants in error. *Mr. H. B. Gill,* by leave of court, filed a brief as *amicus curiae.*

No. 163. WINEHILL & ROSENTHAL *v.* STATE OF LOUISIANA. Error to the Supreme Court of the State of Louisiana. Submitted March 10, 1922. Decided March 13, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Gustave Lemle* for plaintiffs in error. *Mr. H. Garland Dupre, Mr. A. V. Coco* and *Mr. C. C. Friedrichs* for defendant in error.

No. 161. ANCHOR COMPANY *v.* P. & M. COMPANY. Appeal from the District Court of the United States for the Southern District of New York. Argued March 10, 1922. Decided March 13, 1922. *Per Curiam.* Affirmed upon the authority of *Tyler Co.* v. *Ludlow-Saylor Wire Co.,* 236 U. S. 723; *Chicago Car Heating Co.* v. *Gold Car*

Heating & Lighting Co., 245 U. S. 631. *Mr. Edwin B. H. Tower, Jr.*, with whom *Mr. Melville Church* and *Mr. Wylie C. Margeson* were on the brief, for appellant. *Mr. Otto R. Barnett* for appellee.

No. 20, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS. Submitted March 13, 1922. Decided March 20, 1922. Motion of the State of Arkansas for leave to file petition in intervention in this cause denied. *Mr. Walter Holland* for the State of Arkansas.

No. 299. LEON MOREL *v.* PERCY A. BAKER, AS SUPERINTENDENT OF IMMIGRATION STATION. Appeal from the Circuit Court of Appeals for the Second Circuit. Motion to dismiss submitted March 13, 1922. Decided March 20, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Lau Ow Bew* v. *United States,* 144 U. S. 47, 58; *Horn* v. *Mitchell,* 243 U. S. 247, 249. *Mr. Ernie Adamson* for appellant. *Mr. Solicitor General Beck* and *Mr. H. S. Ridgely* for appellee.

No. 746. CARLOS C. CORBETT *v.* STATE OF SOUTH CAROLINA. Error to the Supreme Court of the State of South Carolina. Motion to dismiss submitted March 13, 1922. Decided March 20, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana,* 226 U. S. 99, 101; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 418, 419; *Bruce* v. *Tobin,* 245 U. S. 18, 19. (2) § 237, 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, 5–6. *Mr. Cole L. Blease* and *Mr. W. C. Wolfe* for plaintiff in error. *Mr. Charles A. Douglas* and *Mr. Hugh H. Obear* for defendant in error.

No. 168. J. N. McBride *v.* State of Idaho. Error to the Supreme Court of the State of Idaho. Submitted March 17, 1922. Decided March 20, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk, &c. Ry. Co.,* 228 U. S. 596, 600; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 24. (2) *Crane* v. *Campbell,* 245 U. S. 304. *Mr. Patrick H. Loughran* and *Mr. M. H. Eustace* for plaintiff in error. *Mr. Roy L. Black* and *Mr. Albert H. Conner* for defendant in error.

No. 499. G. D. Collins et al. *v.* J. J. Byrnes, Sheriff, etc. Error to the Superior Court in and for the City and County of San Francisco, State of California. Motion to dismiss submitted March 20, 1922. Decided March 27, 1922. *Per Curiam.* Dismissed for want of jurisdiction. § 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, 5–6. *Mr. George D. Collins, Mr. Maxwell McNutt* and *Mr. William H. Metson* for plaintiffs in error. *Mr. John W. Preston* for defendant in error.

No. 352. D. A. Williams et al. *v.* John K. Scudder et al. Error to the Supreme Court of the State of Ohio. Motion to dismiss or affirm submitted March 20, 1922. Decided March 27, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. (2) *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. Smith W. Bennett* for plaintiffs in error. *Mr. John G. Price* and *Mr. Roy Martin* for defendants in error.

No. 185. JIM DENSON *v.* STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. Argued March 22, 1922. Decided March 27, 1922. *Per Curiam.* Dismissed for want of jurisdiction. § 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, 5–6. *Mr. John Randolph Cooper* for plaintiff in error. *Mr. George M. Napier*, with whom *Mr. Seward M. Smith* was on the brief, for defendant in error, submitted.

No. 201. CITY OF SAPULPA ET AL. *v.* OKLAHOMA NATURAL GAS COMPANY. Error to the Supreme Court of the State of Oklahoma. Submitted March 24, 1922. Decided March 27, 1922. *Per Curiam.* Dismissed upon the authority of *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394; *Kansas City* v. *Public Service Commission of Missouri*, 250 U. S. 652; *Hillsboro* v. *Public Service Commission of Oregon*, point (3), 255 U. S. 562; *Groesbeck* v. *Detroit United Railway*, 257 U. S. 609; *Chicago* v. *Chicago Railways Co.*, 257 U. S. 617; *Avon* v. *Detroit United Railway*, 257 U. S. 618; *Edgewood* v. *Wilkinsburg & East Pittsburgh Street Ry. Co., ante*, 604. *Mr. James F. Lawrence, Mr. Van H. Albertson* and *Mr. T. L. Blakemore* for plaintiffs in error. *Mr. D. A. Richardson, Mr. C. B. Ames, Mr. Russell G. Lowe, Mr. T. G. Chambers* and *Mr. B. A. Ames* for defendant in error.

No. 250. EVELYN P. FERRY *v.* HENRY L. CORBETT ET AL. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Submitted March 20, 1922. Decided April 10, 1922. Decree affirmed with costs, and cause remanded to the District Court of the United States for the District of Oregon, per stipulation of counsel that this case abide decision in case No. 177, *ante,* 314. *Mr. Charles Haldane* for appellant. *Mr. Joseph Simon* for appellees.

No. 555. OGDEN PORTLAND CEMENT COMPANY *v.* PUBLIC UTILITIES COMMISSION OF UTAH;

No. 556. UNION PORTLAND CEMENT COMPANY *v.* PUBLIC UTILITIES COMMISSION OF UTAH; and

No. 574. UTAH IDAHO CENTRAL RAILROAD COMPANY *v.* PUBLIC UTILITIES COMMISSION OF UTAH. Error to the Supreme Court of the State of Utah. Motion to affirm submitted March 27, 1922. Decided April 10, 1922. *Per Curiam.* Affirmed upon the authority of *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372, 375–376; *Producers Transportation Co.* v. *Railroad Commission of California,* 251 U. S. 228, 232. *Mr. C. R. Hollingsworth, Mr. Hiram H. Henderson* and *Mr. J. A. Howell* for plaintiffs in error. *Mr. Henry H. Cluff, Mr. C. C. Parsons* and *Mr. John F. MacLane* for defendant in error.

No. 198. JULIA LAMERE MICKADIET ET AL. *v.* ALBERT B. FALL, SECRETARY OF THE INTERIOR. Error to the Court of Appeals of the District of Columbia. Submitted March 24, 1922. Decided April 10, 1922. *Per Curiam.* Affirmed upon the authority of *Lane* v. *Mickadiet,* 241 U. S. 201. *Mr. Edward F. Colladay, Mr. Harry S. Barger, Mr. Howard Saxton, Mr. P. H. Marshall* and *Mr. B. B. Pettus* for plaintiffs in error *Mr. Solicitor General Beck* and *Mr. Blackburn Esterline* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF WISE & FELDER, RECEIVERS, ETC., PETITIONERS. April 17, 1922. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Charles H. Tuttle* and *Mr. Saul S. Myers* for petitioners.

No. —, Original. *Ex parte:* IN THE MATTER OF SAMUEL SINGER, PETITIONER. April 17, 1922. Motion for leave to file petition for a writ of habeas corpus herein denied. *Mr. J. Mercer Davis* for petitioner.

No. —, Original. *Ex parte:* IN THE MATTER OF TOLEDO SCALE COMPANY, PETITIONER. April 17, 1922. Motion for leave to file petition for writ of prohibition and mandamus herein denied, without prejudice. *Mr. George D. Welles* for petitioner.

No. 290. KANSAS CITY, CLAY COUNTY & ST. JOSEPH RAILWAY COMPANY *v.* GEORGE S. GRIER, ADMINISTRATOR, ETC. Error to the Supreme Court of the State of Missouri. Motion to dismiss or affirm submitted April 10, 1922. Decided April 17, 1922. *Per Curiam.* Judgment affirmed with costs. *Mr. John E. Dolman* for plaintiff in error. *Mr. Vinton Pike* for defendant in error.

No. 816. GEORGE H. ENGELHARD, RECEIVER, ETC., *v.* GEORGE J. SCHROEDER ET AL. Appeal from the Circuit Court of Appeals for the Third Circuit. Motion to dismiss or affirm submitted April 10, 1922. Decided April 17, 1922. *Per Curiam.* Decree affirmed with costs; and cause remanded to the District Court of the United States for the District of New Jersey. *Mr. Gustavus A. Rogers* and *Mr. A. F. Jenks* for appellant. *Mr. Harry Lane* for appellees.

No. —, Original. *Ex parte:* IN THE MATTER OF ERWIN R. BERGDOLL, PETITIONER. April 24, 1922. Motion for leave to file a petition for a writ of habeas corpus denied. *Mr. Joseph D. Shewalter* for petitioner.

No. —, Original. *Ex parte:* IN THE MATTER OF FIDELITY & DEPOSIT COMPANY OF MARYLAND ET AL. April 24, 1922. Motion for leave to defer reprinting previous record on application for certiorari granted. Motion for leave to file petition for writ of mandamus herein denied. *Mr. Charles Markell, Mr. Edward Osgood Brown* and *Mr. Edwin J. Marshall* for petitioners.

No. 62. JOE ALI ET AL. *v.* DAVID LEHRHAUPT, IMMIGRATION INSPECTOR, ETC. Appeal from the District Court of the United States for the Western District of New York. Motion to dismiss submitted April 17, 1922. Decided April 24, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Brolan* v. *United States,* 236 U. S. 216, 217–218; *Sugarman* v. *United States,* 249 U. S. 182, 185. See *Samad* v. *Behrandt,* 257 U. S. 613. *Mr. Hannis Taylor* for appellants. *Mr. Solicitor General Beck* for appellee.

No. 239. VIRGINIA BAILEY ET AL. *v.* OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY. Error to the Supreme Court of the State of Oregon. Motion to dismiss submitted April 17, 1922. Decided April 24, 1922. *Per Curiam.* Dismissed for want of jurisdiction. § 237, 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, 5–6. *Mr. Thomas Mannix* and *Mr. George Arthur Brown* for plaintiffs in error. *Mr. H. W. Clark, Mr. A. C. Spencer* and *Mr. John F. Reilly* for defendant in error.

No. —, Original. JOHN DOE, DEMISE OF THE COMMONWEALTH OF MASSACHUSETTS, *v.* CITY OF ROCHESTER; AND No. —, Original. COMMONWEALTH OF MASSACHUSETTS *v.* EUGENE VAN VOORHIS ET AL., COMMISSIONERS OF APPRAISAL. Argued April 24, 1922. Decided April 24, 1922. Motions for leave to file declarations herein denied, without prejudice to filing of motions for leave to file bills in equity for the same purpose. *Mr. E. H. Abbott, Jr.,* for plaintiffs. *Mr. Eugene Van Voorhis* for Van Voorhis et al.

No. 92. UNITED STATES EX REL. ROBERT A. WIDENMANN *v.* CHARLES E. HUGHES, AS SECRETARY OF STATE, ETC. Error to the Court of Appeals of the District of Columbia. May 1, 1922. Motion requesting the court to deliver an opinion in this case denied. *Mr. George W. Tucker* and *Mr. Everett V. Abbott,* for plaintiff in error, in support of the motion. [See 257 U. S. 619.]

No. —, Original. *Ex parte:* IN THE MATTER OF CARL PARKER, PETITIONER. May 1, 1922. Motion for leave to file petition for a writ of habeas corpus herein denied. *Mr. Walter Holland* for petitioner.

No. 232. HARTFORD LIFE INSURANCE COMPANY *v.* GARLAND S. JOHNSON, ADMINISTRATOR, ETC. Appeal from the District Court of the United States for the Western District of Missouri. Submitted April 24, 1922. Decided May 1, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. James C. Jones, Mr. Lon O. Hocker, Mr. Frank H. Sullivan, Mr. George F. Haid, Mr. E. H. Angert* and *Mr. James C. Jones, Jr.,* for appellant. *Mr. Matthew A. Fyke* and *Mr. Peyton A. Parks* for appellee.

No. 222. JOHN BARTON PAYNE, AGENT, ETC., ET AL. *v.* INDUSTRIAL BOARD OF ILLINOIS ET AL. Error to the Circuit Court of Coles County, State of Illinois. Argued April 25, 1922. Decided May 1, 1922. *Per Curiam.* Dismissed for want of jurisdiction. Act of February 8, 1899, c. 121, 30 Stat. 822; *LeCrone* v. *McAdoo,* 253 U. S. 217, 219. *Mr. George B. Gillespie, Mr. H. N. Quigley, Mr. Leonard J. Hackney* and *Mr. James Vause, Jr.,* for plaintiffs in error, submitted. *Mr. Michael M. Doyle,* with whom *Mr. Bryan H. Tivnen* and *Mr. Thomas R. Figenbaum* were on the brief, for defendants in error.

No. 228. KEOKUK & HAMILTON BRIDGE COMPANY *v.* PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN H. MCCALLISTER, COUNTY TREASURER, ETC. Error to the Supreme Court of the State of Illinois. Submitted April 28, 1922. Decided May 1, 1922. *Per Curiam.* Dismissed for want of jurisdiction. § 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, 5–6. *Mr. F. T. Hughes* for plaintiff in error. *Mr. Lee Siebenborn* and *Mr. Clifton J. O'Harra* for defendant in error.

No. 216. CLEVE EDWARDS *v.* STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. Submitted April 24, 1922. Decided May 1, 1922. *Per Curiam.* Affirmed upon authority of *Vigliotti* v. *Pennsylvania, ante,* 403. *Mr. Carl N. Davie* for plaintiff in error. *Mr. George M. Napier* and *Mr. Seward M. Smith* for defendant in error.

No. 226. WILLARD M. LINDSEY *v.* J. WESTON ALLEN, ATTORNEY GENERAL OF THE STATE OF MASSACHUSETTS,

ET AL. Appeal from the District Court of the United States for the District of Massachusetts. Submitted April 28, 1922. Decided May 1, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. See *Williams* v. *Scudder, ante,* 607. *Mr. Hector M. Hitchings* and *Mr. Henry N. Rice* for appellant. *Mr. J. Weston Allen* and *Mr. Arthur E. Seagrave* for appellees.

PETITIONS FOR CERTIORARI GRANTED, FROM FEBRUARY 28, 1922, TO AND INCLUDING MAY 1, 1922.

No. 735. HARTFORD LIFE INSURANCE COMPANY *v.* FRANK F. DOUDS ET AL., EXECUTORS, ETC. March 6, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Ohio granted. *Mr. Harry B. Arnold, Mr. James C. Jones, Mr. Frank H. Sullivan* and *Mr. James C. Jones, Jr.,* for petitioner. *Mr. Smith W. Bennett* for respondents.

No. 756. HARTFORD LIFE INSURANCE COMPANY *v.* ROBERT H. LANGDALE. March 6, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Ohio granted. *Mr. Harry B. Arnold, Mr. James C. Jones, Mr. Frank H. Sullivan* and *Mr. James C. Jones, Jr.,* for petitioner. *Mr. Smith W. Bennett* for respondent.

No. 775. TRANSPORTES MARITIMOS DO ESTADO, CLAIMANT, ETC. *v.* TIETJEN & LANG DRYDOCK COMPANY;

No. 776. TRANSPORTES MARITIMOS DO ESTADO, CLAIMANT, ETC. *v.* MAXWELL ROSE, DOING BUSINESS, ETC.;

No. 777. TRANSPORTES MARITIMOS DO ESTADO (IN PERSONAM) *v.* MAXWELL ROSE, DOING BUSINESS, ETC.;

No. 778. TRANSPORTES MARITIMOS DO ESTADO, CLAIMANT, ETC. *v.* THOMAS DESIMONE; and

No. 779. TRANSPORTES MARITIMOS DO ESTADO (IN PERSONAM) *v.* THOMAS DESIMONE. March 6, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. F. Dudley Kohler* for petitioner. *Mr. E. Curtis Rouse* and *Mr. Robert S. Erskine* for respondent in No. 775. *Mr. Frank J. Hogan* for respondent in Nos. 778 and 779. No appearance for respondent in Nos. 776 and 777.

No. 726. JOAQUIN RAMOS FERRO ET AL. *v.* FELIX FABIAN ET AL.;

No. 727. J. OCHOA Y HERMANO *v.* MIGUEL, LUIS, GERARDO, TERESO AND ANTONIO MARTORELL Y TORRENS; and

No. 728. JOSE J. BENITEZ DIAZ, IN HIS OWN RIGHT, ETC. *v.* CARLOTA AND CLEMENTINA GONZALEZ Y LUGO, REPRESENTED BY THEIR GUARDIAN AD LITEM, ETC., ET AL. March 13, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Jose R. F. Savage* for petitioners. *Mr. George B. Hayes, Mr. Frank Antonsanti* and *Mr. Frederick S. Tyler* for respondents.

No. 764. GEORGE E. VANDENBURGH *v.* TRUSCON STEEL COMPANY. March 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Carlos P. Griffin* for petitioner. *Mr. W. F. Guthrie* for respondent.

No. 774. LAYNE & BOWLER CORPORATION *v.* WESTERN WELL WORKS, INC., ET AL. March 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Frederick S. Lyon* and

Mr. William K. White for petitioner. *Mr. Frederic D. McKenney* and *Mr. Charles E. Townsend* for respondents.

No. 769. JOHANNA FRESE, ADMINISTRATRIX, ETC., *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. March 27, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Mr. John G. Parkinson* for petitioner. No appearance for respondent.

Nos. 825 and 826. FOX FILM CORPORATION *v.* FREDERICK M. KNOWLES ET AL. April 17, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Saul E. Rogers* and *Mr. William J. Hughes* for petitioner. *Mr. Louis R. Bick* for respondents.

No. 824. CITY NATIONAL BANK OF EL PASO, TEXAS, *v.* EL PASO & NORTHEASTERN RAILROAD COMPANY ET AL. April 24, 1922. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas granted. *Mr. A. H. Culwell* for petitioner. *Mr. W. A. Hawkins, Mr. William R. Harr* and *Mr. Charles H. Bates* for respondents.

No. 846. FRANK G. GARDNER, TRUSTEE, ETC., *v.* CHICAGO TITLE & TRUST COMPANY, RECEIVER, ETC. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Henry M. Wolf, Mr. A. F. Reichmann* and *Mr. Arthur M. Cox* for petitioner. *Mr. Hiram T. Gilbert* for respondent.

PETITIONS FOR CERTIORARI DENIED, FROM FEBRUARY 28, 1922, TO AND INCLUDING MAY 1, 1922.

No. 743. CHARLES L. CRAIG *v.* THOMAS D. MCCARTHY, UNITED STATES MARSHAL, ETC., ET AL. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied, and alternative motion for a rule to show cause by way of mandamus denied. *Mr. George Sutherland, Mr. John P. O'Brien* and *Mr. Edmund L. Mooney* for petitioner. *Mr. Solicitor General Beck* for respondents.

No. 673. IRVING NATIONAL BANK *v.* AMERICAN STEEL COMPANY. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John Larkin* for petitioner. *Mr. John M. Perry* for respondent.

No. 689. JOHN G. KENEDY ET AL. *v.* STATE OF TEXAS ET AL. March 6, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Mr. Gordon Boone* for petitioners. *Mr. R. L. Ball* and *Mr. A. W. Seeligson* for respondents.

No. 698. UNITED STATES *v.* VARIOUS DOCUMENTS, ETC. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Solicitor General Beck* and *Mr. W. C. Herron* for the United States. *Mr. William Burry* and *Mr. Albert L. Hopkins* for respondents.

No. 705. JUSTUS S. WARDELL, AS COLLECTOR OF INTERNAL REVENUE, ETC. *v.* JAMES A. BLUM ET AL. March 6,

1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. G. Noble Jones* for petitioner. *Mr. John W. Preston* and *Mr. John C. Altman* for respondents.

No. 715. FEDERAL TRADE COMMISSION *v.* D. A. WINSLOW ET AL.; and

No. 716. FEDERAL TRADE COMMISSION *v.* NORDEN SHIP SUPPLY COMPANY, INC. March 6, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Solicitor General Beck, Mr. W. H. Fuller, Mr. Adrien F. Busick* and *Mr. Charles S. Moore* for petitioner. *Mr. Henry Bowden* for respondents.

No. 717. SILAS WILLIAMS, TRUSTEE IN BANKRUPTCY, ETC. *v.* H. M. EVANS. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. B. Sizer* and *Mr. J. W. Thompson* for petitioner. *Mr. Nathaniel H. Maxwell* and *Mr. Frank Spurlock* for respondent.

No. 720. MICHAEL WEISMAN *v.* UNITED STATES. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ernest S. Cary* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 721. HAROLD D. BOEHM, AS ADMINISTRATOR, ETC. *v.* LEHIGH VALLEY TRANSPORTATION COMPANY, ETC. March 6, 1922. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Second Circuit denied. *Mr. Lewis H. Fisher* for petitioner. *Mr. D. Roger Englar* for respondent.

No. 722. PUGET SOUND POWER & LIGHT COMPANY *v.* S. B. ASIA ET AL. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James B. Howe* and *Mr. Frederic D. McKenney* for petitioner. *Mr. O. B. Thorgrimson, Mr. Harold Preston* and *Mr. Maurice McMicken* for respondents.

No. 723. UNITED STATES *v.* JAMES A. BAKER, RECEIVER, ETC. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Solicitor General Beck* and *Mr. Blackburn Esterline* for the United States. No appearance for respondent.

Nos. 729, 730, 731, and 732. UTAH CONSOLIDATED MINING COMPANY *v.* UTAH APEX MINING COMPANY. March 6, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George Sutherland, Mr. John P. Gray* and *Mr. A. C. Ellis, Jr.,* for petitioner. *Mr. J. A. Marshall* and *Mr. William E. Colby* for respondent.

No. 738. DAYTON BRASS CASTINGS COMPANY *v.* A. C. GILLIGAN, UNITED STATES COLLECTOR OF INTERNAL REVENUE. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lawrence Maxwell* and *Mr. J. Sprigg McMahon* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Charles H. Weston* for respondent.

No. 739. NEW YORK CENTRAL RAILROAD COMPANY *v.* CHARLES PLESS. March 6, 1922. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Maurice C. Spratt* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 742. SUPREME COUNCIL, CATHOLIC BENEVOLENT LEGION, *v.* MARY J. GALLERY. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James G. Condon* and *Mr. Edward S. Connolly* for petitioner. *Mr. Samuel C. Irving* for respondent.

No. 754. BOSTON TOWBOAT COMPANY *v.* DARROW-MANN COMPANY; and

No. 755. CHARLES F. ADAMS ET AL., TRUSTEES, ETC. *v.* DARROW-MANN COMPANY. March 6, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Edward E. Blodgett* and *Mr. Foye M. Murphy* for petitioners. *Mr. Alexander Wheeler* for respondent.

No. 762. SAMUEL SINGER *v.* UNITED STATES. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James Mercer Davis* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 763. ROY LUCAS ET AL. *v.* UNITED STATES. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William H. Dickson* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 765. BALTIMORE & OHIO RAILROAD COMPANY *v.* RALPH SULLIVAN. March 6, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. J. M. Wright* for petitioner. *Mr. Robert P. Stewart* for respondent.

No. 766. BULL INSULAR LINE, INC., *v.* SOCIETE ANONYME DES SUCRERIES DE SAINT JEAN. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John A. McManus* for petitioner. *Mr. Boyd B. Jones* and *Mr. Philip N. Jones* for respondent.

No. 771. A. G. NESBITT, ANCILLARY ADMINISTRATOR, ETC. *v.* CHARLES H. CLARK ET AL. March 6, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Harvey A. Miller* for petitioner. *Mr. John M. Freeman* and *Mr. W. D. Stewart* for respondents.

No. 780. WESTERN UNION TELEGRAPH COMPANY *v.* LAURA HALE, ETC. March 6, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph L. Egan, Mr. Francis Raymond Stark* and *Mr. John E. Hartridge* for petitioner. No appearance for respondent.

No. 773. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* NEW YORK CENTRAL RAILROAD COMPANY. March 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Ledyard P. Hale* and *Mr. Edward G. Griffin* for petitioner. *Mr. Maurice C. Spratt* for respondent.

Nos. 744 and 745. AUTO ACETYLENE LIGHT COMPANY ET AL. *v.* PREST-O-LITE COMPANY. March 13, 1922. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles A. Seiders* for petitioners. *Mr. Keyes Winter* and *Mr. Howard Lewis* for respondent.

No. 781. CITY OF NEW YORK, OWNER, ETC. *v.* NEW ENGLAND STEAMSHIP COMPANY, OWNER, ETC. March 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John P. O'Brien* for petitioner. *Mr. Clarence Bishop Smith* and *Mr. Henry M. Hewitt* for respondent.

No. 710. BLUEFIELD WATER WORKS & IMPROVEMENT COMPANY *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA ET AL. Error to the Supreme Court of Appeals of the State of West Virginia. March 20, 1922. Petition for a writ of certiorari herein denied. *Mr. Alfred G. Fox* and *Mr. Joseph M. Sanders,* for plaintiff in error, in support of the petition. No appearance for defendants in error.

No. 759. RUTH WILLIAMS, ADMINISTRATRIX, ETC., *v.* SOUTHERN PACIFIC COMPANY. March 20, 1922. Petition for a writ of certiorari to the Supreme Court of the State of California denied for lack of final judgment. Application not considered on its merits. *Mr. Theodore A. Bell* for petitioner. *Mr. Robert T. Devlin, Mr. William H. Devlin, Mr. William F. Herrin* and *Mr. Henly C. Booth* for respondent.

No. 809. UNITED STATES *v.* OLAF A. HANA. March 20, 1922. Petition for a writ of certiorari to the Circuit Court

of Appeals for the Ninth Circuit denied, because the petition was not filed within the time prescribed by the statute. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States. No appearance for respondent.

No. 704. SAMUEL SCHONFELD *v.* UNITED STATES. March 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elijah N. Zoline* for petitioner. No brief filed for the United States.

No. 757. MAN-A-WATZE (INDIAN WIDOW, ETC.) ET AL. *v.* JOSEPH WOONSOOK (INDIAN), ALIAS LITTLE JOE WOONSOOK, ET AL. March 27, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Utah denied. *Mr. William H. King* for petitioners. No appearance for respondents.

No. 758. JOSEPH NEWMAN *v.* UNITED STATES. March 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Douglas Wetmore* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. W. C. Herron* for the United States.

No. 761. CHARLES S. WINSTON *v.* EUGENE M. HOYNE ET AL. March 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edwin M. Ashcraft* for petitioner. *Mr. John J. Healy, Mr. Thomas M. Hayne, Mr. John J. O'Connor, Mr. Tappan Gregory, Mr. Edward R. Johnston* and *Mr. Angus Roy Shannon* for respondents.

No. 782. J. F. HAMER *v.* COUNTY OF GRAY, STATE OF TEXAS. March 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. H. Kimbrough* for petitioner. No appearance for respondent.

No. 783. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS *v.* PLANO MILLING COMPANY ET AL. March 27, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Mr. Joseph M. Bryson, Mr. Alexander H. McKnight* and *Mr. Alexander Britton* for petitioner. No appearance for respondents.

No. 796. YELLOW CAB COMPANY *v.* O. K. EARLE. March 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Horace B. Walmsley* and *Mr. George T. Simpson* for petitioner. *Mr. Moses E. Clapp* for respondent.

No. 811. DAVID A. HENKES *v.* J. H. MCRAE, COMMANDANT OF THE U. S. DISCIPLINARY BARRACKS AT FORT LEAVENWORTH. March 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John S. Maxwell* for petitioner. *Mr. Solicitor General Beck* for respondent.

No. 795. IOWA STATE BANK *v.* NEW AMSTERDAM CASUALTY COMPANY. April 10, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Howard J. Clark* and *Mr. H. W. Byers* for petitioner. *Mr. O. M. Brockett* for respondent.

No. 802. HARRY BROLASKI *v.* UNITED STATES. April 10, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Philip S. Ehrlich* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 808. INSURANCE COMPANY OF NORTH AMERICA *v.* HARRY R. BRIGHAM ET AL. April 10, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Rufus S. Day, Mr. D. Roger Englar* and *Mr. George S. Brengle* for petitioner. *Mr. Pierre M. Brown* for respondents.

No. 810. DIRECTOR GENERAL OF RAILROADS *v.* LEAH ST. DENNIS, AS ADMINISTRATRIX, ETC. April 10, 1922. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Lyman M. Bass* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 818. SARNIA STEAMSHIP CORPORATION, AS CLAIMANT, ETC., *v.* L. TELLES DE VASCONCELLOS. April 10, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Whitefield Betts, Jr.,* for petitioner. *Mr. D. Roger Englar* and *Mr. Oscar R. Houston* for respondent.

No. 830. SAN JOAQUIN & KING'S RIVER CANAL & IRRIGATION COMPANY, INC., *v.* W. H. WORSWICK, JR., ET AL.; and

No. 831. MILLER & LUX, INC., ET AL., *v.* W. H. WORSWICK, JR., ET AL. April 10, 1922. Petition for writs of certiorari to the Supreme Court of the State of California denied. *Mr. Edward F. Treadwell* for petitioners. *Mr. R. M. Widney* for respondents.

No. 748. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY ET AL. *v.* WESTERN UNION TELEGRAPH COMPANY. April 17, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Fitzgerald Hall* for petitioners. *Mr. John S. Cooper, Mr. John A. Pitts, Mr. K. T. McConnico, Mr. Charles T. Cates, Jr.,* and *Mr. Francis Raymond Stark* for respondent.

No. 768. FRED VIOLETTE ET AL. *v.* UNITED STATES. April 17, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph W. Cox* and *Mr. Charles A. Russell* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 799. P. J. CAMOU *v.* UNITED STATES. April 17, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George D. Collins* for petitioner. *Mr. Solicitor General Beck* and *Mr. W. C. Herron* for the United States.

No. 814. SOUTHERN OIL CORPORATION *v.* R. M. WAGGONER. April 17, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. S. Arnold* for petitioner. No appearance for respondent.

No. 823. HENRY A. WISE ET AL., RECEIVERS, ETC., *v.* AMERIGUS REALTY CORPORATION. April 17, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles H. Tuttle* and *Mr. Saul S. Myers* for petitioners. *Mr. Eugene W. Leake* for respondent.

No. 835. JAMES C. DAVIS, DIRECTOR GENERAL, ETC., *v.* JOHN WILEY REYNOLDS. April 17, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edwin P. Cox* and *Mr. William B. McIlwaine* for petitioner. *Mr. S. Heth Tyler* and *Mr. James Mann* for respondent.

No. 838. FELO MCALLISTER, TRUSTEE, ETC., *v.* PRODUCERS NAVAL STORES COMPANY ET AL. April 17, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sam R. Marks* for petitioner. *Mr. William L. Clay, Mr. Samuel B. Adams* and *Mr. A. Pratt Adams* for respondents.

No. 853. PUBLIC LEDGER COMPANY *v.* NEW YORK TIMES COMPANY ET AL. April 17, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas Raeburn White* and *Mr. William C. Cannon* for petitioner. *Mr. Alfred Cook* and *Mr. Harold Nathan* for respondents.

No. 817. BOSTON & MAINE RAILROAD COMPANY *v.* GEORGE B. SULLIVAN. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis P. Garland* for petitioner. *Mr. James E. Cotter* for respondent.

No. 819. WILLIAM PAGE ET AL. *v.* UNITED STATES. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank J. Murphy* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 822. C. E. SCHAFF, RECEIVER, ETC. *v.* MRS. SARAH MORRIS, ADMINISTRATRIX, ETC. April 24, 1922. Petition for a writ of certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas denied. *Mr. Joseph M. Bryson, Mr. Alex. Britton* and *Mr. A. H. McKnight* for petitioner. *Mr. Cone Johnson* and *Mr. James M. Edwards* for respondent.

No. 827. MISS MARY E. COX *v.* MRS. MARY A. PHILLIPS. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Purnell M. Milner* and *Mr. J. Hirsh* for petitioner. No appearance for respondent.

No. 840. JOHN R. MARKLEY ET AL. *v.* JOHN O. SHEATZ, RECEIVER, ETC. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Vernon R. Loucks* and *Mr. Henry J. Scott* for petitioners. *Mr. Owen J. Roberts* for respondent.

No. 848. CHARLES H. JOHN, TRUSTEE, ETC. *v.* INTERSTATE IRON & STEEL COMPANY. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Paul D. Durant* for petitioner. *Mr. Jacob Newman, Mr. Edward R. Johnston* and *Mr. Joseph V. Quarles* for respondent.

No. 849. CLARENCE H. VENNER *v.* SOUTHERN PACIFIC COMPANY ET AL. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elijah N. Zoline* for petitioner. *Mr. J. P. Blair* and *Mr. Gordon M. Buck* for respondents.

No. 850. STEAM TUG WILLIAM H. TAYLOR, HER ENGINES, ETC. *v.* STANDARD OIL COMPANY OF NEW YORK. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Mr. O. D. Duncan* and *Mr. Warner Pyne* for respondent.

No. 851. EDWIN FORREST *v.* UNITED STATES ET AL. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. W. Hutton* for petitioner. *Mr. Solicitor General Beck* and *Mr. W. C. Herron* for the respondents.

No. 867. GEORGE F. HINRICHS, INC., *v.* STANDARD TRUST & SAVINGS BANK. April 24, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis A. Winslow* and *Mr. Bern Budd* for petitioner. *Mr. Otto C. Wierum* for respondent.

No. 852. AMERICAN & BRITISH MANUFACTURING COMPANY *v.* G. W. MCNEAR, INC. May 1, 1922. Petition for a writ of certiorari to the Superior Court of the State of Rhode Island denied. *Mr. Ralph M. Greenlaw* and *Mr. William D. Loucks* for petitioner. *Mr. Charles F. Choate, Jr.,* for respondent.

No. 858. CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY *v.* INDIANAPOLIS UNION RAILWAY COMPANY ET AL. May 1, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Morison R. Waite* and *Mr. John R. Schindel* for petitioner. *Mr. Joseph S. Graydon, Mr. Lawrence Maxwell* and *Mr. Albert Baker* for respondents.

No. 859. COUNTY OF SHASTA *v.* MOUNTAIN COPPER COMPANY, LIMITED;

No. 860. COUNTY OF SHASTA *v.* MOUNTAIN COPPER COMPANY, LIMITED; and

No. 861. COUNTY OF SHASTA *v.* BALAKLALA CONSOLIDATED COPPER COMPANY. May 1, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward Hohfeld* for petitioner. *Mr. C. W. Durbrow* for respondents.

No. 862. WILLIAM NELSON CROMWELL ET AL., AS EXECUTORS, ETC., *v.* ANNIE S. SIMONS. May 1, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward T. Brackett* and *Mr. Philip L. Miller* for petitioners. *Mr. Roger Foster* for respondent.

No. 864. IKE LEWISOHN *v.* UNITED STATES. May 1, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lewis F. Jacobson* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for the United States.

No. 871. CANTRELL & COCHRANE, LIMITED *v.* HYGEIA DISTILLED WATER COMPANY, INC. May 1, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Oscar W. Jeffery* for petitioner. No appearance for respondent.

No. 878. KOKUSAI KISEN KABUSHIKI KAISHA *v.* ARGOS MERCANTILE CORPORATION, TRUSTEE, ETC.; and

No. 879. KOKUSAI KISEN KABUSHIKI KAISHA *v.* FREDERICK E. CROTOIS, TRUSTEE, ETC. May 1, 1922. Peti-

tions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George C. Sprague* for petitioner. *Mr. Walter C. Noyes* for respondents.

No. 886. PORT OF NEW YORK STEVEDORING CORPORATION *v.* MICHAEL CASTAGNA. May 1, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Bertrand L. Pettigrew* for petitioner. *Mr. Harold R. Medina* for respondent.

No. 893. LEHIGH VALLEY RAILROAD COMPANY *v.* FRANK SKOCZYLA, ADMINISTRATOR, ETC. May 1, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George S. Hobart* for petitioner. *Mr. Frank M. Hardenbrook* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM FEBRUARY 28, 1922, TO AND INCLUDING MAY 1, 1922.

No. 151. VICTOR HOFFMAN *v.* FRANCIS P. GARVAN, ALIEN PROPERTY CUSTODIAN, ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. March 3, 1922. Dismissed with costs, pursuant to the tenth rule. *Mr. Victor Hoffman* pro se. *Mr. George H. Terriberry* for appellees.

No. 162. FRED. M. HALL ET AL. *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Ninth Circuit. March 10, 1922. Dismissed on motion of counsel for appellants. *Mr. Peter F. Dunne* and *Mr. U. T. Clotfelter* for appellants. *Mr. Solicitor General Beck* for the United States.

No. 165. AMERICAN COAL MINING COMPANY *v.* SPECIAL COAL & FOOD COMMISSION OF INDIANA ET AL. Appeal from the District Court of the United States for the District of Indiana. March 10, 1922. Dismissed with costs, on motion of counsel for appellant. *Mr. Charles Martindale* for appellant. *Mr. Ele Stansbury* and *Mr. James W. Noel* for appellees.

No. 709. PRATT & YOUNG, INC., ET AL. *v.* SUSQUEHANNA COAL COMPANY. On petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit. March 13, 1922. Petition for writ of certiorari dismissed, on motion of counsel for petitioners. *Mr. Boyd B. Jones* for petitioners. No appearance for respondent.

No. 272. UNITED STATES EX REL. STEPHEN E. MCCULLOUGH ET AL., *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. Error to the Court of Appeals of the District of Columbia. March 17, 1922. Dismissed with costs, on motion of *Mr. Samuel Herrick* for plaintiffs in error. *The Attorney General* for defendant in error.

No. 492. SUPERIOR COURT OF PINAL COUNTY, ARIZONA, ET AL., *v.* STATE OF ARIZONA EX REL. W. J. GALBRAITH, ATTORNEY GENERAL OF THE STATE OF ARIZONA, ET AL. On petition for a writ of certiorari to the Supreme Court of the State of Arizona. March 17, 1922. Dismissed with costs, on motion of *Mr. Samuel Herrick* for petitioners. No appearance for respondents.

No. 182. CHARLES H. MCKEE, AS EXECUTOR, ETC., ET AL. *v.* INTER-STATE OIL & GAS COMPANY; and

No. 183. FRED W. SMITH *v.* INTER-STATE OIL & GAS COMPANY. Error to the Supreme Court of the State of Oklahoma. March 17, 1922. Dismissed with costs, pursuant to the tenth rule. *Mr. T. J. Leahy* for plaintiffs in error. No appearance for defendant in error.

No. 264. C. E. SCHAFF, RECEIVER, ETC., *v.* UNITED STATES; and

No. 265. UNITED STATES *v.* C. E. SCHAFF, RECEIVER, ETC. Appeals from the Court of Claims. March 20, 1922. Dismissed per stipulation, on motion of *Mr. Solicitor General Beck* for the United States. *Mr. F. Carter Pope,* for Schaff, Receiver.

No. 192. DOEHLER DIE-CASTING COMPANY ET AL. *v.* BROOKLYN UNION GAS COMPANY. Appeal from the District Court of the United States for the Southern District of New York. March 20, 1922. Dismissed with costs, on motion of counsel for appellants. *Mr. Walter Gordon Merritt* for appellants. *Mr. William N. Dykman* for appellee.

No. 184. EARL A. NOSSAMAN *v.* STATE OF KANSAS. Error to the Supreme Court of the State of Kansas. March 20, 1922. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Edwin C. Wilcox* for plaintiff in error. No appearance for defendant in error.

No. 134. UNITED STATES *v.* NORTH AMERICAN OIL CONSOLIDATED ET AL. Appeal from the Circuit Court of Appeals for the Ninth Circuit. March 21, 1922. Dismissed per stipulation, on motion of *Mr. Solicitor General Beck* in that behalf. *Mr. Charles S. Wheeler* for appellees.

No. 1. ASSOCIATED BILLPOSTERS & DISTRIBUTORS OF THE UNITED STATES AND CANADA ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of Illinois. March 27, 1922. Dismissed per stipulation, on motion of *Mr. Solicitor General Beck* in that behalf. *Mr. E. Allen Frost, Mr. Harris C. Lutkin* and *Mr. R. T. M. McCready* for appellants.

No. 225. ALBERT H. WIGGIN ET AL., ETC. *v.* FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN. Error to the Circuit Court of Appeals for the Second Circuit. April 10, 1922. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Henry Root Stern* for plaintiffs in error. *Mr. Solicitor General Beck* for defendant in error.

No. 887. WILLIAM E. WOODBRIDGE *v.* UNITED STATES. Appeal from the Court of Claims. April 17, 1922. Docketed and dismissed, on motion of *Mr. Solicitor General Beck* for the United States. *Mr. Rufus S. Day* and *Mr. H. P. Doolittle* for appellant.

No. 209. ROTH DIXON ET AL. *v.* JESSE H. COX ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. April 19, 1922. Dismissed with costs, pursuant to the tenth rule. *Mr. Thomas L. Sloan* for appellants. *Mr. Harry L. Keefe* and *Mr. Karl J. Knoepfler* for appellees.

No. 211. SARAH F. DONLEY *v.* ERWIN RAY VAN HORN; and

No. 212. SARAH F. DONLEY *v.* PRESCOTT WEST. On petitions for writs of certiorari to the District Court of Appeal, Second Appellate District, Second Division, of the State of California. April 19, 1922. Dismissed. *Mr. A. Haines* for petitioner. No appearance for respondents.

No. 505. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, *v.* ABRAHAM J. ELIAS. Error to the Supreme Court of the State of Nebraska. April 24, 1922. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Wymer Dressler* for plaintiff in error. *Mr. James H. Hanley* for defendant in error.

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