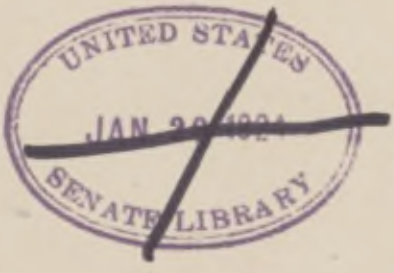
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UNITED STATES REPORTS

VOLUME 262

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1922

FROM APRIL 10, 1923, TO AND
INCLUDING JUNE 11, 1923

ERNEST KNAEBEL
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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.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.

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

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see p. iv, *post*.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.[1]

ORDER OF ALLOTMENT OF JUSTICES.

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, PIERCE BUTLER, Associate Justice.

For the Fourth Circuit, WILLIAM H. TAFT, Chief Justice.

For the Fifth Circuit, EDWARD T. SANFORD, Associate Justice.

For the Sixth Circuit, JAMES C. MCREYNOLDS, Associate Justice.

For the Seventh Circuit, GEORGE SUTHERLAND, Associate Justice.

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

February 19, 1923.

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[1] For next previous allotment, see 260 U. S., p. XIV.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1922.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. *v.* OLSEN, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, ET AL.

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

No. 701. Argued February 26, 1923.—Decided April 16, 1923.

1. The decision of this Court in *Hill* v. *Wallace*, 259 U. S. 44, holding that local dealings on boards of trade in grain for future delivery, could not constitutionally be brought under federal control by means of the taxing power, as was attempted by the Future Trading Act, is not an authority against the Grain Futures Act of September 21, 1922, c. 369, 42 Stat. 998, which is an exercise of the power to regulate interstate commerce. P. 31.
2. The flow of grain shipped into the Chicago market from other States, stored temporarily or held on cars, sold on the Chicago Board of Trade, and reshipped in large part to other States and foreign countries, is interstate commerce subject to regulation by Congress. P. 33.
3. The fact that such grain is shipped under through bills of lading from western to eastern States giving shippers the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and of changing ownership, consignee or destination, and then of continuing the shipment under the same contract at the same rate, while it does not prevent the local taxing of the grain while in Chicago, does not take it out of interstate commerce so as to deprive Congress of the power of regulation over it. P. 33. *Stafford* v. *Wallace*, 258 U. S. 495.

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4. Neither does the fact that grain so shipped is temporarily stored in Chicago in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for continuing the shipment. P. 33. *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265.
5. Sales on the exchange of the Chicago Board of Trade are indispensable to the continuity of this flow of grain in interstate commerce. P. 36.
6. Congress having reasonably found that sales of grain for future delivery (most of which transactions do not result in actual delivery but are settled by off-setting with like contracts), are susceptible to speculation, manipulation and control, affecting cash prices and consignments of grain in such wise as to cause a direct burden on and interference with interstate commerce therein, rendering regulation imperative for the protection of such commerce and the national public interest therein,—had power to provide in the Grain Futures Act, *supra*, for placing grain boards of trade under federal supervision and regulation as "contract markets," as a condition to dealing by their members in contracts for future delivery. P. 36.
7. The provision of the act requiring each board, so designated, to adopt a rule permitting the admission, as members, of authorized representatives of cooperative associations of producers engaged in the cash grain business, who comply, and agree to comply, with the rules of the board applicable to other members, and forbidding any rule to prevent the return of the commissions earned by such a representative, less expenses, for division among the members of his association on a *pro rata* patronage basis,—does not take the property of the members of the Chicago Board of Trade without due process of law. P. 40.
8. The Chicago Board of Trade is engaged in a business affected by a public national interest, and subject to national regulation as such. P. 40.
9. And Congress, therefore, may reasonably limit the rules governing its conduct to prevent abuses and secure freedom from undue discrimination in its operations, even if, incidentally, the value of memberships is decreased. P. 41.
10. The constitutionality of provisions of the above act forbidding use of the mails or interstate means of communication, to offer or accept sales for future delivery, except through members of boards of trade, is not here involved, since the plaintiffs are not affected by them, and, under § 10, invalidity of part of the act is not to affect the validity of the remainder. P. 42.

11. Section 9 of the act, declaring it to be a misdemeanor for a member of a board of trade, designated as a "contract market," to fail to evidence any contract mentioned in § 4 by a written record as therein required, is constitutional. P. 42.
12. The constitutionality of the part of § 9 providing punishment for delivering through the mails, or interstate means of communication, false or misleading crop or market reports, is not involved in this case. P. 42.
13. Neither is the constitutionality of paragraph (b) of § 6, giving the commission power to exclude from "contract markets" persons violating the act or attempting to manipulate the price of grain, in violation of § 5, or of any rule or regulation made in pursuance of its requirements. P. 43.

Affirmed.

This is an appeal from a decree of the District Court for Northern Illinois, dismissing a bill in equity. The appeal is under § 238 of the Judicial Code (as amended Act January 28, 1915, c. 22, 38 Stat. 803, 804), the case being one in which the constitutionality of the Grain Futures Act (enacted by Congress September 21, 1922, c. 369, 42 Stat. 998), is drawn in question.

The bill was brought by the Board of Trade of the City of Chicago, and a number of its members representing each class of traders on the exchange of the Board, to enjoin the United States District Attorney at Chicago, the Secretary of Agriculture, and the United States Postmaster at Chicago from taking steps to enforce the provisions of the act against them on the ground that it violates their rights under the Federal Constitution.

The purpose of the act is expressed in its title to be for the prevention of obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges and for other purposes. Its second section, par. (a), is one of definitions. Its definition of interstate commerce, in the sense of the act, is as follows: "The words 'interstate commerce' shall be construed to mean commerce between any State, Terri-

tory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia."

Paragraph (b) contains the following addition to the foregoing definition:

"(b) For the purposes of this Act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof 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 manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nation."

Section 3 is in the nature of a recital and finding as follows:

"Sec. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in inter-

state commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

The act in §4 forbids all persons to use mails or interstate telephone, telegraphic, wireless or other communication, in offering or accepting sales of grain for future delivery or to disseminate prices or quotations thereof, excepting the man who holds the grain he is offering for sale, and the owner or renter of land on which the grain offered for sale is to be grown; and excepting also members of boards of trade located at a terminal market on which cash sales occur in sufficient volume and under such conditions as to reflect the general value of grain and its different grades, and which have been designated by the Secretary of Agriculture as "contract markets."

The act puts these boards of trade under the supervision of the Secretary of Agriculture and imposes conditions

precedent and subsequent on his power to designate or continue them as "contract markets."

The conditions are:

(a) The keeping of a record with prescribed details of every transaction of cash and future sales of grain of the Board or its member in permanent form for three years, open to inspection of representatives of the Departments of Agriculture and of Justice.

(b) The prevention of the dissemination by the Board or any member of misleading prices.

(c) The prevention of manipulation of prices or the cornering of grain by the dealers or operators on the Board.

(d) The adoption of a rule permitting the admission as members of authorized representatives of lawfully formed coöperative associations of producers having adequate responsibility engaged in the cash grain business, complying with and agreeing to comply with, the rules of the Board applicable to other members, provided that no rule shall prevent the return to its members on a *pro rata* patronage basis the money collected by such association in the business, less expenses.

The Secretary of Agriculture, the Secretary of Commerce and the Attorney General are made a commission to hear and determine, after due notice, whether any board of trade has failed or is failing by rule to do the things required above, and, if found in default, to suspend its functions as a contract market for a period not to exceed six months, or to revoke its designation as such, with an appeal on the record to the Circuit Court of Appeals within the circuit where the board is situate. Such Commission, too, is to hear appeals from the Secretary's action in refusing to designate any board of trade as a contract market.

There is a further provision for excluding from all contract markets and trading privileges any person violating

the provisions of the act or the regulations in pursuance thereof.

Section 9 declares anyone trading in futures in violation of § 4 or sending intentionally or carelessly, false or misleading quotations or information as to the prices of grain, guilty of a misdemeanor.

The bill of the plaintiffs describes the organization of the Chicago Board of Trade as a corporation under a special act of the Legislature of Illinois, passed in 1859, with a membership of 1600 and a board of eighteen directors, of whom one is president. It avers that the Board does no business in selling or buying grain, but only furnishes an exchange and offices where such business can be done by its members; that it does not deliver any market quotation through interstate means, but it does cause to be collected the first price and each change of price on its exchange in cash and future sales during the regular hours in the exchange hall and delivers them to certain telegraph companies, who pay the Board for this information.

The bill further avers that it is sustained only by the initiation fees and dues of its members, the former being $25,000, for each member, and the latter being in the form of annual assessments, that it has from these sources accumulated funds with which to provide a large building and offices for the exchange, from some of which it receives rental and so has property worth two millions of dollars or more; that its existence depends on keeping its memberships valuable; that it does this by requiring character and financial responsibility as qualifications for its membership and by a requirement that a member shall charge for every sale a fixed minimum commission to a non-member principal, and a less minimum to a member who shall be his principal; that corporations are not permitted to be members, but that when two of the stockholders and officers are members, the corporation

is permitted as a member to make contracts on the exchange. The bill further avers that if the Board were required to admit representatives of cooperative associations of producers with the privilege of dividing with their members the proceeds of commissions less expenses, it would greatly impair the value of its memberships to other members.

The bill further avers that the members of its exchange engage only in three kinds of trading. (1) Many act as commission merchants and receive from producers and country grain dealers grain in cars and boats consigned to them which as agents they sell for immediate delivery and account to their principals for the proceeds of such sales less their commissions and other expenses, and many members as principals or agents purchase and sell grain in Chicago which is in cars or elevators for immediate delivery, and all of these transactions are known as " cash trades."

(2) Many members send out in the afternoons whenever market conditions are favorable, telegrams or letters to country grain dealers offering to buy grain, or to millers and other non-residents of Chicago, probable buyers, offering to sell grain at released prices and to be shipped within a certain time on condition that these offers be accepted before regular market hours the next morning. These are known as " cash sales for deferred shipment ", or as " sales to arrive."

(3) Many of the members engage either as principals or agents in making on the exchange contracts with other members for the purchase and sale of grain for future delivery by which the seller agrees to deliver in Chicago the grain covered by the contract upon any day of the named month that he shall select. More than 75 per cent. of the volume of all trading in the exchange is for future delivery and under the rules it must be done in the exchange hall and between regular fixed hours; that both buyers

and sellers in all such contracts are personally present when the contracts are made.

The bill further avers that all contracts for future delivery are under the rules of the Board fulfilled only by delivery of warehouse receipts for the grain issued by twelve warehouses in Chicago, selected by the Board and having a capacity of 13 million bushels and licensed by the State of Illinois to do a public warehouse business; that the grain is mixed with other grain so that the receipt holder never gets the grain deposited when the receipt was issued; that while a rule of the exchange makes grain in railroad cars deliverable in future cars the last three days of the month, the transaction is not fully completed till the grain in those cars is deposited in a regular warehouse and receipt issued; that in the trading for future delivery more than three-quarters of the many millions of bushels contracted to be delivered are settled for without delivery by offsetting purchases; that a large part of the future trading is done by grain merchants, millers and others only for the purpose of insuring themselves against price fluctuations in respect of like grain owned by them and held for sale, shipment or manufacture and is settled by offsetting.

The bill further avers that another large part of future trading is done by speculators, so-called, who make a study of market conditions affecting prices, and try to profit by their judgment as to future prices; that few of such speculators have capital enough to make large single purchases in any way affecting the market; that six-sevenths of all the trading in futures in the country take place in Chicago; that no corners have been run on the exchange for fifteen years, due to the enforcement of rules against them by the Board and "perhaps to the Sherman Anti-Trust Act;" that manipulation has never been successfully resorted to to depress prices; that the selling of futures has no such effect; that the law of sup-

ply and demand regulates prices and prevents violent fluctuations, and that before hedging was made possible by this future trading the cost of the middleman between producer and consumer was much greater.

The defendants filed an answer admitting much of the bill but specifically denying the averments included in the last foregoing paragraph.

The plaintiffs submitted a large number of affidavits in support of a motion for a temporary injunction. These contained opinions of many professors of political economy in the colleges of the country to the effect that trading in futures in the long run did not depress prices, but stabilized them.

The court denied the motion for a temporary injunction and of its own motion dismissed the bill for want of equity.

The conclusions of Congress expressed in the recital of § 3 as to the detriment to interstate commerce from constantly recurring manipulation of sales for future delivery were reached after many years of investigation and examination of witnesses, including the advocates of regulation and those opposed, and men intimately advised in respect to the grain markets of the country.

The Senate Committee on Agriculture and Forestry reported to the Senate as follows:

"Every member of a grain exchange who testified before this committee acknowledged that there is at times excessive speculation and undesirable speculation in the futures market. Furthermore, it was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also, it was shown that a continually fluctuating, and not a stable, market is the desire of speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crops to best advantage. A market without wide and frequent price fluctuations

would greatly benefit the producer. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid at country stations, so an additional margin must be allowed when buying in the country." Sen. Rep. No. 212, 67th Cong., 1st sess.

Witnesses testified before the Committee that a calculation based on commissions showed the total bushels of grain sold for future delivery on the Chicago Board of Trade in a year reach nearly twenty billions and that the amount of grain actually delivered under such contracts is not one per cent. of this. Objectors to future trading insisted at first that future trading put in the hands of desperate speculators an easy opportunity to corner the market and to promote great and rapid fluctuations in value and was wholly vicious and should be forbidden. Further investigation and consideration have satisfied many that the law of supply and demand operated on futures as on cash sales and that futures are very useful in certain respects; notably in offering a means by which through "hedging," owners of grain can, to some extent, protect themselves against the danger of losses by fluctuation.

The Government did not, in this hearing and argument, maintain that by manipulation the operators can permanently depress the prices of grain but cited the actual quotations from time to time, some as late as the summer of 1922, showing violent fluctuations through "deals" of large operators engaged in manipulating the futures market at intervals since 1900, before which corners were ever recurring but since which they have been infrequent. Much evidence was adduced before congressional committees that the sales of futures on the Chicago Board dominated the prices of wheat in this country and the world. The injurious effect of these recurring fluctuations in such futures upon the consignment of grain by owners and producers was asserted by witnesses. Mr.

Herbert Hoover, whose experience as Food Administrator gave his opinion weight, said to the House Committee on Agriculture (Future Trading Hearings—66th Cong. 3d sess., p. 909–910):

"The second form of manipulation and the one that I feel does at times take place, is the making of a drive on the price by either the sale or the purchase of such quantities as will affect the price by the volume of material coming to the market at that particular time. I would regard those transactions as an attempt to dislocate the normal flow of the law of supply and demand, and any attempt of any individual to dislocate a free market must be against public interest. I feel it is also against the interest of the individual producer, because a drive on the market that depresses the price must find a considerable number of farmers who, through the fall in price and their outstanding obligations, are compelled to liquidate, and they have been done an injury. Incidentally, the commodity has been brought into the market, and an acceleration to depression has been created."

Mr. Julius H. Barnes, the head of the United States Grain Corporation during the War, and of widest experience in the grain markets of the world, at the same hearing, after explaining that future dealing stabilizes prices and helps legitimate hedging and that a drive on prices worked its own cure in the long run, as did the distinguished economists whose affidavits were exhibited in this case, said (pp. 839–840):

"But it is also true that even though such a price depression must be temporary in character it may, during its period of effectiveness, do substantial injustice by forcing the liquidation of grain held on margins, or by the price tendency thus displayed frightening owners otherwise confident of the ultimate value of their goods."

The Federal Trade Commission in its report on wheat prices to the President, December 13, 1920, said, p. 8:

"Prices of wheat futures, the decline in which has been especially the subject of criticism, are susceptible of manipulation. Wide fluctuations in prices and large discounts of the future price below the cash price have prevailed. This has made it unsatisfactory for 'hedging,' and hedging sales may also appear to be manipulative, because, if they are large, they may cause sharp depressions. Wheat futures are not functioning well, even according to the standards of their advocates."

Mr. Julius H. Barnes, in his evidence before the Federal Trade Commission, in October, 1922, describes the effect upon interstate commerce of a "deal" in May, 1922, wheat on the Chicago Board of Trade, when the price of futures rose rapidly. Large operators collected cash wheat all over the country and headed it for Chicago for delivery at the attractive prices. This took wheat away from all the other wheat centers of the country where it normally would have remained for consumption and accumulated an almost unsalable quantity in Chicago, greatly disturbing the normal and useful flow of wheat in its ordinary and proper distribution and precipitating a crash in prices.[1]

[1] In response to Senate Resolution 133 the Federal Trade Commission prepared to make a report by conducting in October, 1922, an inquiry into the market manipulation of grain. Mr. Julius H. Barnes was a witness, and in the course of his examination said (pp. 74–76):

"Now, in May, 1922, we had the same spectacular gyrations in prices, starting earlier in the month and falling into a complete collapse in price. Why?

"COMMISSIONER MURDOCK: In the middle of the month this time?

"MR. BARNES: Yes, starting early in the month, rising to a peak and then falling to an early collapse. Without knowing the facts, because these things are detected by commission merchants, it seems quite clear that there were two or three large lines of wheat bought in Chicago for delivery in May, 1922; that at least one of those, on popular report, was a man who could easily pay for five million bushels of wheat; that he intended to take the wheat as a merchant;

It was charged before the congressional committees that the limitation of deliveries under contracts for futures to warehouse receipts of twelve regular warehouses aggregating but thirteen million bushels capacity, with the privilege of a tender of grain in cars on the last three days of the delivery month and a power in the board of directors to enlarge the privilege in case of an emergency, casts another element of speculative doubt into the prices of futures and puts too much control in the board of directors. In view of the fact that the total capacity of Chicago for storing grain in public and private warehouses is forty-five millions, it is urged that this rule of the futures market is sinister and dangerous in affecting the prices of a market that are world-wide in their influence by such a narrow limitation of deliveries subject to

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that he was going to pay cash for it and not squeeze somebody to make a settlement. He expected to get delivery of that, did not buy it in anticipation that it could not be delivered, and therefore he could force a settlement, and he was going to act as a merchant on the belief that wheat was worth more in the world's markets than the prices then ruling in Chicago; but on top of that there developed that two or three other men, who were evidently clear speculators, not acting with that conception, had also lines of wheat, and the aggregate of those made a shortage in Chicago exceeding the stock of wheat in Chicago or naturally tributary thereto.

"The result of that was that as this situation developed, the buyer, miller or exporter began to get afraid about the Chicago market, that he might have to buy his hedges in higher, and began to buy in those hedges and the market advanced under that kind of apprehensive buying, the buying of legitimate merchants who were frightened to leave their hedges in that month any longer. That helped make the peak, plus perhaps some buying by interested people who wanted to see the price marked up, and those large cash interests in Chicago began to collect all over the country wheat and head it to Chicago for delivery at these attractive prices, which by this time had reached a relation in respect to all of the markets which attracted wheat from every direction to Chicago.

"The result of that was that by the end of the month there was accumulated in Chicago a stock of ten or twelve million bushels of

arbitrary and uncertain change at the discretion of the Board, and that it is a factor in frightening shippers and lawful hedgers in making opportunity for speculative manipulation and burdening the flow of grain in normal interstate channels.[2]

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wheat, which was beyond the normal absorbing capacity of the consumption trade that rests on Chicago, and that wheat had been lifted by the incentive of these apprehensively made prices from centers where it should have remained for the consumption which normally overtakes it from those centers—Omaha, Kansas City, Minneapolis, all these other points. So that the country stocks which should normally supply mills west of Chicago or south of Chicago were lifted out of their natural place and directed to Chicago by these apprehensively made prices, and there was collected in Chicago an almost unsalable quantity of wheat which could only press in one direction, could not go back.

"COMMISSIONER MURDOCK: So that we had a price collapse by that?"

See also letter of J. H. Barnes to Chicago Board of Trade, p. 69, Grain Futures Hearings before Committee on Agriculture and Forestry, U. S. Senate, 67th Cong., 2d sess., on H. R. 11843, containing the following:

"Present conditions lay an economic burden on distribution cost by drawing wheat to Chicago out of its accustomed channels and from points of supply needed shortly for actual consumption elsewhere. These evil effects are solely from apprehension of a forced settlement at artificial prices on hedges properly used as insurance against price level fluctuations."

[2] Evidence of Julius H. Barnes before Federal Trade Commission in October, 1922 (p. 77), on inquiry in response to Senate Res. No. 133:

"MR. BARNES: In the demonstration for several years that the chief abuses of the trade were deliberate manipulation and congestion, the deliberate forcing of settlement by artificial prices, the trade step by step tried to make it more difficult for anyone to obtain that control of the market. They made No. 1, 2, 3 wheat, and on all varieties deliverable. That was not sufficient, as demonstrated in Chicago two years ago to the Market Committee of 1917. I suggested to them that the trade ought to seriously consider a widening of the contract basis once more, so as to make wheat at Omaha and Kansas City and Minneapolis, at points of accumulation on the normal

Mr. Henry S. Robbins for appellants.

I. This case should be reversed with directions for a decree for appellants upon the authority of *Hill* v. *Wallace*, 259 U. S. 44.

The new act (§ 3) presents no reasons that were not before this Court on the former hearing. The provisions of the law, which are material here, are the same. The reasons of Congress for their enactment are the same, and in both cases are brought to the attention of this Court.

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flow. So that there was not any substantial injustice done a buyer; deliverable at a freight cost difference and a small penalty, so that it would not be abused, and I stand to-day for that as being the one real constructive thing left for the Chicago market to-day, if Chicago is to be the liquid grain future trading market of America, as it should be, if there is a natural advantage in concentrating all the trading of the country in one market, so that you can send an order through and get one hundred thousand or five hundred thousand bushels in a minute, to answer a cable from abroad or a milling order, because the volume of trade there is liquid all the time, and I believe that is in the public interest.

"If it is to do that, then Chicago ought to widen this wedge against these shippers, and it can be done by taking into contract delivery the wheats in these other markets. The effect last May would have been that that wheat would have been delivered, but the wheat itself would have physically been in Omaha and Kansas City and available for milling in June and July, when it was needed, and it would not have been in Chicago to press direct on the east and the world's market and cause a further decline in price.

"Mr. Watkins: Mr. Barnes, what you would include for delivery at Chicago markets you would include for delivery at Seaboard markets, would you not?

"Mr. Barnes: No, I would not, because as I say, on the natural flow, a buyer in Chicago for actual delivery of wheat must in the normal process of trade move that wheat east. His consumption both for export and milling is east of Chicago. Therefore, for him to take delivery west of Chicago at a freight difference and a small penalty is no substantial injustice; but to force him to take wheat at the Seaboard at the transportation cost when maybe he is buying in Chicago to supply a mill in Omaha, might be a very substantial injustice."

If there is a distinction broad enough to escape the effect of the former decision, it must lie in the fact that the reasons of Congress are now recited in the act, while in the former case this Court had them from the records of Congress. Such a distinction must rest either on the ground that the recitals in a statute of the reasons of Congress for passing it become conclusive upon the Court, when it is passing upon the constitutionality of the act, or that this Court can fully appraise the reasons of Congress only when they are incorporated into the act.

We do not stop to consider whether the technical doctrine of estoppel is here applicable; nor whether the doctrine of *stare decisis* is applicable to constitutional questions, because in any event *Hill* v. *Wallace* must, so far as applicable, control the decision of this case, unless this Court shall conclude—what we may not assume—that it made a mistake in that case, and should now recede from that decision.

II. Future trading on the exchanges does not impose a burden upon interstate commerce. The contrary of this proposition constitutes the key of the arch upon which this law rests. Without it the act clearly falls within the decision in *Hill* v. *Wallace.*

The recitals of § 3 are not conclusive of this question.

When the existence of constitutional power depends on a certain fact or condition, this Court must for itself determine whether that fact or condition really exists. *Matter of Jacobs,* 98 N. Y. 110; *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 606; *Hill* v. *Wallace, supra; Child Labor Tax Case,* 259 U. S. 20.

How then is the existence of this essential fact or condition to be ascertained—by the usual legal method of allegation and proof, or by such knowledge as this Court is presumed to have?

If the former, then upon this record such obstacle or burden to interstate commerce does not exist; for the bill

so alleges, and the case is here upon a demurrer to the bill sustained for want of equity.

But as after all this is a question of economic or trade law, which must be resolved more as a matter of expert opinion than by direct proof, it would seem to be a question which this Court could decide upon its own present knowledge of the subject, supplemented by such resort to the writings of trained minds as it shall find necessary.

Starting with the proposition that the price fluctuations under consideration are such as are created in sales for future delivery on an exchange, which " are not in and of themselves interstate commerce," such prejudicial effect, if any, as these fluctuations may have upon this future trading—which is purely intrastate commerce—or those participating in it, must be put to one side.

Our inquiry is to be confined to the effect of these future price fluctuations on such cash sales—including sales " of cash grain for deferred shipment or delivery "—as are interstate commerce.

We should here start with a clear conception that the prices in these future sales do not fix or determine the prices in cash sales in either intrastate or interstate commerce. The cash price and the future price in the same market will never—or at least only by a rare chance—be the same, except in the delivery month of the future contract when further trading for delivery in that month usually ceases except for the closing of existing contracts.

The cost of carrying the grain from the present time to the future delivery date constitutes one normal element of difference between the " cash " price and the price in the futures. So when the future sales contemplate delivery in a month of the next crop year the cash and future prices have no fixed relation to each other because dependent upon different supply conditions.

True, the cash prices will not continue below the level determined by a deduction from the future price equal

to the normal cost of carrying the actual grain until the delivery month; for whenever cash wheat thus falls speculators quickly take advantage of it by buying the cash and selling the future. But the cash price may be, and frequently is, relatively higher than the future price because of some urgent immediate demand of millers or exporters or other reason.

So too, there is nothing to compel those who make interstate sales or purchases of grain, to accept as their price the future price or any fixed departure from it. Two persons engage in a cash transaction in grain only when both minds agree upon what the price should be, and this occurs only when each is satisfied to join in a trade at that price. It is, in other words, a price voluntarily arrived at. What is true of an individual sale is equally true of all the sales which go to make up interstate commerce.

Doubtless the quotations of prices in future trading constitute a part, and often an important part, of the information upon which the minds of seller and buyer act in agreeing upon their price. But the shipper of grain across state lines will be more influenced by the prices of "cash" grain in his accessible markets, which are seldom actually, and often not relatively, the same as the future prices.

We must first ascertain the test or standard by which to determine whether these price fluctuations in intrastate commerce are a burden upon interstate commerce. Nothing may be regarded as a burden upon commerce, which does not prejudicially affect those engaged in it or the public generally. If this country exported all the grains that it raises, it might be said that whatever tends to raise the price is beneficial rather than hurtful, and only such conduct or influences as tended to depress prices should be regarded as a burden upon commerce. But this country consumes the major part of its own grains,

and this Court has determined in *United States* v. *Patten,* 226 U. S. 525, that a conspiracy of persons to run a "corner" and thereby increase prices is so harmful to the public as to be within the Sherman Anti-Trust Act.

Hence, what the law contemplates is the free and unrestricted play of the natural law of supply and demand. Only such conduct or influences, therefore, as cause prices in interstate commerce to be other than such as would result from this natural law, are to be here considered in ascertaining what are burdens upon that commerce.

This burden may arise, either because such prices are raised above, or depressed below, the normal price. The former could result—if at all—only from the excessive buying of speculators who aim to "corner" the markets and thereby force short sellers to settle at a price above the natural price. But "corners" in the grain market are "a thing of the past."

The question is thus reduced to, whether the fluctuations in this future trading are such as to abnormally depress the price of "cash" grain in interstate commerce to the prejudice of the producers.

The bill avers and the evidence in the *Christie Case,* 198 U. S. 236, showed that the grain buyers' profit in moving grain from the farmers to the foreign market—which formerly was from five to eight cents a bushel—had been reduced to not exceeding two cents a bushel by the opportunity afforded by future trading to the grain dealers to insure themselves against price fluctuations by the making of "hedging" contracts.

Theories respecting speculative trading in grain, which in the past have been deemed by legislators to be economic truths and been made the basis of restrictive legislation, are now conceded to be economic fallacies. No thoughtful person now contends that on economic grounds public injury results from speculation in grain, or that all future trading on the grain exchanges should be suppressed.

All that the proponents of this legislation now claim is that " sudden or unreasonable fluctuations in prices " in future trading " frequently occur as the result of speculation, manipulation or control," and that a depression of prices which results therefrom is " detrimental to the producers or consumers," and hence is a burden upon interstate commerce.

The short-seller's only motive is to profit by correctly forecasting the price, at which grain will sell at a future day. He is ever conscious that there are others at hand, who are actuated by a like motive to profit by buying, when the market price is such as to promise profit.

Before one can sell he must find some other member of the exchange who, or whose customer, takes a directly opposite view of the probable future price; the quantity bought equals the quantity sold. It is these conflicting views of many traders, which make the market. Thus future trading but expresses the attempts of all participants therein to profit by correctly forecasting the future price. Each is acting under the highest incentive to be right, because of the severe loss that will result from being wrong. They all know that the ultimate factor is the law of supply and demand, as affected by the market conditions when the delivery time arrives. Their sole aim is to correctly appraise the effect of such conditions upon the operation of that law.

The claim asserted in § 3 of the Grain Futures Act, that sudden or unreasonable fluctuations in prices frequently occur as the result of speculation, manipulation or control, in future trading, and constitute a burden upon interstate commerce, is negatived by the writings of economists and by the affidavits of twenty or more professors of political economy in our leading universities, which form part of this record.

Concurrence of view in the minds of those, who are best qualified to know, clearly establishes (1) that future

trading has not produced sudden or unreasonable fluctuations in prices; (2) that such fluctuations do not frequently occur as the result of speculation, manipulation or control; and (3) that such fluctuations as do occur in future trading are not detrimental to the producers or consumers, or a burden upon interstate commerce. Furthermore, there was nothing in the hearings before the committees of Congress preceding the passage of this and the former act to justify these recitals in § 3 of the act.

Whatever is intrastate in character must, in order to be a burden upon interstate commerce, (1) directly touch or affect such commerce, and (2) affect it in a substantially injurious way. In other words, it must be a direct and onerous burden upon such commerce. *Passenger Cases,* 7 How. 402; *Hopkins* v. *United States,* 171 U. S. 578; *Adair* v. *United States,* 208 U. S. 161; *Hooper* v. *California,* 155 U. S. 648; *Smith* v. *Maryland,* 18 How. 71; *Blumenstock Bros.* v. *Curtis Publishing Co.,* 252 U. S. 436; *Brodnax* v. *Missouri,* 219 U. S. 285; *Merchants Exchange* v. *Missouri,* 248 U. S. 365; *Field* v. *Barber Asphalt Co.,* 194 U. S. 618.

Does this intrastate future trading thus burden interstate commerce? Considered in its entirety, no one claims that it does. All concede that future trading is distinctly helpful to commerce.

All that is claimed by the proponents of this legislation is, that the *prices* made in this future trading at times prejudicially depress prices in interstate transactions in grain. It has already been shown that this is a false premise.

But assuming it to be a true one, can it be said that such intrastate prices so directly and materially affect interstate prices as to constitute a burden on interstate commerce? As we have already seen, interstate traders in grain are not obliged to accept, nor do in fact accept, these intrastate prices as the prices in their interstate

transactions. They constitute but a part of the information upon which such traders act in agreeing upon their prices. If Congress may justify interference with this purely intrastate trading upon the theory of protecting the normal play of the law of supply and demand as respects grain, it may upon the same grounds regulate the numerous exchanges where stocks, eggs, butter and other produce are dealt in, and whose prices are quoted in the daily press. Thus is presented the question, whether purely intrastate trading becomes subject to the commerce power of Congress merely because it frequently indirectly affects prices in interstate commerce. But there can be no distinction between intrastate *prices* and anything else of an intrastate character, which affects interstate prices. In other words, the question here is, whether every intrastate employment, business, or condition is within the commerce power of Congress, if it in any way affects prices in interstate commerce.

If so, then this Court was wrong in adjudging unconstitutional the first Child Labor Law. If the protection of prices in interstate commerce is to be held to justify the exercise of the interstate commerce power, that power will be enlarged far beyond any present conceptions of it. Wages of labor employed in manufacture and other elements of manufacture materially affect the prices of such manufactured products as subsequently enter into interstate commerce. Is the commerce power broad enough to regulate labor employed in, and other features of, manufacture? This Court in *United States* v. *Knight Co.*, 156 U. S. 1, 17, stated that combinations which raise or lower prices or wages in domestic enterprise only indirectly affect interstate commerce. See also *Railroad Co.* v. *Richmond,* 19 Wall. 584.

We do not here contend that Congress may not treat as an obstruction to commerce persons who combine for the purpose of directly fixing or affecting prices in interstate commerce (as in the *Addyston Pipe Case,* 175 U. S.

211; the *Swift Case,* 196 U. S. 375, and the *Patten Case,* 226 U. S. 525), but only that acts which may directly influence prices in intrastate trading in grain for future delivery can only indirectly affect, if at all, the interstate buying and selling of grain for immediate delivery; and that such acts are, therefore, beyond the commerce power of Congress.

III. The present act is not one to remove an alleged burden upon interstate commerce.

If the condition or subject-matter be partly of an interstate and partly of an intrastate character the commerce power will be judicially confined to that which is interstate. *Trade-Mark Cases,* 100 U. S. 82.

The only qualification to this principle is found where there is such an intermingling that that which is interstate cannot be protected or regulated without also touching that which is intrastate, *Minnesota Rate Cases,* 230 U. S. 354; *Houston, East & West Texas Ry. Co.* v. *United States,* 234 U. S. 342; and here the federal power is limited to the removal of the obstruction. *Illinois Central R. R. Co.* v. *Public Utilities Commission,* 243 U. S. 493.

Still another phase of the question is presented where the condition or subject matter is wholly within intrastate commerce, but it gives rise to certain incidents or opportunities, which enable evilly disposed persons so to act as to create an obstacle to or burden upon interstate commerce. The commerce power here should—if the spirit of the Constitution is not to be violated—be confined to measures directly aimed at the obstacle and those who create it. Congress may not use such obstacle as a pretext for absorbing complete control of such intrastate commerce in respect to things and persons in no way responsible for the supposed obstacle or burden. The present case falls within this last phase of the question.

Again Congress may not compel a trade agency created by a State and not itself participating in the offense—

as a condition of its continuing to participate in purely intrastate commerce—to actively assist the Nation in the enforcement of its laws—that is, become the police officer or the criminal court of the General Government.

The obstacle here claimed is overtrading which prejudices prices in interstate commerce in grain. The grain exchanges never trade at all: they merely maintain halls where others trade. The great majority of the members of exchanges are not guilty of overtrading.

The Grain Futures Act does not, in the section (9) which provides for the enforcement of the act through the criminal courts, include as an offense manipulation or overtrading. The act, however, does in fact, in § 6, make an attempt to manipulate a crime. When this is ascertained by the commission which the act creates, the offending person is punished by being deprived of the right to trade on any exchange—which may be his only vocation—and the exchange is required to coöperate in imposing this punishment, as a condition to the exercise of its right to conduct its purely intrastate business. Thus the exchange—which is not guilty of manipulation or overtrading—is punished by this law by being restricted in its right to pursue a lawful business.

The act is, therefore, not one to remove an obstruction to commerce, because it does not adopt the only appropriate means for doing so—a statute aimed at those who create the obstacle. See *United States* v. *Dewitt*, 9 Wall. 41, where this Court held that Congress could not prohibit the making of some oils in order to increase the production of others that it taxed.

IV. The removal of an obstruction to interstate commerce is a mere pretext, under which Congress seeks to regulate what is exclusively intrastate commerce.

V. The Grain Futures Act conflicts with the legislative discretion of the States respecting their intrastate commerce, and is in itself a burden upon that commerce.

VI. The act cannot be sustained under the power of Congress to establish post offices, or under its control of interstate communication by telegraph or telephone.

The purpose in this connection is not to exclude from such avenues of communication a message or letter or quotation that is false or obscene or fraudulent in itself or will promote fraud or other illegal conduct.

It is to compel the exchange to accept designation as a contract market by denying its members, if the exchange refuses so to qualify, the privilege of communicating with their customers through the mails or by interstate telegram or telephone. The prohibition is in the nature of a penalty. It is one of the enforcing provisions of the act. *Ex parte Jackson,* 96 U. S. 727; *In re Rapier,* 143 U. S. 110; *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288; *Burton* v. *United States,* 202 U. S. 344, 371; *Hoover* v. *McChesney,* 81 Fed. 472; *Western Union Tel. Co.* v. *Foster,* 247 U. S. 114; *Hammer* v. *Dagenhart,* 247 U. S. 251.

VII. The insurance feature.

Section 3 of the act recites that future contracts are utilized by shippers and dealers engaged in interstate commerce "as a means of hedging themselves against possible loss through fluctuations in price."

Section 4 of the act makes it unlawful for any person to make a contract of sale upon an exchange "which is or may be used for hedging any transactions in interstate commerce in grain," except it be made through a member of a "contract market."

These provisions seem to be based upon the theory that, because those who ship grain in interstate commerce resort to future trading to get insurance, future trading is thereby subject to the interstate commerce power.

But this Court has held that the business of insurance is not commerce, nor an instrumentality of commerce, but a mere incident thereto.

VIII. The provision of the act, § 5 (e), requiring exchanges to admit to membership representatives of cooperative associations of producers, and sanctioning "patronage dividends," deprives the Board of Trade and its members of their property without due process of law.

This identical provision was in the Future Trading Act, and was by this Court held to be not within the commerce power of Congress. The reasons alleged for reënacting some of the provisions of the former act, and which are thought to justify the new act, have no application to this particular provision. But this provision is also unconstitutional upon the further ground that it violates the due process provision of the Constitution.

It has never been held, even as respects modern common carriers, that any person could be legislated into a position where he might share with the owners the profits accruing from the use of their property in public service.

The power to impress property with a public use is, as respects a State, "an exercise of the police power of the State." *Budd* v. *New York,* 143 U. S. 545; *Lawton* v. *Steele,* 152 U. S. 133–137.

Congress may exercise such power only so far as it is included in the other powers conferred on it by the Constitution. *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146; *United States* v. *Cruikshank,* 92 U. S. 542; *Tennessee* v. *Davis,* 100 U. S. 257.

Again, this power, as respects any particular object, must reside exclusively either in the State or in Congress; it cannot well reside in both without producing conflicting statutes.

The property of this Board is situated in Illinois, the Board transacts no business upon its property, and the business that it permits its members to transact thereon is mostly of a domestic and local, as distinguished from an interstate, character; and it seems that the power to impress this property with a public use ought to belong to the State of Illinois alone.

Again, this section 5 (e) is in no sense a proper exercise of the power. In all cases where the property involved is privately owned, the only interest therein that a statute may grant to the public (without paying for the property) is the right of all to share in the service it renders on fair and common terms.

This section is not for the benefit of the public generally, but only a certain class—farmers' organizations.

What the Grain Futures Act does is to force agents of farmers' organizations into membership in the exchanges, so that all farmers who join coöperative associations may escape the payment of the commissions—which all others must pay—and thereby indirectly share in the profit which accrues from the rendering of the service—a profit which has resulted to the members of the exchanges from the creation and maintenance for many years (at private expense of money and effort) of these instrumentalities of trade.

This instrumentality or privately owned property, and the profit accruing from its use, like the grain elevator or insurance company, and the profit therefrom, belong to those who have created and own it.

Any statute which takes private property for a private purpose—as well as one which takes property for a public use without the payment of adequate consideration—violates the due process clause of the Fifth or Fourteenth Amendments to the Constitution. *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; *Missouri, etc., Ry. Co.* v. *Nebraska,* 217 U. S. 196; *Chicago, Mil. & St. P. Ry. Co.* v. *Wisconsin,* 238 U. S. 491; *Eubank* v. *Richmond,* 226 U. S. 137; *Cole* v. *La Grange,* 113 U. S. 1.

The Fifth Amendment applies to an intangible right as well as to tangible property. *Monongahela Co.* v. *United States,* 148 U. S. 312, 343; *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 253.

Again, any statute which materially impairs the value or profitable use of private property is as much a taking

within the due process provision as the actual appropriation of it. *Peabody* v. *United States,* 231 U. S. 530; *Filor* v. *United States,* 9 Wall. 45, 49.

Indeed, a pecuniary loss need not be shown. If the right of property is invaded, the statute is within the constitutional provision. *Buchanan* v. *Warley,* 245 U. S. 60, 74.

IX. Section 6 of the act violates the due process of law provision of the Constitution.

This section provides that any person who "is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements," shall upon the complaint of the Secretary of Agriculture be tried before a commission consisting of such Secretary and two other cabinet officers (all of whom are appointed by, and hold office during the will of, the President), and if found guilty, the commission may punish him by depriving him of all trading privileges upon all "contract markets" "for such period as may be specified in said order," which may be permanently.

As speculating in grain and acting as agent for such speculators are recognized by the law to be lawful vocations, and as the right to pursue any lawful vocation—sometimes called "the liberty of pursuit"—is a part of the liberty which the Constitution guarantees to every citizen, it follows that the punishment here authorized is a deprivation of liberty within the meaning of that term in the due process clause.

Considering the offense created by, and the punishment provided therefor in, § 6, a trial by this commission appointed by the President, is not "due process of law." *Ex parte Milligan,* 4 Wall. 2; *Wong Wing* v. *United States,* 163 U. S. 228; *Huber* v. *Reily,* 53 Pa. St. 112; *Ex*

parte Randolph, Fed. Cas. No. 11,558; *Ong Chang Wing* v. *United States,* 218 U. S. 272; *Kilbourn* v. *Thompson,* 103 U. S. 168; *State* v. *Ryan,* 70 Wis. 676; *Parsons* v. *Russell,* 11 Mich. 113; *Addison* v. *State,* 126 Pac. 840; *Bessette* v. *Conkey Co.,* 194 U. S. 324.

Within authoritative definitions, attempts to manipulate, or other violation of the Grain Futures Act, clearly constitute crimes, which are punished solely in the interest of the general public. By depriving the violator of a part of his liberty it penalizes him for a wrong done to the public.

In this particular it is no less a criminal statute because, instead of compelling the wrong-doer to pay a money penalty or sending him to jail, it deprives him of his constitutional right to earn a living by trading on an exchange.

Section 6 authorizes the commission to punish one "violating any of the provisions of the act." Section 9 of the act declares a like violation a misdemeanor and punishable by a fine not exceeding $10,000, or imprisonment not exceeding a year, or both. Section 9 contemplates a conviction in a criminal prosecution in the District Court. If violating any of the provisions of the act is a crime under § 9 it cannot be less so under § 6. By declaring in one section that the forbidden act is a misdemeanor and not doing so in another section, Congress cannot make the same act at once a crime and not a crime within the Constitution. *Schick* v. *United States,* 195 U. S. 65; *Passavant* v. *United States,* 148 U. S. 214; *Origet* v. *Hedden,* 155 U. S. 228; *Oceanic Steam Nav. Co.* v. *Stranahan,* 214 U. S. 320; *Callan* v. *Wilson,* 127 U. S. 540; *Murray* v. *Hoboken Co.,* 18 How. 277; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81.

Section 6 also violates the Constitution in not being confined to such attempts to manipulate as prejudicially affect interstate commerce. *Trade-Mark Cases,* 100 U. S. 82.

It is hardly conceivable that the Constitution, in conferring interstate commerce power on Congress, intended to authorize it to exact licenses from every person engaged in making intrastate contracts for future delivery and make them revocable by an executive officer as a means of preventing some from obstructing interstate commerce.

It is therefore submitted that § 6 of the act, so far as it confers on this commission jurisdiction to try persons for overtrading, and to punish them by depriving them of the right to resort to the exchanges, is unconstitutional.

This question directly arises on this appeal; for the suit is not merely one by the Board of Trade, but also by seven members of the Board (suing on behalf of all of them) to restrain a public official (the Secretary of Agriculture) from enforcing, as prosecutor, what is a criminal provision—it being, as the bill alleges, his purpose to enforce it.

Mr. Solicitor General Beck, with whom *Mr. Blackburn Esterline,* Assistant to the Solicitor General, *Mr. R. W. Williams* and *Mr. Fred Lees* were on the brief, for appellees.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the Court.

Appellants contend that the decision of this Court in *Hill* v. *Wallace,* 259 U. S. 44, is conclusive against the constitutionality of the Grain Futures Act. Indeed in their bill they pleaded the judgment in that case as *res judicata* in this, as to its invalidity. The act whose constitutionality was in question in *Hill* v. *Wallace* was the Future Trading Act (c. 86, 42 Stat. 187). It was an effort by Congress, through taxing at a prohibitive rate sales of grain for future delivery, to regulate such sales on boards of trade by exempting them from the tax if they would comply with the congressional regulations. It was

held that sales for future delivery where the parties were present in Chicago, to be settled by offsetting purchases or by delivery, to take place there, were not interstate commerce and that Congress could not use its taxing power in this indirect way to regulate business not within federal control. We said (p. 68):

"Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."

Again, on page 69, we said:

"It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."

The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held in the somewhat carefully framed language of the foregoing quotations prevented our sustaining the Future Trading Act. As we have seen in the statement of the case, the act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce. Instead,

therefore, of being an authority against the validity of the Grain Futures Act, it is an authority in its favor.

The Chicago Board of Trade is the greatest grain market in the world. *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 235. Its report for 1922 shows that on that market in that year were made cash sales for some three hundred and fifty millions of bushels of grain, most of which was shipped from States west and north of Illinois into Chicago, and was either stored temporarily in Chicago or was retained in cars and after sale was shipped in large part to eastern States and foreign countries. This great annual flow is made up of the cash grain sold on the exchange, the cash sales to arrive (*Chicago Board of Trade* v. *United States,* 246 U. S. 231), and the comparatively small percentage of grain contracted to be sold in the futures market not settled by offsetting. *Chicago Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, 248. The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from western States bills of lading through Chicago to points in eastern States with the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate. *Bacon* v. *Illinois,* 227 U. S. 504. Such a contract does not prevent the local taxing of the grain while in Chicago; but it does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it, as is plainly intimated in the authority cited (p. 516) and expressly recognized in *Stafford* v. *Wallace,* 258 U. S. 495, 525, 526. The fact that the grain shipped from the west and taken from the cars may have been stored in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for con-

tinuing the shipment, does not take away from the interstate character of the through shipment any more than a mixture of the oil or gas in the pipe lines of the oil and gas companies in West Virginia, with the right in the owners to withdraw their shares before crossing state lines, prevented the great bulk of the oil and gas which did thereafter cross state lines from being a stream or current of interstate commerce. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, 272; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 281.

It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts, from the current of stock shipments declared to be interstate commerce in *Stafford* v. *Wallace,* 258 U. S. 495. That case presented the question whether sales and purchases of cattle made in Chicago at the stockyards by commission men and dealers and traders under the rules of the stockyards corporation could be brought by Congress under the supervision of the Secretary of Agriculture to prevent abuses of the commission men and dealers in exorbitant charges and other ways, and in their relations with packers prone to monopolize trade and depress and increase prices thereby. It was held that this could be done even though the sales and purchases by commission men and by dealers were in and of themselves intrastate commerce, the parties to sales and purchases and the cattle all being at the time within the city of Chicago.

We said (pp. 515, 516):

" 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."

This case was but the necessary consequence of the conclusions reached in the case of *Swift & Co.* v. *United States,* 196 U. S. 375. That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The *Swift Case* merely fitted the commerce clause to the real and practical essence of modern business growth. It applies to the case before us just as it did in *Stafford* v. *Wallace.*

The distinction that the exchange of the Chicago Board of Trade building is not within the same enclosure as the

railroad yards and warehouses in which the grain is received and stored on its way from the West to the East as it is being sold on the exchange, while the stockyards exchange and the actual receipt and shipment of cattle are within the same fence, surely can make no difference in the application of the principle. The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East.

The question under this act is somewhat different in form and detail from that in the *Stafford Case*, but the result must be the same. It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of federal agency by Congress in the Grain Futures Act although a record of cash sales is required and a corner in cash sales would be a violation of it, and there are other provisions equally regulatory of them. It is the contracts of sales of grain for future delivery, most of which do not result in actual delivery but are settled by offsetting them with other contracts of the same kind, or by what is called "ringing." *Chicago Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 246–247. The question is whether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain? And further, are they such an incident of that commerce and so intermingled with it that the burden and obstruction caused therein by them can be said to be direct?

In *United States* v. *Ferger*, 250 U. S. 199, the question was of the validity of a statute of Congress punishing the forging of bills of lading used in interstate commerce, and altering them. The lower court had dismissed an indictment charging the offense denounced in the statute,

on the ground that Congress could only deal with real bills of lading where there was an actual shipment in interstate commerce and had no power to punish a fraud and fiction where there was no such commerce, and where the bills of lading whose fabrication was the subject of complaint were mere pieces of paper fraudulently inscribed, and did not relate to any actual interstate commerce. This Court, speaking through Chief Justice White, rejected the view of the lower court, on the ground that interstate commerce would be directly impaired and weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently connected with such commerce. The Court, in *Stafford* v. *Wallace, supra,* adopted and applied this principle and said, 258 U. S. 521:

"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 the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.

It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding

of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse.

But it is contended that it is too remote in its effect on interstate commerce, and that it is not like the direct additions to the cost of the producer of marketing cattle by exorbitant charges and discrimination of commission men and dealers, as in *Stafford* v. *Wallace*. It is said there is no relation between prices on the futures market and in the cash sales. This is hardly consistent with the affidavits the plaintiffs present from the leading economists, already referred to, who say that dealing in futures stabilizes cash prices. It is true that the curves of prices in the futures and in the cash sales are not parallel and that sometimes one is higher and sometimes the other. This is to be expected because futures prices are dependent normally on judgment of the parties as to the future, and the cash prices depend on present conditions, but it is very reasonable to suppose that the one influences the other as the time of actual delivery of the futures approaches, when the prospect of heavy actual transactions at a certain fixed price must have a direct effect upon the cash prices in unfettered sales. The effect of such a "deal" as that of May, 1922, as explained by Mr. J. H. Barnes, shows this clearly and illustrates in a striking way the direct effect of such manipulation in disturbing the actual normal flow of grain in interstate commerce most injuriously. Mr. Barnes also points out the effect of the operation of the rule limiting deliveries to warehouse receipts from warehouses selected by the directors of the Board whose unregulated power to suspend or modify the rule pending settlement, adds to the speculative character of the market and frightens consignors.

More than this, prices of grain futures are those upon which an owner and intending seller of cash grain is influenced to sell or not to sell as they offer a good opportunity to him to hedge comfortably against future fluctuations. Manipulations of grain futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only this justifiable hedging but disturb the normal flow of actual consignments. A futures market lends itself to such manipulation much more readily than a cash market.

In the case of *United States* v. *Patten*, 226 U. S. 525, an indictment charged a conspiracy to run a corner by making purchases of quantities of cotton for future delivery, by means of which the conspirators were to secure control of the available supply of cotton in the country and enhance the price of cotton at will. It was contended that even if the necessary result of this was an obstruction of interstate trade, it was so indirect as not to constitute a restraint of it within the Federal Anti-Trust Law under which the indictment was drawn. This Court held otherwise and sustained the indictment.

Corners in grain through trading in futures have not been so frequent as they were before 1900, due, as the plaintiffs aver, to the stricter rules of the Board of Trade as to futures and to the Sherman Anti-Trust Act, though they do seem to have since occurred infrequently. The fact that a corner in grain is brought about by trading in futures shows the direct relation between cash prices and actual commerce on the one hand, and dealing in futures on the other, because a corner is not a monopoly of contracts only, it is a monopoly of the actual supply of grain in commerce. It was this direct relation that led to the decision in the *Patten Case*. If a corner and the enhance-

ment of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided.

The next provision of the act which is attacked as invalid is that which forbids a board, designated as a contract market, from excluding from membership in, and all privileges on, its exchanges any duly authorized representative of a lawfully formed and conducted association of producers having adequate financial responsibility, engaged in the cash grain business, and complying or agreeing to comply with the terms and conditions lawfully imposed on the other members, and which bars any rule forbidding the return by such association of the commissions of its representative, less expenses, to the *bona fide* members of the cooperative association in proportion to their consignments of grain to the exchange. It is said that this will impair the value of membership in the Board and will take the property of the members without due process of law.

The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to

reasonable regulation in the public interest. The Supreme Court of Illinois has so decided in respect to its publication of market quotations. *New York & Chicago Grain Exchange* v. *Chicago Board of Trade*, 127 Ill. 153. In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales of futures upon interstate commerce, we find no difficulty under *Munn* v. *Illinois*, 94 U. S. 113, 133, and *Stafford* v. *Wallace, supra,* in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest and is subject to national regulation as such. Congress may, therefore, reasonably limit the rules governing its conduct with a view to preventing abuses and securing freedom from undue discrimination in its operations. The incidental effect which such reasonable rules may have, if any, in lowering the value of memberships does not constitute a taking, but is only a reasonable regulation in the exercise of the police power of the National Government. Congress evidently deems it helpful in the preservation of the vital function which such a board of trade exercises in interstate commerce in grain that producers and shippers should be given an opportunity to take part in the transactions in this world market through a chosen representative. Nor do we see why the requirement that the relation between them and this representative, looking to economy of participation on their part by a return of patronage dividends, should not be permissible because facilitating closer participation by the great body of producers in transactions of the Board which are of vital importance to them. It would seem to make for more careful supervision of those transactions in the national public interest in the free flow of interstate commerce. Under the present rules of the Board, corporations are permitted to enjoy the benefit of membership by reason of the membership of two of their executive officers who are *bona fide* stockholders, and all their stock-

holders are thus given a chance to enjoy the commissions earned and the benefits to the corporation of other membership privileges to the extent of their stock ownership. The provisions of the act objected to are to be sustained on the principles laid down in *House* v. *Mayes,* 219 U. S. 270; *Brodnax* v. *Missouri,* 219 U. S. 285, and *Grisim* v. *South St. Paul Live Stock Exchange,* 152 Minn. 271. We think the objection to this feature of the act untenable.

We do not find it necessary to our decree in this case to consider the constitutional objections made in the bill to that part of the fourth section which forbids the use of the mails and interstate facilities of communication to offer or accept sales for future deliveries or to send quotations of prices thereof except through members of a board of trade, because the plaintiffs are not affected thereby. Section 10 of the act reads as follows:

" If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

The unconstitutionality of these provisions, if they be unconstitutional, would, therefore, not invalidate the rest of the act.

Section 9 declares it to be a misdemeanor for a member of a designated board of trade to fail to evidence any contract mentioned in § 4 by a record in writing as therein required. This is only a legitimate means of enforcing the statutory regulations of the Board of Trade which we have found to be within the power of Congress.

As to the power of Congress to provide in § 9 for the punishment of any one who shall knowingly or carelessly deliver through the mail or interstate means of communication false or misleading crop or market reports, it will be time enough for us to consider its existence when some one is charged with the offense and is brought to trial therefor. The plaintiffs present no such case.

Paragraph (b) of § 6 which gives to the Commission the power, on complaint after investigation by the Secretary of Agriculture, and after a hearing, to exclude from all contract markets any person violating any of the provisions of the act or attempting to manipulate the market price of any grain in violation of the provisions of § 5 of the act or of any of the rules or regulations made in pursuance to its requirements, is attacked as invalid because a jury trial is not afforded. The plaintiffs do not aver that they are committing acts which will subject them to such exclusion, or that charges have been made and proceedings have been begun or are about to be begun against them by the Secretary of Agriculture. Until they are thus in danger of suffering prejudice from the operation of the paragraph, they can not invoke our decision as to its validity.

For the reasons given the decree of the District Court is

Affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND dissent.

PRENDERGAST ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL. *v.* NEW YORK TELEPHONE COMPANY.

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

No. 542. Argued February 21, 1923.—Decided April 16, 1923.

1. The fact that a public service commission, seven months after it had been temporarily enjoined from enforcing rates fixed by it provisionally for a public service corporation, made final orders fixing rates yielding a much higher return, does not, without more, establish that the former rates were confiscatory when they were made, and does not, therefore, constitute a sufficient basis for dismissing, on motion, an appeal from the temporary injunction. P. 46.

2. The District Court, constituted of three judges, has jurisdiction, under Jud. Code, § 266, to enjoin the enforcement of rates ordered by a public commission, upon the ground that the order is unconstitutional. P. 47. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290.
3. A bill to enjoin enforcement of rates, as confiscatory, properly alleges the ultimate facts upon which the claim of confiscation is based, omitting mere statements of evidence. Equity Rule 25, par. 3. P. 47.
4. In the matter of fixing telephone rates, the Public Service Commission of New York is vested with the final legislative authority of the State, review by the state courts by certiorari being purely judicial. Laws N. Y. 1920, c. 925, §§ 1304, 1305, pp. 437, 438. P. 48.
5. Under the New York Public Service Commission Law, an application to the Commission for a rehearing is allowed, but not required, does not excuse compliance with the Commission's order or its enforcement, except as the Commission may direct, and is addressed entirely to the discretion of the Commission; and any change that may be made upon rehearing does not affect the enforcement of any right arising from the original order. *Held*, that a telephone company, complaining that rates fixed by the Commission were confiscatory, need not apply to it for a rehearing before resorting to the federal court for an injunction, and that failure so to apply was manifestly no ground for denying a temporary injunction, when the Commission by its answer insisted that the orders in question were correct. P. 48.
6. For like reasons, it was not necessary that the complaining company should first have exercised the privilege granted by one of the orders, of applying to the Commission for a modification of a classification affecting the rates. P. 49.
7. The fact that rates prescribed are temporary, to be effective only until the final determination by the Commission, does not prevent resort to the Court to restrain their enforcement pending the continuance and completion of the rate-making process. P. 49.
8. To sustain an application for an order temporarily restraining enforcement of rates challenged as confiscatory, the plaintiff is not obliged to offer in evidence testimony taken by the Commission which fixed the rates. P. 50.
9. A temporary injunction should be sustained on appeal when not contrary to equity or the result of improvident exercise of judicial discretion, and especially when the balance of injury as between the parties favors its issue. P. 50.

10. The evidence in this case was sufficient without a practical test of the rates involved. P. 51.

Affirmed.

APPEAL under Jud. Code, § 266, from an order of the District Court temporarily restraining enforcement of orders of the New York Public Service Commission prescribing maximum telephone rates.

Mr. Simon Fleischmann and *Mr. Wilber W. Chambers*, with whom *Mr. Carl Sherman*, Attorney General of the State of New York, *Mr. Ledyard P. Hale* and *Mr. Martin Clark* were on the briefs, for appellants.

Mr. John W. Davis, with whom *Mr. Charles T. Russell* and *Mr. Nathaniel T. Guernsey* were on the brief, for appellee.

Mr. George P. Nicholson, Mr. M. Maldwin Fertig and *Mr. Harry Hertzoff*, by leave of court, filed a brief on behalf of the City of New York, as *amici curiae*.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is an appeal, under § 266 of the Judicial Code, from an order of the District Court enjoining *pendente lite* the enforcement of orders of the Public Service Commission of New York prescribing maximum rates for the exchange service of the Telephone Company.

The Commission, having entered upon an investigation as to the rates charged by the Company for telephone service within the State, on March 3, 1922, after a large amount of evidence had been taken, but before the hearings had been completed, made the two orders in question. One of these reduced temporarily, pending final determination, the maximum rates to be charged by the Company after April 1, for exchange telephone service in the City of New York. The other made a like reduc-

tion in the maximum rates for such service in other municipalities within the State, which were divided into groups, with basic area rates in each; with a further provision that either the Company or any municipality affected might apply for modification of the classifications on or before April 15. The Company on March 29 filed its bill in the District Court against the Commission, its counsel and the Attorney General of the State, for the purpose of enjoining the enforcement of these orders, upon the ground that they were confiscatory and in violation of the Fourteenth Amendment. An application for an interlocutory injunction was heard by three judges; and the court as thus constituted on June 12 granted an interlocutory order enjoining the defendants from enforcing the orders of the Commission pending the final hearing and until the further order of the court; the Company being required to give bond for $6,000,000 to secure the repayment to its subscribers of all excess charges paid pending the suit in the event the injunction should thereafter be dissolved. From this interlocutory order the defendants have appealed directly to this Court.

Since the argument on the appeal the Company has submitted a motion to dismiss the appeal or affirm the order of the court, upon the ground that on January 25, 1923, the Commission made final orders in the pending investigation establishing a schedule of telephone rates for the State which will yield the Company a much higher annual return than the temporary rates whose enforcement was enjoined. This, it is insisted, shows that the injunction was properly granted.[1] The fact that the

[1] The motion, which is supported by affidavits, alleges that the annual return which will be afforded by the rates established by the final orders of the Commission will exceed by not less than $2,000,000 the revenue afforded by the rates which were in effect before the Commission prescribed the temporary rates in question, and by about $5,000,000 the revenue which would have been afforded by such temporary rates.

Commission has, more than seven months after the injunction was granted, made orders allowing higher rates—whose correctness may yet be questioned in appropriate proceedings for review—upon evidence not before us, does not establish that the injunction was rightly granted under the conditions which then existed. See *Cumberland Telephone Co.* v. *Louisiana Commission* (D. C.), 283 Fed. 215, 218. Hence the motion is denied.

The appellants urge, in substance, as grounds of error: That the special court of three judges had no jurisdiction to grant the injunction; that the bill contained insufficient averments of fact, as distinguished from mere conclusions; that it was prematurely filed; and that the injunction was granted upon insufficient evidence.

We conclude:

1. The specially constituted court of three judges had jurisdiction under § 266 of the Judicial Code to hear and determine the application for the injunction upon the ground of the unconstitutionality of the orders of the Commission. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290.

2. The defendants answered the bill on the merits without questioning in any way the sufficiency or form of its averments. See *Campbell* v. *United States,* 224 U. S. 99, 106. The bill specifically alleged that the cost of the Company's property in the State devoted to the rendition of intrastate telephone service, the cost of its reproduction, and its fair and reasonable value exceeded the sums of $247,000,000, $373,000,000 and $323,000,000, respectively; and that the rates prescribed by the Commission would prevent it from earning more than 2.56% per annum upon the cost of such property and 1.96% upon its fair and reasonable value, and would not afford it a fair return upon such value. In short, it aptly stated the ultimate facts upon which the Company asked relief,

omitting any mere statements of evidence. 25th Equity Rule, par. 3.

3. Upon the making by the Commission of the orders in question the proceedings had reached the judicial stage entitling the Company to resort to the court for relief. *Bacon* v. *Rutland Railroad*, 232 U. S. 134, 137; distinguishing *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229, in which an appeal had not been taken to the highest tribunal vested with the final legislative authority of the State. Here the Commission is vested with the final legislative authority of the State in the rate-making process; the authority exercised by the state courts upon a review by certiorari (*People v. Wilcox*, 194 N. Y. 383), being purely judicial and having no legislative character. Laws, New York, 1920, c. 925, §§ 1304, 1305, pp. 437, 438.

It was not necessary that the Company should apply to the Commission for a rehearing before resorting to the court. While under the Public Service Commission Law any person interested in an order of the Commission has the right to apply for a rehearing, the Commission is not required to grant such rehearing unless in its judgment sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement except as the Commission may direct; and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order (§ 22). As the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order. See, by analogy, *Hollis* v. *Kutz*, 255 U. S. 452, 454; *Re Arkansas Rate Cases* (C. C.), 187 Fed. 290, 306; *Atlantic Coast Line* v. *Interstate Commission* (Com. Ct.), 194 Fed. 449, 452; *Baltimore Railroad* v. *Railroad Commission* (C. C.), 196 Fed. 690, 693,

699; and *Chicago Railways* v. *Illinois Commission* (D. C.), 277 Fed. 970, 974. In *Palermo Water Co.* v. *Railroad Commission* (D. C.), 227 Fed. 708, the statute specifically provided that no cause of action should accrue in any court out of any order of the Commission unless an application for a rehearing had been made. Here the Commission did not suggest in its answer that it perceived any ground upon which it would have granted a rehearing, if an application had been made, but, on the contrary, maintained the correctness of its orders in all respects. Manifestly under such circumstances the injunction should not have been denied merely because application had not been made to the Commission for a rehearing.

And for like reasons, it was not necessary that the Company should have exercised the privilege granted by one of the orders of applying to the Commission for modification of the classification.

Nor did the fact that the orders of the Commission merely prescribed temporary rates to be effective until its final determination, deprive the Company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process. *Cumberland Telephone Co.* v. *Louisiana Commission, supra.* And see, by analogy, *Oklahoma Natural Gas Co.* v. *Russell, supra;* and *Love* v. *Atchison Railway* (C. C. A.), 185 Fed. 321, 326 (affirming

174 Fed. 59, and 177 Fed. 493). If the Commission, however, had fixed an early date for the final hearing this might have been taken into consideration by the court as an element affecting the exercise of its discretion in the matter of granting an interlocutory injunction. *Cumberland Telephone Co.* v. *Louisiana Commission, supra,* p. 217. But in the present case the Commission was still continuing indefinitely its general investigation and had not fixed any date for the final hearing.

4. The application for the injunction was heard by the District Court upon the pleadings and affidavits relating to the cost and value of the Company's property, its revenue and expenses. It was not necessary that the Company offer in evidence the voluminous testimony that had been taken by the Commission on the legislative question prior to making the orders in question. The bill did not challenge the orders of the Commission on the ground that it had acted arbitrarily, without any evidence. See *Louisville Railroad* v. *Garrett,* 231 U. S. 299, 308. The sole issue presented was whether or not the orders were confiscatory; which was to be determined by the court upon the evidence submitted to it. Either party might, of course, show, by competent testimony, any fact brought out before the Commission which might throw light upon this issue; and the defendants cannot now rightly complain that the Company did not introduce evidence which they themselves do not appear to have regarded as material.

The District Court, after consideration and analysis of the evidence, concluded that the value of the Company's property upon which it was entitled to a return could not be reduced much below $300,000,000, and that the rates prescribed could not possibly yield a fair return upon such valuation. It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal,

an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Meccano, Ltd.* v. *John Wanamaker,* 253 U. S. 136, 141; *Love* v. *Atchison Railway, supra,* p. 331; and cases there cited. Especially will the granting of the temporary writ be upheld, when the balance of injury as between the parties favors its issue. *Amarillo* v. *Southwestern Telephone Co.* (C. C. A.), 253 Fed. 638, 640. Here the Commission had prescribed temporary rates which were found to be confiscatory, which were to continue in effect pending the final determination of the Commission after its investigation had been completed; and no date had been fixed for the completion of this investigation or the final hearing. The Company meanwhile could only be protected from loss by injunction; while, on the other hand, its subscribers were protected by the bond which was required for the return of the excess charges collected if the injunction should be thereafter dissolved. There was no necessity in the particular situation presented for any test period of the new rates.

And finding nothing in the record which justifies us in concluding that the District Court improvidently exercised its judicial discretion in granting the interlocutory injunction, its order is

Affirmed.

COMMERCIAL TRUST COMPANY OF NEW JERSEY *v.* MILLER, AS ALIEN PROPERTY CUSTODIAN.

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

No. 575. Argued April 13, 1923.—Decided April 23, 1923.

1. A proceeding for the seizure of enemy-held property, brought by the Alien Property Custodian as delegate of the President, under

the Trading with the Enemy Act, is a purely possessory one, in which the custodian's determination that the property is so held is conclusive. P. 55. *Central Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239.

2. This is a constitutional exercise of the war power. *Id.*

3. Where securities and moneys were held by a trustee in trust for the joint account of a neutral and an alien enemy, to be delivered and paid to either upon his sole demand, or to the survivor, the Alien Property Custodian, proceeding under the Trading with the Enemy Act, was entitled to a decree requiring the trustee forthwith to transfer and deliver them all to him. P. 54.

4. How long this act should remain in force in view of the consequences of the War, is a legislative, not a judicial, question; it was not terminated by the cessation of hostilities, by the joint resolution declaring the state of war as between Germany and the United States at an end, or by the President's proclamation of peace. P. 57.

281 Fed. 804, affirmed.

Appeal from a judgment of the Circuit Court of Appeals affirming a judgment of the District Court which required the appellant to convey, transfer, assign, deliver, and pay to the Alien Property Custodian money and property held by it as a trustee.

Mr. Selden Bacon for appellant.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

Mr. Justice McKenna delivered the opinion of the Court.

This is a suit under the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, and the amendment of November 4, 1918, c. 201, 40 Stat. 1020. It was commenced by Francis P. Garvan, as Alien Property Custodian. He ceasing to be such, Thomas W. Miller was appointed his successor, and substituted as petitioner.

Section 7 of the act provides that "If the President shall so require any money or other property . . . held . . . for the benefit of an enemy", without license "which the President after investigation shall determine . . . is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

The act has received exposition in *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, and *Stoehr* v. *Wallace*, 255 U. S. 239, and what it authorizes, and the conditions of the exercise of its authorization determined.

Whatever problems the act presents those cases resolve. They decide that the President's power may, under § 5 [1] of the act, be delegated to and be exercised by the Custodian, and that the determination of the Custodian is conclusive whether right or wrong. And it may be exercised by forcible seizure of the property or by suit and, if by suit, the suit is purely possessory and must be yielded to; the right of any claimant being postponed to subsequent assertion. And it was decided that the Custodian acquires by suit "nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more." In other words, and in comprehensive description, the act may be denominated an exercise of governmental power in the emergency of war and its procedure is accommodated to and made adequate to its purpose, but securing, as well, the assertion of opposing or countervailing rights "by a suit in equity unembarrassed by the precedent executive determination", and if the claimant "prevails" the property "is to be forthwith returned to him."

[1] By § 5 the President is in terms authorized to exercise "any" of his powers "through such officer or officers as he shall direct." By § 6 he is authorized to appoint and "prescribe the duties of" the officer to be known as the Alien Property Custodian.

These are the determining generalities, and the Circuit Court of Appeals, applying them, affirmed the decree of the District Court, adjudging, ordering and decreeing that the Commercial Trust Company of New Jersey "do forthwith convey, transfer, assign, deliver and pay to Thomas W. Miller, as Alien Property Custodian, all of the money and other property held by it under a certain trust agreement entered into on January 30, 1913", between the Company and Frederick Wesche and Helene J. v. Schierholz. A list of the moneys and other property was attached to the decree.

It was recited in the trust agreement that the property, which consisted of bonds, was held "for the joint account of said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds" for their joint account, and to deliver the bonds from time to time as requested, to either "or to the survivor of them, it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche or to the said Helene J. v. Schierholz, or to the survivor of them."

In addition to the above, the following may be quoted from the opinion of the Circuit Court of Appeals:

"The Trust Company, in compliance with the provisions of the act, made a report in December, 1917, that it held stocks, bonds, and mortgages, securities and money, of the value of about $600,000, in trust, as to both principal and interest, for the joint account of Frederick Wesche, of Paris, France, and Helene J. von Schierholz, of Plaue, Germany, to be delivered and paid to either upon his or her sole demand, or to the survivor.

"Upon investigation the Alien Property Custodian determined that Wesche was a neutral and von Schierholz an alien enemy not holding a license from the President, and demanded surrender of the securities. Because the

neutral had power upon his sole order to withdraw the whole property, the Trust Company thought the Alien Property Custodian had no right to it and accordingly declined to yield possession. Because the alien enemy had like power upon her sole order to withdraw the whole property and acquire its possession, the Alien Property Custodian thought he had a right to it and accordingly demanded it. The question is, which was right?"

The court answered, the Custodian by virtue of his power under the act and the efficacy of its exercise. This appeal disputes the answer, and the contention is that the power was not exercised as required because the Custodian had not made an investigation which justified in any way "any determination that [the property] was *all* [italics counsel's] enemy property, or seizure of *all* [italics counsel's] the property as such." In support of the contention, it is urged, that no investigation was made of any interest in the property other than that of Mrs. Schierholz—none of Wesche, or none determined beyond what was shown by the report of and letter of the Commercial Trust Company. And there is also a contention that Wesche was not an enemy, and that he was given no opportunity of review, and the act, as to him, was "unconstitutional and without due process of law" and that, consequently, surrender of the property by appellant (Trust Company) under such circumstances to the Custodian, would have afforded it no defense to the claim of Wesche for such part of the property as belonged to him. The appellant accordingly did not transfer or deliver the property as so demanded, and still retains it under *supersedeas* bond.

The contentions are precluded by the cases which we have cited. As there decided, the act was of peremptory quality and effect. The suit was tantamount to physical seizure—gave preliminary custody such as seizure gives, and was intended to be not "less immediately effective than a taking with the strong hand."

It is manifest, therefore, that the defenses upon which the contentions are based were not available to either claimant of the property. And besides, under the act, it is to be remembered, the Custodian succeeds to all the rights in the property to which the enemy is entitled as completely as if by conveyance, transfer or assignment, and the Trust Company in the present case held the bonds for the joint account of Wesche and Mrs. Schierholz to be paid over to either of them. She had the power, therefore, to demand the bonds and receive them and to this power the Custodian determined he succeeded, and, therefore, exercised it. What interest Wesche had or has does not require decision, nor can the Trust Company urge it, the act requiring submission to the determination of the Custodian.

The case, therefore, has no complexity and we do not think it is necessary to trace through the elaborate argument of counsel by which he attempts to sustain the contention of the Trust Company. Its foundation is, as said by the Circuit Court of Appeals, that the Trust Company "claims the right to have property interests judicially determined by a court of equity before a right to the possession of the property can be asserted by the Alien Property Custodian." The claim is precluded, we have seen, by *Central Union Trust Co.* v. *Garvan,* and *Stoehr* v. *Wallace, supra.* Those cases decide, as we have also seen, that the suit is of as peremptory character as "seizure *in pais*" and is the dictate and provision for the emergency of war, not to be defeated or delayed by defenses, its only condition, therefore, being the determination by the Alien Property Custodian that it was enemy property. It was recognized that there is implication in the act that mistakes may be made, but the act assumes "that the transfer will take place whether right or wrong." In other words, it is the view of the opinions that the act provides for an exercise of government, but also provides, as

we have said, redress for mistakes in its exercise by the claimant of the property filing a claim under § 9, which, if not yielded to, may be enforced by suit.

The next contention of the Trust Company is that the act being a provision for the emergency of war, it ceased with the cessation of war, ceased with the joint resolution of Congress declaring the state of war between Germany and the United States at an end, and its approval by the President, July 2, 1921, and the Proclamation of Peace by the President August 25, 1921. The contention, however, encounters in opposition the view that the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that act shall be retained by the United States "until such time as the Imperial German Government . . . shall have . . . made suitable provision for the satisfaction of all claims." See *Kahn* v. *Anderson,* 255 U. S. 1, and *Vincenti* v. *United States* (C. C. A., 272 Fed. 114, and 256 U. S. 700).

Affirmed.

UNITED STATES TRUST COMPANY OF NEW YORK, ANCILLARY ADMINISTRATOR OF WESCHE, *v.* MILLER, AS ALIEN PROPERTY CUSTODIAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 292. Argued April 13, 1923.—Decided April 23, 1923.

Decided upon the authority of *Commercial Trust Co.* v. *Miller, ante,* 51.
Affirmed.

APPEAL from an order of the District Court denying a petition for leave to intervene in the case above cited.

Mr. Selden Bacon for appellant.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

This case was argued and submitted with No. 575, *Commercial Trust Co.* v. *Miller,* just decided, *ante,* 51. It is a petition for leave to intervene in the latter suit instituted (as we have seen) by Francis P. Garvan, then Alien Property Custodian, Miller subsequently succeeding him. That suit is here on appeal from the United States Circuit Court of Appeals for the Third Circuit, this suit is here on appeal from the District Court of the United States for the District of New Jersey, a constitutional question being, it is contended, involved. "The District Court," the assertion is, "months after peace had been declared, denied Wesche's petition to intervene,

and awarded conveyance and delivery of what was admittedly his separate property, to the Custodian."

In support of these contentions and their pertinency and control, counsel's comment is that the Custodian made two demands for the property, but "that these demands were both made while the act forbade recourse by any claimant to any court to review any seizure thereunder by the Custodian, save the United States District Court for the district in which the claimant resided. The amendment permitting suit in the Supreme Court for the District of Columbia was added only by the Act of July 11th, 1919. And Wesche, a neutral, separate owner of part of the property, and custodian of it all, resided in Switzerland, and Ahrenfeldt, an American citizen, separate owner of part of the property, was residing throughout the war in England, France or Switzerland."

And the further argument is that "seizure under such circumstances was unconstitutional" and that "mere demands" by the Custodian "did not constitute constructive capture, and even constructive capture was not completed before peace came."

This statement is enough preliminarily to the understanding and appreciation of Wesche's fundamental contentions which are that the conditions of the act were not complied with before suit and suit, therefore, was not justified. And the unconstitutionality of the act as applied to his case is also urged, and that the defenses were available to him in the suit. The court therefore, is the contention, in denying his petition to intervene, committed error.

The case, it will be observed, is identical in legal aspects with *Commercial Trust Co.* v. *Miller.* Here, as there, Wesche's interest is asserted in the property, here by himself, there by the Trust Company. Here, as there, the conditions of suit were asserted not to have been performed; here, perhaps with more emphasis, as there, the

unconstitutionality of the act is argued; here, as there, it is urged that these contentions constituted defenses that could be made in the suit, and that relief was not only through the "filing of a claim and instituting proceedings as provided by Section 9 of the Trading with the Enemy Act."

We repeat, therefore, the cases are identical and upon the authority of that case, the order of the District Court denying Wesche's petition for intervention is

Affirmed.

AHRENFELDT *v.* MILLER, AS ALIEN PROPERTY CUSTODIAN.

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

No. 576. Argued April 13, 1923.—Decided April 23, 1923.

Decided upon the authority of *Commercial Trust Co.* v. *Miller, ante,* 51.
282 Fed. 944, affirmed.

APPEAL from a judgment of the Circuit Court of Appeals which affirmed an order of the District Court denying the appellant's petition for leave to intervene in the case above cited.

Mr. Selden Bacon for appellant.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Ahrenfeldt, the appellant, filed a petition in the District Court in the case of *Garvan* v. *Commercial Trust Co.,* (in this Court, *Commercial Trust Co.* v. *Miller,* No. 575, *ante,* 51) for leave to intervene, alleging that

he was an American citizen residing abroad since January 1st, 1914, in France, England and Switzerland, having no residence in any judicial district of the United States during that time.

He further alleged that he was the admitted separate owner of an identified portion of the securities and cash deposited with the Commercial Trust Company as mentioned in cases Nos. 575 and 292, *ante,* 51, 58, and that his "petition for leave to intervene related solely to his own separate property."

The District Court denied his petition and its order was affirmed by the Circuit Court of Appeals. The grounds of affirmance, the Court, through Circuit Judge Woolley, expressed as follows:

"At the hearing in Commercial Trust Company of New Jersey *v.* Thomas W. Miller, as Alien Property Custodian, 275 Fed. 841, the appellant, Charles J. Ahrenfeldt, presented a petition for leave to intervene and have determined by the District Court his claim to ownership of a part of the property in process of seizure. The District Court denied the petition, holding that the question sought to be litigated by Ahrenfeldt can be raised only after the demand of the Alien Property Custodian has been complied with, and then only by proceedings authorized by Section 9 of the Act, as amended June 5, 1920. That the District Court was right is established by the decisions of the Supreme Court in *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, and *Stoehr* v. *Wallace,* 255 U. S. 239.

"The order is affirmed."

It is manifest that the case is identical in legal principle, and to a certain and material extent in contentions, with cases Nos. 575 and 292, and is necessarily involved in their ruling.

The decree of the Circuit Court of Appeals affirming the decree of the District Court is

Affirmed.

UNITED STATES *v.* LUSKEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 371. Argued April 10, 1923.—Decided April 16, 1923.

The additional pay provided by the Act of March 3, 1915, c. 83, 38 Stat. 928, for enlisted men in the Navy and Marine Corps "while lawfully detailed for duty involving actual flying in air craft," goes to the person so detailed irrespective of the number of flights made by him. P. 64.

56 Ct. Clms. 411, affirmed.

APPEAL from a judgment of the Court of Claims awarding a sum as extra pay to a machinist's mate in the Navy.

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

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

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The findings of fact of the Court of Claims are in substance, these: (1) Luskey was a machinist's mate in the Navy. He was by proper authority detailed for duty involving actual flying in aircraft, September 15, 1915, and continued in that duty until after February 1, 1917. He made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered. (2) He received the sum of $329.00, being 50% additional pay allowed him by the Act of March 3, 1915, c. 83, 38 Stat. 928, for duty involving actual flying for the entire period from July 1, 1916, to January 31, 1917, a period of seven months. At a later period the amount was deducted from his pay. He was paid a certain amount for the month of December, 1916.

If entitled to additional pay for aviation duty for the entire period, July 1, 1916, to January 31, 1917, less pay received for December, 1916, he would receive $279.95.

Upon the facts found, the court concluded "as matter of law" that he was entitled to recover, and "adjudged and ordered that" he "recover of and from the United States the sum of two hundred and seventy-nine dollars and ninety-five cents ($279.95)."

The United States, by this appeal, disputes the conclusion and judgment. Its contention is that "to entitle an officer designated to such service to the extra compensation" he must "be actually engaged in flying, and that, when an unreasonable time elapses during which he makes no actual flight, he is not entitled to extra pay for such period." Expressing its contention in other words, it, in effect, is that it is not the detail but the flying, not the possibility of a risk but the actual risk, that vests the right to the additional pay.

To sustain the contention, emphasis is put upon, and insistence made of, the words of the act (38 Stat. 939) that compensation is awarded to the officer "while lawfully detailed for duty involving actual flying in air craft."

To the contention, and rejecting it, the court replied, after quoting the statute: [1] "The word 'involving,' used in the statute may be inept, but its meaning in the connection in which it is used is plain and not to be mistaken, and that is, that the pay is not made dependent upon the number of flights while on such duty, but is made dependent on the detail to such duty. When, therefore, the plaintiff was lawfully detailed to duty involving flying in

[1] "Hereafter enlisted men of the Navy or Marine Corps, while detailed for duty involving actual flying in air craft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service or rank and service, as the case may be, plus fifty per centum increase thereof."

aircraft he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty."

We concur in the conclusion and judgment. The meaning of the statute "is plain." If Congress had intended to provide a detail to intermittent duty with intermittent pay, Congress would have specifically so provided, not left repulsion to it the advantage of ambiguity. If it intended to regard "the possibility of a risk or the actual risk" in flying as determination of compensation or as a factor in compensation, as the United States urges, care would have been taken, not, we will say, against its abuse, but against its use putting the officer's life in peril many times a day. If that were reasonable in expectation, the other contention is condemned, that is, that the officer is entitled to compensation only when he engages in flights and for reasonable intervals between them. The contention gives no animation to prepare for the duty and its hazards.

Congress naturally supposed that there would be no detail to aircraft duty unless there was requirement or use for it, and when either ceased, the detail would be revoked, but if made and not revoked, its duration constituted a service for which the officer must keep prepared and to which, therefore, the compensation was by the statute assigned.

Judgment affirmed.

UNITED STATES *v.* MOSSEL.

UNITED STATES *v.* MILFORD.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 372, 373. Submitted April 10, 1923.—Decided April 23, 1923.

Decided, pursuant to stipulation, in accordance with *United States* v. *Luskey, ante,* 62.
56 Ct. Clms. 502, affirmed.

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

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

MR. JUSTICE MCKENNA delivered the judgment of the Court.

Under stipulation of counsel, filed in the Clerk's Office, the above cases are submitted on the record as printed in *United States* v. *Luskey,* No. 371, just decided, *ante,* 62, "it being agreed by counsel that they shall be controlled by the decision in that case."

Therefore, upon its authority, the judgments in these cases are

Affirmed.

A. G. SPALDING & BROS. *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 710. Argued April 10, 11, 1923.—Decided April 23, 1923.

1. A sale of goods made in this country to a commission merchant for a foreign consignee, for the sole purpose of export, and consummated only when the goods, addressed to the foreign consignee, are delivered by the vendor to the exporting carrier, is a step in their exportation and, under Const., Art. I, § 9, cannot be taxed by the United States, even though the law under which the tax is imposed is a general one, not aimed specially at exports. P. 67.
2. Goods were started in exportation when so delivered to the carrier, notwithstanding the fact that the bill of lading was not issued until later, and, notwithstanding the possibility that the commission merchant, holding the title, might change his mind and divert them from their foreign destination. P. 69.

285 Fed. 784, reversed.

ERROR to a judgment of the District Court dismissing the complaint in an action to recover money exacted by the Government as a tax on a sale of goods.

Mr. Frank Davis, Jr., with whom *Mr. Franklin Grady* was on the briefs, for plaintiff in error.

Mr. Solicitor General Beck, with whom *Mr. P. C. Alexander* was on the brief, for defendant in error.

From the history of the Export Clause in the Constitution, it will appear that the framers had in mind a tax levied directly and deliberately upon the act of exportation. They were not considering the application of general taxing laws, which might fall in individual cases upon merchandise, which might thereafter be exported.

The tax levied by § 600 of the Revenue Act of 1917 is an excise levied upon the business of selling the particular

articles named in the statute and is measured by the price for which the article is sold. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245.

The constitutional provision has been often interpreted by the courts. The most recent cases clearly negative the plaintiff's contention. *Cornell* v. *Coyne,* 192 U. S. 418; *Turpin* v. *Burgess,* 117 U. S. 504; *Coe* v. *Errol,* 116 U. S. 517; *Southern Pacific Co.* v. *Arizona,* 249 U. S. 472; *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Pace* v. *Burgess,* 92 U. S. 372; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459. The cases which held taxes unconstitutional all clearly disclosed direct burdens upon some process or instrumentality of exportation. *Brown* v. *Maryland,* 12 Wheat. 419; *Almy* v. *California,* 24 How. 169; *Fairbank* v. *United States,* 181 U. S. 283; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of taxes collected by duress under color of the War Revenue Act of October 3, 1917, c. 63, § 600 (f), 40 Stat. 300, 316. The plaintiff, a corporation, manufacturer of the goods in question, says that the tax was laid on articles exported from a State, (New York,) in violation of Article I, § 9, of the Constitution of the United States. Upon demurrer the complaint was dismissed by the District Court on the merits.

The tax is " upon all . . . baseball bats, . . . balls of all kinds . . . sold by the manufacturer, producer, or importer " and was levied on three occasions admitted to be similar, so that the statement of one transaction will be enough. Delgado & Cia, a firm in the city of La Guaira, Venezuela, ordered Scholtz & Co., commission

merchants in New York, to buy for their account and risk a certain number of baseballs and baseball bats, &c., at an agreed price and to mark the packages D & C S La Guaira # 36 to indicate the purchasers and their place. Scholtz & Co. thereupon sent to the plaintiff in writing, dated December 10, 1918, this: "Export order from Scholtz & Co., Shipping and Commission Merchants . . . Please ship on or before the ..... per steamer .... Rush. . . . Errors in weight often entail heavy fines in Foreign Customs Houses, therefore be careful when weighing and marking Goods, as we shall hold you responsible for any fines caused through your errors. Cases or crates must be made to fit Goods as duty is paid by Gross weight. Shipping mark and number to be put on packages. [As above, with statement of the goods wanted.] Please send Memo. Invoice at once so we can apply for license and clear at Custom House." Scholtz & Co. instructed the plaintiff to deliver the packages so marked to the Atlantic & Caribbean Steam Navigation Co., an exporting carrier in New York. The plaintiff marked and delivered the goods as directed and was given a receipt by the carrier which it sent to Scholtz & Co. and which was exchanged by them for an export bill of lading in their name, dated February 10, 1919. The goods were transported and delivered in due time to Delgado & Cia. Scholtz & Co. paid the plaintiff on February 1 and were paid their commission by Delgado & Cia. in ninety days from date of shipment. The transaction from start to finish was understood and intended by the plaintiff and Scholtz & Co. to be for the purpose of exporting the goods to Delgado & Cia. in Venezuela. The question is whether the sale was a step in exportation, assuming as appears to be the fact, that the title

passed at the moment when the goods were delivered into the carrier's hands.

The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was "laid on articles exported from any State", because that is forbidden in terms by the Constitution. Article I, § 9. *United States* v. *Hvoslef*, 237 U. S. 1, 18. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292. Articles in course of transportation cannot be taxed. *William E. Peck & Co.* v. *Lowe*, 247 U. S. 165, 173. So we return to the question that we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. *Cornell* v. *Coyne*, 192 U. S. 418. *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245. On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.

The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter

so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. Theoretical possibilities may be left out of account. In *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336, the consignees might have retained the goods at New Orleans instead of shipping them abroad. The fact that they came to New Orleans by rail from another place in the State made no difference. The same principle was applied in *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 123. The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell* v. *Coyne*, 192 U. S. 418. To put it at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seen in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19.

Judgment reversed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 184. Argued March 6, 7, 1923.—Decided April 23, 1923.

1. Under the Act of March 4, 1913, c. 143, 37 Stat. 797, authorizing the Postmaster General to pay additional compensation, not exceeding five per cent., for transportation of mail on railroads on and after July 1, 1913, for the remainder of the contract terms,

on account of increased weight of mails resulting from the parcels post law, the decision of the Postmaster General upon the amount of compensation to be allowed within the limit fixed was conclusive; and a railroad company, which accepted payment, under protest, of amounts so fixed, cannot claim more from the Government upon the ground that they were inadequate. P. 73.

2. Transportation of additional mail matter, resulting from the parcel post, even if not requirable under contracts existing when the parcel post system was adopted, did not give the transporting company a right to additional compensation, when it was done voluntarily during a period (January 1, 1913, to June 30, 1913) for which Congress has failed to allow such compensation. Act of March 4, 1913, *supra*. P. 73.

56 Ct. Clms. 64, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition upon demurrer.

Mr. Benjamin Carter for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. W. Marvin Smith* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Prior to July 1, 1910, claimant entered into a contract with the Post Office Department to carry the mails over a part of its line for the period of four years from that date. Prior to July 1, 1911, it entered into a like contract to carry the mails over another part of its lines. These contracts were in form and substance similar to that involved in *New York, New Haven & Hartford R. R. Co.* v. *United States,* 258 U. S. 32, and other recent cases.[1] By them the amount of compensation was fixed by a weighing prior to the date of the contract. While the mails

[1] *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 249 U. S. 451; *New York, New Haven & Hartford R. R. Co.* v. *United States,* 251 U. S. 123; *The Mail Divisor Cases,* 251 U. S. 326.

were being carried by claimant under these contracts, the parcel post system was established pursuant to the Act of August 24, 1912, c. 389, § 8, 37 Stat. 539, 557-559. From the inauguration of the service, on January 1, 1913, to the end of the contract periods, claimant carried the parcel post together with the other mail. For rendering this service, during the first six months, no additional compensation has been paid claimant. For rendering it during the remainder of the contract periods, claimant received, under later legislation, sums in addition to the compensation provided by the contracts. These sums it deems inadequate. On February 1, 1919, this suit was brought to recover, as reasonable compensation for the service rendered, the several amounts which it insists should have been paid. The Government demurred to the petition. The Court of Claims dismissed it on the ground that there was neither a contract express or implied in fact, nor a law of Congress to support the claims for additional compensation. The case is here on appeal.

The Act of August 24, 1912, provided that the establishment of parcel post zones and postage rates should go into effect January 1, 1913. It increased the weight of fourth class mail matter from four to eleven pounds and the size to seventy-two inches in length and girth. It also authorized further increases of the weight limit, by order of the Postmaster General with the consent of the Interstate Commerce Commission. But that act, while it authorized the Postmaster General to "readjust the compensation of star route and screen wagon contractors if it should appear that as a result of the parcel post system the weight of the mails handled by them has been materially increased," made no provision whatsoever for increasing the pay of railroads because of carrying parcel post matter. Act of March 4, 1913, c. 143, 37 Stat. 791, 797, authorized the Postmaster General "to add to the compensation paid for transportation on railroad routes

on and after July 1, 1913, for the remainder of the contract terms" not exceeding five per cent. thereof per annum "on account of the increased weight of mails resulting from the enactment of" the parcel post provision of the preceding year. The Postmaster General allowed claimant, under this act on some routes the full five per cent.; on some less; on some nothing additional. But the latter act, also, contained no provision authorizing additional pay to the railroads for carrying parcel post matter from January 1, 1913, to June 30, 1913.

First. That no recovery can be had for the period after June 30, 1913, is clear. Before that date Congress had made express provision for the additional compensation and in so doing had limited the amount payable. The power to grant or to withhold was, within the limit set, vested in the Postmaster General; and his decision as to additional compensation was conclusive except upon Congress.[2] The protest alleged to have been made in August, 1913, against the amounts proposed to be paid for this period, cannot avail claimant, *New York, New Haven & Hartford R. R. Co.* v. *United States,* 251 U. S. 123.

Second. The first six months' period presents a different situation; but the legal result is the same. There is no claim of an express contract to pay additional compensation; nor is there any basis for a claim on a contract implied in fact. The petitioner alleges that the parcel post matter was radically different in character

[2] Some further compensation was in fact made after the expiration of the contracts, under later legislation. By Act of July 28, 1916, c. 261, 39 Stat. 412, 425 (passed after both contracts with claimant had expired), the Postmaster General was authorized to make an additional payment not exceeding one-half of one percentum per annum on account of the increased weight of mails resulting from his order effective August 15, 1913, raising the weight limit to twenty pounds and additional payment not exceeding one per cent. on account of the increased weight resulting from his order effective January 1, 1914, raising the weight limit to fifty pounds.

from the ordinary mails as constituted before January 1, 1913. It may be, that claimant might legally have refused, for this reason, to carry the parcel post mail under then existing contracts; even if additional compensation had been offered. Compare *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414; *Hunt* v. *United States*, 257 U. S. 125. But the petition contains no allegation that it refused to perform this extra service, unless the Government would agree to pay additional compensation. The petition contains allegations apparently designed to show that objection to carrying the parcel post matter would have been largely futile; [3] but the allegations fall far short of showing a demand that the parcel post matter be eliminated, or a protest against carrying it under the conditions then existing. If the parcel post act, or other legislation, gives a right to compensation, the refusal or failure of the Postmaster General to allow the claim could not, of course, defeat recovery. Compare *Campbell* v. *United States*, 107 U. S. 407, 411;

[3] The petition alleges: "Much the larger part of the mails on petitioner's routes and on the routes of the other important railroad companies were carried in post office cars, for which cars arrangements were made between the Post Office Department and the railroad companies independent of the contracts for mail transportation, and, under such arrangements, such cars were in operation on petitioner's said routes at the time when the parcel post was established and at the times when the increases in weight of the parcel-post matter became effective. The greater part of the mails carried in such cars were loaded into and out of the same by contractors or other persons employed by the Post Office Department, over whom petitioner and the other railroad companies had no control, and the Postal Laws and Regulations (sec. 1583) forbade that railroad employees should enter the post office cars when in motion for any other purpose than the operation of the trains. Moreover, the parcel-post matter was so confused with the other mails that the employees of petitioner and the other railroad companies could not possibly have distinguished them, and removed them from the post office cars, if otherwise they had had opportunity."

United States v. *Knox,* 128 U. S. 230. But, unless there is such legislation, claimant cannot recover without showing a contract, express or implied in fact to pay the extra compensation. Compare *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330, 335; *Sutton* v. *United States,* 256 U. S. 575, 581. No basis for such a contract is afforded by the further allegation that when the Act of 1912 was passed, and when the parcel post system was established, railroads, high officials of the Post Office Department, and members of both houses of Congress, in charge of postal legislation, understood that Congress would provide additional compensation to the railroads.

The legislation makes no provision for additional compensation to the railroads for the period prior to July 1, 1913; and its history makes clear that Congress concluded not to allow any. For some time prior to the passage of the Act of August 24, 1912, there had been much discussion in Congress concerning the pay of railroads for carrying the mail. The carriers urged generally that the pay was inadequate; and there were proposals for increase of compensation. On the part of the public, there was a widespread belief that the railroads were overpaid; and there were proposals to reduce the compensation. When Congress passed the 1912 Act, it was not prepared to decide this controverted question. It, therefore, appointed a special committee to enquire into the subject, and also others, relating to parcel post, and directed the committee to report at the earliest date possible. Meanwhile, the discussion continued in Congress. That the parcel post would result in largely increased weight of mail was repeatedly asserted; but it was insisted that the pay under existing contracts would give the railroads even more compensation than they deserved. The fact was recognized that the appropriation bill enacted March 4, 1913, provided increased pay only for parcel post service ren-

dered after June 30, 1913.[4] The failure of Congress to make any provision for the preceding six months was not inadvertent. It was the deliberate purpose of Congress not to give the railroads additional pay for carrying the parcel post mail during that period.[5]

The case at bar is wholly unlike *Freund* v. *United States*, 260 U. S. 60; *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414, and *Hunt* v. *United States*, 257 U. S. 125, on which claimant relies. In each of those cases there was ample power in the Postmaster General to pay the additional compensation claimed. In each the main question presented was whether under the proper construction of the contract claimant was entitled to additional pay. Moreover, in each, the contractor had by proper protest preserved his rights; and there was perhaps an element of duress. Here, as in *Sutton* v. *United States*, 256 U. S. 575, the Department had been denied power to pay an additional sum; there

[4] See Vol. 49, Cong. Rec., Part 5, 62nd Cong., 3rd sess., pp. 4459, 4461, 4684, 4686–4689, 4690, 4692, 4767, 4769, and particularly p. 4768:

"Mr. Moon of Tennessee (Manager on part of the House, submitting Conference Report). No; we do not add anything until after July, 1913.

"Mr. Murdock. That is my question—do we add 5 per cent after July, 1913?

"Mr. Moon. Yes; weighed before January 1."

[5] See Senate Report, Committee on Post Offices and Post Roads, July 23, 1912, No. 955, p. 25, 62nd Cong., 2nd sess.; Conference Report, August 23, 1912, H. R. No. 1242, 62nd Cong., 2nd sess.; Message of President, December 19, 1912, Sen. Doc. 989, p. 6, 62nd Cong., 3rd sess.; Senate Report, February 11 (17), 1913, No. 1212, pp. 2, 4, 62nd Cong., 3rd sess.; also Vol. 49, Cong. Rec., Part 2, 62nd Cong., 3rd sess., pp. 1409, 1411, 1412, 1466, 1476, 1506, 1509, 1511; Vol. 49, Cong. Rec., Part 4, 62nd Cong., 3rd sess., pp. 4012, 4013, 4014; Vol. 48, Cong. Rec., 62nd Cong., 2nd sess., Part 5, pp. 4675, 4989, 5068, 5075, 5227; Vol. 48, Cong. Rec., 62nd Cong., 2nd sess., Part 6, pp. 5439, 5473, 5504, 5649.

was no protest by the contractor against assuming the additional service; and there was no duress. The service was undertaken voluntarily; no doubt, in the expectation that Congress would provide additional compensation. It made some provision; but concluded not to make any for the first six months. We may not enquire into the reasons for this refusal, or undertake to revise its judgment. The obstacle to recovery is not strictly lack of jurisdiction in the Court of Claims. There was an express contract between the parties; there was also legislation; and on these the claim is founded. The obstacle to recovery is lack of legal merits. The Government did not in fact promise to pay for the extra service; nor did the legislation give to claimant a right to compensation. In other words, the petition fails to set out a cause of action.

Affirmed.

LION BONDING & SURETY COMPANY *v.* KARATZ.

DEPARTMENT OF TRADE & COMMERCE OF THE STATE OF NEBRASKA ET AL. *v.* HERTZ ET AL., AS RECEIVERS OF LION BONDING & SURETY COMPANY.

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

Nos. 574, 467. Argued March 2, 1923.—Decided April 23, 1923.

1. Insolvency of a corporation is not an equitable ground for appointing a receiver at the suit of a simple contract creditor. P. 85. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491.
2. In a suit by a creditor alleged to be on behalf also of others similarly situated, seeking to collect a debt from an insolvent corporation through a receivership and by having the debt declared a lien on its assets, the amount in controversy, determining the jurisdiction of the District Court, does not depend on the corpo-

ration's assets or liabilities, but is the amount of the plaintiff's claim as shown by the bill. P. 85.

3. Where the bill discloses that the amount in controversy is less than the jurisdictional amount, a general allegation to the contrary is of no avail. *Id.*

4. A suit in the District Court which is dependent on a receivership in the District Court of another district fails with the dismissal of the bill in that case. P. 87.

5. The provision of Jud. Code, § 56, extending the operation of a receivership to other districts in the same judicial circuit, applies where there is fixed property extending, as a unit, into different States, like railroads or pipe lines; but not where the assets are those of an insurance company, described as cash, mortgages, securities, bills receivable, real estate, stocks and bonds. P. 87.

6. The general rule is that a receiver cannot sue in a foreign jurisdiction, and this is not overcome by an order of the court appointing him purporting to embrace in the receivership all property of the defendant wherever situate and authorizing the receiver to apply to other courts in aid of the order. P. 87.

7. Where a state court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. P. 88.

8. Where a state court of Nebraska, under Comp. Stats. Neb. 1922, §§ 7745–7748, first took possession of records and assets of a local insurance company, through the State Department of Trade and Commerce, for the purpose of conducting the business temporarily, and later, by a supplemental decree made on a supplementary application, ordered the Department to liquidate it, *held* that receivers appointed by a federal court in the interim were not entitled to possession of the *res*, and that their suit in a federal court against the company and the Department for the purpose of acquiring possession could not be maintained, and that the legality of the state court's action in continuing its control could not be thus questioned or attacked collaterally. P. 89.

281 Fed. 1021; 280 Fed. 540, reversed.

CERTIORARI to two decrees of the Circuit Court of Appeals, the first, affirming a decree of the District Court for Minnesota appointing general receivers for a Nebraska insurance company; the second, reversing a decree of the District Court for Nebraska which dismissed a bill

brought by the receivers for the possession of the company's property.

Mr. Halleck F. Rose, with whom *Mr. O. S. Spillman,* Attorney General of the State of Nebraska, *Mr. John F. Stout, Mr. Arthur R. Wells, Mr. Paul L. Martin* and *Mr. Amos Thomas* were on the brief, for petitioners.

Mr. Bruce W. Sanborn, with whom *Mr. William G. Graves, Mr. Samuel G. Ordway* and *Mr. William R. Kueffner* were on the briefs, for respondents.

Mr. Francis R. Stoddard, Jr., Superintendent of Insurance of the State of New York, and *Mr. Clarence C. Fowler,* by leave of court, filed a brief as *amici curiæ.*

Mr. Justice Brandeis delivered the opinion of the Court.

These two cases arise out of the insolvency of the Lion Bonding and Surety Company, a Nebraska insurance corporation. They are here on writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. In the *Karatz* case, it affirmed a decree of the federal court for Minnesota which appointed receivers in a suit brought by an unsecured simple contract creditor. See 280 Fed. 532. In the *Hertz* case, it reversed a decree of the federal court for Nebraska, which dismissed a suit brought by those receivers for possession of the company's property, 280 Fed. 540. At the date of each decree the property of the company in Nebraska was held by the Department of Trade and Commerce of that State, with the usual powers of a receiver, under a decree of a state court. The Circuit Court of Appeals directed, in the *Hertz* case, that the lower court enjoin the Department from doing any act in relation to the property, except to hold custody thereof subject to the further order of the federal court for Minnesota. Petitioners ask that the judgments of the appellate court be reversed and that the bills in the

federal district courts be dismissed. The grounds on which jurisdiction was asserted by the federal courts makes necessary a fuller statement of the facts.

The Lion Bonding & Surety Company had for some years prior to 1921 been licensed to conduct the business of insurance in Nebraska; and was doing business and had property also in eighteen other States. A statute of Nebraska commits to its Department of Trade and Commerce the supervision of insurance companies and control thereof in case of insolvency and otherwise. (Compiled Statutes, Nebraska, 1922, §§ 7745–7748.) Nebraska Laws, 1919, c. 190, Title 5, Article III, p. 576–581. Paragraph 1 of § 4 of that act provides:

"Whenever any domestic company is insolvent . . . or is found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policy holders, or to its creditors, or to its stockholders, or to the public; . . . the department . . . may apply to the district court . . . in the county . . . in which the principal office of such company is located, for an order directing such company to show cause why the department . . . should not take possession of its property, records and effects and conduct or close its business, and for such other relief as the nature of the case and the interest of its policy holders, creditors, stockholders or the public may require."

On April 12, 1921, the Department applied to the District Court of Douglas County, Nebraska, for an order directing it to take possession of the property and to conduct the business of the company, under paragraph 2 of § 4, which provides:

"On such application, or at any time thereafter, such court or judge may, in his discretion, issue an order restraining such company from the transaction of its business, or disposition of its property, records, and effects until the further order of the court. On the return of such order to show cause, and after a full hearing, the

court shall either deny the application or direct the department . . . forthwith to take possession of the property, records and effects, and conduct the business of such company, and retain such possession . . . until on application of the department . . . or of such company, it shall, after a like hearing, appear to the court that the cause of such order directing the department . . . to take possession has been removed, and that the company can properly resume possession of its property, records and effects, and the conduct of the business."

The petition prayed also for an order restraining the company from the transaction of its business or from disposing of any of its property; and for other and further relief. The company immediately filed an answer, by which it admitted the material allegations of the petition, and joined in the prayer thereof. On the same day the state court entered a decree in accordance with the prayer; the Department entered upon the duties prescribed by the decree; it immediately took possession of all the property of the company in Nebraska; has since held possession thereof subject to the orders of the state court; and has also obtained like possession of property of the company in other States. On May 28, 1921, the Department filed, in that court, a supplemental petition, in which it prayed for an order directing it to liquidate the business under paragraph 3 of § 4, which provides:

" If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the department . . . , which may deal with the property, records, effects and business of such company in the name of the department . . . or in the name of the company, as the court may direct and it shall be vested by operation of law with title to all the property, effects, contracts and

rights of action of such company as of the date of the order so directing it to liquidate. . . ."

The supplemental petition prayed, among other things, that the orders theretofore made, so far as applicable, and necessary to further the liquidation, remain in full force. The company filed an answer by which it admitted the material allegations contained in the supplemental petition and joined in the prayer thereof. On the same day that court entered an order in accordance with the prayer of the supplemental petition, all action of the Department being made subject to the direction of the court.

On May 2, 1921, while the decree of the Nebraska court entered April 12, 1921, was in full force and the Department was in actual possession thereunder of the property in that State, Karatz, a citizen of Minnesota, purporting to sue also on behalf of others similarly situated, filed a bill in equity against the company in the federal court for the District of Minnesota, Fourth Division. No disclosure was made of the proceedings taken against the company in the state court of Nebraska, nor that under its decree the Department was in possession of all the company property in that State, and, at least, of some of its property elsewhere. The bill alleged that the company had been admitted to do business in Minnesota; that through its operation there plaintiff had become an unsecured simple contract creditor to the amount of $2,100; that the company had ceased to do business and was insolvent; that it had assets within that district valued at $20,000; and that there was danger that the property of the company would be wasted. The bill prayed that the amount due plaintiff be ascertained and declared a first lien upon all the assets of the company in Minnesota; that, for the purpose of protecting the general public, creditors and stockholders, receivers be appointed to collect all its assets, wherever situated, and to realize upon and distribute the same; that the company be directed to deliver possession to them of all the

property wherever situated; that the company and its officers be restrained from interfering in any way with such receivers; and for general relief. On the filing of this bill the federal court, acting *ex parte,* appointed Hertz and Levin receivers of all the property of the company wheresoever situated; and authorized them to apply to any other District Court of the United States in aid of the order so entered. The company (which was served on May 5 by process upon the Insurance Commissioner of Minnesota) moved, on May 14, 1921, to dismiss the Karatz bill for want of federal jurisdiction and for want of equity. A motion was also made to discharge the receivers and to restore the property to the company or to the Department of Trade and Commerce. Both motions were denied on May 30, 1921.

The Minnesota receivers secured the appointment of themselves as ancillary receivers by the federal courts for twelve other districts, but not for the Nebraska district. On May 11 and May 12, 1921, they filed, in purported compliance with § 56 of the Judicial Code, certified copies of the bill and of the order of appointment with the clerks of the federal district courts for Nebraska and other States in the Eighth Circuit. On May 14, 1921, the company moved the Circuit Court of Appeals under that section for an order of disapproval of the appointment of receivers, so far as it may be operative outside the District of Minnesota. This motion was denied on May 31, 1921.[1]

On September 6, 1921, the Minnesota receivers filed in the federal court for the District of Nebraska, Omaha

[1] There was this qualification: "That the right of said receivers to the possession of such of the property of said company as is situated in the District of Nebraska shall be subject to such right of possession thereof in the Department of Trade and Commerce of Nebraska as had accrued to it, under proceedings in the District Court of Douglas County in that state, when the right of the receivers arose under the laws of the United States."

Division, a bill in equity (called the *Hertz* suit) against the company, the Department of Trade and Commerce and others. It charged that there was a conflict of authority between the federal court for Minnesota and the Nebraska state court concerning the administration of the company's property; that the Department threatened to liquidate the company under the order of the state court entered May 28, 1921; that its rights were limited to the temporary possession and listing of the property authorized by the order of April 12, 1921; and that it had no longer any right to the possession or control of the property either for the administration of the affairs of the company under direction of the state court or otherwise. The bill prayed that defendants be restrained from interfering with the Minnesota receiver's possession and control; that they be directed to surrender possession to plaintiffs; and for other relief. A motion of defendants to dismiss the bill for want of jurisdiction and for want of equity was granted; and the receivers appealed to the Circuit Court of Appeals.

Meanwhile the *Karatz* case had proceeded to final hearing. On August 11, 1921, a decree was entered adjudicating Karatz's claim for $2,100; making permanent the appointment of the receivers and continuing their powers to administer the property of the company; and perpetually enjoining it from interfering with the receiver's control. The company appealed to the Circuit Court of Appeals. That court then heard together appeals in the two cases. On April 28, 1922, it rendered the opinions, 280 Fed. 532, 540, by which, in the Minnesota case, it affirmed the order appointing receivers; [2]

[2] The decree in the *Karatz* case directly under review here is that entered by the Circuit Court of Appeals on July 7, 1922, pursuant to its *per curiam* opinion of June 30, 1922, in which it affirmed the final decree of the District Court entered August 11, 1921, for reasons stated in the opinion in that cause, of April 28, 1922, affirming the "interlocutory order appointing a receiver."

and in the Nebraska case, reversed the decree dismissing the bill. The decree in the latter was later enlarged by directing the district court to reinstate the bill, and to restrain the Department, the company and their employees: "from removing, secreting or disposing of the moneys, books, papers, records, assets, property, accounts or choses in action, of or derived from the Lion Bonding and Surety Company, and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division." [3]

The decrees of the Circuit Court of Appeals in both cases must be reversed.

First. In the Karatz case the motion to dismiss the bill should have been granted. There was want of equity; for it was brought by an unsecured simple contract creditor. *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491. But there was also the fundamental objection that the district court was without jurisdiction as a federal court.

The only ground of jurisdiction alleged is diversity of citizenship. The facts specifically stated show that the amount in controversy was less than $3,000. Plaintiff's claim against the company was $2,100. He prayed that this debt be declared a first lien on the assets within the State. His only interest was to have that debt paid. The amount of the corporation's assets, either within or without the State, is of no legal significance in this connection. Nor is the amount of its debts to others. The case is not of that class where the amount in controversy

[3] In accordance with this decree of the Circuit Court of Appeals the federal District Court for Nebraska entered a decree for an injunction. From the decree of the District Court the Department appealed directly to this Court on the ground that the District Court was without jurisdiction as a federal court. The appeal was dismissed on October 16, 1922, for lack of jurisdiction in this Court. 260 U. S. 696.

is measured by the value of the property involved in the litigation. *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, 335; *Western & Atlantic R. R. Co.* v. *Railroad Commission of Georgia,* 261 U. S. 264. Nor is it like those cases in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount. *Troy Bank* v. *G. A. Whitehead & Co.,* 222 U. S. 39, 41. In the case at bar, if several creditors of the company, each with a debt less than $3,000, had joined as plaintiffs, the demands could not have been aggregated in order to confer jurisdiction. *Rogers* v. *Hennepin County,* 239 U. S. 621; *Scott* v. *Frazier,* 253 U. S. 243. Nor can Karatz's allegation that he sued on behalf of others similarly situated help him. Compare *Title Guaranty Co.* v. *Allen,* 240 U. S. 136; *Eberhard* v. *Northwestern Mutual Life Ins. Co.,* 241 Fed. 353, 356.[4] Since the bill in this case discloses that the amount in controversy was less than the jurisdictional amount, the general allegation that it exceeds this amount is, therefore, of no avail. *Vance* v. *W. A. Vandercook Co. (No. 2),* 170 U. S. 468.

As the bill should have been dismissed on motion, there is no occasion to consider whether the provisions of the Nebraska statute and the proceedings taken thereunder in the courts of that State, which the defendant set up, constituted a bar to the *Karatz* suit.[5]

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[4] Where a creditor's bill has been entertained by this Court, the amount of a single plaintiff's claim has been large enough to satisfy the jurisdictional requirement. Compare *Hatch* v. *Dana,* 101 U. S. 205; *Johnson* v. *Waters,* 111 U. S. 640; *Handley* v. *Stutz,* 137 U. S. 366.

[5] Compare *O'Neil* v. *Welch,* 245 Fed. 261, 267, 268; *Ward* v. *Foulkrod,* 264 Fed. 627, 634. See also *Relfe* v. *Rundle,* 103 U. S. 222; *Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Hamilton,* 224 U. S. 243.

Second. In the *Hertz* case, also, the motion to dismiss the bill should have been granted. Being dependent upon the decree in the *Karatz* suit appointing the receivers, the *Hertz* suit must necessarily fall with the dismissal of that bill. But there are other insuperable obstacles to the maintenance of the *Hertz* suit.

Hertz and Levin were not appointed ancillary receivers for Nebraska. They sue in the Nebraska district as Minnesota receivers, relying upon § 56 of the Judicial Code. That section, by its terms, applies only, where in a suit "in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit." It relates to those cases where the fixed property is a unit, extending into several States, like interstate railroads and pipe lines.[6] See *Public Utilities Commission* v. *Landon,* 249 U. S. 236, 243. It cannot be assumed that the assets of an insurance company are of that character. Those of this company, within the Minnesota district, specifically described in the *Karatz* bill were alleged to consist of money and credits. The description of the property in Nebraska, given in the *Hertz* bill, is "cash, mortgages and other securities, bills receivable, real estate, stocks and bonds." The provisions of § 56 extending the operation of a receivership to other districts of the same judicial circuit were, therefore, inapplicable to this case. The motion made, under that section, for disapproval of the order, so far as it may be operative outside the District of Minnesota, should have been granted. As Minnesota receivers merely, Hertz and Levin had no rights whatever in Nebraska. The general rule that a receiver cannot

[6] The scope and effect of this section was stated by Mr. Moon (who introduced it) to be this: "It applies to a case where a receiver is to be appointed by a district judge covering property that runs across an entire circuit." Cong. Rec., 61st Cong., 3rd sess., pp. 566, 3998.

sue in a foreign jurisdiction applied. *Great Western Mining Co.* v. *Harris,* 198 U. S. 561. The express authorization (contained in the order of appointment) to apply for aid to other courts could not aid them in this respect. *Sterrett* v. *Second National Bank,* 248 U. S. 73.

Moreover, even if the federal court for Minnesota would have had jurisdiction to appoint the receivers, and these receivers had secured ancillary appointment in the Nebraska district, the *Hertz* bill should still have been dismissed; because the property was then in the possession of the state court. What the federal court undertook to do was not to adjudicate rights *in personam* (as the state court did in *Kline* v. *Burke Construction Co.,* 260 U. S. 226), but to take the *res* out of the possession and control of the state court, and to enjoin all action on its part, except as directed by the federal court for Minnesota. It sought to do this, although the state court alone had jurisdiction of the parties and of the subject-matter, at the time when the proceeding before it was begun; at the time its decree directing the Department to take possession was entered; and at the time possession was taken thereunder. Moreover, the proceeding in the state court was confessedly an appropriate one; the possession taken was actual; and it has been continuous. All this occurred before any suit was begun in any federal court. The federal court did not seek to gain possession and control of the Nebraska property until three months after entry of the decree of the state court directing the Department (which had possession of the *res*) to proceed with the liquidation. The case is, thus, free of those features which sometimes create difficulty in determining conflicts between courts of concurrent jurisdiction.

Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn

from the jurisdiction of all other courts. *Wabash R. R. Co.* v. *Adelbert College,* 208 U. S. 38, 54. Compare *Oklahoma* v. *Texas,* 258 U. S. 574, 581. Possession of the *res* disables other courts of coördinate jurisdiction from exercising any power over it. *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.,* 177 U. S. 51, 61. The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction. *Palmer* v. *Texas,* 212 U. S. 118, 126, 129.

The assertion of control by the federal courts over property in the possession of the state court, is sought to be justified on the following ground: The possession taken by the Department under the state court's decree of April 12, 1921, was only for a temporary purpose; namely, to conduct the business until the company could properly resume the conduct thereof. True, the supplemental decree entered by the state court on May 28, 1921, directed the Department to liquidate the business as provided in the statute. But, meanwhile, on May 2, 1921, suit had been brought by Karatz in the federal court for Minnesota; and it had obtained jurisdiction over the company's assets by its appointment *ex parte* of receivers. So, the court says, 280 Fed. 542, " its right to the possession by its receivers is superior to that of the state court. It follows that the receivers appointed by it are entitled to the possession of the company's records and assets as against the Department of Trade and Commerce."

This contention is opposed to the settled principles which govern the relations of courts of concurrent jurisdiction. It is inconsistent, also, with § 265 of the Judicial Code, which prohibits courts of the United States from

staying proceedings in courts of a State. *Essanay Film Manufacturing Co.* v. *Kane,* 258 U. S. 358. The Nebraska court was confessedly a court of competent jurisdiction. While it was in possession of the *res,* it entered a supplemental decree directing the Department to liquidate the company. The statute of the State expressly provides for such liquidation. The original petition of April 12, 1921, clearly contemplated it and contained a prayer for general relief. The claim is that the application for liquidation is a new and independent proceeding; and that jurisdiction over the *res* had terminated before entry of the supplemental decree, although the courts' possession of the *res* continued. The claim is groundless. But if the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court. *Covell* v. *Heyman,* 111 U. S. 176, 179; *Byers* v. *McAuley,* 149 U. S. 608, 614. Compare *Laing* v. *Rigney,* 160 U. S. 531; *Metcalf* v. *Barker,* 187 U. S. 165; *Pickens* v. *Roy,* 187 U. S. 177; *Murphy* v. *John Hofman Co.,* 211 U. S. 562, 569. If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. *Wiswall* v. *Sampson,* 14 How. 52. But the judgment of the state court, which had possession of the *res,* could not be set aside by a collateral attack in the federal courts. *Mutual Reserve Fund Life Association* v. *Phelps,* 190 U. S. 147, 159, 160. Nor could it be ignored. *Shields* v. *Coleman,* 157 U. S. 168. Lower federal courts are not superior to state courts.

Reversed.

Counsel for Parties.

EX PARTE: IN THE MATTER OF FULLER ET AL., INDIVIDUALLY AND AS COPARTNERS UNDER THE NAME OF E. M. FULLER & COMPANY, PETITIONERS.

APPLICATION FOR A STAY OF ORDERS OF DISTRICT COURT PENDING APPEAL.

No. —. Motion for stay submitted April 27, 1923.—Decided April 30, 1923.

One who becomes a bankrupt has no right, under the Fourth and Fifth Amendments to the Constitution, to resist delivery of his books and papers to the trustee in bankruptcy or affix conditions as to their use, upon the ground that they may be used to incriminate him. P. 93.

Application denied.

THIS was an application, made here to stay, pending appeal, two orders of the District Court requiring a receiver in bankruptcy and the bankrupts and their attorneys to turn over certain books and papers to the trustee in bankruptcy.

Mr. William J. Fallon, Mr. Eugene F. McGee and *Mr. Arthur Garfield Hays,* for petitioners, in support of the motion.

Mr. Francis L. Kohlman, for the trustee in bankruptcy, in opposition to the motion.

Mr. William M. Chadbourne, Mr. Cyrus F. Smythe and *Mr. C. R. Ward,* for the Creditors' Committee of E. M. Fuller & Company, in opposition to the motion.

Mr. Joab H. Banton, District Attorney for New York County, *Mr. John Caldwell Myers* and *Mr. Hugo Wintner,* by leave of court, filed a memorandum in opposition to the motion, as *amici curiæ.*

Mr. Chief Justice Taft delivered the opinion of the Court.

On June 26, 1922, a petition in involuntary bankruptcy was filed against Fuller and McGee, individually and as partners, in the name of E. M. Fuller & Company, in the District Court for the Southern District of New York. Thereafter Strasbourger was appointed Receiver and at once demanded of the bankrupts the books of accounts, records, documents, both of themselves individually and of the firm. The bankrupts claimed that the books would tend to incriminate them and refused to turn them over unless the Receiver agreed that they were to be used in connection with the civil administration of bankrupts' estate only. A stipulation of this kind was made between the Receiver and the attorneys for the bankrupts, with the further specific agreement that the books and records would not be turned over to any district attorney or used before any grand or petit jury. The district attorney, County of New York, then attempted to bring the books and records into the state court by serving a subpœna upon the Receiver. Judge Augustus Hand, at the petition of the bankrupts, enjoined the Receiver from turning the books over.

On April 6, 1923, the attorneys for the bankrupts demanded of the Receiver that he return the books and papers to them because his receivership had terminated by the appointment of a trustee in bankruptcy. The Referee in bankruptcy directed the Receiver to turn the books and papers over to the Trustee without condition or restriction. On review, this order was affirmed by Circuit Judge Mack sitting in bankruptcy. April 21st last, all the books and papers were then delivered over to the Trustee except certain books and papers which had been redelivered by the Receiver to the attorneys for the bankrupts on their receipts which were turned over to

the Trustee. The bankrupts objected to turning over the books and papers thus receipted for by their attorneys to the Trustee. Thereupon on April 24, 1923, Judge Mack made a second order directing the attorneys for the bankrupts and the bankrupts to turn over these records and papers so withheld by them to the Trustee. On April 21st, the District Attorney of New York County had subpœnaed the Trustee to produce the books and papers of the bankrupts he then had in his custody and on the 24th of April offered them in evidence in the Court of General Sessions of New York as evidence against E. M. Fuller under an indictment arising out of the business of the bankrupts. On the 25th of April Judge Mack granted an application for a stay pending proceedings for appeal to this Court and an application for a stay here; and Judge Nott presiding in the state court adjourned the trial there until April 30th.

Proceedings for appeal to this Court have now been begun under the authority of *Perlman* v. *United States,* 247 U. S. 7, and the application for a stay of Judge Mack's two orders has now been made.

A man who becomes a bankrupt or who is brought into a bankruptcy court has no right to delay the legal transfer of the possession and title of any of his property to the officers appointed by law for its custody or for its disposition, on the ground that the transfer of such property will carry with it incriminating evidence against him. His property and its possession pass from him by operation and due proceedings of law, and when control and possession have passed from him, he has no constitutional right to prevent its use for any legitimate purpose. His privilege secured to him by the Fourth and Fifth Amendments to the Constitution is that of refusing himself to produce, as incriminating evidence against him, anything which he owns or has in his possession and control, but his privilege in respect to what was his and in his custody

ceases on a transfer of the control and possession which takes place by legal proceedings and in pursuance of the rights of others, even though such transfer may bring the property into the ownership or control of one properly subject to subpœna *duces tecum*. These conclusions follow from the principles announced by this Court in the *Matter of Harris*, 221 U. S. 274, 279, and *Johnson* v. *United States*, 228 U. S. 457.

In considering the correctness of Judge Mack's orders, it is wholly immaterial what stipulation had been entered into between the Receiver and the bankrupts in regard to the use to be made pending the receivership of the books and papers or what sanction Judge Hand's action had given the stipulations. With the appointment of the Trustee both the title and the right to possession of such books and papers passed to him and Judge Mack's orders properly confirmed this result. The Receiver, the bankrupts and their attorney must yield possession and title to the Trustee. Neither can accompany the delivery he is bound by law to make with any effective conditions restricting use of the books, papers or other property of the bankrupts' estate as evidence against them.

The application is denied.

PEOPLE OF THE STATE OF NEW YORK EX REL. CLYDE *v.* GILCHRIST, PRESIDENT, ET AL., AS MEMBERS OF THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

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

No. 318. Argued April 17, 1923.—Decided April 30, 1923.

1. Upon error to a state court, when a statute is alleged to impair the obligation of a contract, this Court must decide for itself whether there was a contract and what it was. P. 96.

2. But where the contract claimed is one of tax exemption, involving the taxing system of the State, this Court will be slow to depart from a judgment of the state courts denying it, if no real oppression or manifest wrong result. P. 97.
3. The New York Mortgage Recording Tax Law, Art. XI, § 251, in providing that payment of the taxes therein provided on recording of mortgages should exempt them and the debts and obligations thereby secured from other taxation; and Art. XV of the Tax Law, as amended by c. 802, N. Y. Laws, 1911, in providing that, upon payment on other secured debts of a tax of ½ of 1% of their face value, and certification by the Comptroller, they should be exempt from all taxation, with specified exceptions,— were not intended to establish contracts with those paying such taxes exempting them from taxation of their income from such debts and mortgages. Pp. 97, 99.

197 App. Div. 913; 232 N. Y. 550, affirmed.

ERROR to a judgment of the Supreme Court of New York (affirmed by the Court of Appeals) confirming, in a statutory proceeding, an assessment under the state income tax law.

Mr. Arthur E. Goddard for plaintiff in error.

Mr. Carl Sherman, Attorney General of the State of New York, *Mr. Francis W. Cullen, Mr. James S. Y. Ivins* and *Mr. C. T. Dawes,* for defendants in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a statutory proceeding to recover the amount of taxes for 1919 paid under duress and protest. As the first step the relator, the plaintiff in error, filed an application for a revision of the tax with the Comptroller of the State. His determination presented the issue in a few words. The relator held bonds secured by mortgages upon which latter the mortgage recording tax under Article XI of the Tax Law had been paid. She also held secured debts upon which a tax had been paid under Article XV of the Tax Law as amended by c. 802 of the

Laws of 1911. An additional assessment was made under the Income Tax Law of 1919, c. 627, on account of the relator's income from these bonds and debts. The relator seems to have contended that if the Income Tax Law imposed the additional assessment it was unconstitutional as impairing the obligation of contracts made by the statutes laying the taxes first mentioned. The Comptroller held that the additional assessment was correct and that no payment was unlawfully exacted. His determination was confirmed by the Appellate Division of the Supreme Court, and the order of the Appellate Division was affirmed by the Court of Appeals. No opinion was delivered by either Court. The case was brought here by writ of error and the defendant in error moved to dismiss on the ground that it does not appear that the judgment below necessarily decided a question that can be brought here in this way. *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304

The position of the relator is that where the ground of judgment does not appear this Court will not assume that the Court below proceeded upon ground clearly untenable, and that therefore if the only one that seems plausible opens a constitutional question raised upon the record, this Court will proceed to deal with it. *Adams* v. *Russell,* 229 U. S. 353, 358. The only ground suggested by the defendant in error as local is that the decision of the Appellate Division at least is shown to have gone upon the construction of the exempting statutes by an opinion rendered at the same time as the present judgment, to the effect that the exemption of mortgages by the Mortgage Recording Tax Law, if a contract, did not extend to the interest upon the debt. *New York ex rel. Central Union Trust Co.* v. *Wendell,* 197 App. Div. 131. To this the relator rightly replies that when a statute is alleged to impair the obligation of a contract this Court must decide for itself whether there was a contract

and what it was. *Detroit United Ry.* v. *Michigan,* 242 U. S. 238, 249. *Columbia Water Power Co.* v. *Columbia Electric Street Railway, Light & Power Co.,* 172 U. S. 475, 487. The relator in her petition to the Supreme Court failed to call attention in terms to the provision of the Constitution relied upon. *Harding* v. *Illinois,* 196 U. S. 78, 88. But she set forth that the exemptions claimed were granted by the statutes under which the earlier taxes were fixed, that they were secured for a valuable consideration, the payment of those taxes, and that the subsequent tax upon the income of the bonds and securities violated the provisions of the Constitution of the United States. We shall assume in her favor that Article I, § 10, was sufficiently indicated as the clause upon which she relied.

Nevertheless we are not satisfied that the relator is entitled to prevail. It is apparent that the New York Courts held that there was no contract of the kind that is alleged. It would be extravagant to suppose that they upheld a law admitted to impair the obligation of an admitted contract. The opinion of the Supreme Court shows clearly enough the general nature of the defense sustained. The relator contends and must contend that this is so. While it is true that we are not bound by the construction of the New York statutes by the New York Courts in deciding the constitutional question, yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result. *Troy Union R. R. Co.* v. *Mealy,* 254 U. S. 47, 50.

The Mortgage Recording Tax Law, Article XI, § 251, provides that all mortgages of real property situated within the State that are taxed by that article and the debts and obligations that they secure shall be exempt

from other taxation by the state and local subdivisions. The caution that should be used before interpreting such declarations of legislative policy as promises, even when they manifestly tend and are expected to induce voluntary action, is illustrated in *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 386. *Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47, 50. But the Appellate Division, in the case that we have cited, while having this caution in mind, preferred to assume without deciding that there was a contract of exemption, but held that it did not extend to this income tax. The Court recognized that for many purposes a tax upon the interest received from a mortgage debt is a tax upon the mortgage; but for the purpose of construing the words of a statute it rightly recognized that a distinction might be taken. That a distinction was intended, or rather that the Legislature had in mind only a tax upon the principal debt or obligation, it deduced from a nice consideration of the words of the statute, which led it to the conclusion that " the dominant idea in the mind of the Legislature was to render mortgagees independent of the action, capricious or otherwise, of local tax officials." Considering that only the principal of mortgages was taxed when the law was passed and that in those days no one thought of an income tax; that any contract of exemption must be shown to have been indisputably within the intention of the Legislature; that it is difficult to believe that the Legislature meant to barter away all its powers to meet future exigencies for the mere payment of a mortgage recording tax; and that a tax upon the individual measured by net income might be regarded as one step removed from a tax on the capital from which the income was derived, *Peck & Co.* v. *Lowe*, 247 U. S. 165, 175; it held that there was no promise that the present tax should not be imposed. With regard to the mortgages the conclusion does not seem to us very difficult to reach. The State did not need to offer a bar-

gain to induce mortgagees to record their deeds. *Federal Land Bank of New Orleans* v. *Crosland*, 261 U. S. 374.

The provision as to the tax on secured debts other than the foregoing is to the effect that any person may send them or a description of them to the Comptroller and may pay a tax of one-half of one per centum on the face value and that thereupon the Comptroller by indorsement or receipt shall certify that they are exempt from taxation and that thereafter they shall be exempt from all taxation in the State or local divisions of the State with certain specified exceptions. Laws of 1911, c. 802, § 331. This is an alternative to a tax, at such rate as may be fixed, on the fair market value of the security. § 336. There is an argument that it relates only to the year for which payment is made, and, although for reasons indicated in *Wisconsin & Michigan Ry. Co.* v. *Powers, supra,* consideration seems to be of little importance except as bearing on interpretation, that the payment of an alternative tax is consideration for exemption from nothing except its alternative. On the other hand the provision for an indorsement upon the security hardly is reconcilable with less than a permanent exemption; it is said that so the law generally has been understood; and the ground taken by the Appellate Division in the case that we have cited indicates that they were not prepared to deny that the exemption even of mortgages looked beyond the year. In the absence of further opinion it seems fair to assume that the Appellate Division and the Court of Appeals decided against the exemption for the reasons stated in *New York ex rel. Central Union Trust Co.* v. *Wendell,* 197 App. Div. 131, of which we have given a summary. As we said at the outset we ought to be slow to depart from the judgment of the Courts of the State in a case like this and we accept their conclusion also with regard to secured debts. We are not prepared to say that the judgment was wrong and therefore it is affirmed.

Judgment affirmed.

CUNARD STEAMSHIP COMPANY, LTD., ET AL. *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

OCEANIC STEAM NAVIGATION COMPANY, LTD., *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

INTERNATIONAL NAVIGATION COMPANY, LTD., *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

COMPAGNIE GENERALE TRANSATLANTIQUE *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY (HOLLAND AMERICA LINE) *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

ROYAL MAIL STEAM PACKET COMPANY *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERICAN LINE) *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

PACIFIC STEAM NAVIGATION COMPANY *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

NAVIGAZIONE GENERALE ITALIANA *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

INTERNATIONAL MERCANTILE MARINE COMPANY *v.* STUART, ACTING COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK, ET AL.

UNITED AMERICAN LINES, INC., ET AL. *v.* STUART, ACTING COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK, ET AL.

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

Nos. 659–662, 666–670, 678, 693, 694. Argued January 4, 5, 1923.—Decided April 30, 1923.

1. The words " transportation " and " importation," in the Eighteenth Amendment, are to be taken in their ordinary sense, the former comprehending any real carrying about or from one place to another, and the latter any actual bringing into the country from the outside. P. 121.
2. The word " territory," in the Amendment (in the phrase " the United States and all territory subject to the jurisdiction thereof,") means the regional areas, of land and adjacent waters, over which the United States claims and exercises dominion and control as a sovereign power,—the term being used in a physical, not a metaphorical sense, and referring to areas and districts having fixity of location and recognized boundaries. P. 122.
3. The territory subject to the jurisdiction of the United States includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles; and this territory, and all of it, is that which the Amendment designates as its field of operation. P. 122.
4. Domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters, are part of the " territory " of the United States in a metaphorical sense only, and are not covered by the Amendment. P. 123.
5. The jurisdiction arising out of the nationality of a merchant ship, as established by her domicile, registry and use of the flag, partakes more of the characteristics of personal than of territorial sovereignty, is chiefly applicable to ships on the high seas where there is no territorial sovereign; and, as respects ships in foreign

territorial waters, it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. P. 123.

6. The Amendment covers foreign merchant ships when within the territorial waters of the United States. P. 124.

7. A merchant ship of one country, voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place, and correlatively is bound to yield obedience to them. The local sovereign may, out of considerations of public policy, choose to forego the exertion of its jurisdiction, or to exert it in a limited way only, but this is a matter resting solely in its discretion. P. 124.

8. The Eighteenth Amendment does not prescribe any penalties, forfeitures, or mode of enforcement, but by its second section leaves these to legislative action. P. 126.

9. The only instance in which the National Prohibition Act recognizes the possession of intoxicating liquor for beverage purposes as lawful, is where the liquor was obtained before the act went into effect and is kept in the owner's dwelling for use therein by him, his family, and his *bona fide* guests. P. 127.

10. Examination of the National Prohibition Act, as supplemented November 23, 1921, c. 134, 42 Stat. 222, shows,

(*a*) That it is intended to be operative throughout the territorial limits of the United States, with the single exception of liquor in transit through the Panama Canal or on the Panama Railroad,

(*b*) That it is not intended to apply to domestic vessels when outside the territorial waters of the United States,

(*c*) That it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise. Pp. 127–129.

11. Congress, however, has power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign. P. 129.

12. The antiquity of the practice of carrying intoxicating liquors for beverage purposes as part of a ship's sea stores, the wide extent of the practice and its recognition in a congressional enactment, do not go to prove that the Eighteenth Amendment and the Prohibition Act could not have been intended to disturb that practice, since their avowed and obvious purpose was to put an end to prior practices respecting such liquors. P. 129.

13. After the adoption of the Amendment and the enactment of the National Prohibition Act, Congress withdrew the prior statutory recognition of liquors as legitimate sea stores. Rev. Stats., § 2775; Act of September 21, 1922, c. 356, Tit. IV, and § 642, 42 Stat. 858, 948, 989. P. 130.
14. The carrying of intoxicating liquors, as sea stores, for beverage purposes, through the territorial waters or into the ports and harbors, of the United States, by foreign or domestic merchant ships, is forbidden by the Amendment and the act. P. 130.

284 Fed. 890, affirmed.

285 Fed. 79, reversed.

APPEALS from decrees of the District Court dismissing, on the merits, as many suits brought by the appellant steamship companies for the purpose of enjoining officials of the United States from seizing liquors carried by appellants' passenger ships as sea stores and from taking other proceedings against the companies and their vessels, under the National Prohibition Act.

Mr. George W. Wickersham for appellants in Nos. 659–662, 666–670, and 678.

I. Neither the Eighteenth Amendment, nor the National Prohibition Act, properly construed, requires the application of the prohibition to every place where the United States may exercise its power.

This statute contained no provision defining the territory within which it should be operative. It, therefore, was governed by the provisions of Rev. Stats., § 1891: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

A question having arisen as to the jurisdiction of the courts in the territories and insular possessions of the United States to enforce the act, a section was enacted in the Supplemental Act of November 23, 1921. An examination of the debates preceding this discloses only a

most perfunctory consideration of the section. It clearly appears that the dominating purpose underlying its inclusion in the act was to give power to the courts of Hawaii and the Virgin Islands to enforce the statute.

There is nothing else in all of the many pages of the Congressional Record devoted to a discussion of these two acts which throws any further light upon the territorial limitations of their application. Especially is there nothing to indicate that Congress was extending the application of the law to any place not previously embraced within the description contained in the Amendment, " the United States and all the territories subject to the jurisdiction thereof." It surely is a strained construction to hold that a foreign ship temporarily within American waters is embraced within the phrase " the territories subject to the jurisdiction " of the United States. Nothing in the legislative history of the act supports the contention that Congress had any such intention.

Evidently Congress was in some doubt as to whether or not the National Prohibition Act, *ex proprio vigore,* applied to territories which had not been embodied within the United States, and, therefore, deemed it necessary specifically to extend it to such territory. The Philippine Islands undoubtedly are territory subject to the jurisdiction of the United States, yet we have not heard that the Eighteenth Amendment *ex proprio vigore* applies to them, nor that the National Prohibition Act governs them. Moreover, § 20, Tit. III, of that act itself involves a recognition of the fact that the statute by its own terms did not apply to everything subject to the jurisdiction of the United States, because it specifically provides for its application to the Canal Zone—which has been defined as not a " territory " but " a place subject to the jurisdiction of the United States " (25 Ops. Atty. Gen. 441), and also expressly provides that it shall not apply to liquor in transit through that zone by railroad or steamship.

It is difficult to understand why, if Congress was right in supposing it could exclude transportation of liquors from the application of the Amendment under any circumstances, it could not exclude it by failure specifically to include, as well as by an exception expressly grafted on to a comprehensive inclusion.

In our view, § 20, Tit. III, involves the expression of an important recognition by Congress that it has power under the Amendment to exclude from the operations of prohibition in some instances, and, if that be true, the words *"territory subject to the jurisdiction thereof"* in the Eighteenth Amendment cannot mean " *wherever the United States may exercise its power,*" as contended by the Government.

The conclusions announced by this Court in the *National Prohibition Cases,* 253 U. S. 350, are not at variance with this view. Nor do we think that *Grogan* v. *Walker & Sons Co.* and *Anchor Line* v. *Aldridge,* 259 U. S. 80, are.

In adopting the broad canon of construction which controlled the decision rendered by this Court in the *Grogan* and *Anchor Line Cases,* it is evident that the Court placed emphasis upon the controlling force of the admonition contained in § 3 of Tit. II of the National Prohibition Act, enjoining liberality of construction, to the end that the use of intoxicating liquor as a beverage might be prevented. Let us consider what meaning and purpose are to be assigned to the Eighteenth Amendment and the enforcing act. Certainly the first sense of every law must be that the field of its operation is the country of its enactment. This is equally true of the Eighteenth Amendment and the National Prohibition Act. Necessarily, they get their meaning from the field and purpose of their operation—from the conditions which exist in the field or are designed to be established there. The transportation that they prohibit is transportation within that field—that is, the United States and its Territories, " for

beverage purposes." The transportation and the purposes are, therefore, complements of each other and both must exist to fulfill the declared prohibition. Thus considered, the "admonition" which received such emphasis in the adoption of this broad canon of construction, and was relied upon by the lower court herein, loses all force under the circumstances of the instant case. Liberality of interpretation is enjoined to the end "that the use of intoxicating liquor as a beverage" may be prevented. These words carry with them an unspoken but necessary qualification, namely, "within the United States, its Territories, Hawaii, and the Virgin Islands."

We have said that the transportation and purposes are complements of each other and both must exist to fulfill the required prohibition. The foreign steamship lines do not seek to transport liquor through, for use as a beverage within, the United States, its Territories, Hawaii, or the Virgin Islands.

II. A foreign ship temporarily within the waters of the United States is not "territory subject to the jurisdiction" of the United States, within the meaning of the Eighteenth Amendment and the National Prohibition Act.

The jurisdiction exercised by a State over foreign vessels within her waters has been the subject of much controversy. On the one hand, it is held that, in a sense, the vessel is part of the territory of the Nation to which it belongs, and those on board are subject to its laws, even in a foreign port (Vattel, book 1, c. 19, § 216; Wheat. Int. Law, 157; *Brown* v. *Duchesne*, 19 How. 183; *Wilson* v. *McNamee*, 102 U. S. 572; *United States* v. *Bowman*, 260 U. S. 94), while on the other hand, it is held, with certain reservations, that by voluntarily coming into the waters or ports of one Nation, the ships of another submit themselves to the laws of the former. *United States* v. *Diekelman*, 92 U. S. 520; *Wildenhus's Case*, 120 U. S. 1; *The*

Exchange, 7 Cr. 116, 144. See 2 Moore Int. Law Dig., p. 292; 8 Ops. Atty. Gen. 73; Taylor, Int. Law, § 268; Wheaton, Int. Law, 5th Eng. ed. (Phillipson), p. 169; 2 Wharton, Conflict of Laws, 3d ed., §§ 816, 817; 42 Albany Law Jour., pp. 345–353; 1 Oppenheim, Int. Law, 3d ed., § 189; Ortolan, Diplomatie de la Mer, vol. 1, pp. 192, 193; Gregory, 2 Mich. Law Rev., p. 333; 1 Halleck, Int. Law, 4th ed. (Baker), pp. 245–247; Wheaton, El. Int. Law, 8th ed., § 95, note 58; *United States* v. *Bowman,* 260 U. S. 94.

III. The courts will never give a construction to a statute contrary to international law or the accepted custom and usage of civilized nations, when it is possible reasonably to construe it in any other manner. *The Paquete Habana,* 175 U. S. 677; *Murray* v. *Schooner Charming Betsy,* 2 Cr. 64.

The same rule, *a fortiori,* should apply to the construction of a provision in the Constitution. Presumably, provisions of the latter are not intended to regulate the affairs of foreign nations or to upset established international usage. If, as we contend, the Amendment does not foreclose the question, then it becomes one of statutory construction, namely, whether Congress intended to disregard the long established general rule respecting the jurisdiction of the country of a visiting ship over its internal affairs and to impose its will with respect to such internal management, in cases which cannot in any respect be considered as affecting the peace and order of the port into which the ships come. In construing other statutes which might affect such internal management, the federal courts have been careful to avoid, unless constrained by the obvious, inescapable meaning of the act, giving such construction to the statute as would lead to a conflict of laws, or interference with well settled international usage, or unduly interfere with the internal management of the ship. *The Exchange,* 7 Cr. 116, 136, 146; *Murray* v.

Schooner Charming Betsy, supra, 118; *The Brig Wilson* v. *United States,* Fed. Cas. No. 17,846; *Brown* v. *Duchesne,* 19 How. 183; *The State of Maine,* 22 Fed. 734; *The Kestor,* 110 Fed. 432; *Patterson* v. *Bark Eudora,* 190 U. S. 169; *Wildenhus's Case,* 120 U. S. 1, 11, 12; *Sandberg* v. *McDonald,* 248 U. S. 185; *Neilson* v. *Rhine Shipping Co.,* 248 U. S. 205.

So it uniformly has been held that the acts prohibiting the bringing of Chinese laborers to the United States are not violated by a foreign vessel coming into one of our ports with Chinese as seamen or members of the crew. *In re Moncan,* 14 Fed. 44; *United States* v. *Ah Fook,* 183 Fed. 33; *United States* v. *Burke,* 99 Fed. 895; *United States* v. *Jamieson,* 185 Fed. 165; appeal dismissed 223 U. S. 744.

See *Taylor* v. *United States,* 207 U. S. 120; *Scharrenberg* v. *Dollar S. S. Co.,* 245 U. S. 122.

The executive departments also always have exercised like care in avoiding such interpretative application of statutes as unnecessarily to interfere with international commercial relations. 27 Ops. Atty. Gen. 440.

The care which Congress used to exclude opium from our territorial waters serves also to point out the underlying distinction between the situation there existing and the facts of the instant case. Section 5 of the Opium Act dealt only with smoking opium, which had no legitimate uses and which for years had been considered an international outlaw, the mere presence of which within their borders was considered intolerable by all civilized nations. Here, on the other hand, it appears from an examination of the National Prohibition Act that Congress has permitted the possession and use of intoxicating beverages in the homes of our people if acquired prior to the effective date thereof. The act also repeatedly recognizes as legal the existence of large quantities of bonded liquor within the United States, as also the manufacture, sale and trans-

portation of intoxicating liquor for other than beverage purposes (§ 3 and § 37 of Tit. II). It cannot, therefore, be said that the National Prohibition Act imposes an *unqualified prohibition*, still less can it be said that Congress intended to prevent the mere presence within our borders of intoxicating beverages under any and all circumstances; for the act itself proves a contrary intention. Congress has not only failed to use language sufficient to indicate that liquor could not be possessed within our borders for any purpose, but, under the system of qualified prohibition imposed by the act, there was no reason why it should prohibit the presence of such liquor within our territorial waters as an incidental element to the continuation of international commerce, sanctioned by the usage and custom of civilized nations since the inception of our Government. In marked contrast with this, also, is the record of congressional action respecting the subject under consideration in the cases at bar. From the date of the enactment of the National Prohibition Act, foreign ships had been bringing into American waters and ports liquors as a part of the ships' stores, for consumption by passengers and crew on the high seas, with the approval and subject to regulations promulgated by the Treasury Department, in conformity with international usage and the uniform course of American law and regulation from the foundation of the Government. This was a matter of newspaper notoriety and general knowledge. Treasury decisions had been promulgated which sanctioned the practice, and the Attorney General of the United States had declared its legality and laid down the rules under which it should be conducted. And yet, in the legislation of 1921, by which Congress sought to strengthen the law in other directions and to clothe the courts of the Territory of Hawaii and the Virgin Islands with jurisdiction to enforce the act, no mention was made of this subject and no attempt to broaden the scope of the law,

so as to apply it to foreign vessels in American ports. It seems incredible that, if Congress had intended to apply prohibition to foreign merchant ships, it would not have expressed such intention in the amending act. The fact that it did not, furnishes strong evidence that it had no intention of interfering with the well established usages of international commerce. This moreover is emphasized by the fact that § 5 of the amending act expressly dealt with the application of prohibition to common carriers by land and sea.

It is important to note in this connection that the provisions of the Transportation Act of 1920 are expressly applicable to foreign merchant vessels; and yet, neither the framers of the act, nor those who discussed it on the floors of Congress, suggested that the amending act should be broadened so as to make it clear that the possession by a foreign common carrier by vessel within American waters of intoxicating liquors for beverage purposes, was prohibited by our laws.

When Congress legislated with respect to intoxicating liquors in the Territory of Alaska, by Act of February 14, 1917, 39 Stat. 903, it clearly expressed its intention to apply prohibition to vessels within the territorial waters.

So in dealing with the Canal Zone, Congress, unrestricted by the limitations of the Constitution or the Eighteenth Amendment, but legislating as a domestic legislature, enacted § 20, Tit. III, of the National Prohibition Law. It will be noted that this prohibition went far beyond the Amendment or the National Prohibition Act. It not only prohibited the importation but the introduction into the Canal Zone. It absolutely prohibited possession by an individual or his having under his control any of the described beverages. Then, in order to emphasize its intention that these extreme measures should not be extended so as to interfere with foreign commercial intercourse, it added the proviso.

The provisions affecting the Canal Zone in the National Prohibition Act are not included in the general provisions relating to the United States, but in a specific section incorporated in the act to deal with that place. Section 20, Tit. III, places the Canal Zone in a special position. It will be noted that Congress has not said in the proviso that the *act* shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad, but that "this *section*" shall not apply. In other words, as the language of the section goes far beyond the confines of the Amendment and the act, Congress deemed it necessary to disclaim the application of its provisions, that is, the provisions of the *section*, to commerce passing through the Zone. And, therefore, it cannot be that by referring in § 20 to the carriage on the Panama Canal and on the Panama Railroad, Congress intended that no other transportation of liquor anywhere within the United States, or its possessions, was authorized except through the Canal Zone. The proviso completes the legislation by Congress respecting the Zone, but it has no bearing on the interpretation of the act itself in its application to the United States. It does illustrate the care which Congress has taken in this act, as in so many others, to avoid the implication of legislation affecting foreign merchant vessels, save and except in the particulars where its deliberate and expressed policy was to apply legislation to those ships.

IV. Sea stores on merchant ships are considered as part of the ship itself and always have been exempted from tariff and other laws affecting merchandise introduced into the country. 21 Ops. Atty. Gen. 92, 94; Rev. Stats., § 2807, amended by Act June 3, 1892, 27 Stat. 41; *United States* v. *24 Coils of Cordage,* Fed. Cas. No. 16,566; *United States* v. *One Hempen Cable,* Fed. Cas. No. 15,931a; Treasury Circular Dec. 4, 1922; *Brough* v. *Whitmore,* 4 Term. Rep. 206; *The Dundee,* 1 Hagg. Adm.

109; *Gale* v. *Laurie*, 5 B. & C. 156; English Marine Insurance Act 1906, Arnould Marine Insurance, 10th ed., vol. 2, p. 1659; *id.* vol. 1, p. 295.

A further proof of the incorporation of stores into the ship is the fact that they are valued by surveyors, when valuing the ship for general average contribution, as part of the contributory value of the ship. Lowndes, General Average, § 76. It is also a very interesting fact that, in the case of many European nations, a separate list of ship's stores is considered as part of the ship's papers, in addition to the ordinary cargo manifest. In this connection see Atherly Jones on Commerce in War, pp. 347–352. *United States* v. *Hawley & Letzerich,* 160 Fed. 734.

The laws of Italy, France, and Holland require merchant ships trading with their ports to carry and furnish liquors for the consumption of passengers and crew. In those cases, liquors are *necessaries* within the meaning of the admiralty law. See *The Satellite,* 188 Fed. 717.

It was, therefore, in pursuance of a long applied doctrine of sea law and the consistent legislative policy that, after the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, the Treasury Department promulgated regulations covering sea stores of liquors which have been in force up to the present time. The new opinion of the Attorney General, and the decision of the District Court in the present cases, present to this Court the question of whether or not the necessary construction of the Prohibition Law overrules this consistent, uniform, continued policy of our Government, and, disregarding all international comity, imposes our domestic regulations upon all foreign vessels coming into our ports.

V. Even if the foreign steamships within American ports or waters should be considered as territory subject to the jurisdiction of the United States, nevertheless the carriage of intoxicating liquors as part of their sea stores,

under the circumstances described in the bill, is not a violation of the Amendment or the statute.

It is well settled law, that the carriage of ship stores on board a foreign vessel coming into ports of the United States, and on its departure therefrom, is neither importation into, nor exportation from, the United States. *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 144; *The Conqueror,* 49 Fed. 99, 102; affd. 166 U. S. 110.

That the carriage of liquors from one point to another within the United States may not amount to transportation within the prohibition of the Amendment and the statute, is recognized in *Street* v. *Lincoln Safe Deposit Co.,* 254 U. S. 88. *United States* v. *254 Bottles of Intoxicating Liquor,* 281 Fed. 247.

The Amendment does not make mere possession of intoxicating liquors unlawful. Its prohibition applies only when one lawfully in possession when the Amendment took effect seeks to sell or transport it within the United States, etc., or to export it therefrom, for beverage purposes. If the National Prohibition Act goes beyond this, it exceeds the authority conferred upon Congress by the Amendment. We do not construe it as going beyond the Amendment. The act, recognizing the lawfulness of possession of liquors in a private dwelling, makes possession elsewhere only *prima facie* evidence that it is possessed for an unlawful purpose, and this evidence, of course, is open to rebuttal by the facts of the case.

The actual basis of *Corneli* v. *Moore,* 257 U. S. 491, is stated in the *Grogan Case,* 259 U. S. 80.

In the cases at bar, the liquors are in the strictest sense in the lawful possession of the owners of the steamships, and they remain immovable within the ship as a part of its sea stores, in effect as a part of the ship, in the same sense in which a cable which had been bought in Liverpool by the master of an American vessel, to replace an old

one worn out, was held to be a part of the ship and not to be treated as imported goods, wares or merchandise, in the case of *United States* v. *A Chain Cable,* 2 Sumner. 362; Fed. Cas. 14,776.

The movement of these liquors within our territorial waters, moreover, can in no proper sense be deemed a " transportation " in any accepted sense of the word. The universal and practical conception of transportation, as applied to any article or commodity under any circumstances, presupposes a carrier of some kind or description separate and distinct from the article or thing transported. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203.

In the present case there is not any separation of the sea stores from the ship. They are incorporated as it were into the body of the ship. Properly considered, sea stores are really aids to transportation rather than the subject matter thereof. While, of course, all parts of the vessel, including masts, spars, tackle and apparel, as well as sea stores, necessarily move with her when she moves, they are not being transported in the sense of that word as understood by our statutes or case law. It is submitted that the transportation prohibited by the Eighteenth Amendment and the National Prohibition Act is transportation in a commercial sense. Undoubtedly this was present in both the *Grogan* and *Anchor Line Cases.*

Specific reference to the question of transportation is found in §§ 13 and 14 of Tit. II of the act, and here Congress considers the question in some detail by requiring the carriers to mark the consignors' and consignees' names on the outside of all packages, in addition to making clear the contents.

Under the *Street Case, supra,* the conveyance from warehouse to residence was held not to be transportation within the act, because the goods were in the owner's possession in a leased room in a warehouse, and in effect

merely transferred by him to his residence. In the *Corneli Case* a different result was reached because the goods were in possession of the warehouse, and the transfer thereof involved commercial transportation of and delivery to the owner at the latter's residence. Sea stores, like bunker coal, belong to the ship owner and are on board his vessel solely for consumption therein. They are not received from any shipper nor are they to be delivered to any consignee, and transportation is not the purpose of their presence on shipboard. They are brought within the territorial waters of the United States merely because it is unavoidable under the circumstances.

If the National Prohibition Act goes beyond the limits of the Amendment, and prohibits mere possession, it is unsupported by the Constitution, and, to that extent at least, unenforceable. While the language of § 3, Tit. II, does prohibit any person to "possess any intoxicating liquor except as authorized in this act," read in connection with § 33, Tit. II, such unauthorized possession would appear only to be *prima facie* evidence of possession for one of the illegal purposes prescribed in the act, and not in and of itself to be punishable. That this construction is correct is emphasized by the provisions of § 20, Tit. III, where the congressional intention clearly expressed with respect to the Canal Zone is to make possession in and of itself a crime, as also to prohibit, not only the technical "importation" into the Zone, but the introduction of liquor into that specific territory. Not only, too, is possession prohibited, but it is made a crime to have "under one's control within the Canal Zone" any of the specified beverages.

If it be suggested that the Prohibition Act, § 33, Tit. II, makes the possession of liquors by any person not legally permitted by its provisions to possess liquor, evidence that such liquor is kept for purposes prohibited by the statute, the answer is that it is only *prima facie* evidence of that fact.

It is our contention that the cases of liquor carried as part of ship stores in foreign merchant vessels, also fairly fall within the obvious implication of § 33, Tit. II, and that an intention to confiscate the private property in these liquors and to extend the jurisdiction of an act which is, in the most emphatic sense of the term, a domestic police regulation, over the internal concerns of foreign ships, and thus indirectly to foist our laws and our conception of the proper use of alcohol for beverage purposes, over the people of other Nations whose usages and laws differ from ours, has not been expressed by the Eighteenth Amendment nor by Congress.

Mr. Cletus Keating, with whom *Mr. John M. Woolsey, Mr. J. Parker Kirlin* and *Mr. Ira A. Campbell* were on the brief, for appellant in No. 693.

I. The District Judge erred in holding that intoxicating liquors which have been legally acquired and which are kept and used only as sea stores by vessels of the United States are within the purview of the Eighteenth Amendment.

Sea stores are consumable provisions kept on board a vessel as part of her equipment for the maintenance of her passengers and crew.

Intoxicating liquors, having the status of sea stores and their situs on board a vessel, do not come within any of the prohibitions of the Eighteenth Amendment, although kept on board a vessel of the United States within territorial waters of the United States.

Intoxicating liquors incorporated as sea stores on a vessel, are not the subject of "importation into" the United States.

When a vessel passes out of our territorial waters, sea stores are not the subject of "exportation from" the United States.

Intoxicating liquors incorporated into sea stores, whilst kept on board a vessel of the United States, mov-

ing in territorial waters, are not the subject of "transportation within" the United States.

The possession of intoxicating liquors, lawfully acquired and kept sealed as sea stores, is legal within the territorial waters of the United States.

II. The District Judge erred in holding that vessels of the United States on the high seas and in foreign ports are territory subject to the jurisdiction of the United States, within the meaning of the Eighteenth Amendment, and subject to the penalties of the National Prohibition Act, and hence were not free to sell intoxicating liquors on the high seas and in foreign ports.

The Eighteenth Amendment was not necessary to give Congress power to legislate for lands subject to the jurisdiction of the United States and not included among the several States, or for vessels of the United States engaged in foreign or coastwise commerce.

Vessels of the United States are not "territory subject to the jurisdiction of the United States" within the meaning of the Eighteenth Amendment, nor are they subject to the National Prohibition Act.

The National Prohibition Act does not by its terms apply and was not intended to apply to vessels of the United States on the high seas or in foreign ports.

III. The unnecessary adoption of a fiction in constitutional construction that would attribute to the word "territory" as used in the Eighteenth Amendment a meaning which would include vessels of the United States upon the high seas and in foreign ports, would lead to embarrassing international situations.

IV. Neither the history nor purpose of the Eighteenth Amendment and its enforcement acts indicates any intention on the part of Congress to extend prohibition to vessels of the United States while on the high seas or in foreign ports.

In considering whether Congress intended that vessels of the United States should be considered "territory" within the meaning of the Amendment and the enforcement acts, § 20 of the National Prohibition Act is of great importance.

It seems hardly conceivable that Congress would place an additional obstacle in the way of the establishment of an American merchant marine, when the additional burden imposed was not essential to carry out the fundamental purposes of the prohibition reform. Vessels of the United States engaged in foreign trade go to all parts of the world, and are in competition with ships of foreign nations. The construction of the Amendment and the enforcement acts here contended for would not constitute an interference or limitation upon what everyone realizes is a great national reform.

Mr. Reid L. Carr, with whom *Mr. George Adams Ellis* and *Mr. Frederick H. Stokes* were on the brief, for appellants in No. 694.

The word "territory" as employed in the Eighteenth Amendment must be construed according to the meaning fixed upon it in our constitutional history.

A ship is not territory, within the meaning of the Eighteenth Amendment or the enforcing legislation.

As a matter of statutory construction, the Prohibition Acts negative the intention of Congress to extend their operation to vessels of the United States on the high seas or in foreign ports.

Mr. Solicitor General Beck and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, with whom *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, was on the briefs, for appellees.

Mr. Andrew Wilson and *Mr. Wayne B. Wheeler,* by leave of court, filed a brief as *amici curiae.*

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

These are suits by steamship companies operating passenger ships between United States ports and foreign ports to enjoin threatened application to them and their ships of certain provisions of the National Prohibition Act. The defendants are officers of the United States charged with the act's enforcement. In the first ten cases the plaintiffs are foreign corporations and their ships are of foreign registry, while in the remaining two the plaintiffs are domestic corporations and their ships are of United States registry. All the ships have long carried and now carry, as part of their sea stores, intoxicating liquors intended to be sold or dispensed to their passengers and crews at meals and otherwise for beverage purposes. Many of the passengers and crews are accustomed to using such beverages and insist that the ships carry and supply liquors for such purposes. By the laws of all the foreign ports at which the ships touch this is permitted and by the laws of some it is required. The liquors are purchased for the ships and taken on board in the foreign ports and are sold or dispensed in the course of all voyages, whether from or to those ports.

The administrative instructions dealing with the subject have varied since the National Prohibition Act went into effect. December 11, 1919, the following instructions were issued (T. D. 38218):

"All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

" Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

"Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same line or owner."

January 27, 1920, the first paragraph of those instructions was changed (T. D. 38248) so as to read:

"All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. All such liquors on foreign vessels should be sealed on arrival of the vessels in port, and such portions thereof released from seal as may be required from time to time for use by the officers and crew."

October 6, 1922, the Attorney General, in answer to an inquiry by the Secretary of the Treasury, gave an opinion to the effect that the National Prohibition Act, construed in connection with the Eighteenth Amendment to the Constitution, makes it unlawful (a) for any ship, whether domestic or foreign, to bring into territorial waters of the United States, or to carry while within such waters, intoxicating liquors intended for beverage purposes, whether as sea stores or cargo, and (b) for any domestic ship even when without those waters to carry such liquors for such purposes either as cargo or sea stores. The President thereupon directed the preparation, promulgation and application of new instructions conforming to that construction of the act. Being advised of this and that under the new instructions the defendants would seize all liquors carried in contravention of the act as so construed and would proceed to sub-

ject the plaintiffs and their ships to penalties provided in the act, the plaintiffs brought these suits.

The hearings in the District Court were on the bills or amended bills, motions to dismiss and answers, and there was a decree of dismissal on the merits in each suit. 284 Fed. 890; 285 Fed. 79. Direct appeals under Judicial Code, § 238, bring the cases here.

While the construction and application of the National Prohibition Act is the ultimate matter in controversy, the act is so closely related to the Eighteenth Amendment, to enforce which it was enacted, that a right understanding of it involves an examination and interpretation of the Amendment. The first section of the latter declares, 40 Stat. 1050, 1941:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

These words, if taken in their ordinary sense, are very plain. The articles proscribed are intoxicating liquors for beverage purposes. The acts prohibited in respect of them are manufacture, sale and transportation within a designated field, importation into the same, and exportation therefrom. And the designated field is the United States and all territory subject to its jurisdiction. There is no controversy here as to what constitutes intoxicating liquors for beverage purposes; but opposing contentions are made respecting what is comprehended in the terms "transportation," "importation" and "territory."

Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that

sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; nor that it be incidental to a transfer of the possession or title. If one carries in his own conveyance for his own purposes it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. See *United States* v. *Simpson,* 252 U. S. 465. Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.

Various meanings are sought to be attributed to the term "territory" in the phrase "the United States and all territory subject to the jurisdiction thereof." We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense,—that it refers to areas or districts having fixity of location and recognized boundaries. See *United States* v. *Bevans,* 3 Wheat, 336, 390.

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. *Church* v. *Hubbart,* 2 Cranch, 187, 234; *The Ann,* 1 Fed. Cas., p. 926; *United States* v. *Smiley,* 27 Fed. Cas., p. 1132; *Manchester* v. *Massachusetts,* 139 U. S. 240, 257–258; *Louisiana* v. *Mississippi,* 202 U. S. 1, 52; 1 Kent's Com., 12th ed., *29; 1 Moore

International Law Digest, § 145; 1 Hyde International Law, §§ 141, 142, 154; Wilson International Law, 8th ed., § 54; Westlake International Law, 2d ed., p. 187, *et seq;* Wheaton International Law, 5th Eng. ed. (Phillipson), p. 282; 1 Oppenheim International Law, 3d ed., §§ 185–189, 252. This, we hold, is the territory which the Amendment designates as its field of operation; and the designation is not of a part of this territory but of "all" of it.

The defendants contend that the Amendment also covers domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters. But it does not say so, and what it does say shows, as we have indicated, that it is confined to the physical territory of the United States. In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. *Scharrenberg* v. *Dollar S. S. Co.,* 245 U. S. 122, 127; *In re Ross,* 140 U. S. 453, 464; 1 Moore International Law Digest, § 174; Westlake International Law, 2d ed., p. 264; Hall International Law, 7th ed. (Higgins), § 76; Manning Law of Nations (Amos), p. 276; Piggott Nationality, Pt. II, p. 13. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty. See *The Hamilton,* 207 U. S. 398, 403; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 355; 1 Oppenheim International Law, 3d ed., §§ 123–125, 128. It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. 2 Moore International

Law Digest, §§ 204, 205; Twiss Law of Nations, 2d ed., § 166; Woolsey International Law, 6th ed., § 58; 1 Oppenheim International Law, 3d ed., §§ 128, 146, 260.

The defendants further contend that the Amendment covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail. But, as that is a fiction, we think the contention is right.

A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion. The rule, now generally recognized, is nowhere better stated than in *The Exchange*, 7 Cranch, 116, 136, 144, where Chief Justice Marshall, speaking for this Court, said:

" The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

* * * * * * *

"When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption."

That view has been reaffirmed and applied by this Court on several occasions. *United States* v. *Diekelman,* 92 U. S. 520, 525, 526; *Wildenhus's Case,* 120 U. S. 1, 11; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Knott* v. *Botany Mills,* 179 U. S. 69, 74; *Patterson* v. *Bark Eudora,* 190 U. S. 169, 176, 178; *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348, 355–356. And see *Buttfield* v. *Stranahan,* 192 U. S. 470, 492–493; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 324; *Brolan* v. *United States,* 236 U. S. 216, 218. In the *Patterson Case* the Court added:

"Indeed, the implied consent to permit them [foreign merchant ships] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose."

In principle, therefore, it is settled that the Amendment could be made to cover both domestic and foreign

merchant ships when within the territorial waters of the United States. And we think it has been made to cover both when within those limits. It contains no exception of ships of either class and the terms in which it is couched indicate that none is intended. Such an exception would tend to embarrass its enforcement and to defeat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied.

In itself the Amendment does not prescribe any penalties, forfeitures or mode of enforcement, but by its second section [1] leaves these to legislative action.

With this understanding of the Amendment, we turn to the National Prohibition Act, c. 85, 41 Stat. 305, which was enacted to enforce it. The act is a long one and most of its provisions have no real bearing here. Its scope and pervading purpose are fairly reflected by the following excerpts from Title II:

"Sec. 3. No person [2] shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

"Sec. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used

[1] The second section says: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." For its construction, see *United States* v. *Lanza*, 260 U. S. 377.

[2] The act contains a provision (§ 1 of Title II) showing that it uses the word "person" as including "associations, copartnerships, and corporations" when the context does not indicate otherwise.

in maintaining the same, is hereby declared to be a common nuisance. . . ."

"Sec. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, . . . any liquor . . . in violation of this title is guilty of a nuisance . . ."

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. . . ."

Other provisions show that various penalties and forfeitures are prescribed for violations of the act; and that the only instance in which the possession of intoxicating liquor for beverage purposes is recognized as lawful is where the liquor was obtained before the act went in effect and is kept in the owner's dwelling for use therein by him, his family, and his *bona fide* guests.

As originally enacted the act did not in terms define its territorial field, but a supplemental provision [3] afterwards enacted declares that it "shall apply not only to the United States but to all territory subject to its jurisdiction," which means that its field coincides with that of the Eighteenth Amendment. There is in the act no provision making it applicable to domestic merchant ships when outside the waters of the United States, nor any provision making it inapplicable to merchant ships, either domestic or foreign, when within those waters, save in the Panama Canal. There is a special provision dealing

[3] Section 3, Act November 23, 1921, c. 134, 42 Stat. 222.

with the Canal Zone [4] which excepts "liquor in transit through the Panama Canal or on the Panama Railroad." The exception does not discriminate between domestic and foreign ships, but applies to all liquor in transit through the canal, whether on domestic or foreign ships. Apart from this exception, the provision relating to the Canal Zone is broad and drastic like the others.

Much has been said at the bar and in the briefs about the Canal Zone exception, and various deductions are sought to be drawn from it respecting the applicability of the act elsewhere. Of course the exception shows that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture to the transportation of liquor while "in transit through the Panama Canal or on the Panama Railroad." Beyond this it has no bearing here, save as it serves to show that where in other provisions no exception is made in respect of merchant ships, either domestic or foreign, within the waters of the United States, none is intended.

Examining the act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States,

[4] The pertinent portion of § 20 of Title III, relating to the Canal Zone, is as follows:

"Sec. 20. That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: *Provided,* That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. *Lord* v. *Steamship Co.*, 102 U. S. 541; *The Abby Dodge*, 223 U. S. 166, 176. But we do mean that the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limits its field of operation, like that of the Amendment, to the territorial limits of the United States.

The plaintiffs invite attention to data showing the antiquity of the practice of carrying intoxicating liquors for beverage purposes as part of a ship's sea stores, the wide extent of the practice and its recognition in a congressional enactment, and argue therefrom that neither the Amendment nor the act can have been intended to disturb that practice. But in this they fail to recognize that the avowed and obvious purpose of both the Amendment and the act was to put an end to prior practices respecting such liquors, even though the practices had the sanction of antiquity, generality and statutory recognition. Like data could be produced and like arguments advanced by many whose business, recognized as lawful theretofore, was shut down or curtailed by the change in national policy. In principle the plaintiffs' situation is not different from that of the innkeeper whose accustomed privilege of selling liquor to his guests is taken away, or that of the dining-car proprietor who is prevented from serving liquor to those who use the cars which he operates to and fro across our northern and southern boundaries.

It should be added that after the adoption of the Amendment and the enactment of the National Prohibition Act Congress distinctly withdrew the prior statutory recognition of liquors as legitimate sea stores. The recognition was embodied in § 2775 of the Revised Statutes, which was among the provisions dealing with customs administration, and when, by the Act of September 21, 1922, those provisions were revised, that section was expressly repealed along with other provisions recognizing liquors as legitimate cargo. C. 356, Title IV and § 642, 42 Stat. 858, 948, 989. Of course, as was observed by the District Court, the prior recognition, although representing the national policy at the time, was not in the nature of a promise for the future.

It therefore is of no importance that the liquors in the plaintiffs' ships are carried only as sea stores. Being sea stores does not make them liquors any the less; nor does it change the incidents of their use as beverages. But it is of importance that they are carried through the territorial waters of the United States and brought into its ports and harbors. This is prohibited transportation and importation in the sense of the Amendment and the act. The recent cases of *Grogan* v. *Walker & Sons* and *Anchor Line* v. *Aldridge*, 259 U. S. 80, are practically conclusive on the point. The question in one was whether carrying liquor intended as a beverage through the United States from Canada to Mexico was prohibited transportation under the Amendment and the act, the liquor being carried in bond by rail, and that in the other was whether the transshipment of such liquor from one British ship to another in the harbor of New York was similarly prohibited, the liquor being in transit from Scotland to Bermuda. The cases were considered together and an affirmative answer was given in each, the Court saying in the opinion, p. 89:

"The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and

obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, § 20, 41 Stat. 322."

Our conclusion is that in the first ten cases—those involving foreign ships—the decrees of dismissal were right and should be affirmed, and in the remaining two—those involving domestic ships—the decrees of dismissal were erroneous and should be reversed with directions to enter decrees refusing any relief as respects the operations of the ships within the territorial waters of the United States and awarding the relief sought as respects operations outside those waters.

Decrees in Nos. 659, 660, 661, 662, 666, 667, 668, 669, 670 and 678, *Affirmed.*

Decrees in Nos. 693 and 694, *Reversed.*

MR. JUSTICE MCREYNOLDS, dissents.

MR. JUSTICE SUTHERLAND, dissenting.

I agree with the judgment of the Court in so far as it affects domestic ships, but I am unable to accept the view that the Eighteenth Amendment applies to foreign ships coming into our ports under the circumstances here disclosed.

It would serve no useful purpose to give my reasons at any length for this conclusion. I therefore state them very generally and briefly.

The general rule of international law is that a foreign ship is so far identified with the country to which it belongs that its internal affairs, whose effect is confined to the ship, ordinarily are not subjected to interference at the hands of another State in whose ports it is temporarily present, 2 Moore, Int. Law Dig., p. 292; *United States* v. *Rodgers,* 150 U. S. 249, 260; *Wildenhus's Case,* 120 U. S. 1, 12; and, as said by Chief Justice Marshall, in *Murray* v. *Schooner Charming Betsy,* 2 Cranch, 64, 118: " . . . an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."

That the Government has full power under the Volstead Act to prevent the landing or transshipment from foreign vessels of intoxicating liquors or their use in our ports is not doubted, and, therefore, it may provide for such assurances and safeguards as it may deem necessary to those ends. Nor do I doubt the power of Congress to do all that the Court now holds has been done by that act, but such power exists not under the Eighteenth Amendment, to whose provisions the act is confined, but by virtue of other provisions of the Constitution, which Congress here has not attempted to exercise. With great deference to the contrary conclusion of the Court, due regard for the principles of international comity, which exist be-

tween friendly nations, in my opinion, forbids the construction of the Eighteenth Amendment and of the act which the present decision advances. Moreover, the Eighteenth Amendment, it must not be forgotten, confers concurrent power of enforcement upon the several States, and it follows that if the General Government possesses the power here claimed for it under that Amendment, the several States within their respective boundaries, possess the same power. It does not seem possible to me that Congress, in submitting the Amendment or the several States in adopting it, could have intended to vest in the various seaboard States a power so intimately connected with our foreign relations and whose exercise might result in international confusion and embarrassment.

In adopting the Eighteenth Amendment and in enacting the Volstead Act the question of their application to foreign vessels in the circumstances now presented does not appear to have been in mind. If, upon consideration, Congress shall conclude that when such vessels, in good faith carrying liquor among their sea stores, come temporarily into our ports their officers should, *ipso facto,* become liable to drastic punishment and the ships themselves subject to forfeiture, it will be a simple matter for that body to say so in plain terms. But interference with the purely internal affairs of a foreign ship is of so delicate a nature, so full of possibilities of international misunderstandings and so likely to invite retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress to that effect, and this I am unable to find in the legislation here under review.

CULLINAN *v.* WALKER, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF TEXAS.

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

No. 301. Argued March 9, 1923.—Decided April 30, 1923.

1. The gain accruing to a shareholder through enhancement of the value of his shares, and which, when segregated, becomes legally income subject to the income tax, may be segregated by a dividend made on liquidation of the corporation as well as by an ordinary dividend. P. 137.
2. Partly to comply with its state law and partly to procure additional credit for the business, an oil corporation was dissolved; its trustees in liquidation formed a producing corporation and a pipe line corporation, in the same State, transferred one-half of the assets to each, receiving from each in return its stock and its bonds, transferred all this stock to a holding corporation, which they formed in another State, receiving in exchange its stock, and distributed this stock, with the bonds of the other two existing corporations, among the persons who had been the stockholders of the dissolved concern. The three new corporations had at the time of the distribution no assets other than those so received from the trustees and the value of the assets was the same as when the trustees held them. *Held*, that the securities thus distributed were not in legal effect a stock dividend, and that a distributee was taxable under the income tax provision of September 8, 1916, c. 463, Tit. I, §§ 1 and 2, 39 Stat. 756, upon the amount by which the securities he received exceeded in value his investment in the shares of the original corporation. P. 136. *United States* v. *Phellis*, 257 U. S. 156.

Affirmed.

ERROR to a judgment of the District Court in an action against an internal revenue collector to recover back a tax, paid under protest.

Mr. John Walsh, with whom *Mr. William Wright Moore* and *Mr. Beeman Strong* were on the brief, for plaintiff in error.

Mr. Solicitor General Beck, with whom *Mr. Nelson T. Hartson* and *Mr. P. C. Alexander* were on the brief, for defendant in error.

Mr. James Byrne, by leave of court, filed a brief as *amicus curiae.*

Mr. Arthur A. Ballantine, by leave of court, filed a brief as *amicus curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

A tax of $156.212.66 was laid upon Cullinan, under the Act of September 8, 1916, c. 463, Title I, §§ 1 and 2, 39 Stat. 756, 757, for additional gain or income of that year, assessed at $1,571,760. He paid the tax, under protest; and brought, in the federal court for southern Texas, this action against the local collector of internal revenue to recover the amount. The question was whether certain securities received by Cullinan in that year should be deemed gain or income. The case was tried by the court without a jury, upon agreed facts; and judgment was entered for defendant. Cullinan contends that securities issued to him, which the collector treated as gain or income, were, in legal effect, like a stock dividend; and that, under *Eisner* v. *Macomber,* 252 U. S. 189, he was not taxable thereon. The Government insists that the securities so distributed were gains or income within the rule laid down in *United States* v. *Phellis,* 257 U. S. 156, and *Rockefeller* v. *United States,* 257 U. S. 176. This issue, presented on the facts hereinafter stated, is the only matter for decision. The case is here on writ of error under § 238 of the Judicial Code, because of the constitutional question involved. *Towne* v. *Eisner,* 245 U. S. 418.

Farmers Petroleum Company was, in 1915, a Texas corporation, with a capital stock of $100,000. Cullinan

owned 26.64 per cent. of its stock, for which he had paid (in that, and the preceding year) $26,640 in cash. Later in 1915, the company was dissolved under the Texas law; and Cullinan became one of the trustees in liquidation. In 1916 the trustees organized two Texas corporations: Republic Production Company, a producing concern, and American Petroleum Company, a pipe line concern. To these corporations the trustees transferred the assets held by them; one-half in value to each. From each they received $1,500,000 par value of its stock and $1,500,000 par value of its bonds; being the total issues. The trustees also organized under the laws of Delaware a third company: American Republics Corporation, a holding company. To this company the trustees transferred all the $1,500,000 stock of each of the new Texas corporations; from it they received $3,000,000 of its stock. They thus held in 1916 the $3,000,000 stock of the Delaware corporation and the $1,500,000 bonds of each of the new Texas corporations. All these securities the trustees then distributed *pro rata* among the persons who had been stockholders in Farmers Petroleum Company.

Farmers Petroleum Company had been dissolved solely for the purpose of effecting a reorganization. The reorganization was undertaken, partly, in order to separate the pipe lines from the producing properties, which counsel advised was necessary; and, partly, in order to procure credit required for the developing business. The two new Texas corporations had at the time of the distribution of the stock of the Delaware corporation no assets other than those received from the trustees in liquidation. These assets were at the time of distribution of the same value as they were when held by the trustees in liquidation. Cullinan received 26.64 per cent. of each class of security. The stock and bonds distributed were then all worth par. The aggregate value of the securities received by him was $1,598,400. The amount which he

had invested in Farmers Petroleum Company was $26,640. On the difference, $1,571,760, the internal revenue collector assessed the tax here in question.

Cullinan insists that his gain so ascertained was merely an incident of a reorganization. This was equally true in the *Phellis* and the *Rockefeller Cases*. It is sought to differentiate those cases on the ground, that there the distributed stock of the new corporation was technically a dividend paid out of surplus; and that here the segregation is not of that character. But the gain, which when segregated becomes legally income subject to the tax, may be segregated by a dividend in liquidation, as well as by the ordinary dividend. If the trustees in liquidation had sold all the assets for $6,000,000 in cash, and had distributed all of that, no one would question that the late stockholders of Farmers Petroleum Company would, in the aggregate, have received a gain of $5,900,000, taxable as income. The result would obviously have been the same, if the trustees had taken in payment, and distributed, bonds of the value of $6,000,000, in some new corporations. And the result must, also, be the same where that taken in payment is $3,000,000 of such bonds and $3,000,000 in stock of a third corporation. All the material elements which differentiate the *Phellis* and *Rockefeller Cases* from *Eisner* v. *Macomber* are present also here. The corporation, whose stock the trustees distributed, was a holding company. In this respect, it differed from Farmers Petroleum Company, which was a producing and pipe line company. It differed from the latter, also, because it was organized under the laws of another State. It is true that, at the time this Delaware corporation's stock was distributed, it held the stock of the new oil producing company and likewise the stock of the new pipe line company. But the Delaware corporation was a holding company. It was free, at any time, to sell the whole, or any

part, of the stock in either of the new Texas companies and to invest the proceeds otherwise. By such a sale, and change of investments, all interest of the holding company in the original enterprise might be parted with, without, in any way, affecting the rights of its own stockholders. When the trustees in liquidation distributed the securities in the three new corporations, Cullinan, in a legal sense, realized his gain; and became taxable on it as income for the year 1916.

Affirmed.

YUMA COUNTY WATER USERS' ASSOCIATION ET AL. *v.* SCHLECHT ET AL.

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

No. 268. Argued February 28, 1923.—Decided April 30, 1923.

1. Preliminary, tentative opinions of the cost of constructing projected irrigation works, expressed by government engineers and officials in official correspondence and in statements at a meeting of prospective water-users, do not constitute the estimate of cost, or the public notice, required by § 4 of the Reclamation Act, and, though relied upon by the water-users in subjecting their lands to the project, do not bind or estop the Government from afterwards fixing the construction charges against the lands pursuant to the statute, in accordance with a higher estimate arrived at in the light of further investigation and experience. P. 143.
2. The Reclamation Act, § 4, contemplates a precise and formal public notice, stating the lands irrigable under a project, the limit of area for each entry, the charges per acre, the number of annual instalments, and the time when payments shall commence. P. 144.
3. The determination by the Secretary of the Interior of the practicability of a project and the making of the construction contracts are conditions precedent to the estimate of cost and the public notice, under § 4 of the act. P. 145.
4. The time within which the notice shall be given, after the occurrence of these conditions, is left to the sound discretion of the Secretary; and he may delay the notice while the question of cost remains in doubt. P. 145.

5. A contract between the Government and a water-users' association provided for payment of the first instalment of charges at the time of completion of proposed works, and reserved the right of the Secretary of the Interior to make such changes of the plans "as further investigations and circumstances" might "dictate to be requisite for the public welfare". *Held,* that the works were not to be deemed incomplete either (a) because a small part of the drainage system was unfinished, the effectiveness of the system not being thereby detracted from, or (b) because two of three tracts which the Government undertook to reclaim were eliminated by the Secretary, in the exercise of his discretion, greater areas having been substituted which more than counterbalanced any injury that otherwise might have resulted to complaining water-users in the matter of increased assessments. P. 146.
6. Concurrent findings of fact of the District Court and the Circuit Court of Appeals, sustaining a determination of the Secretary of the Interior that reclamation works had been completed when public notice was given under § 4 of the Reclamation Act, must be accepted by this Court, in absence of clear error. P. 146.

275 Fed. 885, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court, which dismissed, upon the merits, a suit to restrain officials of the Reclamation Service from taking steps toward the enforcement of charges for construction cost, under the Reclamation Act.

Mr. Thomas D. Molloy for appellants.

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

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Yuma County Water Users' Association is a corporation organized primarily to represent the settlers on the Yuma Irrigation Project in Arizona in their dealings with the Government. The other appellants are shareholders and owners of tracts of land under the project.

On April 8, 1904, the Secretary of the Interior received the report of a board of consulting engineers, made at his request, giving alternative estimates of the cost of the project, and recommending that $3,000,000 be set aside for construction. This report was followed by a letter from the Director of the Geological Survey, joining in the recommendation and, among other things, saying:

"In general the reports indicate that by means of construction of a dam across Colorado River and other works, it will be possible to reclaim upwards of 85,000 acres of land at a cost of less than $40 per acre. . . .

"The land is extremely fertile in character, the climate is somewhat tropical, and the products have such value per acre that it is believed that the cost of $40 per acre is not prohibitive.

"There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending."

The Secretary, on May 10, 1904, replied approving the recommendation. Correspondence ensued between the Water Users' Association and the officials of the Reclamation Service, and on May 28, 1904, a meeting between them was had. It does not seem necessary to give the details of this correspondence or of the meeting. It suffices to say that, throughout, the officials declared that in their opinion the project would cost at the rate of about $35 per acre, and the water users joined in the enterprise under that belief. True, it was stated that this sum might be increased or lessened as the work progressed and the opinion was otherwise qualified; but it was evidently thought that the cost would not depart

from the figures given to any great extent one way or the other. Thereupon the land owners subscribed for shares in the association, binding themselves to pay the cost of the project in proportion to their interests and pledging their lands as security to that end.

On May 31, 1906, the association, acting for its shareholders, entered into an agreement with the Government by which it was stipulated: that the Secretary should determine the number of acres capable of irrigation under the project; that payments should be divided into not less than ten equal annual installments, the first payable at the time of the completion of the works, or within a reasonable time thereafter and after due notice from the Secretary; and that the cost per acre should be equal throughout the district. And the association agrees "that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the cost of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders. . . ." The contract is silent as to the amount of the cost and nowhere suggests that it had already been fixed.

It does not appear that a definite plan of construction was determined upon until after the meeting in 1904; the report of the engineers contains no estimate in respect of the works as they were finally constructed; and no construction contract was made until June, 1905. In the process of construction, great and unexpected difficulties were encountered. The contractors finding themselves unable to proceed, abandoned their contract and the Government was forced to take upon itself the burden of completing the work. The ultimate cost was more than double what had been anticipated. The project was finally completed, as found by both lower courts, on April 6, 1917, and on that date public notice was given

by the Secretary, imposing upon the water users a construction charge of $75 per acre. This notice complies with the provisions of § 4 of the Reclamation Act, 32 Stat. 388, 389, c. 1093, printed in the margin.[1]

Appellants (plaintiffs) brought suit in the United States District Court for the District of Arizona to enjoin the defendants, who were officials of the Reclamation Service, from putting into operation the determination of the Secretary so as to exact a greater sum than $35.28 per acre. The court, after a trial, found in favor of the Government and dismissed the bill and its action was affirmed by the Court of Appeals (275 Fed. 885), from whose decree the case comes here by appeal.

The pleadings are voluminous, much testimony was taken at the trial and a large number of errors have been assigned. After eliminating from consideration those matters which are clearly immaterial or without merit, two questions remain. They are:

[1] "Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon."

(1) Whether the report, correspondence and statements made in 1904 constituted an estimate of the cost of the project and a public notice, under the terms of § 4; and, if not, whether the notice of 1917 may be so regarded?

(2) Whether the project was completed on April 6, 1917, within the meaning of the contract of 1906?

First. It is contended by appellants that the report of the engineers, the correspondence among the officials and with the Water Users' Association and the statements made at the meeting in 1904, taken together, constitute an estimate of cost binding on the Government, and, though informal, a compliance with § 4 as to public notice. That it was the firm belief of the government officials that the cost of the project would not greatly, if at all, exceed $35 an acre, and that their opinion to that effect was given to the Water Users' Association, by the documents and statements referred to, does not admit of doubt. It seems clear that the water users relied upon these expressions of opinion, and it may be assumed that if they had known in the beginning that the cost was to be as much as $75 per acre they would not have gone forward with the enterprise. But however confidently these opinions were expressed and however much they may have influenced the water users, the attendant circumstances, the language employed and the statutory requirements all preclude the idea that they constituted an estimate of the cost as contemplated by the statute. No element of fraud or bad faith is shown or suggested. The Reclamation Act sets aside all money received from the sale and disposal of public lands in certain States and Territories named for the reclamation of the arid lands therein; and this fund is to be kept intact as nearly as possible by collecting from the water users under each project the estimated cost of the construction thereof. See *Swigart* v. *Baker*, 229 U. S. 187, 197. The extent to which the fund will be preserved, obviously, will depend

upon the accuracy of the estimate, and this in turn, will depend upon the care exercised in securing information upon which to base it. Investigation as to the feasibility of any project, opinions of experts and collection of data relating to the question of cost must precede such an estimate, and § 4, moreover, requires that the charges against water users shall not be assessed until after construction contracts shall have been made, the evident purpose being to put the Secretary in possession of the data furnished by the contracts themselves before he acts in that respect. Prior to the making of the construction contracts, opinions expressed by engineers or officials may be estimates in one sense, but they are tentative and preliminary and cannot be regarded as constituting the required statutory estimate, though contributing to the basic facts upon which it is made. See *Payette-Boise Water Users' Ass'n.* v. *Cole,* 263 Fed. 734, 738–739. The statute contemplates a precise and formal public notice which must state the lands irrigable under the project, the limit of area for each entry, the charges to be made per acre, the number of annual installments and the time when the payments shall commence. The opinions, correspondence and statements relied upon do not fulfill the statutory requirements and we must hold that the Government is neither bound nor estopped by them. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291; *Whiteside* v. *United States,* 93 U. S. 247, 256–257; *The Floyd Acceptances,* 7 Wall. 666, 676; *Filor* v. *United States,* 9 Wall. 45, 49; *Hart* v. *United States,* 95 U. S. 316; *Lee* v. *Munro,* 7 Cranch, 366. Moreover, the contract of 1906, made subsequently, expressly provides for payment on the part of the water users "for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders." Plainly this looked forward to

future action on his part and did not rest upon any action already taken.

Following the provisions requiring the Secretary to determine the practicability of the project and to make construction contracts the words are " and thereupon he shall give public notice," etc. The word " thereupon " is construed by appellants as an adverb of time, meaning immediately thereafter. But this is only one of its uses. It is employed more frequently to express the relation of cause or of condition precedent. It is in the latter sense that it is used here, and its meaning is that the determination as to the practicability of the project and the making of contracts are precedent conditions to the estimate of cost and public notice. See *Porphyry Paving Co.* v. *Ancker*, 104 Cal. 340, 342. The notice must follow the coming into existence of the conditions. The time thereafter within which it shall be given is left, and from the nature of the matter must be left, to the discretion of the Secretary, and whether that discretion has been unreasonably exercised will depend upon the circumstances of each case. Here it is made plain that performance of the construction contract became impossible and the same was abandoned. Acting upon its judgment, which so far as the record shows was not unreasonable, the Government then itself undertook the completion of the work. Physical conditions not originally foreseen were encountered, presenting difficulties and requiring increased expenditures of great magnitude. It does not appear that these expenditures were made unnecessarily or improvidently; nor is there anything in the record to indicate that the work was not done with reasonable expedition. The uncertainties arising from the newly discovered conditions, the abandonment of the construction work by the contractors, the changes which were necessitated in the original plans, and the unexpected turn of events in other respects, left the question of cost in such doubt as to justify withholding

the public notice until it could rest on more definite information. The delay, it is true, was long continued but, under all the circumstances, we cannot say as a matter of law, that it was undue or that the Secretary's discretion in respect of the time was unreasonably exercised.

Second. The contract of May 31, 1906, provides that the first installment shall be payable at the time of the completion of the proposed works, and appellants contend that in two respects they were not completed on April 6, 1917, when the public notice was given: (1) that complete drainage for one of the tracts was not provided, and (2) that only one of three tracts which the Government promised to reclaim was reclaimed.

As to the first point, it is sufficient to say that the testimony shows that the contemplated drainage was substantially completed, and fails to show that the small portion left undone detracted in any way from the effectiveness of the system.

As to the second point, the original plans disclose that it was the intention to reclaim the three tracts mentioned, but the Secretary reserved the right to make such changes "as further investigations and circumstances may dictate to be requisite for the public welfare." The elimination, therefore, of the two tracts was within his discretion. Moreover, while these tracts were not reclaimed, other lands of greater area were added to the project which much more than counterbalanced any injury to the water users here concerned that might otherwise have resulted from the omission. The Secretary determined that the project had been completed when the public notice was given and both lower courts concurred in the same finding. These findings will be accepted here in the absence of clear error, which the record before us does not show. *Bodkin* v. *Edwards,* 255 U. S. 221; *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77.

The decree of the Court of Appeals is

Affirmed.

DIER ET AL., INDIVIDUALLY AND AS COPARTNERS UNDER THE FIRM NAME OF E. D. DIER & COMPANY, ET AL., *v.* BANTON, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL.

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

No. 330. Argued April 17, 1923.—Decided May 7, 1923.

1. One who has been adjudged an involuntary bankrupt and has complied with an order requiring him to turn over his books and papers to a receiver is not privileged by the Fourth and Fifth Amendments to prevent their production by the receiver before a grand jury in a state court upon the ground that he might thus be incriminated. P. 149.
2. Books and papers in the possession of a receiver in bankruptcy appointed by a federal court cannot be taken by a subpœna issuing from a state court, unless the federal court, exercising its discretion with due regard for comity, shall consent. P. 151.

279 Fed. 274, affirmed.

APPEAL from an order of the District Court discharging a rule *nisi* and refusing to enjoin the production of books and papers, in the custody of its receiver in bankruptcy, before a grand jury in a state court.

Mr. Nash Rockwood for appellants.

It will be noted that the petition in bankruptcy was an involuntary proceeding instituted by creditors, and that when the receiver, upon appointment, took possession of the books, records and documents of the alleged bankrupts, he did so wholly under the specific order of the court. This was not such a delivery of the books by the bankrupts as constituted a waiver of their constitutional rights. If they had interfered with the receiver in obtaining possession of the books, it would have been a contempt of court. The order of the court, which was wholly *ex parte,* did not in any way protect or seek to

protect the constitutional privileges of the alleged bankrupts. In this respect the order differed materially from the order of the District Court in *Matter of Harris,* 221 U. S. 274.

A trustee under the Bankruptcy Act has title, whereas a receiver is only an arm of the court, to hold possession without title, and his possession is the possession of the bankrupts. *In re Hess,* 134 Fed. 109. See *Counselman* v. *Hitchcock,* 142 U. S. 547; *Brown* v. *Walker,* 161 U. S. 591; *Ensign* v. *Pennsylvania,* 227 U. S. 592.

The bankrupts' objection to the use of the books in the criminal prosecution by the District Attorney of New York County was made in due time.

Let us assume that the petition in bankruptcy had been dismissed, then the bankrupts would again have been entitled to possession of their books. Could it be held that, because the books had temporarily passed into the legal possession of the receiver, their constitutional rights with reference to criminal proceedings had been waived? *Johnson* v. *United States,* 228 U. S. 457; *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383; *Flagg* v. *United States,* 233 Fed. 481; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Amos* v. *United States,* 255 U. S. 313.

The order is appealable to this Court.

Mr. Joab H. Banton and *Mr. John Caldwell Myers* appeared for Banton, District Attorney, appellee.

Mr. Saul S. Myers, Mr. Walter H. Pollak and *Mr. William J. Hughes* appeared for Ehrich, Trustee in Bankruptcy, appellee.

Mr. Chief Justice Taft delivered the opinion of the Court.

This appeal is from an order of the District Court for the Southern District of New York discharging a rule *nisi* and

refusing an injunction. On January 14, 1922, a petition in involuntary bankruptcy was filed against Elmore D. Dier and others, partners, as E. D. Dier & Company. Two days after the filing of the petition, Manfred W. Ehrich was appointed Receiver of the estate of the alleged bankrupts, and they and their servants were directed to turn over all their property, assets, account books and records and were restrained from suing out of any other court any process to impound or take possession of them. This order was complied with and the Receiver took possession of the books and papers of the alleged bankrupts and of the firm. On February 16th, Dier informed the court that the District Attorney of New York County had applied to the Receiver for the production of these books and papers before the Grand Jury, and asked for the rule *nisi* against the Receiver and the District Attorney, and upon a hearing thereof an injunction to prevent the use of such books and papers against him before the Grand Jury, on the ground that they would incriminate him and that his right to refuse to testify against himself under the Fourth and Fifth Amendments would thus be violated by the process of the Federal District Court. Judge Learned Hand, sitting in bankruptcy, discharged the rule and refused to enjoin the proposed use of the books. Judge Hand's action was based on the ruling of this Court in *Johnson* v. *United States,* 228 U. S. 457. He quoted the language used in the *Johnson Case,* "A party is privileged from producing the evidence but not from its production." He alluded to the circumstance that in the *Johnson Case* there were both title and possession in the Trustee, whereas in this case, the books and papers were in the hands of the Receiver who has no title but that, he said, made no difference. We agree with this view and hold that the right of the alleged bankrupt to protest against the use of his books and papers relating to his business as evidence against him ceases as soon as his pos-

session and control over them pass from him by the order directing their delivery into the hands of the Receiver and into the custody of the court. This change of possession and control is for the purpose of properly carrying on the investigation into the affairs of the alleged bankrupt and the preservation of his assets pending such investigation, the adjudication of bankruptcy *vel non*, and if bankruptcy is adjudged, the proper distribution of the estate. It may be that the allegation of bankruptcy will not be sustained, and in that case, the alleged bankrupt will be entitled to a return of his property including his books and papers; and when they are returned, he may refuse to produce them and stand on his constitutional rights. But while they are, in the due course of the bankruptcy proceedings, taken out of his possession and control, his immunity from producing them, secured him under the Fourth and Fifth Amendments, does not enure to his protection. He has lost any right to object to their use as evidence because, not for purpose of evidence, but in the due investigation of his alleged bankruptcy and the preservation of his estate pending such investigation, the control and possession of his books and papers relating to his business were lawfully taken from him.

It is pressed upon us that the bankrupt may prevent the use of such books and papers taken over by a receiver in the bankruptcy proceedings for evidence in a criminal case in the state court by resisting surrender and protesting against their use for such a purpose at the time the Receiver took possession. But we think the alleged bankrupt has no such right. We so held in *Ex parte Fuller, ante*, 91, in which it was sought to attach conditions of this kind to the turning over of the books and papers of a bankrupt to the Trustee in Bankruptcy. We are of opinion that the same principle must apply to the delivery of the books and papers relating to the bankrupt's business and property included in the estate into the custody of the Receiver of the Bankruptcy Court.

Of course, where such books and papers are in the custody of the Bankruptcy Court, they can not be taken therefrom by subpœna of a state court except upon consent of the federal court. In granting or withholding that consent the latter exercises a judicial discretion dependent on the circumstances, and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory. *Ponzi* v. *Fessenden*, 258 U. S. 254, 259. All we hold here is that the court below having exercised discretion to allow the use of the books and papers in the custody of its officer upon subpœna by another court, the alleged bankrupt's rights under the Fourth and Fifth Amendments have not been violated.

Order affirmed.

ESSGEE COMPANY OF CHINA ET AL. *v.* UNITED STATES.

HANCLAIRE TRADING CORPORATION ET AL. *v.* UNITED STATES.

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

Nos. 706 and 707. Submitted April 25, 1923.—Decided May 7, 1923.

1. Review of orders of the District Court in special proceedings in which no jury can intervene is by appeal, and not by writ of error. P. 152.
2. In view of provisions of the Act of September 6, 1916, rendering mistakes in proceeding by writ of error instead of appeal, or *vice versa*, immaterial from the standpoint of jurisdiction, the practice of adopting both methods through abundant caution is discouraged. *Id.*
3. A corporation is not protected by the Fourth and Fifth Amendments from producing its books and records before a federal grand jury engaged in investigating its conduct in relation to the federal criminal laws. P. 155.

4. The lawful effect of a subpœna *duces tecum* addressed to a corporation is not disturbed by failure to put its officers who produce the papers on the stand. P. 157.
5. A claim of irregularity in not calling such officers before the grand jury, *held*, to have been waived by their conduct. *Id.*
6. An officer of a corporation having custody of its books and papers can not object to producing them upon the ground that they may disclose his own guilt. P. 158.

Affirmed.

REVIEW of orders of the District Court denying petitions for the return of books and papers produced under a subpœna *duces tecum*.

Mr. W. M. K. Olcott and *Mr. A. A. Silberberg* for plaintiffs in error and appellants.

Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim, Mr. Clifford H. Byrnes, Special Assistant to the Attorney General, and *Mr. Francis A. McGurk* for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These are appeals and writs of error to review the action of the District Court in denying petitions of the two companies, the Essgee Company of China and the Hanclaire Trading Corporation, praying that the books and papers produced by an officer of the two companies, in response to a *duces tecum* issued to them by order of the Federal Grand Jury, be returned to the petitioners, on the ground that the process issued and the detention of the books by the Government were and are in violation of their rights under the Fourth and Fifth Amendments to the Federal Constitution.

Both appeals and writs of error were allowed in these cases. This was unnecessary. The review sought is of an order of the District Court in a special proceeding in

which no jury can intervene. It likens itself in its appellate character to a review of cases in equity or in admiralty or of an order upon a writ of *habeas corpus* in which issues of facts are triable to the court, and in which the review may properly involve a reëxamination by the reviewing court of the whole record and of the findings of the court upon both the law and the evidence therein. Since the passage of the Act of September 6, 1916, entitled "An Act To amend the Judicial Code" (39 Stat. 726, c. 448, § 4), which provides that no court having power to review a judgment or decree passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal because a writ should have been sued out, but that when such mistake or error occurs, it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed, the distinction is not important from the standpoint of the jurisdiction of this Court. In the interest, however, of orderly procedure, economy in time of both courts, and in the making up and printing of the record, counsel should make every effort to select the proper procedure in review and not duplicate methods out of an abundant caution which the Act of 1916 makes unnecessary.

The Hanclaire Trading Corporation and the Essgee Company of China were organized under the laws of New York and were doing an importing business in New York City. Schratter was an officer in both companies and Kramer was an officer of one and attorney for both. The Federal Grand Jury in the Southern District of New York was investigating charges of frauds in importations by these two companies whose interests and transactions were intermingled. On October 14, 1921, a subpœna *duces tecum* was served upon each of the corporations by personal service upon Schratter as a chief officer thereof. Schratter then directed Kramer to gather together the

books and papers called for and produce them at the Federal Court House. The subpœna was served by the U. S. Marshal for the District. He was accompanied by three other Government officials, who, it was charged, without authority examined and took away to the Court House other books and papers not included in the list set forth in the *duces tecum*. This incident was made an issue in the affidavits; but it is evident from reading the record and the admission of counsel that we are not concerned with any such records and papers, but only with those which were produced by Kramer for the two companies in response to the *duces tecum*. Schratter in his affidavit and petition claims that under the subpœna some papers belonging to him individually were taken, but an examination of the list of records and papers produced, shows that the only personal paper produced by Kramer was the personal tax return of Schratter, which he does not assert was in any way relevant to the charges, or in any degree incriminating as to him. Kramer and Schratter brought the records and papers called for by the subpœna to a room in the Court House and deposited them on a table where the District Attorney found them and took charge of them. Neither Schratter nor Kramer was then called before the Grand Jury, but they were both at once arrested upon warrants for violation of the importing laws. They testified that they did not see the District Attorney when he took the records and papers and that Kramer demanded a return of them and protested against their detention. Evidence to the contrary is offered by the Government witnesses, but we do not regard the issue as material.

The next day, October 15, 1921, Schratter appeared before Judge Knox and applied for permission to go abroad in order to attend to business of vital personal importance. Schratter remained abroad until June, 1922, and on the 9th of that month appeared to plead to an indictment

which had in the meantime been found against the two corporations and himself. Meantime, Kramer, after much solicitation on his part, was given an opportunity to testify to the Grand Jury and to present to them other records and papers which he voluntarily produced. He was not indicted. After Schratter's return and Kramer's escape from indictment, the two corporations and Schratter filed the petition, denial of which by the District Court is now before us for review.

The books and papers brought before the Grand Jury and the court in this case were the books, records and papers of corporations of the State of New York. Such corporations do not enjoy the same immunity that individuals have, under the Fourth and Fifth Amendments, from being compelled by due and lawful process to produce them for examination by the state or Federal Government. Referring to the books and papers of a corporation, Mr. Justice Hughes speaking for this Court in *Wilson* v. *United States,* 221 U. S. 361, 382, said:

"They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its charter privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise; it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the

authority of the National Government where the corporate activities are in the domain subject to the powers of Congress." *Hale* v. *Henkel,* 201 U. S. 43, and *Wheeler* v. *United States,* 226 U. S. 478, are to the same point.

Counsel for appellants rely upon *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, but it has no application to the case before us. The *Silverthorne Case* was a writ of error to reverse a judgment for contempt against a corporation for refusal to obey an order of the court to produce books and documents of the company to be used to show violation of law by the officers of the company. This Court found that without a shadow of authority and under color of an invalid writ, the marshal and other government officers had made a clean sweep of all the books, papers and documents in the office of the company while its officers were under arrest. These documents were copied and photographed and then the court ordered their return to the company. A subpœna was then issued to compel the production of the originals. The company refused to obey the subpœna. The court made an order requiring obedience and refusal to obey the order was the contempt alleged. This Court held that the Government could not, while in form repudiating the illegal seizure, maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had. In other words, we held that the search thus made was an unreasonable one against which the corporation was protected by the Fourth Amendment and which vitiated all the subsequent proceedings to compel production. There was nothing inconsistent with the *Wilson Case* in this ruling for, as we have seen in the passage quoted from the opinion in that case, a corporation can only be compelled to produce its records against itself by the demand of the Government expressed in lawful process, confining its requirements within limits which reason imposes in the circumstances of the case. It is to submit its books and

papers only to "duly constituted authority when demand is suitably made." In the case before us the demand was suitably made by duly constituted authority. In the *Silverthorne Case*, it was not. Here it was expressed in lawful process, confining its requirements to certain described documents and papers easily distinguished and clearly described. Their relevancy to the subject of investigation was not denied. As said in the *Wilson Case* (p. 376): "But there is no unreasonable search and seizure, when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced."

Objection is made that neither Kramer nor Schratter was called before the Grand Jury when they produced the books and papers in response to the *duces tecum*. That was not necessary. The subpœna only summoned the corporations to appear and produce the named documents and papers. There was no real *ad testificandum* clause in the subpœna because a corporation could not testify. It was expressly ruled in the *Wilson Case*, that the failure to put officers of the corporation on the stand in such a case did not in any way invalidate or destroy the lawful effect of the *duces tecum*.

Kramer says that he protested against the retention of the documents he had produced at the time because he was not called before the Grand Jury. At his own solicitation he was thereafter called before that body and testified and voluntarily produced other documents and papers, and never renewed his demand for the documents produced under subpœna until after the Grand Jury ignored the charge against him some eight months later. Schratter against the opposition of the District Attorney but with the consent of the court absented himself from the country for eight months and took no steps in respect to the produced documents and papers. Judge Knox

held that such conduct constituted a waiver of any irregularities in not calling these witnesses before the Grand Jury when the documents and papers were produced. If a waiver were needed, as we do not think it was under the *Wilson Case,* this clearly would have been sufficient.

Schratter joined with each corporation in asking a return of the documents and papers of that corporation on the ground that they might incriminate him. But the cases of *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361, and *Wheeler* v. *United States,* 226 U. S. 478, show clearly that an officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity and is not, therefore, protected against their production or against a writ requiring him as agent of the corporation to produce them.

Appellants cite the cases of *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383, and *Gouled* v. *United States,* 255 U. S. 298, to support their contention that the proceedings complained of herein violate their rights under the Fourth and Fifth Amendments. Those cases were all unreasonable searches of documents and records belonging to individuals. The distinction between the cases before us and those cases lies in the more limited application of the Amendments to the compulsory production of corporate documents and papers as shown in the *Henkel, Wilson* and *Wheeler Cases.*

The order of the District Court is affirmed

MAGNUM IMPORT COMPANY, INC., *v.* COTY.

COHN, TRADING AS MACLEN IMPORT COMPANY, *v.* COTY.

BAUM ET AL., TRADING AS BEAUTEX COMPANY, *v.* COTY.

IVORY NOVELTIES TRADING COMPANY, INC., *v.* COTY.

MAGNUM IMPORT COMPANY, INC., *v.* HOUBIGANT, INC.

PETITIONS FOR ORDERS, PENDING APPLICATIONS FOR CERTIORARI, SUSPENDING DECREES OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 978, 979, 980, 982, 981. Argued on return to rule to show cause April 16, 17, 1923.—Decided May 7, 1923.

1. Under Jud. Code, § 262, this Court has power to suspend or modify an interlocutory or final decree of the Circuit Court of Appeals, which is reviewable under § 240 by certiorari, pending the disposition of a petition filed here for the issuance of that writ. P. 162.
2. The jurisdiction to bring up cases from the Circuit Court of Appeals by certiorari was given for the two purposes of securing uniformity of decision in the circuits and of having questions of importance decided by this Court when desirable in the public interest,—not for the purpose of giving the defeated party another hearing. P. 163.
3. An application to suspend a judgment of the Circuit Court of Appeals, pending disposition of a petition for certiorari here, should be first made to that court, which is free to determine it upon its own view of the likelihood of a certiorari being granted and of the balance of convenience. P. 163.
4. If the application be refused by that court, a stay will be granted here, pending the application for certiorari, only upon an extraordinary showing, and, even after certiorari has been granted, only in a clear case and upon a decided balance of convenience. P. 164.

Petitions denied.

APPLICATIONS for orders to suspend interlocutory decrees of the Circuit Court of Appeals pending petitions for certiorari.

Mr. Charles H. Tuttle, with whom *Mr. Isaac Reiss* and *Mr. William J. Hughes* were on the briefs, for petitioners.

Mr. Asher Blum, with whom *Mr. Hugo Mock* was on the briefs, for Coty, respondent.

Mr. George S. Hornblower, with whom *Mr. Lindley M. Garrison* and *Mr. Raoul E. Desvernine* were on the brief, for Houbigant, Inc., respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

All these cases involve the question how far the purchasers of perfumes made by manufacturers whose perfumes have gained a high reputation with the public may use the name and trade-mark of such manufacturers in rebottling or repacking and selling them when, as claimed by the manufacturers and owners of the trade-mark, the process of rebottling and repacking injures the perfumes and impairs the value of the trade-mark and the reputation of the manufacturers. In a case presenting a similar question, to wit, *Prestonettes, Inc.* v. *Coty,* 260 U. S. 720, this Court granted a writ of certiorari, and applications in the above entitled cases are now pending. They are also before us on petitions praying that this Court issue orders suspending the operation of the decrees of the Circuit Court of Appeals and that, pending the applications for certiorari in this Court, we restore the temporary injunctions of the District Court which the Circuit Court of Appeals enlarged.

The District Court found that the defendants in all these cases were infringing the rights of the complainants in their trade-marks and the use of their trade names,

but thought it sufficient to permit the defendants to continue their rebottling and repacking of complainants' perfumes and powders if in the form in which resold, the bottles or boxes bore a legend reciting all the facts and not giving any more prominence to the fact that these were complainants' perfumes or powders than to the fact that they had been rebottled and repacked by defendants. The Circuit Court of Appeals found that such rebottling and repacking as done by defendants so impaired the delicate odors and qualities of the perfumes and powders that it unlawfully injured the right of the complainants in their trade-marks and business, that such rebottling and repacking and resale with the use of the original manufacturer's trade-mark and name were a violation of a criminal statute of the State of New York, that the proposed inspection of defendants' rebottling and repacking with a view to preserving the excellence of the perfumes and powders would entail such expense and burden upon complainants as to be impracticable, and that the only complete and satisfactory remedy to which complainants were entitled was an injunction against the use of the complainants' trade-marks or names upon the rebottled or repacked articles for sale, and the temporary injunctions granted by the District Court were accordingly modified and the case was remanded to the District Court for final hearing. Applications were then made to the Circuit Court of Appeals to stay the mandate and to grant an application upon proper bond to suspend its modification of the District Court's orders until applications for certiorari and motions for a suspending order could be made to this Court. After full consideration, these motions were denied by the Circuit Court of Appeals, its mandate has gone down and the injunctions as enlarged by it are now in force. Meantime these applications for certiorari have been made here, and in ad-

vance of our consideration of them in due course, motions for the suspension of the orders of the Circuit Court of Appeals have been presented to us on affidavits and heard, and are now to be decided.

It is objected for Houbigant, Inc., one of the respondents in these petitions for certiorari, that this Court has no jurisdiction to suspend the operation of the order or decree of the Circuit Court of Appeals pending a petition for certiorari and before it is granted. The cases of *In re Massachusetts,* 197 U. S. 482, *In re Glaser,* 198 U. S. 171, and *McIntire* v. *Wood,* 7 Cranch, 504, are cited to this point. They are wholly without application. The first two were cases pending in inferior courts which, under the Constitution and the statutes of the United States, could never, by any possibility, come within the jurisdiction of this Court. The third case was one of an application to a Circuit Court for the issuing of a mandamus to the register of the land office to compel him to issue a final certificate of purchase of land to the relator. This Court found that, under the statute, the Circuit Court was not given original power to issue a mandamus in such a case when not necessary or ancillary to the exercise of its jurisdiction otherwise conferred.

Under § 262 of the Judicial Code this Court is given power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. Here the jurisdiction of this Court to grant the application for certiorari already made and pending is conferred by § 240 of the Judicial Code. That section provides that in any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final, it shall be competent for this Court by certiorari upon the petition of a party thereto to bring the case here for review as if it had come by error or appeal. By § 128 of the Judicial Code, as amended by the Act of

Jan. 28, 1915, c. 22, § 2, 38 Stat. 803, the judgment or decree of the Circuit Courts of Appeals is made final in trade-mark cases. Hence, if in its discretion, this Court conceives that upon the showing made it should order the suspension or modification of a judgment or decree of the Circuit Court of Appeals, interlocutory or final, to preserve or secure a status of the case for the full and satisfactory exercise of its reviewing power over it, it may make the necessary order of suspension or modification upon such terms as seem equitable upon the filing of the petition for certiorari and pending its disposition. So much on the question of the power.

The question how the Court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the Circuit Court of Appeals, a heavy burden rests on the applicant.

The petition should, in the first instance, be made to the Circuit Court of Appeals which with its complete knowledge of the cases may with full consideration promptly pass on it. That court is in a position to judge first whether the case is one likely under our practice to be taken up by us on certiorari, and second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It involves no dis-

respect to this Court for the Circuit Court of Appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us. If it thinks a question involved should be ruled upon by this Court, it may certify it. If it does not certify, it may still consider that the case is one in which a certiorari may properly issue, and may in its discretion facilitate the application by withholding the mandate or suspending its decree. This is a matter however wholly within its discretion. If it refuses, this Court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and a decided balance of convenience before it will grant such stay. These remarks, of course, apply also to applications for certiorari to review judgments and decrees of the highest courts of States.

Coming now to the circumstances presented on the inquiry before us, we find nothing to justify our granting the motion. It is clear that the Circuit Court of Appeals gave full consideration to a similar motion and with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter. We have read the affidavits and we do not find that the petitioners have, in the light of what we have said, made a case for the suspension of the order. On the contrary, the weight of the evidence is clearly with the respondents.

The petitions are denied.

UNITED STATES *v.* SISCHO.

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

No. 76. Reargued April 23, 1923.—Decided May 7, 1923.

1. The purpose of requiring a ship's manifest is not merely the collection of duties but also to inform the Government whether forbidden things are being imported. P. 167.
2. Rev. Stats. § 2766, providing that "the word 'merchandise,' as used in this Title, may include goods, wares, and chattels of every description capable of being imported," does not mean such only as are capable of being legally imported, or make that restriction upon the term as used in prior statutes. P. 168.
3. The Act of January 17, 1914, which forbids the importation of smoking opium, and provides that wherever there shall be found on an incoming vessel opium, or its preparations or derivatives, not shown upon her manifest as provided by Rev. Stats. §§ 2806 and 2807, the vessel shall be liable to the penalty and forfeiture prescribed by § 2809, intends that smoking opium must be included in the manifest, and shows that, from the date of the act at least, the definition of merchandise in Rev. Stats. § 2766, *supra*, must be taken as including forbidden opium. *Id.*
4. Rev. Stats., § 2809, providing that if any merchandise shall be brought into the United States in any vessel from a foreign port, which is not included or described in the manifest, the master shall be liable to a penalty equal to the value of such merchandise, applies to smoking opium, the importation of which has been forbidden. *Id.*
5. The foreign value of such opium was properly taken for the purpose of measuring the penalty in this case. P. 169.

270 Fed. 958, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court for the appellee in an action by the United States to recover a penalty.[1]

[1] The case was first argued on October 10, 11, 1922, and, on October 16, 1922, the judgment was affirmed with costs by an equally divided court. 260 U. S. 697. On November 13, 1922, a petition for rehearing was granted and the cause restored to the docket for hearing before a full bench. 260 U. S. 701.

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

Mr. John M. Woolsey, with whom *Mr. Cletus Keating* and *Mr. Harry D. Thirkield* were on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the United States to recover a penalty of $6,400 from the defendant for bringing into this country one hundred five-tael tins of opium prepared for smoking purposes without including the same in the ship's manifest. The defendant was master of the vessel in which the opium was imported and was charged by the Collector of Customs with a liability for the above sum, that being the price paid by the defendant for the goods. By Rev. Stats. § 2809, "If any merchandise is brought into the United States in any vessel whatever from any foreign port . . . which shall not be included or described in the manifest . . . the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited." The District Court, sitting without a jury, held that opium prepared for smoking purposes was not merchandise within the meaning of § 2809, and that being outlawed by the statutes it had no value; and gave judgment for the defendant. 262 Fed. 1001. The judgment was affirmed by the Circuit Court of Appeals, one Judge dissenting, on the former ground. 270 Fed. 958. A writ of certiorari was granted by this Court. 256 U. S. 688. It was stated below that the defendant had been convicted of smuggling; but the

record does not disclose the fact, if material, and nothing turns upon it. The points mentioned are the only ones to be discussed.

The collection of duties is not the only purpose of a manifest, as is shown by the requirement of one for outward bound cargoes and from vessels in the coasting trade bound for a port in another collection district, Rev. Stats. §§ 4197, 3116, and more clearly by the plain reason of the thing. A Government wants to know, without being put to a search, what articles are brought into the country, and to make up its own mind not only what duties it will demand but whether it will allow the goods to enter at all. It would seem strange if it should except from the manifest demanded those things about which it has the greatest need to be informed—if in that one case it should take the chance of being able to find what it forbids to come in, without requiring the master to tell what he knows. It would seem doubly strange when at the same time it required any other person who had knowledge that the forbidden article was on the vessel to report the fact to the master. Act of January 17, 1914, c. 9, § 4, 38 Stat. 275, 276. It is not an answer to say that if the master knows that he has contraband goods on board he is subject to a penalty for that and probably will lie. The law naturally, one would think, would put the screws on to make him tell the truth, and in that way diminish the chance of his carrying contraband and help him to show his innocence if he has made a mistake. *Harford* v. *United States*, 8 Cranch, 109. We are of opinion that this policy, which has been expressed in terms in later statutes, (Act of May 26, 1922, c. 202, § 3, 42 Stat. 596, 598; Tariff Act of September 21, 1922, c. 356, §§ 401(c), 431, 584, 42 Stat. 858, 948, 950, 980;) governs also in the statutes to be construed here. There is less contradiction between the requirement of the manifest and the prohibition of the import than there is between such a

prohibition and a tax. *United States* v. *Stafoff*, 260 U. S. 477.

The main foundation of the decision below is Rev. Stats. § 2766: "The word 'merchandise,' as used in this Title [the Title including § 2809 upon which this suit is based,] may include goods, wares, and chattels of every description capable of being imported." It is argued that this is a definition; that "capable of being imported" must be taken to mean capable of being imported lawfully as otherwise the phrase hardly would do more than exclude chattels real, and would want the poignant significance attributed to every word of legislation; and that therefore the merchandise to be included in the manifest does not embrace opium for smoking which the law has done all it can to exclude. Act of January 17, 1914, c. 9, 38 Stat. 275. Yet this very Act of 1914 provides that whenever there shall be found upon a vessel arriving at any port of the United States opium "or any preparations or derivatives thereof" "which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes." We see no adequate reason for not taking these words in their natural sense as including smoking opium and as meaning that it must be included in the manifest, or for limiting them to forfeiture of the vessel. We rather should read them as showing that, at least for the future and at least so far as derivatives from opium are concerned, the language quoted from Rev. Stats. § 2766, was also to be taken in its natural sense as meaning physically capable of being imported.

The language under consideration was an insertion in the Revised Statutes. That volume was primarily a codification of the general statutes then in force and is

not lightly to be read as making a change, although of course it may do so. The words on their face indicate rather an extension than a restriction. "May include" seems to point to the removal of a doubt as to whether previously "merchandise" might include all that is mentioned. It is a most unnatural way of saying that henceforth it shall not include something that otherwise might have been included. To give it the latter meaning we have again to read "capable of being imported" in an artificial sense instead of taking the phrase simply for what it says to a plain mind. The only objection to reading it in the natural way is that it is thought to add nothing to what was contained in "goods, wares, and chattels of every description." But there is no canon against making explicit what is implied and adding a little emphasis to the endeavors to make the proposition broad. The doubts that have been felt show that the endeavor was not very successful, but we believe that it was made. There can be little doubt that before the insertion of § 2766 goods that could not be imported lawfully were merchandise within the meaning of the statutes. It was held in *Harford* v. *United States,* 8 Cranch, 109, that the unlading of such goods without a permit was an offence subjecting them to forfeiture, upon reasoning that applies to the requirement that they should be entered on the manifest, with equal force.

What we have said sufficiently disposes of the suggestion that the requirement was repealed by the opium act that we have cited. That is merely saying in another way that a manifest is not necessary for goods forbidden to enter the country. All that remains is the suggestion that smoking opium has no value. But assuming it to be established that the statutes require the manifest to disclose prohibited articles the penalty imposed implies that such articles may have value and does not require the Courts to set up a technical rule in face of the plain truth.

So the provision that smoking opium shall be forfeited implies that however evil it may be it has an owner. Act of January 17, 1914, c. 9, § 4, 38 Stat. 275. Act of May 26, 1922, c. 202, § 3, 42 Stat. 596, 598. In the circumstances we see no objection to taking the foreign value as evidence, in accordance with the rulings of the Treasury Department. Treas. Dec. No. 32083, December, 1911. 21 T. D. 687.

Judgment reversed.

BIANCHI ET AL. *v.* MORALES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 934. Motion to affirm or advance, and to vacate stay, submitted April 16, 1923.—Decided May 7, 1923.

1. The court may affirm a decree dismissing a suit, without putting the parties to the expense of printing the full record, when the facts stated and admitted in the motion papers make it plain that the suit cannot be maintained. P. 171.
2. The law of Porto Rico providing for summary foreclosure of mortgages without allowing other defenses than payment, but leaving the mortgagor plenary opportunity to assert other objections by separate suit, clearly does not deprive him of property without due process of law. *Id.*

Affirmed.

APPEAL from a decree of the District Court of the United States for Porto Rico, dismissing, for want of jurisdiction, a bill to restrain summary foreclosure proceedings.

Mr. Phelan Beale and *Mr. George W. Study* for appellants.

Mr. Carroll G. Walter for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity filed in the District Court to restrain proceedings under the Mortgage Law of Porto Rico to foreclose a mortgage. That law gives a summary suit in which, speaking broadly, no defence is open except payment, Mortgage Law Regulations, Art. 175, and it is contended that this deprives the plaintiffs, (appellants,) of their property without due process of law. The statutes give a separate action to annul the mortgage in which any defence to it may be set up, and also provide for a cautionary notice, Mortgage Law, Art. 42; Mortgage Law Regulations, Art. 91, which the Supreme Court of Porto Rico regards as a sufficient substitute for an injunction. *American Trading Co.* v. *Monserrat,* 18 P. R. 268. See *Romeu* v. *Todd,* 206 U. S. 358. The bill was dismissed by the District Court for want of jurisdiction. The appellees move that the decree be affirmed.

The facts stated and admitted in the motion papers make it so plain that the bill cannot be maintained that we shall affirm the decree below without putting the parties to the expense of printing the full record. Apart from other matters urged by the appellees the constitutional objection is simply another form of the objection to the separation between possessory and petitory suits familiar to countries that inherit Roman law and not wholly unfamiliar in our own. The United States, the States, and equally Porto Rico, may exclude all claims of ultimate right from possessory actions, consistently with due process of law. *Grant Timber & Manufacturing Co.* v. *Gray,* 236 U. S. 133. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554. Before these decisions it had been strongly intimated by Chief Justice White that the foreclosure by summary process allowed by the law of Porto Rico was valid, *Torres* v. *Lathrop, Luce & Co.,* 231 U. S. 171, 177, and a decision to the same effect was rendered by

the Supreme Court of the Island. *Giménez* v. *Brenes*, 10 P. R. 124. In view of these decisions we are of opinion that the constitutional question raised was only colorable and that the decree dismissing the bill was right.

Decree affirmed.

OLIVER IRON MINING COMPANY *v.* LORD ET AL.

CLEVELAND-CLIFFS IRON COMPANY *v.* LORD ET AL.

MESABA-CLIFFS IRON MINING COMPANY *v.* LORD ET AL.

BENNETT MINING COMPANY ET AL. *v.* LORD ET AL.

REPUBLIC IRON & STEEL COMPANY ET AL. *v.* LORD ET AL.

BIWABIK MINING COMPANY ET AL. *v.* LORD ET AL.

INTER-STATE IRON COMPANY *v.* LORD ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Nos. 560–566. Argued December 6, 7, 1922.—Decided May 7, 1923.

1. The tax imposed by Laws of Minnesota, 1921, c. 223, on the business of mining iron ore, measured by a percentage of the value of the ore mined or produced, is an occupation tax. P. 176.
2. The mining of ore, even when substantially all of the ore mined is immediately and continuously loaded on cars and shipped into other States to satisfy existing contracts,—is not interstate commerce and is subject to local taxation. P. 177.
3. The facts that the Minnesota tax, *supra*, applies only to those engaged, as owners or lessees, in mining or producing ores on their own account, and not to those who do mining work for them

under contract and whose pay is part of the expenses of the business, and that it does not apply to owners or lessees who do development work but remove no ore,—do not bring it in conflict with the equal protection clause of the Fourteenth Amendment, or with § 1 of Art. 9 of the Minnesota Constitution, providing that taxes shall be uniform upon the same class of subjects. P. 179.

4. The question whether a provision of this Minnesota law allowing the amount of royalties paid on the ore mined and produced during the year to be deducted from the value of such ore before computing the tax, introduces an unconstitutional discrimination in favor of those who operate under leases and pay royalties and against owners who operate their own mines and pay no royalties, cannot be raised in this case, it appearing that all of the iron mines in the State are operated under such leases, except six which were not operated during the tax year in question and are not threatened with a tax for that or later years. P. 180.
5. A tax based on the value of ore mined and produced, after deducting royalties and major expenses of the business, cannot be adjudged arbitrary or unreasonably discriminatory merely because of lack of uniformity in royalties and expenses producing corresponding differences in the tax. P. 181.

Affirmed.

APPEALS from decrees of the District Court dismissing, on their merits, as many suits, brought by the appellants to enjoin the enforcement of a state tax law.

Mr. Cordenio A. Severance, with whom *Mr. George W. Morgan* and *Mr. Frank D. Adams* were on the brief, for appellant in No. 560.

Mr. Henry J. Grannis, with whom *Mr. William P. Belden* was on the brief, for appellants in Nos. 561 and 562.

Mr. Oscar Mitchell, with whom *Mr. William D. Bailey* and *Mr. Albert C. Gillette* were on the brief, for appellants in Nos. 563 and 564.

Mr. Edgar W. MacPherran, for appellants in Nos. 565 and 566, submitted.

Mr. Egbert S. Oakley and *Mr. Patrick J. Ryan,* with whom *Mr. Clifford L. Hilton,* Attorney General of the State of Minnesota, and *Mr. Montreville J. Brown* were on the brief, for appellees.

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

These are suits to restrain and prevent the enforcement of a taxing act adopted by the State of Minnesota, April 11, 1921, c. 223, Laws 1921. The principal sections of the act are copied in the margin [1] and may be summarized as follows: The first subjects all who are "engaged in the business of mining or producing iron ore or other

[1] "Section 1. Every person engaged in the business of mining or producing iron ore or other ores in this state shall pay to the state of Minnesota an occupation tax equal to 6 per cent of the valuation of all ores mined or produced, which said tax shall be in addition to all other taxes provided for by law, said tax to be due and payable from such person on May 1 of the year next succeeding the calendar year covered by the report thereupon to be filed as hereinafter provided.

"Sec. 2. The valuation of iron or other ores for the purposes of determining the amount of tax to be paid under the provisions of Section 1 of this act shall be ascertained by subtracting from the value of such ore at the place where the same is brought to the surface of the earth, such value to be determined by the Minnesota tax commission:

"1. The reasonable cost of separating the ore from the ore body, including the cost of hoisting, elevating, or conveying the same to the surface of the earth.

"2. If the ore is taken from an open pit mine, an amount for each ton of ore mined or produced during the year equal to the cost of removing the overburden, divided by the number of tons of ore uncovered, the number of tons of ore uncovered in each such case to be determined by the Minnesota Tax Commission.

"3. If the ore is taken from an underground mine, an amount for each ton of ore mined or produced during the year equal to the cost of sinking and constructing shafts and running drifts, divided by the number of tons of ore that can be advantageously taken out through such shafts and drifts, the number of tons of ore that can be advan-

ores" within the State to the payment in each year of "an occupation tax" equal to 6 per cent. of the value of the ore mined or produced during the preceding year,—such tax to be "in addition to all other taxes." The second directs that the tax be computed on the value of the ore at the place where it is "brought to the surface of the earth" less certain deductions to be noticed presently. The third requires all who are engaged in such business to make on or before the first of February in each year a true report under oath of relevant information respecting their mining operations during the preceding year. And the sixth provides that where such a report is not made the State Tax Commission shall determine, from such information as it may possess or obtain, the amount and

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tageously taken out in each such case to be determined by the Minnesota Tax Commission.

"4. The amount of royalties paid on the ore mined or produced during the year.

"5. A percentage of the ad valorem taxes levied for said year against the realty in which the ore is deposited equal to the percentage that the tons mined or produced during such year bears to the total tonnage in the mine.

"6. The amount or amounts of all the foregoing subtractions shall be ascertained and determined by the Minnesota Tax Commission.

"Sec. 3. Every person engaged in such mining or production of ores shall, on or before the first day of February, 1922, and annually thereafter on or before the first day of February of each year, file with said commission under oath a correct report in such form and containing such information as the tax commission may require, covering the preceding calendar year."

"Sec. 6. If any person, subject to this act, shall fail to make the report provided for in section 3 hereof at the time and in the manner therein provided, the tax commission shall in such case, upon such information as it may possess or obtain, ascertain the kind and amount of ore mined or produced, together with the valuation thereof, and shall thereon find and determine the amount of the tax due from such person, and there shall be added thereto a penalty for failure to report, which penalty shall equal ten per cent of the tax imposed and shall be treated as a part thereof."

value of the ore and shall compute the tax and include therein a penalty of 10 per cent. for the failure to make the report.

The plaintiffs are corporations engaged in the business of mining or producing iron ore from mines within the State, and the defendants are the officers designated to carry the act into effect.

Preparatory to assessing the tax in 1922 the defendants requested the plaintiffs to make the prescribed reports of their mining operations during 1921, which the plaintiffs refused to do because they conceived that the act was invalid. The defendants then proceeded to take the requisite steps for imposing the tax, and the plaintiffs brought these suits to restrain and prevent such action on the grounds that the act and the tax about to be imposed were in conflict with the commerce clause of the Constitution of the United States, with the equal protection clause of the Fourteenth Amendment and with a clause in § 1 of article 9 of the state constitution providing "Taxes shall be uniform upon the same class of subjects."

The cases were heard together on an agreed statement of facts and some supplemental evidence which was free from conflict. One of the matters stipulated was that the suits were brought in circumstances making them cognizable in equity. The District Court sustained the act and the tax and dismissed the suits on the merits. The cases are here on direct appeals by the plaintiffs under § 238 of the Judicial Code.

The parties differ about the nature of the tax, the plaintiffs insisting it is a property tax and the defendants that it is an occupation tax. Both treat the question as affecting the solution of other contentions. There has been no ruling on the point by the Supreme Court of the State. We think the tax in its essence is what the act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after removal, but on

the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts. Mining is a well recognized business wherein capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business, and laid on them solely because they are so engaged, as is the case here, is an occupation tax. It does not differ materially from a tax on those who engage in manufacturing. *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 414; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114. The plaintiffs regard *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, as making the other way. But that case is not in point. The tax there considered, as the opinion shows (pp. 292–294), was not laid on any business, but on the mere exertion by an owner of distilled spirits of his right to withdraw them from a bonded warehouse, and had "none of the ordinary incidents of an occupation tax."

We shall therefore treat the tax as an occupation tax in dealing with the contentions presented.

The chief contention is that mining as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it is to burden or interfere with such commerce, which a State cannot do consistently with the commerce clause of the Constitution of the United States.

The facts on which the contention rests are as follows: The demand or market within the State for iron ore covers only a negligible percentage of what is mined by the plaintiffs.[2] Practically all of their output is mined to fill existing contracts with consumers outside the State

[2] In 1921, out of a total output of 18,167,370 tons the amount sold and used within the State was 261,622 tons.

and passes at once into the channels of interstate commerce. Three-fourths of it is from open pit mines and one-fourth from underground mines. At the open pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts and put it in elevated pockets where it readily can be loaded into cars. The subsequent movements are much the same as at the open pit mines, but their continuity is not so pronounced. Some of the ore from both kinds of mines—between 10 and 20 per cent.—is concentrated by washing or beneficiated after coming out of the mine and before starting out of the State, but our conclusion respecting the usual operations renders this deflection immaterial.

Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. *Kidd* v. *Pearson,* 128 U. S. 1, 20; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 245; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439, 444; *Hammer* v. *Dagenhart,* 247 U. S. 251. 272; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 410. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the

business be conducted in close connection with interstate commerce. *Cornell* v. *Coyne,* 192 U. S. 418; *Browning* v. *Waycross,* 233 U. S. 16, 22; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis, supra; General Railway Signal Co.* v. *Virginia,* 246 U. S. 500; *Hammer* v. *Dagenhart, supra; Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 151; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129, 136; *Heisler* v. *Thomas Colliery* Co., 260 U. S. 245.

The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference.

The contentions made under the equal protection provision of the Fourteenth Amendment and under the state constitutional provision that "Taxes shall be uniform upon the same class of subjects" present a question of classification and have been argued together.

Consistently with both provisions the legislature of the State may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules. *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121; *State ex rel.* v. *Parr,* 109 Minn. 147, 152. Here the selection is of all who are engaged in mining or producing ores on their own account, that is to say, as owners or lessees. The selection seems to be an admissible one, so we turn to the objections urged against it.

One is that contractors who strip off the overburden of soil, gravel, etc., in open pit mines, other contractors who

load the ore in such mines into cars and still others, usually four in a group, who take ore out of underground mines, are not included. But none of these are engaged in mining on their own account. Instead they are working for those who are so engaged. However important their service, they are not principals in the business, but employees; and their pay, whatever it be, is part of the expense of the business. Their omission has a reasonable basis.

Another objection is that all owners and lessees who mine or produce ore are included while those who do extensive development work, but remove no ore, are omitted. This is not fairly subject to criticism. Equality does not require that unproductive mining be taxed along with productive mining. Besides, if ore is uncovered or made accessible by such development work the tax will be imposed when the ore is mined.

Among the deductions which the act provides shall be made from the value of the ore before computing the tax is "The amount of royalties paid on the ore mined and produced during the year." This provision is assailed as working a serious discrimination in favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one and has not been before the Supreme Court of the State. It apparently requires a construction of the particular provision along with other parts of the act, and possibly of the state constitutional provision. After that it may be that there would be need for turning to the Fourteenth Amendment. "Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction in respect thereto." *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544. The record shows that of the many iron mines in the State all but six are operated

under leases and that none of the six was operated in any way during 1921, the year in respect of which the tax was about to be imposed when these suits were begun. Therefore no tax could be imposed in respect of the six mines based on that year's operations, and it is made plain that the defendants have no purpose to impose one. It cannot be merely assumed that mining has been resumed at those mines nor that any tax in respect of them for later years is now threatened. The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question. We accordingly leave it entirely open.

It also is said that the royalty provision and others respecting deductions will work a discrimination as between different lessees in that some will be subjected to a higher tax than others. No doubt there will be differences in the amount, but they will result from differences in situation and not from differences in treatment. Some lessees pay higher royalties than others and will secure a higher deduction on that score. Some are subjected to greater expense in mining than others and will secure reductions accordingly. And some are subjected to higher local taxes on their mines than others—the mines being scattered through several counties and minor municipal subdivisions—and this will cause the deductions to vary. But all lessees will have the benefit of deductions adjusted to the royalties, expenses and taxes actually paid; and the value of the ore, according to which the tax will be computed, will in each instance be its actual value when it is brought out of the mine less those deductions. In short, the tax is to be adjusted to the value of the output less the major expenses of the business, and this according to uniform rules. We, therefore, cannot say that it is intended to or will work any arbitrary or unreasonable discrimination as between different lessees.

Decrees affirmed.

CITY OF TRENTON *v.* STATE OF NEW JERSEY.

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

No. 430. Argued March 2, 1923.—Decided May 7, 1923.

1. A State has power, and it is its duty, to control and conserve its water resources for the benefit of all its inhabitants. P. 185.
2. Diversion of waters from the sources of supply for this use, is a legitimate function of the State, which may be left to private enterprise subject to state regulation, or be performed directly, or be delegated either to bodies politic created for the purpose or to the State's municipalities. P. 185.
3. In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the State, but are merely departments of the State, with powers and privileges such as the State has seen fit to grant, held and exercised subject to its sovereign will. P. 187.
4. The power of a State over the rights and properties of cities held and used for "governmental purposes," is unrestrained by the Contract Clause, or the Fourteenth Amendment, of the Federal Constitution. P. 188.
5. The distinction between a municipality as an agent of the State for governmental purposes, and as an organization to care for local needs in a private or proprietary capacity, affords no ground for the application of those constitutional restraints against a State in favor of its own municipality. P. 191.
6. The City of Trenton, as successor to a grant made by New Jersey to a private corporation, claimed a perpetual right, unburdened by license fee or other charge, to divert all the water that might be required for the use of the City or its inhabitants from the Delaware River, and resisted a charge, imposed under c. 252, Laws N. J., 1907, for water diverted beyond the amount being legally diverted when the act was passed and in excess of a *per capita* maximum prescribed by the act. *Held*, that the City could not invoke the Contract Clause or the Fourteenth Amendment, even assuming that the private corporation might have done so if its rights had not passed to the City, and that, in view of previous decisions, the City's contention to the contrary did not present a substantial federal question. Pp. 185, 192.

Writ of error to review 117 Atl. 158, dismissed.

ERROR to a judgment of the Supreme Court of New Jersey, affirmed by the Court of Errors and Appeals, in favor of the State, in its action to recover license fees from the City of Trenton, for water diverted from the Delaware River.

Mr. A. V. Dawes, with whom *Mr. Chas. E. Bird* was on the brief, for plaintiff in error.

Mr. William Newcorn, Assistant Attorney General, with whom *Mr. Thomas F. McCran,* Attorney General, of the State of New Jersey, was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The State of New Jersey recovered judgment against the City of Trenton for $14,310.00, in an action brought in the State Supreme Court. The judgment was affirmed by the Court of Errors and Appeals, and is here on writ of error.

The State's right to recover depends upon the validity of an act of the legislature (c. 252, Laws of 1907). The City asserts that this act offends against the contract clause of the Constitution of the United States, and that it takes property owned by the City in its private or proprietary capacity for public use without just compensation and without due process of law in violation of the Fourteenth Amendment. The act provides that:

"Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; *provided, however,* no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred

(100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five."

The City claims the right to take from the Delaware River all the water that it requires without limitation as to quantity and without license fee for any part thereof, and that such right was acquired by the President and Directors of the Trenton Water Works (hereinafter called the water company) by grant direct from the State March 24, 1852, and that the City acquired this right by purchase from the water company. Briefly, the basis of the City's claim is as follows: By an Act of February 29, 1804, the President and Directors of the Trenton Water Works were created a body politic and corporate. They and their successors and assigns were made capable of disposing of water to such as might apply for the same for such annual rent and under such restrictions as they might think proper, and they were authorized to lay and extend their water mains through the streets of the City. Certain springs constituted the company's source of supply, and by reason of increase of population ceased to be adequate. March 24, 1852, a supplement to the above mentioned act was passed, by which the company was authorized to take the water required either in whole or in part from the Delaware River. Later, March 2, 1855, an act was passed, authorizing the City to purchase the whole or a majority of the shares of the capital stock of the water company, and the City purchased all of the stock. Thereafter, an Act of March 1, 1859, required the company to convey unto "the inhabitants of the city of Trenton" all the real estate, works and property and all the corporate powers, franchises and privileges of the company, and this conveyance was duly made.

If the provision of the Act of 1907 imposing the license fee is valid as against the City, the judgment is right.

The Court of Errors and Appeals held that it was valid; that the State under its police power might impose a license fee as specified in the act, and that this does not deprive the City of any contractual or property right.

The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources. Decision of the Court of Errors and Appeals in this case, 117 Atl. 158; *McCarter* v. *Hudson Water Co.*, 70 N. J. Eq. 695, 701, 702, affirmed by this Court in 209 U. S. 349, 355; *Collingswood* v. *Water-Supply Commission,* 84 N. J. L. 104, 110; *Cobb* v. *Davenport,* 32 N. J. L. 369, 378. The only way the City could acquire the right to take the water of the Delaware River was by grant from the State or by authorized purchase or condemnation from one to whom the right had been granted by the State. *State* v. *Jersey City,* 94 N. J. L. 431, 433. The power to determine the conditions upon which waters may be so diverted is a legislative function. The State may grant or withhold the privilege as it sees fit. Assuming in favor of the City, that its grantor received a perpetual right, unburdened by license fee or other charge, to divert all the water required for the use of the City and its inhabitants, does it follow that the State as against the City is bound by contract and is without power to impose a license fee as provided in the act?

The relations existing between the State and the water company were not the same as those between the State and the City. The company was organized and carried on its business for pecuniary profit. Its rights and property were privately owned and therefore safeguarded by the constitutional provisions here sought to be invoked by the City against the legislation of the State. The City is a political subdivision of the State, created as a con-

venient agency for the exercise of such of the governmental powers of the State as may be entrusted to it. The diversion of waters from the sources of supply for the use of the inhabitants of the State is a proper and legitimate function of the State. This function may be left to private enterprise, subject to regulation by the State; it may be performed directly; or it may be delegated to bodies politic created for that purpose, or to the municipalities of the State. Power to own, maintain and operate public utilities, such as waterworks, gas and electric plants, street railway systems, public markets, and the like is frequently conferred by the States upon their cities and other political subdivisions. For the purpose of carrying on such activities, they are given power to hold and manage personal and real property.

As said by this Court, speaking through Mr. Justice Moody, in *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178, 179:

"The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitu-

tion, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

In New Jersey it has been held that within the limits prescribed by the state constitution, the legislature may delegate to municipalities such portion of political power as they may deem expedient, withholding other powers, and may withdraw any part of that which has been delegated. *Van Cleve* v. *Passaic Valley Sewerage Commissioners,* 71 N. J. L. 183, 198.

In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State.[1] A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. See *Barnes* v. *District of Columbia,* 91 U. S. 540, 544, 545.

In *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 524, 525, it was held that where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities. In the opinion it is said (pp. 524, 525):

"Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the State in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature of the State, because there is

[1] Cf. 1 Dillon Municipal Corporations, 5th ed., § 98, p. 154, et seq.

not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact."

The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. In *Hunter* v. *Pittsburgh, supra,* 179, reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private or proprietary capacity, and decisions of this Court which mention that distinction are referred to.[2] In none of these cases was any power, right or property of a city or other political subdivision held to be protected by the contract clause or the Fourteenth Amendment. This Court has never held that these subdivisions may invoke such restraints upon the power of the State.[3]

In *East Hartford* v. *Hartford Bridge Co.,* 10 How. 511, 533, 534, 536, it appeared that for many years a franchise to operate a ferry over the Connecticut River belonged to the town of Hartford; that upon the incorporation of

[2] *Commissioners* v. *Lucas,* 93 U. S. 108, 115; *Meriwether* v. *Garrett,* 102 U. S. 472, 518, 530; *Essex Public Road Board* v. *Skinkle,* 140 U. S. 334, 342; *New Orleans* v. *New Orleans Water Works Co.,* 142 U. S. 79, 91; *Covington* v. *Kentucky,* 173 U. S. 231, 240; *Worcester* v. *Worcester Consolidated Street Ry. Co.,* 196 U. S. 539, 551; *Monterey* v. *Jacks,* 203 U. S. 360.

[3] Some state cases holding that the state legislature is not restrained by federal constitutional provisions: *St. Louis* v. *Shields,* 52 Mo. 351, 354; *Police Jury of Bossier* v. *Corporation of Shreveport,* 5 La. Ann. 661, 665; *Trustees of Schools* v. *Tatman,* 13 Ill. 27; *Board of Education* v. *Aberdeen,* 56 Miss. 518; *Darlington* v. *City of New York,* 31 N. Y. 164, 193. See contra: *Town of Milwaukee* v. *City of Milwaukee,* 12 Wis. 93, 109; *Grogan* v. *San Francisco,* 18 Cal. 590, 612, 613; *Mount Hope Cemetery* v. *Boston,* 158 Mass. 509, 519; *Spaulding* v. *Andover,* 54 N. H. 38, 56; *Ellerman* v. *McMains,* 30 La. Ann. 190.

East Hartford, the legislature granted to it one-half of the ferry during the pleasure of the General Assembly, and that subsequently, after the building of a bridge across the river, the legislature discontinued the ferry. It was held that this was not inconsistent with the contract clause of the Federal Constitution. The reasons given in the opinion (pp. 533, 534) support the contention of the State here made that the City cannot possess a contract with the State which may not be changed or regulated by state legislation.

In *Worcester* v. *Worcester Consolidated Street Ry. Co.*, 196 U. S. 539, 548, it was held that the obligation of the street railway company to the city to pave and repair streets occupied by it, based on accepted conditions of a municipal ordinance granting right of location, is not private property beyond the legislative control of the State, and that state legislation taxing the company and thereby relieving it from its obligation to the city to pave and repair such streets was not void as violating the contract clause of the Federal Constitution. In the opinion it is said (pp. 548, 549):

"The question then arising is, whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and a different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the Commonwealth had that power. A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of

the former city. The city is the creature of the State." Citing *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 533, 534; *United States* v. *Railroad Company*, 17 Wall. 322, 329; *New Orleans* v. *Clark*, 95 U. S. 644, 654; *Commissioners of Laramie County* v. *Commissioners of Albany County*, 92 U. S. 307; *Commissioners* v. *Lucas*, 93 U. S. 108, 114.

In *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394, 399, it was held that a legislative grant to a city of the power to regulate rates to be charged to the city and its inhabitants by a gas company might be withdrawn by the State from the city and conferred upon a commission, and that thereby no question was presented under the contract clause of the Federal Constitution. In the opinion, after a statement of the issue, it is said (pp. 397, 398):

"Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the State is final. . . . In *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, where a city, relying on the contract clause, sought a review by this court of a judgment of a state court sustaining a statute so modifying the franchise of a water works company as to require the city to pay for water used for municipal purposes, to which it theretofore was entitled without charge, the writ of error was dismissed on the ground that no question of impairment within the meaning of the contract clause was involved." [4]

[4] Cf. *Williams* v. *Eggleston*, 170 U. S. 304, 310; *Mason* v. *Missouri*, 179 U. S. 328, 335.

The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris* v. *District of Columbia,* 256 U. S. 650, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited.[5] Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there

[5] See *Winona* v. *Botzet,* 169 Fed. 321, 332, et seq., and cases cited. See also: *Brantman* v. *Canby,* 119 Minn. 396 (recovery permitted for gas explosion where city furnished gas to inhabitants); *Pettengill* v. *Yonkers,* 116 N. Y. 558, 565 (recovery permitted for injury sustained by excavation in street to lay mains); *Watson* v. *Needham,* 161 Mass. 404, 411 (damages recovered for breach of contract by water commissioners to furnish water for plaintiff's boiler, resulting in injury to vegetables in greenhouse heated thereby); *Brown* v. *Salt Lake City,* 33 Utah, 222, 234 (city held liable for death by drowning in conduit forming a part of city water works system). These cases and others that might be cited serve in general to illustrate the course of decision.

is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations.[6] But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. In view of former opinions of this Court, no substantial federal question is presented. *Pawhuska* v. *Pawhuska Oil & Gas Co., supra,* and cases cited.[7]

The writ of error is dismissed.

CITY OF NEWARK *v.* STATE OF NEW JERSEY.

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

No. 469. Argued March 2, 1923.—Decided May 7, 1923.

1. The Equal Protection Clause of the Fourteenth Amendment cannot be invoked by a city against its State. P. 196. *Trenton* v. *New Jersey, ante,* 182.
2. So *held,* where it was claimed that the method adopted in c. 252, Laws of New Jersey, 1907, for fixing maximum amounts of water divertible without payment of license fees to the State, worked

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[6] Cf. 1 Dillon Municipal Corporations, 5th ed., § 110, p. 183.

[7] See decisions per curiam: *Chicago* v. *Dempcy,* 250 U. S. 651; *Michigan ex rel. Groesbeck* v. *Detroit United Ry.,* 257 U. S. 609; *Chicago* v. *Chicago Railways Co., id.* 617; *Avon* v. *Detroit United Ry., id.* 618; *Edgewood* v. *Wilkinsburg & East Pittsburgh Street Ry. Co.,* 258 U. S. 604; *Sapulpa* v. *Oklahoma Natural Gas Co., id.* 608.

arbitrary discriminations, prejudicial to the City of Newark. P. 195.

Writ of error to review 117 Atl. 158, dismissed.

ERROR to a judgment of the Supreme Court of New Jersey, affirmed by the Court of Errors and Appeals, in favor of the State, in its action to recover license fees from the City of Newark, for water diverted from the Pequannock River.

Mr. George W. Wickersham, with whom *Mr. Jerome T. Congleton* was on the briefs, for plaintiff in error.

Mr. William Newcorn, Assistant Attorney General, with whom *Mr. Thomas F. McCran,* Attorney General, of the State of New Jersey, was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The State of New Jersey recovered judgment against the City of Newark for $18,104.08 and costs, in an action brought in the State Supreme Court. The judgment was affirmed by the Court of Errors and Appeals, and the case is here on writ of error. It is based on a state enactment which is attacked on the sole ground that it violates the equal protection clause of the Fourteenth Amendment.

The State's right to recover depends upon the validity of an enactment of the State (c. 252, Laws of 1907) which is sufficiently set forth in the decision of this Court in *Trenton* v. *New Jersey,* handed down on this day, *ante,* 182.

In *East Jersey Water Co.* v. *Board of Conservation & Development,* 91 N. J. L. 448, 453, it is said:

"The statute requires payment 'for all such water hereafter diverted in excess of the amount now being legally diverted,' with the proviso that no payment be required until the legal diversion shall exceed one hun-

dred gallons per day per capita. We are of opinion that 'legally diverted' means not a future diversion, but one now being exercised under a legal right, and that under this statute a legal abstractor may take what he was diverting in 1907, and, if that did not reach the statutory maximum of exemption, as much more as is required to make the total diversion one hundred gallons per day per capita for each of the municipalities supplied, without payment of the license fee.

"If, in 1907, the daily diversion exceeded one hundred gallons per capita, the amount then diverted, if lawful, may be taken without payment, and if it was less, no license fee can be imposed until it exceeds the statutory quantity."

The complaint alleged that under the provisions of this act the City was "permitted to divert . . . an average daily free allowance of water to the amount of 36,241,666 gallons, the said last mentioned amount being the amount of water which was being diverted by said municipality on June 17th, aforesaid, the date when the act aforesaid became effective and operative"; and claimed for each of the years subsequent to July 1, 1914, a license fee of one dollar per million gallons for the excess of the daily average diversion of water over the quantity above specified. The answer alleged that prior to the passage of the Act of 1907, the City had acquired a plant capable of furnishing 50,000,000 gallons of water per day, and set up certain separate defenses. At the trial, the court on motion of the State, struck out the separate defenses; the facts were not in controversy, and judgment was given for the amount claimed. About the same time, the State also recovered judgment against the City of Trenton for the license fee imposed by the same act. Both cases were taken to the Court of Errors and Appeals, the highest court of the State, and there by one decision the judgments were affirmed. (117 Atl. 158.) That court said:

"The facts are not in dispute. It is conceded that the city of Trenton, at the time of the enactment of the act of 1907, was taking from the Delaware river daily 14,200,000 gallons of water for local use, and that the city of Newark was daily extracting from the Pequannock river 36,241,666 gallons for local use. These diversions represent the antestatutory flowage, and are considered by the state under the eighth section of the act of 1907 to be nontaxable."

To establish its contention that § 8 of the enactment in question so discriminates between those authorized to divert water that it violates the equal protection clause of the Fourteenth Amendment, the City says that the highest court has in this case construed the words "now being legally diverted" to mean the amount of water which was actually diverted on the day when the act went into effect, namely, June 17, 1907; that had the City flowed into its mains 50,000,000 gallons that day, the tax would have been levied only upon the excess over that amount, and on the facts shown in the complaint, there would have been no tax in the years above referred to; that the purely accidental figure of 36,241,666 gallons, the amount actually diverted on that day, will for all time be the basis of the assessment of the tax upon the City. It is suggested that cities less populous by one-half than Newark, but owning plants far in excess of their needs might have diverted on June 17, 1907, twice the amount of water which the City of Newark diverted, and that a city twice as large might have diverted half as much, and the former of such cities would thereby have procured an almost perpetual exemption, and the latter would have brought on itself an insupportable burden of indefinite duration; and that accidents of climate, of conflagrations and of breaks in the mains on the critical date, June 17, 1907, would have resulted in increasing the exemption.

The enforcement by the State of the provision of the act imposing upon the City the specified annual payments for such diversion of water does not violate the equal protection clause of the Fourteenth Amendment. The regulation of municipalities is a matter peculiarly within the domain of the State. In *Trenton* v. *New Jersey,* decided this day, *ante,* 182, it is held that the imposition of the license fee specified in this act is not a taking of property of that city in violation of the Fourteenth Amendment. The reasons supporting that conclusion apply here. The City cannot invoke the protection of the Fourteenth Amendment against the State.[1] Considering the former opinions of this Court, there is no substantial federal question in the case.

The writ of error is dismissed.

BEGG ET AL., RECEIVERS OF MANHATTAN & QUEENS TRACTION CORPORATION, *v.* CITY OF NEW YORK ET AL.

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

No. 5. Argued April 13, 16, 1923.—Decided May 7, 1923.

When an application is made to the District Court in a pending suit, for a summary injunction to protect the exercise of the court's jurisdiction in that suit and prevent interference with property of which it has custody therein, the jurisdiction of the summary proceeding depends upon, and takes its character from, the jurisdiction of the main cause; and, when this is based on diverse citizenship only, the summary jurisdiction rests wholly on that basis also, even though federal questions are set up in the application as ground for the summary relief; and, consequently, a decree of the Circuit Court of Appeals, upon review of the sum-

[1] Cf. *Williams* v. *Eggleston,* 170 U. S. 304, 310; *Mason* v. *Missouri,* 179 U. S. 328, 335.

mary proceeding, has the same finality, under Jud. Code, § 128, as its decree in the main cause would have, and is not reviewable here by appeal. P. 198.

Appeal to review 266 Fed. 625, dismissed.

APPEAL from a decree of the Circuit Court of Appeals, reversing a decree of the District Court, which granted a summary injunction upon application of receivers in a pending equity suit.

Mr. Lindley M. Garrison, with whom *Mr. Watson B. Robinson, Mr. Robert S. Sloan, Mr. Arthur J. Egan, Mr. Charles A. Boston* and *Mr. Charles A. Frueauff* were on the briefs, for appellants.

Mr. Vincent Victory, with whom *Mr. John P. O'Brien* was on the brief, for appellees.

MR. JUSTICE SANFORD delivered the opinion of the Court.

On the threshold of the hearing the appellees moved to dismiss this appeal, upon the ground that jurisdiction depends entirely upon diversity of citizenship and the decree of the Circuit Court of Appeals is therefore final.

The appellants were appointed receivers of the Manhattan & Queens Traction Corporation in a suit in equity brought against it in the United States District Court for the Eastern District of New York by a judgment creditor, for the administration of its assets. The jurisdiction depended entirely upon diversity of citizenship of the parties. The receivers, after taking possession of the Corporation's railway in the City of New York, which had been partly completed, filed a petition in this equity cause, alleging that the City, through its Board of Estimate and Apportionment, was threatening to adopt a resolution declaring a forfeiture of the franchise contract of the Corporation and of the completed portion of the railway, for failure to complete the railway within the

prescribed time. This, it was averred, would deprive the Corporation of its property in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I of the Constitution of New York, and cause irreparable injury to the Corporation, its creditors, and the property in the custody of the receivers. Upon this petition the court granted the receivers *ex parte* a temporary injunction and an order to show cause why it should not be continued during the receivership; and thereafter, upon a summary hearing, the temporary injunction was made permanent and the City and the Board were enjoined until further order of the court from passing a resolution forfeiting or affecting the franchise contract of the Corporation or declaring its railway and property in the hands of the receivers to be the property of the City or otherwise interfering therewith in any manner. Upon appeal by the City and the Board, the Circuit Court of Appeals reversed the order of the District Court granting this injunction. *Gas & Electric Securities Co.* v. *Traction Corporation,* 266 Fed. 625, 641. And the receivers have appealed to this Court.

Section 128 of the Judicial Code provides that, with certain exceptions not here involved, "the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different States." This refers to the jurisdiction of the federal court of first instance: and if the jurisdiction of the District Court depended entirely upon diversity of citizenship the appeal must be dismissed. *Shulthis* v. *McDougal,* 225 U. S. 561, 568.

It is well settled that jurisdiction of a petition in intervention asserting a claim upon the property or fund being administered by the court is determined by the jurisdiction originally invoked in the main cause, by

virtue of which the intervening petition is entertained; and hence that if the jurisdiction in the main cause is such that a decree of the Circuit Court of Appeals would be final in respect thereto it is likewise final in respect to the intervening petition. *St. Louis Railroad* v. *Wabash Railroad,* 217 U. S. 247, 250; *Rouse* v. *Letcher,* 156 U. S. 47, 49; *Gregory* v. *Van Ee,* 160 U. S. 643, 645; *Rouse* v. *Hornsby,* 161 U. S. 588, 591; *Pope* v. *Louisville Railway,* 173 U. S. 573, 577; *Ohio Railroad Commission* v. *Worthington,* 225 U. S. 101, 104; *Shulthis* v. *McDougal, supra,* at p. 568. And this is true even although the intervening petition discloses an independent ground of federal jurisdiction; the jurisdiction by virtue of which it is entertained as an intervention being ascribed entirely to that which is invoked and exercised in the main cause. *Rouse* v. *Letcher, supra,* at pp. 49 and 50; *Gregory* v. *Van Ee, supra,* at p. 646. Manifestly the reason of the foregoing rule in reference to an affirmative petition of intervention, as set forth in the cases cited, applies with equal or greater force to a petition filed in a cause to protect the exercise of the jurisdiction of the court itself and prevent interference with property in its custody; which necessarily depends upon that jurisdiction and partakes directly of its character. This is recognized in *Ohio Railroad Commission* v. *Worthington, supra,* at p. 104, in which the distinction is pointed out between petitions filed in the main cause, taking their jurisdiction from it alone, and plenary suits of an ancillary character in which federal jurisdiction is invoked, not merely as ancillary to that in the main suit, but also upon independent grounds.

In the present case the jurisdiction of the District Court to entertain the summary proceedings against the City and the Board was dependent entirely upon the jurisdiction in the main cause and cannot be ascribed to the federal constitutional grounds upon which the claim for

relief was partly predicated, which in no wise enlarged the summary jurisdiction of the court, and could only have been relied upon as independent grounds of federal jurisdiction in a plenary suit.

It results that the decree of the Circuit Court of Appeals as to the petition of the receivers has the same finality as would a decree in the main cause; jurisdiction of the one as of the other depending entirely upon the diversity of citizenship in the main cause.

The appellees' motion is accordingly granted, and the appeal

Dismissed.

WORK, SECRETARY OF THE INTERIOR, JOHNSON, GOVERNOR OF THE CHICKASAW NATION, ET AL. *v.* UNITED STATES EX REL. McALESTER-EDWARDS COMPANY.

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

No. 258. Argued April 12, 1923.—Decided May 21, 1923.

1. The Act of February 8, 1918, c. 12, 40 Stat. 433, was enacted for the chief purpose of selling, after appraisal, the coal and asphalt deposits in segregated mineral land of the Choctaws and Chickasaws, subject to existing leases, and not for the appraisal and disposition of the surface, this having been provided for by the Act of February 19, 1912, c. 46, 37 Stat. 67. P. 206.
2. Section 4 of the Act of February 8, 1918, *supra*, in providing that any lessee shall have the preferential right, upon certain conditions, to purchase "at the appraised value" any and all of the surface lying within his lease and heretofore reserved by order of the Secretary of the Interior, does not contemplate a new appraisement of the surface but refers to the value as previously ascertained by appraisement under the Act of February 19, 1912, *supra*. P. 207.
3. The lessee's right in such case is given by the Act of 1918 without qualification, and is not left to the legal discretion of the Secretary of the Interior in the construction of the act. P. 208.

4. Therefore, a lessee having this preferential right and having elected to purchase and made due and timely tender of the value, as appraised under the Act of 1912, has a right to a mandamus against the Secretary of the Interior, the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation, to compel acceptance of the tender and issuance of an appropriate patent, as directed by § 7 of the Act of 1918. P. 208.

51 App. D. C. 171; 277 Fed. 573, affirmed.

The relator, the McAlester-Edwards Coal Company, filed a petition in the Supreme Court of the District of Columbia, asking for a writ of mandamus to require the Secretary of the Interior and the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation to accept $10,360.06, the balance of the purchase price of $12,651.82 ($2,291.76 having already been tendered and accepted) tendered by the Coal Company in payment for certain surface lands to which under the Act of Congress of February 8, 1918, c. 12, § 4, 40 Stat. 433, it claimed a preferential right of purchase, and to require the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation to issue a patent to the Coal Company for the same and the Secretary of the Interior to approve it.

The answer of the defendants below admitted all the material facts alleged in the petition, but denied the right of the Coal Company to the mandamus on the ground that the construction put upon the Act of 1918 by the Secretary of the Interior, in the exercise of the discretion vested in him by the statute, did not give to the relator, the Coal Company, the preferential right asserted. The Supreme Court of the District overruled a demurrer to the answer, and the relator not pleading further, the petition was dismissed. On review in the Court of Appeals, the judgment of the District Supreme Court was reversed on the ground that the demurrer should have been sustained and the writ asked for should have issued. The cause was remanded to have the writ issue.

The Coal Company is owner by assignment of a lease approved by the Secretary of the Interior of coal lands in Pittsburg County, Oklahoma, belonging to the Choctaw and Chickasaw Nations, executed in July, 1899, and running for 30 years. This lease permitted the lessee to use the surface of the land covered by the lease for the purpose of developing its coal mine. The Act of February 19, 1912, c. 46, 37 Stat. 67, authorized the Secretary of the Interior to sell the surface leased and unleased of the segregated mineral land of the Choctaws and Chickasaws, reserved under previous laws, to include the entire estate of the Indians therein except the coal and asphalt reserved. The Secretary was required in the first section, quoted in the margin,[1] to classify and have appraised the

[1] That the Secretary of the Interior is hereby authorized to sell at not less than the appraised price, to be fixed as hereinafter provided, the surface, leased and unleased, of the lands of the Choctaw and Chickasaw Nations in Oklahoma segregated and reserved by order of the Secretary of the Interior dated March twenty-fourth, nineteen hundred and three, authorized by the Act approved July first, nineteen hundred and two. The surface herein referred to shall include entire estate save the coal and asphalt reserved. Before offering such surface for sale the Secretary of the Interior, under such regulations as he may prescribe, shall cause the same to be classified and appraised by three appraisers, to be appointed by the President, at a compensation to be fixed by him, not to exceed for salary and expenses for each appraiser the sum of fifteen dollars per day for time actually engaged in making such classification and appraisement. The classification and appraisement of the surface shall be by tracts, according to the Government survey of said lands, except that lands which are especially valuable by reason of proximity to towns or cities may, in the discretion of the Secretary of the Interior, be subdivided into lots or tracts containing not less than one acre. In appraising said surface the value of any improvements thereon belonging to the Choctaw and Chickasaw Nations, except such improvements as have been placed on coal or asphalt lands leased for mining purposes, shall be taken into consideration. The surface shall be classified as agricultural, grazing, or as suitable for town lots. The classification and appraisement provided for herein shall

surface so to be sold. The second section, also quoted in the margin,[2] gave a preferential right for sixty days to any coal or asphalt lessee to purchase at the appraised value, the surface of the land covered by his mining lease, not exceeding five per cent. of the whole surface, which the Secretary might extend to ten per cent., upon waiver of right by the lessee to use any more of the surface, but

be completed within six months from the date of the passage of this Act, shall be sworn to by the appraisers, and shall become effective when approved by the Secretary of the Interior: *Provided*, That in the proceedings and deliberation of said appraisers in the process of said appraisement and in the approval thereof the Choctaw and Chickasaw Nations may present for consideration facts, figures, and arguments bearing upon the value of said property.

[2] SEC. 2. That after such classification and appraisement has been made each holder of a coal or asphalt lease shall have a right for sixty days, after notice in writing, to purchase, at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease to embrace improvements actually used in present mining operations or necessary for future operations up to five per centum of such surface, the number, location, and extent of the tracts to be thus purchased to be approved by the Secretary of the Interior: *Provided*, That the Secretary of the Interior may, in his discretion, enlarge the amount of land to be purchased by any such lessee to not more than ten per centum of such surface: *Provided further*, That such purchase shall be taken and held as a waiver by the purchaser of any and all rights to appropriate to his use any other part of the surface of such land, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved: *Provided further*, That if any lessee shall fail to apply to purchase under the provisions of this section within the time specified the Secretary of the Interior may, in his discretion, with the consent of the lessee, designate and reserve from sale such tract or tracts as he may deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations, under any existing lease, and dispose of the remaining portion of the surface within such lease free and clear of any claim by the lessee, except for the purposes of future operations, prospecting, and for ingress and egress, as hereinafter reserved.

allowed the Secretary in case of a lessee's failing to purchase to reserve to him as much of the surface as the Secretary might deem proper for his mining uses and development.

Pursuant to this act, the Secretary classified and appraised the surface of the land which included that covered by the lease of the Coal Company. The Coal Company, however, did not avail itself of the right to purchase but under the authority of the latter part of the section accepted a reservation by the Secretary of a certain part of the surface for its mining operations.

The purpose of the Act of February 8, 1918, 40 Stat. 433, already referred to, is shown by its title "An Act Providing for the sale of the coal and asphalt deposits in the segregated mineral land in the Choctaw and Chickasaw Nations, Oklahoma." Before offering the coal and asphalt deposits for sale, the Secretary was to cause them to be appraised, under such regulations as he should prescribe. All deposits sold were to be subject to the rights of existing lessees, and § 4 contained a provision that any lessee of mining rights should have the preferential right to buy them at the highest price offered for them at public auction—at not less than the appraisement—and that after the appraisement of the mining rights and within ninety days thereof such lessee should have the preferential right to buy the surface rights reserved to him by the Secretary as such lessee " at the appraised value."

The relator bought the mining rights and then within due time undertook to exercise its preferential right to buy the surface rights reserved to it by the Secretary under the Act of 1912, and made a payment on account of $2,291.76, on the basis of the appraisement under the Act of 1912, which was accepted by the Superintendent of the Five Civilized Tribes and approved by the Secretary of the Interior and retained for fourteen months. When this became known to the Choctaw and Chickasaw Na-

tions, their representatives protested and insisted that there must be a new appraisement under the Act of 1918. There was a hearing before the Secretary who reversed his first ruling and held that the relator was entitled to purchase such surface lands only under an appraisement made subsequently to the Act of 1918, and that the money paid under the appraisement of 1912 should be returned to the relator. An appraisement was then ordered by the Secretary under regulations issued by him, at which the price for the surface in respect to which the relator had sought to exercise a preferential right, was fixed at $20,482.60, instead of $9,050.53, which had been the appraisement under the Act of 1912.

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

Mr. G. G. McVay and *Mr. E. O. Clark* filed a brief on behalf of the Chickasaw and Choctaw Nations, plaintiffs in error.

Mr. George M. Porter and *Mr. Conrad H. Syme,* with whom *Mr. John L. Fuller* and *Mr. James W. Beller* were on the brief, for defendant in error.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the Court.

Two questions are to be decided in this case. The first is under what appraisement the preferential right conferred on the relator by the second section of the Act of 1918 to purchase the surface previously reserved to it by the Secretary of the Interior, was to be exercised. Should it have been under that of the Act of 1912, or under that ordered by the Secretary after the Act of 1918? The second question is whether the construction necessary to determine the first question is vested by the statute in

the legal discretion of the Secretary which it is not within the power of the Supreme Court of the District by mandamus to control.

First. We have no doubt that the appraisement referred to in the second section of the Act of 1918 under which the preferential right was to be exercised was that provided for in the Act of 1912. It will be observed that the Act of 1912 provided for the sale of the surface lands covering the coal and asphalt deposits of the Choctaws and Chickasaws, and elaborate provisions were made for the appraisement of them. A board of appraisers was to be appointed by the President of the United States, regulations were to be made by the Secretary for the appraisement, and minute requirements were set forth in the first section as to the different classes of such surface lands. More than that, six months' time was allowed for it and $50,000 was appropriated out of the treasury of the nations to complete the appraisement and sale. By the second section it was attempted to protect the lessees of the minerals in retaining enough surface land to enjoy their leases by giving them short time options to purchase certain percentages of the whole surface and if they did not purchase, by an agreed reservation without purchase of what the Secretary might deem necessary. The object of this legislation was the appraisement, offering, sale and disposition of the surface of the mineral land. The Act of 1918 was enacted not to sell the surface. That had been all disposed of except these agreed reservations by the Secretary specifically provided for in the Act of 1912. The later act was to sell outright the coal and asphalt deposits, much of which had been leased until 1929, subject to such leases. That was its chief purpose. Everything else was incidental. As part of this chief purpose, it provided elaborately for an appraisement of the mineral deposits, just as the Act of 1912 had provided for the appraisement of the surface

land. There is nothing in the Act of 1918 as to the appraisal of the reserved surface land except in the two words italicized in the following paragraph, taken from § 4:

"Any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at *the appraised value* any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior."

This paragraph is in the middle of § 4, a section devoted to saving the rights of the lessees of the coal and asphalt deposits from impairment by the sale of such deposits contemplated by the act. It was entirely natural, as such reservation of the surface had been made to preserve the mining opportunities of the lessees under the Act of 1912, that now that it was hoped that the lessees would buy the leased deposits outright under the act, as we may judge from the provision giving them preferential rights to do so contained in the same section, provision should also be made to secure them permanent ownership of that which the Secretary had deemed necessary for their mining under the leases. These privileges extended to the lessees show clearly that this act is *in pari materia* with all the previous legislation concerning these mineral lands, both as to surface and deposits, and especially with the Act of 1912 as to the surface. This is confirmed by the proviso in § 4 that "nothing herein contained shall be construed as limiting or curtailing the rights of any lessee or owner of mineral deposits from acquiring additional surface lands for mining operations as provided by the Act of Congress of February 19, 1912."

There is nothing in the Act of 1918 expressly or impliedly authorizing the Secretary to order a reappraise-

ment of the surface land. There is no appropriation for the purpose.

If by the words quoted from § 4 of the act it was intended to authorize a new appraisement of the surface reservations, the language would not have been "*the*" appraisement but "*an*" appraisement. The use of the definite article means an appraisement specifically provided for. Such an appraisement of the minerals was provided for in the Act of 1918 and this is mentioned in the same sentence in which "*the* appraisement" of the surface land is referred to. Construing the Acts of 1912 and 1918 together, the appraisement can only refer to that so elaborately provided for in 1912.

Second. We think that the preferential right of relator conferred by § 4 of the Act of 1918 was not to be left to the legal discretion of the Secretary in the construction of that act. There are no words to qualify that which the lessee has as a right granted by the statute, or to vest in the Secretary the final discretion to determine or define that right.

Section 7 of the Act of 1918 provides that when the full purchase price for any property sold hereunder is paid, the chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser an appropriate patent conveying to the purchaser the property so sold. This is language of command, and brings the case within *Lane* v. *Hoglund*, 244 U. S. 174, and the many cases cited there, and in which this Court quotes from its opinion in *Roberts* v. *United States*, 176 U. S. 221, 231, as follows:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases

make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer." See also *Work* v. *United States ex rel. Mosier,* 261 U. S. 352.

The decree of the Court of Appeals of the District of Columbia is

Affirmed.

AMERICAN STEEL FOUNDRIES *v.* ROBERTSON, COMMISSIONER OF PATENTS, AND SIMPLEX ELECTRIC HEATING COMPANY.

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

No. 291. Argued April 19, 1923.—Decided May 21, 1923.

1. Under § 9 of the Trade Mark Act, which provides that an applicant for registration of a trade-mark, if dissatisfied with the decision of the Commissioner of Patents, may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for a patent, and that "the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable," a party whose application for registration of trade-mark has been rejected by the Commissioner and the Court of Appeals, has the remedy by bill in equity granted to unsuccessful applicants for patent by Rev. Stats., § 4915. P. 212.
2. *Held,* that the District Court for the Northern District of Illinois had jurisdiction of this suit, against the Commissioner of Patents and an intervening party, to determine the plaintiff's right to have a trade-mark registered.

Reversed.

51826°—23——14

APPEAL from a decree of the District Court dismissing a bill for registration of trade-mark, for lack of jurisdiction.

Mr. George L. Wilkinson, with whom *Mr. Henry M. Huxley* was on the brief, for appellant.

Mr. Solicitor General Beck and *Mr. Assistant Attorney General Lovett* submitted the case without brief or argument, on behalf of the Commissioner of Patents, appellee.

Mr. Nathan Heard for Simplex Electric Heating Company, appellee.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a direct appeal under § 238 of the Judicial Code from a decree of the District Court of the United States for the Northern District of Illinois dismissing a bill in equity. The District Judge certifies that the motion to dismiss the bill was sustained solely for lack of jurisdiction.

The bill was filed by the appellant, the American Steel Foundries, against the Commissioner of Patents to secure an adjudication that the appellant is entitled to have its trade-mark "Simplex" registered and authorizing the Commissioner of Patents to register the same. The Commissioner appeared as defendant and by stipulation the Simplex Electric Heating Company was allowed to intervene as the real party in interest. The bill averred that the American Steel Foundries had duly filed an application in the Patent Office for the registration, that the Examiner of Trade Marks had refused the application, that the Commissioner of Patents had affirmed this refusal, and that, on appeal, the Court of Appeals of the District of Columbia had affirmed the action of the Commissioner, that a petition for certiorari had been filed in this Court and granted, and that thereafter the cause

was dismissed by this Court for lack of jurisdiction, on the ground that the decree of the Court of Appeals was not a final one.

The appellant then filed this bill under § 9 of the Trade Mark Act of February 20, 1905, c. 592, 33 Stat. 724, and § 4915, Rev. Stats. The intervener based its motion to dismiss on the lack of jurisdiction "over the subject matter or alleged cause of action," and the motion was granted without opinion.

Section 9 of the Trade Mark Act reads as follows:

"Sec. 9. That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the court of appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for a patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable."

Section 4915 of the Revised Statutes reads as follows:

"Sec. 4915. [Patents obtainable by bill in equity.] Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the

Commissioner to issue such patent on the applicant filing in the Patent-Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The question in this case is whether the closing words of § 9 "and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable", are broad enough in their scope to include the "remedy by bill in equity" granted to unsuccessful applicants for a patent in § 4915.

In *Gandy* v. *Marble*, 122 U. S. 432, an unsuccessful applicant for a patent who had carried his application by appeal to the Supreme Court of the District, which was dismissed on its merits January 30, 1880, on May 3, 1883, filed a bill in equity in the District Supreme Court under § 4915 against the Commissioner of Patents. That court dismissed the bill on the ground that the applicant had failed to prosecute his application within two years after the dismissal of his appeal from the Commissioner by the Supreme Court of the District, basing it on § 4894 of the Revised Statutes, reading as follows:

"Sec. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

This section applies to proceedings in the Patent Office and before the Commissioner, and it was pressed upon this Court that it could not apply to such an independent

proceeding as the bill in equity provided for in § 4915. But this Court held that § 4894 did apply. Mr. Justice Blatchford, speaking for the Court, admitted (p. 439), following *Butterworth* v. *Hoe,* 112 U. S. 50, 61, that the proceeding by bill in equity, under § 4915 "intends a suit according to the ordinary course of equity practice and procedure, and is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits," but continued, "yet the proceeding is, in fact and necessarily, a part of the application for the patent." He summed up the conclusion of the Court as follows (p. 440):

"The presumption of abandonment, under § 4894, unless it is shown that the delay in prosecuting the application for two years and more after the last prior action, of which notice was given to the applicant, was unavoidable, exists as fully in regard to that branch of the application involved in the remedy by bill in equity as in regard to any other part of the application, whether so much of it as is strictly within the Patent Office, or so much of it as consists of an appeal to the Supreme Court of the District of Columbia under § 4911. The decision of the court on a bill in equity becomes, equally with the judgment of the Supreme Court of the District of Columbia on a direct appeal under § 4911, the decision of the Patent Office, and is to govern the action of the Commissioner. It is, therefore, clearly a branch of the application for the patent, and to be governed by the rule as to laches and delay declared by § 4894 to be attendant upon the application."

This view of the intimate relation of the bill in equity allowed in § 4915 to the application for a patent and the practice and procedure provided in due course thereof is of much assistance in giving proper scope to the words of § 9 of the Trade Mark Act. After making provision for

an appeal to the District Court of Appeals from a simple refusal of registration, and from decisions of the Patent Office in three different kinds of adversary proceedings therein in respect of such registration, on complying with the conditions required in case of an appeal from refusal of a patent or a decision in a patent interference proceeding, the words are "and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable." If the bill in equity of § 4915 is only a part of the proceeding for an application for a patent as held in *Gandy* v. *Marble,* it is no straining of the language to make these words include a bill in equity for the registration of a trade-mark. This Court has taken exactly this view in *Atkins & Co.* v. *Moore,* 212 U. S. 285. In that case it was held that a decision of the Court of Appeals of the District of Columbia affirming the decision of the Commissioner of Patents refusing registration of a trade-mark on an appeal under § 9 of the Trade Mark Act was not a final judgment of the Court of Appeals which could be appealed to this Court, and in the argument to show that it was not, Chief Justice Fuller, who spoke for the Court, said (p. 291):

"Under § 4914 of the Revised Statutes no opinion or decision of the Court of Appeals on appeal from the Commissioner precludes 'any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question,' and by § 4915 a remedy by bill in equity is given where a patent is refused, and we regard these provisions as applicable in trade-mark cases under § 9 of the Act of February 20, 1905."

This language is quoted with approval in the opinion of this Court in *Baldwin Co.* v. *Howard Co.,* 256 U. S. 35, in which it was held that there could be no review in this Court, by appeal or certiorari, of a decision of the District Court of Appeals in respect to the registration of a trade-mark under § 9 of the Trade Mark Act.

It is pressed upon us, however, that this language in *Atkins & Co.* v. *Moore* and in *Baldwin Co.* v. *Howard Company,* was not necessary to the conclusion in those cases and is to be regarded as *obiter dictum.* It was used *in arguendo* and was the unanimous expression of the Court in both cases. It may be that the conclusion that the decision of the Court of Appeals was not final and appealable to this Court could have been reached without this argument; but, however this may be, the construction put by the Court on § 9 is most persuasive and follows so clearly from the decision in *Gandy* v. *Marble,* that we find no reason to question its correctness.

An argument has been made to us against giving such an effect to § 9 based on the intrinsic differences between the nature of the patent right, and that in a trade-mark. We do not regard such differences as important in interpreting § 9 when it is obvious from that section and the whole of the Trade Mark Act that Congress intended to produce a parallelism in the mode of securing these two kinds of government monopoly from the Patent Office.

The decree of the District Court is reversed and the case is remanded for further proceedings.

CURTIS, COLLINS & HOLBROOK COMPANY *v.* UNITED STATES.

(And Twenty-three Other Cases.)

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

No. 341, and Nos. 342–364. Argued April 9, 10, 1923.—Decided May 21, 1923.

1. Where stockholders of a corporation, imposing no safeguard other than that the paper titles should be passed on by a reputable attorney, entrusted another stockholder, who was also vice president and active manager of the company, with the business of

procuring title to lands, to be patented under the Timber and Stone Act, for which he was to be paid a stated sum per acre, and where lands were so procured, by means of frauds on the act, of which the person thus acting as agent for all had knowledge, and by means of conveyances from the fraudulent entrymen to a naked trustee and from the trustee to the corporation, *held,* that the knowledge of the agent was imputable to the corporation and all its shareholders, and that the defense of *bona fide* purchaser was not available to the corporation in a suit by the United States to annul the patents because of the fraud. P. 221.

2. Where an agent employed to procure titles to land, procures it, contrary to his instructions, through a fraud practiced on the owner, the fact that the agent has an adverse or independent interest in that, having a share in the adventure, his own profits will increase with the number of titles procured, cannot save his principal from imputation of the agent's knowledge in a suit by the landowner to set aside the conveyances because of the fraud. P. 223. *American National Bank* v. *Miller,* 229 U. S. 517, distinguished.

3. The defense of *bona fide* purchaser is an affirmative one, and the burden of sustaining it rests upon the party who asserts it. P. 225.

275 Fed. 670 and 674, affirmed.

In November, 1912, the United States filed seventy-nine bills in the District Court of the United States for the Northern District of California, seeking to set aside patents for land in the Susanville land district in California, issued by it under the Timber & Stone Act (Act of Congress, June 3, 1878, c. 151, 20 Stat. 89, as amended by Act of August 4, 1892, c. 375, § 2, 27 Stat. 348), to various patentees and by them conveyed to one Gregory, and by him to the Curtis, Collins & Holbrook Company, a corporation of California, on the ground that the patents had been obtained by fraud. The entries were filed and the patents were issued in the last six months of the year 1902, and shortly thereafter. The cases were consolidated into groups, were referred to a Master who reported at length, finding that, as to the seventy-nine patents, only twenty-four had been obtained in fraud of the United

States and in violation of the statute, but that as to all of these, the Curtis, Collins & Holbrook Company was a *bona fide* purchaser for value without notice of the fraud. The District Court sustained the findings of the Master and dismissed the bills. The United States then prosecuted appeals as to the twenty-four patents whose issue had been found by the Master to have been obtained by fraud, to reverse the finding by the Master and the District Court, that the Curtis, Collins & Holbrook Company was a *bona fide* purchaser without notice of the fraud. The Circuit Court of Appeals of the Ninth Circuit, to which the appeals were taken, found with the Government on this issue, reversed the decree of the District Court in the twenty-four cases, and remanded them with direction to cancel the patents. The Curtis, Collins & Holbrook Company has now prosecuted appeals to this Court in all these twenty-four cases, under § 241 of the Judicial Code. The parties, as the Master did below, selected as a typical case, of the twenty-four cases in which fraud was found, the patent issued to one Edward L. Cooksey. That has been argued in this Court, with the understanding that the other twenty-three cases are to abide the decree in this, because the facts, so far as notice of the fraud is concerned, are substantially the same.

In 1901, persons owning lands within the limits of the National Forests, could convey them to the United States and select in lieu thereof, and secure title by patent to, timber lands belonging to the United States outside of the forest reservations. One Tuman and C. H. Holbrook agreed to seek capitalists and induce them to purchase lands in forest reservations and exchange them for timber land outside. Tuman was a cruiser who had prepared a list of desirable lieu lands which could be selected. In December, 1901, Holbrook made a contract with Curtis and Collins by which he agreed to sell to them at $7.50 an acre forty-two thousand acres of timber land in Cali-

fornia—described in a schedule—title to which Holbrook was to obtain by conveying to the United States lands of the same amount in National Forest reservations. The forest reservation lands were to be conveyed to Thompson, trustee, by the owners, who were to be paid upon request of Holbrook and on an attorney's certificate of title, not exceeding $5.00 an acre, to be paid by the Bank of California out of a fund of $200,000 deposited with it by Curtis and Collins. The trustee was then to make application for the lieu lands described in the list and when he had acquired title he was, upon notice from Holbrook that he had been paid, to convey to Curtis and Collins or to anyone to whom they directed. After the title to the whole amount had been acquired, Holbrook was to receive the balance of the price for the lands amounting to more than $115,000, partly in cash and promissory notes and in 789 shares of stock in a corporation of California to be formed with 5,000 shares of $100 par value each, to which the lands were to be conveyed. Curtis and Collins were to receive 3,156 shares, 1,844 shares remaining in the treasury, out of which Holbrook's shares were to be taken. Holbrook was to be a director and vice-president and general manager. If Holbrook could not secure the whole of the 42,000 acres from the forest reserve rights, he was given the right to obtain it through any other legal means or source.

Holbrook and his son, with Tuman's assistance, procured the whole 42,000 acres in lieu of forest reservation lands. Holbrook reported to Curtis and Collins that forest reservation lands had become scarce and expensive and suggested that there were valuable timber lands which could be secured under the Stone & Timber Law *ubi supra*. Under this law, land belonging to the United States, valued chiefly for timber or stone, and unfit for cultivation, in quantities not exceeding 160 acres, could be sold to a citizen of the United States at a minimum

price of $2.50 an acre. But any person seeking such land was required to file with the register of the proper district a written statement, under oath, in duplicate, setting forth a number of necessary facts concerning the land and also that he "has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself."

Curtis and Collins accepted Holbrook's suggestion as to the Stone & Timber Law, and it was orally agreed that about 30,000 acres should be thus acquired and that Holbrook was to be paid $10.00 an acre. The entries in this and the other twenty-three cases were procured by agents of Tuman, who made entries under an agreement to convey the lands to anyone he might direct, he paying all the expenses and $100 for each entry, and the entrymen making false oaths in violation of the statute. The land thus entered was conveyed by the entrymen to one Gregory whose name was used with his consent as trustee by Tuman and Holbrook. Gregory neither paid nor received any money and merely acted as a conduit for the titles. All the stone and timber entries were filed in the last six months of 1902, and the deeds to Gregory were made soon after proof by the entrymen, but were not recorded until 1904. The Curtis, Collins & Holbrook Company was organized in accord with the terms of the original contract, August 14, 1902, the incorporators being J. G. Curtis and his son, D. G. Curtis, T. D. Collins and his son, E. S. Collins, Charles H. Holbrook, and his son, Charles H. Holbrook, Jr., and Irving

F. Moulton. Gregory conveyed to this corporation the interests conveyed to him by the entrymen at different times up to 1904, but none of the deeds to the corporation was recorded until October, 1909, and some were not recorded until 1910 and 1911.

Curtis and Collins lived in Pennsylvania but they, together with Tuman and Holbrook, went out to look at the lands in 1902, after the contract was made. D. G. Curtis, who was treasurer of the Company, also frequently went upon the lands. Young Curtis testified that he talked much with Holbrook who managed the Company and did everything in connection with the acquisition of these lands by it and that they all had the utmost confidence in his getting them good titles.

Tuman and Holbrook fell out as to the division of the profit between them. Collins, Sr., effected a compromise whereby Tuman received 200 shares in the Company and $10,000 cash; and after this litigation was begun Collins paid Tuman $750 a share for this stock, although it was twice what it was worth as Collins admitted. Tuman was a witness and testified that he told Holbrook what he had done in procuring the entries to be made and in paying expenses and the $100 apiece to the entrymen, and there was evidence strongly tending to show that the money used to pay these expenses came from an account in a San Francisco bank, opened by Holbrook in the name of Collins and Holbrook, upon which checks were drawn in favor of an account in Holbrook's name in a bank at Susanville upon which Tuman drew checks for this work. There was no evidence that Collins knew of the San Francisco account in the name of Collins and Holbrook. There was evidence that in 1904 and 1906, land office agents were investigating the validity of entries made as to other lands suspected of having been sold in advance to the Curtis, Collins & Holbrook Company, and that Tuman, Holbrook and Collins talked over

the matter, and that Collins agreed they were lost and " that was all there was to it."

Mr. Charles A. Shurtleff, with whom *Mr. Robert B. Gaylord* and *Mr. Morris R. Clark* were on the brief, for appellant.

Mr. S. W. Williams, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Riter* were on the brief, for the United States.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the Court.

The Circuit Court of Appeals attached importance to the conduct of Collins toward Tuman and the compromise made between him and Holbrook, to his willingness to abandon other titles secured by Holbrook when questioned, and to the long delay in recording the deeds to the Company (*Linn & Lane Timber Co.* v. *United States,* 236 U. S. 574, 576) as suspicious circumstances indicating a consciousness on the part of the capitalists in the Company that the titles of the Company to the lands here in question were vulnerable because of the practices of Holbrook and Tuman. Without minimizing the significance of these circumstances, we put our concurrence in the decree of the Circuit Court of Appeals on the other ground stated by that court.

While the contract of December, 1921, called it a sale of 42,000 acres of forest reservation lieu lands by Holbrook to Curtis and Collins, we think that in the light of all the circumstances, it was rather a contract of agency and joint adventure by which Holbrook was to procure the land for his principals at a stipulated profit for himself, they to furnish the money with which he could make the purchases for them. Even if the written contract

would not bear this construction, the practical construction by the parties justifies it; and this is especially true of the subsequent oral contract under which the additional 30,000 acres of stone and timber land was to be purchased. The title to the land was never put in Holbrook, or in Curtis and Collins. Through a naked trustee, it was conveyed directly from the entrymen to the Company. The whole procedure under the Stone & Timber Act was entrusted by Curtis and Collins to the initiation and execution of Holbrook as the manager and vice president of the Company, in which Curtis and Collins had three-fifths interest, and Holbrook had one-sixth. The only safeguard imposed was that a reputable attorney was to pass on the paper title. The Company was in being and under the active management of Holbrook when these entries were being made and final proof submitted. Holbrook knew of the fraud practiced on the Government in making the entries, because Tuman says that he told him, and the circumstances as to the payment of money for expenses and bonuses out of moneys furnished by Holbrook confirms his complicity in it.

Under these circumstances, we do not think the Company can be treated as a *bona fide* purchaser. It is charged with Holbrook's knowledge because he was the sole actor for the Company in procuring the fraudulent patents. It sufficiently appears that young Curtis, the treasurer of the Company, and Curtis and Collins, the capitalists, understood the difference there was between the procedure and limitations attending the acquisition of title to lands under the Forest Reservation Act and under the Stone & Timber Law, and that they depended wholly on Holbrook to secure a good title under the latter act.

The general rule is that a principal is charged with the knowledge of the agent acquired by the agent in the course of the principal's business. Here the business was

the acquisition of land patented by the Government under the Stone & Timber Act. The Company and all its stockholders were charged with notice of any facts impairing the titles, of which in securing them, Holbrook was advised. In other words, the Company in taking over the titles took them *cum onere*. *Hovey* v. *Blanchard,* 13 N. H. 145; *Warren* v. *Hayes,* 74 N. H. 355; *Atlantic Cotton Mills* v. *Indian Orchard Mills,* 147 Mass. 268, 273; *Bank of New Milford* v. *Town of New Milford,* 36 Conn. 93, 101; *Holden* v. *New York & Erie Bank,* 72 N. Y. 286, 294; *First National Bank* v. *Dunbar,* 118 Ill. 625, 632; *Fouche* v. *Merchants National Bank,* 110 Ga. 827, 848; *Wilson* v. *Pauly,* 72 Fed. 129, 135; Mechem on Agency, 2d ed., Vol. 2, § 1818.

Appellants seek to avoid the application of this principle by asserting an exception to it when the agent's attitude is one adverse in interest to that of the principal, because of which it can not be inferred that the agent would communicate the facts against his own interest to his principal. The case relied on to establish this exception is that of *American National Bank* v. *Miller,* 229 U. S. 517. In that case one who was president of a bank at Macon, Georgia, owed his own bank $3,000, and paid it by a check on a Nashville bank in which he was a depositor, but which he owed $50,000. The Nashville bank received the check from the Macon bank for collection and then credited the Macon bank with the amount and sent a letter advising the Macon bank. The president of the Macon bank was insolvent and a petition of involuntary bankruptcy was filed against him the day his check was credited by the Nashville bank. The Nashville bank sought to charge off the credit to the Macon bank on the ground that that bank was chargeable with notice of its president's insolvency. We held that such knowledge could not be imputed to the Macon bank merely because the president knew it, for the reason that it was not to be

inferred that he would communicate such knowledge to his own bank.

We do not think the case applicable here. The president of the Macon bank was engaged in something in which his interest was plainly independent of any agency of his on behalf of his bank. His payment of his note was his own business, and not the bank's as his principal. In the case at bar, Holbrook was the sole agent acting for the Company in securing titles to land for it. It is true that the more titles he got the more profit he would make out of the agency, and we may assume that as between him and the Company in securing fraudulent titles for the Company, he was violating his instructions; but he and the Company were in a common adventure, and if the Company insists on retaining the fruits of that adventure, it must be charged with the knowledge of the agent through whom the fruits came. The interest of Collins, Curtis and Holbrook in the acquisition of the titles was common. Curtis and Collins knew exactly how far Holbrook's interest was adverse to theirs, but trusted him in the joint enterprise notwithstanding. The adverse interests as between them in sharing the fruits of the common business can not enable the Company to retain its share and repudiate the agent with all he knew. This view is sustained by the authorities above cited; it was taken by the Circuit Court of Appeals and we concur in it.

Appellant relies on the cases of the *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, and *United States* v. *Clark*, 200 U. S. 601, to justify the plea of *bona fide* purchase in this case. The facts in those cases were different from the facts in the case before us. In the *Detroit Company Case*, there was no question of agency at all. It was the purchase by one company from another and it was sought to charge the purchasing company with knowledge of the vendor's violations of the statute by

assuming that if the purchaser had looked into its books it might have inferred something irregular. The Court held that there was nothing to put the purchaser on such an inquiry. In the *Clark Case,* Clark bought outright from Cobban by direct warranty deeds lands patented under the Stone & Timber Act. It did appear that Cobban had negotiations with Clark before Cobban acquired title to some of the land, and it further appeared that Clark lent money to Cobban secured by mortgage on land and timber owned by Cobban to enable him to buy additional land. But this Court and the two lower courts held that Clark and Cobban dealt at arm's length. We found expressly that the claim that Cobban was Clark's agent broke down.

These two cases were seemingly relied upon by the Master and the District Court to show that the defense of *bona fide* purchaser is not an affirmative defense, the burden of sustaining which is on the defendant; but such a construction of those cases is refuted by the express ruling of this Court in *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397.

We think the case before us comes within the class of cases of which *McCaskill Co.* v. *United States,* 216 U. S. 504, and *United States* v. *Kettenbach,* 208 Fed. 209, 219, are instances.

Decree affirmed in this and the other twenty-three cases.

WAGNER ELECTRIC MANUFACTURING COMPANY *v.* LYNDON ET AL.

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

No. 738. Motion to dismiss submitted April 30, 1923.—Decided May 21, 1923.

1. Where the District Court dismissed a bill on the ground that the constitutional questions relied on were too unsubstantial to confer jurisdiction, without passing on defendant's further objection that the bill sought to enjoin proceedings in a state court contrary to Jud. Code, § 265, the only appeal allowed by law was to this Court under Jud. Code, § 238, on the ground that the sole issues involved were those involving the application or construction of the Constitution or the jurisdiction of the District Court. P. 230.
2. The Act of September 14, 1922, c. 305, 42 Stat. 837, providing that, if a case is taken, by appeal or writ of error, to the Circuit Court of Appeals, which should have been taken to this Court, the appeal or writ of error shall not for that reason be dismissed, but shall be transferred to the proper court and there be disposed of as if the appeal or writ of error had been properly taken, was applicable to a case in which the Circuit Court of Appeals had rendered a final decree of affirmance before the date of the act, but which remained pending before that court on a petition for rehearing. P. 230.
3. When a case from the District Court which should have been brought here directly was taken to the Circuit Court of Appeals, and then, by appeal from its decision, to this Court, and here submitted for decision on the merits, by a motion to dismiss or affirm and accompanying briefs, *held*, that it was not necessary to remand it to the Circuit Court of Appeals for transfer under the Act of September 14, 1922, *supra*, but that it might be treated as though it had been so transferred. P. 231.
4. The proposition that, in a collateral attack upon the validity of a judgment of a state court, a federal court can examine the evidence to see whether a direction by the court to a jury to find a verdict was justified by the evidence, is frivolous. P. 231.

5. The deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. P. 232.
6. When the state constitution provides that a court shall consist of four judges and that a majority thereof shall constitute a quorum, and review by four judges is given, and an opinion is rendered by three of them, constituting the quorum, the mere fact that the fourth did not hear the oral argument but wrote the opinion on the printed arguments, is at most an irregularity which does not affect the validity of the judgment. P. 232.
7. Where the state constitution provided for a court in two divisions, and a case was disposed of by one of those divisions, and the losing party's motion to transfer the case to the court in banc, because a federal question was involved and it was therefore under the state constitution entitled to a hearing by the full court, was denied, and the propriety of the decision in the state court was questioned in the federal court on this ground, *held*, that the question of the right to the transfer was one of state law upon which the federal courts were bound to accept the decision of the state court. P. 232.
8. When the history of the case and the conduct of the appellant left no doubt that the litigation and successive appeals were prosecuted solely for delay and the case was dismissed by this Court for lack of jurisdiction because the grounds of appeal were frivolous, the appellee was awarded $1,500 as damages for delay, and costs, as upon an affirmance of the decree of the District Court. Rev. Stats., §§ 1010, 1012. P. 232.

Appeal to review 282 Fed. 219, dismissed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decision of the District Court which dismissed the bill in a suit to hold a sheriff as trustee of money paid under an execution issued on a judgment of a state court, and to enjoin him from paying it to the judgment creditor, Lyndon, and the latter from receiving it.

Mr. Charles A. Houts, Mr. Albert Blair and *Mr. Thomas J. Cole* for appellant.

Mr. Lawrence C. Kingsland, Mr. John D. Rippey and *Mr. Clarence T. Case* for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a motion to dismiss or affirm by the appellees in an appeal from the decree of the Circuit Court of Appeals of the Eighth Circuit.

The record discloses the following:

On May 10, 1917, the appellee Lamar Lyndon brought suit in the Circuit Court of the City of St. Louis, Missouri, against the appellant, the Wagner Electric Manufacturing Company, to recover royalties on a patent owned by Lyndon alleged to be due under a contract between the parties. A trial before a jury was had, in which evidence was introduced by both sides, and at the close of all the evidence, the court directed a verdict for the plaintiff, and judgment followed for $12,029.50. The Wagner Company appealed from this judgment to the Supreme Court of Missouri, where it was duly assigned for hearing in Division No. 1 of that court under a provision of the constitution of Missouri that the Supreme Court shall consist of seven judges and shall be divided into two divisions, one to consist of four judges known as Division No. 1, a majority thereof to constitute a quorum and its judgments as to causes and matters before it to have the force and effect of law. On January 21st, the appeal was argued before three of the judges of Division No. 1, and printed arguments were filed by both parties. Judgment was subsequently rendered by the four judges, the opinion being written and filed, with the concurrence of the other three judges, by Judge Woodson of the Division. Judge Woodson had not heard the oral argument. The Wagner Company filed a motion for rehearing and a motion to transfer the cause to the court *in banc,* which were denied.

The Wagner Company then applied to this Court for a writ of certiorari to review the judgment of the Mis-

souri Supreme Court, which was denied in April, 1921. *Wagner Electric Mfg. Co.* v. *Lyndon*, 256 U. S. 690. Thereafter on a mandate from the Supreme Court of Missouri, the State Circuit Court issued execution against the Wagner Company on the judgment. The sheriff made a levy on the real property of the Wagner Company, which filed a bill in the United States District Court for the Eastern District of Missouri, against Lyndon and the sheriff, seeking an injunction against their proceeding with the execution. Application for a preliminary injunction on this bill was denied by the District Court. The Wagner Company then paid the judgment and costs amounting to $15,015.29 to the sheriff, and at once brought the present bill in the United States District Court against Lyndon and the sheriff seeking to hold the sheriff as trustee in his custody of the fund, and to enjoin him from paying the money to Lyndon, and Lyndon from receiving it. The jurisdiction was asserted on the ground that the case was one arising under the Constitution of the United States. The District Court heard the case and dismissed the bill. The Wagner Company then appealed to the Circuit Court of Appeals which affirmed the decree of the District Court.

The grounds urged in behalf of the relief sought in the District Court, the Circuit Court of Appeals and this Court were, first, that the action of the Circuit Court of St. Louis in directing a verdict for plaintiff without evidence to warrant such action, deprived the defendant, the Wagner Company, of its property without due process of law and denied it the equal protection of the laws; second, that the action of Division No. 1 of the Missouri Supreme Court in hearing the case on appeal with three judges and allowing a fourth, who did not hear the oral argument, to take part in the decision and write the opinion, and the refusal of Division No. 1 of the Supreme Court of Missouri to transfer the cause to be heard by

the Supreme Court *in banc,* as required by the law of Missouri when a federal question is involved, deprived the Wagner Company of its property without due process of law and denied it the equal protection of the laws.

Defendant Lyndon moved to dismiss the complaint because the court was without jurisdiction, there being no substantial federal question and because the bill sought an injunction to stay proceedings in a state court contrary to § 265 of the Judicial Code. The District Court dismissed the bill on the first ground. No other questions were presented to the District Court. The only appeal from its decision allowed by law was, therefore, to this Court under § 238, on the ground that the sole issues involved were those involving the application or construction of the Constitution or the jurisdiction of the District Court. *American Sugar Refining Co.* v. *New Orleans,* 181 U. S. 277–281; *Huguley Mfg. Co.* v. *Galeton Cotton Mills,* 184 U. S. 290, 295; *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73; *Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U. S. 453, 458; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305, 318; *Raton Water Works Co.* v. *City of Raton,* 249 U. S. 552, 553. Such a case could not be taken to the Circuit Court of Appeals and, except for legislation enacted by Congress September 14, 1922, it would have been the duty of that court to dismiss it for want of jurisdiction. Except for that legislation, it would now be our duty to reverse the decree of that court with direction to dismiss the appeal. *The Assessors* v. *Osbornes,* 9 Wall. 567, 575; *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 388–389; *Blacklock* v. *Small,* 127 U. S. 96, 105; *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305, 318; *The Carlo Poma,* 255 U. S. 219, 220–221.

The legislation of September 14, 1922, referred to (42 Stat. 837, c. 305), provides that if an appeal or writ of error has been or shall be taken to, or issued out of any

circuit court of appeals in a case wherein such appeal or writ of error should have been taken to, or issued out of, the Supreme Court, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, where it shall be disposed of as if the appeal or writ of error had been properly taken.

The decree of affirmance in the Circuit Court of Appeals was entered on July 7, 1922, but a petition for rehearing was filed and that petition was not denied until September 18, 1922, or four days after the passage of the foregoing act. Before the decree of affirmance became finally the act of the Circuit Court of Appeals, this law came into force, and, however that may be, it is in force now to govern us in the direction which we, in reversing the decree of affirmance, should give to that court. That direction should be to transfer the case to this Court to which it should have been brought by direct appeal from the District Court under § 238 of the Judicial Code.

The case is here on an appeal allowed by a judge of the Circuit Court of Appeals. The case has been submitted to us on the motion to dismiss or affirm which is a hearing on the merits. All parties have filed briefs. Is it necessary for us to go through the idle form of remanding it to the Circuit Court of Appeals to enable that court to transfer it back to us for a second consideration? Certainly such unnecessary consumption of time and labor is not in the spirit of the Act of September 14, 1922. Having the case here, and having heard it on the merits, we think we may properly consider that done which ought to have been done, treat the case as here by appeal from the District Court, and dispose of it, as we would do if the Circuit Court of Appeals had formally transferred it to us.

The only grounds urged by the appellant for a reversal of the decree dismissing the bill of complaint are frivolous and without merit. The first involves the proposition that in a collateral attack upon the validity of a judgment

in a state court, a federal court can examine the evidence to see whether a direction by the court to a jury to find a verdict was justified by the evidence. This would be to make such an attack serve the purpose of a writ of error. More than this, even if it were held that the direction deprived the defendant of the right of trial by jury (a holding shown to be erroneous by *Treat Manufacturing Co.* v. *Standard Steel & Iron Co.*, 157 U. S. 674), still the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. *Walker* v. *Sauvinet*, 92 U. S. 90; *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Twining* v. *New Jersey*, 211 U. S. 78, 110, 111; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, 217. The second ground is equally unsubstantial. The machinery for review of the judgments of courts of first instance is wholly within the control of the state legislature—*Missouri* v. *Lewis*, 101 U. S. 22, 30—and when the review by four judges is given, and an opinion is rendered by three of them, constituting the quorum, the mere fact that the fourth did not hear the oral argument but wrote the opinion on the printed arguments is at most an irregularity which does not in the slightest degree affect the validity of the judgment. The contention that Wagner was entitled under the Missouri constitution to have the cause heard before a full court because a federal question was involved, is wholly without merit, because the question of the right to transfer was a question of Missouri law upon which we are bound to accept the decision of the Missouri courts. *Missouri* v. *Lewis*, 101 U. S. 22.

We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the federal jurisdiction and the successive appeals have been prosecuted solely for delay. Have we power to impose damages in this case?

Section 1010 of the Revised Statutes provides as follows:

"Sec. 1010. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

Section 1012 has the effect to make § 1010 applicable to appeals in equity. The second paragraph of the 23rd Rule of this Court provides that:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment."

The third paragraph is:

"The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court."

An objection to allowing damages in the present case suggesting itself is that the decree appealed from was not a money judgment. It is true that this whole litigation in the federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the 23rd Rule. Sections 1010 and 1012, Rev. Stats., are, however, not so restrictive and they give this Court power to impose just damages upon the affirmance of any judgment or decree, for delay. *Gibbs* v. *Diekma,* 131 U. S. Appendix clxxxvi.

The case should be dismissed for lack of jurisdiction because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed just as if upon an affirmance. *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 109.

We think that damages of $1,500 for delay are not excessive in this case. We, therefore, direct the dismissal

of the appeal with damages of $1,500 and the taxation of costs as upon an affirmance of the decree of the District Court.

Dismissed.

GRAHAM, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* DU PONT.

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

No. 846. Argued April 30, 1923.—Decided May 21, 1923.

1. Under § 3224, Rev. Stats., federal taxing officers who, in the course of general jurisdiction over the subject-matter, have made an assessment and claim that it is valid, cannot be enjoined from collecting the tax upon the ground that the assessment is illegal. P. 254.
2. One who would contest the validity of a federal tax upon the ground that the assessment and the right to distrain were barred by a statutory time limitation, should pay the tax and sue to recover it, and not seek relief by a suit to enjoin the Collector from distraining for the tax. P. 255.
3. Under § 252 of the Revenue Act of 1918, reenacted in the Revenue Act of 1921, a taxpayer whose return of income was due March 15, 1916, and against whom an additional assessment was made December 31, 1919, could pay the amount of the assessment, make his claim therefor, and, if that were rejected, have at least until March 15, 1921, within which to sue to recover back the payment. P. 256.
4. A taxpayer cannot, by delaying payment of an assessment until his right to sue to recover it back is barred by limitations, make a case so extraordinary and entirely exceptional as to render Rev. Stats., § 3224, inapplicable to his suit to enjoin collection by distraint. P. 256. *Lipke* v. *Lederer*, 259 U. S. 557; *Hill* v. *Wallace*, *id.* 44, and other cases distinguished.
5. A taxpayer, whose income return for the year 1915 was filed before March 15, 1916, and who was assessed additionally, December 31, 1919, and, on March 8, 1920, filed a claim for abatement

of such assessment as void, because not made within the statutory time limit therefor and because made on a dividend of corporate shares which were not income (involving a question afterwards determined adversely in *United States* v. *Phellis*, 257 U. S. 156,) *held*, entitled under § 252 of Revenue Act 1921, and § 3226, Rev. Stats., as amended by Revenue Act of March 4, 1923, c. 276, 42 Stat. 1504, to pay the tax assessed, bring suit to recover it back, and, in such suit to raise questions as to the value of the stock, and the amount of resulting tax, and also as to whether the assessment was barred by statutory time limitation. P. 258.

284 Fed. 1017, reversed.

This is a proceeding by certiorari to review the action of the Circuit Court of Appeals of the Third Circuit in affirming on appeal a temporary injunction granted by the District Court of Delaware restraining the then Collector of Internal Revenue for the District of Delaware from levying a distraint against the property of the complainant, Alfred I. duPont, to collect the sum of $1,576,015.86 assessed against him by the Commissioner of Internal Revenue.

In a reorganization of a Dupont Powder Company of New Jersey and the organization of a new Dupont Powder Company of Delaware to take over many of the assets of the old company, the complainant in the year 1915 received 75,534 shares of the common stock of the Delaware Company of the par value of $100 each. The transaction was the subject of consideration by this Court in *United States* v. *Phellis*, 257 U. S. 156, where it was determined that shares in the Delaware Company received by stockholders of the New Jersey Company, as the complainant received his, at the rate of two in the Delaware Company in exchange for one in the New Jersey Company, was a separation of past accumulation of profits from the capital of the New Jersey Company and a distribution to the stockholders, and thus constituted taxable income under the Income Tax Law of 1913.

The complainant filed a return and an amended return

in March, 1916, of his income for the year 1915, in which he did not include these shares. In November, 1917, the Department began an investigation into the liability of the complainant to pay an income tax on his shares of stock in the Delaware Company and finally ordered an assessment of $1,576,015.86. The complainant was notified of this assessment made December 31, 1919. He replied the next day that as his return for 1915 was filed before March 15, 1916, and as the law required any assessment for additional amount to be made within three years, and that period had expired, the assessment and demand for payment were illegal. On February 2, 1920, a hearing was granted to counsel for complainant by the Commissioner of Internal Revenue.

On March 8, 1920, complainant filed a claim for the abatement of the assessment of $1,576,051.86 as void because made after the limitation of three years had expired and because the tax was on something that was not income under the law.

Thereafter by agreement between the stockholders similarly situated, one stockholder, Phellis, paid the tax due under a similar assessment and brought suit in the Court of Claims to recover it. Counsel for the complainant herein took part in the argument of that case. The Court of Claims gave judgment against the United States, but on appeal the judgment was reversed. The opinion of the Court was handed down November 21, 1921. All claims for abatement had been held and not decided by the Commissioner under an agreement with the counsel in the *Phellis Case*. Thereafter the Commissioner rejected complainant's claim for abatement. The bill of complaint was filed January 30, 1922. The District Court granted the temporary injunction. The Circuit Court of Appeals on appeal affirmed the temporary injunction for the reasons stated in the opinion of the District Court.

Mr. Solicitor General Beck, with whom *Mr. Nelson T. Hartson* and *Mr. Chester A. Gwinn* were on the briefs, for petitioners.

The suit in this case has for its purpose the restraining of the collection of a federal tax, and it cannot be maintained.

The only relief prayed for in the bill was injunction to restrain the collection of the tax. It is true that there was a general prayer for relief, but any relief given under a general prayer must be agreeable to the case made by the bill. *Allen* v. *Pullman's Palace Car Co.,* 139 U. S. 638, 662. In this instance respondent sought a preventive remedy only.

If § 3224 had never been enacted, it is possible that the collection of a federal tax might be restrained in cases where the remedy at law is doubtful, although from an examination of the cases arising prior to its enactment, it appears that the United States courts were unanimous in holding that the collection of a federal tax could not be restrained by injunction, regardless of the absence of any express legislative enactment inhibiting such relief. *Roback* v. *Taylor,* 4 Int. Rev. Rec. 170; *McGee* v. *Denton,* 5 Blatchf. 130; *United States* v. *Pacific R. R.,* 4 Dill. 66.

Since the enactment of § 3224 (originally § 10, Act of March 2, 1867, c. 169, 14 Stat. 475), the District and Circuit Courts have had occasion to construe and apply it in many cases, and it may be said without fear of successful contradiction that there can not be found in the federal reports to-day a single decision standing unreversed or unmodified where injunction has been granted to restrain the collection of a federal tax.

On the other hand, the cases are practically unanimous in holding that the inhibition of § 3224 applies to all assessments of taxes made under color of their offices by internal revenue officers charged with general jurisdiction

of the subject of assessing taxes. *Snyder* v. *Marks,* 109 U. S. 189, 193; *Pacific Whaling Co.* v. *United States,* 187 U. S. 447; *Corbus* v. *Alaska Gold Mining Co.,* 187 U. S. 455; *Dodge* v. *Osborn,* 240 U. S. 118; *Dodge* v. *Brady,* 240 U. S. 122; *Bailey* v. *George,* 259 U. S. 16.

This Court will not confuse the case at bar with the recent cases of *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Corporation* v. *Wardell,* 260 U. S. 386, in which the collection of *penalties* under § 35 of the National Prohibition Act was restrained, or with *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, and *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, which were suits by stockholders against the corporation in which they held stock.

Nor does *Hill* v. *Wallace,* 259 U. S. 44, support this suit, because this Court sustained that case as a stockholders' suit against a corporation to restrain the payment of so-called "taxes," adjudged to be beyond the taxing power under the Constitution, and therefore within the rule laid down in the *Pollock* and *Brushaber Cases.* This Court held that the statute laying the taxes in the case of *Hill* v. *Wallace* was not a taxing act, but an act to regulate grain exchanges. The exaction was not, therefore, strictly speaking, a "tax," nor had there been any assessment by the Commissioner of Internal Revenue or attempt by the collector of internal revenue to collect an assessment. The effect of the decision was not, therefore, to restrain the collection of a tax.

The effect of § 3224, Rev. Stats., as construed and applied by this Court, may be summed up as follows: If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection can not be restrained by injunction. *Cheatham* v. *United States,* 92 U. S. 85; *State Railroad Tax Cases,* 92 U. S. 575; *Snyder* v. *Marks,* 109 U. S. 189; *Pacific Whaling Co.* v. *United States,* 187 U. S. 447; *Corbus* v. *Alaska*

Gold Mining Co. 187 U. S. 455; *Dodge* v. *Osborn,* 240 U. S. 118; *Dodge* v. *Brady,* 240 U. S. 122; *Bailey* v. *George,* 259 U. S. 16.

Respondent's remedy at law was plain, adequate, and complete, and was not, and is not, barred by any provision of the Revenue Act of 1921, or any other statute.

The District Court was clearly right in denying plaintiff relief on the grounds: (1) That the assessment was illegal and invalid in that it was not made within three years after the due date of the return; *Eliot National Bank* v. *Gill,* 210 Fed. 933; *Penrose* v. *Skinner,* 278 Fed. 284; *Snyder* v. *Marks,* 109 U. S. 189; (2) that the amount of the assessment was larger than it should have been; *Phellis* v. *United States,* 56 Ct. Clms. 156; *Snyder* v. *Marks,* 109 U. S. 189; Rev. Stats., § 3224; (3) that the assessment constituted a cloud upon respondent's title to his lands; Rev. Stats., § 3224; *Dodge* v. *Osborn,* 240 U. S. 118; (4) that the enforcement of the assessment and demand would result in great hardship to respondent. *Calkins* v. *Smietanka,* 240 Fed. 138; *Markle* v. *Kirkendall,* 267 Fed. 498.

The reason assigned by the District Court, absence of adequate legal remedy, gives no effect whatever to § 3224, but attempts to decide the case on general principles of equity. Furthermore, it is incorrect.

Section 252, Revenue Act 1921, did not bar respondent from his remedy at law; and, even if it did, the bar has been removed by the amendment of March 4, 1923.

The court below held that the first proviso of § 252 constituted a bar to respondent's remedy at law because more than five years had elapsed since the due date of the income-tax return, and the tax was still unpaid; therefore, if respondent had paid the tax after such five years, he could not have claimed a refund because, under the first proviso of § 252, the Commissioner of Internal Revenue was not authorized to allow a credit or refund after such five years.

The construction of the court below was contrary to the contemporaneous construction of the Department at the time the bill was filed, which was later published in T. D. 3416, approved December 16, 1922.

But the previous construction is immaterial now, because by the amendment of March 4, 1923, Congress has authorized the Commissioner to allow a refund or credit in any case where the claim is filed within two years after the payment of the tax, even if the payment is more than five years after the due date of the return.

Section 250 (d), Revenue Act 1921, does not bar the collection by distraint after, if the assessment is made before, the expiration of five years after the date when the return was filed. Section 1320 of that act, cited in the opinion of the court below, does not apply to income taxes.

Distraint is not a "proceeding" within the meaning of § 250 (d) to the effect that "no suit or proceeding for the collection of any such taxes . . . shall be begun, after the expiration of five years after the date when such return was filed." The "proceeding" referred to therein is obviously a judicial proceeding.

This Court indicated by its language in *Dodge* v. *Osborn,* referring to § 3224, that there might possibly arise a case where "by some extraordinary and entirely exceptional circumstance its provisions are not applicable." Such a case had apparently not come to the attention of this Court up to the time of its decision in *Dodge* v. *Osborn,* but the kind of case it evidently had in mind was such as *Lipke* v. *Lederer,* 259 U. S. 557, where this Court held that the exaction was not a "tax," and that § 3224 did not apply. Such a case might also arise where an unauthorized person attempts without color of office or of law to enforce distraint for the collection of an alleged tax; but it can never apply in a case like the one at bar, where the tax in some amount was indisputably due under a decision of this Court, *United States* v. *Phellis,* 257

U. S. 156; the amount of the assessment was correct under a decision of the Court of Claims, *Phellis* v. *United States,* 56 Ct. Clms. 157; the assessment was made by the Commissioner of Internal Revenue and claimed by him to be correct; and the collection was attempted by a method prescribed by law and by an officer authorized by law to make such collections. *Snyder* v. *Marks,* 109 U. S. 189; *Kensett* v. *Stivers,* 10 Fed. 517.

Mr. William A. Glasgow, Jr., with whom *Mr. Henry P. Brown* was on the brief, for respondent.

The alleged assessment under authority of which the distraint is proposed to be made, is without authority of law, illegal and void. The threatened seizure and sale of respondent's property will be illegal and invalid, unless the tax claimed has been duly and properly assessed and the threatened proceedings are authorized by statute. *Williams* v. *Peyton,* 4 Wheat. 77; *Early* v. *Doe,* 16 How. 610; *Ronkendorff* v. *Taylor's Lessee,* 4 Pet. 349; 37 Cyc. 1231.

Under the Income Tax Act of 1913, § E, 38 Stat. 169, and Rev. Stats., § 3176, as amended by that act, 38 Stat. 179, the assessment was illegal because: (1) The only return alleged by petitioners to have been made upon behalf of respondent, was not made until July, 1919, or thereafter. (2) The alleged return relied upon by the petitioners was not such a return as was contemplated by the act, as it was not made by the persons designated or in the manner prescribed. (3) The assessment was not based upon the alleged return. (4) The assessment was not made until December, 1919.

The Commissioner not only failed to comply with the requirements of the law, but was without any jurisdiction whatever to make that assessment at the time that it was made. Under these circumstances the assessment is not merely irregular but void. *Ogden City* v. *Armstrong,* 168 U. S. 224.

It follows that there is no basis for any summary proceedings by distraint to enforce payment of the additional tax claimed by the petitioners.

The petitioners' contention that the three-year period referred to in § E, Act of 1913, relates merely to the time within which the discovery of the omission of income must be made is erroneous; the period relates to the time within which the Commissioner must file a return.

Under their construction, if any error was discovered by the Commissioner within three years, he would have had authority at any time thereafter, no matter how remote, to make a return and assessment and proceed to collect the tax by summary process. His authority to proceed by summary proceedings, would not necessarily be determined by any matter of record, but would depend entirely upon whether he or his predecessor in office had knowledge of the error within the three-year period. The burden would be upon the taxpayer to disprove such knowledge and this whether the Commissioner was alive or dead or otherwise unobtainable as a witness. Thus every case wherein a return was filed after the three-year period would necessarily involve the question of fact as to whether the alleged error had been discovered within said period by the Commissioner then in office. *Woods* v. *Llewellyn,* 252 Fed. 106; *Eliot National Bank* v. *Gill,* 218 Fed. 600; *Penrose* v. *Skinner,* 278 Fed. 284; Montgomery's Income Tax Procedure, ed. 1922, p. 196, footnote 17.

The threatened distraint would be in violation of the express inhibition of § 250 (d), Revenue Act 1921.

On January 30, 1922, when this proceeding was instituted, more than five years had expired since March 1, 1916, when respondent's return was filed, and a distraint or seizure of his property at that time would have constituted a "proceeding" within the inhibition of that section.

That this is the proper construction of its provisions appears unmistakably from the fact that they forbid a determination and assessment after the five year period "unless both the Commissioner and taxpayer consent in writing to a later determination, assessment and collection of the tax." In other words, it was recognized by Congress that consent to merely a determination and assessment of the tax after the five year period would be futile, because even if the tax should be thus determined and assessed, its collection would still be impossible because of the provisions forbidding the commencement of "any suit or proceeding for the collection" of the tax after the five year period. In order to make the consent of the taxpayer effective, therefore, it was provided that it should relate not only to the determination and assessment of the tax but to its collection.

That the phrase "proceeding for the collection of any such taxes" as used in § 250 (d) contemplates a collection by distraint, is also evidenced by other provisions of the Revised Statutes. See §§ 3190, 3187, 3196, 3197, 3207. These designate the proceedings which are available to the Collector for the collection of a tax, and are obviously contemplated by the inhibition of § 250 (d) against any "proceeding for the collection of any such taxes."

Congress could have had no reasonable object in prohibiting, after the five year period, such a suit as is contemplated by § 3207, while allowing a distraint or seizure after that period under §§ 3187 and 3196. Likewise, if, as petitioners claim, Congress had intended to impose no time limit upon the right of the Government to collect a tax by distraint, provided an assessment had been made within five years from the time the tax was due, it is difficult to understand why, in a case where such an assessment had been made, Congress expressly prohibited the collection of such tax by suit after the expiration of said period.

The remedy of distraint has always been the customary method employed to collect taxes, and it has been only in very exceptional cases that the Government has ever resorted to suit. What purpose could Congress have had in mind in depriving the Government of an extraordinary remedy rarely used, while leaving unaffected the customary proceeding by distraint? The obvious intention of Congress was to protect the taxpayer. But what possible reason could there be for protecting him against procedure almost never employed by the Government, if no protection was to be afforded him against the usual and ordinary method of proceeding by distraint?

Also, under the theory advanced by the petitioners, the words "or proceedings" would have comprehended only that which would be included in the ordinary definition of the word "suit," and would, therefore, have been mere surplusage.

The provisions of § 250 (d) which require determination and assessment of the tax within the five-year period, obviously relate to the functions of the Commissioner and impose restrictions upon his authority; while it is equally apparent that the provisions which enjoin any suit or proceeding for the collection of the tax after the prescribed period, relate to the functions of the Collector and are intended to impose restrictions upon his authority to collect taxes which have been assessed by the Commissioner, regardless of the method of collection adopted.

Moreover, while we contend that the limitation imposed by § 250 (d) applies whether or not there has been an assessment, we also take the position, already explained, that the assessment relied upon by the petitioners is illegal and void and that the situation is the same as though no assessment had been made. If this contention is correct, it is immaterial whether or not distraint is contemplated by the word "proceeding", as neither assessment nor distraint would have been made within the five-year period.

We submit, therefore, that the express language and obvious purpose of § 250 (d), was to afford the honest taxpayer, after the expiration of the five-year period, protection against the institution of any proceedings whatever, whether by distraint or otherwise, which have for their object the collection of a tax, and regardless of whether there had or had not been an assessment.

We also submit that the foregoing argument demonstrates the correctness of our first principal proposition, that a distraint by the petitioners for the purpose of collecting the additional income tax claimed to be due from respondent for the year 1915, would be without authority of law and in violation of express statutory inhibition.

Section 3224, Rev. Stats., does not preclude the respondent from equitable relief.

The "extraordinary and entirely exceptional circumstances" referred to in *Hill* v. *Wallace*, 259 U. S. 44, consisted of the fact that failure to pay the tax would subject the taxpayer "to heavy penalties" and that recovery of the amount paid by the Board of Trade "would necessitate a multiplicity of suits and, indeed, would be impracticable."

In the present case the "extraordinary and entirely exceptional circumstances" making § 3224 inapplicable are as follows: (1) The Commissioner had no jurisdiction to make the assessment relied upon and the assessment was, in consequence, void. (2) Section 3224, when construed in connection with § E of the Act of 1913 and with § 250 (d) of the Act of 1921, does not forbid equitable relief under circumstances such as exist in the present case. (3) Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate.

We have already shown that the Commissioner had no jurisdiction to make the assessment. The following cases show that under such circumstances § 3224 has no appli-

cation: *Ledbetter* v. *Bailey,* 274 Fed. 375; *Polk* v. *Page,* 276 Fed. 128; *Page* v. *Polk,* 281 Fed. 74 (reversed on another aspect); *Nichols* v. *Gaston,* 281 Fed. 67; *Frayser* v. *Russell,* Fed. Cas. No. 5,067; *Ogden City* v. *Armstrong,* 168 U. S. 224.

The foregoing cases show that § 3224 is applicable when the injunctive relief prayed for is dependent upon mere errors or irregularities in the assessment which do not go to the foundation of the tax. In such cases it may be properly said that provided the assessment is made under color of their offices by proper government officials charged with general jurisdiction of the subject of assessing taxes, the taxpayer is remitted to his legal remedy if there be one. When, however, it is no mere error or irregularity in the assessment, which is complained of, but upon the contrary a complete want of jurisdiction in the Commissioner to make the assessment and the assessment is in consequence void, § 3224, is not applicable.

It may be said of the federal tax system, as it was said in effect, in *Ogden City* v. *Armstrong, supra,* in reference to the laws of Utah, that the system prescribed by the United States with respect to the collection and refund of taxes, is intended to apply in all cases where the tax is properly assessed and collected, or where there is a mere irregularity or error in the assessment or collection which does not go to the foundation of the tax. But that, where the assessment and, in consequence, the tax is wholly void and illegal, the statutes and their remedies for errors and irregularities have no application.

Section 3224, Rev. Stats., when construed in connection with § E, Revenue Act 1913, and with § 250 (d), Revenue Act 1921, does not forbid equitable relief under circumstances such as exist in the present case.

As already shown, § E of the Act of 1913, authorizes assessment, in the case of "false" returns, within three years after the return was due, while § 250 (d) of the

Revenue Act of 1921, expressly prohibits "any suit or proceeding for the collection" of the tax after five years from the date the return was filed. These provisions were enacted for the purpose of protecting the taxpayers against assessment and against any summary proceeding instituted to collect the tax, after the three and five years periods had elapsed. Can the petitioners successfully maintain that it was the intention of Congress that the taxpayer should be without any means of availing himself of this protection in case the government officials chose to disregard the statutory limits imposed upon their authority?

Unless the respondent is entitled to equitable relief, he can in no way obtain the protection intended to be afforded him by Congress and the statutory limitations imposed upon the authority of the Commissioner and Collector would be meaningless. Unless the Court may exercise its restraining influence in such a case as the present, there would be, in effect, no limitation upon the period during which an assesment or distraint might be made.

Such a result, so manifestly opposed to the intention of Congress, may be avoided by reading § 3224, and the Acts of 1913 and 1921, together and in the light of the authorities already cited. When so construed, § 3224 applies when the complaint is of some mere error or irregularity in the proceeding or an improper exercise of discretion upon the part of a government official, but does not forbid relief when the threatened distraint is not only based upon a void assessment but is also expressly forbidden by statute.

Revised Statutes, § 3224, provided that no injunction shall issue to restrain the assessment or collection of any tax, and by a later statute (Act of 1921) it is provided that no suit or proceeding shall be begun for the collection of any taxes after the expiration of five years after the

date when the return was filed. It would seem obvious that the only way to enforce the provisions of the Act of 1921 would be by injunction if the Collector undertook to violate its provisions, and therefore § 3224 and the Act of 1921, should be read together, and in a case where the limitation bars the officer's right to proceed, it should be held that the provisions of the Act of 1921 supersede § 3224.

Unless the respondent is afforded equitable relief, he will be without legal remedy or such remedy would be inadequate, for the following reasons:

(a) The right given to the respondent by § E, Revenue Act 1913, to be protected against assessment after the expiration of the three-year period, and the right given him by § 250 (d), Revenue Act 1921, to hold his property free from seizure and distraint after five years from the date when his return was filed, cannot be enforced in a court of law.

(b) There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit.

(c) Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold.

The statutory provisions in question confer upon the taxpayer a substantial right, the right to hold his property free from seizure and distraint after the five year period, and the only way in which the respondent may enforce this right and obtain the protection intended to be afforded him by § 250 (d), is by asserting the provisions of that section as a bar to the collection of the tax.

Moreover it would appear that the only right given to the taxpayer by that section, is the right to oppose the collection of the tax after the five year period, and that if this right cannot be successfully asserted as a bar to collection, it becomes ineffective for any purpose whatever.

for it is at least extremely doubtful whether such right as is given by § 250 (d) could be made the basis of a suit by a taxpayer to recover the amount of a tax which has been collected. In such a suit the Government would contend that its *right* to the tax was not impaired by § 250 (d), and that that section relates solely to remedy and gave the taxpayer merely a personal defense which he had been unable to successfully interpose to the collection of the tax.

As against the threatened distraint proceedings, the only way in which respondent may interpose the right or defense afforded by § 250 (d) is by a proceeding in equity.

A like argument applies to the enforcement of the right given respondent by § E, Revenue Act 1913, to be protected against assessment after the three year limitation.

There is no statutory provision under which the respondent may file a claim for refund, which is a condition precedent to the institution of suit. Section 3226, Rev. Stats., as amended by Revenue Act 1921, provides that no suit or proceeding shall be maintained for the recovery of any tax, " until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof." Section 3228, as amended by the Act of 1921, is the only statute under which a claim for refund may be filed which will afford a basis for a suit and this section does not apply to a claim for refund of taxes paid under the Revenue Act of 1913.

Assuming, for argument's sake, that a legal remedy would be available to the respondent, it would be inadequate to compensate him for the loss of his freehold. *Ogden City* v. *Armstrong*, 168 U. S. 224.

We submit, therefore, that the present case falls within the category of extraordinary and exceptional cases which

have been held by this Court not to be within the inhibition of § 3224, Rev. Stats.

It is submitted that there is not the slightest similarity between the facts in *Snyder* v. *Marks*, 109 U. S. 189, and those in the present case. Moreover, in that case, this Court held that § 3224 forbids injunctive relief only when the tax claimed "is in a condition to be collected as a tax," and that "the list shows a tax which the appellant might be liable to pay, and one which the commissioner had general jurisdiction to assess against him," (109 U. S. at 192, 193), whereas in this case the claim is for a tax which the collector is expressly forbidden to attempt to collect by any "suit or proceeding."

In discussing the technical legal points of the present case, one is apt to lose sight of the substantive merits of the respective positions of the parties.

The facts show that the alleged return is not in proper form, nor made by the proper official; it was not made within three years from March 1, 1916; the alleged assessment relied upon was not even based upon the alleged return, and was likewise made after the three years period, and the tax claimed is based on a valuation of the stock far in excess of its real value.

In addition to this, we have the Act of 1921, expressly forbidding the collector from proceeding either by distraint or suit to collect any tax after five years from the date when the return was filed.

Regardless of these facts, we have the spectacle of a United States government official insisting that although his threatened actions are in express violation of statutory inhibition, they cannot be enjoined because of a technical construction of § 3224, Rev. Stats. According to his contention, he must, therefore, be permitted to collect the tax by distraint, although Congress has declared that he shall not, and respondent must be left to discover by long and tedious legal process whether or not there is any legal

remedy by which he may obtain any redress for a wrong committed in violation of express statutory inhibition.

Mr. Solicitor General Beck in reply:

The amount of the tax due to the United States from the respondent cannot be determined in a suit for injunction to restrain the collection of the assessment.

The assessment of the tax made by the Commissioner of Internal Revenue in December, 1919, was legal and its collection by distraint was not barred by § 250 (d), Revenue Act 1921, or any other statute.

Viewed either in the light of the limitation contained in § II E of the Income Tax Act of October 3, 1913, under which the tax was assessed, or under § 250 (d), Revenue Act of 1918, if applicable, the assessment of the Commissioner was made within the statutory period and was a legal assessment. The assessment was made within five years and was therefore within the limitation prescribed by the later act. Whether the Act of 1918 applied only to taxes imposed thereunder may be an open question. The return was due and was made March 1, 1916, and the assessment was made on the December, 1919, list. The assessment in this case was made under the Income Tax Act of 1913, § II E.

By the word "false," contained in § II E, is not meant "fraudulent," but merely untrue or incorrect. *Woods* v. *Llewellyn,* 252 Fed. 106; *Eliot National Bank* v. *Gill,* 210 Fed. 933; 218 Fed. 600; *National Bank* v. *Allen,* 223 Fed. 472; *United States* v. *Nashville & St. Louis Ry. Co.,* 249 Fed. 678. In any event the failure of the respondent to make a return of the income in question was a "refusal or neglect." Fraud is not essential. Respondent's return for the year 1915 was untrue and incorrect in the light of the decision of this Court in the *Phellis Case.*

Under § II E of the 1913 Act, if the discovery of the falsity of the return was made within three years the assess-

ment could be made at any time thereafter. *Eliot National Bank* v. *Gill,* 218 Fed. 600; *Penrose* v. *Skinner,* 278 Fed. 284. This agrees with the departmental construction of the Act of August 5, 1909, and the Act of October 3, 1913, and such has been the continuous and uniform construction of the Department ever since the enactment of said statutes.

Respondent raises other questions, such, for example, as that § II E of the Income Tax Act of 1913, requires a "return on information" to be made by the Commissioner, and that the return in this case was not (*a*) in the prescribed form, (*b*) made by the Commissioner himself or the collector or deputy collector, but was made by a revenue agent, (*c*) made within three years after the due date of the return, and (*d*) did not show the exact amount of tax as was shown by the assessment. These objections to the form and manner of making the assessment are not entitled to consideration in this form of proceeding. At the most, they affect merely the regularity of the assessment.

Nothing could be better settled by the decisions of this Court than that neither the accuracy nor the validity of an assessment of a tax can be determined in a suit for injunction to restrain its collection. *Snyder* v. *Marks,* 109 U. S. 189; *Dodge* v. *Osborn,* 240 U. S. 118; *Pacific Whaling Co.* v. *United States,* 187 U. S. 447.

Distraint for the collection of the assessment would not violate § 250 (d), Revenue Act 1921, and even if it did, the remedy would not be by injunction to restrain the collection of the tax.

The respondent misconstrues § 250 (d). It does not contain a five-year limitation upon the collection by distraint of taxes due and assessed under the Act of 1913. A limitation upon two separate acts is contemplated by it: (1) upon assessment, and (2) upon a "suit or proceeding." The limitation upon judicial remedy is conditioned

upon and a part of the preceding limitation as to assessments.

Congress obviously meant that the Government could have the prescribed period of years to assess the tax, and recognizing the preëxisting law that it could sue to enforce a tax liability even though there were no assessment, it further provided, in order to make its limitation effective, that when the Government had not assessed the tax within the prescribed period it could not sue in the courts, either at common law or in equity, to enforce the unassessed liability of the taxpayer.

If, however, the taxes were assessed within the prescribed period, then the limitation as to a "suit or proceeding" had no application and a suit could be begun at any time.

This construction is in harmony with the entire scheme of taxation, for a tax when assessed has always been a definite liability, and remains a perpetual lien upon the taxpayer's real estate and it was never intended that when a tax was once assessed the taxpayer could escape by a limitation of time. To do this would be to put a premium upon the neglect to pay taxes duly assessed.

An assessment becomes a lien on all the property of the taxpayer under § 3186, and requires no judgment of a court for its satisfaction. An assessment is unnecessary as the basis of a suit to recover taxes, and a suit is unnecessary where there is a valid assessment. To hold that the right to distrain is limited to five years after the due date of the tax, as is the right to assess, would be to destroy the force and effect of an assessment, if made near the end of the five-year period. See Report, Committee on Finance, No. 275, 67th Cong., 1st sess., p. 21, part IV.

The word "proceeding" has been used over and over again by Congress in conjunction with the word "suit" to refer to judicial proceedings and to judicial proceedings alone.

Conceding for the sake of argument that the construction of § 250 (d) is doubtful; even so, the rule in cases of doubtful construction is not that "the doubt is to be resolved in favor of the taxpayer," as stated in respondent's brief, with a quotation from 22 Cyc. 1605. It is only where there is doubt as to whether the statute levies a tax upon a particular person or thing that the doubt has been resolved in favor of the taxpayer by this Court. *Gould* v. *Gould,* 245 U. S. 151. There is no question in this case that the respondent is a taxable person or that the dividends received by him were taxable as income. *United States* v. *Phellis,* 257 U. S. 156. He is seeking exemption from taxation through a technicality, and such exemptions are to be strictly construed against the person claiming the exemption. *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146.

Respondent can pay the tax and file a claim for the refunding thereof under § 252, Revenue Act of 1921, as amended by the Act of March 4, 1923.

Under § 252, as amended, respondent can file a claim for refund or credit within two years after payment of the tax, and if his claim is rejected or held by the Commissioner for six months without a decision, he can commence a suit for the recovery back of the tax under § 3226, Rev. Stats., as amended by § 1318, Revenue Act 1921, and the Act of March 4, 1923. See also T. D. 3462, amending Art. 1039, Regulations 62, Income Tax, 1922 ed.; T. D. 3463, amending Art. 1050, Regulations 63; and T. D. 3457, dated March 17, 1923.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the Court.

Section 3224, Rev. Stats., provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In *Cheatham* v. *United States,* 92 U. S. 85, 88; *State Railroad Tax Cases,*

92 U. S. 575, 613, and in *Snyder* v. *Marks,* 109 U. S. 189, 193, it was said that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures not judicial, to collect them, with appeals to specified tribunals and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares by § 3224 that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assessment and claim that it is valid. This view has been approved in *Shelton* v. *Platt,* 139 U. S. 591; in *Pittsburgh, etc., Ry.* v. *Board of Public Works,* 172 U. S. 32; in *Pacific Steam Whaling Co.* v. *United States,* 187 U. S. 447, 451, 452; in *Dodge* v. *Osborn,* 240 U. S. 118, 121, and in *Bailey* v. *George,* 259 U. S. 16.

The District Court recognized the sweep of these decisions in respect of the contention of the complainant that the assessment of this tax and the threatened distraint to collect it were barred by limitations under the statute, and was of opinion that as a rule such attacks upon the validity of the tax could only be heard and considered after the tax had been paid in a suit to recover it back. In this view we fully concur.

The District Court, however, thought that an exception to the operation of § 3224 must arise when it appeared, as it held it did appear here, that no provision of law existed by which if the taxpayer when he filed his bill for an injunction had paid the tax assessed, he could bring a suit to recover it back because it would be barred by the statutory limitation of time in which such a suit could be brought.

The court based its conclusion on § 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1085, reënacted in the Revenue Act of 1921, c. 136, 42 Stat. 268, which reads as follows:

"If, upon examination of any return of income made pursuant to . . . the Act of October 3, 1913 . . . it appears that an amount of income . . . tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income . . . taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

The return was due March 15, 1916. The assessment was made December 31, 1919. The complainant might then have paid the tax and would have had two years in which to make his claim, and if rejected, to sue to recover it back if, as he now submits, § 252 limited his right to pay and sue to recover. Under such a construction and application of § 252, suit must have been brought on or before March 15, 1921. This is what Phellis did (*United States* v. *Phellis,* 257 U. S. 156) and there was no question raised as to his right to bring the suit in the Court of Claims to recover back the tax paid by him if it had proved to be illegally assessed and collected. Certainly complainant could not, by delaying his payment until his right to sue to recover it back expired, make a case so extraordinary and entirely exceptional as to render § 3224, Rev. Stats., inapplicable.

If it be said that he was waiting for the Commissioner to act on his claim for abatement of the assessment, it is enough to say that the Commissioner's delay until after the decision of the *Phellis Case* in November, 1921, was

due to agreement by the parties. Nor was he prevented from paying the assessment by his claim for abatement.

The cases complainant's counsel rely on do not apply. The cases of *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386, were not cases of enjoining taxes at all. They were illegal penalties in the nature of punishment for a criminal offense. *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U. S. 429, and *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, were suits by stockholders against corporations to restrain the corporations from paying taxes alleged to be unconstitutional. *Hill* v. *Wallace*, 259 U. S. 44, was in part a suit like the foregoing. It was a bill filed by members of the Chicago Board of Trade to prevent the governing board from applying to the Secretary of Agriculture to have the Board of Trade designated as a "contract market" under the Future Trading Act on the ground that the act was unconstitutional and its operation would impair the value of the Board to its members. Without such designation, no member could have sold grain for future delivery without paying a prohibitive tax, and if he sold without paying the tax, he was subjected to heavy criminal penalties. To pay such a tax on each of the many thousands of transactions on the Board, and to sue to recover them back would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured not only the members of the Board but also the producing and consuming public. This phase of the situation was so clear that the Government in effect consented to the temporary injunction. See *Hill* v. *Wallace*, 257 U. S. 310, s. c. 615. Under these extraordinary and most exceptional circumstances, it was held that § 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain

business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional. *Hill* v. *Wallace* should, in fact, be classed with *Lipke* v. *Lederer, supra,* as a penalty in the form of a tax. Certainly we have no such case here.

This conclusion renders it unnecessary for us to consider whether § 252 of the Revenue Act of 1921, in connection with § 3226, Rev. Stats., as amended by the same Revenue Act of 1921, barred complainant's right to pay the tax and sue to recover it back at the time of filing his bill, as held by the District Court. It is certain that by the amendments to § 252 and § 3226, Rev. Stats., by the Act of March 4, 1923, c. 276, 42 Stat. 1504, the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise the questions as to the value of the stock and the amount of the resulting tax and also as to the bar of time against the assessment which he attempted to raise in the bill.

The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court with directions to dissolve the temporary injunction and to dismiss the bill.

Reversed.

DHARANDAS TULSIDAS ET AL. *v.* INSULAR COLLECTOR OF CUSTOMS.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 77. Submitted May 2, 1923.—Decided May 21, 1923.

1. A decision of the duly constituted immigration authorities holding an applicant not of a status entitling him to admission, should not be rejected in *habeas corpus* unless resulting from manifest abuse of power and discretion. P. 263.
2. The right of an alien applicant to be admitted, under the Immigration Act of 1917, as a merchant, does not depend on his pre-

senting a certificate of his status, issued under § 6 of the Act of May 6, 1882, c. 126, 22 Stat. 58, 60, as amended by § 6 of the Act of July 5, 1884, c. 220, 23 Stat. 115, 116. P. 263.

3. To be admissible as a merchant, under the Immigration Act of 1917, an alien must be actually a merchant,—an owner of a business,—not merely a salesman, manager or other employee; and his status as merchant must exist at the time of his application for admission. P. 264.

Affirmed.

CERTIORARI to a judgment of the Supreme Court of the Philippine Islands, which discharged a writ of *habeas corpus* sued out by the petitioners in a court of first instance, to test the legality of their detention, by the respondent, as inadmissible aliens.

Mr. Adam C. Carson, Mr. Hartford Beaumont and *Mr. W. Davis Conrad* for petitioners.

Mr. Grant T. Trent, Mr. Logan N. Rock and *Mr. F. G. Munson* for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Petition in *habeas corpus* in which petitioners pray to be delivered from the custody of the Insular Collector of Customs, by whom they aver that they are detained for deportation from Manila, at which place they are entitled to land and remain under the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, being merchants.[1]

[1] "That the following classes of aliens shall be excluded from admission into the United States: . . . unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia, . . . or who are natives of any country, province, or dependency situate on the Continent of Asia . . . , and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States. The provisions next foregoing, however, shall not apply to persons of the following status or

Petitioners arrived at Manila, September 26, 1919, and were taken before a Board of Special Inquiry formed by the Insular Collector of Customs, constituted of three officers of the Bureau of Customs, duly designated and qualified to serve on such Board at the port of Manila in accordance with law, to determine whether petitioners should be allowed to land, or should be deported.

The right of petitioners to land was considered by the Board separately and decided separately, but for convenience we have considered their applications and the proceedings thereon as joint, and, therefore, it is only necessary, in representation of the applications and the proceedings, to say that the Board after consideration of the applications and the testimony given in support thereof, decided as to Tulsidas that it appeared that he had no business in India, and none in the Philippines, that his passport showed that he was only a salesman, and that it was clear that he was "not a merchant within the meaning of the Immigration Law, and, therefore, not an exempt and entitled to landing." He was refused landing.

The Board also refused landing to Lekhraj and Sukhrani, deciding that they were salesmen, not industrial partners as they claimed to be, of Wassiamall Assomall & Co., but salesmen in that store. The Board further decided that they had no business of their own and that industrial partners were not merchants within the meaning of the Immigration Law.

From the decisions of the Board, petitioners prosecuted appeals to the Insular Collector of Customs and it appearing to him, as he said, that the decisions of the

occupations: . . . merchants, . . . , but such persons . . . who fail to maintain in the United States a status or occupation placing them within the excepted classes shall be deemed to be in the United States contrary to law, and shall be subject to deportation as provided in section nineteen of this Act." [§ 3.]

Board were "reasonable and proper" in that petitioners being natives of India, failed to show that they belonged to any exempted classes under the provisions of § 3 of the Immigration Act of February 5, 1917, he refused them landing, and ordered that they be "returned to their port of embarkation in accordance with law."

It will be observed, therefore, that the officers on whom was imposed the duty of administering the Immigration Law and passing upon the right of an alien applicant to admission into the United States, decided that the petitioners were of the class excluded from admission, and refused them landing.

In question of the legality of that ruling, proceedings were instituted in the Court of First Instance by a petition for *habeas corpus*. To the petition, the Attorney General of the Islands, as representative of the Insular Collector of Customs, and in his official capacity, opposed the decision rendered by the Board of Special Inquiry and the Insular Collector of Customs, and denied the allegations of the petition "except as same may be admitted in, or appear to be true from, the proceedings of the immigration officials in this case."

The Court of First Instance reversed the rulings of the immigration officials and "definitely ordered that the petitioners be placed at liberty."

The court assigned especial probative force to the partnership agreement introduced in the case, "the genuineness of which" the court said was not questioned, according to which the court further said, "the petitioners were admitted as industrial partners of said partnership, the first having a right to fifteen per cent of the profits, the second ten per cent, and the third five per cent." And the court was of the view that "industrial partners" were as much merchants as "capitalist partners."

The Supreme Court of the Philippine Islands to which the case was appealed, revoked the granting of the writ

of *habeas corpus,* and ordered and decreed that the judgment of the Department of Customs ordering deportation of petitioners be affirmed.

The court based its decision on two grounds: (1) Granting that appellees (petitioners) are merchants, they did not present as proof of the fact the certificate issued under § 6 of the Act of Congress of May 6, 1882, c. 126, 22 Stat. 58, 60, as amended by § 6 of the Act of July 5, 1884, c. 220, 23 Stat. 115, 116, which, it is provided, shall be the sole evidence permissible to establish the exemption of an alien from the prohibition of the Immigration Law. (2) The court considered that, independently of the requirement, appellees (petitioners) had failed to show that they were merchants in the country from which they had come, and that was necessary because the law did "not contemplate that aliens who claim to belong to an exempted class, or aliens otherwise prohibited from entering the United States, shall be permitted to enter the territory of the United States to become merchants." And the court construed the partnership agreement as creating a condition or status after landing in Manila,[1] and concluded that, "There is absolutely nothing in the record which shows that the depart-

[1] The partnership agreement recites that it is made the "nineteenth day of September" 1919, between certain parties who are named "to be known as the capitalist partners, parties of the first part" and the petitioners and other parties, "to be known as industrial partners, parties of the second part,

"Witnesseth: That said parties have agreed, and by these presents do agree, to associate themselves as co-partners for the purpose of carrying on the business of buying and selling goods, wares, merchandise and commodities and such commission business as may appertain to the same, in the Philippine Islands to the faithful performance of which they mutually bind and engage themselves each to the other, his executors and administrators:

"1. That the principal place of business and domicile of this copartnership shall be Manila; or at such other place as the business

ment of customs abused its power, authority or discretion in the slightest degree."

The conclusion has pertinent signification, for counsel admit that "under the express provisions of the statute, the decision of a Board of Special Inquiry, such as that now under consideration, is final, when affirmed on administrative appeal", and only to be reviewed upon *habeas corpus* when the administrative officers have manifestly abused the power and discretion conferred upon them.

It would seem, therefore, as if something more is necessary to justify review than the basis of a dispute. The law is in administration of a policy which, while it confers a privilege, is concerned to preserve it from abuse and, therefore, has appointed officers to determine the conditions of it, and speedily determine them, and on practical considerations, not to subject them to litigious controversies, and disputable, if not finical, distinctions. Keeping in mind the admonition of this, we pass to the consideration of the rulings of the officials and the courts.

In the ruling of the Supreme Court that a "Section-Six certificate," as the court and counsel call it, is the prescribed evidence for admission under the Immigration Law, we do not concur, but in the ruling of the court that an applicant for admission as a merchant must be such at the time of his application, we do concur.

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now conducted at said location may hereinafter be transferred by mutual consent, and this contract shall relate to this particular store and business only.

"2. That the business of this co-partnership shall be conducted under the firm name of 'Wassiamall Assomall & Co.'

"3. That the direction, control and management of this partnership is vested solely and exclusively in the parties of the first part, who are hereby granted full power and authority to appoint such manager or managers from the industrial partners as they may deem necessary or proper for the management of the store above mentioned."

The law defines the classes of aliens which shall be excluded from admission to the United States, but provides that the exclusion shall not apply to persons having the "status or occupations" of "merchants." This means, necessarily, having the "status" at the time admission is sought, not a status to come, or to be established. If the latter, what indulgence of time is to be given for its attainment, and how is detriment to the policy of the law while the status is attaining to be prevented, and how terminate the indulgence and the detriment, and execute the law? There can be no answer to those questions consistent with the denial that the status of merchant must exist at the time of application for admission.

The petitioners testified, and upon considering the testimony, we encounter some anomalies—anomalies that strain belief in its truth—certainly repel from acceptance, pretensions which are based upon the confusion of established distinctions between occupations. We have seen, the assertion is that petitioners are industrial partners, and as such Lekhraj testified he was absent from Manila over three years but was an industrial partner in the store of Wassiamall Assomall & Co., during that time—he "only took a rest." Sukhrani put his absence at sixteen months. At the time of his testimony, he said he was "a salesman" but was to become manager.

May we not wonder, in some disbelief, how a salesman or manager, whether his compensation be a salary or a percentage of profits, could have been indulged in absences of such duration?

The confounding of occupations—that of salesman or manager with that of merchant—cannot be accepted. A merchant is the owner of the business; a salesman or manager, a servant of it; and especially so under the Immigration Law. The policy of the law must be kept in mind. It is careful to distinguish between the status of a mer-

chant and those below that status. A merchant is fixed in it and made constant to it by his financial interest, a salesman or manager is but an employee, however else he may be denominated, and may withdraw from his employment at any moment of time and become a competitor in the ranks of labor, using the word in the sense the law implies. So particular is the law in regard to its distinctions and policy that if a merchant descends from his status he shall be "deemed to be in the United States contrary to law, and shall be subject to deportation." And induced, no doubt, by such consideration as well as the distinction in occupations, the Insular officials adjudged that petitioners were not merchants, so adjudged from their knowledge of the conditions obtaining in the Philippines, so adjudged from contact with petitioners, and in estimate of their pretensions. And, necessarily, we should not view the spoken word, nor even the partnership agreement produced in support of the spoken word, separate from that contact and that estimate. And in accepting the adjudication, we do not share the alarm of counsel that it will result in admitting only petty tradesmen, in excluding "the managing partners and directors of great mercantile enterprises. We think rather it will leave the administration of the law where the law intends it should be left; to the attention of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion.

Counsel themselves seem conscious of the exaggeration which made managers and industrial partners of petitioners in a great enterprise, made especially such of a boy nineteen years of age. As to him (Tulsidas), counsel say, though asserting his right to admission, that "there is substantial ground for a contention" that "the writ [*habeas corpus*] should not issue because of the lack of sufficient affirmative evidence in the record in support

of his claim that he is a merchant, and as such entitled to admission to American territory." And further, "as a newcomer to the islands, something more than his own uncorroborated statements as to his status in the country from which he came might fairly and reasonably have been required of him."

We concur with counsel as to Tulsidas and extend the requirement to the other petitioners and hold that instead, as counsel urge, of the Insular officers being obliged to seek confirmation or denial of petitioners' testimony, they, the petitioners, should have produced something more than their own statements of their status as merchants. It was for them to establish their exemption from the prohibition of the law, for them to satisfy the Insular officials charged with the administration of the law. If they left their exemption in doubt and dispute, they cannot complain of a decision against it.

Judgment affirmed.

STEVENS *v.* ARNOLD ET AL., EXECUTORS AND TRUSTEES OF NIRDLINGER.

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

No. 200. Argued May 2, 1923.—Decided May 21, 1923.

1. A suit under 4 N. J. Comp. Stat. p. 5399, to determine title to land, must be dismissed, according to the interpretation of the highest New Jersey court, if the plaintiff fail to show title in himself, even though the defendant set up an independent title, and although the statute provides for a decree conclusively settling the rights of all the parties. P. 268.
2. Dismissal of the bill, in such case, estops the plaintiff from asserting against the same defendant, in a second suit, any ground of title existing at the time of the first suit, especially one that was then waived. P. 268.
3. Such dismissal does not establish the title set up by the defendant; but he may reassert it, by counterclaim, in a second suit

brought by the plaintiff, and, in so doing, does not waive the benefit of the former decree as an adjudication against the plaintiff's title. P. 269.

4. In New Jersey, a grant by the State of land flowed by the tide revokes the license to riparian owners to wharf out or otherwise encroach upon the tract granted, but it does not prevent them from gaining title by accretion, even though the grant be described by metes and bounds. P. 269.

5. Lands formed by accretions of the sea upon a convex shore, *held* bounded, not by lines spreading fan-wise from riparian boundaries but by a city street extending through the accreted tract as shown on a plan adopted before the accretions took place. P. 270.

273 Fed. 1022, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court against the present petitioner, in a suit brought by respondents' decedent to quiet title to a parcel of land.

Mr. Harvey F. Carr for petitioner.

Mr. Robert H. McCarter, with whom *Mr. George A. Bourgeois* and *Mr. Harry R. Coulomb* were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill to quiet title to land in Atlantic City, New Jersey, brought primarily at least under a statute of that State. 4 Compiled Stat. p. 5399. (P. L. 1870, p. 20.) The suit was begun by Samuel F. Nirdlinger and now is maintained by his executors and trustees (the respondents). He owned a parcel lying to the East of New Hampshire Avenue, which runs north and south, and to the north of Oriental Avenue which crosses the other avenue at right angles. The defendant owns an adjoining parcel on the other side of New Hampshire Avenue and the land in controversy is a triangular tract having its apex in the southwestern corner of the complainants' lot

and spreading South of Oriental Avenue and East of New Hampshire Avenue to the sea. It has been formed by accretion in recent years. The defendant claims title by a former adjudication and by a riparian grant from the State. The District Court entered a decree for Nirdlinger after an elaborate discussion, 262 Fed. 591, and its opinion was adopted and the decree affirmed by the Circuit Court of Appeals. 273 Fed. 1022.

The former adjudication relied upon by the defendant was in a suit in the State Court brought against him under the same statute for the same purpose as the present one, by Nirdlinger and the Dewey Land Company from which Nirdlinger afterwards purchased a part of his land. The statute allows a person in peaceable possession of lands, claiming to own the same, whose title is disputed, to bring a suit in chancery against any person claiming an interest, calling upon him to set forth his title. After the issues are tried the decree is to settle the rights of all parties and to be conclusive. The complainants in the chancery suit alleged possession and claimed ownership, at first by accretion but by amendment by virtue of two deeds only. The defendant, as here, set up his riparian grant and a claim by accretion. The Chancellor held that the grant from the State could not be impeached collaterally and dismissed the bill. The Court of Errors and Appeals held this to be error but affirmed the decree on the ground that the complainants showed no title; that the deeds did not give the right claimed and that "all claim by accretion is waived." *Dewey Land Co.* v. *Stevens*, 83 N. J. Eq. 314, 316; *ibid.* 656. It would have been intelligible if the Court had held that the complainants' statement of title was immaterial and that it was enough that they showed possession and a claim of ownership. But it being established that, notwithstanding the claim, if the title disclosed is defective the bill must be dismissed, we think that until the

Court of Errors and Appeals decides otherwise it must be assumed that the decree is conclusive between the parties that at that time the complainants did not own the land. We cannot imagine that the statute contemplated a series of suits based on coexisting titles produced one after another, and especially when the one now relied upon was waived in the earlier case. We assume that the usual rule applies, and that if the claim to own must be justified, all justifications then existing are in issue. It follows that the plaintiffs' bill must be dismissed.

But plainly the claim of the defendant was not established in the former suit. That appears from the nature of the decree, from the opinion of the Court of Errors and Appeals, and from the admitted fact that it subsequently refused to amend its remittitur so as to establish the defendant's right. See also *Dewey Land Co.* v. *Stevens,* 85 N. J. Eq. 374. Therefore the defendant took a proper step and did not waive the benefit of the former decree when in the present case he made a counterclaim and asked that his rights be adjudicated to be paramount. Upon this matter the discussion of the District Court was adequate and convincing, so that the unsatisfactory result will be that neither party can get a declaration of title and the complainants will be left to stand upon their possession alone.

The first ground of the defendant's claim is a grant from the State to the defendant's predecessors in title of land flowed by tidewater at the date of the deed, June 28, 1900, which included the strip in controversy. There seems to be no doubt from the decision of the Court of Errors and Appeals that this grant put an end to the right of the complainants to build wharves or otherwise to encroach upon the granted land, that being regarded as merely a license, revoked by the grant. The defendant contends that the effect was greater still, and relies upon a statement in the decision referred to, that

"if the land was formerly fast land, [as this was said to have been] and the title was lost by erosion, it became the property of the State, not merely as long as it remained under water, but, if the State made a riparian grant, absolutely." This form of statement remained unchanged notwithstanding the criticism in a concurring opinion by White, J., 83 N. J. Eq. 656. But we agree with the District Court that it means no more than we have stated, and is shown to mean no more not only by the authority cited but by the following words in the opinion: "The title lost by erosion was then lost forever, unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss." We presume from this language that in New Jersey as elsewhere by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees, when as here the grantees have not filled in the land. In some countries that inherit the Roman law the rule may be different. *Ker & Co.* v. *Couden,* 223 U. S. 268. We conclude that the conveyance by the State did not give the defendant a title to land added by accretion to the complainants' premises, and that it does not matter that this conveyance was by metes and bounds. The boundaries however indicated were good until changed by the gradual work of the ocean and then were modified in accordance with what we believe to be the common law. *Banks* v. *Ogden,* 2 Wall. 57.

The defendant's other contention is that as the former seashore was convex the dividing lines should spread outward like a fan, and not continue the north and south divisions indicated by the extension of New Hampshire Avenue to the present or recent high-water mark. Without going into the details elaborated by the District Court we agree that since a plan was made in 1852

showing New Hampshire Avenue as extending farther south even than at present the existing street system was adopted and recognized New Hampshire Avenue as the dividing line as well for accretions as for the fixed land. The result is that both the bill and the cross bill must be dismissed.

Decree reversed.
Bill and cross bill dismissed.

HART *v.* B. F. KEITH VAUDEVILLE EXCHANGE ET AL.

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

No. 763. Argued May 2, 3, 1923.—Decided May 21, 1923.

1. A bill in the District Court setting up a claim of federal right should not be dismissed for lack of jurisdiction because the claim is wanting in merit, if it be not wholly frivolous. P. 273.
2. Plaintiff, by a bill brought before the decision of this Court in *Federal Base Ball Club* v. *National League*, 259 U. S. 200, sought an injunction and damages, under the Anti-Trust Act of 1890, against an alleged conspiracy of theatre owners and of corporations engaged, like himself, in the business of getting contracts for vaudeville actors to perform throughout the United States, and of acting as their manager and personal representative, alleging that the business involved contracts not only for travel of performers from State to State and from abroad, but also for transportation of vaudeville acts, including performers, scenery, music, costumes, etc., resulting in a constant stream of commerce from State to State, in which, he claimed, the apparatus transported was not a mere incident, but sometimes more important than the performers. *Held*, that the claim that the case came within the Anti-Trust Act was not frivolous, and that the bill should not have been dismissed by the District Court for want of jurisdiction. P. 274.

Reversed.

APPEAL from a decree of the District Court dismissing, for want of jurisdiction, a bill for an injunction and damages, brought under the Anti-Trust Act.

Mr. Martin W. Littleton, with whom *Mr. Louis B. Eppstein, Mr. Laurence H. Axman* and *Mr. Ira W. Hirshfield* were on the brief, for appellant.

Mr. George Wharton Pepper, with whom *Mr. Maurice Goodman* was on the brief, for appellees.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by one whose business is getting contracts for vaudeville performers to perform in theatres all over the United States and acting as their manager and personal representative. It is brought against a combination of corporations engaged in similar business, and the owners of a large number of theatres known as the Keith Circuit, the owners of others known as the Orpheum Circuit, and some other persons not needing special mention here, who it is alleged are ruining the plaintiff's business by a conspiracy forbidden by the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. An injunction and enormous damages are asked. The bill was dismissed for want of jurisdiction by the District Court on the ground that it did not state a cause of action arising under the Constitution or laws of the United States.

The bill sets out at superfluous length a combination of the defendants to exclude actors from the theatres controlled by them, being practically all the theatres in the United States and in Canada in which high class vaudeville entertainments are produced, and to exclude the managers and personal representatives of actors from the defendants' booking exchange in New York and from business, unless they respectively comply with the defendants' requirements, including the payment of considerable sums. It is alleged that a part of the defendants' business is making contracts that call on performers to travel between the States and from abroad and in con-

nection therewith require the transportation of large quantities of scenery, costumes and animals. Some or many of these contracts are for the transportation of vaudeville acts, including performers, scenery, music, costumes and whatever constitutes the act, so that it is said that there is a constant stream of this so-called commerce from State to State. The defendants contend and the judge below was of opinion that the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that, and therefore that the case is governed by *Federal Base Ball Club* v. *National League*, 259 U. S. 200. On the other hand it is argued that in the transportation of vaudeville acts the apparatus sometimes is more important than the performers and that the defendants' conduct is within the statute to that extent at least.

The jurisdiction of the District Court is the only matter to be considered on this appeal. That is determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not. *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, 203. *Lamar* v. *United States*, 240 U. S. 60. *Geneva Furniture Manufacturing Co.* v. *S. Karpen & Bros.*, 238 U. S. 254, 258. *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25. While appeals to this Court often are dismissed as frivolous, *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 109, 110, the former case expressly and the latter by implication follow and reaffirm *Swafford* v. *Templeton*, 185 U. S. 487, 493, to the effect that when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be dismissed for want of jurisdiction "however wanting in merit" may be the averments intended to

establish a federal right. See also *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S. 265, 275, 276. It is not necessary to draw the line between the foregoing and other cases brought in Courts of the United States to assert a claim under the Constitution that have been ordered to be dismissed below because "absolutely devoid of merit," *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576, 579, beyond confining the latter to those that are very plain. It is enough that we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress, or at least that the claim is wholly frivolous. The bill was brought before the decision of the *Base Ball Club Case*, and it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently. The logic of the general rule as to jurisdiction is obvious and the case should be decided upon the merits unless the want of jurisdiction is entirely clear. What relief, if any, could be given and how far it could go it is not yet time to discuss.

Decree reversed.

EX PARTE: IN THE MATTER OF DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., PETITIONER.

PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS.

No. 27, Original. Argued on return to rule to show cause April 16, 1923.—Decided May 21, 1923.

1. Where the District Court, after due hearing, overruled objections to its jurisdiction and made an interlocutory order, *held*, that a mandamus from this Court was not the proper remedy for correcting its action, if erroneous. *Ex parte Roe*, 234 U. S. 70. P. 275.
2. Prohibition will not issue to forbid the District Court from proceeding with a suit, for want of jurisdiction, when it is not clear that jurisdiction is absent, and when there is no imperative reason

why error, in that regard, should be corrected by prohibition rather than by appeal. *Id.*

Rule discharged; petition denied.

PETITION for mandamus or prohibition to restrain the District Court from entertaining jurisdiction of a suit in admiralty to recover damages from the Director General of Railroads, for a maritime tort.

Mr. T. Catesby Jones, with whom *Mr. James W. Ryan, Mr. Evan Shelby* and *Mr. D. Roger Englar* were on the briefs, for petitioner.

Mr. Mark Ash, with whom *Mr. Edward Ash* was on the briefs, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The petitioner seeks a writ of prohibition or mandamus commanding the judges of the District Court, Southern District of New York, not to take further steps in an admiralty proceeding instituted by the New Jersey Shipbuilding & Dredging Company to recover from him for damage inflicted upon its scow by the Lehigh Valley Railroad Company's steamtug "Mahanoy" while under federal control, or in the alternative to direct vacation of an interlocutory order theretofore entered and dismiss the libel. A rule to show cause issued out of this Court and return has been made showing the relevant facts and circumstances.

The District Court after hearing ruled upon the matters presented for its determination and, under settled doctrine, we can find no occasion for mandamus. *Ex parte Roe,* 234 U. S. 70.

Involved in the cause are questions touching the liability of the Director General of Railroads as Agent designated by the President under the Transportation Act of 1920 for maritime torts committed by vessels un-

der federal control; his power to enter appearance by counsel without prior service of process; and whether in the same proceeding he may take different and antagonistic positions, first as the agent of one railroad system and then of another.

We cannot say the court below was clearly without jurisdiction to determine all the points presented. Moreover, by appeal in the ordinary way possible errors can be corrected; and there is no imperative reason for awarding a writ of prohibition. *Ex parte Gordon,* 104 U. S. 515; *Ex parte Pennsylvania,* 109 U. S. 174; *In re Cooper,* 143 U. S. 472, 495; *In re Morrison,* 147 U. S. 14; *In re New York & Porto Rico S. S. Co.,* 155 U. S. 523; *Ex parte Chicago, Rock Island & Pacific Ry. Co.,* 255 U. S. 273, 275, 280.

The rule to show cause is discharged and the prayer of the petition is denied.

Rule discharged.

STATE OF MISSOURI EX REL. SOUTHWESTERN BELL TELEPHONE COMPANY *v.* PUBLIC SERVICE COMMISSION OF MISSOURI, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 158. Argued December 8, 1922.—Decided May 21, 1923.

1. Rates fixed by state authority for a public utility corporation must be such as will yield a fair return upon the value of its property devoted to the public service. P. 287.
2. What will amount to a fair return cannot be ascertained by valuing the property as of past times without giving consideration to greatly increased costs of labor, supplies, etc., prevailing at the time of the investigation. *Id.*
3. An honest and intelligent forecast of probable future values is also essential, and this cannot be made if the highly important element of present costs be wholly disregarded. *Id.*
4. Rates admitting of a possible return of but 5½%, in net profits after allowing for depreciation, on the minimum value of the prop-

erty of a telephone company, *held* wholly inadequate, considering the character of the investment and the interest rates then prevailing. P. 288.

5. A state commission, in fixing the rates of a public utility corporation, cannot substitute its judgment for the honest discretion of the company's board of directors respecting the necessity and reasonableness of expenditures made in the operations of the company. *Id.*

233 S. W. 425, reversed.

ERROR to a judgment of the Supreme Court of Missouri affirming a judgment of the State Circuit Court, which sustained an order by which the Public Service Commission undertook to reduce the rates of the above-named telephone company and to abolish installation and moving charges.

Mr. Frederick W. Lehmann, with whom *Mr. J. W. Gleed, Mr. Thos. O. Stokes, Mr. Claude Nowlin* and *Mr. E. W. Clausen* were on the briefs, for plaintiff in error.

The value of the property found by the Commission was not its present value, but was its actual cost, or its value in 1913, plus net additions since, its present value being ignored, the value found being far below the present value of the property, with the result that the rates prescribed were confiscatory in their effect and operation. §§ 10511, 10502, R. S. Mo. 1919; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Minnesota Rate Cases,* 230 U. S. 352; *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256; *City Light & Traction Co. of Sedalia,* 8 Mo. P. S. C. 204; *Hurst* v. *Chicago, Burlington & Quincy Ry. Co.,* 280 Mo. 566; *Elizabethtown Gas Co.* v. *Public Utility Commissioners,* 95 N. J. L. 18.

Valuation, though described as tentative, must be as of the date of determination, and rates prescribed, though designated as temporary, must be just and reasonable. §§ 10502, 10511, R. S. Mo. 1919; *Columbia Tel. Co.* v. *Atkinson,* 271 Mo. 28; *Galveston Electric Co.* v. *Galves-*

ton, 258 U. S. 388; *New York Tel. Co.* v. *Prendergast,* U. S. D. C., So. D. N. Y., May 26, 1922; *Potomac Electric Power Co.* v. *Public Utilities Comm.,* 276 Fed. 327.

The findings of the Commission as to the value of the property were made under a mistake of law, are entirely without support in the evidence, and are against the evidence of indisputable character in the case. The rates prescribed by the Commission are therefore without legal effect and void. §§ 10502, 10511 (2), R. S. Mo. 1919; *State Public Utilities Comm.* v. *Toledo, etc., Ry. Co.,* 286 Ill. 582; *Springfield* v. *Springfield Gas Co.,* 291 Ill. 209; *State* v. *Great Northern Ry. Co.,* 135 Minn. 19; *Interstate Commerce Comm.* v. *Union Pacific R. R. Co.,* 222 U. S. 541; *Interstate Commerce Comm.* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88.

The Commission's calculation of expenses was far below what was actually and necessarily incurred in the operation of the property and resulted in a showing of net earnings far beyond what was realized, and, the reduced rates being predicated on such showing, there was a taking and appropriation of the Company's property without due process of law and a denial of the equal protection of the law.

The annual charge for depreciation is estimated by the Commission upon an undervaluation of the property and is entirely inadequate.

Increase in wages made in July and August, 1919, were not taken into full account by the Commission.

The four and one-half per cent payment under the license contract with the American Telephone & Telegraph Company is a legitimate item of expense. *Houston* v. *Southwestern Bell Tel. Co.,* 259 U. S. 318; *Chesapeake & Potomac Tel. Co.* v. *Manning,* 186 U. S. 239; *Interstate Commerce Comm.* v. *Chicago Great Western Ry. Co.,* 209 U. S. 108; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Wisconsin,* 238 U. S. 491; *People ex rel.* v.

Stevens, 197 N. Y. 1; *Bacon* v. *Boston & Maine R. R.,* 83 Vt. 421; *Atlantic Coast Line R. R. Co.* v. *North Carolina,* 206 U. S. 1; *Springfield* v. *Springfield Gas & Electric Co.,* 291 Ill. 209.

Charges for installation, moving, etc., were wrongfully disallowed. § 10218, R. S. Mo. 1919; *Interstate Commerce Comm.* v. *Chicago Great Western Ry. Co.,* 209 U. S. 108; *Smyth* v. *Ames,* 169 U. S. 466; *Interstate Commerce Comm.* v. *Stickney,* 215 U. S. 98.

No question as to division of rates on long distance messages is involved in this suit. *Houston* v. *Southwestern Bell Tel. Co.,* 259 U. S. 318.

The Commission's allowance of 6.81 per cent per annum for return, surplus and contingencies on the tentative value of $20,400,000 did not permit a fair return on the property used in the service.

Mr. L. H. Breuer and *Mr. James D. Lindsay* for defendants in error.

The Supreme Court of Missouri gave to the findings of the Commission no more weight than that of a presumption of right action, and asserted and exercised the right to review the evidence for itself, and to make its own findings of fact, unhampered by the findings of the Commission. § 10522, R. S. Mo. 1919; *Chicago, Burlington & Quincy R. R. Co.* v. *Public Service Comm.,* 266 Mo. 333; *Lusk* v. *Atkinson,* 271 Mo. 155; *Ozark P. & W. Co.* v. *Commission,* 287 Mo. 522.

Upon writ of error to the highest court of the State, this Court will not review the evidence further than to ascertain that the finding of facts by the state court, upon which depends the asserted constitutional right in issue, is supported by substantial evidence. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585; *Truax* v. *Corrigan,* 257 U. S. 312; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655; *Ohio Valley Water Co.* v. *Ben Avon*

Borough, 253 U. S. 287; *Interstate Commerce Comm.* v. *Union Pacific R. R. Co.,* 222 U. S. 541.

The Supreme Court of Missouri found, upon a review of the evidence, that the rates established by the Commission were not confiscatory, nor unreasonable, and that the rates were calculated upon the basis of the fair value of the property of the company, being used and useful in the service of the public. These findings of fact are supported by substantial evidence, are not arbitrary nor capricious, and will not be set aside by this Court upon writ of error. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439; *Louisiana R. R. Comm.* v. *Cumberland Tel. Co.,* 212 U. S. 414; *Portland Ry. Light & Power Co.* v. *Oregon R. R. Comm.,* 229 U. S. 397; *Darnell* v. *Edwards,* 244 U. S. 564; *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 545.

The decision of the highest court of the State, upon a review of all the evidence, sustaining the orders of an administrative commission, which are temporary in effect and duration, and which expressly give to the complainant the right at any time thereafter, without prejudice, to reopen the issues involved, should not be set aside upon review on writ of error, solely because the Court may differ in its view as to where lies the greater weight of the evidence, or the more expedient solution of the administrative issues involved. *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Houston* v. *Southwestern Bell Tel. Co.,* 259 U. S. 318.

There is no constitutional or inherent right in the utility company, on the one hand, or, in the public, on the other, which imperatively demands that the fair value of property devoted to a public service, shall be determined upon estimated cost of reproduction new, either in a time of

abnormally high prices, or in a time of abnormally low prices; and a finding made in view of the various tests of value, supported by substantial evidence, and approved upon judicial review by the highest court of a State, should not be set aside because the state commission and the state court did not approve a valuation made at prices prevailing in an abnormal period; and particularly so, when the findings are tentative, and the rates temporary, and a reopening of the issues is expressly permitted. *Smyth* v. *Ames,* 169 U. S. 466; *Minnesota Rate Cases,* 230 U. S. 351; *Brooklyn Borough Gas Co.* v. *Public Service Comm.,* P. U. R. 1918 F, 335.

A net return of 6.81 per cent is not confiscatory, nor unreasonable; and particularly so, under an order tentative and temporary in character and duration. Federal Control Act, as amended, 40 Stat. 451, §§ 1, 16; Interstate Commerce Act, § 15–a, added by Transportation Act 1920, 41 Stat. 488; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Denver* v. *Denver Union Water Co.,* 246 U. S. 178; *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256.

The disallowance of installation and moving charges is not reversible error, the revenue from other sources not being unreasonably low.

The allowance of such charges was not mandatory upon the Commission. Their allowance or disallowance is a question of expediency or policy of regulation, and not of power, or of undue interference with the management of the property. *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota,* 193 U. S. 53; *Oregon R. R. & Nav. Co.* v. *Fairchild,* 224 U. S. 510.

Mr. Justice McReynolds delivered the opinion of the Court.

The Supreme Court of Missouri (233 S. W. 425) affirmed a judgment of the Cole County Circuit Court

which sustained an order of the Public Service Commission of Missouri, effective December 1, 1919. That order undertook to reduce rates for exchange service and to abolish the installation and moving charges theretofore demanded by plaintiff in error. It is challenged as confiscatory and in conflict with the Fourteenth Amendment.

During the period of federal control—August 1, 1918, to August 1, 1919—the Postmaster General advanced the rates for telephone service and prescribed a schedule of charges for installing and moving instruments. The Act of Congress approved July 11, 1919, c. 10, 41 Stat. 157, directed that the lines be returned to their owners at midnight July 31, 1919, and further—

"That the existing toll and exchange telephone rates as established or approved by the Postmaster General on or prior to June 6, 1919, shall continue in force for a period not to exceed four months after this Act takes effect, unless sooner modified or changed by the public authorities—State, municipal, or otherwise—having control or jurisdiction of tolls, charges, and rates or by contract or by voluntary reduction."

August 4, 1919, the Commission directed plaintiff in error to show why exchange service rates and charges for installation and moving as fixed by the Postmaster General should be continued. After a hearing, it made an elaborate report and directed that the service rates should be reduced and the charges discontinued.

The Company produced voluminous evidence, including its books, to establish the value of its property dedicated to public use. The books showed that the actual cost of "total plant, supplies, equipment and working capital," amounted to $22,888,943. Its engineers estimated the reproduction cost new as of June 30, 1919, thus—Physical telephone property, $28,454,488; working capital, $1,051,564; establishing business, $5,594,816; total $35,100,868. They also estimated existing values

(after allowing depreciation) upon the same date—Physical telephone property, $24,709,295; working capital, $1,051,564; establishing business, $5,594,816; total, $31,355,675.

The only evidence offered in opposition to values claimed by the Company, were appraisals of its property at St. Louis, Caruthersville and Springfield, respectively, as of December 1913, February 1914 and September 1916, prepared by the Commission's engineers and accountants, together with statements showing actual cost of additions subsequent to those dates.

Omitting a paragraph relative to an unimportant reduction—$17,513.52—from working capital account, that part of the Commission's report which deals with property values follows.

"The Company offered in evidence exhibits showing the value of its property in the entire State (outside the cities of Kansas City and Independence, whose rates are not involved in this case), and also at forty-six of its local exchanges in the State. It shows by such exhibits that the value of the property in the entire State (and when speaking of the property in the State in this report we mean exclusive of Kansas City and Independence) is as follows: Reproduction cost new, $35,100,471; reproduction cost new, less depreciation, $31,355,278; and cost as per books, $22,888,943. It also shows the Company's estimate of reproduction cost new, reproduction cost new less depreciation, and the prorated book cost, at each of the forty-six local exchanges mentioned.

"The engineers of this Commission have made a detailed inventory and appraisal and this Commission has formally valued the Company's property at only three of its exchanges, viz: at the City of Caruthersville, reported in re Southwestern Tel. & Tel. Company, 2 Mo. P. S. C. 492; at the City of St. Louis in cases No. 234 and No. 235 as yet unreported; and at the City of Springfield, reported

in re Missouri and Kansas Telephone Company, 6 Mo. P. S. C. 279, and as a result we have only the estimates and appraisals of the Company before us in relation to the value of the property at the other exchanges. We think it is clear, however, from the data at hand that the values placed by the Company upon the property are excessive and not a just basis for rate making.

"The values fixed by this Commission at Caruthersville, St. Louis and Springfield in the cases above mentioned aggregate $11,003,898, while the Company estimates the aggregate cost of reproduction new of these plants in this case at $18,971,011. The ratio of the latter figure is 172.4 per cent. This percentage divided into $35,100,471, the Company's estimate of the aggregate cost of reproduction new of its property in Missouri in this case, equals $20,350,000, which might be said to be one measure of the value of the property.

"Again, the Company's estimate of the aggregate cost of reproduction new, less depreciation, of its properties at Caruthersville, St. Louis and Springfield, in this case is $16,913,673. The ratio of this figure to the aggregate value fixed by the Commission at these exchanges, plus additions reported by the Company, is 153.7 per cent. This percentage divided into $31,355,278, the Company's estimate of the aggregate cost of reproduction new, less depreciation, of its property in Missouri in this case, equals $20,400,000, which may be said to be another measure of the value of the property.

"The Company also shows by Exhibits 19 and 212 that its return under the Postmaster General's rates on $22,888,943, the book value of its property in the State, is at the rate of 11.65 per cent per annum for depreciation and return on the investment, which would yield the Company 6 per cent for depreciation and 5.65 per cent for return on the book cost of the property. As stated, however, we do not think that the book cost or the

'prorated book cost' of the property as claimed by the Company would be a fair basis for rate making.

"As we understand it, the 'prorated book cost' given in evidence by the Company for the various exchanges is simply the percentage relation of reproduction cost new which the original cost of all property bears to reproduction cost new of all property and in individual instances the actual cost might vary greatly, either up or down, from what an appraisal would show. If the Company, to eliminate competition, paid a price in excess of the value or because of discouraged local operation were enabled to purchase a plant far below its actual value, the 'prorated book cost' basis would not reflect anything like the original cost.

"We also think that the figure of $22,888,943, claimed by the Company to represent the book cost or original cost of its property in the State, is subject to certain adjustments with reference to the amount of non-useful property included, working capital, and the amount to be deducted account extinguished value recouped from patrons by charges to depreciation.

"In the St. Louis case, supra, the original cost of the non-useful property deducted and disallowed by the Commission amounted to $454,689.16. It appears from the Company's Exhibit 256 that the 'prorated book cost' of the St. Louis exchange is just about half of that given for the State. However, it is clear that the proportion of non-used and non-useful property in St. Louis bears a much larger percentage relation to useful property than would obtain throughout the State. It would appear that estimating the Company's property not used and useful for the entire State at $500,000 would be a fair approximation. This sum at least should be deducted. . . .

"The depreciation reserve applicable to the Missouri property is not shown by the Company. However, on

the Company's Exhibit 15, the balance sheet as of June 30, 1919, of the Southwestern Bell Telephone Company (Missouri corporation) operating in Missouri, Kansas and Arkansas, the reserve for accrued depreciation and reserve for amortization of intangibles is given as $7,963,082.37. The same exhibit shows the original cost of fixed capital for Missouri, Kansas and Arkansas property as $46,061,162.76. The total fixed capital of the Missouri property shown on the Company's Exhibit 19 is $21,837,759, which is 47.4 per cent of $46,061,162.76 and 47.4 per cent of the reserve for depreciation, $7,963,082.37 equals $3,774,501, or the portion assignable to the Missouri property.

"Adjusting in accordance with the above, we have: Total plant and equipment, including working capital, as per Company's Exhibit No. 19, $22,888,943. Deduct property not used or useful, $500,000.00; deduct excess working capital, $17,513.52; deduct depreciation reserve, $3,774,501.00; [total to be deducted] $4,292,014.52. [Net total] $18,596,928.48; add for intangibles, 10 per cent, $1,859,692.85; total adjusted original cost, $20,456,621.33.

"After carefully considering all the evidence as to values before us in this case, we are of the opinion that the value of the Company's property in the State, exclusive of Kansas City and Independence, devoted to exchange service, will not exceed the sum of $20,400,000, and we will tentatively adopt this sum as the value of the property for the purposes of this case. As stated supra, this Commission has formally valued only a part of this property, and we should not be understood as authoritatively fixing the value of the property at this time."

The three earlier valuations to which the Commission referred are—St. Louis, December 1913, $8,500,000; Caruthersville, February 1914, $25,000; Springfield, Sep-

tember 1916, $815,000; total, $9,340,000. Between those dates and June 30, 1919, additions were made to these properties which cost, respectively, $1,623,765, $5,992 and $34,141. Adding these to the original valuations gives $11,003,898, the base sum used by the Commission for the estimates now under consideration.

Obviously, the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum.

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41, 52, this Court said:

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public. . . . And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase."

In the *Minnesota Rate Cases*, 230 U. S. 352, 454, this was said:

"The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

See also *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 191; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165 (March 6, 1922); and *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388 (April 10, 1922).

It is impossible to ascertain what will amount to a fair return upon properties devoted to public service with-

out giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day.

Witnesses for the Company asserted—and there was no substantial evidence to the contrary—that excluding cost of establishing the business the property was worth at least 25% more than the Commission's estimates, and we think the proof shows that for the purposes of the present case the valuation should be at least $25,000,000.

After disallowing an actual expenditure of $174,048.60 for rentals and services by the American Telephone & Telegraph Company and some other items not presently important, the Commission estimated the annual net profits on operations available for depreciation and return as $2,828,617.60—approximately 11⅓% of $25,000,000. That 6% should be allowed for depreciation appears to be accepted by the Commission. Deducting this would leave a possible 5⅓% return upon the minimum value of the property, which is wholly inadequate considering the character of the investment and interest rates then prevailing.

The important item of expense disallowed by the Commission—$174,048.60—is 55% of the 4½% of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter Company and its subsidiaries. Four and one-half per cent. is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter

requiring business judgment. It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield* v. *Springfield Gas and Electric Company,* 291 Ill. 209, 234.

"The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers."

See *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.,* 209 U. S. 108; *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin,* 238 U. S. 491; *People ex rel.* v. *Stevens,* 197 N. Y. 1.

Reversed.

MR. JUSTICE BRANDEIS dissenting from opinion, with whom MR. JUSTICE HOLMES concurs.

I concur in the judgment of reversal. But I do so on the ground that the order of the state commission prevents the utility from earning a fair return on the amount prudently [1] invested in it. Thus, I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. The Court, adhering to the so-called rule of *Smyth* v. *Ames,*

[1] The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

169 U. S. 466, and further defining it, declares that what is termed value must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing.

The so-called rule of *Smyth* v. *Ames* is, in my opinion, legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return.[2] Thus, it sets the limit to the power of the State to regulate rates. The Constitution does not guarantee to the utility the opportunity to earn a return on the value of all items of property used by the utility, or of any of them. The several items of property constituting the utility, taken singly, and freed from the public use, may conceivably have an aggregate value greater than if the items are used in combination. The owner is at liberty, in the absence of controlling statutory provision, to withdraw his property from the public service; and, if he does so, may obtain for it exchange value. Compare *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396; *Erie R. R. Co.* v. *Public Utility Commissioners*, 254 U. S. 394, 411; *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204. But so long as the specific items of property are employed by the utility, their exchange value is not of legal significance.

The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable.

[2] Except that rates may, in no event, be prohibitive, exorbitant, or unduly burdensome to the public. *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 596; *Smyth* v. *Ames*, 169 U. S. 466, 544; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757; *Minnesota Rate Cases*, 230 U. S. 352, 454; Mr. Justice Miller in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, 459.

His company is the substitute for the State in the performance of the public service; thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined.

To decide whether a proposed rate is confiscatory, the tribunal must determine both what sum would be earned under it, and whether that sum would be a fair return. The decision involves ordinarily the making of four subsidiary ones:

1. What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)

2. What the operating expenses and charges, while so operating, would be. (A prediction.)

3. The rate-base, that is, what the amount is on which a return should be earned. (Under *Smyth* v. *Ames*, an opinion, largely.)

4. What rate of return should be deemed fair. (An opinion, largely.)

A decision that a rate is confiscatory (or compensatory) is thus the resultant of four subsidiary determinations. Each of the four involves forming a judgment, as distinguished from ascertaining facts. And as to each factor, there is usually room for difference in judgment. But the first two factors do not ordinarily present serious difficulties. The doubts and uncertainties incident to

prophecy, which affect them, can, often, be resolved by a test period; and meanwhile protection may be afforded by giving a bond. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18, 19; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight*, 244 U. S. 368. The doubts and uncertainties incident to the last two factors can be eliminated, or lessened, only by redefining the rate base, called value, and the measure of fairness in return, now applied under the rule of *Smyth* v. *Ames*. The experience of the twenty-five years since that case was decided has demonstrated that the rule there enunciated is delusive. In the attempt to apply it insuperable obstacles have been encountered. It has failed to afford adequate protection either to capital or to the public. It leaves open the door to grave injustice. To give to capital embarked in public utilities the protection guaranteed by the Constitution, and to secure for the public reasonable rates, it is essential that the rate base be definite, stable, and readily ascertainable; and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise. It is consistent with the Federal Constitution for this Court now to lay down a rule which will establish such a rate base and such a measure of the rate of return deemed fair. In my opinion, it should do so.

The rule of *Smyth* v. *Ames* sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of the utility be determined by capitalizing its net earnings, since the earnings are determined, in large measure, by the rate which the company will be permitted to charge; and, thus, the vicious circle would be encountered. So, under the rule of *Smyth* v. *Ames*, it is usually sought to prove the present value of a utility by ascer-

taining what it actually cost to construct and instal it; or by estimating what it should have cost; or by estimating what it would cost to reproduce, or to replace, it. To this end an enumeration is made of the component elements of the utility, tangible, and intangible.[3] Then the actual, or the proper, cost of producing, or of reproducing, each part is sought. And finally, it is estimated how much less than the new each part, or the whole, is

[3] In estimating replacement cost the first step is to determine what part of the property owned is used and useful in the public service. That involves, among other things, a consideration of retired or discarded property and the question whether the size and capacity of the plant are, in part, excessive.

The property included in the valuation is commonly treated under the following heads (See Report of Special Committee on Valuation, Amer. Society of Civil Engineers, October 28, 1916, Vol. 42 Proceedings, pp. 1708–1938):

A. Tangibles:
- (a) Land and buildings.
- (b) Plant.

B. Incidentals during construction:
- (a) Administration.
- (b) Engineering and superintendence.
- (c) Legal expenses.
- (d) Brokerage.
- (e) Promotion fees.
- (f) Insurance.
- (g) Taxes.
- (h) Bond discount.
- (i) Contingencies.

C. Intangibles:
- (a) Good will.
- (b) Franchise value.
- (c) Going concern value.
- (d) Working capital.

"Going value" was declared by the Special Report (p. 1727) to embrace, among other things, "efficiency, favorable business arrangements and design"; intangibles to include also "leases, easements, water rights, traffic and operating agreements, strategic location and advantages and other privileges."

worth. That is, the depreciation is estimated.[4] Obviously each step in the process of estimating the cost of reproduction, or replacement, involves forming an opinion, or exercising judgment, as distinguished from merely ascertaining facts. And this is true, also, of each step in the process of estimating how much less the existing plant is worth, than if it were new. There is another potent reason why, under the rule of *Smyth* v. *Ames*, the room for difference in opinion as to the present value of a utility is so wide. The rule does not measure the present value either by what the utility cost to produce; or by what it should have cost; or by what it would cost to reproduce, or to replace, it.[5] Under that rule the tribunal is directed, in forming its judgment, to take into consideration all those and also, other elements, called relevant facts.[6]

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[4] Several different methods are used for measuring depreciation: (1) The replacement method; (2) the straight-line method; (3) the compound interest method; (4) the sinking fund method; (5) the unit cost method. It is largely a matter of judgment whether, and to what extent, any one of these several methods of measuring depreciation should be applied. They may give widely different results. Special Report, October 28, 1916, Valuation of Public Utilities, Amer. Society of Civil Engineers, Vol. 42 Proceedings, pp. 1723–1727; 1846–1900.

[5] This Court declared in *Smyth* v. *Ames*, 169 U. S. 466, 547, that "present as compared with original cost of construction" is to be considered; and in *Minnesota Rate Cases*, 230 U. S. 352, 452, that "the cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty." Reproduction cost was thus held to be evidence of value. But it has never been held to be the measure of value.

[6] Some of these so-called relevant facts are, as the rule has been applied:

(a) Capitalization, i. e., bonds, stock, and other securities outstanding.

(b) Book cost, i. e., the investment account as shown on the books.

Obviously "value" cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different; and must, when applied in a particular case, lead to widely different results. The rule of *Smyth* v. *Ames,* as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes the deter-

(c) Actual cost, i. e., amounts actually paid in cash for installing the original plant and business, and the additions thereto.

(d) Historical cost, i. e., the proper cost of the existing plant and business, estimated on the basis of the price levels existing at the respective dates when the plant and the additions were constructed. This is often called prudent investment. Historical cost would, under normal conditions, be equal in amount to the original cost. The phrases are sometimes used to denote the same thing. But they are not the same; and they are often ascertained by different processes. Original cost is the amount actually paid to establish the utility. The amount is ascertained, where possible, by inspection of books and vouchers, and by other direct evidence. If this class of evidence is not complete, it may be necessary to supplement it by evidence as to what was probably paid for some items, by showing prices prevailing for work and materials at the time the same were supplied. But the evidence of these prices is merely circumstantial, or corroborative, evidence of the amount actually paid. In determining actual cost, whatever the evidence, there is no attempt to determine whether the expenditure was wise or foolish, or whether it was useful or wasteful. Historical cost, on the other hand, is the amount which normally should have been paid for all the property which is usefully devoted to the public service. It is, in effect, what is termed the prudent investment. In enterprises efficiently launched and developed, historical cost and original cost would practically coincide both in items included and in amounts paid. That is, the subjects of expenditure would coincide; and the cost at prices prevailing at the time of installation would substantially coincide with the actual cost.

(e) Reproduction cost of plant and business—estimated on price levels prevailing at the date of valuation.

(f) Reproduction cost of plant and business, estimated on average price levels prevailing during periods of, say, 5 to 10 years preceding the valuation.

mination. Whether a desired result is reached may depend upon how any one of many elements is treated. It is true that the decision is usually rested largely upon records of financial transactions, on statistics and calculations. But as stated in *Louisville* v. *Cumberland Telegraph & Telephone Co.*, 225 U. S. 430, 436, "every figure . . . that we have set down with delusive exactness" is "speculative."

The efforts of courts to control commissions' findings of value have largely failed. The reason lies in the character of the rule declared in *Smyth* v. *Ames*. The rule there stated was to be applied solely as a means of determining whether rates already prescribed by the legislature were confiscatory. It was to be applied judicially after the rate had been made; and by a court which had had no part in making the rate. When applied under such circumstances the rule, although cumbersome, may occasionally be effective in destroying an obstruction to justice, as the action of a court is, when it sets aside the verdict of a jury. But the commissions undertook to make the rule their standard for constructive action. They used it as a guide for making, or approving, rates. And the tendency developed to fix as reasonable, the rate which is not so low as to be confiscatory.[7] Thus the rule which assumes that rates of utilities will ordinarily be higher than the minimum required by the Constitution has, by the practice of the commissions, eliminated the margin between a reasonable rate and a merely compensatory rate; and, in the process of rate making, effective judicial review is very often rendered impossible.[8] The

[7] This, it appears, was the purpose of the board in *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388.

[8] A rate order will not be set aside, unless the evidence compels conviction that a fair-minded board could not have reached the conclusion that the rate would prove adequate. *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 442; *Knoxville* v. *Knoxville Water*

result, inherent in the rule itself, is arbitrary action, on the part of the rate regulating body. For the rule not

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Co., 212 U. S. 1, 17; *Van Dyke* v. *Geary*, 244 U. S. 39, 49; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 401, 402. The range for difference of opinion on each of the many factors to be taken into consideration in fixing the rate base is so wide that such compelling evidence can rarely be adduced, where the report filed recites that, after full hearing, all the so-called relevant facts were given consideration by the commission in reaching the decision made. There may often be found in opinions of utility commissions, after a lengthy and detailed discussion of a vast quantity of expert opinion, a conclusion like the following from *Re Illinois Northern Utilities Co.*, P. U. R. 1920 D, 979, 999:

"After considering all the evidence and arguments of counsel in this case, bearing upon the valuation of the properties herein involved, the investment therein, their original costs, cost to reproduce, and present values, including all overheads; preliminary costs; costs of engineering; supervision, interest, insurance, organization and legal expenses during construction; working capital; materials and supplies; and all other elements of value, tangible and intangible, and considering the plants are now going concerns in successful operation, the Commission finds . . for the purposes of this proceeding, and for those purposes only, the fair rate-making values . . as follows."

Hence, a commission's order must ordinarily be allowed to stand, unless it appears that there was some irregularity in the proceedings or that some erroneous rule of law was applied.

Since *Smyth* v. *Ames* this Court has dealt with the validity (under the Fourteenth Amendment) of rate regulation by the States in over 50 cases. In only 25 of these has the Court passed upon the question whether a rate fixed, or approved, by a state commission denied to the utility the opportunity of earning a fair return upon the fair value of the property. In none of these 25 cases has an order of a state commission, made after a full hearing, been declared void by this Court, on the ground that the finding of the rate-base, or value, was too low. In none of them has the order been declared void on the ground that the commission fixed too low a percentage of return. Lower federal courts and state courts have occasionally intervened with effect. But the instances are relatively few as compared with the number of adverse decisions of the commissions. Even where orders fixing rates have been set aside for irregularity or error, the result of the new hearing is not always advantageous to the company.

only fails to furnish any applicable standard of judgment, but directs consideration of so many elements, that almost any result may be justified.

The adoption of present value of the utility's property, as the rate base, was urged in 1893, on behalf of the community; and it was adopted by the courts, largely, as a protection against inflated claims based on what were then deemed inflated prices of the past. See argument in *Smyth* v. *Ames,* 169 U. S. 466, 479, 480; *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739, 757, 758; *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 442, 443; *Stanislaus County* v. *San Joaquin & Kings River Canal & Irrigation Co.,* 192 U. S. 201, 214. Reproduction cost, as the measure, or as evidence, of present value was, also, pressed then by representatives of the public who sought to justify legislative reductions of railroad rates.[9] The long depression which followed the panic of 1893 had brought prices to the lowest level reached in the Nineteenth Century. Insistence upon reproduction cost was the shippers' protest against burdens believed to have resulted from watered stocks, reckless financing, and unconscionable construction contracts. Those were the days before state legislation prohibited the issue of public utility securities without authorization from state officials; before accounting was prescribed and supervised; when outstanding bonds and stocks were hardly an indication of the amount of capital embarked in the enterprise; when depreciation accounts were unknown; and when book values, or property accounts, furnished no trustworthy evidence either of cost or of real value. Estimates of reproduction cost were then offered, largely as a means, either of supplying lacks in the proof of actual cost and investment, or of testing

[9] See *Steenerson* v. *Great Northern Ry. Co.,* 69 Minn. 353, 374; *San Diego Water Co.* v. *San Diego,* 118 Cal. 556, 568; *Metropolitan Trust Co.* v. *Houston & Texas Central R. R. Co.,* 90 Fed. 683, 687, 688.

the credibility of evidence adduced, or of showing that the cost of installation had been wasteful. For these purposes evidence of the cost of reproduction is obviously appropriate.

At first reproduction cost was welcomed by commissions as evidence of present value. Perhaps it was because the estimates then indicated values lower than the actual cost of installation. For, even after the price level had begun to rise, improved machinery and new devices tended for some years to reduce construction costs.[10] Evidence of reproduction costs was certainly welcomed, because it seemed to offer a reliable means for performing the difficult task of fixing, in obedience to *Smyth* v. *Ames,* the value of a new species of property to which the old tests—selling price or net earnings—were not applicable. The engineer spoke in figures—a language implying certitude. His estimates seemed to be free of the infirmities which had stamped as untrustworthy the opinion evidence of experts common in condemnation cases. Thus, for some time, replacement cost, on the basis of prices prevailing at the date of the valuation, was often adopted by state commissions as the standard for fixing the rate base. But gradually it came to be realized that the definiteness of the engineer's calculations was delusive; that they rested upon shifting theories; and that their estimates varied so widely as to intensify, rather than to allay doubts.[11] When the price

[10] Compare Mr. Justice Field in *Railroad Commission Cases,* 116 U. S. 307, 343, 344; *Steenerson* v. *Great Northern Ry. Co.,* 69 Minn. 353, 374.

[11] Thus in *Re Marin Municipal Water District* (Cal.) P. U. R. 1915 C, 433, 452, the several valuations of five experts were: $670,163; $723,001.85; $763,028; $919,204; $1,031,436. In *Springfield* v. *Springfield Gas & Electric Co.* (Ill.), P. U. R. 1916 C, 281, 307, the several valuations of five experts were $547,488; $588,262; $806,404; $898,785; $940,988. In *Duluth Street Ry. Co.* v. *Railroad Commission* (Wis.), P. U. R. 1915 D, 211, the valuations of two experts, both employed by the State were $600,000 and $1,100,000.

levels had risen largely, and estimates of replacement cost indicated values much greater than the actual cost of installation, many commissions refused to consider valuable what one declared to be assumptions based on things that never happened and estimates requiring the projection of the engineer's imagination into the future and methods of construction and installation that have never been and never will be adopted by sane men.[12] Finally, the great fluctuation in price levels incident to the World War led to the transfusion of the engineer's estimate of cost with the economist's prophecies concerning the future price plateaus. Then, the view that these estimates were not to be trusted as evidence of present

[12] 15 Mich. Law Rev. 205, 216; *Re Grafton County Electric Light & Power Co.* (N. H.), P. U. R. 1916 E, 879, 885–888. Compare *Appleton Water Works Co.* v. *Railroad Commission*, 154 Wis. 121, 154, quoting: "Skilled witnesses come with such prejudice in their minds that hardly any weight should be given to their evidence."

In *Re Michigan State Telephone Co.* (Mich.) P. U. R. 1921C, pp. 545, 554, 555, the Commission said:

"This method [reproduction at prices prevailing at time of valuation] of determining value usually included percentages for engineering services never rendered, hypothetical efficiency of unknown labor, conjectural depreciation, opinion as to the condition of property, the supposed action of the elements; and, of course, its correctness depends upon whether superintendence was or would be wise or foolish; the investment improvident or frugal. It is based upon prophecy instead of reality, and depends so much upon half truths that it bears only a remote resemblance to fact, and rises at best, only to the plane of a dignified guess." See also *Danbury* v. *Danbury & Bethel Gas & Electric Light Co.*, P. U. R. 1921 D, 193, 206 (Conn.).

In *Public Service Commission* v. *Pacific Telephone & Telegraph Co.*, P. U. R. 1916 D, 947, 955, the Commission said: "The old methods have proven uncertain, indefinite, and unsatisfactory to honest utilities and commissions alike."

See also *In re Northampton Gas Petition* (Mass.), P. U. R. 1915 A, 618, 626; *Public Service Commission* v. *Pacific Telephone & Telegraph Co.*, P. U. R. 1916 D, 947, 955.

value, was frequently expressed. And state utility commissions, while admitting the evidence in obedience to *Smyth* v. *Ames,* failed, in ever-increasing numbers, to pay heed to it in fixing the rate base.[13] The conviction is wide-spread that a sound conclusion as to the actual value of a utility is not to be reached by a meticulous study of conflicting estimates of the cost of reproducing new the congeries of old machinery and equipment, called the plant, and the still more fanciful estimates concerning the value of the intangible elements of an established business.[14] Many commissions, like that of Massachusetts, have declared recently that " capital honestly and

[13] Their action is in accord with views commonly held by legal writers. Compare Edwin C. Goddard, " Public Utility Valuation," 15 Mich. Law Rev. 205; Robert L. Hale, " The ' Physical Value ' Fallacy in Rate Cases," 30 Yale Law Journal, 710; Donald R. Richberg, "A Permanent Basis for Rate Regulation," 31 Yale Law Journal, 263; Robert H. Whitten, " Fair Value for Rate Purposes," 27 Harv. Law Rev. 419; Henry W. Edgerton, " Value of the Service as a Factor in Rate Making," 32 Harv. Law Rev. 516; Gerard C. Henderson, " Railway Valuation and the Courts," 33 Harv. Law Rev. 902, 1031; Armistead M. Dobie, " Judicial Review of Administrative Action in Virginia," 8 Va. Law Rev. 477, 504. See also 32 Yale Law Journal, 390, 393; 19 Mich. Law Rev. 849.

[14] The Public Utility Reports for 1920, 1921, 1922 and 1923 (to March 1) contain 363 cases in which the rate-base or value was passed upon. Reproduction cost at unit prices prevailing at the date of valuation appears to have been the predominant element in fixing the rate base in only 5. In 63 the commission severely criticised, or expressly repudiated, this measure of value. In nearly all of the 363 cases, except 5, the commission either refused to pay heed to this factor as the measure of value, or indeed as evidence of any great weight.

The following summary shows the predominant element in fixing the rate base in the several cases:

In 5 cases: Reproduction cost at unit prices prevailing at the date of the valuation.

In 28 cases: Reproduction cost at unit prices prevailing at some date, or the averages of some period, prior to the date of the valuation.

prudently invested must, under normal conditions, be taken as the controlling factor in fixing the basis for computing fair and reasonable rates." [15]

To require that reproduction cost at the date of the rate hearing be given weight in fixing the rate base, may subject investors to heavy losses when the high war and post-war price levels pass—and the price trend is again

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In 12 cases: Reproduction cost at unit prices prevailing at some date not specifically stated.

In 22 cases: Reproduction cost of an inventory of a prior date at prices prevailing at that date or prior thereto, plus subsequent additions at actual cost (so-called split inventory method).

In 3 cases: Reproduction cost on basis of future predicted prices (so-called trend prices, or new plateau method).

In 102 cases: A prior valuation by the commission plus the actual cost of subsequent additions.

In 85 cases: The actual original cost (including both initial cost and additions).

In 6 cases: Original cost arbitrarily appreciated.

In 27 cases: The historical cost or prudent investment.

In 28 cases: Book cost or investment.

In 12 cases: Bond and stock capitalization.

In 36 cases: Determination and classification of method impossible.

[15] *Middlesex and Boston Rate Case,* Public Service Commission (Mass.), October 28, 1914, report, pp. 7–14; *Bay State Rate Case,* P. U. R. 1916 F, 221, 233. And see ibid for a quotation from an address delivered at the "Conference on Valuation" in Philadelphia, November, 1915, in which the late John M. Eshleman, first president of the California Railroad Commission, said: "If we had this problem at the beginning and were not attacking it in the middle, we would have no difficulty in agreeing with the holder of capital upon this subject, for he would quite readily agree to take the cost of doing the business plus an earning upon the money actually invested comparable to the earning offered in other available investments. Therefore, the cost of doing the business, plus a return upon the capital necessarily invested in the business, which return shall be as great as is offered in other businesses of similar hazard, is all that ought to be accorded for the future, and it is all that will be accorded if the public has any business sense. And if more is asked by the

downward.[16] The aggregate of the investments which have already been made at high costs since 1914, and of those which will be made before prices and costs can fall heavily, may soon exceed by far the depreciated value of all the public utility investments made theretofore at relatively low cost. For it must be borne in mind that depreciation is an annual charge. That accrued on plants constructed in the long years prior to 1914 is much larger than that

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private owner, then he may expect no sympathy when he finds the public his competitor and his earning power impaired."

No case involving the fixing of rates by a commission has ever come to this Court from New England. The only case involving in any way the validity of rates is *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79.

See also *Re Cripple Creek Water Co.* (Colo.), P. U. R. 1916 C, 788, 799, 800; *Butler* v. *Lewiston, Augusta & Waterville St. Ry.* (Maine), P. U. R. 1916 D, 25, 35.

[16] Engineers testifying in recent rate cases have assumed that there will be a new plateau of prices. In *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, the company contended that a plateau 70 per cent. above the price level of 1914 should be accepted, and a plateau 33⅓ per cent. above was found probable by the master and assumed to be such by the lower court. In *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 679, *post*, one 50 per cent. above the 1914 level was contended for; in the case at bar a plateau 25 per cent. above. But for the assumption that there will be a plateau there is no basis in American experience. The course of prices for the last 112 years indicates, on the contrary, that there may be a practically continuous decline for nearly a generation; that the present price level may fall to that of 1914 within a decade; and that, later, it may fall much lower. Prices rose steadily (with but slight and short recessions) for the 20 years before the United States entered the World War. From the low level of 1897 they rose 21 per cent. to 1900; then rose further (with minor fluctuations, representing times of good business or bad) and reached in 1914 a point 50 per cent. above the 1897 level. Then the great rise incident to the war set in. "Wholesale Prices, 1890 to 1921," U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 320, pp. 9–26. These are averages of the wholesale prices of all commodities. In the Bureau chart the 1913 prices are taken as the datum

accruing on the properties installed in the shorter period since.[17]

That part of the rule of *Smyth* v. *Ames* which fixes the rate of return deemed fair, at the percentage customarily paid on similar investments at the time of the rate hearing, also exposes the investor and the public to danger of serious injustice. If the replacement-cost measure of value and the prevailing-rate measure of fairness of return should be applied, a company which raised, in 1920,

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line (100). As compared with them the 1897 level was 67, the 1900 level 81. The chart on page 10 of the pamphlet entitled, "Price Changes and Business Prospects," published by the Cleveland Trust Company, gives price fluctuations for the 110 years prior to 1921. It shows three abrupt rises in the price level, by reason of war; and some less abrupt falls, by reason of financial panic. These may be called abnormal. But the normal has never been a plateau. The chart shows that the peak price levels were practically the same during the War of 1812, the Civil War, and the World War; and it shows that practically continuous declines, for about 30 years, followed the first two wars. The experience after the third may be similar.

[17] The new enterprises undertaken at the present high level, or projected, are many; among them, development and long distance transmission of hydroelectric power, and of electric power generated at the coal mines. Moreover, nearly every utility now existing must make expenditures upon its plant to provide improvements, additions, or extensions. The growth of our communities, and increase in the demands of the individual, constantly compel enlargement of a utility's facilities. The present annual investment in public utility enterprises is much greater in amount than at any time in the past. Some of the construction done during the war was at prices for labor and materials 120 per cent. above those prevailing in 1914. Recent construction was at prices 70 per cent. higher. If replacement cost should become the measure of the rate base, the return on enterprises entered upon after 1914 would, obviously, be imperilled. And a serious decline of the price level would subject the return on many utilities established earlier to like dangers. A collapse of public utility values might result. And the impairment of public utility credit might be followed by the cessation of extensions and new undertakings.

for additions to plant, $1,000,000 on a 9 per cent. basis, by a stock issue, or by long-term bond issue, may find a decade later, that the value of the plant (disregarding depreciation) is only $600,000, and that the fair return on money then invested in such enterprise is only 6 per cent. Under the test of a compensatory rate, urged in reliance upon *Smyth* v. *Ames*, a prescribed rate would not be confiscatory, if it appeared that the utility could earn under it $36,000 a year; whereas $90,000 would be required to earn the capital charges. On the other hand, if a plant had been built in times of low costs, at $1,000,000 and the capital had been raised to the extent of $750,000. by an issue at par of 5 per cent. 30-year bonds and to the extent of $250,000 by stock at par, and ten years later the price level was 75 per cent. higher and the interest rates 8 per cent., it would be a fantastic result to hold that a rate was confiscatory, unless it yielded 8 per cent. on the then reproduction cost of $1,750,000. For that would yield an income of $140,000, which would give the bondholders $37,500; and to the holders of the $250,000 stock $102,500, a return of 41 per cent. per annum. Money required to establish in 1920 many necessary plants has cost the utility 10 per cent. on thirty-year bonds. These long-time securities, issued to raise needed capital, will in 1930 and thereafter continue to bear the extra high rates of interest, which it was necessary to offer in 1920 in order to secure the required capital. The prevailing rate for such investments may in 1930 be only 7 per cent.; or indeed 6 per cent.; as it was found to be in 1904, in *Stanislaus County* v. *San Joaquin & Kings River Canal & Irrigation Co.*, 192 U. S. 201; in 1909, in *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; and in 1912, in *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 670. A rule which limits the guaranteed rate of return on utility investments to that which

may prevail at the time of the rate hearing, may fall far short of the capital charge then resting upon the company.

In essence, there is no difference between the capital charge and operating expenses, depreciation, and taxes. Each is a part of the current cost of supplying the service; and each should be met from current income. When the capital charges are for interest on the floating debt paid at the current rate, this is readily seen. But it is no less true of a legal obligation to pay interest on long-term bonds, entered into years before the rate hearing and to continue for years thereafter; and it is true also of the economic obligation to pay dividends on stock, preferred or common. The necessary cost, and hence the capital charge, of the money embarked recently in utilities, and of that which may be invested in the near future, may be more, as it may be less, than the prevailing rate of return required to induce capital to enter upon like enterprises at the time of a rate hearing ten years hence. To fix the return by the rate which happens to prevail at such future day, opens the door to great hardships. Where the financing has been proper, the cost to the utility of the capital, required to construct, equip and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn.[18]

The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate

[18] The community may, of course, demand, in respect to financing, as in respect to operation, that the right to earn a fair return be limited by the requirement that reasonable efficiency be exercised.

with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges. The wild uncertainties of the present method of fixing the rate base under the so-called rule of *Smyth* v. *Ames* would be avoided; and likewise the fluctuations which introduce into the enterprise unnecessary elements of speculation, create useless expense, and impose upon the public a heavy, unnecessary burden.

In speculative enterprises the capital cost of money is always high; partly because the risks involved must be covered; partly because speculative enterprises appeal only to the relatively small number of investors who are unwilling to accept a low return on their capital. It is to the interest both of the utility and of the community that the capital be obtained at as low a cost as possible. About 75 per cent. of the capital invested in utilities is represented by bonds. He who buys bonds seeks primarily safety. If he can obtain it, he is content with a low rate of interest. Through a fluctuating rate base the bondholder can only lose. He can receive no benefit from a rule which increases the rate base as the price level rises; for his return, expressed in dollars, would be the same, whatever the income of the company.[19] That

[19] Of course, anyone who chances to have money to invest, when money rates are high, gets the advantage incident to investing in a favorable market. If he invests in utility bonds, the higher agreed return upon his capital would be provided for by a rule which measures fair return by capital charges, as suggested above. If he elects to invest in the stock, he would, under the rule suggested, have the opportunity of earning a return commensurate with the value of the capital at the time it was embarked as stock in the enterprise.

the stockholder does not in fact receive an increased return in time of rapidly rising prices under the rule of *Smyth* v. *Ames,* as applied, the financial record of the last six years demonstrates. But the burden upon the community is heavy because the risk makes the capital cost high.

The expense and loss now incident to recurrent rate controversies is also very large. The most serious vice of the present rule for fixing the rate base is not the existing uncertainty; but that the method does not lead to certainty. Under it, the value for rate-making purposes must ever be an unstable factor. Instability is a standing menace of renewed controversy. The direct expense to the utility of maintaining an army of experts and of counsel is appalling. The indirect cost is far greater. The attention of officials high and low is, necessarily, diverted from the constructive tasks of efficient operation and of development. The public relations of the utility to the community are apt to become more and more strained. And a victory for the utility, may in the end, prove more disastrous than defeat would have been. The community defeated, but unconvinced, remembers; and may refuse aid when the company has occasion later to require its consent or coöperation in the conduct and development of its enterprise. Controversy with utilities is obviously injurious also to the public interest. The prime needs of the community are that facilities be ample and that rates be as low and as stable as possible. The community can get cheap service from private companies, only through cheap capital. It can get efficient service, only if managers of the utility are free to devote themselves to problems of operation and of development. It can get ample service through private companies, only if investors may be assured of receiving continuously a fair return upon the investment.

What is now termed the prudent investment is, in essence, the same thing as that which the Court has always

sought to protect in using the term present value.[20] Twenty-five years ago, when *Smyth* v. *Ames* was decided, it was impossible to ascertain with accuracy, in respect to most of the utilities, in most of the States in which rate controversies arose, what it cost in money to establish the utility; or what the money cost with which the utility was established; or what income had been earned by it; or how the income had been expended. It was, therefore, not feasible, then, to adopt, as the rate base, the amount properly invested or, as the rate of fair return, the amount of the capital charge. Now the situation is fundamentally different. These amounts are, now, readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. The change in this respect is due to the enlargement, meanwhile, of the powers and functions of state utility commissions. The issue of securities is now, and for many years has been, under the control of commissions, in the leading States. Hence the amount of capital raised (since the conferring of these powers) and its cost are definitely known, through current supervision and prescribed accounts, supplemented by inspection of the commission's engineering force. Like knowledge concerning the investment of that part of the capital raised and expended before these broad functions were exercised by the utility commissions has been secured, in many cases, through investigations undertaken later, in connection with the issue of new securities or the regulation of rates. The amount and disposition of current earnings of all the

[20] Compare Mr. Justice Field in *Railroad Commission Cases*, 116 U. S. 307, 343, 344; Mr. Justice Harlan, *ibid*, p. 341; *Dow* v. *Beidelman*, 125 U. S. 680, 690, 691; and *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 409, 412; where the necessity of limiting the broad power of regulation enunciated in *Munn* v. *Illinois*, 94 U. S. 113, was first given expression. See also "Public Utilities, Their Cost New and Depreciation," by H. V. Hayes, pp. 255, 256.

companies are also known. It is, therefore, feasible now to adopt as the measure of a compensatory rate—the annual cost, or charge, of the capital prudently invested in the utility.[21] And, hence, it should be done.

Value is a word of many meanings. That with which commissions and courts in these proceedings are concerned, in so-called confiscation cases, is a special value for rate-making purposes, not exchange value. This is illustrated by our decisions which deal with the elements to be included in fixing the rate base. 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, 165, good will and franchise value were excluded from the rate base in determining whether the prescribed charges

[21] In 1898, when *Smyth* v. *Ames* was decided, only one State—Massachusetts—had control by commission of the issue of securities by all public utility companies. (New Hampshire controlled security issues of railroads and street railways; Maine and New York controlled increase of capital stock by railroads; and Connecticut, the issue of bonds by railroads.) In 1923 at least 24 States and the District of Columbia controlled through commissions the issue of securities of public utility companies. Legislation for 1923 and 1922 (in part) has not been available. Other States may have legislated on the subject in 1923 or 1922.

In 1898 no State had control by commission of the accounting of all public utilities. Massachusetts controlled the accounting of gas, electric light, street railway, and railroad companies; Iowa, of railways and carriers; New York, Texas and Vermont, of railroads only. In 1923 at least 36 States and the District of Columbia controlled through commissions the accounting of public utility companies.

In 1898, only one State—Massachusetts—exercised through a commission control of all public utilities. In 1923 such control is exercised in at least 39 States and the District of Columbia. This does not include those States exercising commission control over railroads and related utilities, such as street railways, express companies, telephone and telegraph companies. These States number 47. The number of States having commission control of railroads in 1898 was 27. In 1922 every State except Delaware had commission control of railroads.

of the public utility were confiscatory. In *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, the cost of developing the business as a financially successful concern was excluded from the rate base. In *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 171, the fact that the street had been paved (and hence the reproduction cost of laying gas mains greatly increased), was not allowed as an element of value. But, obviously, good will and franchise value are important elements when exchange value is involved. And where the community acquires a public utility by purchase or condemnation, compensation must be made for its good will and earning power; 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. Likewise, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. These cases would seem to require rejection of a rule which measured the rate base by cost of reproduction or by value in its ordinary sense.

The rule by which the utilities are seeking to measure the return is, in essence, reproduction cost of the utility or prudent investment, whichever is the higher. This is indicated by the instructions contained in the Special Report on Valuation of Public Utilities, made to the American Society of Civil Engineers, October 28, 1916, Proceedings, Vol. 42:

"So long as the company owner keeps a sum equivalent to the total investment at work for the public, either as property serving the public, or funds held in reserve for such property, no policy should be followed in estimating depreciation that will reduce the property to a value less than the investment. . . . " (p. 1726).

"Estimates of the cost of reproduction should be based on the assumption that the identical property is to be

reproduced, rather than a substitute property" (p. 1719), —"although such a substitute property, much less costly than the existing plant, might furnish equal or better service, it is not reproduction of service, but of property, that is under consideration; and clearly the estimate should be of existing property created with public approval, rather than of a substituted property" (p. 1772).

If the aim were to ascertain the value (in its ordinary sense) of the utility property, the enquiry would be, not what it would cost to reproduce the identical property, but what it would cost to establish a plant which could render the service, or in other words, at what cost could an equally efficient substitute be then produced. Surely the cost of an equally efficient substitute must be the maximum of the rate base, if prudent investment be rejected as the measure. The utilities seem to claim that the constitutional protection against confiscation guarantees them a return both upon unearned increment and upon the cost of property rendered valueless by obsolescence.

DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT, ETC. *v.* FARMERS CO-OPERATIVE EQUITY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 270. Argued April 17, 18, 1923.—Decided May 21, 1923.

1. Solicitation of traffic by railroads in States remote from their lines is part of the business of interstate transportation. P. 315.
2. A state statute which provides that any foreign corporation having an agent in the State for the solicitation of freight and passenger traffic over lines outside the State may be served with summons by delivering a copy thereof to such agent, imposes an unreasonable burden on interstate commerce and is void under the

Commerce Clause, as applied to an action brought against a railroad company which neither owns nor operates a railroad within the State, by a plaintiff who does not and did not reside there, upon a cause of action which arose elsewhere out of a transaction entered into elsewhere. Laws Minnesota, 1913, c. 218. P. 315. *Missouri, Kansas & Texas Ry. Co.* v. *Reynolds*, 255 U. S. 565, and *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218, distinguished.

3. The Court notices judicially the large volume and importance of litigation against interstate carriers on personal injury and freight claims, and the heavy expense, and impairment of the carriers' efficiency, entailed when the litigation is in jurisdictions remote from where the cause of action arose—also that the burden imposed on such carriers by the Minnesota statute here involved (*supra*) is heavy, and that the resulting obstruction to interstate commerce must be serious. P. 315.
4. Avoidance of waste, in interstate transportation, as well as maintenance of service, has become a direct concern of the public. P. 317.

150 Minn. 534, reversed.

ERROR to a judgment of the Supreme Court of Minnesota affirming a judgment for damages for loss of grain shipped between two points in Kansas.

Mr. Gardiner Lathrop and *Mr. Homer W. Davis*, with whom *Mr. Thomas F. Quinn* and *Mr. William T. Faricy* were on the briefs, for plaintiff in error.

Mr. Morton Barrows, with whom *Mr. George H. Lamar*, *Mr. Frederick M. Miner* and *Mr. Walter W. Patterson* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

A statute of Minnesota (Laws 1913, c. 218, p. 274; General Statutes, 1913, § 7735) provides that:

"Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served

with summons by delivering a copy thereof to such agent."

Whether this statute, as construed and applied, violates the Federal Constitution is the only question for decision.

The Atchison, Topeka & Santa Fe Railway Company is a Kansas corporation engaged in interstate transportation. It does not own or operate any railroad in Minnesota; but it maintains there an agent for solicitation of traffic. In April, 1920, suit was brought by another Kansas corporation in a court of Minnesota against the Director General of Railroads, as agent, on a cause of action arising under federal control. Service was made pursuant to the Minnesota statute.[1] The recovery sought was for loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that State to another. So far as appears the transaction was in no way connected with Minnesota or with the soliciting agency located there. Defendant appeared specially; claimed that, as to it, the statute authorizing service violated the due process and equal protection clauses of the Fourteenth Amendment, as well as the commerce clause; and moved to dismiss the suit for want of jurisdiction. The motion was denied. After appropriate proceeding, the trial court entered final judgment for plaintiff; its judgment was affirmed by the Supreme Court of Minnesota, 150 Minn. 534; and the case is here on writ of error under § 237 of the Judicial Code.

[1] The alleged cause of action having arisen during federal control, the action was brought pursuant to § 206(*a*) of Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, 461, against the Director General, as Agent. A contract had been made with the carrier for the conduct of litigation arising out of operation during federal control. Hence, under § 206(*b*) process could be served upon the agent of the company "if such agent . . is authorized by law to be served with process in proceedings brought against such carrier." The question of the validity of the service is, thus, the same as if suit had been brought against the company on such a cause of action arising after federal control had terminated.

Solicitation of traffic by railroads, in States remote from their lines, is a recognized part of the business of interstate transportation. *McCall* v. *California,* 136 U. S. 104. As construed by the highest court of Minnesota, this statute compels every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the State. Jurisdiction is not limited to suits arising out of business transacted within Minnesota. Compare *Mitchell Furniture Co.* v. *Selden Breck Construction Co.,* 257 U. S. 213; *Missouri Pacific R. R. Co.* v. *Clarendon Boat Oar Co.,* 257 U. S. 533; *Chipman, Limited* v. *Thomas B. Jeffery Co.,* 251 U. S. 373. It is asserted, whatever the nature of the cause of action, wherever it may have arisen, and although the plaintiff is not, and never has been, a resident of the State. *Armstrong Co.* v. *New York Central R. R. Co.,* 129 Minn. 104; *Lagergren* v. *Pennsylvania R. R. Co.,* 130 Minn. 35; *Rishmiller* v. *Denver & Rio Grande R. R. Co.,* 134 Minn. 261; *Merchants Elevator Co.* v. *Chesapeake & Ohio Ry. Co.,* 147 Minn. 188; *Callaghan* v. *Union Pacific R. R. Co.,* 148 Minn. 482. This condition imposes upon interstate commerce a serious and unreasonable burden which renders the statute obnoxious to the commerce clause. Compare *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203.

That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate

carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious.[2] During federal control absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co.* v. *Journey,* 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war.

The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a State. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579. The requirements of orderly, effective administration of justice are paramount. In *Kane* v. *New Jersey,* 242 U. S. 160, 167, a statute was sustained which required non-resident owners of motor vehicles to appoint a state official as agent upon whom process might be served in suits arising from their use within the State, because the burden thereby imposed upon interstate commerce was held to be a reasonable requirement for the protection of the public. It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered

[2] A message, dated February 2, 1923, of the Governor of Minnesota to its Legislature, recites that a recent examination of the calendars of the district courts in 67 of the 87 counties of the State disclosed that in those counties there were then pending 1,028 personal injury cases in which non-resident plaintiffs seek damages aggregating nearly $26,000,000 from foreign railroad corporations which do not operate any line within Minnesota.

upon within the State,[3] or if the plaintiff was, when it arose, a resident of the State.[4] These questions are not before us; and we express no opinion upon them. But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act, 1920, which authorizes rate increases necessary to ensure to carriers efficiently operated a fair return on property devoted to the public use. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184. Avoidance of waste, in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce.

The case at bar resembles, in its facts, but is not identical with, *Missouri, Kansas & Texas Ry. Co.* v. *Reynolds*, 255 U. S. 565, and *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218. In the former, the validity of a similar Massachusetts statute was sustained in a *per*

[3] Compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; "Jurisdiction over nonresidents doing business within a State", by Austin W. Scott, 32 Harv. Law Rev. 871, 887.

[4] Compare *Blake* v. *McClung*, 172 U. S. 239; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142; *Maxwell* v. *Bugbee*, 250 U. S. 525, 537; *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553; *Kenney* v. *Supreme Lodge*, 252 U. S. 411.

curiam opinion. In the latter, jurisdiction was upheld in the absence of a statute concerning solicitation. But in both cases the only constitutional objection asserted was violation of the due process clause. See *Reynolds* v. *Missouri, Kansas & Texas Ry. Co.*, 224 Mass. 379; 228 Mass. 584. Since we hold that the Minnesota statute as construed and applied violates the commerce clause, we have no occasion to consider whether it also violates the Fourteenth Amendment.[5]

Reversed.

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

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY ET AL. *v.* STATE OF TENNESSEE ET AL.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* STATE OF TENNESSEE ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Nos. 396 and 429. Argued April 11, 12, 1923.—Decided May 21, 1923.

1. Section 22 of the Act to Regulate Commerce, as amended, in declaring that nothing in the act shall prevent the carriage of property free, or at reduced rates, for the United States, state or municipal governments, does not in effect deny to the Interstate Commerce Commission power to prohibit such reduced rates when they result

[5] Compare *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516; *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171. Also *Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Meyer*, 197 U. S. 407; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245; *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93.

in unjust discrimination or in undue prejudice to interstate commerce. P. 320.

2. The object of this section was to settle beyond doubt that the preferential treatment of certain classes of shippers and travelers in matters therein recited is not necessarily prohibited; it limits or defines the requirement of equality imposed in other sections of the act, and so preserves the right theretofore enjoyed by the carrier of granting preferential treatment to particular classes, in certain cases, and in this sense only is permissive; but it confers no right upon any shipper or traveler, nor any new right upon the carrier. P. 323.

3. The State of Tennessee authorized increases of intrastate freight rates to correspond with a level of interstate rates authorized by the Interstate Commerce Commission, but excluded rates on stone and gravel when for use in building public highways and consigned to federal, state, county and municipal authorities. The Interstate Commerce Commission, on complaint of a carrier, found that the exception produced illegal discrimination against interstate commerce and undue prejudice to persons and localities engaged in such commerce and ordered increase of the rates.

Held: (*a*) That the findings are conclusive, the evidence on which the Commission acted not having been introduced in this suit. P. 324.
(*b*) That the order was valid. *Id.*

284 Fed. 371, reversed.

APPEALS from a decree of the District Court declaring void, and enjoining the enforcement of, an order of the Interstate Commerce Commission. The State of Tennessee and its Railroad and Public Utilities Commission brought the suit against the United States, to have the order set aside. The Interstate Commerce Commission and three carriers affected intervened as defendants.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. William H. Swiggart, Jr., with whom *Mr. Frank M. Thompson,* Attorney General of the State of Tennessee, was on the brief, for appellees.

Mr. Fitzgerald Hall, with whom *Mr. John Bell Keeble* and *Mr. Charles N. Burch* were on the brief, for appellant carriers.

Mr. Justice Brandeis delivered the opinion of the Court.

Section 22 of the Act to Regulate Commerce, as amended by Act of March 2, 1889, c. 382, § 9, 25 Stat. 855, 862, provides, among other things,

"That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, . . ." [1]

Whether this section should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce is the main question for decision.

On July 29, 1920, the Interstate Commerce Commission authorized a general increase, throughout southern territory, of 25 per cent. in interstate freight rates. *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220. Thereafter, the Railroad and Public Utilities Commission of Tennessee authorized, for that State, a like increase of intrastate rates. But the following articles (among others) were excluded from this increase: Carload shipments of stone and gravel when for use in building public highways and consigned to federal, state, county and municipal authorities or their *bona fide* agents. To remove the exception, carriers applied to the Interstate Commerce Commission, claiming that the exception produced illegal discrimination against interstate commerce and an undue prejudice

[1] The first line of § 22 as originally enacted, 24 Stat. 379, 387, read, "That nothing in this act shall apply to the carriage," etc.

to persons and localities engaged in such commerce. The Commission found such discrimination; and ordered that the intrastate rates on these commodities, also, be increased to the level of the interstate rates. *Tennessee Rates and Charges,* 63 I. C. C. 160, 172. On October 21, 1921, the State of Tennessee and its commission brought, in the federal court for the Middle District of Tennessee, this suit against the United States to have the order set aside. The Interstate Commerce Commission, the Nashville, Chattanooga & St. Louis Railway and two other interstate carriers, intervened as defendants. The case was heard by three judges under the Act of October 22, 1913, c. 32, 38 Stat. 208, 219. A final decree was entered, declaring the order void, and enjoining its enforcement. 284 Fed. 371. The case is here on two appeals. No. 396 is that of the carriers; No. 429, that of the United States and the Interstate Commerce Commission.

Railroad Commission of Wisconsin v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, had been decided by this Court before entry of the judgment appealed from. But the District Court considered that case inapplicable; and held that, by reason of § 22, the Interstate Commerce Commission is "without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight;" that the section "excludes this particular traffic from the rate structure which the Commission is authorized to erect and control, in still other words, there is freedom of discrimination."

The argument is, in substance, this: An order of the Interstate Commerce Commission increasing intrastate rates to the level of interstate rates, must rest upon a finding of illegal preference resulting from the relation of intrastate to interstate rates. Preference to governmental shippers is expressly permitted by § 22 of the act. Hence, a grant of such preference cannot be held to be unjust or

unreasonable under §§ 2 and 3. There was no finding that these lower intrastate rates resulted in failure of the intrastate traffic to yield its proper share of the earnings of the carriers. Consequently, the order of the Commission is void.[2] The argument is, in our opinion, unsound.

Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by §§ 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 219, 220; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481. Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic. On the other hand, preferential treatment of a class, ordinarily harmless, may become undue, because, under the special circumstances, it results in prejudice, or disadvantage to some other person, commodity, or locality, or to interstate commerce.

[2] The order of the Interstate Commerce Commission was declared void "to the extent that the rates therein ordered to be established . . . apply to such transportation, for the United States, State or Municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transportation."

Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 511.[3] Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do. The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.

The grant of a lower rate on road material to a government, engaged in highway construction, may benefit the government without subjecting to prejudice any person, locality or class of traffic. But a lower rate may result in giving to a single quarry within the State all of the governmental business, so that competing quarries and localities within or without the State, or interstate traffic, would be prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee commission was expressly found by the Interstate Com-

[3] See also *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446; *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 129, 130; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275, 282.

merce Commission. Its findings are necessarily conclusive, since the evidence on which it acted was not introduced in this suit. *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114.

There is nothing in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.,* 145 U. S. 263, 278; *Lake Shore & Michigan Southern Ry. Co.* v. *Smith,* 173 U. S. 684, or *Pennsylvania R. R. Co.* v. *Towers,* 245 U. S. 6, inconsistent with the views expressed above. The decisions made by the Interstate Commerce Commission are in substantial harmony with them.[4]

Reversed.

MR. JUSTICE SANFORD took no part in the consideration or decision of these cases.

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[4] Section 22 has been construed by the Commission as conferring upon carriers such permission to furnish transportation at reduced rates or free, in certain cases; as not conferring upon any shipper or traveler a right to such transportation; and, ordinarily, as not conferring upon the Commission power to establish such exceptions to the normal rates and fares. *Sprigg* v. *Baltimore & Ohio R. R. Co.,* 8 I. C. C. 443; *Field* v. *Southern Ry. Co.,* 13 I. C. C. 298; *Metropolitan Paving Brick Co.* v. *Ann Arbor R. R. Co.,* 17 I. C. C. 197, 204; *Eschner* v. *Pennsylvania R. R. Co.,* 18 I. C. C. 60, 63; *Dairymen's Supply Co.* v. *Pennsylvania R. R. Co.,* 28 I. C. C. 406; *United States* v. *Union Pacific R. R. Co.,* 28 I. C. C. 518, 524. See also *C. B. Havens & Co.* v. *Chicago & Northwestern Ry. Co.,* 20 I. C. C. 156. Compare *Cator* v. *Southern Pacific Co.,* 6 I. C. C. 113; *Commutation Rate Case,* 21 I. C. C. 428, 437; *United States* v. *Alabama & Vicksburg Ry. Co.,* 40 I. C. C. 405. Conference rulings provide, as to some reduced rates under § 22, that they must be filed and posted with the Commission; and as to others that they need not be. See Conference Rulings, Issued Nov. 1, 1917, Nos. 33, 36, 208e, 218, 244, 311, 452.

SOUTH UTAH MINES & SMELTERS *v.* BEAVER COUNTY.

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

No. 321. Argued March 15, 1923.—Decided May 21, 1923.

1. In an action at law tried by the District Court without a jury, the court, after deciding the case upon a general finding, may make special findings of fact and incorporate them in the record, if all this is done at the same term. P. 329.
2. Under the Utah Constitution, which contemplates that all property shall be taxed according to its money value, and, as a means of valuing metaliferous mines, provides that, in addition to an arbitrary valuation of five dollars per acre, they shall be assessed at a value based on some multiple or sub-multiple of their net annual proceeds; and under Utah Laws 1919, c. 114, which adopts three as the multiple for valuing metaliferous mines, (providing that all other mines and valuable mineral deposits shall be assessed at their true value;) and defines net annual proceeds as the net proceeds realized during the preceding calendar year from the sale, or conversion into money or its equivalent, of all ores extracted by the owner, lessee, contractor or other person working upon or operating the property during or previous to the year for which the assessment is made, including all dumps and tailings, after making certain deductions. *Held:* (a) That tailings, left as refuse from the concentration of ore derived from a mine long since worked out, and which were situate on land remote from the mine and had an ascertained and adjudicated value of their own, constituted a unit of property entirely apart from the mine. P. 332.

(b) That an agreement of the owner of the mine and the tailings, under which a leasing company took possession of and worked the tailings and paid the owner a per cent. of the net recovery, was a lease and left the owner subject to taxation on the value of the tailings during the process of extraction. *Id.*

(c) But that an attempt to tax the owner, upon the assumption that the tailings were part of the mine, by assessing the value at three times the entire proceeds extracted from the tailings by the lessee, during the tax year, was void. *Id.*

3. It is the duty of the Court to construe state statutes, if possible, so as to remove all doubt of their validity under the Fourteenth Amendment. P. 331.

Reversed.

ERROR to a judgment of the District Court, in favor of the County, in an action brought against it to recover the amount of a tax paid under protest.

Mr. C. C. Parsons, with whom *Mr. Fisher Harris* and *Mr. E. O. Leatherwood* were on the briefs, for plaintiff in error.

Mr. Harvey H. Cluff, Attorney General of the State of Utah, and *Mr. William A. Hilton,* for defendant in error, submitted. *Mr. J. Robert Robinson, Mr. W. Hal Farr* and *Mr. Lawrence A. Miner* also were on the brief.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought by the plaintiff in error (plaintiff below) against the defendant in error (defendant below) in the Federal District Court for the District of Utah to recover a tax alleged to have been illegally imposed by the state taxing authorities and paid under protest. The plaintiff is a mining corporation organized and existing under the laws of Maine, and since 1909 has owned mining property in Beaver County, Utah, consisting of mining claims, a concentrating mill, now obsolete and largely dismantled, and other property incident thereto. The property was continuously operated until August, 1914. The ores were copper-bearing and upon extraction were transported to the mill and there crushed and concentrated, the resulting concentrates being shipped and sold to smelters at some distance away. As a result of the concentrating operations refuse material, still retaining small quantities of copper and other metals, was deposited near the concentrating mill as

tailings. This deposit was begun by plaintiff's predecessor as early as May, 1903, and from then until August, 1914, approximately 900,000 tons of tailings were accumulated upon desert land owned by plaintiff, non-mineral in character, and located about three miles from its mining claims. At the time of the accumulation of these tailings there was no known process by which the small percentage of metals which they contained could be profitably recovered. In August, 1914, plaintiff stopped work on its mining claims and has never since resumed. The court below expressly found that at the date last mentioned all ores which could be profitably mined under processes then or since known had been taken out, and that plaintiff's mine, excluding the tailings, had never since been of any value; that plaintiff had never abandoned its property but had maintained its title and paid and discharged all taxes assessed against it; and that, on January 1, 1919, the said tailings deposit was of the value of $20,000.

In January, 1914, plaintiff made an agreement with the Utah Leasing Company for the treatment and reduction of this deposit upon a royalty of ten per cent. The leasing company took possession of the tailings, constructed reduction works, using in connection therewith some of the plaintiff's improvements on its mining property, and, as a result of its operations, recovered from the tailings in the year 1918 the net amount of $120,547, ten per cent. only of which was paid over to the plaintiff, under the terms of the agreement. The taxing authorities, claiming to act under the state constitution and laws, multiplied the amount thus recovered by three and fixed the value of plaintiff's mining property for the year 1919 for taxing purposes at the multiple thereof, viz., $361,641. The defendant thereupon assessed and collected from plaintiff $6,907.34 as a tax against plaintiff's

mining property for the year 1919, based upon a valuation computed in the manner just stated.

The Constitution of Utah declares (§§ 2 and 3, Article XIII) that all property in the State shall be taxed in proportion to its value, and requires the legislature to provide a uniform and equal rate of assessment and taxation of all property according to its value in money, and prescribe such regulations as shall secure a just valuation for the taxation of all property, so that every person and corporation shall pay a tax in proportion to such value. By an amendment to § 4, Article XIII, adopted in 1918, it is provided that all metaliferous mines or mining claims, in addition to an arbitrary valuation of $5 per acre, shall be assessed "at a value based on some multiple or sub-multiple of the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be assessed at their full value."

The legislature, at its session in 1919, enacted a statute in pursuance of this constitutional provision, providing that metaliferous mines or mining claims shall be assessed, in addition to the $5 per acre, upon a value to be determined by taking the multiple of three times the net annual proceeds thereof. Other mines and valuable mineral deposits are to be assessed at their full value. The words "net annual proceeds" are defined to be the net proceeds realized during the preceding calendar year from the sale, or conversion into money or its equivalent, of all ores extracted by the owner, lessee, contractor or other person working upon or operating the property during or previous to the year for which the assessment is made, including all dumps and tailings, after making certain deductions. Session Laws, 1919, c. 114, § 5864.

Upon the facts stated and under these constitutional and statutory provisions, the lower court upheld the validity of the tax.

The plaintiff contended in the court below that the tailings deposit was neither a mine nor a part of a mine, but a thing separate and apart from its mining claims, constituting a "valuable mineral deposit" and taxable as such upon the value and not a multiple thereof; that the agreement with the leasing company was a sale of the deposit, which thereupon ceased to be assessable as its property, or the basis for assessment of its worked out and worthless mine; that since 1914 its mining claims, having become valueless and yielding no net proceeds, were not taxable; that the tax assessed was therefore in contravention of § 3, Article XIII, of the Constitution of Utah, requiring a uniform and equal rate of assessment of property according to its value in money, so that every person and corporation should pay a tax in proportion to such value; and also was in contravention of the clauses of the Fourteenth Amendment to the Constitution of the United States in respect of due process and equal protection of the laws. The court below denied these contentions and sustained the tax and the case comes here for review upon writ of error.

The defendant has submitted a motion to dismiss the writ of error and of this we first dispose. The ground of the motion is that the case was tried by the court without a jury; that no exceptions were taken during the trial and no request for special findings or a declaration of law made during the progress of the trial; that the court gave its decision and a general finding orally and directed judgment for the defendant, which was duly entered; that nearly three months later, on motion of plaintiff, and against defendant's objection, the court made and filed special findings of fact. The defendant challenges the power of the court to make these special findings and insists that they should be disregarded, in which event nothing substantial would be left for review.

All of the proceedings, including the special findings, happened at the same term. The rule is that during the

term the record is "in the breast of the court" and may be altered during that time in its discretion as justice may require. *Goddard* v. *Ordway,* 101 U. S. 745, 752; *Ayres* v. *Wiswall,* 112 U. S. 187, 190; *Doss* v. *Tyack,* 14 How. 297, 312; *Barrell* v. *Tilton,* 119 U. S. 637, 643; *Basset* v. *United States,* 9 Wall. 38, 41.

That rule is applicable here and the motion to dismiss is accordingly denied.

The state constitution plainly contemplates that all property irrespective of its character, shall be taxed "according to its value in money." The provision with reference to the taxation of metaliferous mines does not mean to depart from this rule, but recognizes that their value cannot be determined in the ordinary way, since the ores which constitute the wealth of such property are hidden in the earth and, as a general thing, disclosure of their extent and character must await extraction. The constitution, therefore, provides, not for disregarding value in the assessment of taxes upon mines, but for arriving at it in a special manner—that is, by a measurement proportioned to the net annual proceeds derived from the property. The value of property bears a relation to the income which it affords. If it be property whose production is uniform and of indefinite duration the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value. The life of a mine, however, is limited. The extraction of ores from year to year constitutes a constant drain upon the capital, which, in course of time, will be exhausted. It follows that a given multiple of the net annual proceeds which may be a fair measure of value in the early part of a mine's development, will become excessive as the stage of exhaustion approaches. The constitutional provision, therefore, at best, will produce only approximate equality. Undoubtedly in fixing the multiple of

the net annual proceeds upon which the value of metaliferous mines is to be calculated a good deal of latitude must be allowed the legislature and the taxing authorities, but the power is not unbounded. Without attempting to delimit the boundaries—a matter primarily for the state courts—it is sufficient for present purposes to say that in our opinion they have been clearly exceeded in the instant case. The net proceeds here involved arose from a lot of refuse material, which, long prior to the imposition of the tax, had been severed from the mining claims, removed to a distance, submitted to the process of reduction and stored upon lands separate and apart from the claims. Moreover, but one-tenth of the amount of these net proceeds was realized by the owner of the mining claims. To treble the total of these proceeds for the purpose of basing thereon an altogether fictitious value for a mine worked out and worthless years before the adoption of the statutory provisions supposed to confer the authority to do so, results in such flagrant and palpable injustice as would cast the most serious doubt upon the constitutionality of such provisions if thus construed. See *Dane* v. *Jackson,* 256 U. S. 589, 598; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 614–615. These statutory provisions, so far as we are informed, have not received the consideration of the state courts, and we will not assume in advance of such consideration, that they will be so construed as to produce that result. See *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546; *Missouri, Kansas & Texas Ry. Co.* v. *Cade,* 233 U. S. 642, 650. Clearly they are susceptible of a construction which will preclude their application to the case now under consideration and, as that construction will resolve all doubt in favor of their constitutionality, it is our duty to adopt it. *Plymouth Coal Co.* v. *Pennsylvania, supra,* p. 546; *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 369; *Arkansas Natural Gas Co.* v. *Arkansas Railroad Commission,* 261 U. S. 379.

The rule prescribed for the valuation of metaliferous mines, as we have already indicated, is one of necessity, and should not be extended to cases clearly not within the reason of the rule. The tailings, severed and removed from the mining claims, changed in character, placed on other and separate lands and having an ascertained and adjudicated value of their own, in our opinion, constituted a unit of property entirely apart from the mine from which they had been taken. See *Forbes* v. *Gracey,* 94 U. S. 762, 765. We think the agreement with the leasing company was not a sale of these tailings, but that the ownership, pending the process of reduction, remained in plaintiff. The plaintiff, therefore, was subject to taxation upon their value, but not as a mine, since that implies something capable of being mined which this loose and homogeneous deposit obviously was not.

While the taxing authorities cannot be held to an inflexible rule of equality, even in respect of properties in the same classification where their nature is such as to practically preclude the application of such a rule, it does not follow that all distinctions are to be ignored and indubitably dissimilar and readily distinguishable things treated as though they were the same. It may well be that the taxable value of mines differing in extent of development or in degree of exhaustion and relatively of different actual values, must, from the practical necessities of the case, be subjected to the same rule of measurement, although it may work inequality to some extent. But the difference between a mine from which ore is still being or still may be extracted and net income derived, and one conceded to be an empty shell, with no present or prospective value whatsoever, is so obvious that the imposition of a tax upon the basis of their being, nevertheless, one and the same cannot be sustained with due regard for either law or logic.

How far the state statute defining the net annual proceeds to be considered in measuring the value of a mine,

properly includes those derived from dumps and tailings placed and remaining upon the mining claims or connected with a going mine, we do not determine; but we do hold that the proceeds from the tailings in question, under the facts here disclosed, are not included within its terms. The court below should have so construed the statute and rendered judgment for the plaintiff. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390–391; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 507. This disposition of the case makes it unnecessary to adjudicate the questions raised under the Fourteenth Amendment.

The judgment of the District Court is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

RIDDLE *v.* DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

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

No. 663. Argued April 12, 1923.—Decided May 21, 1923.

1. The objection that a trial and conviction in the District Court were illegal because the jury was made of but eleven men is one that should be taken by a writ of error, based on proper exceptions. P. 334.
2. A person tried, convicted and sentenced upon a record showing that a lawful jury was empaneled, sworn and charged, cannot collaterally impeach the record by a proceeding in *habeas corpus* based on the proposition that there were only eleven jurors. P. 335. Cf. *Ex parte Riddle*, 255 U. S. 450.
3. Proceedings of a District Court within its jurisdiction cannot be impeached and reexamined collaterally by a District Court of another district. P. 336.

Affirmed.

APPEAL from an order of the District Court discharging a writ of *habeas corpus* and remanding the appellant to custody.

Mr. Henry E. Davis, with whom *Mr. L. H. Ellis* was on the brief, for appellant.

Mr. Rufus S. Day, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant was convicted in the Federal District Court for the Northern District of Alabama of a felony and sentenced to imprisonment. The record of the District Court recites that "a jury of good and lawful men" was duly empaneled, sworn and charged. After sentence appellant moved to amend the record entry to show that only eleven men sat as jurors in the case and offered testimony in support of the motion. The court rejected the proof on the ground that oral testimony was not admissible to modify or amend the record and, first reciting that after hearing the evidence and arguments and being of opinion that the record of the judgment entry was as it should be and did not need amendment, denied the motion. Appellant then applied to this Court for a writ of mandamus to require the district judge to correct the record in the particulars just stated, setting forth in his petition the evidence offered and rejected. The writ was denied, *Ex parte Riddle,* 255 U. S. 450, this Court saying (p. 451):

"He [appellant] might have saved the point by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof were material, and then have brought a

writ of error. *Nalle* v. *Oyster,* 230 U. S. 165, 177. In such cases mandamus does not lie. Ordinarily, at least, it is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record. *Ex parte Morgan,* 114 U. S. 174; *Ex parte Park Square Automobile Station,* 244 U. S. 412, 414. In this case the facts were more or less clearly admitted at the argument but the record does not establish them and the extent of agreement or dispute with regard to them does not change the remedy to be sought." Appellant then took the case by writ of error to the Circuit Court of Appeals for the Fifth Circuit, *Riddle* v. *United States,* 279 Fed. 216, where the judgment so far as it concerns appellant was affirmed.

The point was not saved in a bill of exceptions, and it was not considered by the Court of Appeals. After the rendition of the judgment by that court, appellant sued out a writ of *habeas corpus* in the District Court for the Northern Division of the Northern District of Georgia, seeking release from imprisonment on the ground that the jury which convicted him was illegally constituted of less than twelve men. That court, on the return of the appellee and after hearing, discharged the writ and remanded appellant to custody, from which order the case comes here by appeal.

That the trial court had jurisdiction to try and punish the appellant for the offense with which he was charged is not disputed. The attempt is collaterally to impeach the record, showing upon its face that a lawful jury was duly empaneled, sworn and charged. Appellant's remedy, as suggested in the mandamus proceeding, was by writ of error. He did not avail himself of it and whatever may have been the cause or excuse for not doing so, *habeas corpus* cannot be used as a substitute. *Frank* v. *Mangum,* 237 U. S. 309, 326, and cases cited; *In re Lennon,* 166 U. S. 548, 552; *In re Coy,* 127 U. S. 731, 758–759. The

writ of *habeas corpus* is not a proceeding in the original criminal prosecution but an independent civil suit, *Ex parte Tom Tong,* 108 U. S. 556, 559, in which the record of the trial court is not open to collateral attack but imports absolute verity. See *Ex parte Tobias Watkins,* 3 Pet. 193, 202–203, 207; *In re Lennon, supra,* p. 553; *Grignon's Lessee* v. *Astor,* 2 How. 319, 340–342; *Matter of Gregory,* 219 U. S. 210, 213–214, 218; 2 Black on Judgments, § 625; 1 *Id.* § 254.

The power to inquire into facts outside the record. allowed under some circumstances, *In re Mayfield,* 141 U. S. 107, 116, cannot be extended to such as are inconsistent with the record.

The *Frank Case,* relied upon by appellant, does not decide otherwise. The language quoted (237 U. S. 331) to the effect that the court may "look behind and beyond the record . . . to a sufficient extent to test the jurisdiction of the . . . court" and "inquire into jurisdictional facts, whether they appear upon the record or not" was not meant to abrogate the rule established by prior decisions that the record may not be contradicted collaterally at least, where, as here, jurisdiction of the cause or parties is not involved; and this is demonstrated by the cases cited in support of the statement. In *Cuddy, Petitioner,* 131 U. S. 280, 286, the Court, sustaining the propriety of the inquiry there permitted, said: "Such evidence would not have contradicted the record." In the *Mayfield Case, supra,* it was said that the inquiry might involve "an examination of facts outside of, but not inconsistent with, the record." 141 U. S. 116. Nor is there anything to the contrary in the other two cases cited.

The court below was right in ruling that it was without authority to review or set aside the action of the trial court, for, as this Court said in *Sargeant* v. *State Bank of Indiana,* 12 How. 371, 385: ". . . whatever may be

the powers of a superior court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the exercise of appellate power."

The order of the District Court denying the writ is

Affirmed.

L. VOGELSTEIN & COMPANY, INC. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 269. Argued March 5, 6, 1923.—Decided May 21, 1923.

Just compensation for copper taken by the United States for war purposes under the Act of June 3, 1916, c. 134, §§ 120, 123, 39 Stat. 215, is to be measured by the market value of the copper at the time of the taking, and not by higher prices which the owner was obliged to pay under long time purchase contracts. P. 340.

56 Ct. Clms. 362, affirmed; motion to remand denied.

APPEAL from a judgment of the Court of Claims.

Mr. Alfred G. Reeves and *Mr. Frederic D. McKenney,* with whom *Mr. Russell H. Robbins* was on the brief, for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett* and *Mr. J. Robert Anderson,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Between September 28, 1917, and February 1, 1918, the United States obtained from appellant 12,542,857 pounds of copper and paid 23½ cents per pound therefor. By

its petition, appellant asks judgment for $424,196.54, being 3.381977 cents per pound, in addition to the price paid. The Court of Claims made findings of fact, and as a conclusion of law held that appellant was not entitled to recover, and dismissed the petition. From that judgment this appeal is taken.

The Court of Claims found that the market price of copper was 23½ cents per pound. The United States insists that payment of the market price was just compensation. The appellant claims that there was no express contract of sale; that the copper was taken pursuant to mandatory orders, and that it did not waive its right to just compensation. It submits that the finding of the Court of Claims, that after September 20, 1917, the market price of copper was 23½ cents per pound, must be read as referring to a mere fiat price fixed by the United States, and that it does not mean the market price as fixed by supply and demand and other elements in normal trading in copper. It asserts that the necessary cost of the copper to it was 26.881977 cents per pound, and demands that price.

It appears from the findings that appellant purchased ores, minerals and metals, had them smelted and refined, and sold the refined products. It was not a mine owner, operator, producer or refiner. On September 20, 1917, at close of business, it had on hand 43,851,042 pounds of copper. It had purchased 34,687,579 pounds as unrefined copper under long term contracts, and 9,163,463 pounds as refined copper in the open market. The average cost to appellant was 26.881977 cents per pound. Out of the stock then on hand, it had sold 31,308,183 pounds at 26.34389 cents per pound. There remained 12,542,857 pounds.

It further appears that some time before September 21, 1917, an agreement was made by the War Industries Board with copper producers fixing a price of 23½ cents

per pound for copper, and this agreement was approved by the President on that date. September 28, 1917, Vogelstein, who controlled appellant, attended a meeting of copper producers and government representatives and placed in nomination the persons who were chosen at that meeting as members of a committee to act for the copper producers in carrying out the agreement of September 21st, and to coöperate with government representatives in securing performance of the agreement and to take the necessary measures to that end. The United Metals Selling Company was the sales agent for copper producers, and the plan adopted for obtaining the copper for the United States was for the War and Navy Departments to send orders and shipping directions to the Selling Company. The orders were sent to the producers' committee, which returned them to the Selling Company with the name of the producer or dealer on whom the orders should be made. Thereupon the Selling Company placed its own order with the producer or dealer named, requesting the shipment to be made, and stating the price to be paid as 23½ cents per pound. The Selling Company from time to time, beginning April 6, 1917, made a number of contracts for the furnishing of copper to the United States. The first two, respectively dated April 6 and April 21, covered 45,100,000 pounds at 16.6739 cents per pound. Later contracts covered 297,826,734 pounds at 23½ cents per pound. Between September 28, 1917, and February 1, 1918, the period in which appellant's copper here involved was obtained, about 283,000,000 pounds were furnished the United States under these contracts. In appellant's petition it is stated that since September 21, 1917, it sold and delivered to the United States at least 25,000,000 pounds of copper, which cost it substantially 23½ cents per pound, the price it received from the United States. Appellant's contention that there was no market price other than that fixed by the fiat of

the United States is without support. The price so found uniformly prevailed during the period in question. Appellant cooperated with others having copper to sell in putting into effect and maintaining that price. The finding of the Court of Claims is plain and cannot be read as referring to a mere fiat price. It is not impaired, but is supported and confirmed by other findings. The appellant is bound by it.

It contends that when the price was fixed at 23½ cents per pound, it unavoidably had on hand the 12,542,857 pounds of copper in question; that this copper was requisitioned and taken upon mandatory orders pursuant to §§ 120 and 123 of an Act approved June 3, 1916, c. 134, 39 Stat. 213, 215, and that it protested against the price. It moves to remand the case with directions to find facts with reference to these claims. Assuming all these matters of fact in favor of appellant and considering the case as if they had been so found by the Court of Claims, the United States' contention that appellant has received just compensation must be sustained. The market price was paid. The market value of the copper taken at the time it was taken measures the owner's compensation. *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 80, 81; *Boom Co.* v. *Patterson,* 98 U. S. 403, 407; *United States* v. *New River Collieries Co.,* 276 Fed. 690, affirmed this day, *infra,* 341. The higher prices, if any, paid by appellant for the copper it was compelled to take on long time purchase contracts are not evidence of the value of the copper at the time it was obtained by the United States. The United States is under no obligation to make good the loss. Appellant would be entitled to the gain if it had purchased at less than the market price at the time of taking.

The motion to remand is denied, and the judgment appealed from is affirmed.

UNITED STATES *v.* NEW RIVER COLLIERIES COMPANY.

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

No. 316. Argued March 7, 8, 1923.—Decided May 21, 1923.

1. Under § 10 of the Lever Act and the Fifth Amendment, the owner of property requisitioned by the United States is entitled to the full money equivalent of the property taken; and the ascertainment of this just compensation is a judicial function. P. 343.
2. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. P. 344.
3. Evidence of the cost of production, and of what would be a reasonable profit, to the owner, is inadmissible when market prices, prevailing at the time and place of the taking, have been established beyond controversy. P. 344.
4. Evidence of prices of coal for future delivery current at the time and place of taking, has no weight against market prices then and there current for immediate delivery; nor any tendency to prove what they were. P. 344.
5. An owner of coal who, at the time and place of its taking by the Government, could clearly have sold it for a higher export market price, and had the right to do so, is not justly compensated by payment of a lower, domestic market price, current there at the same time. P. 345.

276 Fed. 690, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment for the Collieries Company in the District Court in an action to recover a balance due as compensation for coal requisitioned by the United States.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck, Mr. L. L. Hight,* Special Assistant to the Attorney General, and *Mr. R. S. Collins* were on the brief, for the United States.

Mr. Ira Jewell Williams, with whom *Mr. Charles L. Guerin, Mr. Yale L. Schekter, Mr. F. R. Foraker* and *Mr. Francis Shunk Brown* were on the briefs, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

On various dates between September 17, 1919, and February 1, 1921, at Hampton Roads, Virginia, the United States requisitioned from defendant in error upwards of 60,000 tons of bituminous coal for use of the Navy. The taking was under § 10 of the Lever Act. 40 Stat. 276. The President, acting through the Navy Department, fixed certain prices as just compensation. These were not satisfactory to the owner. The United States paid 75% of the amount fixed, or, under stipulation of the parties is to be considered as having paid it in accordance with the act. The owner sued in the United States District Court for the District of New Jersey for a sum which added to the 75% would make just compensation. Three actions were consolidated and tried as one. There was no controversy as to the quantity or quality of the coal taken. Judgment was entered in accordance with the verdict of a jury, fixing prices in excess of those allowed by the President. The Government took the case to the Circuit Court of Appeals, and to review its judgment affirming that of the District Court brings the case here on writ of error.

When the coal was taken, there was at Hampton Roads a market for coal for export and also a domestic market. The business of the defendant in error was chiefly in the export trade. During the period in question, it produced about 907,000 tons and sold nearly two-thirds of it for export. Many producers shipped coal there which, with the coal of defendant in error, went into a common pool. There was a strong demand for export coal. There

were many buyers and export prices fluctuated. About 36,000,000 tons were sold in the open market. Supply and demand were controlling factors affecting market prices which prevailed in both the export and domestic markets. The prices for export coal were considerably higher than for domestic coal. If the coal had not been taken by the United States, it could have been sold by the owner at export market prices. The market prices for export coal were shown by a number of witnesses of long experience and familiar with the market, by excerpts from leading trade journals, and by a statement of prices actually received by defendant in error for export coal during that period. On that point the United States offered no opposing evidence. The court held market prices for export coal constituted just compensation, and left to the jury the ascertainment thereof.

The United States contends that the court erred in refusing, under the circumstances disclosed, to allow it to introduce evidence of the "real" value of the coal as distinguished from its market value, and in holding that spot export prices controlled in determining just compensation; and further that, even if such market prices are taken, it was error to exclude evidence of domestic prices.

Section 10 of the Lever Act in obedience to the Fifth Amendment provides for just compensation. The war or the conditions which followed it did not suspend or affect these provisions. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88.[1] The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, and cases cited. The ascertainment of compensation is a

[1] See also *C. G. Blake Co.* v. *United States*, 275 Fed. 861.

judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. *Vogelstein & Co.* v. *United States,* decided this day, *ante,* 337; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 80, 81; *Boom Co.* v. *Patterson,* 98 U. S. 403, 407. More would be unjust to the United States and less would deny the owner what he is entitled to.

The United States admits that market value is usually the basis for ascertaining the pecuniary equivalent, but suggests that sometimes an article has no market price and that in such case "proof of real value" is admissible and that therefore market value and just compensation are not necessarily synonymous. The court below excluded evidence offered by the United States to show the owner's cost of production and a reasonable profit. This ruling was right, because it was shown beyond controversy that there were market prices prevailing when and where the coal was taken. The United States had the right to take the coal on payment of these prices; the owner was not entitled to more and could not be required to take less. The owner's cost, profit or loss did not tend to prove market price or value at the time of taking, and was therefore immaterial.

The United States offered evidence of prices specified for domestic coal in contracts for future deliveries (current at the time of the taking), as distinguished from prices for spot coal, i. e., coal for immediate delivery. These contract prices were rightly excluded. They could be given no weight as against current market prices, and would have no tendency to prove what such market prices were.

The facts bring this case within the rule stated by the Circuit Court of Appeals (276 Fed. 690, at p. 692):

"If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition." The lower courts rightly held that market prices prevailing at the times and place of the taking constitute just compensation.

Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.

The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.[2]

The judgment of the Circuit Court of Appeals is affirmed.

[2] Cf. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326; *Five Tracts of Land* v. *United States*, 101 Fed. 661, 665; *New York* v. *Sage*, 239 U. S. 57, 61.

INTERNATIONAL LIFE INSURANCE COMPANY *v.* SHERMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 295. Argued March 15, 1923.—Decided May 21, 1923.

Stockholders of a corporation equitably owning the stock of an insurance company brought suit against the two companies, and their managers, in the District Court, for the purpose of protecting the assets of the insurance company through a receiver, against mismanagement; other like stockholders, and holders of annuity certificates issued by the insurance company, intervening, proposed a plan, for reorganizing that company, which provided, *inter alia*, that holders of such annuity certificates should pay a stated amount on each certificate, surrender their certificates for cancelation and receive stock of the insurance company in exchange, and that all who failed to avail themselves of this privilege within 20 days, should be barred and estopped from any claim against the company and their certificates be deemed canceled, etc. *Held*, that, as to certificate holders who were not parties, and did not appear in the suit, and against whom no relief was prayed, the attempt to bar their rights and cancel their certificates was plainly void; and that the contention that a judgment of a state court, in so holding, failed to give full faith and credit to the District Court's decree, as required by the Constitution and acts of Congress, was frivolous. P. 351.

Writ of error to review 291 Mo. 139, dismissed; certiorari denied.

ERROR to a judgment of the Supreme Court of Missouri affirming a judgment against the Insurance Company on annuity certificates issued by its predecessor.

Mr. Charles G. Revelle, with whom *Mr. Armwell L. Cooper* was on the brief, for plaintiff in error.

Mr. Oscar S. Hill, with whom *Mr. Thad B. Landon*, *Mr. John H. Atwood* and *Mr. William Thomson* were on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is an action brought by the defendant in error in the Circuit Court of Jackson County, Missouri, for money paid by his assignors for annuity certificates issued by the Great Western Life Insurance Company, the predecessor of plaintiff in error. Judgment for $47,463.90, with interest and costs, was affirmed in the State Supreme Court. That court allowed writ of error bringing the case here. A petition for writ of certiorari also has been presented. The federal question asserted is that the state court, in violation of the Constitution and acts of Congress defining the jurisdiction of federal courts, failed to give full faith and credit to certain provisions of a decree of the United States Circuit(now District) Court for the Western District of Missouri, set up in the answer, purporting to cancel and annul the annuity certificates. The defendant in error moves to dismiss the writ of error and opposes the granting of certiorari on the grounds, among others, that the United States court was without jurisdiction to decree the cancellation of the certificates assigned to defendant in error, and that the provisions of the decree relied on by plaintiff in error are void.

We are of opinion that the asserted federal right is so obviously devoid of merit and frivolous that the writ of error must be dismissed and certiorari denied.[1]

In 1906 the Great Western Agency Company was incorporated under the laws of Colorado. In 1907 those

[1] *Missouri Pacific R. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533; *Piedmont Power & Light Co.* v. *Graham*, 253 U. S. 193; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583; *Fay* v. *Crozer*, 217 U. S. 455; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Farrell* v. *O'Brien*, 199 U. S. 89, 100. See also decisions per curiam: *Nesmith* v. *Ohio*, 257 U. S. 622; *Pueblo of Laguna* v. *Candelaria*, *id.* 623; *Harvey* v. *Union Traction Co.*, *id.* 624; *Winehill & Rosenthal* v. *Louisiana*, 258 U. S. 605; *Hartford Life Insurance Co.* v. *Johnson*, *id.* 612; *Lindsey* v. *Allen*, *id.* 613.

in control of that company caused the Great Western Life Insurance Company to be organized under the laws of Missouri, having a capital of $100,000—1000 shares. Eight shares were held in the names of the incorporators, and the remaining 992 were held by them as trustees for the agency company. Desiring to raise more funds, the company issued so-called annuity certificates which were sold at $150 per "share." Each share obligated the company to pay an annuity to be arrived at by dividing 500 into a sum based on 25 cents on each $1000 of insurance—with certain exceptions not necessary here to be set forth—written by the company during fifty years from its incorporation. In May, 1908, certain stockholders of the agency company filed a bill in the United States court against that company, the insurance company and individuals controlling them, alleging mismanagement and improper use of the insurance company's property in fraud of their rights. It prayed that a receiver be appointed to take charge of and administer the assets of both companies for the benefit of those entitled thereto. A receiver was appointed and directed to sell the property of the insurance company. When the application of the receiver for confirmation of his acceptance of an offer came before the court, certain stockholders of the agency company and certificate holders appeared and asked a postponement. It was shown that some of the stockholders and certificate holders had undertaken to raise funds for the rehabilitation of the insurance company; that some money for this purpose had been contributed; and that there was assurance that enough would be raised to pay off the debts. Postponement was granted by an order which stated:

"F. M. Pearl and other stockholders of the Great Western Agency Company and annuity certificate holders of the Great Western Life Insurance Company who are similarly situated, appearing by B. P. Waggoner and James W. Orr, . . . etc."

The matter again came before the court, and its order recited:

"Now on this 27th day of August, 1908 . . . came on further to be heard the objections and exceptions of F. M. Pearl and other stockholders of the Great Western Agency Company and Annuity Certificate holders of the Great Western Life Insurance Company to the confirmation of the sale of the assets . . . A. F. Sherman appearing for himself and certain other annuity certificate holders . . . and all parties being before the court and being heard and the court being fully informed and advised, it is considered, ordered, and decreed:"

The decree approved the reorganization plan presented and directed the return of all property to the company, immediate payment of approved death claims, and the giving of a bond to indemnify the receiver from such claims as might be presented and approved. The plan of rehabilitation was that annuity certificate holders should pay $37.50 on each certificate, surrender the same for cancellation and then receive stock of the insurance company of par value equal to one-half of the payment, and gave those who had not availed themselves of this privilege 20 days within which to do so, and declared those failing to make such payment and surrender their annuity certificates for cancellation, "barred and estopped from making any claim of any kind whatsoever against said Life Insurance Company or officers or stockholders thereof, or against any assets of said company, and such annuity certificates will then and thereby be fully canceled in law and in equity, and such annuity certificate holders will have no further rights, claims or demands against said company, its officers, stockholders, assets or property on account thereof."

The decree directed the sale by the receiver of the agency company of the 992 shares of stock of the insurance company to a trustee for those so contributing to

the rehabilitation of the insurance company; it fixed compensation of the receiver and his solicitors and provided for the payment thereof; it stated that the insurance company had deposited funds for carrying out the provisions of the decree and directed the same to be so used; bids submitted for the assets were rejected, and the decree continued: " . . . that the jurisdiction of this court is fully retained, extended and continued from time to time until this cause is finally concluded, over all subjects-matter covered by any pleading now on file or that later on may be filed, and over all parties whose names are now on the record and such other party or parties as may later on be brought into court, or who may come into court by any pleading. And all such parties now to the record, including the said, the Great Western Life Insurance Company, and all parties who may later on be made parties herein, shall be bound by such further orders and decrees as to the court may seem necessary and proper."

No further proceedings were had, and on November 29, 1912, an order was filed relinquishing jurisdiction and discontinuing the case.

The insurance company resumed business and continued until its merger with the plaintiff in error, December 7, 1912. By the articles of consolidation, the latter agreed to pay all debts, liabilities and obligations of the former. The claims of the certificate holders were specifically referred to, and the plaintiff in error agreed to pay the annuities provided for in such certificates or refund the amounts paid for them if they should be held by the Supreme Court of Missouri to be valid obligations of the Great Western Company at the time of the merger. The state court found that the certificate holders who assigned to defendant in error were not original parties to the suit; that they did not subsequently intervene or appear in person or by counsel; that no relief was sought

against them by any party to the suit, and that the only relief sought by stockholders and annuity certificate holders, who proposed and supported the plan of rehabilitation, was to have the property returned to the insurance company upon payment of its debts. These findings are sustained by the evidence. The stockholders and certificate holders who did appear in that suit for the purpose of reorganizing the company had no authority or power to represent certificate holders who did not appear. There is nothing in the record to support the jurisdiction of the court to deal with or cancel the annuity certificates assigned to defendant in error. The assignors were denied a hearing upon the matters decreed against them.

The provisions of the decree, attempting to bar and estop certificate holders from making any claim against the insurance company, its officers, stockholders or assets, and attempting to cancel their certificates and determine that they had no further rights, claims or demands unless within the specified 20 days, they should pay in $37.50 per share, and, upon surrender of their certificates, take stock in the insurance company of par value of one-half the amount so paid, were without jurisdiction. The company could not thus be relieved of its obligations to non-consenting annuity certificate holders and have its property returned to it exempt from their claims. Their rights could not be so disposed of. As to them the decree was not a judicial determination, and the courts of Missouri were right in holding it to be a nullity. See *Hovey* v. *Elliott,* 167 U. S. 409; *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *McVeigh* v. *United States,* 11 Wall 259.[1]

Writ of error dismissed.
Writ of certiorari denied.

[1] Cf. *Reynolds* v. *Stockton,* 140 U. S. 254, 264; Rev. Stats., § 737; Equity Rules 47 and 48, in force in 1908.

CAMPBELL *v.* CITY OF OLNEY.

ERROR TO THE COUNTY COURT OF YOUNG COUNTY, STATE OF TEXAS.

No. 266. Submitted April 20, 1923.—Decided May 21, 1923.

1. Unless a federal right is involved, a state court's application of the local laws will not be reviewed here. P. 354.
2. Where a property owner, complaining of a special sidewalk assessment, had full opportunity, under the state laws, to be heard before the assessment was made, and a reasonable time thereafter to bring suit to set it aside, or to correct it or any proceeding with reference to it, but failed to avail himself of these rights, and did not draw in question the validity of the state laws, *held*, that a contention that he was denied due process of law was not even colorable. *Id.*

Writ of error dismissed.

ERROR to a judgment of a county court, of Texas, (the highest court to which the cause could be taken in that State,) in favor of the City of Olney, in its action to collect a sidewalk assessment from the plaintiff in error.

Mr. A. H. Carrigan for plaintiff in error.

Mr. William B. Jaynes for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

A statute of Texas (Rev. Civ. Stats. 1911, c. 11, Arts. 1006–1017), empowered the City of Olney to lay sidewalks and to assess the cost against abutting property and owners. The City ordered the construction of sidewalks in front of four lots owned by plaintiff in error. An ordinance was passed making the cost of sidewalks a lien against abutting property, and providing for 20 days' notice to the owner, before charging such cost personally against him or as a lien upon his property. Plaintiff in

error was given notice in compliance with the statute and ordinance. He failed to appear or make objection to the assessment.

The statute provides that any property owner against whom or whose property such assessment has been made may within 20 days bring suit in any court having jurisdiction to set aside or correct the same or any proceeding with reference thereto, on account of any error or invalidity therein; but thereafter, he may not question the validity of such proceedings or assessment. No suit was brought by the plaintiff in error. The City issued its assessment certificate, declaring the cost of the sidewalks, $89.32, a charge against him and against the lots.

The statute further provides that if any such certificate shall recite that the proceedings have been regularly had, and that all prerequisites to the fixing of the assessment lien and personal liability have been complied with, it shall be *prima facie* evidence of the facts so recited. The certificate contained these recitals. Plaintiff in error failed to pay, and the City brought suit in justice court. He answered in substance that the City had no ordinance authorizing the assessment; that it had not complied with the statute, and was therefore without authority to invoke it, and that its acts and conduct in making the assessment constituted a taking of his property without due process of law in violation of the Fourteenth Amendment. He contended that there should have been a specific ordinance concerning this sidewalk and assessment.

The justice of the peace gave judgment in favor of plaintiff in error. The City appealed to the county court. At the trial, it offered the assessment certificate in evidence and rested. Plaintiff in error offered to prove that no ordinance had been passed relative to the laying of this particular sidewalk; that he received the notice to appear, and went to the meeting place of the city council, and that the council had adjourned. He did not offer

to prove any fact excusing his failure to appear before adjournment, or that he was denied a hearing. The county court found for the City. Its order denying a motion for a new trial recites that it is the highest appellate court to which the cause can be taken in the State of Texas because the amount involved is less than $100. The county judge allowed a writ of error bringing the case here.

The judgment of that court necessarily determines that the state laws were complied with. Unless a federal right is involved, the state court's application of local laws will not be reviewed here. *Hallinger* v. *Davis,* 146 U. S. 314, 319; *Peters* v. *Broward,* 222 U. S. 483, 492; *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, 234; *Wade* v. *Travis County,* 174 U. S. 499, 508; *Osborne* v. *Florida,* 164 U. S. 650, 654; *Bardon* v. *Land & River Improvement Co.,* 157 U. S. 327, 331; *Missouri* v. *Lewis,* 101 U. S. 22, 32–33. Plaintiff in error had opportunity to be heard before the city council and was allowed a reasonable time after the assessment to bring suit to set it aside or to correct it or any proceeding with reference thereto. He failed to avail himself of the rights so given him by state laws. Their validity was not drawn in question. His claim that he was denied due process of law is not even colorable. *Valley Farms Co.* v. *County of Westchester,* 261 U. S. 155; *Withnell* v. *Ruecking Construction Co.,* 249 U. S. 63, 69; *Hibben* v. *Smith,* 191 U. S. 310, 321, *et seq.; French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 334, 344, and cases cited. There is no federal question in the case.

The writ of error is dismissed.

Counsel for Parties.

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

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

No. 404. Argued April 11, 1923.—Decided May 21, 1923.

1. A disclosure made by a witness not amounting to an actual admission of guilt or of incriminating facts, does not deprive him of his privilege of stopping short in his testimony whenever it may fairly tend to incriminate him. P. 358.
2. This rule applies to the involuntary examination of a bankrupt. *Id.*
3. Where the only issue presented by the Marshal's return, or passed upon by the District Court, in a *habeas corpus* proceeding, was whether the relator, who had been imprisoned for refusal to answer questions propounded in his examination as a bankrupt, upon the ground that they might incriminate him, had waived his privilege in that regard; and contentions as to whether some of the questions were such that the answers could not have incriminated him and as to whether his claim of privilege was not in good faith were first made on appeal to this Court from the order of the District Court discharging him in the *habeas corpus, held,* that this Court was not called upon to scrutinize the voluminous record of his examination, and decide, for the first time, whether such contentions were justified, especially as the District Judge, in the contempt proceeding, had expressed his opinion that answers to the questions might furnish incriminating information. P. 360.

Affirmed.

APPEAL from an order of the District Court discharging the appellee, in *habeas corpus.*

Mr. Saul S. Myers and *Mr. Walter H. Pollak,* Special Assistants to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Lindley M. Garrison* were on the briefs, for appellant.

Mr. W. J. Fallon for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is an appeal from an order of the District Court sustaining a writ of *habeas corpus* and discharging the appellee from custody. It involves the same proceeding which was before this Court at an earlier stage in *Arndstein* v. *McCarthy*, 254 U. S. 71 and 379.

Arndstein, having been adjudicated an involuntary bankrupt and called before a Special Commissioner for examination as to his assets under § 21a of the Bankruptcy Act, refused to answer four hundred and forty-seven of the questions which were asked him, asserting his constitutional privilege upon the ground that to do so might tend to degrade and incriminate him. The district judge, having "no doubt that the answers might furnish information which would render him liable to prosecutions in the federal courts for concealment of assets," denied a motion to punish him for contempt. After his examination, however, Arndstein filed, without objection, sworn schedules of his assets and liabilities, showing only one item of property, namely, a bank deposit of $18,000. Thereupon, the district judge, being of opinion that Arndstein thus asserted not only that he had this bank deposit but also that he had no other property, and had thereby become subject to examination as to his property, ordered him to answer four hundred and twenty-six of the former questions. Being recalled for further examination he again refused to answer them, upon the same ground as before. He was then adjudged to be guilty of contempt of court and committed to the custody of the Marshal for confinement in jail so long as he persisted in his refusal to answer.

He thereupon presented to the District Court a petition for a writ of *habeas corpus*, alleging that he was restrained of his liberty without due process and in violation

of the Federal Constitution. This petition was held to be insufficient, and the writ was refused. Upon an appeal by Arndstein this Court held that as the schedules did not amount to an admission of guilt or furnish clear proof of crime, they did not constitute a waiver of his right to stop short whenever he could fairly claim that to answer might tend to incriminate him; and the order of the District Court was accordingly reversed and the cause remanded for further proceedings in conformity with the opinion. *Arndstein* v. *McCarthy, supra,* pp. 72, 73. In a supplemental memorandum (p. 379) it was added that this decision only required the District Court to issue the writ and proceed as usual, and that if proper reasons existed for holding Arndstein not shown by the petition they might be set up in the return for consideration.

Thereafter the District Court, in accordance with the mandate of this Court, vacated its former order and issued the writ of *habeas corpus;* to which the Marshal made return, exhibiting a transcript of the entire proceedings before the Commissioner. Aside from general denials of the illegality of Arndstein's commitment the only ground set up in the return as a reason for holding him was that, after being notified by the Commissioner of his privilege, he had, before refusing to answer the questions in issue, testified of his own accord, without invoking any privilege, to the very matters with which these questions were concerned, thereby waiving his privilege upon further examination concerning them. Upon a hearing on the petition and return, the District Court was of opinion that, although in certain answers made without objection Arndstein had denied that he had any stocks or bonds in his possession or under his control at any time during the preceding year, the conclusion to be drawn from the decision of this Court in reference to the schedules was that his denials or partial disclosures as a witness did not terminate his privilege so as to deprive him of the right to

refuse to testify further about his property, and that he was at liberty to cease disclosures, even though some had been made, whenever there was just ground to believe the answers might tend to incriminate him; and it accordingly sustained the writ and discharged him from custody. The Marshal, by reason of the constitutional question involved, has appealed directly to this Court. Jud. Code, § 238; *Boske* v. *Comingore,* 177 U. S. 459, 465; *Collins* v. *Miller,* 252 U. S. 364, 365, 371; *Arndstein* v. *McCarthy, supra,* p. 72.

We find no error in the order of the District Court:

1. The opinion of this Court upon the former appeal was not based upon the ground, as the Marshal in effect contends, that schedules filed by a bankrupt are so essentially different from evidence given by him that, whatever their disclosures, they cannot constitute a waiver of his privilege against incrimination when he is called for compulsory examination under the Bankruptcy Act. On the contrary, the sworn schedules were, impliedly at least, assimilated to evidence given by the bankrupt as a witness, the ground upon which they were held not to have waived his privilege against subsequent incrimination being thus stated (p. 72): "The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. See *Brown* v. *Walker,* 161 U. S. 591, 597; *Foster* v. *People,* 18 Michigan, 266, 274; *People* v. *Forbes,* 143 N. Y. 219, 230; *Regina* v. *Garbett,* 2 C. & K. 474, 495."

The four cases thus cited related to testimony given by witnesses and the limit upon their right to stop disclosures. In *Brown* v. *Walker,* this Court said that "if the witness himself elects to waive his privilege . . . and discloses his criminal connections, he is not permitted to

stop, but must go on and make a full disclosure"; in *Foster* v. *People*, the court, while holding that a witness who has voluntarily admitted his guilt of a criminal offense is not protected from further disclosures on the same subject, said that if he has not actually admitted criminating facts, he "may unquestionably stop short at any point, and determine that he will go no further in that direction"; in *People* v. *Forbes*, it was held that a witness by answering questions exonerating himself in general terms from all connection with a criminal transaction, does not thereby waive his right to remain silent when it is thereafter sought to draw from him circumstances which might form another link in the chain of facts capable of being used to his peril; and in *Regina* v. *Garbett*, it was held that it makes no difference in the right of a witness to protection from incriminating himself that he has already answered in part, he being "entitled to claim the privilege at any stage of the inquiry."

In short, it is apparent not only from the language of the former opinion but from its citations that this Court applied to the non-incriminating schedules the rule in the cases cited, namely, that where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him. And although there is some conflict of authority as to the application of this rule, we see no reason for departing from its recognition in the former opinion, and think that it is the sound rule which should be applied to the involuntary examination of a bankrupt where he is practically in the position of a witness under cross-examination. And since we find that none of the answers which had been voluntarily given by Arndstein, either by way of denials or partial disclosures, amounted to an admission or showing of guilt, we are of

opinion that he was entitled to decline to answer further questions when so to do might tend to incriminate him.

2. The Marshal also contends that in many instances the questions which Arndstein refused to answer were plainly of such a character that the answers could not have incriminated him, and that his whole testimony shows that he was not making his claim of privilege in good faith, but largely in obedience to suggestions of his counsel, who in some instances claimed the privilege for him. It is, however, a sufficient answer to this contention that no such reasons for denying the writ were set up in the Marshal's return, or, so far as it appears, brought to the attention of the District Court or ruled upon by it. And in such case we are not called upon, on appeal, to examine, as with a microscope, the multitudinous questions in issue, involved in an unduly protracted examination, containing many vain and futile repetitions, much of which does not appear to have had any relation to a discovery of assets of the bankrupt but was of such character as to suggest that the underlying purpose was the discovery of evidence to support the charge of grand larceny for which Arndstein had been indicted in the state court; or to determine, as original questions in this Court, matters not in issue under the pleadings in the District Court or determined by that court.

Furthermore, the district judge, in ruling in the bankruptcy proceedings on the first motion to punish Arndstein for contempt, had, as shown, specifically stated that he had no doubt that answers to these questions might furnish incriminating information. There was clearly no abuse of discretion in this ruling which would justify us in reviewing it under the writ of *habeas corpus*. And it may be added, that on the first appeal this Court also stated that it was "impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been an-

swered with entire impunity." *Arndstein* v. *McCarthy, supra,* p. 72.

The order of the District Court sustaining the writ and discharging Arndstein from custody is accordingly

Affirmed.

HOUSTON COAL COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 365. Argued April 10, 1923.—Decided June 4, 1923.

Section 10 of the Lever Act grants jurisdiction to the District Court of an action against the United States to recover the difference between what the Government has paid the plaintiff as just compensation for property requisitioned under that section, and what the plaintiff, alleging that the payment was accepted under protest, because of duress, and with express reservation of the right to demand more, claims to be just compensation. P. 364.

Reversed.

ERROR to a judgment of the District Court dismissing, for want of jurisdiction, an action under the Lever Act, to recover the difference between what the Government paid the plaintiff, as just compensation in full, for property requisitioned, and a larger amount which, plaintiff alleged, was the true value.

Mr. A. Julius Freiberg and *Mr. Ira Jewell Williams,* with whom *Mr. W. A. Geoghegan* was on the briefs, for plaintiff in error.

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

The jurisdiction conferred upon the District Courts by § 10 of the Lever Act does not extend to suits brought

to recover additional compensation after the property owner has elected to receive, and has received, the amount determined by the President to be just compensation, nor to suits to avoid an accord and satisfaction upon the ground that it was obtained by duress.

Section 10 of the Lever Act provided two methods of payment. First, the President was directed to ascertain the just compensation and pay it. Second, if the owner of the property taken elected not to accept the President's award he was to be paid 75 per cent. thereof and could sue for such additional amount as would make the compensation just, and jurisdiction was conferred upon the District Courts to hear and determine that issue.

The Government claims that such were the only issues which the District Courts were empowered to entertain.

The District Courts have no general jurisdiction of suits against the United States other than that conferred by § 24, Jud. Code, pursuant to which they sit as courts of claims, without a jury, in cases involving claims not exceeding $10,000. Statutes extending the right to sue the Government and conferring jurisdiction upon the courts for that purpose will, as a general rule, be strictly construed, *Blackfeather* v. *United States,* 190 U. S. 368; and the jurisdiction can not be enlarged by implication. *Price* v. *United States,* 174 U. S. 373, 375.

It is only when a controversy within the terms of the Lever Act is stated that the District Court has jurisdiction to entertain it against the United States. If that court might not entertain the case by virtue of that particular act, it might not entertain it at all. That the petition must show a case within the statutory permission to sue the United States or fail for want of jurisdiction is undoubted. *Hill* v. *United States,* 149 U. S. 593; *Haupt* v. *United States,* 254 U. S. 272; *Great Western Serum Co.* v. *United States,* 254 U. S. 240; *United States* v. *Nederlandsch-Amerikaansche Stoomvaart,* 254 U. S. 148.

It would seem to be clear that, from the language of § 10 of the Lever Act, the only issue which Congress contemplated would arise under the act was that of just compensation, and it was willing, indeed, it insisted, that the property owner have the right of trial by jury as to that issue. *United States* v. *Pfitsch,* 256 U. S. 547.

The alleged facts constituting the duress are that plaintiff was told that the document which it was asked to sign was an order; that, if it was not obeyed, certain payments then due and to become due would not be paid; that its coal and mines would be confiscated, although there was no claim by the officers making the threats that the President would find it necessary, to secure an adequate supply of necessaries for the Army or for the maintenance of the Navy, or for any other public use connected with the common defense, to take over the mines or confiscate the coal, and although the fact was, to the full knowledge of the President and of the officers, that there was an abundant supply, or source of supply, for all of said purposes.

In avoidance of the receipt in full which it gave, the plaintiff therefore seeks to obtain the verdict of a jury upon the good faith of the President of the United States and of the officers acting under his authority. To hold that § 10 of the Lever Act conferred general jurisdiction upon the District Courts to try with a jury cases involving such issues as these is not to be believed. It is not merely an action for just compensation. It seeks to set aside an accord and satisfaction on the ground of duress.

After a property owner has elected to take, and has received, the award of the President, no cause of action cognizable in the District Courts remains. The facts constituting the alleged duress are unavailing.

Mr. Ira Jewell Williams, Mr. Henry Hudson, Mr. F. R. Foraker, Mr. John H. Stone and *Mr. Francis Shunk Brown,* by leave of court, filed a brief as *amici curiae.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This cause went off below on motion to dismiss the petition and the record presents a question of jurisdiction only. Judicial Code, § 238. Did the District Court have authority to hear and determine the issues tendered by plaintiff in error? The point is not free from difficulty; but, after considering the contending views, we conclude there was jurisdiction and that the judgment to the contrary must be reversed.

Purporting to proceed under authority granted by § 10 [1] of the Lever Act, approved August 10, 1917, c. 53, 40 Stat. 276, the President, acting through the Secretary of the Navy, requisitioned coal belonging to the plaintiff in error and paid therefor four dollars per ton, just compensation as ascertained by him. Alleging that this was received under protest, because of duress, and with express reser-

[1] Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: *Provided*, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

vation of the right to demand more, the Coal Company instituted the original action to recover the difference between the amount received and what it claimed to be just compensation. The court held that § 10 did not grant permission to sue the United States therein to one who has received the amount determined by the President for requisitioned articles; and that it lacked jurisdiction to adjudicate the issues which the petition presented.

The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. As heretofore pointed out, *United States* v. *Pfitsch,* 256 U. S. 547, by deliberate purpose the different sections of the act provide varying remedies for owners—some in the district courts and some in the Court of Claims.

It reasonably may be assumed that Congress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners. Considering this purpose and the attending circumstances, we think § 10 should be so construed as to give the district courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section.

Reversed.

FIRST NATIONAL BANK OF SAN JOSE *v.* STATE OF CALIFORNIA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 276. Submitted April 13, 1923.—Decided June 4, 1923.

A state law providing for the escheat to the State of bank deposits after they have remained intact and unclaimed for more than twenty years, when no notice of his residence has been filed with the bank by the depositor or any claimant, is void as applied to deposits in National Banks. Calif. Code Civ. Proc. § 1273; U. S. Rev. Stats., § 5136. P. 369.

186 Cal. 746, reversed.

ERROR to a judgment of the Supreme Court of California affirming a judgment for the State against the plaintiff in error Bank, in an action to declare unclaimed deposits escheated to the State.

Mr. S. F. Leib for plaintiff in error.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Frank L. Guerena,* Deputy Attorney General, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Section 1273, California Code of Civil Procedure, declares, "All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state." It further directs

the Attorney General to institute actions in the Superior Court for Sacramento County against banks and depositors to recover all such amounts, "and if it be determined that the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property." Section 15 of the Bank Act contains similar provisions.

In a proceeding under § 1273 the trial court gave judgment for the State against plaintiff in error for the amount credited upon its books to P. A. Campbell for more than twenty years, and this was affirmed by the Supreme Court. 186 Cal. 746. We are asked to hold that so construed and applied this section conflicts with the laws of the United States touching national banks and is therefore invalid.

The trial court found—

"That for more than twenty years prior to the institution of this action there was on deposit with the said defendant bank to the credit of P. A. Campbell the sum of $1,192.25; that for more than twenty years prior to the institution of this action the said P. A. Campbell has not made any deposit to the credit of said account or withdrawn any part thereof or any interest or dividends accruing thereon; that the said money and account so deposited and all accruing interest and dividends thereon have remained unclaimed for more than twenty years after the same were so deposited or credited, and after the withdrawal of any part of the principal or interest or dividends, and said moneys and account now are unclaimed; that the date of the last transaction in connec-

tion with the said deposit of the said P. A. Campbell, whether by deposit or withdrawal of any portion of such account or by withdrawal of any interest or dividends accruing thereon, was on the 10th day of November, 1880; that neither the said depositor nor any claimant of the said deposit or account, or of any interest or dividends thereon, has filed any notice with the said defendant bank showing the present residence of the said P. A. Campbell, and the said P. A. Campbell is not known to the president or to the managing officers of the said defendant bank to be now living; that the name of the said depositor, P. A. Campbell, together with the date of the last transaction in connection with his said deposit or account, and the amount now on deposit in the said defendant bank to the credit of the said depositor were all contained in the annual statement of the said defendant bank filed with the State Controller of the State of California in January, 1917, as required by law, and the Attorney General of the State of California has been informed of all of the foregoing facts."

The Supreme Court declined to express an "opinion upon the question whether the judgment of the superior court herein operates as a present escheat of the rights of the several depositors against the respective banks, or whether under section 1272 they each still have the right within the time there stated to prosecute an action to obtain payment of their several deposits from the state treasurer," and said, "if they have such right the judgment of the superior court would not be a bar thereto."

Section 5136, U. S. Revised Statutes, confers upon national banks power to receive deposits, which necessarily implies the right to accept loans of money, promising to repay upon demand to lender or his order. These banks are instrumentalities of the Federal Government. Their contracts and dealings are subject to the operation of general and undiscriminating state laws which do

not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a State to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283, 288, 290.

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'" *Farmers' and Mechanics' National Bank* v. *Dearing,* 91 U. S. 29, 33, 34.

Congressional legislation in respect of national banks "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *Easton* v. *Iowa,* 188 U. S. 220, 229.

Plainly, no State may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a State may not dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power.

Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obvi-

ously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *United States Bank,* 9 Wheat. 738; *Farmers' and Mechanics' National Bank* v. *Dearing, supra; California* v. *Central Pacific R. R. Co.,* 127 U. S. 1; *Davis* v. *Elmira Savings Bank, supra; Easton* v. *Iowa, supra; Covington* v. *First National Bank,* 198 U. S. 100; *Farmers and Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292; *Bank of California* v. *Richardson,* 248 U. S. 476.

Reversed.

UNITED STATES *v.* AMERICAN LINSEED OIL COMPANY ET AL.

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

No. 307. Argued April 25, 26, 1923.—Decided June 4, 1923.

For the avowed purpose of substituting so-called "open competition" for the normal competition theretofore prevailing between them, but really to defeat the Sherman Anti-Trust Act without subjecting themselves to its penalties, large manufacturers of linseed oil, oil cake and linseed meal, subscribed to an agreement with a central agency which required each of the subscribers: to reveal to the agency, promptly and periodically, intimate details of its business for transmission to the others; to subject itself to autocratic powers vested in the agency; to pay large fees to the agency and make it pecuniary deposits forfeitable for infractions of the agreement; to furnish schedules of prices and terms of sale and adhere to them (unless more onerous ones were obtained), until prepared to give immediate notice of departure therefrom for relay by the agency to the other subscribers; to be represented at monthly meetings and report upon matters of interest to be there discussed; and to comply with all reasonable requirements of the agency, and divulge no secrets. *Held*, that the necessary effect of the combination, viewed in the light of what was done under it, was to suppress competition, in violation of the Sherman Act. P. 388. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377.

275 Fed. 939, reversed.

APPEAL from a decree of the District Court dismissing a bill for an injunction, brought under the Sherman Act.

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

The competition which it was intended by the Sherman Act to preserve was that existing in the economic world at the time of its enactment; and which had always existed and continued to exist, except as now and then inter-

fered with by unlawful agreements down to the organization of latter day associations and bureaus. Economists then supposed that prices were regulated by the law of supply and demand. Of course the price of an article was necessarily based on the cost of producing and selling it. It could not for any substantial length of time be sold at a price under cost of production and marketing; but the producer's profit depended upon the amount he could realize in excess of costs, and that was controlled by the demand and the supply in the market. The producer then sought to manufacture his article at the lowest cost possible. He would figure a reasonable profit upon that cost, and would be satisfied if he could receive the amount thus determined. If he had an advantage in location; or for any reason he could obtain his raw material more cheaply than a competitor; or had his factory so organized that he could produce the article more economically, the public received the benefit of those advantages, unless the demand was substantially in excess of the supply; in which event naturally he increased his price, thus temporarily realizing a larger profit. If this condition continued for a time others entered the field, and the production soon equaled or probably exceeded the demand; and then it became a question of the survival of the fittest. Under those conditions but little attention was given to the prices of competitors. When the market was active because the demand was great, prices naturally advanced; when business was depressed and demand lax, prices were reduced. Then producers were endeavoring to conceal every detail of their business from their competitors; and they were in ignorance of the details of each other's business except as they were accidentally revealed to them through agents, or possibly were obtained through some devious method. All effort, therefore, was concentrated upon producing the goods as cheaply as possible, so that they could sell them upon the market against competition,

and yet realize a reasonable profit; and no dependence was had upon the prices of competitors.

Under the present system of so-called "constructive" competition a precisely contrary course is pursued. Each producer of an article reveals every detail of his entire business to every competitor. He reports to him every sale, and the price at which it is made, and the locality to which it is shipped. They all agree upon terms of sale, and the amount that shall be charged to every locality in lieu of the freight from the mill to such locality. They adopt uniform practices with reference to storage, and conditions under which allowances shall be made. They then meet together and personally discuss every question relating to the production and distribution of the goods made by them. In other words, every producer is as familiar with the details of the business of his competitors as he is with those of his own business, or as they are with their business. Can anyone possessing intelligence sincerely contend that this revolution does not profoundly affect the economic laws governing prices which previously existed, and does not necessarily affect prices themselves? The result is that the producer now devotes his time to studying the business of his competitor instead of his own business. He interests himself in ascertaining whether his competitor has deviated at some point from an agreed uniform practice and in calling him upon the carpet to stop such deviation, rather than in figuring upon some means of reducing the cost of production. In determining upon prices he studies the price lists of his several competitors, ascertains what they are receiving for their goods in certain markets, and fixes his price therefrom instead of studying his cost sheet and determining what is a reasonable profit upon his investment.

If it be conceded that there are plausible arguments in support of this so-called "stabilization," which is nothing less than fixing prices, and of the effects of this so-called

"constructive" competition, the debate over that question is purely an economic and not a legal one. The undoubted fact is that economic laws are profoundly affected by this new system; and the Sherman Act was passed to maintain the system governing competition then existing; and any fundamental change in practice by agreement between competitors whereby prices of articles moving in interstate commerce are substantially affected is a violation of that act.

The combination between the defendants is unlawful, because when carried into effect it inevitably restrains interstate commerce. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377.

It has been repeatedly held that any combination which necessarily results in a restraint of interstate commerce is violative of the Anti-Trust Act regardless of how innocent the intention of the parties thereto may have been. *United States* v. *Freight Association,* 166 U. S. 290; *Addyston Pipe Co.* v. *United States,* 175 U. S. 211; *United States* v. *St. Louis Terminal Co.,* 224 U. S. 383; *United States* v. *Reading Co.,* 226 U. S. 324; *United States* v. *Patten,* 226 U. S. 525; *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20.

It is just as unlawful to agree upon practices as upon prices, as conveniences and favors to the trade suffer because of the elimination thereby of all competition in practices. *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, 88.

The restraint resulting from the combination was an unreasonable and unlawful restraint. It has been assumed by some of the lower courts that in speaking of a reasonable restraint in the *Standard Oil Case,* 221 U. S. 1, Mr. Chief Justice White had reference to the amount of the restraint of interstate commerce. However, a careful consideration of that opinion shows that the learned Chief Justice had in mind the character of the agreement

or combination which produced the restraint, and not the extent of the restraint resulting therefrom. 221 U. S. 58. *United States* v. *American Tobacco Co.*, 221 U. S. 179; *United States* v. *Addyston Pipe Co.*, 85 Fed. 271.

The relief that should be granted in this case is an adjudication that the combination described in the bill and proven in the evidence is unlawful *in toto*, and an injunction inhibiting any further operation under the plan as a whole or under any part thereof. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377; *Swift & Co.* v. *United States*, 196 U. S. 375.

Mr. John Walsh, with whom *Mr. Louis A. Spiess* was on the brief, for Ankeney Linseed Manufacturing Co. et al., appellees.

The charge of the Government in this case, is that the inevitable result of the exchange of true and accurate market information as to past transactions must inevitably result in a curtailment of production and the advancement of prices, and therefore is in violation of the Sherman Anti-Trust Act.

That act being a penal statute, proof of its violation must be clear, positive and convincing. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Reading Co.*, 183 Fed. 427.

We contend therefore that it is incumbent upon the Government to show that the operations of the Bureau necessarily had the effect of curtailing production or enhancing prices. Further, if the Government relies on circumstantial evidence to prove a combination or conspiracy to restrain trade, as it asserts it does, it must show that the circumstances upon which reliance is placed are inconsistent with supposition of innocence.

The burden is on the Government in this case to prove by a clear and satisfying preponderance of evidence that

a combination or conspiracy existed among the defendants to bring about an unlawful result. The rule as to presumptions and burden of proof in a suit in equity for injunction to prohibit violations of the Sherman Act is substantially the same as in a criminal case for violation of the act. That rule is very clearly announced in *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737.

While this is a civil suit, it is based upon an alleged violation of the Sherman Act, which is a highly penal statute. Thus a judgment under the pleadings in such a civil action must necessarily rest upon the conclusion from the facts that this highly penal statute has been violated.

It is quite useless to review the decisions of the courts which condemn combinations and conspiracies in restraint of trade in violation of the Sherman Act. Each case stands upon its own facts. Each of the reported cases where acts are condemned as combinations and conspiracies in violation of law are well supported by courses of conduct from which any discerning mind can at once come to the conclusion that the conduct complained of constituted a direct restraint upon competition, and artificially interfered with the natural course of trade. We submit that no such degree of proof is present in this case.

We do not feel that it is necessary to discuss the legal difference between reasonable and unreasonable restraint of trade. We contend that there is no proof submitted to show that any restraint was brought about through the dissemination by the Bureau of true, accurate market information as to past transactions. We feel, however, that what is the test of reasonable or unreasonable restraint of trade is not out of place in this case. *United States* v. *Addyston Pipe Co.*, 85 Fed. 271, 282.

There is no proof in the record that the interests of the public were injuriously affected, or that buyers ever complained that they were being penalized by prices quoted

by the members of the Council. Further, there is no proof in the record that crushers outside of the Council were injuriously affected in their efforts to compete for the business of the crusher defendants. Those who are injured are the first to complain, and the Government submitted no testimony that any one had complained against the operations of the Bureau.

It is a matter of record, however, that buyers called by the Government and the defendants testified that they never considered the prices quoted by the defendant crushers while members of the Linseed Oil Council were out of line with price of flaxseed. This fact we assert ought to be proof sufficient that no one was burdened by reason of the exchange of accurate market information set forth in this case. *United States* v. *United States Steel Corporation,* 223 Fed. 154, 155.

It is true that the crushers did have the benefit of accurate information which assisted each in individually forming his own judgment as to the prices he should charge for his product. Every one who has anything to sell always seeks to ascertain what others are selling the same products for. There can be no violation of law in that. Can it be said to be unlawful if persons having like products for sale agree among themselves to inform each other as to the prices that have prevailed? Nothing further was done by the linseed oil crushers. They had freedom to contract, to do a lawful thing, and they did nothing more. Not a scintilla of evidence has been presented in this case that indicates, by inference or otherwise, that the exchange of information by the linseed oil crushers brought about an artificial influence on the linseed oil market. *United States* v. *United States Steel Corporation,* 251 U. S. 417.

The Court cannot, and will not, decide this case on guess or presumptions not supported by evidence, but can, of course, only find the existence of a purpose to artificially

influence prices, and the affecting thereof, by a clear and satisfying preponderance of the evidence.

Applying the test of this Court, in the language of the opinion in *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, how can there be spelled out of the conduct of the linseed oil crushers any purpose or effect of lessening or suppressing competition? *State* v. *Arkansas Lumber Co.*, 260 Mo. 212.

We assert that before the Court can find an unlawful use by the defendants of such information, it is necessary to find that there was an agreement, express or implied, to unlawfully use the information. *United States* v. *Prowaty & Sons*, 251 Fed. 375; *United States* v. *Naval Stores Co.*, 172 Fed. 455, 460.

So far as we can ascertain no court, state or federal, has ever held that the collection and dissemination of true, accurate market information, although obtained from and exchanged by competitors, constituted a violation of law as part of a combination or conspiracy in restraint of competition or trade.

The matter of uniformity of price of itself means nothing so far as proof of combinations or conspiracies is concerned if there is no proof of effort to bring it about by concerted action.

Mr. Thomas M. Debevoise, with whom *Mr. Eugene Congleton* and *Mr. Willet M. Spooner* were on the brief, for American Linseed Oil Co. et al., appellees.

The operation of the Linseed Crushers Council did not affect the market price of linseed oil. The price of linseed oil was determined by the market price of flaxseed.

The record shows, without any evidence to the contrary, that prices, spot and future, of linseed oil are directly based upon prices, spot and future, of flaxseed; that flaxseed, like wheat and other commodities of like nature, is bought and sold on open exchanges and that fluctuations in flaxseed prices cannot be artificially controlled.

The members of the Linseed Crushers Council during its existence were actively competing against each other, and although there were periods during the operation of the Council, just as there had been before the Council was formed, when the prices of linseed oil were uniform, these periods of uniformity obtained at times when the market was inactive and did not obtain when the market was active and sales were large.

The correspondence between the Armstrong Bureau and the members of the Linseed Crushers Council indicates clearly that the individual council members were actively competing with each other, and the very insistence by the individual members that the reports of price changes should be prompt and accurate negatives the existence of any understanding or agreement to maintain arbitrary prices.

The Government's argument based upon the uniformity of prices at various periods during the operation of the Council is palpably misleading.

The decision of the court below, to the effect that the facts adduced at the trial did not constitute a direct and undue restraint of competition among members of the Linseed Crushers Council, supported by a great preponderance of evidence, is entitled to great weight in this Court. *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32; *Adamson* v. *Gilliland*, 242 U. S. 350; *Davis* v. *Schwartz*, 155 U. S. 631; *Tilghman* v. *Proctor*, 125 U. S. 136.

Mr. Wm. J. Matthews and *Mr. Hugh T. Martin*, by leave of court, filed a brief as *amici curiae*.

Mr. Justice McReynolds delivered the opinion of the Court.

By an original bill filed June 30, 1920, the United States charged that appellees—defendants below—were parties

to a combination in restraint of interstate trade and commerce forbidden by the Sherman Act, and asked that they be enjoined from continuing therein. The court below held the combination lawful and dismissed the bill. 275 Fed. 939.

The defendants are twelve corporations, commonly referred to as "crushers," with principal places of business in six different States, which manufacture, sell and distribute linseed oil, cake and meal; and Julian Armstrong, who operates at Chicago under the name, Armstrong Bureau of Related Industries. This Bureau conducts a so-called "exchange" through which one subscribing manufacturer may obtain detailed information concerning the affairs of others doing like business. The defendant "crushers" constitute one of the groups who contract for this service. They manufacture and distribute throughout the Union a very large part of the linseed products consumed therein and prior to the challenged combination were active, unrestrained competitors. Some time in September or October, 1918, each of them entered into an identical written "Subscription Agreement" with the Armstrong Bureau, and a year thereafter signed another, not essentially different. The latter is summarized and quoted from below.

After stating that "the matter contained herein is for the exclusive and confidential use of the subscriber," the agreement recites that it and other "crushers" of flaxseed desire promptly and economically to secure from and through the Bureau the following things, "which will promote better and more safe, sane, and stable conditions in the linseed oil, cake, and meal industry and increase its service to the commonwealth:" Comprehensive data as to market, trade and manufacturing conditions in the linseed oil industry; economies in manufacture and sale by frank exchange of accurate information; the latest authentic information concerning the credit of buyers; a

broader market for cake and meal; establishment of uniform cost accounting systems; fair and just freight tariffs and classifications; definite standardization of the products of the industry; economies in the development of foreign markets and increase of sales therein; stabilization of the flaxseed market so far as lawful; shipment of cake and meal to the consumer from the nearest point of production.

The contracting "crusher" agrees:

To subscribe for the Bureau's service for twelve months and thereafter from year to year, subject to cancellation by either party upon thirty days' notice, and pay therefor a sum reckoned upon the amount of flaxseed milled by it, but not less than eleven hundred dollars annually.

That all information reported or received shall be purely statistical and relevant to past operations and no part of the Bureau's machinery will be used to fix prices, divide territory, limit sales, production or manufacture, or control competition.

That it will "promptly make, have made, forward, and have sent in and to said bureau, as and in the form required by this agreement, full, accurate, complete, signed, and certified reports of all said sales, quotations, and offerings or other information required by the bureau and full, correct replies or answers to any and all inquiries concerning the same or seeking any information in regard thereto."

That upon request it will "at once turn and have turned over to the bureau's auditor for examination all vouchers, books of account, correspondence, and such other evidence or documents as he may request or, in lieu of the same or any part thereof, such abstracts therefrom as he may designate, verified under oath and certified by a certified public accountant in good standing."

That "if any subscriber considers that it has good cause to question the report made by any other subscriber then

it may request an investigation or audit to be made by the bureau and, if considered proper by the bureau, it will be so made," the incident expense to be paid by the party found in error.

That it will deposit with the Bureau not less than one thousand nor more than ten thousand dollars of Liberty Bonds, according to its milling capacity.

That "should the undersigned subscriber fail, in any manner whatsoever, to comply with any of the terms of this agreement or with any and all reasonable requirements of said bureau, then it shall and does hereby forfeit to said bureau, at its election, all money paid for services and all further benefits and rights under this agreement; which forfeiture, for just cause, may be declared by said bureau, evidenced by written notice thereof mailed to said offender by U. S. registered mail, and such subscriber shall thereby forfeit all further right, title, or interest in and to said bonds (so on deposit) in whole or in part," subject to the right of appeal to a council, of three subscribers, which shall have power to review the entire matter, reinstate the offender or take such other final action as seems proper. No fine shall exceed the deposit with the Bureau.

That it will (a) "immediately, and when and as hereafter issued, deposit with the bureau all published price lists of the undersigned covering raw and boiled linseed oil, cake and meal; (b) also to report to the bureau by prepaid telegraph, and further confirm by mail, duplicate of all quotations made at variance with above price lists, giving better terms to the contemplated purchaser than those quoted; (c) with all reports made in compliance with the above paragraph 'b' of quotations which amount to one carload or more of oil, cake or meal there shall also be reported at the same time and in the same manner the prospective buyer's name, address, and f. o. b. point of shipment; (d) in so far as the above reports 'a,'

'b' and 'c' do not disclose the following, the undersigned 'subscriber' agrees to give the following information in connection therewith; that is: the exact prices, terms, and discounts—and whether made to jobber, dealer, or consumer—and in what quantities, carload or less than carload, and warehouse or mill prices; (e) also to promptly report all changes in and alterations or withdrawals of the above, of every kind whatsoever, that may be made; (f) also to promptly report by prepaid telegraph, and further confirm by mail, all orders received by the undersigned subscriber in response to special quotations made as above provided in paragraph 'c,' designating the quotation which is the basis of such order and any variance therefrom."

That "directly at the close of each day's business each subscriber shall mail by special delivery to the bureau a complete report of all its carload sales for that day of oil, cake or meal, not covered by its previous daily sales reports, which report shall disclose the quantity and kind, price and terms, and whether for immediate or future delivery, and if no sale has been so made, this fact shall be likewise reported."

That for the purpose of compiling a weekly sales report "a map of the United States shall be divided into zones as agreed upon by all of the subscribers to this service, and each subscriber at the conclusion of the week shall send to the bureau by special delivery, not later than the following Monday night, a compiled report of all of its sales of oil, cake or meal into each zone made during the period covered by such report and not previously so reported, specifically setting forth the following: (a-a) Total gallons of oil sold into each zone, also showing the total gallons and price per gallon received for such oil sold; (b-b) Total tonnage of cake and meal sold into each zone, also showing total weight and price received per ton for such cake or meal sold; (c-c) Sales reports on both

oil, cake and meal shall differentiate spot and future delivery, giving period of such futures."

That before the tenth day of each calendar month it will report to the Bureau the number of gallons of oil and the total tons of meal or cake on hand not covered by sale or contract.

That all information received from the Bureau or any meeting of subscribers will be treated as confidential.

The Bureau undertakes, "with the help of each and every subscriber":

That it will use its best efforts to organize the linseed oil, cake and meal industry of the United States.

That it will afford its full statistical service for the exchange of information concerning quotations, sales, shipments, production and terms, also the service of its credit reporting department, will suggest from time to time the means for broader service; and will supply additional service whenever required, the rate to be agreed upon.

That the statistical service furnished shall be accomplished and provided by the use of special report forms conveying information on past transactions, which may be modified, changed and others provided, as experience suggests or as called for by the subscribers in any of their meetings and approved by the Bureau.

That the market information received by the Bureau will be cleared and relayed promptly to subscribers in good standing.

That it will send to subscribers, in the form of market letters, "news clippings" of interest to the industry and in accordance with the object and terms of the agreement.

It is agreed by all:

That "monthly meetings will be held of all subscribers hereto at some convenient center," with a representative of the Bureau, as Secretary, who shall present the matters pertaining to the industry to be therein openly discussed. Subscribers may send in notice of matters and

topics for discussion and if they accord with the agreement and object of the service the Bureau shall cause the same to be docketed and presented. "All subscribers shall report at these meetings on all matters and conditions within their knowledge affecting the industry and within the limits of this agreement that they may be there discussed for mutual benefit." "Any subscriber failing to attend in person or by said representative at each of these meetings and be in punctual and continued attendance thereon shall be subject to a fine of twenty-five dollars for each offense, the same to be collected by and payable to the bureau. This fine may be remitted by a majority vote of the members present at the meeting where it is incurred."

That "any subscriber who has made offerings or quotations to a prospective buyer and is advised by such buyer that it is not to be awarded such business shall have the right to immediately advise the bureau of such unsuccessful offering or quotation giving all details of such bid or offering, and may then request the bureau to bulletin all of its subscribers asking specific information regarding any quotation or sale to such prospective buyer by any of the other subscribers and the bureau, on receipt of such request, will immediately bulletin all subscribers asking therefor and on receipt of replies will send out a compilation report thereof to all subscribers, together with the details of sale, if such a sale has been reported, so that all subscribers, including the original inquirer, will have a complete report of this transaction. On receipt of a request for such specific information from the bureau, the undersigned subscriber will immediately reply to same giving full information as to any quotation or sale which it may have made to such a buyer and, if it has made none, so report."

That each subscriber will furnish the Bureau, upon request, information pertaining to any buyer of linseed

oil, cake and meal and may request the Bureau to secure like information from all other subscribers, whenever it shall have an order or an account with, or an inquiry from, the buyer, and this information will be promptly relayed to all interested subscribers.

When an adequate number of subscriptions had been obtained (September, 1918) the organization began vigorously to function according to letter and spirit of the agreement. It will suffice to state a few of the steps taken.

The United States were divided into eight zones for price quoting; and it was stipulated that each member should quote a basic price for zone number one and should add thereto one, two, four, six, seven, eight and eleven cents, respectively, for the others. At subscribers' meetings regularly held "matters pertaining to the industry" were discussed; members were "put on the carpet" and subjected to searching inquiry concerning their transactions. A meeting held October 29, 1919, adopted the following rule: "In order to provide that the daily market information as relayed by the bureau shall at all times contain the fullest measure of news value, it is agreed that hereafter no council member shall dispatch changes in his prices as last filed with the bureau to more than one buyer without instantly thereafter telegraphing such full and complete information to the bureau as, and in the form, required by the service contract." Another meeting "resolved that it now be recorded that the recommended terms of this council for the sale of oil be 1% discount for cash settlement in 10 days, or 30 days net trade acceptance from date of shipment, and in order that a specific list of the terms of sale of all the council members may now be compiled and distributed, it is further resolved that all council members shall send to the bureau, not later than January 27th, a full explanation of the terms of sale as quoted by them to their trade."

The Bureau displayed great industry in making inquiries, collecting information, investigating the smallest derelictions and giving immediate advice to subscribers. Hundreds of so-called "market letters," relating to divers transactions, were sent to subscribers. A sale of two barrels of oil below schedule was deemed worthy of special attention. Also from time to time it gave counsel concerning "unfair merchandising" and the necessity for establishing sound policy by constructive coöperation. The following letters—224 and 245—dated February 5 and 12, 1919, are characteristic.

"Will all council members please reply promptly and fully through the bureau whether or not they made the sale in question to the following?

New York, N. Y., Feb. 3, 1919.

Armstrong Bureau of Related Industries, Chicago.

Gentlemen: Our Chicago manager advises us that under date of February 1st the Enterprise Paint Mfg. informed him that they had bought 10 barrels linseed oil at less than $1.46 from another crusher in the Chicago territory. Will you kindly bulletin the subscribers with a view to finding out if any of the crushers sold this lot at under their published price?

Yours very truly, American Linseed Company."

"In the file of replies today completed, 11 subscribers state, in effect, that they have neither quoted nor sold the Enterprise Paint Mfg. Co. The sale was apparently made by subscriber No. 6, whose letter follows:

Minneapolis, Minn., Feb. 6, 1919.

Armstrong Bureau of Related Industries, Chicago.

Gentlemen: Replying to your market letter No. 224, we sold Enterprise Paint Manufacturing Company on February 3rd five barrels of bleached linseed oil at $1.50 delivered their plant. This is our price in the Chicago market at the present time.

Yours truly, Midland Linseed Products Co."

The prices of oil became more stable.

Defendants continued with meticulous care actively to carry out the several provisions of the agreement amongst them; and that they intended further to pursue the plan unless restrained is not denied.

The obvious policy, indeed the declared purpose, of the arrangement was to submerge the competition theretofore existing among the subscribers and substitute "intelligent competition," or "open competition;" to eliminate "unintelligent selfishness" and establish "100 per cent confidence"—all to the end that the members might "stand out from the crowd as substantial co-workers under modern co-operative business methods."

In *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, we considered a combination of manufacturers got up to effectuate this new conception of confidence and competition and held it within the inhibition of the Sherman Act because of inevitable tendency to destroy real competition, as long understood, and thereby restrain trade. Our conclusion there cannot be reconciled with the somewhat earlier opinion and judgment of the court below. They are in direct conflict.

The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain. "The statute did not forbid or restrain the power to make normal and useful contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. . . . The words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the

statute to protect." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, 180; *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501; *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463.

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it the Court can see that its necessary tendency is to suppress competition in trade between the States, the combination must be declared unlawful. That such is its tendency, we think, must be affirmed. To decide otherwise would be wholly inconsistent with the conclusion reached in *American Column & Lumber Co.* v. *United States, supra.*

The record discloses that defendants, large manufacturers and distributors—powerful factors in the trade—of commodities restricted by limited supplies of raw material (linseed), located at widely separated points and theretofore conducting independent enterprises along customary lines, suddenly became parties to an agreement which took away their freedom of action by requiring each to reveal to all the intimate details of its affairs. All subjected themselves to an autocratic Bureau, which became organizer and general manager, paid it large fees and deposited funds to insure their obedience. Each subscriber agreed to furnish a schedule of prices and terms and adhere thereto—unless more onerous ones were obtained—until prepared to give immediate notice of departure therefrom for relay by the Bureau. Each also agreed, under penalty of fine, to attend a monthly meeting and report upon matters of interest to be there discussed; to comply with all reasonable requirements of the Bureau; and to divulge no secrets.

With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming them-

selves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions. Obviously they were not *bona fide* competitors; their claim in that regard is at war with common experience and hardly compatible with fair dealing.

We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection. The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties.

The challenged plan is unlawful and an injunction should go against it as prayed by the original bill. The cause will be remanded to the court below with instructions to issue such an injunction and promptly to take any further action necessary to carry this opinion into effect.

Reversed.

MEYER *v.* STATE OF NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 325. Argued February 23, 1923.—Decided June 4, 1923.

A state law forbidding, under penalty, the teaching in any private, denominational, parochial or public school, of any modern language, other than English, to any child who has not attained and success-

fully passed the eighth grade, invades the liberty guaranteed by the Fourteenth Amendment and exceeds the power of the State. P. 399.

So *held* where the statute was applied in punishment of an instructor who taught reading in German, to a child of ten years, in a parochial school.

107 Neb. 657, reversed.

ERROR to a judgment of the Supreme Court of Nebraska affirming a conviction for infraction of a statute against teaching of foreign languages to young children in schools.

Mr. Charles E. Sandall, with whom *Mr. I. L. Albert, Mr. Arthur G. Wray* and *Mr. August Wagner* were on the briefs, for plaintiff in error.

The right to choose and pursue a given legitimate vocation is within the rights guaranteed by the Fourteenth Amendment.

The vocation of the plaintiff is teaching—a legitimate vocation—and in teaching, as he did, a certain subject in a language other than English, he encroached upon the rights of no other person. *Ritchie* v. *People,* 155 Ill. 98; *Ex parte Harrison,* 212 Mo. 88; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746; *Hooper* v. *California,* 155 U. S. 662; *Allgeyer* v. *Louisiana,* 165 U. S. 589; *Cully* v. *Baltimore & Ohio R. R. Co.,* 1 Hughes, 539; *Adair* v. *United States,* 208 U. S. 578; *Munn* v. *Illinois,* 94 U. S. 113; *Taylor* v. *Beckham,* 178 U. S. 548; *Powell* v. *Pennsylvania,* 127 U. S. 678. *Berea College* v. *Kentucky,* 211 U. S. 45, dissenting opinion, p. 67.

Imparting knowledge in a foreign language is not inherently immoral or inimical to the public welfare, and not a legitimate subject for prohibitory legislation. In fact, an examination of the statute will show that the legislature did not regard the teaching of a pupil in some language other than English as vicious or inimical to the public welfare. It applies only to schools, leaving teach-

ers and others at liberty to teach privately. *State* v. *Redmon,* 134 Wis. 89; *People* v. *Weiner,* 271 Ill. 74.

When the legislature by clear implication finds that the practice or pursuit against which the act is leveled does not of itself injuriously affect the public, a measure designed to prohibit it is unconstitutional. It being clear, therefore, both upon reason and legislative finding, that the prohibited acts are not harmful, this measure, insofar as it imposes upon teachers, both lay and clerical, penalties of fine and imprisonment for the giving of instruction in languages, is violative of their constitutional right to engage in the practice of their chosen profession or calling. *Coal Co.* v. *People,* 17 Ill. 66; *Adams* v. *Tanner,* 244 U. S. 590.

The statute, as construed by the Supreme Court of Nebraska, is prohibitive, not regulatory of a legitimate vocation.

The statute in question is not a legitimate exercise of the police power. The exercise of the police power can be justified only when it adds, in a substantial way, to the security of the fundamental rights.

The relation to the common good of a law fixing a minimum of education is readily perceived, but how one fixing a maximum—limiting the field of human knowledge—can serve the public welfare or add substantially to the security of life, liberty or the pursuit of happiness is inconceivable. *State* v. *Redmon, supra; Mugler* v. *Kansas,* 123 U. S. 623; *Wyeth* v. *Cambridge Board of Health,* 200 Mass. 474; *State* v. *Sperry,* 94 Neb. 785.

One claim put forward is, that the statute forwards the work of Americanization. But in our desire for the Americanization of our foreign born population we should not overlook the fact that the spirit of America is liberty and toleration—the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions.

The law, as construed by the Supreme Court of Nebraska, operates to deny the plaintiff in error the equal protection of the law.

The law is directed against the teaching in or of a foreign language in public, private, denominational and parochial schools. It leaves those engaged in giving private lessons in such languages free to pursue their vocations. *Nebraska District Evangelical Synod* v. *McKelvie,* 104 Neb. 93; *Bailey* v. *People,* 190 Ill. 28; *Dunahoo* v. *Huber,* 185 Ia. 753; *State* v. *Sloane,* 49 N. J. L. 356; *State* v. *Ramsey,* 48 Minn. 236; *Lincoln* v. *Lincoln Gas Co.,* 182 Fed. 926; *Haynes* v. *Lapeer Circuit Judge,* 201 Mich. 138; *Smith* v. *Board of Examiners,* 85 N. J. L. 46.

Mr. Mason Wheeler and *Mr. O. S. Spillman,* with whom *Mr. Clarence A. Davis,* Attorney General of the State of Nebraska, and *Mr. Hugh La Master* were on the brief, for defendant in error.

The federal constitutional question was injected into the case as an afterthought and too late to permit its review by this Court.

The statute was a legitimate exercise of the police power of the State.

The statute forbids the teaching of foreign languages to children of tender years before such children are grounded in the English tongue. It does not forbid the use of foreign languages by persons of maturity or prevent the study of foreign languages by persons who have passed the eighth grade. It does not in any way interfere with *bona fide* religious instruction or with any legitimate religion.

The object of the legislation, as is pointed out in *Nebraska District of Evangelical Synod* v. *McKelvie,* 104 Neb. 93, and in the second case, 187 N. W. 927, and in the decision below, and by the Ohio Supreme Court in *Pohl* v. *State,* 102 Oh. St. 474, and by the Iowa Supreme Court in *Bartels* v. *State,* 191 Ia. 1060, was to create an enlight-

ened American citizenship in sympathy with the principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language and observe American ideals. It is a well known fact that the language first learned by a child remains his mother tongue and the language of his heart. The purpose of the statute is to insure that the English language shall be the mother tongue and the language of the heart of the children reared in this country who will eventually become the citizens of this country.

These foreign language statutes are no more difficult to sustain under the police power of the State than the Bank Guarantee Act, the Workmen's Compensation Acts, the Female Labor Laws, and Tenement Housing legislation.

Taking the test laid down as to the legitimate exercise of the police power by Freund (§ 143): A danger exists; of sufficient magnitude; concerning the public; the proposed measure tends to remove it; the restraint is a requirement in proportion to the danger; it is possible to secure the object sought without impairing essential rights and principles. *Wilson* v. *New,* 243 U. S. 332; *Muller* v. *Oregon,* 208 U. S. 412; *Second Employers' Liability Cases,* 223 U. S. 1; *Arizona Employers' Liability Cases,* 250 U. S. 400; *Block* v. *Hirsh,* 256 U. S. 135. If it is within the police power of the State to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the State to compel every resident of Nebraska so to educate his children that the sunshine of American ideals will permeate the life of the future citizens of this Republic.

The recognized general necessity for legislation similar to the Nebraska foreign language act is shown by the fact that twenty-one States besides Nebraska have enacted similar foreign language laws.

In no State has this foreign language legislation been successfully attacked. Three attempts only have been made, in Ohio, Iowa and Nebraska. In every adjudicated case the legislation has been upheld and sustained as against all constitutional objections.

The police power itself is an attribute of sovereignty. It exists without any reservation in the Constitution. It is founded on the right of the State to protect its citizens, to provide for their welfare and progress and to insure the good of society. It corresponds to the right of self preservation in the individual. Its application varies with the exigencies of the situation and with the progress of mankind. It is the foundation of our social system and upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It extends to the protection of life, health, comfort and welfare of persons, protection of property, and to the welfare of the State itself. All natural persons within the jurisdiction hold their property and pursue their various callings subject to the police power. It is inherent in the various States of the Union, as well as in the Federal Government. To the extent that property or business is devoted to public use or is affected with a public interest it is subject to regulation by the police power. It extends to regulation of education as the very existence of our government, as well as its progress and development, depends upon the intelligence of our citizenry. *McLean* v. *Arkansas,* 211 U. S. 539; *Muller* v. *Oregon,* 208 U. S. 412; *Holden* v. *Hardy,* 169 U. S. 366; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Atkin* v. *Kansas,* 191 U. S. 207; *Murphy* v. *California,*

225 U. S. 623; *Booth* v. *Illinois*, 184 U. S. 425; *Second Employers' Liability Cases*, 223 U. S. 1; *Noble State Bank* v. *Haskell*, 219 U. S. 104; s. c., 219 U. S. 575; *Arizona Employers' Liability Cases*, 250 U. S. 400; *Gilbert* v. *Minnesota*, 254 U. S. 325; *Wilson* v. *New*, 243 U. S. 332; *Block* v. *Hirsh*, 256 U. S. 135; *State* v. *Sperry*, 94 Neb. 785; *Matter of Gregory*, 219 U. S. 216; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Pitney* v. *Washington*, 240 U. S. 387; *Tanner* v. *Little*, 240 U. S. 369.

The statute does not unlawfully interfere with the defendant's occupation as a teacher. *Mugler* v. *Kansas*, 123 U. S. 623; *Wenham* v. *State*, 65 Neb. 395; *Muller* v. *Oregon*, 208 U. S. 412; *Barbier* v. *Connolly*, 113 U. S. 27; *Slaughter-House Cases*, 16 Wall. 36; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549.

The statute does not deny defendant the equal protection of the law. *Nebraska District of Evangelical Synod* v. *McKelvie*, 187 N. W. 927; *Miller* v. *Wilson*, 236 U. S. 373; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Johnston* v. *Kennecott Copper Co.*, 248 Fed. 407; *Halter* v. *Nebraska*, 205 U. S. 34; *Quong Wong* v. *Kirkendall*, 223 U. S. 59; *Wilson* v. *New*, 243 U. S. 332; *Pitney* v. *Washington*, 240 U. S. 387; *Tanner* v. *Little*, 240 U. S. 369; *McLean* v. *Arkansas*, 211 U. S. 539; *Lower Vein Coal Co.* v. *Industrial Board*, 255 U. S. 144.

Mr. William D. Guthrie and *Mr. Bernard Hershkopf*, by leave of court, filed a brief as *amici curiæ*.

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School, he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of ten years, who had not attained

and successfully passed the eighth grade. The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919, which follows [Laws 1919, c. 249.]:

"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

"Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100) or be confined in the county jail for any period not exceeding thirty days for each offense.

"Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval."

The Supreme Court of the State affirmed the judgment of conviction. 107 Neb. 657. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefor. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion.

"The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting for-

eigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. *Pohl* v. *State,* 132 N. E. (Ohio) 20; *State* v. *Bartels*, 181 N. W. (Ia.) 508.

"It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign line-

age. Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence."

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Slaughter-House Cases,* 16 Wall. 36; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Minnesota* v. *Barber,* 136 U. S. 313; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Lochner* v. *New York,* 198 U. S. 45; *Twining* v. *New Jersey,* 211 U. S. 78; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549; *Truax* v. *Raich,* 239 U. S. 33; *Adams* v. *Tanner,* 244 U. S. 590; *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357; *Truax* v. *Corrigan,* 257 U. S. 312; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Wyeth* v. *Cambridge Board of Health,* 200 Mass. 474. The established doctrine is that this liberty may not be inter-

fered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton* v. *Steele,* 152 U. S. 133, 137.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the State has held that "the so-called ancient or dead languages" are not "within the spirit or the purpose of

the act." *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie*, 187 N. W. 927. Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child,

nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams* v.

Tanner, supra, p. 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

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

Reversed.

[See the separate opinion of MR. JUSTICE HOLMES, concurred in by MR. JUSTICE SUTHERLAND, in the next case, at p. 412, *infra.*]

BARTELS *v.* STATE OF IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BOHNING *v.* STATE OF OHIO.
POHL *v.* STATE OF OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, ET AL. *v.* McKELVIE ET AL., ETC.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Nos. 134, 181, 182, 440. Argued October 10, November 28, 1922, and February 23, 1923.—Decided June 4, 1923.

Decided upon the authority of *Meyer* v. *Nebraska, ante,* 390. 191 Ia. 1060; 102 Oh. St. 474; 187 N. W. 927, reversed.

ERROR, (1) to a judgment of the Supreme Court of Iowa, sustaining a conviction of a teacher for teaching German to pupils in a parochial school, below the eighth grade; (2) to like judgments of the Supreme Court of Ohio; (3) to a judgment of the Supreme Court of Nebraska reversing a decision of a trial court, and refusing an injunction, in a suit brought against state officials to prevent enforcement of a statute penalizing the teaching of foreign languages to young children in schools.

Mr. Frank E. Farwell, with whom *Mr. Charles E. Pickett, Mr. Benjamin F. Swisher,* and *Mr. Fred B. Hagemann* were on the briefs, for plaintiff in error in No. 134.

Mr. Bruce J. Flick, for defendant in error in No. 134, submitted. *Mr. Ben J. Gibson,* Attorney General of the State of Iowa, was also on the brief.

Plaintiff in error cannot insist that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case he presents the effect of applying the statute is to deprive him of his property without due process of law. *Davidson* v. *New Orleans,* 96 U. S. 97; *New York & North Eastern R. R. Co.* v. *Bristol,* 151 U. S. 566, 570.

The constitutionality of the statute cannot be assailed without showing that the party questioning it has been deprived of property or liberty in some arbitrary way; because some other person might be thus affected, he is not authorized to ask the court to invalidate a law on questions of constitutionality which do not directly affect him.

The constitutionality of acts like the one in question has been upheld in: *Nebraska District Evangelical Synod* v. *McKelvie,* 104 Neb. 93; *Pohl* v. *State,* 102 Oh. St. 474; *State* v. *Bartels,* 191 Ia. 1074; *Castello* v. *McConnico,* 168 U. S. 680; *Tyler* v. *Judges,* 179 U. S. 410; *Strouse* v. *Foxworth,* 231 U. S. 162.

The language of the statute does not violate Art. I, § 3, of the state constitution prohibiting the free exercise of religion. The defendant is not being prosecuted for giving religious instruction in a foreign language. *Commonwealth* v. *Herr,* 229 Pa. St. 132.

When the law operates equally upon all, when the rule of conduct is uniform throughout the State, presumption lying at the foundation of representative government is that the legislator will act wisely and in the interest of all of the people. Such legislation is not open to the objection that it is class legislation. *Viermaster* v. *White,* 179 N. Y. 235; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Northwestern Laundry* v. *Des Moines,* 239 U. S. 486; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Booth* v. *Illinois,* 184 U. S. 425; *Adams* v. *Milwaukee,* 228 U. S.

572; *State* v. *Fairmont Creamery Co.*, 153 Ia. 702; *Bopp* v. *Clark*, 165 Ia. 697; *Hunter* v. *Coal Co.*, 175 Ia. 245.

In determining the reasonableness of a police regulation, the legislature is at liberty to act with reference to established usages, customs, and conditions of the people and with a view to the promotion of their comfort and the preservation of the public peace and good order. *Plessy* v. *Ferguson*, 163 U. S. 550; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 556, 559.

It will be presumed that the legislature in passing this statute was familiar with existing conditions, and that no general laws are ever passed either through want of information on the part of the legislature or because it was misled. *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 363.

Courts do not sit in judgment upon the wisdom of legislative enactments.

Mr. Timothy S. Hogan and *Mr. Frank Davis, Jr.*, for plaintiffs in error in Nos. 181 and 182.

Mr. E. J. Thobaben, with whom *Mr. Edward C. Stanton* was on the brief, for defendant in error in Nos. 181 and 182.

The legislature has the right, more than that, the duty, of providing adequate means of education of the young. It surely has the right to prescribe the course of study which shall be taught. In § 7648 of the Code of Ohio, the legislature has named the subjects which shall be taught in and which shall constitute a school an elementary school. Having defined what shall be taught, and clearly having the right to so define, has not the legislature a correlative right to say what shall not be taught, and the language in which the teachings shall be conducted?

Experience has shown that it is not wise to keep a young child or one that would be a student in the ele-

mentary branches in attendance on school more than forty weeks out of fifty-two. It has also demonstrated that it requires at least thirty weeks in any one year to impart the knowledge necessary in certain essential studies. The legislature of Ohio has therefore enacted laws fixing the maximum and minimum length of attendance in elementary schools in any year, and prior to the enactment of the legislation complained of herein had attempted only to say what branches of knowledge should be taught.

Sections 7762–1 and 7762–2 of the General Code are elements of the compulsory educational law, and by their natural effect operate to prohibit spending any of the time deemed essential to acquiring knowledge in the branches which are affirmatively prescribed by teaching a language not deemed essential to good intelligent citizenship in the State of Ohio.

Section 7762–2 applies this same rule to private, institutional and parochial schools. It is as essential that pupils in these schools should receive standard educational facilities as those who attend the public schools. The objective, intelligent citizenship, is the same, and it cannot be said that, because a child attends a private school or a parochial school, the standard of its educational requirement should be any less than is required of a pupil in the public schools.

The only remaining question is that § 7762–2 provides that the teaching shall be conducted in the English language only. We think that this is clearly within the right of a legislature in an English speaking country; to say otherwise would create conditions chaotic in the extreme, with results that are unthinkable.

Much is said about personal rights, liberty, equality, privilege, due process of law, poison virus, etc. These questions are not involved in the law complained of. The

first duty of society to itself is to see to it that the elements which compose society have the essentials of good citizenship. This is paramount to any whim or notion that any person or set of persons may have. No religious liberties are interfered with by the act in question. If a parent wishes his child taught Martin Luther's dogma in Martin Luther's language, there is no law against the child being taught that language, unless it takes so much of the child's time and health as to endanger society in that regard, nor does the act complained of interfere with any substantial right under the Constitution. It does not interfere with religious liberty, nor does it abridge any privilege or immunity, nor deprive any person of life, liberty or property, nor does it deny to any person equal protection of the laws. It is a reasonable regulation, having for its objective the highest purpose of government, the upbuilding of an intelligent citizenship, or as said by Chief Justice Fuller in *Giozza* v. *Tiernan*, 148 U. S. 657–662, it tends to promote "their health, morals, education and good order."

It certainly is within the province of the legislature to enact laws protective of patriotism and the war power of the country.

Mr. Arthur F. Mullen and *Mr. C. E. Sandall*, with whom *Mr. I. L. Albert* was on the briefs, for plaintiffs in error in No. 440.

Mr. Mason Wheeler and *Mr. O. S. Spillman*, with whom *Mr. Clarence A. Davis*, Attorney General of the State of Nebraska, *Mr. Charles S. Reed*, *Mr. Guy C. Chambers* and *Mr. Hugh La Master* were on the brief, for defendants in error in No. 440.

Mr. William D. Guthrie and *Mr. Bernard Hershkopf*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The several judgments entered in these causes by the Supreme Courts of Iowa, Ohio and Nebraska, respectively, must be reversed upon authority of *Meyer* v. *Nebraska,* decided today, *ante,* 390.

Number 134. Plaintiff in error was convicted of teaching pupils in a parochial school below the eighth grade to read German contrary to "An act requiring the use of the English language as the medium of instruction in all secular subjects in all schools within the State of Iowa," approved April 10, 1919.[1] He used English for teaching the common school branches, but taught young pupils to read German. The Supreme Court of the State held: "The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language, and in no other. The evident purpose is that no other language shall be taught in any school, public or private, during the tender years of youth, that is, below the eighth grade." 191 Iowa, 1060.

Numbers 181 and 182. Bohning and Pohl, of St. Johns Evangelical Congregational School, Garfield Heights, Cuyahoga County, Ohio, were severally convicted (102

[1] Section 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the State of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited, provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.

Section 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00). [Laws 1919, c. 198.]

Ohio St. 474) of violating "An act to supplement section 7762 of the General Code . . . and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language," (108 Ohio Laws 614) approved June 5, 1919,[2] which prohibits the teaching of German to pupils below the eighth grade.

Number 440. An injunction is sought against the Governor and Attorney General of the State and the Attorney for Platte County to prevent enforcement of "An act to declare the English language the official language of this State, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools," etc., approved April 14,

[2] Section 7762–1. That all subjects and branches taught in the elementary schools of the State of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

Section 7762–2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state.

Section 7762–3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense. . . .

1921.[3] This statute is subject to the same objections as those offered to the Act of 1919 and sustained in *Meyer* v. *Nebraska, supra.* The purpose of the later enactment, as stated by counsel for the State, is "to place beyond the possibility for legal evasion a prohibition against the teaching in schools of foreign languages to children who have not passed the eighth grade." The Supreme Court considered the merits of the cause, upheld the statute, and refused an injunction. 187 N. W. 927.

McKelvie and Davis, formerly Governor and Attorney General, no longer occupy those offices. The cause is dismissed as to them. Otto F. Walter is now the County Attorney and the judgment below as to him must be reversed.

Reversed.

[3] Sec. 1. The English language is hereby declared to be the official language of this State, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Sec. 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

Sec. 3. Languages other than the English language may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language. . . .

Sec. 7. Chapter 249, of the Session Laws of Nebraska for 1919, entitled, 'An Act relating to the teaching of foreign languages in the State of Nebraska,' is hereby repealed. . . . [Laws 1921, c. 61.]

MR. JUSTICE HOLMES, dissenting.

We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is " whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192, 204. *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303. *Jacob Ruppert* v. *Caffey,* 251 U. S. 264. I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.

I agree with the Court as to the special proviso against the German language contained in the statute dealt with in *Bohning* v. *Ohio*.

MR. JUSTICE SUTHERLAND concurs in this opinion.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* DAUGHTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, ET AL.

NORFOLK SOUTHERN RAILROAD COMPANY *v.* SAME.

SEABOARD AIR LINE RAILWAY COMPANY *v.* SAME.

SOUTHERN RAILWAY COMPANY *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

Nos. 724, 727, 744, 756. Argued April 25, 1923.—Decided June 4, 1923.

1. A State may, consistently with the Federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce. P. 420.
2. The Income Tax Law of North Carolina directs that the "net operating income" of railroads within the State be determined upon the basis of accounts to be kept according to the method established by the Interstate Commerce Commission, and lays a tax upon the "net income," to be ascertained by deducting from "net operating income" only uncollectible revenue, certain taxes, and amounts paid for car hire, thus treating the railroad property within the State as the thing of which the income is taxed, and taking no account of other income of the corporation owning the railroad and making no deduction of its capital charges. *Held*, That the statute, considering this distinction, does not in effect, depart from the Commission's definition of net income, nor, as applied to

interstate railroads, does it directly burden interstate commerce, or discriminate against it, (other public service corporations, wholly intrastate, being treated in the same way); nor does it, with other railroad taxes of the State, make an aggregate burden violating the commerce clause; nor does it violate that clause by departing from the standard form of accounts prescribed by the Interstate Commerce Commission under the Transportation Act, 1920. P. 421.

3. The above statute is not obnoxious to the equal protection clause, either in refusing to public service corporations, including railroads, deductions of interest on funded debt, rentals and worthless debts, which are allowed to other corporations and individuals in calculating net income, or in not requiring certain short line railroads to keep the accounts required of other railroads. P. 423.
4. The Constitution of North Carolina does not forbid taxing the net income of property operated as a railroad as distinguished from the net income of the company owning the railroad. P. 424.
5. The above cited statute does not violate the uniformity clause of the North Carolina Constitution, in that the permissible deductions in computing net income of public service corporations are different from, and not so great as, those allowed individuals or other corporations. *Id.*
6. The statute is not retroactive and void under the state constitution because it lays a tax based upon the net income of the calendar year within which it was enacted. P. 425.
7. A bill in the District Court, to enjoin the collection of state taxes alleged to be unconstitutional, will not be dismissed upon the ground that a plain, adequate and complete remedy exists, in paying the taxes under protest and suing to recover the amount paid, when the statute relied on as affording such remedy is recent and has not been construed and applied by the highest court of the State. P. 425.

Affirmed.

APPEALS from decrees of the District Court dismissing the bills, after hearing the merits, in four suits brought by railroad companies to enjoin the enforcement of a state income tax.

Mr. Thomas W. Davis, with whom *Mr. George B. Elliot* and *Mr. Harry Skinner* were on the brief, for appellant in No. 724.

Mr. George H. Brown and *Mr. Wm. P. Bynum*, with whom *Mr. James S. Manning*, Attorney General of the State of North Carolina, *Mr. Frank Nash*, *Mr. Locke Craig*, *Mr. Thomas D. Warren* and *Mr. Sidney S. Alderman* were on the briefs, for appellees.

Mr. W. B. Rodman for appellant in No. 727.

Mr. S. R. Prince, with whom *Mr. W. M. Hendren* and *Mr. L. E. Jeffries* were on the brief, for appellant in No. 756.

Mr. Murray Allen, *Mr. Forney Johnston* and *Mr. James F. Wright* filed a brief on behalf of appellant in No. 744.

Mr. Justice Brandeis delivered the opinion of the Court.

The Constitution of North Carolina (Article V, § 3, as amended January 7, 1921) authorizes the General Assembly to tax incomes at a rate not exceeding six per cent. The Income Tax Act of March 8, 1921 (Revenue Act, c. 34, Schedule D, §§ 100–904, as amended by c. 35, Public Laws 1921) laid upon corporations a tax equal to three per cent. of the entire net income as therein defined and upon individuals a progressive tax not exceeding that percentage. For the purpose of ascertaining the taxable income the statute divides taxpayers into three classes—individuals, ordinary corporations and public service corporations (including railroads). The statute, in terms, taxes only net income. For railroads and other public service corporations required to keep accounts according to the method established by the Interstate Commerce Commission, it makes those accounts the basis for determining the "net operating income" (§ 202 as amended); and it directs that, in order to ascertain the "net income," there shall be deducted from the net operating income (*a*) uncollectible revenue; (*b*) taxes for

the income year, other than income taxes, and war profits and excess profits taxes; (*c*) amounts paid for car hire. Whether the statute is unconstitutional, because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, is the main question for decision.

The first year's tax under the act was payable in 1922, with respect to the net income received during the calendar year 1921. To enjoin its enforcement these four corporations brought suit in the federal court for the Eastern District of North Carolina against the Commissioner of Revenue and others. Each plaintiff owns and operates a line of railroad within the State, and is an interstate carrier. Each assails the statute on the grounds that it violates the commerce clause, the Fourteenth Amendment and the state constitution; and only on these grounds. Each case was heard upon the merits. And in each a final decree was entered dismissing the bill. Appeals were taken under § 238 of the Judicial Code; and orders of the District Court stayed collection of the taxes pending the determination of the appeals. Since the cases are properly here on federal questions, all questions presented by the record whether involving federal law or state law must be considered. *Southern Ry. Co.* v. *Watts,* 260 U. S. 519.

It is conceded by appellants that taxation of the net income of an interstate carrier does not violate the commerce clause, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37, 57; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; and by the State, that taxation of gross receipts would be void as burdening interstate commerce. *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217. It is conceded by appellants that classification of public service corporations, and specifically of railroads, for purposes of taxation does not violate the Fourteenth Amend-

ment; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519; and by the State, that an arbitrary classification is obnoxious to the equal protection clause. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400. The contentions are that the statute, in fact, taxes gross income; that the classification as made by it is unreasonable; and that for these, and other, reasons it violates both the federal and the state constitution. All the contentions are, in our opinion, unsound. To appreciate the objections urged, and to present the reasons for holding them groundless, it is necessary to show the incidence of the tax. This may be done by examining how the assessment of $13,133.09 made upon the Seaboard Air Line, and here assailed, was calculated.

The Seaboard being an interstate carrier, the accounts were kept as required by the Interstate Commerce Commission. Interstate business was apportioned, as customary, according to mileage. The results of operations within the State calculated according to the statute were these:

Operating revenues	$8,457,328.52	
Operating expenses	7,308,823.29	
Net operating income.....		$1,148,505.23
From the net operating income were deducted:		
Uncollectible revenue ...	$6,342.31	
Taxes paid.....	410,043.38	
Car hire.....	294,350.02	
Additional deductions.....		$710,735.71
Net taxable income.....		$437,769.52

Tax on $437,769.52 at 3 per cent. $13,133.09.

Thus, about one-twentieth ($\frac{1}{20}$) of the operating revenues of the Seaboard was subjected to taxation. To this one-twentieth the 3 per cent. income tax was applied.

The tax assessed ($13,133.09) is about one-six hundred and fiftieth ($\frac{1}{650}$) of the total operating revenues ($8,457,328.52).

That the calculation is correct, in accordance with the statute, is not disputed. That is, the net income earned, in 1921, by the Seaboard's lines in North Carolina was as calculated $437,769.52. The Seaboard insists that it had no net income taxable in North Carolina; but, on the contrary, a loss, of which $254,290.22 was apportionable to North Carolina. The loss is figured in this way:

Net income as calculated under the statutes	$437,769.52	
Non-operating income—not taken into account under the statute [1]	539,643.30	
Total net income		$977,412.82
From which deduct:		
Capital charges (including rents paid) not taken into account under the statute [2]		1,231,703.04
Net loss or deficit		$254,290.22 [3]

[1] The items of the above non-operating income are these:

Dividend income	$113,350.45
Income from funded securities	97,257.47
Income from unfunded securities	13,781.90
Income from lease of road	259,525.95
Joint facility rent income	12,664.17
Rent from work equipment	5,047.23
Rent from floating equipment	18.22
Rent from locomotives	6,767.21
Miscellaneous rent income	22,387.79
Misc. non-operating physical property	7,685.69
Miscellaneous income	1,157.22
	$539,643.30

Thus the State takes, as the entity to be taxed, the railroad property operated by the Seaboard within the State. Therefore, it takes, as the primary basis for the tax, only operating revenues; that is, the gross receipts from operating such property. The Seaboard, on the other hand, assumes, as the entity which should be taxed, the company in respect to its North Carolina interests. Therefore the Seaboard takes, as the primary basis for the tax, in addition to the operating revenues of the lines within the State, North Carolina's proportion of the non-operating income of the company derived from other property owned by it, wherever situated. For the Seaboard, like

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[2] The items of the above capital charges are these:

Interest on funded debt	$1,179,252.20
Interest on unfunded debt	43,823.64
Annual allotment of discount on bonds	24,494.16
Rent of leased roads	10,448.12
Rents of joint facility	34,480.98
Rent of locomotives	19,860.91
Rent for floating equipment	2,599.96
Rent for working equipment	510.24
Rents, miscellaneous	3,194.86
Income charges, miscellaneous	685.25
	$1,231,703.04

If the above items were added the total would be $1,319,350.32. There is apparently some error in the items which is not however material to the result.

[3] For the Atlantic Coast Line the calculation in accordance with the statute shows a net income of $1,389,565.25. According to the company's contention the net income was $333,205.09.

For the Norfolk Southern the calculation in accordance with the statute, it is said, shows a net income of $653,882.17. (The correct figures would seem to be $603,003.51.) According to the company's contention there was a deficit of $424,338.92.

For the Southern Railway the calculation in accordance with the statute shows a net income of $2,384,068.71. According to the company's contention the net income on one calculation was $554,724.41 and on another calculation was $456,798.56.

most other railroad systems, is, to some extent, a holding company, as well as an operating company; and, as holding company, receives dividends from other concerns, interest on bonds of other concerns, and rental from property owned but not operated. As the State treats the operated property as the entity, it does not concern itself with interest charges and the rentals paid, just as it does not concern itself with a mortgage upon the real estate when it lays the *ad valorem* tax. On the other hand, as the Seaboard treats the company—the person—as the entity to be taxed, it undertakes to ascertain the net income of the company. This includes as gross income, a proportion of the receipts from property not within the State and includes among the deductions from the gross income of the company, the capital charges.

That a State may, consistently with the Federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer* v. *Carter,* 252 U. S. 37, 44, 52. There an Oklahoma statute was sustained which laid the tax upon the net income of Oklahoma oil property owned by a citizen and resident of Illinois. The Federal Constitution which permits to be taxed the net income of property owned by an individual, although a citizen of another State, obviously does not preclude such a tax where the property is owned or operated by a corporation. It is a common provision in state income tax laws to tax the net income of property within the State which is owned, or operated, by non-residents.[4] The differences between the parties arise, in the main, not from differ-

[4] The Federal Government taxes the net income of property owned or business carried on within the United States by a citizen resident abroad. *DeGanay* v. *Lederer,* 250 U. S. 376. The New York income tax law involved in *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60, 73, taxes the net income "from all property owned . . by natural persons not residents of the state."

ence in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. This will appear from an examination of the several grounds on which the validity of the statute is assailed.

First. The contention that the statute is obnoxious to the commerce clause rests upon the argument that the State's definition of net income differs from that adopted by the Interstate Commerce Commission; that the State is without power to depart from the Commission's definition so far as concerns interstate commerce; and that, since the statutory definition differs, the act is unconstitutional. A conclusive answer to that argument is found in the fact that the State adopts (without modification) the commission's definition for the net income of that which it taxes. For treating as the entity to be taxed, the railroad property operated by the company within the State, it appears that every item which the railroad claims the statute wrongly disallowed as a deduction is of such a character, that it is either clearly a capital charge (as distinguished from an operating charge) or reasonably may be deemed such as a matter of accounting.[5] The question of law thus presented is not one which involves enquiry into the intricacies of railroad account-

[5] To prove that the statute, in fact, taxes some part of the gross earnings, attention is called specifically to some minor items which the statute does not allow as deductions. But these stand in no different position than the major items—interest on funded debt and leased line rentals—discussed above. Prominent among these lesser items is "joint facility rents" which, in the case of the Seaboard, amounted net to $21,816.81. Joint facility rents paid were $34,480.98; those received (credited as non-operating income) were $12,664.17. This is rental paid for railroad facilities—like tracks, terminals and roundhouses. They are needed by the carrier as a part of the plant and, not being owned, are rented from others. The fact that they are used jointly with others, is, of course, immaterial. This rent, like the rent of a leased line, is paid to secure control of the

ing. Under the commerce clause it is essential that a state tax shall not directly burden interstate commerce and that it shall not discriminate against interstate commerce. With these essentials the North Carolina act complies. It is not assessed on gross receipts.[6] Compare *Peck & Co.* v. *Lowe*, 247 U. S. 165; *Pullman Co.* v. *Richardson*, 261 U. S. 330. It does not discriminate against interstate commerce. For the taxable net income of other public service corporations which are wholly intrastate is determined also without allowing capital charges as a deduction. That there is no basis for the claim that the commerce clause is violated by the burden resulting from the aggregate of the several North Carolina railroad taxes was settled in *Southern Ry. Co.* v. *Watts, supra.*

Another, and more technical, argument in support of the contention that the statute violates the commerce clause as applied to interstate carriers is based upon the cases which sustain the power of the Interstate Commerce Commission to prescribe a uniform system of accounting.[7]

property operated. Hire of freight cars might have been treated in the same way, but the State, for reasons satisfactory to it, permitted that financial charge to be deducted, and to that extent reduced the tax.

[6] The term "net income," in law or in economics, has not a rigid meaning. Every income tax act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation. These details are largely a matter of governmental policy. As to them States differ; and there is apt to be difference of view in the same States at different times; and at the same time a different definition of taxable net income for different classes of taxpayers. Obviously such differences in detail do not render obnoxious to the commerce clause a state income tax which is otherwise unobjectionable.

[7] *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. Also *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 461, 462; *Union Pacific R. R. Co.* v. *United States*, 99 U. S. 402, 420, 427.

It is said that, since the statute in ascertaining net income purports to follow the standard form of accounts prescribed by the Interstate Commerce Commission, but in fact departs therefrom, the statute invades the province of Congress and conflicts with the policy expressed in Transportation Act, 1920. There is in fact no such divergence in the accounting. But if there had been, it would not follow that every departure from the Commission's standard classification would render unconstitutional a state income tax act. The function of determining whether a tax burdens interstate commerce was not conferred upon the Commission. Its sole function is the regulation of carriers. For this purpose it has been empowered by Congress to require of them a uniform system of accounting. The financial results of their operations as therein disclosed are useful for many purposes. But they are not made conclusive for all. Moreover, the Commission's standard form is not immutable. Railway accounting is in process of development.[8]

Second. The contention that the statute is obnoxious to the equal protection clause rests upon the argument that the State's definition of net income of public service corporations (including railroads) is arbitrary. It is alleged to be arbitrary because it allows to other corporations and to individuals, certain deductions which

[8] See *Groesbeck* v. *Duluth, South Shore & Atlantic Ry. Co.*, 250 U. S. 607, 614; 3 I. C. C. 289, 343. Power to prescribe a mandatory accounting system was first conferred upon the Commission by the Hepburn Act (June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593). In 1888 a recommendatory classification of operating revenues, expenses and charges was issued by the Commission; and between that date and 1908 the form was revised from time to time. On June 1, 1908, the Commission ordered carriers to make reports in the form prescribed and furnished by the Commission. Thereafter changes continued to be made from time to time. A comprehensive and detailed classification of income accounts was issued effective July 1, 1912. This was superseded by the revised classification effective July 1, 1914, which is now in force.

are denied to public service corporations; namely, interest on funded debt, rentals, and certain worthless debts (§ 306, pars. 2, 3, 6 and 7). That the differentiation results from the difference in the subject of the tax and, hence, is not arbitrary has been pointed out above. But, in any event, the differentiation would not render the statute unconstitutional. The State might, consistently with the equal protection clause, have subjected only public service corporations to the income tax, or it might have laid upon them a higher income tax than upon others; as it laid upon railroads a higher franchise tax than it did upon other corporations. Compare *Southern Ry. Co.* v. *Watts*, 260 U. S. 519.

The classification is also assailed as arbitrary on the ground that § 202 defining net income applies only to corporations required to keep records "according to the standard classification of accounting of the Interstate Commerce Commission"; that there are in the State corporations which are not required by law to keep their accounts according to the Commission's form, but which own railroads of standard gauge operated by steam, and have obtained authority to act as limited common carriers. In support of this contention, two railroads with short lines are instanced. They are owned by lumber companies and are taxed, not as railroads, but as if part of the lumber corporation. So far as appears the North Carolina authorities might require them to file accounts according to the Commission's classification, if they deemed this advisable. But obviously the State might reasonably classify such railroads differently from ordinary carriers.

Third. The claim that the statute violates the state constitution rests mainly on the contention that the tax is not upon the net income.[9] As shown above, the assump-

[9] The provision is: "The general assembly may also tax . . . incomes provided the rate . . . shall not . . . exceed six per cent., and there . . . shall be allowed . . . deductions . . . so that only net incomes are taxed."

tion is erroneous. Only the net income of the property operated as a utility is taxed. There is nothing in the constitution of the State which precludes taxing the net income of the property so operated, as distinguished from the net income of the company. There is no inconsistency between §§ 101 and 202 of the statute. It would seem from the decisions of the Supreme Court of North Carolina that the uniformity clause applies to income taxation; but that court has repeatedly held that the uniformity clause does not prevent reasonable classification.[10] The contention that the uniformity clause is violated because the permissible deductions in the case of public service corporations are different from (and not so great as), those allowed individuals or other corporations[11] is unfounded, for reasons stated above. So is the contention that the statute is retroactive and void, because it was not enacted until March, 1922, but lays a tax based upon the net income of the calendar year.

On behalf of the State it was urged that the bill was properly dismissed by the District Court because there is under the laws of North Carolina a plain, adequate, and

[10] *Smith* v. *Wilkins,* 164 N. C. 135; *Caldwell Land & Lumber Co.* v. *Smith,* 151 N. C. 70; *Lacy* v. *Packing Co.,* 134 N. C. 567; *Gatlin* v. *Tarboro,* 78 N. C. 119. Compare *State* v. *Williams,* 158 N. C. 610; *State* v. *Moore,* 113 N. C. 697; *Worth* v. *Railroad,* 89 N. C. 291.

[11] Every corporation is allowed to deduct from gross income all operating expenses,—that is, the disbursements incident to the life and the conduct of its business. But the individual is not permitted to deduct from gross income any part of his living expenses (except so far as they may be covered by the exemption). Railroads and other public corporations are allowed to deduct, as an operating expense, the cost of tools and small equipment. Individuals and other corporations are not. Ordinary corporations and individuals are allowed to deduct rentals and interest paid. Compare the limited deduction for interest paid under the Federal Corporation Tax Act. *Anderson* v. *Forty-two Broadway Co.,* 239 U. S. 69; *New York, New Haven & Hartford R. R. Co.* v. *United States,* 269 Fed. 907.

complete remedy at law by which a taxpayer may recover the amount of an illegal tax paid by him under protest. Our attention has been called to several North Carolina cases and statutes bearing upon this contention. But the statute mainly relied upon is a recent one which appears not to have been construed and applied by the highest court of the State. In the absence of such decision, we cannot say the remedy at law is plain and adequate. *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 296; *Wallace* v. *Hines*, 253 U. S. 66, 68; *Shaffer* v. *Carter*, 252 U. S. 37, 47; *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Davis* v. *Wakelee*, 156 U. S. 680, 688. We have therefore passed upon the merits.

Affirmed.

COLLINS *v.* LOISEL, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA.

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

No. 880. Argued May 4, 1923.—Decided June 4, 1923.

1. The provision of the Fifth Amendment against double jeopardy does not prevent the commitment of a person for extradition on new affidavits after he has been discharged on others identical in form and substance. P. 429.
2. Under the extradition treaty with Great Britain, a fugitive may be arrested a second time upon a new complaint charging the same crime, when he has been discharged by the magistrate on the first complaint or the first complaint has been withdrawn. P. 429.
3. Refusal of the State Department to issue a warrant of extradition because of the pendency of *habeas corpus* proceedings, does not bar further proceedings for the same cause on a new complaint. P. 430.
4. A discharge in *habeas corpus* based on mere irregularities in extradition proceedings, does not operate as *res judicata* against a new proceeding for the same offense. P. 430.

5. The pendency of *habeas corpus* proceedings relating to one charge in extradition, does not deprive the magistrate of jurisdiction to entertain an application for arrest on other charges or render invalid his warrant issued on such application. P. 430.
6. The crime for which a fugitive is extradited need not be specifically set forth in the magistrate's order of commitment, if sufficiently identified by the magistrate's finding and his certificate to the Secretary of State. P. 431.
7. By established practice, the warrant of extradition issued by the Secretary of State likewise identifies the crime. P. 431.

Affirmed.

APPEAL from a judgment of the District Court dismissing a petition for *habeas corpus*. See *post*, 730.

Mr. J. Zach Spearing, with whom *Mr. J. Kemp Bartlett* and *Mr. Guion Miller* were on the brief, for appellant.

Mr. Robert H. Marr appeared for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is the third appeal by Collins in *habeas corpus* proceedings instituted to prevent his extradition to British India. After the decision in *Collins* v. *Miller*, 252 U. S. 364, the District Court dismissed the application for *habeas corpus* so far as the commitment was based on the charge of obtaining property by false pretenses from Mahomed Alli Zaimel Ali Raza, and remanded Collins to the custody of Loisel, the marshal. The judgment of the District Court discharged the prisoner, so far as the commitment was based on charges of obtaining property by false pretenses from Pohoomul Brothers and from Ganeshi Lall & Sons. The ground of the discharge, stated in the judgment, was that Collins had been remanded to await further proceedings on these charges, to the end that he might be given the opportunity of introducing evidence at a preliminary examination under the law of Louisiana; that no further examination had been held;

that the prosecution on those affidavits had been definitely abandoned; and that other new affidavits had been filed by the British Consul General. In this judgment the British Consul General acquiesced. Collins appealed. The judgment was affirmed in *Collins* v. *Loisel*, 259 U. S. 309.

On those new affidavits, referred to in the judgment, apparently Collins was again committed to await extradition; the papers were transmitted for action to the Department of State with the magistrate's certificate; but, owing to the fact that proceedings were still pending in the District Court, the Department refused to issue the warrant of extradition. Thereafter, while the *Loisel Case* was pending in this Court, and while Collins was being held in custody to answer on the charge of obtaining property from Mahomed Alli Zaimel Ali Raza, a third set of affidavits were lodged against the prisoner by the British Consul General before the same committing magistrate. They were in form and substance identical with those in which Collins had been previously charged with obtaining property by false pretenses from Pohoomul Brothers and from Ganeshi Lall & Sons and discharged by the District Court. Alleging that the affidavits were identical with those first filed on which he had been so discharged, Collins moved, before the magistrate, to quash the new affidavits. His motion was overruled; and, after due hearing, an order was entered by the magistrate again committting Collins to be held for extradition on these charges. Then he filed, in the same District Court, this petition for a writ of *habeas corpus* and *certiorari*. Judgment was entered therein in December, 1922, dismissing this second petition for a writ of *habeas corpus;* Collins was remanded to the custody of the marshal; and this appeal was taken under § 238 of the Judicial Code. After hearing counsel for appellant, this Court on May 4, 1923, ordered that the judgment below be affirmed; and that

the mandate issue forthwith. Because of the importance of the questions presented, the reasons for this decision are now stated.

Collins contended that commitment on the new affidavits, after discharge in proceedings based on others identical in form and substance, was a violation of the Fifth Amendment and of the Treaty with Great Britain. The constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. See *Kepner* v. *United States,* 195 U. S. 100, 126. The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal. *Commonwealth* v. *Rice,* 216 Mass. 480. *People* v. *Dillon,* 197 N. Y. 254, 256. Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing* v. *Cady,* 208 U. S. 386, 391, not to constitute jeopardy. Likewise it has been consistently held under the treaties with Great Britain and other countries, that a fugitive from justice may be arrested in extradition proceedings a second time upon a new complaint charging the same crime, where he was discharged by the magistrate on the first complaint or the complaint was withdrawn.[1] The precise question appears not to have been passed upon by this Court in any case involving international extradition. But in *Bassing* v. *Cady, supra,* the rule was applied to a case of interstate rendition. Protection against unjustifiable vexation and harassment in-

[1] 6 Ops. Atty. Gen. 91; 10 Ops. Atty. Gen. 501; *In re Macdonnell,* 11 Blatchf. 170, 179; *In re Kelly,* 26 Fed. 852; *Fergus, Petitioner,* 30 Fed. 607; *Ex parte Schorer,* 195 Fed. 334; See also 1 Moore on Extradition, pp. 457–464; 1 Hyde, International Law, p. 596; *Muller's Case,* 5 Phila. 289; *In re Farez,* 7 Blatchf. 345.

cident to repeated arrests for the same alleged crime must ordinarily be sought, not in constitutional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection. The proceedings before the committing magistrate on the first and on the second set of affidavits, and the action of the Department of State on the latter, were no bar to the proceedings on the third set of affidavits here involved. The filing by the British Consul General of these new affidavits was clearly justified.

The discharge of Collins on the first petition for *habeas corpus,* so far as it related to the charge of obtaining property from Pohoomul Brothers and from Ganeshi Lall & Sons does not operate as *res judicata.* It is true that the Fifth Amendment in providing against double jeopardy, was not intended to supplant the fundamental principle of *res judicata* in criminal cases, *United States* v. *Oppenheimer,* 242 U. S. 85; and that a judgment in *habeas corpus* proceedings discharging a prisoner held for preliminary examination may operate as *res judicata.* But the judgment is *res judicata* only that he was at the time illegally in custody, and of the issues of law and fact necessarily involved in that result.[2] The discharge here in question did not go to the right to have Collins held for extradition. It was granted because the proceedings on which he was then held had been irregular and the British Consul General, instead of undertaking to correct them, had concluded to abandon them, and to file the charges anew by another set of affidavits.

The contention was also made that, as the arrest on the new affidavits after discharge on the old was an independent proceeding, and Collins was then being held on an entirely different charge under review by this Court

[2] Compare *Ex parte Milburn,* 9 Pet. 704, 710; *In re White,* 45 Fed. 237; *United States* v. *Chung Shee,* 71 Fed. 277; 76 Fed. 951; *Ex parte Gagliardi,* 284 Fed. 190.

in the *Loisel Case,* the magistrate was without jurisdiction. There was here no attempt to interfere by the second proceeding with the custody of Collins on the first. The fact that Collins was in the custody of the court did not render invalid the second warrant. It would merely prevent withdrawal of the prisoner from the custody of the court by means of the execution of a second warrant. *In re Macdonnell,* 11 Blatchf. 170, 177, 178. Compare *Ponzi* v. *Fessenden,* 258 U. S. 254, 260, 265. The pendency of *habeas corpus* proceedings, relating to the charge involved in the *Loisel Case, supra,* did not deprive the magistrate of jurisdiction to entertain this application for arrest on other charges. *Stallings* v. *Splain,* 253 U. S. 339, 342.

It was further contended that the magistrate's order of commitment was insufficient, because it adjudged that Collins be held for extradition "for trial on the charges pending against him in the Chief Presidency Magistrate's Court at Bombay"; and that, since he could legally be tried there only on the charge for which he was extradited, the order of commitment must specifically set forth that crime. *United States* v. *Rauscher,* 119 U. S. 407. The contention is unsound. The order must, of course, be interpreted as limited by the finding therein made, that the evidence produced "justify his commitment on the charge of having obtained property by false pretenses." The certificate which the magistrate issued thereon to the Secretary of State identifies the charge as those set forth in the two new affidavits. By established practice, the warrant of extradition issued by the Secretary of State likewise identifies the crime with which the prisoner has been charged and for the trial of which the prisoner is delivered up. Moreover, it may be assumed that the British Government will not try appellant upon charges other than those upon which the extradition is allowed. *Kelly* v. *Griffin,* 241 U. S. 6, 15.

Affirmed.

GEORGIA RAILWAY & POWER COMPANY ET AL. *v.* TOWN OF DECATUR.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 463. Argued April 24, 25, 1923.—Decided June 4, 1923.

1. A judgment of a State Supreme Court which does not terminate the litigation between the parties in such manner that, should there be an affirmance here, the court below would have nothing to do but to execute the judgment it had rendered, is not a final judgment for the purpose of review in this Court, even though it be regarded by the state court as settling the law of the case. P. 436.
2. Upon review of a judgment of a State Supreme Court, its decision upholding the power of a municipality of the State, under the local constitution and laws, to enter into a rate contract with a street railway company is controlling upon this Court. P. 437.
3. But in deciding constitutional questions presented, this Court will determine for itself whether there is, in fact, a contract, and, if so, the extent of its binding obligations, but will lean to an agreement with the state court. P. 438.
4. A street railway company cannot avoid the obligation to abide by maximum rates fixed by a valid contract with a town, by showing that they have become confiscatory. P. 438.
5. A state statute extending the corporate limits of a town and construed by the State Supreme Court as having the effect of rendering applicable to the added territory maximum street railway rates fixed by an earlier contract between the town and the street railway company, impairs the obligation of the contract by adding to its burdens. P. 439.
6. In the absence of any showing that the classification is in fact unreasonable and arbitrary, a statute which empowers a commission to revise the rates of street railway companies as they may be fixed by future contracts with municipalities, but not those fixed by contracts existing when the statute passed, cannot be said to violate the Equal Protection Clause of the Fourteenth Amendment, as applied to a company whose contract is thus excepted and prescribes a maximum rate which the company claims to be inadequate. P. 439.
7. An order of a state commission requiring a street railroad company to continue issuance of transfers and to provide additional

seating capacity and trailer cars, *upheld* against constitutional objection, in view of obligations imposed by a contract between the company and a municipality and the powers of the commission. P. 439.

153 Ga. 329, reversed; certiorari denied.

ERROR to a judgment of the Supreme Court of Georgia affirming a decree for the Town of Decatur, in its suit to enjoin the plaintiffs in error from increasing the fare on a street car line in violation of a contract.

Mr. Walter T. Colquitt, with whom *Mr. Luther Z. Rosser* and *Mr. J. Prince Webster* were on the briefs, for plaintiffs in error.

Mr. J. Howell Green and *Mr. Frank Harwell* for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The defendant in error, plaintiff below, brought suit against the Power and Electric Companies, defendants below, to enjoin them from increasing the rate of fare on a line of street railway between Decatur and the City of Atlanta. Hackman and others intervened, asserting that they resided near Atlanta and used certain car lines of defendant going to and from Atlanta, upon which a seven-cent fare was exacted; and that the contract, hereinafter referred to, giving residents of Decatur a lower rate of fare, constituted an illegal discrimination against them and against the localities where they lived. They did not allege that the seven-cent fare was unreasonable; nor did they seek any change in that rate; but merely joined with defendants in praying that the contract be held void and of no effect.

The Electric Company was the owner and the Power Company the lessee of the lines involved. About the year 1902 the Electric Company owned three lines be-

tween Atlanta and Decatur. Desiring to abandon the most northerly of these lines, the company began to tear it up. Thereupon suit was brought for an injunction. The controversy was adjusted by an agreement between the company and the Town of Decatur, by which the company was allowed to remove its line and an ordinance was enacted, carrying the agreement into effect. This ordinance, which was formally accepted, bound the company "to never charge more than five cents for one fare upon its main Decatur line . . . for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta . . ." and "to grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur . . . to any point within the City of Atlanta, on any of its lines in said city, and vice versa." In pursuance of this agreement the company tore up, removed and abandoned the northerly line and has never since restored it.

The company maintained a five-cent fare until October, 1920, at which time it gave notice that the fare would be increased to seven cents. Prior thereto an application of the company to the Railroad Commission of Georgia for permission to make this increase had been denied, on the ground that, because of the contract, the commission was without jurisdiction. The company then sought by mandamus to compel the commission to assume jurisdiction of the question; but the application was denied by the trial court, whose ruling was affirmed by the Supreme Court of the State, in so far as it related to the line covered by the contract. The present suit against the defendants was predicated upon the foregoing facts. The contentions of the defendants were that the execution of the con-

tract was beyond the powers of the town; that permission to remove and abandon the northerly line furnished no consideration for it; that it constituted an attempt to fix fares outside the corporate limits of the town; that since it was entered into, these limits had been twice extended so as to include a portion of the main line, outside the corporate limits when the contract was entered into; and that the contract could not be applied to this additional territory without impairing its obligation, in violation of the Constitution of the United States. They further contended that, in any event, the five-cent fare should be limited to passengers entering cars at the termini of the line in Atlanta and Decatur and not to those entering at intermediate points; and that, because of changed conditions since the contract was made, the five-cent fare was confiscatory. Upon an application made by the defendants, after the disposition of the mandamus proceeding, the Railroad Commission had fixed a seven-cent fare on lines not covered by the contract and required the defendants to furnish, during rush hour periods, additional seating capacity, and, on the main Decatur and College Park routes, to operate trailers during such rush hours. The commission had also ordered that no change should be made in the existing rules and practices of the company as to transfers.

The trial court made an interlocutory order, granting a preliminary injunction, which was affirmed on writ of error by the State Supreme Court. 152 Ga. 143. Thereafter, the case having been remanded, defendants were allowed to amend their answer and crossbill in several particulars. A general demurrer to these amended pleadings was sustained in part; and a jury, impaneled to try the remaining issues, found for the plaintiff by direction of the court, upon which a final decree was entered. A second writ of error from the State Supreme Court followed. That court held that its judgment upon the first

writ of error became the law of the case and was *res judicata* and therefore precluded a further review and the decree of the trial court was affirmed. 153 Ga. 329. Deprivation of rights under the Federal Constitution was duly and properly asserted. The case is here on writ of error. From motives of caution defendants also filed a petition praying the issuance of a writ of certiorari, consideration of which was postponed to await the hearing on the writ of error.

Preliminarily, defendant in error insists that the decision of the State Supreme Court on the first writ of error affirming the interlocutory order of the trial court, was a final adjudication from which a writ of error from this Court might have been sued out, and, hence, that we are precluded from considering the present writ of error. *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, is cited and relied upon; but that case furnishes no support to the contention. There the trial court had adjudged the title to a piece of land to be in the defendant. Upon appeal the State Supreme Court reversed this judgment and remanded the case with directions to enter judgment awarding plaintiff title to a right of way over the land. The trial court followed this direction. Plaintiff again appealed, insisting, as it had done before, that it had title in fee simple; but the appellate court declined to consider the question, holding that the former decision concluded the court as well as the parties. This Court held that as the judgment on the first appeal disposed of the whole case on the merits and directed that judgment should be entered, it left nothing to the judicial discretion of the trial court and was therefore final. Here the first writ of error was not from a final judgment, but from an interlocutory order granting a temporary injunction. That it did not finally dispose of the case is clear, since the trial court thereafter allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict and entered a

final decree; and it was upon this decree that the second writ of error was brought. We are not unmindful of the ruling of the appellate court to the effect that the issues were, in fact, disposed of on the first writ of error and its powers brought to an end; but whatever may be the view of that court in respect of its own power to again consider the issues, the judgment now under review is the only one this Court can consider as final, for the purpose of exercising its appellate jurisdiction. *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339, 343; *United States* v. *Denver & Rio Grande R. R. Co.,* 191 U. S. 84, 93; *Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S. 207, 214; *Zeckendorf* v. *Steinfeld,* 225 U. S. 445, 454. While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that in order to give this Court appellate jurisdiction the judgment or decree "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Bostwick* v. *Brinkerhoff,* 106 U. S. 3, and cases cited.

We hold, therefore, that the writ of error was properly brought and come to a consideration of the substantive matters presented.

1. The principal question, and the one to which the briefs and arguments are mainly directed, is, whether the agreement between the plaintiff and the Electric Company was within the powers of the town and is now valid and subsisting. This contract has been before the Supreme Court of Georgia in the course of the litigation on three distinct occasions: 149 Ga. 1; 152 Ga. 143, and (the instant case) 153 Ga. 329. That court, in carefully considered and well reasoned opinions, sustained the authority of the municipality and upheld the contract as valid and subsisting. Defendants contend that the au-

thority to fix rates devolved by the state constitution upon the General Assembly, and, therefore, that the Town of Decatur was without power to enter into a contract on that subject. When the contract was made the General Assembly had never exercised this authority and the State Supreme Court held that there was nothing in the constitution of the State which precluded the municipality from contracting as to fares; and that, while the matter was one falling within the police power, whose exercise could not be abridged by contract, it was competent for the municipality to enter into such a contract where the State had not exercised and was not seeking to exercise its police power over the subject, and that this contract would remain effective until there should be conflicting legislative action. See *Milwaukee Electric Ry. Co.* v. *Wisconsin R. R. Comm.*, 238 U. S. 174, 183. This conclusion, involving, as it does, a construction of the state constitution and laws and powers of state municipalities, is controlling upon this Court, as it has decided many times. See, for example: *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410; *Richmond* v. *Smith*, 15 Wall. 429, 438.

On the other hand, in deciding the constitutional questions presented, this Court will determine for itself whether there is, in fact, a contract and, if so, the extent of its binding obligations, but will lean to an agreement with the state court. *Tampa Water Works Co.* v. *Tampa*, 199 U. S. 241, 242–243, and cases cited; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 595; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 386; *Milwaukee Electric Ry. Co.* v. *Wisconsin R. R. Commission*, *supra*. And considering the question in this light we see no reason to differ with that court in its view of the validity and binding quality of the contract. The contract being valid we are not concerned with the question whether the stipulated rates are confiscatory. *Southern*

Iowa Electric Co. v. *Chariton,* 255 U. S. 539, 542; *Paducah* v. *Paducah Ry. Co.,* 261 U. S. 267.

2. Treating the contract as valid, it is insisted that its obligation is impaired by the statutory extension of the limits of the town and the action of the court in holding the five-cent fare applicable in the added territory. While the statute does not refer to the contract or in terms make the rates applicable in the annexed territory, the necessary result of the decision of the state courts is to give it that effect, and in that way the statute, in the respect complained of, does substantially impair the obligation of the contract by adding to its burdens. *Detroit United Railway* v. *Michigan,* 242 U. S. 238, 247–248; *Columbia Railway, Gas & Electric Co.* v. *South Carolina,* 261 U. S. 236.

3. The state statute of August 23, 1907, Civil Code, § 2662, extends the power of the Railroad Commission to street railroad companies, but contains a proviso to the effect that it shall not be construed " to impair any valid, subsisting contract now in existence between any municipality and any such company." It is insisted that this proviso brings about an arbitrary classification, in violation of the equal protection clause of the Fourteenth Amendment, because it subjects future contracts to the power of the Commission while exempting existing contracts therefrom. But it is not shown that the classification in fact is unreasonable and arbitrary and, under the decisions of this Court, we cannot say that it is obnoxious to the constitutional provision. *Arkansas Natural Gas Co.* v. *Arkansas Railroad Commission,* 261 U. S. 379, and cases cited.

4. We cannot agree with the contention of defendants that the order of the commission, directing that no change be made in the matter of the issuance of free transfers is open to constitutional objection. The order of the com-

mission went no further than to direct a continuance of a practice which, so far as the record discloses, was not beyond the terms of the contract providing specifically for such transfers.

Neither are we able to say that the order of the commission, directing the defendants to provide additional seating capacity on some of its lines and trailers upon the line covered by the contract, was beyond its ordinary power to require adequate service. There is nothing in the contract with which the order conflicts, and such service naturally would seem to be implied, in the absence of a provision to the contrary.

5. Other contentions advanced by defendants we find so clearly lacking in merit that we dismiss them without special consideration.

It results from the foregoing that the judgment below, in so far as it makes applicable the contract rates within the annexed territory cannot be sustained. The contract rates apply only to the Town of Decatur, as it existed when the contract was made. To apply them to additional territory is to impose a burden upon defendants outside the contract. We find no other error; but, upon the ground stated under paragraph 2, the decree of the State Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Writ of certiorari denied.

GEORGIA RAILWAY & POWER COMPANY ET AL. *v.* MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 464. Argued April 24, 25, 1923.—Decided June 4, 1923.

1. A state statute extending the limits of a city and construed as having the effect of rendering applicable to the added territory maximum street railway rates fixed by an earlier contract between the city and the street railway company, impairs the obligation of the contract by adding to its burdens. P. 442. *Georgia Ry. & Power Co.* v. *Decatur, ante,* 432.
2. A contract of a street railway company with a city to carry passengers for a fare not greater than a stated maximum does not oblige it to issue free transfers. *Id.*
3. A contract of a street railway company with a city fixing a maximum fare for passage from that city to another city, *construed,* in accordance with the practice of the parties, as applying to passage between the cities in either direction. *Id.*

153 Ga. 329, reversed; certiorari denied.

ERROR to a decree of the Supreme Court of Georgia affirming a decree for the City of College Park in its suit to enforce compliance with a contract fixing street railway fares.

Mr. Walter T. Colquitt, with whom *Mr. L. Z. Rosser* and *Mr. J. Prince Webster* were on the briefs, for plaintiffs in error.

Mr. Geo. P. Whitman for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The facts in this case and the contentions to be considered, with some exceptions presently to be stated, are essentially the same as those involved in *Georgia Ry. & Power Co.* v. *Decatur,* No. 463, just decided, *ante,* 432. From their inception in the state courts the two cases

have been considered together and in each of the three decisions referred to in the *Decatur Case* the State Supreme Court has disposed of them in a single opinion.

The contract here involved was made in 1905. It granted to the Electric Company the right to convert its single track within the limits of the municipality into a double track line of electric railway and provided: "That no greater fare than that of five cents for each passenger be charged for passage from the southern limits of said city of College Park to some central point in the City of Atlanta." The contract, however, unlike the Decatur one, contains no provision on the subject of transfers. Subsequently, by an act of the legislature, the limits of College Park were extended so as to take in a portion of the College Park line theretofore outside the municipality. Upon the authority of the *Decatur Case,* we hold that the application of the five-cent fare to the annexed territory impairs the obligation of the contract. In addition to that, the order of the commission requiring the issuance of free transfers to College Park patrons, was erroneous.

The state courts, in effect, construed the contract as obliging defendant to carry passengers in both directions between College Park and Atlanta at the stipulated rate, and with this construction we agree. It cannot be supposed to have been within the intention of the contracting parties that one rate of fare should be charged for passage in one direction and a different rate in the opposite direction, for the same distance, over the same line, under the same conditions and entailing the same service. Such a construction of the clause would subvert the plain purpose of the ordinance, which was to fix a five-cent fare between the two cities. We construe the phrase "from . . . College Park to . . . Atlanta" as though it read "between College Park and Atlanta." See *State* v. *Stone,* 20 R. I. 269. This construction, moreover,

agrees with the practice of the appellant, extending over many years in charging the same fare in each direction.

The decree of the State Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.
Writ of certiorari denied.

BRUSH ELECTRIC COMPANY *v.* CITY OF GALVESTON ET AL.

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

No. 179. Argued April 18, 19, 1923.—Decided June 4, 1923.

A decree of the District Court refusing present relief by injunction from rates challenged by a public utility company as confiscatory, but leaving the plaintiff free to renew its application after an actual test of the rates, *affirmed*, because the evidence was so conflicting and the conclusion to be drawn from it respecting items involved in the computation was so uncertain and speculative as not to warrant disturbance of the findings of the lower court. P. 446.
Affirmed.

APPEAL from a decree of the District Court refusing to enjoin the enforcement of ordinances of the appellee regulating the rates to be charged by the appellant for electricity.

Mr. William H. Ambrecht, with whom *Mr. Chas. A. Frueauff* was on the brief, for appellant.

Mr. James W. Wayman, with whom *Mr. Frank S. Anderson* was on the brief, for appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant for many years has been operating an electric light and power plant in the City of Galveston,

under a franchise reserving to the city the right to regulate rates.

In 1918 an ordinance was enacted increasing the rates then in force. By a subsequent ordinance, passed in 1919, these 1918 rates were decreased.

The present suit was brought by appellant in the Federal District Court for the Southern District of Texas to enjoin the enforcement of these ordinances, and especially that of 1919, on the ground that the rates fixed thereby were confiscatory. In 1920 the case was referred to a master who heard the evidence and made a report, in which he determined that the rates of 1919 were confiscatory and that those of 1918 were not. To this report both parties filed exceptions. Those filed by the appellant were overruled by the District Court while those of the appellee were, with two exceptions, sustained. The questions presented are numerous, but, in view of the conclusion we have reached, we do not consider it necessary to review them in detail.

The parties stipulated, and the master found, that the then undepreciated value of the physical property at January 1, 1920, prices, was $784,689; and that the cost of the physical property at average pre-war prices undepreciated as of January 1, 1920, was $576,898. The master found the former amount, after deducting the value of real estate, office and utility equipment and depreciation, represented the depreciated value of the depreciable property for rate making purposes; following the principle established by this Court. See *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276, and cases cited.

The testimony as to depreciation was conflicting and speculative,—the estimates ranging from 15% to 40% of the value of the plant. The master fixed it at 28%, making the present depreciated value of the depreciable property $534,818. To this he added the value of vari-

ous items, including intangible property, real estate, and office and utility equipment, bringing the total up to $800,000. This he held to be the fair present value of the property. Upon this valuation he recommended an annual return of 8% and an annual rate for depreciation of 4½%. The gross earnings for the year ending July 31, 1920, which arose from the application of the rates fixed by the ordinance of 1918, were $333,079.65, which left, after deductions for expenses of operation and maintenance, net earnings of more than $104,000, or over $4,000 in excess of a reasonable and fair return. He estimated that under the rates fixed by the 1919 ordinance the net earnings would have been only $77,665, or over $22,000 less than a fair and reasonable return. The 1919 rates, however, have never been put into operation, and appellant has continued to operate under the 1918 rates.

The District Judge did not agree with the master's findings, but substituted no base value of his own, because of his conclusion that the injunction should be denied "on the ground that the ordinance has had no test, and that in my view, taking the master's base, the ordinance is still not confiscatory, it will not be necessary for me to hazard a guess as to what value ought to be taken, since I feel sure that before the precise valuation of the plant by me can become important, conditions of prices and values will have settled down to such a definite and permanent basis, as that there will be no difficulty in reaching a proper price basis to apply on any future adjustment in or out of court."

The lower court accepted the master's estimate of 8% upon the value as a fair rate of return, but fixed 4% instead of 4½% as a fair rate for annual depreciation. In sustaining certain of the appellee's exceptions, it held that the master's allowance for some items should be decreased and in other instances disallowed. Instead of 28% for past depreciation the court fixed 33⅓% and pro-

visionally determined that the total fair valuation of the plant for rate making purposes was $612,000. Upon this valuation, the estimated net earnings under the rates fixed by the 1919 ordinance was shown to be in excess of a fair return to the extent of over $21,000. The estimated amount of income under the 1919 rates is based on the amount of business done under the 1918 rates and, consequently, is largely a matter of prophecy. An actual test of these rates may result in a larger return, by bringing about an increase of business. The conclusion of the court that the temporary restraining order theretofore granted should be dissolved, the injunction prayed for refused, and, at the option of appellant, the bill dismissed without prejudice, or passed to the suspense docket " with leave to again call the matter up after a trial of the ordinance, or before trial, should unusual and extraordinary conditions occur, making it imperative to save complainant's property from confiscation," under the circumstances disclosed by the record commends itself to our judgment.

The evidence is so conflicting and the conclusion to be drawn therefrom in respect of this or that item so uncertain and speculative, that we do not feel warranted in disturbing the findings of the court below in the absence of an actual test under the new rates. If hereafter it can be shown that the returns afforded are confiscatory, appellant will be free to make another application for relief. *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 18; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 54, *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655; *Louisville* v. *Cumberland Tel. & Tel. Co.,* 225 U. S. 430; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 403.

Decree affirmed.

COMMONWEALTH OF MASSACHUSETTS *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

IN EQUITY.

FROTHINGHAM *v.* MELLON, SECRETARY OF THE TREASURY, ET AL.

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

No. 24, Original, and No. 962. Argued May 3, 4, 1923.—Decided June 4, 1923.

1. This Court has no jurisdiction of an original proceeding by a State if the matter is not of justiciable character. P. 480.
2. The Act of November 23, 1921, c. 135, 42 Stat. 224, called the "Maternity Act," authorizes appropriations, to be apportioned among such of the States as shall accept and comply with its provisions, for the purpose of cooperating with them to reduce maternal and infant mortality and to protect the health of mothers and infants; it provides for its administration by a federal bureau in cooperation with state agencies, which are to make such reports of their operations and expenditures as the bureau may prescribe; and that, whenever the bureau shall determine that funds have not been properly expended by any State, payments to that State may be withheld. In a suit brought in this Court by a State, against the federal officials charged with the administration of the act, who were citizens of other States, to enjoin them from enforcing it, wherein the plaintiff averred that the act is unconstitutional, in that its purpose is to induce the States to yield sovereign rights reserved by them and not granted the Federal Government, under the Constitution, and that the burden of the appropriations falls unequally upon the several States, *held*, that, as the statute does not require the plaintiff to do or yield anything, and as no burden is imposed by it other than that of taxation, which falls, not on the State but on her inhabitants, who are within the federal, as well as the state, taxing power, the complaint resolves down to the naked contention that Congress has usurped reserved powers of the States by the mere enactment of the statute, though nothing has been, or is to be, done under it

without their consent,—an abstract question of political power, not a matter of judicial cognizance. P. 482.

3. A State may not, as *parens patriae,* institute judicial proceedings to protect her citizens (who are no less citizens of the United States), from the operation of a federal statute upon the ground that, as applied to them, it is unconstitutional. P. 485.
4. A suit by an individual, as a past and future federal taxpayer, to restrain the enforcement of an act of Congress authorizing appropriations of public money, upon the ground that the act is invalid, cannot be entertained in equity. P. 486.
5. To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. P. 488.

No. 24, Original. Dismissed.

No. 962. 288 Fed. 252, affirmed.

THE first of these cases was an original suit, brought in this Court by the Commonwealth of Massachusetts, for herself and as representative of her citizens, against the Secretary of the Treasury, the Chief of the Children's Bureau of the Department of Labor, the Surgeon General of the United States Public Health Service, and the United States Commissioner of Education, all of whom were citizens of States other than Massachusetts, and the last three of whom constituted the Board of Maternity and Infant Hygiene created by the above-mentioned act of Congress. The purpose was to enjoin the enforcement of the act. The second case is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District, which dismissed a bill brought by the appellant, for the same purpose, against the same defendants.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief, for Mellon et al.

I. The bills are fatally defective in that they do not join as parties defendant those States which, by complying with the terms of the act, have become entitled to its benefits. *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158.

II. The actions are essentially against the United States, which may not be sued without its consent. *Kansas* v. *United States,* 204 U. S. 331.

Where plaintiffs have sought to interfere with the performance of official duties by officers of the United States, this Court has held that the actions were, in substance, against the Federal Government, even although they did not affect the title of the United States to property. *Wells* v. *Roper,* 246 U. S. 335; *Louisiana* v. *McAdoo,* 234 U. S. 627; *North Dakota* v. *Chicago & Northwestern Ry. Co.,* 257 U. S. 485.

III. The suit brought by the Commonwealth of Massachusetts is not a controversy between a State and citizens of other States. Jurisdiction may not be based upon that ground.

In substance and effect these suits are against the Children's Bureau and the Board of Maternity and Infant Hygiene. But they are not citizens of any particular State; and the Commonwealth may not make this an action between a State and citizens of another State, and thus within the original jurisdiction of this Court, by naming as defendants the individuals composing the Board and the Chief of the Bureau. *Texas* v. *Interstate Commerce Commission, supra; Bankers Trust Co.* v. *Texas & Pacific Ry. Co.,* 241 U. S. 295.

This Court does not exercise its original jurisdiction upon a mere formal or colorable showing either as to parties or subject-matters. It looks through the form to the real character and substance of the suit. *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265; *Louisiana* v. *Texas,* 176 U. S. 1; *Oklahoma* v. *Atchison T. & S. F. Ry.*

Co., 220 U. S. 277; *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 220 U. S. 290.

It may be admitted *arguendo* that if suit might be brought solely against the Secretary of the Treasury, although his duties under the act are merely ministerial, the suit need not be dismissed upon jurisdictional grounds. But as the Board and the Bureau are indispensable parties, without which the suit may not proceed, and as their joinder would preclude the basing of jurisdiction upon the ground that the defendants are citizens of States other than the plaintiff State (*Minnesota* v. *Northern Securities Co.*, 184 U. S. 199), the jurisdictional status of the Secretary of the Treasury is not material.

IV. Even if money raised by federal taxes is being misspent, a State may not bring suit in behalf of its citizens. Since the Constitution superseded the Articles of Confederation, the revenues of the United States have not been collected from States but from individuals. The State is here asking the Court to pass upon, not the rights of the State, but the *federal* rights of taxpayers who, while citizens of Massachusetts, are also citizens of the United States and whose payment of federal taxes is in the latter capacity.

It is possible that a State might appeal to the federal courts in cases in which the rights of its citizens *as citizens of the State* were involved; but such rights are not involved in this case. A State certainly may not appeal to the federal courts in cases in which it is seeking to represent the *federal* rights of any number of its citizens. *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277; *Oklahoma* v. *Gulf, C. & S. F. Ry. Co.*, 220 U. S. 290, 301. And even if a State might appear in a representative capacity under such circumstances, it would not then have the right to invoke the original jurisdiction of this Court.

V. These actions present no justiciable controversy. The only effect of this law in the plaintiff State is upon the taxpayers as federal taxpayers and not upon the State itself. A very small proportion of the federal revenues raised under general statutes throughout the entire country is appropriated to carry out the purposes of the act. Other than this, the law has no force whatever in any State without the consent of that State. Nothing has been done under it within the limits of Massachusetts. This Court should not be asked to consider whether an opportunity offered to that State and not accepted by it was offered unconstitutionally nor whether other States which are not parties to this proceeding have surrendered any of their constitutional rights. The plaintiff State can not properly invoke the aid of this Court when its own rights are not involved. *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158.

Nor is the plaintiff in the second of the instant suits in any better position. It is true that she is a taxpayer, but that fact alone will not create a justiciable controversy with respect to an appropriation of government property which may or may not have been derived from taxation. Her liability to pay a general tax remains, whether the appropriation is valid or invalid. No one has ever seriously claimed that a taxpayer could refuse to pay his taxes until he first was advised that the revenues thus raised would be expended for a constitutional purpose. If Congress may not make these appropriations in the promotion of the general welfare, the appellant, Mrs. Frothingham, could not recover any part of taxes which she has already paid, nor could she refuse in future to pay any taxes imposed upon her. Thus her liability as a taxpayer is unaffected by the disposition which Congress in the exercise of its broad political discretion may make of the public revenues or property.

The difficulty of plaintiffs in both the instant cases is that they are asking the Court to determine abstract ques-

tions which do not appreciably or practically affect them. Massachusetts was within her rights in refusing to accept the grant under the law in question. Paying no taxes and not being liable to any, she has no just cause of complaint. Mrs. Frothingham can neither recover taxes already paid nor defend against the imposition of future taxes in whatever amount Congress may in its discretion impose upon her, however the decision in the instant case may be. How, then, has either plaintiff any interest in the question other than as an abstract question of constitutional law? Such questions this Court has uniformly held that it will not answer. *Marye* v. *Parsons,* 114 U. S. 325; *Muskrat* v. *United States,* 219 U. S. 346.

It is true that Massachusetts is a sovereign State, but there are forty-seven other sovereign States. Each one of them has a deep interest in the preservation of our constitutional form of government. But such fact in itself does not give to Massachusetts or to any other State the right to invoke the decision of this Court as to whether an act of Congress is constitutional. Otherwise every act of Congress might be challenged by any one of forty-eight States before it was enforced.

Similarly, Mrs. Frothingham as a taxpayer has an abstract interest in the way the public revenues are appropriated. But there are many million taxpayers (seven millions alone paying an income tax), and as the enforcement of every law presumably requires some expenditure of money by the Federal Government, it cannot be that every taxpayer has a right to challenge a law as unconstitutional because its enforcement requires the expenditure of public moneys and these are in part raised by taxation.

This tribunal is a court and not a council of revision, and as a court it requires that the litigant who invokes its judgment must have some direct, tangible, and practical interest in the question litigated.

VI. The essential questions involved: All that Congress has done under this act has been to offer and give financial aid to those States which wish such support to their own efforts to reduce maternal and infant mortality and to protect the health of mothers and infants. No question of federal taxation is involved; nor is any question of federal regulation, for Congress has not attempted to prescribe the conduct of the States or of their citizens.

The only questions as to the constitutionality of such an act which can arise are whether the appropriations are unauthorized uses of federal funds, to the injury of the federal treasury; whether they are made upon such conditions as to deprive either the States which accept or those which reject the conditions of any constitutional rights; and whether Congress has delegated its legislative power. Massachusetts attempts to raise the first two of these questions, although it seems clear that the State has no proper concern in the question whether the appropriations made under the act squander the funds of the Federal Government.

VII. The power of Congress to make appropriations from the general funds of the United States is almost unlimited. Article I, § 8, cl. 3, of the Constitution confers upon Congress the power to collect taxes in order to make appropriations, and by necessary inference authorizes the making of appropriations. But it is not necessary to rely upon this authority to tax and appropriate, for no tax is necessarily involved; the sole question is whether Congress may appropriate, and Congress has other authority for making appropriations.

The money which is paid out under this act is not earmarked as having been derived from taxes and may not have come into the Treasury from that source or as a result of that power. The Constitution provides that the Government may derive funds from other sources than taxes, and the Constitution provides other authority than

this clause under which Congress may dispose of the financial resources of the Government.

Taxes have not been the only means of replenishing the Treasury. Billions of dollars which were spent in the World War were secured by loans and not by taxation, and a large portion of this money will be repaid without resort to federal taxation. After the war several hundred millions of dollars were recovered by the sale of war supplies; a portion of the money loaned to our Allies has already been repaid; and Germany has paid some of the expenses of our Army. Conceivably all of the cost of a successful war might be met initially by loans and eventually by reparations without any resort whatever to the levying of additional taxes by Congress.

Furthermore, the Government has secured many millions of dollars by the sale of lands which were originally ceded to the United States by the States or purchased from other countries or acquired by conquest or discovery. Many other millions have been obtained by treaties. The current operations of the Government have often been a source of revenue.

Article IV, § 3, clause 2, of the Constitution provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The power given is a broad one. *United States* v. *Gratiot,* 14 Peters, 526; *Gibson* v. *Chouteau,* 13 Wall. 92.

The term property, as the Court pointed out in *Dred Scott* v. *Sandford,* 19 How. 393, 436 (see also *Mormon Church* v. *United States,* 136 U. S. 1, 64), includes personal property. Later decisions have shown that it includes money, from whatever source derived. *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438; *Bush* v. *Elliott,* 202 U. S. 477; *In re Louisville National Banking Co.,* 158 Fed. 403; *In re Gilpin,* 160 Fed. 171. See also *Fishburn* v. *Londershausen,* 50 Ore. 363; *Washington County*

v. *Weld County,* 12 Colo. 152; *Williams* v. *State,* 58 Tex. Crim. 82; *State* v. *Parmenter,* 50 Wash. 164; *Fullerton* v. *Young,* 94 N. Y. S. 511; *Mt. Holly Safe Deposit & Trust Co.* v. *Deacon,* 79 N. J. Eq. 120; 18 R. C. L., Tit. "Money," p. 1268; 22 R. C. L., Tit. "Property," p. 43.

In the earliest years of our national existence Congress made a portion, though only a portion, of its donations by grants of tracts of land. No one can doubt that such appropriations were authorized by Article IV. Congress later made a portion of its grants from funds derived from the sale of lands and not from taxation. As to such appropriations, it is obvious that they were authorized by Article IV. So also, where appropriations have been made from the general funds in the Treasury, many million dollars of which were not derived from taxation, it seems clear that, by parity of reasoning, those appropriations were authorized by the same article. Nor is there anything in the broad terms of that provision which restricts it to the disposition of funds derived otherwise than from taxes. The clause broadly empowers Congress to dispose of any of the financial resources of the Federal Government. After property has been acquired by the United States, after funds have been brought into the Treasury and mingled with the other funds there placed, Congress has sweeping power to dispose of those resources.

VIII. This act does not violate any express or implied limitations upon the power of Congress. The only express limitations which the Constitution imposes upon the power of Congress to appropriate money are those which relate to the salaries of the President and the federal judges and provide that no appropriation for the support of the armies shall be for a longer period than two years. Those provisions clearly have no bearing upon this case.

The plaintiff and appellant simply claim that federal taxpayers suffer because of expenditures which are alleged to be unauthorized by the Constitution, that the rights of the States are invaded, and that legislative power is delegated in violation of the Constitution.

IX. The grant of power to appropriate which is contained in the "general welfare" provision is in no wise restricted to the subject-matters upon which Congress may make regulations.

Obviously this clause in Article I does not empower Congress to provide for the general welfare otherwise than through appropriations, for the entire clause relates only to taxation and to the use of the funds raised by taxation.

On the other hand, the clause does not restrict congressional appropriations to the subject-matters upon which Congress may legislate. As to such subject-matters it would have been unnecessary to specifically authorize appropriations, for the final clause in this section broadly empowers Congress to make all laws which shall be necessary and proper for carrying into execution "the foregoing powers."

Even without the "general welfare" provision Congress could, whenever it has authority to impose its will by positive commands, appropriate the money necessary to make its will effective. The clause authorizing Congress by appropriations to provide for the general welfare must, therefore, have a broader purpose than merely to facilitate the exercise of the powers of Congress to impose commands.

Moreover, the grant of power to tax and appropriate, in the first clause of § 8, is distinct from the grants of power in each of the other sixteen clauses of that section, and there is nothing in the sweeping term "to provide for . . . the general welfare" to show that the power to appropriate money was given merely in aid of the grants in those other clauses. See Story, Const., 5th ed., § 913.

X. The overwhelming weight of authority shows that such is the extent of the power of Congress to appropriate money for the general welfare.

From the earliest days of our country's existence statesmen have recognized in their public utterances this broad scope of the power to appropriate for the public welfare; Congress has recognized it in innumerable appropriations of money and property aggregating in value billions of dollars; and those appropriations have never been successfully challenged in this Court. Hamilton: Opinion to Washington, Hamilton's Works, Lodge's ed., III, pp. 179, 217; Report on Manufactures, ibid., pp. 294, 371, 372. Washington: Story Const., 5th ed., note to § 978; First Annual Message, Richardson, Messages and Papers of the Presidents, I, 66; Eighth Annual Message, ibid., 202. Madison: Federalist, No. 41; Richardson, op. cit., II, 485, 568; ibid I, 410. Calhoun: IV Elliot's Debates, 2d ed., p. 431, note; Benton, Abridgment, V, 706, 707. Tucker: Am. State Papers, Misc., II, 443, 446, 447. Monroe: Richardson, II, 142, 144, 162–164, 166, 173. John Quincy Adams: Inaugural Address, Richardson, II, 298; First Annual Message, ib. pp. 306, 307, 311–314; Letter to Stevenson, July 11, 1832. Story: Const., 5th ed., §§ 991, 923, 924. Pomeroy, Intro., Const. Law, §§ 274, 275; Hare, Am. Const. Law, 245, 246; Willoughby, Const., § 269; Burdick, Am. Const., § 77; Corwin, Harv. Law Rev., March, 1923, pp. 569, 575, 577, 584.

XI. This Court has never rendered a decision adverse to such an interpretation of the general welfare clause. *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Realty Co.,* 163 U. S. 427; *Allen* v. *Smith,* 173 U. S. 389.

XII. From the earliest years of the country's history, Congress has repeatedly made appropriations relating to subject-matters which it is not entitled to regulate.

The Constitution was so interpreted by the First Congress, and it has been so interpreted in innumerable instances since then.

Such precedents are so numerous and extend to such an early date as to be entitled to binding force in this Court. *Stuart* v. *Laird,* 1 Cr. 299; Note by Cooley to Story on the Constitution, § 311. See also *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 472, 473; *Martin* v. *Hunter's Lessee,* 1 Wheat. 352; *McCulloch* v. *Maryland,* 4 Wheat. 401; *Field* v. *Clark,* 143 U. S. 691; *Downes* v. *Bidwell,* 182 U. S. 286; *Ogden* v. *Saunders,* 12 Wheat. 290.

XIII. The appropriations made under this act are for the general welfare.

XIV. The contention of the appellant that the appropriations authorized by this act are unrestricted grants to the States and therefore not made for the public welfare is unsound.

XV. The question whether such appropriations are for the general welfare is not a judicial question.

XVI. The act does not undertake to enlarge the governmental powers of any State or state officials.

XVII. The act does not in any way entrench upon the powers of the States.

XVIII. Congress has not by this act delegated legislative power to the Board or the Bureau.

Ours is a dual form of government and thus involves a dual citizenship. Therefore both the Nation and the States have an equal interest in providing that the citizen shall be well born as well as well educated. If the newborn child is a citizen of the State in which he is born, he is equally a citizen of the United States, in which he is also born. Both governmental entities have a direct and practical interest in the new citizen. Undoubtedly the child as life advances will have many relations to the social unit, as to which the State is solely competent to deal. But it is equally true that as a citizen of the United States the new citizen will, if he lives, have many relations to the Federal Government as voter, taxpayer, and possible soldier, as to which the government is legally

competent to deal. Both the Nation and the States, therefore, have a direct and practical interest that the citizen shall not only have a "*mens sana*" but that it shall also be "*in corpore sano,*" and the latter consideration of a healthy, vigorous life not infrequently depends upon the conditions of birth. Moreover, the mothers of America give to both State and Nation their future citizens, and it seems a strange doctrine to contend that while the State has a legitimate interest in the preservation of women from the perils of maternity, the United States has not an equal interest.

I have already quoted from the wise words of Washington in his final message to Congress, in recommending the establishment of a national university for the wise education of the American youth. He recognized the direct interest that the United States has in the intellectual welfare of its citizens; and, if it has such interest, why has it not an equal interest in the physical welfare of its future citizens?

The law presents another method of coöperation between the Nation and the States with respect to the general welfare.

The time is past, if any such time ever were, when our Government can be divided into two noncommunicating compartments. If separate compartments at all, the potent agencies of steam and electricity have made them communicating. *Hoke* v. *United States,* 227 U. S. 308, 322.

Mr. Alexander Lincoln, Assistant Attorney General, with whom *Mr. Jay R. Benton,* Attorney General, was on the brief, for the Commonwealth of Massachusetts.

I. The act is unconstitutional. It purports to vest in agencies of the Federal Government powers which are almost wholly undefined, in matters relating to maternity and infancy, and to authorize appropriations of federal funds for the purposes of the act.

Section 8 provides that "any State desiring to receive the benefits of this Act shall, by its agency described in section 4, submit to the Children's Bureau detailed plans for carrying out the provisions of this Act within such State, which plans shall be subject to the approval of the board." What are "the provisions of this Act" to which this section refers? We find none except the statement of the purpose of the act, that it is for the promotion of the welfare and hygiene of maternity and infancy. The "detailed plans" then, except in so far as their provisions are otherwise limited by the act, may contain any provisions which may reasonably be thought to be suitable for the accomplishment of that purpose. There are certain limitations restricting the power of state or federal agents to enter homes, or to take charge of children against the objection of parents or others having custody of them, and preserving the right of parents and others in similar relations to decide concerning the treatment or correction to be applied. Moneys to be appropriated by the States are not to be used for maternity or infancy pensions or gratuities. But otherwise the field is open; the plans may contain any provisions reasonably adaptive to the purpose stated.

Many examples may be given and were stated in the debates on the bill in Congress of regulations which may be imposed under the act. The forced registration of pregnancy, governmental prenatal examination of expectant mothers, restrictions on the right of a woman to secure the services of a midwife or physician of her own selection, are measures to which the people of those States which accept its provisions may be subjected. There is nothing which prohibits the payment of subsidies out of federal appropriations. Insurance of mothers may be made compulsory. The teaching of birth control and physical inspection of persons about to marry may be required.

By § 4 the Children's Bureau is given all necessary powers to coöperate with the state agencies in the admin-

istration of the act. Hence it is given the power to assist in the enforcement of the plans submitted to it, and for that purpose by its agents to go into the several States and to do those acts for which the plans submitted may provide. As to what those plans shall provide the final arbiters are the Bureau and the Board. The fact that it was considered necessary in explicit terms to preserve from invasion by federal officials the right of the parent to the custody and care of his child and the sanctity of his home shows how far reaching are the powers which were intended to be granted by the act.

On the other hand, the freedom of action of the States in the same field is largely controlled by the requirements that the state agencies shall submit to the Children's Bureau detailed plans for carrying out the provisions of the act and shall make reports of their operations and expenditures, which plans and reports must be approved as a prerequisite to the receiving of appropriations; and the States are also required to make appropriations to match federal appropriations, the expenditure of which is subject to the same supervision. No effective control is secured to the States by § 14, providing that "This Act shall be construed as intending to secure to the various States control of the administration of this Act within their respective States, subject only to the provisions and purposes of this Act," for the powers of the federal agencies under the act are in no degree curtailed by that provision.

(1) The act is invalid because it assumes powers not granted to Congress and usurps the local police power. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405; *United States* v. *Cruikshank*, 92 U. S. 542, 549–551.

This Court has several times declared that the power of the States to regulate their internal affairs and to provide for the general welfare of their people is inherent and exclusive, and has never been surrendered to the

United States. *New York* v. *Miln,* 11 Pet. 102; *In re Rahrer,* 140 U. S. 545; *Kansas* v. *Colorado,* 206 U. S. 46; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Lane County* v. *Oregon,* 7 Wall. 71; *Barbier* v. *Connolly,* 113 U. S. 27; *Keller* v. *United States,* 213 U. S. 138; Federalist, No. 45.

It appears from the debates in Congress that the proponents of this measure have attempted to defend it on the ground that Congress under the Constitution has power to provide for the general welfare of the people of the United States. The words "general welfare" occur twice in the Constitution, once in the preamble and once in Art. I, § 8. The preamble, however, contains no grant of power. It is a mere statement of the purposes effected by the Constitution itself. *Jacobson* v. *Massachusetts,* 197 U. S. 11; Story, Const., 5th ed., § 462.

We pass, therefore, to a consideration of Art. I, § 8. It is plain that the words "to pay the debts and provide for the common defence and general welfare of the United States" are not a substantive grant of power, but a qualification of the first enumerated power "to lay and collect taxes, duties, imposts and excises." 5 Elliot's Debates, pp. 378, 451, 462, 476, 477, 506, 507, 543; I Curtis, Const. History of United States, pp. 518–521, 728 note, 731; *Loughborough* v. *Blake,* 5 Wheat. 317; *Ward* v. *Maryland,* 12 Wall. 418; *United States* v. *Boyer,* 85 Fed. 425; Story, Const., 5th ed., §§ 906–911; Miller, Const. of United States, pp. 229–231.

The source of the power to make appropriations, it is generally conceded, is to be found in the grant of the taxing power. *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Realty Co.,* 163 U. S. 427; Story, Const., 5th ed., §§ 923, 976.

The defendants, indeed, contend that the power to make apropriations may be derived also from Art. IV, § 3, cl. 2; that this clause broadly empowers Congress to dispose of any of the financial resources of the Federal

Government, and that therefore the power to make appropriations from the general funds is almost without limit. But this provision has never been interpreted as having so broad a scope. It is regarded as applying to the public lands and not to funds in the Treasury. In *De Lima* v. *Bidwell,* 182 U. S. 1, 196, it is called " the territorial clause." Cf. *Gibson* v. *Chouteau,* 13 Wall. 92; *Dred Scott* v. *Sandford,* 19 How. 393; *Kansas* v. *Colorado,* 206 U. S. 46; *Light* v. *United States,* 220 U. S. 523.

The controversy has not been whether the power to appropriate is broader than the taxing power, but how both powers may be affected by the general welfare clause.

Hamilton held that, under the general welfare clause, the revenues of the United States can be raised or appropriated for any public purpose connected with the general welfare of the United States. This doctrine was stated in his Report on Manufactures, in 1791 (Story Const., 5th ed., § 978). It was adopted and followed by Story (§§ 975–992). Madison, on the other hand, held that the general welfare clause is merely descriptive of and limited by the specific grants of power to Congress contained in § 8, and that the power to tax and appropriate is therefore confined to the enumerated powers. Madison expressed this view in the Federalist, No. 41, and the statement there made must be presumed to have had some effect in obtaining the ratification of the Constitution by the States. He renewed the same statement in his message vetoing a bill for internal improvements, March 3, 1817 (4 Elliot's Debates, pp. 468–470), and in a letter to Andrew Stevenson, dated November 27, 1830 (4 Madison's Works, pp. 120–139). Madison's view was supported and emphasized by Jefferson, as stated in his Opinion on the Constitutionality of a National Bank, February 15, 1791 (Federalist, ed. by Paul L. Ford, pp. 651–655). See Tucker Const. of United States, §§ 222–231.

The view that the general welfare clause, in its effect on the power to tax and appropriate, is limited by the substantive grants of power which follow, is at least consistent with a reasonable interpretation of § 8. If the grant of the taxing power had been retained in its original form, without the qualifying clauses, there could have been little doubt but that the power either to tax or to appropriate revenue could have been exercised only for purposes within the field of the enumerated powers. The power to tax is an auxiliary power coextensive with the general legislative powers of government. *Lowell* v. *Boston,* 111 Mass. 454; *Loan Association* v. *Topeka,* 20 Wall. 655; *Northern Liberties* v. *St. John's Church,* 13 Pa. St. 104.

The qualifying clauses, however, as matter of history were not added to extend the taxing power. Modification was proposed in order that there might be an express provision for payment of the debts of the United States, and one purpose being added it was necessary to make some reference to other necessary purposes, to avoid the possibility of a construction which would exclude them. The remaining enumerated powers all relate to matters of the common defence or general welfare of the United States. " Common defence " and " general welfare " were therefore apt words to describe objects of taxation which would include all purposes for the promotion of which Congress, in § 8, was given substantive power to provide. If those words are to be construed as having been used with that intention, then the objects of the powers expressly granted (with the implied powers which flow from them) are particulars for which alone Congress has the power to tax and to make expenditures. Story, Const., 5th ed., § 930; *Gibbons* v. *Ogden,* 9 Wheat. 1, 199; *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Child Labor Tax Case,* 259 U. S. 20. The question was reserved in

Field v. *Clark,* 143 U. S. 649, and in *United States* v. *Realty Co.,* 163 U. S. 427.

The objections to the act go further in that the proposed appropriations are not *general* in their application, but are confined to those States which accept the act and appropriate their own funds to be used for its purposes. Hamilton in his Report on Manufactures, cited above, although contending for the broad power of appropriation, says: "The only qualification of the generality of the phrase in question, which seems to be admissible, is this, that the object to which an appropriation of money is to be made must be *general* and not *local,*—its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot". Story, Const., 5th ed., § 978; Tucker, Const., § 225.

It must be doubtful whether on any theory Congress has the power to appropriate to the States, according to a fixed method of apportionment, revenues raised from the people of the United States for national purposes. But an appropriation by Congress discriminating between States which accept its conditions and make appropriations to match and States which do not, it is submitted, is on its face purely arbitrary, having no legitimate relation to the general welfare of the country, and cannot be for the "general welfare of the United States". Would any one say for example that Congress could appropriate money for the maintenance of post office facilities or for the pay of federal judges in those States only which should contribute equally towards such expenses, thereby manifestly attempting to coerce the States into contributing to the support of the United States Government? Such a proposition would seem to be absurd.

An examination of acts of Congress which have been referred to in debates as examples of legislation resting for its validity on the general welfare clause, and of other acts which may be considered to belong in the same class,

will, it is believed, show that there has not been in the past any intentional reliance by Congress on the general welfare clause for support, but that, on the contrary, legislation which touches upon the health, morals, education and prosperity of the people of the United States has been founded on, and in many cases upheld by the Court as an exercise of, some specific power contained in the Constitution. It will be strikingly evident, however, that the amount of such legislation has increased greatly in recent years, and that it is now taking a prominent place in the field of congressional action. There is now exhibited what may be conservatively called a tendency, with regard to many subjects of internal police regulation, towards nationalization of such subjects (to adopt the expression used by this Court in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245).

A number of statutes relating to the public health or morals have been upheld by this Court as having been passed either in the exercise of the taxing power, or of the power over interstate and foreign commerce, or of the power to regulate the use of the mails. The Court has gone far in some cases to sustain such acts, where the inference was reasonable that the purpose of the act was to impose a regulation in a matter not subject to the control of Congress, but the Court declined to interfere for the reason that it was not within the judicial power to inquire into the purposes or motives of the legislative branch of the government. Instances of such acts and of decisions holding them constitutional are the following:

Oleomargarine Acts: *In re Kollock*, 165 U. S. 526; *McCray* v. *United States*, 195 U. S. 27. Lottery Acts: *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Lottery Case*, 188 U. S. 321. Pure Food and Drug Act: *Hipolite Egg Co.* v. *United States*, 220 U. S. 45. White Slave Traffic Act: *Hoke* v. *United States*, 227 U. S. 308;

Caminetti v. *United States,* 242 U. S. 470. Harrison Narcotic Drug Act: *United States* v. *Jin Fuey Moy,* 241 U. S. 394; *United States* v. *Doremus,* 249 U. S. 86. Acts regulating interstate transportation of intoxicating liquors: *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311; *United States* v. *Hill,* 248 U. S. 420.

In more recent cases, however, the Court has shown that there are limits to the power of Congress to pass legislation purporting to be based on one of the powers expressly granted to Congress which in fact usurps the reserved powers of the States, and that laws showing on their face detailed regulation of a matter wholly within the police power of the States will be held to be unconstitutional although they purport to be passed in the exercise of some constitutional power. *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44.

Various bureaus and boards have been established by Congress and appropriations made for investigations and reports on different subjects. Among these may be mentioned: The Bureau of Education, the Geological Survey, the Bureau of Mines, the Weather Bureau, the Bureau of Animal Industry, the Bureau of Plant Industry, the Bureau of Markets, the Bureau of Soils, the Bureau of Fisheries, the Bureau of Labor Statistics, the Children's Bureau, the Public Health Service, and the Smithsonian Institution. There is no express provision of the Constitution giving Congress the power to establish offices and make appropriations for the collection of valuable information. The power of Congress to make such provision, however, may well be implied from the powers expressly granted and the power, given by Art. I, § 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or

officer thereof." In many respects the information thus collected may be useful for carrying into execution the express powers of the Federal Government, and the acts referred to may be sustainable within the rule laid down in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. See *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668, 680–683.

It should be observed that such acts as these constitute no interference with the rights of the States reserved by the Tenth Amendment.

The act is not made valid by the circumstance that federal powers are to be exercised only with respect to those States which accept the act, for Congress cannot assume, and state legislatures cannot yield, the powers reserved to the States by the Constitution. Message of President Monroe, May 4, 1822; 4 Elliot's Debates, p. 525; *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Escanaba Co.* v. *Chicago,* 107 U. S. 678; *Coyle* v. *Oklahoma,* 221 U. S. 559; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390.

(2) The act is invalid because it imposes on each State an illegal option either to yield a part of its powers reserved by the Tenth Amendment or to give up its share of appropriations under the act.

A statute attempting, by imposing conditions upon a general privilege, to exact a waiver of a constitutional right, is null and void. *Harrison* v. *St. Louis & San Francisco R. R. Co.,* 232 U. S. 318; *Terral* v. *Burke Construction Co.,* 257 U. S. 529.

(3) The act is invalid because it sets up a system of government by coöperation between the Federal Government and certain of the States, not provided by the Constitution.

Congress cannot make laws for the States, and it cannot delegate to the States the power to make laws for the United States. *In re Rahrer,* 140 U. S. 545; *Knicker-*

bocker Ice Co. v. *Stewart,* 253 U. S. 149; *Opinion of the Justices,* 239 Mass. 606.

Each sovereignty executes its own laws and not the laws of any other. The Constitution provides, by Art. II, § 1, that the executive power shall be vested in the President. The laws passed by Congress are in theory executed by the President, although they may be administered by departments, bureaus and commissions established by Congress. *Wilcox* v. *Jackson,* 13 Pet. 498; *United States* v. *Farden,* 99 U. S. 10; *Wolsey* v. *Chapman,* 101 U. S. 755; *Runkle* v. *United States,* 122 U. S. 543; *Jones* v. *United States,* 137 U. S. 202; 7 Ops. Atty. Gen. 453.

The powers and duties of all federal bodies and officials are to administer federal law, and that law alone. In the performance of their official duties they have no power to administer state laws. The Constitution, Art. II, § 3, requires the President to " take care that the laws be faithfully executed ",—that is the laws of the United States. 8 Ops. Atty. Gen. 8, 11.

The Constitution does not contemplate a government by coöperation between the United States and the several States in the enforcement of joint laws. On the contrary the two governments, federal and state, are entirely distinct, each being supreme in its separate sphere. *Collector* v. *Day,* 11 Wall. 113; *Matter of Heff,* 197 U. S. 488. " The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White,* 7 Wall. 700, 725; *Keller* v. *United States,* 213 U. S. 138, 149.

A system of government by coöperation between the United States and some of the States, from which others are excluded, is still more objectionable.

The proposition here made does not go to the length of asserting that there may not be coöperation between the Federal Government and the States in the enforcement of their respective laws where they are not in con-

flict, or that Congress may not make appropriations conditioned on expenditures by States, municipalities or other contributors for projects in which each has a legitimate interest. But coöperation between the Federal Government and States which match appropriations, in the preparation and enforcement of "plans" which are intended to have the force of laws emanating jointly from both sovereignties,—coöperation in activities which have to do with the internal affairs of the States and have no relation to the enumerated powers of Congress, is quite a different matter.

The act is invalid because it purports to delegate congressional powers to state agencies and administrative boards.

II. Massachusetts has an interest in the case presented sufficient to entitle it to sue as party plaintiff.

(1) The imposition on the plaintiff of an option either to yield a part of its powers reserved by the Tenth Amendment or to give up its share of appropriations under the act gives the plaintiff a sufficient interest to maintain this suit.

If the act empowered federal officials to administer and enforce provisions for promoting the welfare and hygiene of maternity and infancy in the several States without their consent, it would be unconstitutional, if the plaintiff's contention is sound, as an invasion of the reserved powers of the States. If so the plaintiff would clearly have an interest enabling it to maintain a suit to prevent such violation of its rights by the enforcement of the act. *Ableman* v. *Booth,* 21 How. 506; *Gordon* v. *United States,* 117 U. S. 697; *Matter of Heff,* 197 U. S. 488; *South Carolina* v. *United States,* 199 U. S. 437; *Missouri* v. *Holland,* 252 U. S. 416; *Harrison* v. *St. Louis & San Francisco R. R.,* 232 U. S. 318; *Terral* v. *Burke Construction Co.,* 257 U. S. 529.

(2) The establishment by the act of a system of government by coöperation between the United States and

the States accepting the act, from which the plaintiff is excluded, gives the plaintiff a sufficient interest, in order that it may be restored to its position as one of the States in a Federal Union. *Texas* v. *White,* 7 Wall. 700; *South Carolina* v. *United States,* 199 U. S. 437.

(3) The exclusion of the plaintiff from the benefits of appropriations which are not general, but are made for the benefit of certain of the States only, gives the plaintiff a sufficient interest.

(4) The fact that revenues available for state taxation are diminished by federal taxation imposed to execute an unconstitutional law gives the plaintiff a sufficient interest. *Collector* v. *Day,* 11 Wall. 113. Cf. *Missouri* v. *Holland,* 252 U. S. 416.

(5) The plaintiff is also interested in maintaining the suit as the representative of its citizens because their rights are invaded.

The question whether a State may sue in this Court by original bill as *parens patriae* or representative of its citizens was presented but not settled in *Louisiana* v. *Texas,* 176 U. S. 1. But later decisions have made it plain that such suits by States will lie for the protection of the personal and property rights and welfare of their citizens generally. *Missouri* v. *Illinois,* 180 U. S. 208; *Kansas* v. *Colorado,* 185 U. S. 125; s. c. 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230; *New York* v. *New Jersey,* 256 U. S. 296.

Cases holding that the original jurisdiction of this Court does not extend to suits by States for the protection of their citizens against violation of their laws by others are readily distinguishable. *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 220 U. S. 277; *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 220 U. S. 290.

III. The suit is properly brought against the defendants named in the bill and they may be enjoined from

proceeding under the act although they are federal officials. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605; *Wilson* v. *New,* 243 U. S. 332; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Hill* v. *Wallace,* 259 U. S. 44; *Missouri* v. *Holland,* 252 U. S. 416; *National Prohibition Cases,* 253 U. S. 350.

IV. The suit involves a justiciable controversy.

Since the bill shows that the defendants have proceeded and are proceeding to enforce the act, there is manifestly an actual controversy involving the constitutional question in the determination of the plaintiff's right; and the question whether an act of Congress is in violation of the reserved powers of the States is clearly justiciable. *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *Missouri* v. *Holland,* 252 U. S. 416; *National Prohibition Cases,* 253 U. S. 350.

The controversy does not call for the decision of a political question. *Georgia* v. *Stanton,* 6 Wall. 50, distinguished.

The doctrine that a State cannot sue to protect its sovereign rights, where rights of property are not involved, has now been completely refuted, and it has been said that in such cases jurisdiction will be accepted where the controversy can be judicially determined, for the reasons first stated by the Court in *Rhode Island* v. *Massachusetts, supra. Virginia* v. *West Virginia,* 11 Wall. 39; *Kansas* v. *Colorado,* 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230; *Missouri* v. *Holland,* 252 U. S. 416.

There is one class of cases where the Court has uniformly declined to act. Those are cases where the Court has been asked to decide what is the established government in a State, and to enforce the constitutional guaranty of a republican form of government under Const., Art. IV, § 4. *Luther* v. *Borden,* 7 How. 1; *Taylor & Marshall* v. *Beckham,* 178 U. S. 548; *Pacific Tel. Co.* v. *Oregon,* 223 U. S. 118; *Davis* v. *Ohio,* 241 U. S. 565; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

V. The suit is within the original jurisdiction of this Court.

The defendants named in the bill are citizens of other States who occupy the offices described therein. The suit is, therefore, a controversy of a civil nature in which a State is plaintiff and citizens of other States, but not of one other State, are defendants. Const., Art. III, § 2, extends the judicial power of the United States to controversies "between a State and citizens of another State", while § 13 of the Judiciary Act and all subsequent reënactments use the words "between a State and citizens of other States." This controversy then is one of which this Court has original jurisdiction. The words "citizens of another State", in the Constitution, do not limit the jurisdiction to cases where the defendants are citizens of one other State. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Texas* v. *White*, 7 Wall. 700; *Alabama* v. *Burr*, 115 U. S. 413; *National Prohibition Cases*, 253 U. S. 350.

If the act is unconstitutional as alleged, the defendants who have been acting individually or collectively under color of its authority cannot justify their action, and are subject to judicial restraint. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605. The fact that some of the defendants have been purporting to act as a board is immaterial. If their action is unauthorized they may be individually restrained. *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Smyth* v. *Ames*, 169 U. S. 466; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499.

The Bureau and the Board, are not indispensable parties without which the suit may not proceed because: First, they are not separate entities. Cf. *United States* v. *Strang*, 254 U. S. 491; *Sloan Shipyards* v. *U. S. Emergency Fleet Corp.*, 258 U. S. 549. Secondly, if they were separate entities, the mere fact that powers and duties under the act are delegated to them does not make them indispensable parties. There are many cases where persons to whom powers and duties are assigned under

statutes alleged to be unconstitutional have not been parties to suits to restrain their enforcement, and it has never been hinted that the omission constituted a defect. See e. g., *Hill* v. *Wallace,* 259 U. S. 44.

VI. The bill of complaint is not defective for want of essential parties defendant. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Shields* v. *Barrow,* 17 How. 130; *Elmendorf* v. *Taylor,* 10 Wheat. 152; *Barney* v. *Baltimore City,* 6 Wall. 280. *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, distinguished.

It has never been suggested that an original bill by a State in this Court to restrain action under an act of Congress alleged to be unconstitutional should be brought formally in behalf of other States or that other States generally should be joined as parties. The practice has been to the contrary. *Missouri* v. *Holland,* 252 U. S. 416; *National Prohibition Cases,* 253 U. S. 350; *Western Union Tel. Co.* v. *Andrews,* 216 U. S. 165; *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499; *Osborn* v. *United States Bank,* 9 Wheat. 738; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *Smyth* v. *Ames,* 169 U. S. 466; *Ex parte Young,* 209 U. S. 123; *Truax* v. *Raich,* 239 U. S. 33.

VII. Growth and danger of "Federal Aid" legislation. The bill contains allegations, admitted by the motion to dismiss, that so-called "Federal Aid" legislation by Congress, by which appropriations are made by Congress for local and not national purposes, to States which accept the federal grants and appropriate equal amounts to be spent under federal direction, has been found to be an effective way to induce States to yield a portion of their sovereign rights; that bills of a similar nature calling for expenditures of immense sums of money, such as an Education Bill and a bill to create a Department of Public Welfare, are now pending or proposed, and that, unless checked by this Court on the ground of unconstitutionality, no limit can be foreseen to the amounts which may

thus be expended for matters of local concern, resulting in the establishment of large federal bureaus with many officers for the performance of duties entirely outside the purview of the Constitution.

The case is one of large import. If the issue should seem to the Court in any respect doubtful, then, as bearing on the intention of the framers of the Constitution, the purpose of which was to form an enduring Union of sovereign States, we conceive it to be permissible and proper to call attention to the magnitude and extent of the forces by which, through the medium of this modern scheme of legislation, the structure of our Federal Government is being broken down.

Mr. William L. Rawls, with whom *Mr. George Arnold Frick* and *Mr. William H. Lamar* were on the brief, for appellant in No. 962.

It has been held with practical uniformity by the Courts of the various States that a taxpayer has a sufficient interest to entitle him to maintain a suit against a public officer for the purpose of enjoining an unauthorized payment of public funds or disposition of public property. II Cooley, Taxation, 1435; IV Dillon, Municipal Corporations, § 1579.

This right of a taxpayer to enjoin such action on the part of a state or municipal officer has been recognized by this Court. *Crampton* v. *Zabriskie,* 101 U. S. 601, 609; *Brown* v. *Trousdale,* 138 U. S. 389; *Calvin* v. *Jacksonville,* 158 U. S. 456; *Ogden City* v. *Armstrong,* 168 U. S. 224, 236; *Hawke* v. *Smith,* 253 U. S. 221, 224.

This Court has in other cases permitted a proceeding to be maintained by one of a large class affected by a law alleged to be invalid, for the purpose of enjoining a public officer from executing it. *Hammer* v. *Dagenhart,* 247 U. S. 251; *Truax* v. *Raich,* 239 U. S. 33; *Millard* v. *Roberts,* 202 U. S. 429.

The right of a taxpayer to maintain a suit to enjoin an alleged unauthorized payment of public moneys from the Treasury of the United States had been expressly adjudicated by the Court of Appeals of the District. *Roberts* v. *Bradfield,* 12 App. D. C. 453. That case came upon appeal to this Court and was decided upon its merits, the question of the right of a taxpayer to maintain such a suit not being discussed. 175 U. S. 291.

It is submitted that there is no distinction, so far as the right of a taxpayer to maintain a suit is concerned, between an officer of a State who is about to make an unauthorized expenditure of public money and an officer of the Federal Government who threatens to do the same thing. Both are subject to the law and must find valid authority for all of their acts. In so far as they exceed the authority conferred upon them, their acts are void. This principle is of uniform application. *Mott* v. *Pennsylvania R. R. Co.,* 30 Pa. St. 9.

This Court in numerous decisions has laid down the rule that all governmental officers or agencies are subject to judicial restraint where they attempt to act in excess of authority. *Osborn* v. *United States Bank,* 9 Wheat. 739; *Board of Liquidation* v. *McComb,* 92 U. S. 531; *United States* v. *Lee,* 106 U. S. 196; *Virginia Coupon Cases,* 114 U. S. 311; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *Scott* v. *Donald,* 165 U. S. 107; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Smyth* v. *Ames,* 169 U. S. 466; *Ex Parte Young,* 209 U. S. 123.

Likewise, where a sufficient interest in the plaintiff has been shown, this Court has always recognized his right to maintain a suit to enjoin the head of a department of the Federal Government from committing an unauthorized act to the plaintiff's injury. *Noble* v. *Union River Logging R. R.,* 147 U. S. 165; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605.

The appellant maintains that the so-called Sheppard-Towner Act is null and void because it is in violation of

the Constitution of the United States and no authority is conferred thereby upon the Secretary of the Treasury to make any of the payments mentioned therein. If these payments are made, this plaintiff will suffer a direct injury in that she will be subjected to taxation to pay her proportionate part of such unauthorized payments. She, therefore, has an interest sufficient under the practically uniform decisions of the courts of this country to enable her to maintain a proceeding to enjoin the making of these payments. Her relation to these funds is exactly that of a *cestui que trust* to funds held by his trustee. Her injury would be irreparable because it cannot be calculated. She can resort only to equity to maintain her right.

The proper parties are before the Court.

The act in question is invalid because it attempts to authorize the appropriation of money out of the Treasury of the United States for purposes wholly outside of any authority or power conferred upon the Government of the United States by the Constitution.

Granting, for the sake of the argument, that Congress had the power to appropriate money out of the Treasury of the United States for the purpose specified therein, the act is still unconstitutional and void because its provisions go beyond the exercise of such power of appropriation and constitute substantive legislation with respect to matters manifestly beyond the legislative power conferred upon Congress by the Constitution.

The act is invalid because it amounts to a delegation to a subordinate agency by Congress of legislative power in violation of the Constitution.

Mr. J. Weston Allen and *Mr. Edwin H. Abbot, Jr.*, filed a supplemental brief on behalf of appellant in No. 962.

Congress has no power to appropriate public money to promote the welfare and hygiene of maternity and infancy in the several States.

Article I, § 8, cl. 18, restricts the power to appropriate public money, to ends within the scope of the powers vested by the Constitution in the United States.

To hold that the United States may appropriate money to execute the reserved powers of the States is to confer, by construction, a new substantive power.

The act is invalid as an attempt to make a virtual amendment of the Constitution by compact with the States.

Messrs. Charles I. Dawson, George W. Woodruff, John R. Saunders, Clifford L. Hilton, Russell W. Fleming, S. B. Townsend, Jr., U. S. Lesh, J. S. Utley, John W. Murphy, and *C. C. Crabbe,* Attorneys General respectively of Kentucky, Pennsylvania, Virginia, Minnesota, Colorado, Delaware, Indiana, Arkansas, Arizona and Ohio, by leave of court, filed a brief as *amici curiæ,* on behalf of those States, in No. 24, Original.

Mr. Charles K. Burdick, by leave of court, filed a brief as *amicus curiæ* on behalf of the Association of Land-Grant Colleges, in No. 24, Original.

Mr. Everett P. Wheeler and *Mr. Waldo G. Morse,* by leave of court, filed a brief as *amici curiæ,* in both cases.

Mr. Henry St. George Tucker, by leave of court, filed a brief as *amicus curiæ,* in No. 962.

Mr. Justice Sutherland delivered the opinion of the Court.

These cases were argued and will be considered and disposed of together. The first is an original suit in this Court. The other was brought in the Supreme Court of the District of Columbia. That court dismissed the bill and its decree was affirmed by the District Court of Appeals. Thereupon the case was brought here by ap-

peal. Both cases challenge the constitutionality of the Act of November 23, 1921, c. 135, 42 Stat. 224, commonly called the Maternity Act. Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several States as shall accept and comply with its provisions, for the purpose of coöperating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It creates a bureau to administer the act in coöperation with state agencies, which are required to make such reports concerning their operations and expenditures as may be prescribed by the federal bureau. Whenever that bureau shall determine that funds have not been properly expended in respect of any State, payments may be withheld.

It is asserted that these appropriations are for purposes not national, but local to the States, and together with numerous similar appropriations constitute an effective means of inducing the States to yield a portion of their sovereign rights. It is further alleged that the burden of the appropriations provided by this act and similar legislation falls unequally upon the several States, and rests largely upon the industrial States, such as Massachusetts; that the act is a usurpation of power not granted to Congress by the Constitution—an attempted exercise of the power of local self-government reserved to the States by the Tenth Amendment; and that the defendants are proceeding to carry the act into operation. In the *Massachusetts* case it is alleged that the plaintiff's rights and powers as a sovereign State and the rights of its citizens have been invaded and usurped by these expenditures and acts; and that, although the State has not accepted the act, its constitutional rights are infringed by the passage thereof and the imposition upon the State of an illegal and unconstitutional option either to yield to the Federal Government a part of its reserved rights or

lose the share which it would otherwise be entitled to receive of the moneys appropriated. In the *Frothingham* case plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law.

We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions.

In the first case, the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue.

First. The State of Massachusetts in its own behalf, in effect, complains that the act in question invades the local concerns of the State, and is a usurpation of power, viz: the power of local self government reserved to the States.

Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject. But we do not rest here. Under Article III, § 2, of the Constitution, the judicial power of this Court extends "to controversies . . . between a State and citizens of another State" and the Court has original jurisdiction "in all cases . . . in which a State shall be party." The effect of this is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant. In *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 289, Mr. Justice Gray, speaking for the Court, said:

"As to 'controversies between a State and citizens of another State.' The object of vesting in the courts of

the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist No. 80; Chief Justice Jay, in *Chisholm* v. *Georgia*, 2 Dall. 419, 475; Story on the Constitution, §§ 1638, 1682. The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

That was an action brought by the State of Wisconsin to enforce a judgment of one of its own courts for a penalty against a resident of another State, and, in pursuance of the doctrine announced by the language just quoted, this Court declined to assume jurisdiction upon the ground that the courts of no country will execute the penal laws of another.

In an earlier case it was held that a proceeding by mandamus by one State to compel the Governor of another to surrender a fugitive from justice was not within the powers of the judicial department, since the duty of the Governor in the premises was in the nature of a moral rather than a legal obligation. *Kentucky* v. *Dennison*, 24 How. 66, 109. In *New Hampshire* v. *Louisiana; New York* v. *Louisiana*, 108 U. S. 76, this Court declined to take jurisdiction of actions to enforce payment of the bonds of another State for the benefit of the assignors, citizens of the plaintiff States. In *Georgia* v. *Stanton*, 6 Wall. 50, 75, and kindred cases, to which we shall presently refer, jurisdiction was denied in respect of questions of a political or governmental character. On the other hand, jurisdiction was maintained in *Texas* v. *White*, 7

Wall. 700; *Florida* v. *Anderson,* 91 U. S. 667; and *Alabama* v. *Burr,* 115 U. S. 413, because proprietary rights were involved; in *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237, because the right of dominion of the State over the air and soil within its domain was affected; in *Missouri* v. *Holland,* 252 U. S. 416, because, as asserted, there was an invasion, by acts done and threatened, of the quasi-sovereign right of the State to regulate the taking of wild game within its borders; and in other cases because boundaries were in dispute. It is not necessary to cite additional cases. The foregoing, for present purposes, sufficiently indicate the jurisdictional line of demarcation.

What, then, is the nature of the right of the State here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the States to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several States; and that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the States, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

In *Georgia* v. *Stanton, supra,* this Court held that a bill to enjoin the Secretary of War, and other officers, from carrying into execution certain acts of Congress, which it was asserted would annul and abolish the existing state government and establish another and different one in its place, called for a judgment upon a political question and presented no case within the jurisdiction of the Court. Mr. Justice Nelson, speaking for the Court, said (6 Wall. 77):

"That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court."

In *Cherokee Nation* v. *Georgia,* 5 Pet. 1, an injunction was sought to prevent certain acts of legislation from being carried into execution within the territory of the Cherokee Nation of Indians, the original jurisdiction of this Court being invoked on the ground that plaintiff was a foreign nation. It was asserted that the acts in ques-

tion, if executed, would have the effect of subverting the tribal government and subjecting the Indians to the jurisdiction of the State of Georgia. It was held that the Cherokee Nation could not be regarded as a foreign nation, within the meaning of the Judiciary Act, but Chief Justice Marshall, delivering the opinion for the majority, said, further (p. 20):

"That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned; it savors too much of the exercise of political power, to be within the proper province of the judicial department." And Mr. Justice Thompson, with whom Mr. Justice Story concurred, in the course of an opinion, said (p. 75):

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here." See also *Luther* v. *Borden,* 7 How. 1; *Mississippi* v. *Johnson,* 4 Wall. 475, 500; *Pacific Telephone Co.* v. *Oregon,* 223 U. S. 118; *Louisiana* v. *Texas,* 176 U. S. 1, 23; *Fairchild* v. *Hughes,* 258 U. S. 126.

It follows that in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of

person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. No rights of the State falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute and this Court is as much without authority to pass abstract opinions upon the constitutionality of acts of Congress as it was held to be, in *Cherokee Nation* v. *Georgia, supra,* of state statutes. If an alleged attempt by congressional action to annul and abolish an existing state government " with all its constitutional powers and privileges," presents no justiciable issue, as was ruled in *Georgia* v. *Stanton, supra,* no reason can be suggested why it should be otherwise where the attempt goes no farther, as it is here alleged, than to propose to share with the State the field of state power.

We come next to consider whether the suit may be maintained by the State as the representative of its citizens. To this the answer is not doubtful. We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a State may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illinois,* 180 U. S. 208, 241), it is no

part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Second. The attack upon the statute in the *Frothingham* case is, generally, the same, but this plaintiff alleges in addition that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass *sub silentio* or the determination of it expressly withheld. *Millard* v. *Roberts,* 202 U. S. 429, 438; *Wilson* v. *Shaw,* 204 U. S. 24, 31; *Bradfield* v. *Roberts,* 175 U. S. 291, 295. The case last cited came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts* v. *Bradfield,* 12 App. D. C. 453, 459–460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. *Crampton* v. *Zabriskie,* 101 U. S. 601, 609. Nevertheless, there are decisions to the contrary. See,

for example, *Miller* v. *Grandy*, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV Dillon Municipal Corporations, 5th ed., § 1580, *et seq.* But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the ex-

penditure of moneys for non-federal purposes have been enacted and carried into effect.

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines* v. *Thompson,* 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To

do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

No. 24, Original, dismissed.
No. 962 affirmed.

WILLARD, SUTHERLAND & COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 209. Argued May 1, 2, 1923.—Decided June 4, 1923.

1. A contract for the purchase of coal by the Government at a stated price per ton which does not require the Government to take, or limit its demand to, any ascertainable quantity, is unenforceable, for lack of consideration and mutuality. P. 492.
2. Such a contract, however, becomes valid and binding to the extent to which it is performed, and a party who, abandoning an earlier protest, voluntarily delivers coal under the contract, is limited to the contract price, and cannot recover more from the United States. P. 494.

56 Ct. Clms. 413, affirmed.

APPEAL from a judgment of the Court of Claims, denying the appellant's claim for the difference between the market price of coal furnished the Navy and the price stated in a contract.

Mr. Thomas Renaud Rutter and *Mr. Gibbs L. Baker,* with whom *Mr. Karl Knox Gartner, Mr. John A. Selby* and *Mr. Clarence A. Miller* were on the brief, for appellant.

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

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought to recover $3,650, being $3.65 per ton for 1,000 tons of coal furnished the Navy. Appellant

claims that it is entitled to the market price at the time of delivery, $6.50 per ton. The United States claims that appellant was bound by contract to furnish it for $2.85 per ton. The Court of Claims made findings of fact, and concluded that appellant was not entitled to recover.

In the spring of 1916, the Navy Department, being desirous of making contracts for coal for the ensuing fiscal year ending June 30, 1917, issued its invitation for bids in the form of a schedule containing general specifications and conditions and printed forms of proposals for deliveries in stated quantities at ten different ports or stations. Included therein was a form of proposal for the furnishing of 600,000 tons of coal to be delivered at Hampton Roads, Va. On one of these forms, appellant submitted its bid for coal of the kind and quality described: "to be delivered . . . at such times and in such quantities as may be required during the fiscal year ending June 30, 1917 . . . 10,000 tons steaming coal . . . for delivery . . . Hampton Roads, Va., per ton, $2.85 . . . $28,500."

The general specifications printed on the form contained the following provisions:

"Quantities Estimated"—"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obligated to order any specific quantity. The estimated quantities have been arrived at from records of previous purchases. While they represent the best information obtainable as to the quantities which will be required . . . they are estimated only, and are not to be considered as having any bearing upon the quantity which the Government may order under the contract."

"Deliveries"—"Deliveries to be made promptly, and in lots or quantities specified . . . on call and at the prices accepted by the Department, . . ."

"Reservations"—"The Government reserves the right to reject any or all bids and in accepting any bids . . . the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government."

"Notes"—"Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications."

Appellant was notified of the acceptance of its proposal, and on June 5, 1916, a contract was made containing the portions of the bid and specifications above referred to.

March 26, 1917, appellant was informed by the Department that the quantity estimated in its contract would be exceeded by ten per cent. Appellant answered that when it had furnished 10,000 tons, it would consider its obligation under the contract discharged, and that it was prepared to furnish the balance. The Department cited the provisions of the contract as authority for requiring the additional tonnage; stated that the same requirement was made of other contractors, and expressed the hope that it would not be necessary to resort to extreme measures to accomplish compliance. Later the Department informed appellant that the steamer Kennebec had been directed to coal with it, and that the quantity required was 2,180 tons. Appellant answered that the balance due under the contract was 560 tons, which it was ready to supply at any time, and that this amount was all that it was able to furnish. The Department insisted that the full cargo assigned to the Kennebec must be furnished.

Appellant reiterated its position. June 9, the Department advised appellant that failure to supply the tonnage ordered would necessitate immediate purchase in the open market for its account. June 12, appellant replied that it had arranged to supply the Kennebec the full quantity required, and that it was "doing this under protest which can be straightened out later." June 14, appellant wrote that it would agree to supply the 2,180 tons ordered, with the understanding that no further assignments would be made to it; that this was 1,620 tons more than it was obligated to deliver; that this excess would be furnished under protest, reserving the right to take the proper steps to recover the difference between the current market price and the contract price; it asked confirmation from the Department and stated that on receipt thereof it would furnish the coal.

June 15, the Department acknowledged appellant's letter of the 14th, but, as found by the Court of Claims, "not acceding to any proposition therein contained," directed appellant:

"Your company will please supply Kennebec with fifteen hundred sixty tons coal, or such quantity as may be necessary to bring the total tonnage delivered by you under contract twenty-six four ninety-two up to total estimated quantity plus ten per cent, or total eleven thousand tons. Balance Kennebec cargo will be obtained elsewhere."

1. The language of the contract indicates that the parties intended and understood that, depending on its own choice, the Department might call for more or less than 10,000 tons of coal. The forms of bid indicated a purpose to contract in advance for the year's supply and not to buy coal in the open market; they informed bidders that the stated quantities were estimated on the basis of previous purchases and were not to be taken as exact figures, and such forms were suitable to enable the De-

partment to award one contract for the total estimated quantity or to distribute its requirements among a number of producers as it might determine. Appellant's bid mentioned specifically 10,000 tons, (which was only one-sixtieth of the estimated total for Hampton Roads). It provided that, "It shall be distinctly understood and agreed that . . . the contractor will furnish and deliver any quantity of the coal specified [i. e., of the kind and quality specified] which may be needed . . . irrespective of the quantities stated, *the Government not being obligated to order any specific quantity* . . . "; and that the stated quantities "are estimated only, and are not to be considered as having *any bearing* upon the quantity which the Government may order under the contract . . . The right is also reserved to make such distribution of tonnage among the different bidders . . . as will be considered for the best interests of the Government."

There is nothing in the writing which required the Government to take, or limited its demand, to any ascertainable quantity. It must be held that, for lack of consideration and mutuality, the contract was not enforceable. *Cold Blast Transportation Co.* v. *Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81; *Fitzgerald* v. *First National Bank, id.* 474, 478; *A. Santaella & Co.* v. *Otto F. Lange Co.*, 155 Fed. 719, 721, *et seq.*; *Golden Cycle Mining Co.* v. *Rapson Coal Mining Co.*, 188 Fed. 179, 182, 183.

United States v. *Purcell Envelope Co.*, 249 U. S. 313, is not inconsistent with the conclusion that the contract here was not enforceable. There, the making and acceptance of the bid consummated the contract, and it was construed to bind the company to furnish and the Department to take the envelopes and wrappers specified which the Department would need during the period covered by the contract.

2. While the contract at its inception was not enforceable, it became valid and binding to the extent that it was performed. *St. Louis Hay & Grain Co.* v. *United States,* 191 U. S. 159, 163; *Hartman* v. *Butterfield Lumber Co.,* 199 U. S. 335, 338; *United States* v. *Andrews & Co.,* 207 U. S. 229, 243.

There was no duress or compulsory taking. The last order was given, as prior orders had been given, with reference to the contract. The failure of the Department in the correspondence directly to decline the proposal made by appellant in its letter of June 14 has no significance in favor of appellant. The Department did not accept or in any manner acquiesce. Immediately its order was given for 1,560 tons, making a total of 11,000 tons, the exact amount it claimed it was entitled to call for under the contract. The correspondence shows that the Department declined to accept appellant's view and refused to entertain its requests or proposals to leave the matter of price open. Appellant failed further to object and delivered the coal. It is not important whether it was persuaded that the Department's interpretation of the writing was correct or, to avoid controversy, decided to fill the order. Its earlier protest is of no avail (see *Savage* v. *United States,* 92 U. S. 382), and it must be held voluntarily to have accepted the order for the additional 1,000 tons, and to have furnished it at the price specified in the contract. *Charles Nelson Co.* v. *United States,* 261 U. S. 17. By the conduct and performance of the parties, the contract was made definite and binding as to the 11,000 tons ordered and delivered according to its terms.[1]

The judgment of the Court of Claims is affirmed.

[1] See *Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273; *Topliff* v. *Topliff,* 122 U. S. 121, 131; *Old Colony Trust Co.* v. *Omaha,* 230 U. S. 100, 118; *Nelson* v. *Ohio Cultivator Co.,* 188 Fed. 620, 623; *Bunday* v. *Huntington,* 224 Fed. 847, 854; *Bransford* v. *Regal Shoe Co.,* 237 Fed. 67, 69.

WILLIAM C. ATWATER & COMPANY, INC. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 218. Argued May 1, 2, 1923.—Decided June 4, 1923.

Decided on the authority of *Willard, Sutherland & Co.* v. *United States, ante,* 489.

56 Ct. Clms. 458, affirmed.

APPEAL from a judgment of the Court of Claims, denying the appellant's claim for the difference between the market price of coal furnished the Navy and the price stated in a contract.

Mr. Thomas Renaud Rutter and *Mr. Gibbs L. Baker,* with whom *Mr. Karl Knox Gartner* and *Mr. Clarence A. Miller* were on the brief, for appellant.

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

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought to recover $73,964.48, being $3.70 per ton for 19,990.4 tons of coal furnished the Navy. Appellant seeks to recover the market price at the time of delivery, $6.50 per ton. The United States claims appellant was bound by contract to furnish it for $2.80 a ton, and this has been paid. The Court of Claims made findings of fact and concluded that the appellant was not entitled to recover.

In the spring of 1916, the Navy Department, being desirous of making contracts for coal for the ensuing fiscal year, ending June 30, 1917, issued its invitations for bids. Appellant submitted a bid and was awarded a contract to furnish a part of the coal required at Hampton Roads, Va. The invitation, form of bid, specifications and con-

tract in this case are the same as in *Willard, Sutherland & Co.* v. *United States,* decided this day, *ante,* 489, except that in this case the contract price was $2.80 per ton, and the quantity specifically mentioned was 200,000 tons.

On March 26, 1917, appellant was informed by the Department that the estimated quantity mentioned in its contract would be exceeded by about ten per cent. Appellant stated that it had not bid on tonnage in excess of 200,000 tons, and called attention to the heavy curtailment of production at its mines due to shortage of cars and labor. The Department cited the provisions of the contract as authority for requiring thereunder additional tonnage, stated that the same requirement was being made of other contractors, and that the contract price must apply to the total requirements during the fiscal year. Appellant then called attention to the provisions of note (b), printed in the margin,[1] giving relief in case of shortage of transportation, among other things, and submitted a statement as to the car supply, and maintained that on that basis it was only obliged to deliver 148,357 tons up to April 1, 1917, whereas it had actually delivered to date 160,377 tons, an excess of 12,020 tons, and stated that the total of 220,000 above referred to was subject to the reduction of 12,020 tons, making the actual tonnage deliverable by it under its contract 207,980 tons. The Department answered by letter and insisted that the

[1] "(b) Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes, or combinations of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be canceled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes."

ten per cent. additional must be furnished under the contract, and said:

"It cannot be recognized that you are entitled to any relief on account of such shortage of equipment as may have been experienced; as, in this respect, the Navy is accorded preferential treatment and this department has not failed to obtain the cars required by its suppliers when requests for cars to move Navy tonnage have been received."

Appellant then limited its claim for reduction on account of shortage of cars to the period prior to January 1, 1917, and stated that on that basis:

"The total of 220,000 tons requisitioned by the department under our contract is therefore subject to reduction to the extent of 8,219 tons, making the actual tonnage deliverable under the contract 211,781 tons."

April 26, 1917, the Department again insisted on the delivery of the additional ten per cent. May 22, 1917, acknowledging an order of 10,000 tons to be delivered between June 1, and June 10, the appellant stated that 204,430.19 tons had been delivered; that 2,650 tons were assigned to barges, making a total of 207,080.19 tons, and that the 10,000 tons would make a total of 217,080.19 tons, leaving 2,920 tons. June 2, 1917, appellant wired the Department, saying:

"We beg to call attention to department's notice to us under date March twenty-sixth we would be required to deliver contract tonnage plus ten per cent, eighty-two hundred nineteen tons of which by reasons of short car supply we are delivering under protest. With completion of your requisition for ten thousand tons May twenty-first, two hundred and twenty thousand tons will have been delivered, being eighty-two hundred nineteen tons in excess of the tonnage required to complete contract."

Appellant delivered 219,990.4 tons of coal in all. It billed 211,771 tons at the contract price and 8,219 tons at $6.25 per ton, and protested against accepting the con-

tract price therefor, claiming that on account of car shortage it was not bound to deliver it. The Court of Claims found that when the excess over 200,000 was delivered, the market price was $6.50 per ton, and that such tonnage—19,990.4—was worth in the market $73,964.48 in excess of the contract price.

On the authority of the *Willard Case, supra,* it is held that by the language of the contract it appears that the parties intended that the Department might call for more or less than the 200,000 tons mentioned therein, and that because of lack of consideration and mutuality the contract at its inception was not enforceable, but that it became valid and binding to the extent that it was performed.

On the facts found it must be held that appellant abandoned its claim that it was not bound to furnish more than the 200,000 tons, and acquiesced in the Department's interpretation of the contract and accepted and performed its orders. By its billing the appellant conceded that the contract price applied to all except 8,219 tons. The provisions of note (b) have no relation to price. The purpose of that paragraph was to relieve the contractors from liability resulting from their inability to fulfill their contracts on account of causes mentioned therein. The Department at all times adhered to its position both as to quantity and price. Appellant's protest against delivery of the 8,219 tons because of car shortage, and against acceptance of the contract price therefor was of no avail. When it sued, the demand made was not in accordance with the billing, and it claimed the market price for all coal delivered in excess of the estimated quantity mentioned in the contract. The case is presented on the same grounds as was the *Willard Case,* and it must be held that all of the 219,990.4 tons was ordered and delivered under the contract.

The judgment of the Court of Claims is affirmed.

MADERA SUGAR PINE COMPANY *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Nos. 235 and 296. Argued March 7, 1923.—Decided June 4, 1923.

1. A state workmen's compensation act otherwise valid, does not, by requiring that compensation for the accidental death of an employee, irrespective of negligence, be paid to his non-resident alien dependents, deprive the employer of property without due process, in violation of the Fourteenth Amendment. P. 501.
2. The constitutionality of acts of this kind does not depend upon the compensation's being limited to citizens or residents of the State. *Id.*

Affirmed.

ERROR to judgments of the Supreme Court of California denying writs to review two awards made by the State Industrial Accident Commission.

Mr. H. E. Barbour, for plaintiff in error, submitted. *Mr. William C. Ring* was also on the brief.

Mr. Adolphus E. Graupner, with whom *Mr. Warren H. Pillsbury* was on the brief, for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These two cases were heard together. They involve a single question as to the constitutionality of the Workmen's Compensation Act of California.

This is a compulsory compensation act establishing in all except certain employments, an exclusive system governing compensation for injuries to employees resulting in disability or death. By its terms liability exists against an employer for the compensation therein pro-

vided, in lieu of any other liability whatsoever to any person, and "without regard to negligence," for any injury sustained by his employees, including aliens, arising out of and in the course of the employment, not caused by their intoxication or intentionally self-inflicted; such compensation being recoverable by the employees, according to a prescribed scale gauged by their previous wages and the extent of their disability, or, if the injuries cause death, by those dependent upon them for support, according to prescribed death benefits gauged by the previous wages and the extent of the dependency of the beneficiaries. Laws, California, 1917, c. 586; amendment, Laws, 1919, c. 471. See *Western Indemnity Co.* v. *Pillsbury,* 170 Cal. 686, 695; and *North Alaska Salmon Co.* v. *Pillsbury,* 174 Cal. 1. Non-resident alien dependents are included within its provisions as to death benefits. See *Western Supply Co.* v. *Pillsbury,* 172 Cal. 407, 416.

In the present cases, two laborers employed by the Madera Sugar Pine Company in California, having sustained, without negligence of the Company, fatal injuries, arising out of and in the course of their employment, their partially dependent mother and sisters, respectively, being aliens residing in Mexico, were awarded by the Industrial Accident Commission, in appropriate proceedings under the act, death benefits against the Company as therein prescribed.

Petitions for writs to review these awards in accordance with the state practice were denied by the Supreme Court of California; and thereupon, on the application of the Company, these writs of error, with supersedeas, were allowed by the Chief Justice of that court. See *Napa Valley Co.* v. *Railroad Commission,* 251 U. S. 366, 372.

The sole contention of the Company here is that the act, as construed and applied in these cases, requiring it to make compensation for the death of employees, occurring without fault, to their non-resident alien dependents,

operates to deprive it of property without due process and in violation of the Fourteenth Amendment.

The argument is, in substance, that while an employer may lawfully be compelled to make compensation to the resident dependents of employees whose death was caused by no legal wrong, on the ground that the State is interested in preventing such dependents from becoming public charges, this justification does not extend to the case of foreign dependents, who would not become public charges of the State; and, therefore, that an act requiring compensation to be made to such foreign dependents in the absence of legal wrong, is not a reasonable exercise of the police power of the State. This argument, however, erroneously assumes that in a compensation act of this character the constitutionality of the provision for death benefits is to be separately determined, independently of the general scope of the act, and solely with reference to the relation of the beneficiaries to the employers and to the State.

Provision is universally made in workmen's compensation acts for compensation not only to disabled employees but to the dependents of those whose injuries are fatal. And the two kinds of payment are "always regarded as component parts of a single scheme of rights and liabilities arising out of" the relation of employer and employee. *Western Metal Supply Co.* v. *Pillsbury*, 172 Cal. 407, 414. The object of such acts "is single—to provide for the liability of an employer to make compensation for injuries received by an employee", whether to the employee himself or to those who suffer pecuniary loss by reason of his death. *Huyett* v. *Pennsylvania Railroad*, 86 N. J. L. 683, 684.

This Court has in several cases sustained the constitutionality of workmen's compensation acts, from which the California Act in its constitutional aspects is not distinguishable, establishing exclusive systems governing the

liabilities of employers in hazardous occupations in respect to compensation for industrial accidents to employees resulting in disability or death, and requiring compensation to be paid to a disabled employee or to his surviving dependents in accordance with prescribed scales gauged upon the previous wage and the extent of the disability or dependency. *New York Central Railroad* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Ward & Gow* v. *Krinsky*, 259 U. S. 503. And see *Arizona Employers' Liability Cases*, 250 U. S. 400. These acts were sustained, in their entirety, without any separate reference to the status of the dependents—although in the *White Case* the right of a widow to compensation was directly involved—upon the broad ground that the State, by reason of its public interest in the safety and lives of employees engaged in such occupations, may provide, in the just and reasonable exercise of its police power, that the loss of earning power sustained by an employee through an industrial accident resulting in his disability or death, constituting a loss arising out of the business and an expense of its operation, shall, in effect, be charged against the industry after the manner of casualty insurance, and to that end require the employer to make such compensation as may reasonably be prescribed for the loss thus incurred in the common enterprise, irrespective of the question of negligence, to the injured employee or to his surviving dependents. *New York Central Railroad* v. *White* (pp. 203, 207); *Mountain Timber Co.* v. *Washington* (p. 243); *Ward & Gow* v. *Krinsky* (p. 512). That is to say, as shown by these decisions, the compensation to dependents is merely a part of the general scheme of compensation provided by these acts for the loss resulting from the impairment or destruction of the earning power of an employee caused by an industrial accident, which in case of his death is paid to those whom he had supported by his earnings and

who have suffered direct loss through the destruction of his earning power. And it is clear that the underlying reason of these decisions applies alike to all dependents who by his death have been deprived of their support, whether they be residents or non-residents of the State.

If an employment be such as to fall within the State's lawmaking jurisdiction and the legislature determines that the employment of labor therein entails upon the employer certain responsibilities toward the persons performing the labor and those dependent on them, there is no constitutional provision requiring that the benefits of such legislative scheme be limited to citizens or residents of the State. *Western Metal Supply Co.* v. *Pillsbury, supra,* p. 416. Just as accident insurance goes to the beneficiary regardless of his residence, so the *quasi*-insurance of a workmen's compensation act goes to those to whom the employee would naturally have made such insurance payable: to himself, although an alien, if he be disabled; and to those dependent upon his earnings for support, if he be killed. *Derinza's Case,* 229 Mass. 435, 441.

A strong argument in support of the view that as part of a system of compulsory compensation established by a State to protect employees from loss through industrial accidents, the death benefits may properly be extended to alien dependents, is also found, by analogy, in the reasons stated in various decisions holding that employers' liability acts authorizing recovery for the death of employees caused by negligence, inure to the benefit of alien as well as resident beneficiaries. Thus, as the Federal Employers' Liability Act, in order to protect the life of the employee gives compensation to those who had relation to it, it makes no difference where they may reside; it being " the fact of their relation to the life destroyed that is the circumstance to be considered, whether we

consider the injury received by them or the influence of that relation upon the life destroyed." *McGovern* v. *Philadelphia Railway*, 235 U. S. 389, 400. Such employers' liability statutes are designed to benefit all employees. *Vetaloro* v. *Perkins* (C. C.), 101 Fed. 393, 397. They have the interest of the employees in mind and are primarily for the protection of their lives; the action is given to the beneficiaries on their account and they are not intended to be less protected if their beneficiaries happen to live abroad. *Mulhall* v. *Fallon*, 176 Mass. 266, 269. "Many of these toilers in mines, on public works, railroads and the numberless fields of manual labor, receive a moderate wage and are compelled to leave in foreign lands those who are dependent upon them and for whose support they patiently work on, indulging the hope that ultimately they may bring to these shores a mother, or wife and children. . . . The statute not only benefits the survivors, but protects the laboring man . . . The laborer, leaving wife and children behind him and coming here from abroad, has a right to enter into the contract of employment, fully relying upon the statute." *Alfson* v. *Bush Co.*, 182 N. Y. 393, 398, 399; *Kaneko* v. *Atchison Railway* (D. C.), 164 Fed. 263, 266.

For the foregoing reasons we conclude that the Workmen's Compensation Act of California, as it has been construed and applied in these cases, in providing for death benefits to the non-resident alien dependents of employees meeting death as the result of industrial accidents, is not in conflict with the Fourteenth Amendment.

Affirmed.

STATE OF OKLAHOMA *v.* STATE OF TEXAS.

UNITED STATES, INTERVENER.

IN EQUITY.

No. 18, Original.

Order entered June 4, 1923.

Order directing Commissioners, heretofore appointed for locating and marking the boundary between Texas and Oklahoma on the south bank of Red River, to survey and plat also the medial line between that boundary and the northerly bank, in the vicinity of the oil wells; with provisions for report, objections, approval, and costs.

The commissioners heretofore designated herein to run, locate and mark portions of the boundary between the States of Texas and Oklahoma on and along the south bank of Red River are hereby ordered and directed also to survey, and run upon the ground and to delineate upon a suitable plat the medial line between such state boundary and the northerly bank of such river for a total length of three miles at and in the vicinity of the river bed oil wells. In so surveying, running and platting such medial line the commissioners shall conform to the fifth paragraph of the decree entered herein March 12, 1923 [261 U. S. 345], entitled, "Supplement to Partial Decree of June 5, 1922," and shall ascertain and show on such plat the exact location of all oil wells which are within three hundred feet of such medial line. The commissioners shall make a separate report of their action under this order, and shall include therein a statement of the time employed and the expenses incurred in that work. The work and report of the commissioners hereunder shall be subject to the approval of the Court. Copies of the report shall be promptly delivered to the two States and the United States, and exceptions or objections thereto,

if there be such, on the part of either State, the United States or any private intervener herein, shall be presented to the Court, or, if it be not in session, filed with the Clerk, within forty days after the report is made. The cost of executing this order shall be borne and paid as part of the expenses of the receivership.

SONNEBORN BROTHERS *v.* CURETON, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.

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

No. 20. Argued March 24, 1922; restored to docket for reargument May 29, 1922; reargued October 5, 1922.—Decided June 11, 1923.

1. A state occupation tax, levied on all wholesale dealers in oil and measured by a per cent. of the gross amount of their respective sales made within the State, is not invalid, as a burden on interstate commerce, when applied to local sales in the original packages, of oil previously shipped into the State and stored by the dealer as part of his stock in trade. P. 508.
2. As regards immunity from state taxation, the distinction between imports and articles in original packages in interstate commerce, is that, in the one case, the immunity attaches to the import itself before sale, while, in the other, it depends on whether the tax regulates or burdens interstate commerce. P. 509.

Woodruff v. *Parham*, 8 Wall. 123, followed. *Standard Oil Co.* v. *Graves*, 249 U. S. 389; *Askren* v. *Continental Oil Co.*, 252 U. S. 444; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, and *Texas Co.* v. *Brown*, 258 U. S. 466, qualified.

Affirmed.

APPEAL from a decree of the District Court dismissing, on final hearing, the appellants' bill, which sought to enjoin the enforcement of penalties for failure to make reports of sales of oil and for failure to pay a state tax, in respect

of oil sold in the packages in which it had been originally shipped into the State.

Mr. Joseph Manson McCormick, with whom *Mr. Francis Marion Etheridge* was on the briefs, for appellants.

Mr. E. F. Smith, with whom *Mr. C. M. Cureton,* Attorney General of the State of Texas, and *Mr. C. W. Taylor* were on the brief, for appellees.

Mr. Chief Justice Taft delivered the opinion of the Court.

This is an appeal from a decree of a United States District Court under § 238, Judicial Code, in a case in which a law of Texas is claimed to be in contravention of the Constitution of the United States. The law in question is Art. 7377 of the Revised Civil Statutes of Texas, approved May 16, 1907, Acts of 1907, p. 479. It provides that every individual, firm or corporation, foreign or domestic, engaging as a wholesale dealer in coal oil or other oils refined from petroleum, shall make a quarterly report to the State Comptroller, showing the gross amount collected and uncollected from any and all sales made within the State during the quarter next preceding, and that an occupation tax shall be paid by such dealer equal to two per cent. of the gross amount of such sales collected or uncollected.

From an agreed statement of facts, the following appears:

Sonneborn Brothers is a firm of non-resident merchants selling petroleum products, with its principal place of business in New York City. In January, 1910, it opened an office in Dallas, Texas, and since that time has maintained it and connecting warerooms and has rented space in a public warehouse at San Antonio, Texas. From January, 1910, until April 11, 1919, receipts from its total

sales, made through orders received at the Dallas office, have amounted to $860,801.50. This sum included:

(1) Those from the sale of oil which, when sold, was not in Texas.

(2) Those from sales of oil to be delivered from Texas out of the State.

(3) Those arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in unbroken original packages.

(4) Those from sales in Texas from broken packages.

The receipts from the first two classes amounted to $643,622.40 and the state authorities made no effort to tax them. The receipts from (4) amounted in the period named to $16,549.84, and appellants do not deny their liability for the tax thereon. The sales made under (3) of unbroken packages, after their arrival in Texas, and after storage in the warerooms or warehouse of appellants, amounted to $217,179.10, and the tax on this amounting to $4,674.58 is the subject of the contest here.

The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.

Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil

as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject.

This has been established so far as property taxes on the merchandise are concerned by a formidable line of authorities. *Brown* v. *Houston,* 114 U. S. 622; *Coe* v. *Errol,* 116 U. S. 517; *Pittsburg & Southern Coal Co.* v. *Bates,* 156 U. S. 577; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Bacon* v. *Illinois,* 227 U. S. 504.

But the argument is that for articles in original packages, the sale is a final step in the interstate commerce, and that the owner may not be taxed upon such sale because this is a direct burden on that step. The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the State. This immunity of imports was established by this Court in *Brown* v. *Maryland,* 12 Wheat. 419, 446, 447, and was declared in obedience to the prohibition of the Constitution contained in § 10, Article I, par. 2, providing that:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the State may not tax it. This immunity has been enforced as against

a license or occupation tax on the importer in *Brown* v. *Maryland,* 12 Wheat. 419, as against a personal property tax on a stock of wines of a wine dealer to the extent to which the stock included imported wines in the original packages, *Low* v. *Austin,* 13 Wall. 29, and as against an occupation tax on an auctioneer measured by his commissions on the sales of such imports, *Cook* v. *Pennsylvania,* 97 U. S. 566. When, however, the article imported is sold or is taken from the original packages and exposed for sale, the immunity is gone. *Waring* v. *The Mayor,* 8 Wall. 110; *May* v. *New Orleans,* 178 U. S. 496.

Cases subsequent to *Brown* v. *Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce.

The first of the cases making this distinction is *Woodruff* v. *Parham,* 8 Wall. 123. In that case, Woodruff, an auctioneer in Mobile, received, in the course of his general business for himself and as consignee and agent for others, merchandise from Alabama and from other States and sold it in unbroken packages. The City of Mobile under its charter levied a uniform tax on real and personal property, on sales at auction, on sales of merchandise, and on capital employed in the business in the city. Woodruff objected to paying any tax on the auction sales of merchandise from other States in original packages. The question most considered by the Court was whether merchandise exported from one State to another was an export which a State was forbidden to tax by Article I, § 10, par. 2, of the Federal Constitution, above quoted. It was held that it was not, and that the words "imports and exports" as there used referred to, and included only mer-

chandise brought in from, or transported to, foreign countries. The Court (p. 140) further held that such a tax which did not discriminate against the sales of goods from other States, but was imposed upon sales of all merchandise, whether its origin was in Alabama or in any other State, was not "an attempt to fetter commerce among the States."

At the close of the opinion in *Brown* v. *Maryland,* Chief Justice Marshall made the remark "that we suppose the principles laid down in this case apply equally to importations from a sister State." This was pronounced in *Woodruff* v. *Parham* not to be a judicial decision of the question but an *obiter dictum.*

While the opinion by Mr. Justice Miller in *Woodruff* v. *Parham* is chiefly devoted to showing that exports are limited to goods sent out of the country, the decision on the interstate commerce phase of the issue was most fully considered. The adverse view was pressed with all the learning and force of argument of John A. Campbell, formerly a Justice of this Court.

Immediately following *Woodruff* v. *Parham* is *Hinson* v. *Lott,* 8 Wall. 148, in which was at issue the validity of a provision of the Alabama law that before it should be lawful for a dealer introducing spirituous liquors into the State to offer the same for sale, he must pay fifty cents a gallon thereon. The provision was sustained as not being an attempt to burden interstate commerce, because by another section of the same law every distiller of the State was required to pay fifty cents a gallon on all liquor made by him, and the two sections were complementary in order "to make the tax equal on all liquors sold in the State."

Woodruff v. *Parham* was affirmed and applied in *Brown* v. *Houston,* 114 U. S. 622, where coal mined in Pennsylvania and sent in barges to New Orleans to be sold after arrival from those barges, without being landed, to a

vessel bound to a foreign port was held while awaiting sale to be subject to taxation by the State as property in Louisiana.

The case of *Woodruff* v. *Parham* has never been overruled but has often been approved and followed as the cases above cited show. As an authority it controls the case before us and shows conclusively that the tax in question is valid.

The distinction between the immunity from state taxation of imports in original packages, and that of articles coming from interstate commerce in original packages, is again brought out with emphasis by Mr. Justice White, afterwards Chief Justice, in *American Steel & Wire Co.* v. *Speed,* 192 U. S. 522. In that case, articles of hardware were shipped by the American Steel & Wire Company from their factories in the East to Memphis, Tennessee, and there kept in store in original packages to be distributed to Arkansas and other States when sold, on orders to be subsequently secured. Memphis, under a general law, imposed a merchant's tax on the Wire Company, based on the average capital invested in the business and included this stock of original packages in the average. The Court conceded that if these goods were "imports," they could not be taxed under *Brown* v. *Maryland,* but said (p. 519):

"But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the State for sale," and cited the cases of *Woodruff* v. *Parham,* and *Brown* v. *Houston.* Speaking of these cases, the Justice said:

"Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two

cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the States of the Union."

Support for the contention that a state tax on sales of merchandise in original packages brought in from another State is to be distinguished from *ad valorem* taxes on the merchandise itself is supposed to be found in the cases of *Leisy* v. *Hardin,* 135 U. S. 100, and *Lyng* v. *Michigan,* 135 U. S. 161. In those cases it was held that a law of a State which forbade sales of merchandise brought into the State from another State and subjected it to forfeiture, was invalid because freedom to sell was part of interstate commerce and interference with such freedom was an obstruction and would be so regarded as long as the merchandise was unsold and in an original package. The reasoning in *Brown* v. *Maryland* as to the necessity of sale to complete importation was resorted to by the Court in *Leisy* v. *Hardin* to sustain the view that a sale was a part of interstate commerce and any state action which intercepted the merchandise brought in before sale in the original package was void. In drawing the proper line between the valid operation of state prohibition laws and lawful interstate commerce, Chief Justice Marshall's conception of that to be drawn between importation from abroad under the Constitution and state taxation was adopted. Without questioning the reasoning used to reach the conclusion in *Leisy* v. *Hardin,* it is enough to point out the radical difference between state legislation preventing any sale at all accompanied by forfeiture of the merchandise, and a provision for an occupation tax applicable to all sales of such merchandise whether domestic or brought from another State. The one plainly interferes with or destroys the commerce, the other merely puts the merchandise on an equality with all other merchandise in the State and constitutes no real hindrance to introducing the merchandise into the State for sale

upon the basis of equal competition. Mr. Justice White in his opinion in *American Steel & Wire Co.* v. *Speed,* thus distinguished *Leisy* v. *Hardin* from the case then before the Court. The obstruction to interstate commerce in *Leisy* v. *Hardin* was like that in *Schollenberger* v. *Pennsylvania,* 171 U. S. 1, 12, in *Railroad Co.* v. *Husen,* 95 U. S. 465, 469, in *Minnesota* v. *Barber,* 136 U. S. 313, in *Brimmer* v. *Rebman,* 138 U. S. 78, in *Scott* v. *Donald,* 165 U. S. 58, 97, in *Vance* v. *Vandercook Co., No. 1,* 170 U. S. 438, and in *American Express Co.* v. *Iowa,* 196 U. S. 133.

Counsel for the appellants cite the case of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, as aiding their argument that a tax on a sale of merchandise in an original package brought from another State is a tax on interstate commerce and is different from an *ad valorem* property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a State to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky to be delivered at a railway station in Kentucky for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that State might nevertheless make and enforce without incurring the penalty of the state law. It was said in that case (p. 290) that,

"Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland,* 12 Wheat. 419, 446–447; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another, the

commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa,* 196 U. S. 133, 143."

But this language has no relevancy to show that a tax without discrimination on goods after the transportation ceases, is a burden on interstate commerce, a proposition negatived in the *American Steel & Wire Co. Case* it cites, or that a different rule should apply to an *ad valorem* property tax from that in case of a tax on sales.

Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it. *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Asher* v. *Texas,* 128 U. S. 129; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 147; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Brennan* v. *Titusville,* 153 U. S. 289; *Dozier* v. *Alabama,* 218 U. S. 124; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Stewart* v. *Michigan,* 232 U. S. 665; *Western Oil Refining Co.* v. *Lipscomb,* 244 U. S. 346.

So too a tax upon the gross receipts from interstate transportation or transmission, whether receipts from intrastate transportation or transmission are equally taxed or not, is an unlawful tax because a direct burden upon interstate commerce. *State Freight Tax,* 15 Wall. 232, 276, 277; *Fargo* v. *Michigan,* 121 U. S. 230, 244; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 336; *Leloup* v. *Port of Mobile,* 127 U. S. 640, 648; *McCall* v. *California,* 136 U. S. 104, 109; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, 227; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

A state tax upon merchandise brought in from another State or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State. This distinction is illustrated in the difference between those cases which uphold the validity of a tax upon peddlers engaged in selling merchandise from out of the State which they carry with them, like those of *Machine Co.* v. *Gage,* 100 U. S. 676, *Emert* v. *Missouri,* 156 U. S. 296, *Baccus* v. *Louisiana,* 232 U. S. 334, and *Wagner* v. *Covington,* 251 U. S. 95, on the one hand, and that of *Welton* v. *Missouri,* 91 U. S. 275, in which a peddler's tax was held bad because it was levied only on goods from other States, on the other. *Ward* v. *Maryland,* 12 Wall. 418, 429, *Guy* v. *Baltimore,* 100 U. S. 434, 442-443, *Tiernan* v. *Rinker,* 102 U. S. 123, *Webber* v. *Virginia,* 103 U. S. 344, 350, and *Walling* v. *Michigan,* 116 U. S. 446, are other instances showing the invalidity of state tax laws discriminating against merchandise brought in from other States.

Appellants' chief argument to sustain their contention that a sale of merchandise in the original package made after it is brought into the State from another State is exempt from state taxation is based upon the language of the opinions in certain recent cases in this Court. They are *Standard Oil Co.* v. *Graves,* 249 U. S. 389; *Askren* v. *Continental Oil Co.,* 252 U. S. 444; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, and *Texas Co.* v. *Brown,* 258 U. S. 466.

Standard Oil Co. v. *Graves* was a case of excessive inspection fees. The law of Washington in that case required inspection and labelling before sale, and punished sales without them. The Supreme Court of the State said the law could be sustained as an excise law on selling oil in the State. The opinion contains this passage:

"In this case the amended complaint alleges that the oils were shipped into Washington from California. They are brought there for sale. This right of sale as to such importations is protected to the importer by the Federal Constitution, certainly while the same are in the original receptacles or containers in which they are brought into the State."

The Court said finally:

"We reach the conclusion that the statute imposing these excessive inspection fees, in the manner stated, upon all sales of oils brought into the State in interstate commerce necessarily imposes a direct burden upon such commerce, and is, therefore, violative of the commerce clause of the Federal Constitution."

There is nothing in the statement of the case to show the details of the importations of oil, and nothing to indicate how much, if any, of the oil imported had been ordered before shipment into the State or how much sold after importation. The remark of the Court as to original receptacles or containers, therefore, is not shown to have been necessary to the conclusion.

The case of *Askren* v. *Continental Oil Co.* involved the validity of a law called an inspection law, imposing a license tax upon those selling gasoline in the State, and an excise tax of 2 cents a gallon on the sale or use of it. The inspectors' duties were to see to the execution of the act and the excess of receipts after payment of their salaries and expenses went into the road fund of the State. The case was decided on the averments of the bill which described complainant's business of two kinds, first, that of selling oil to customers in tanks, and also in barrels and packages containing not less than two 5-gallon cans, without breaking them, and, second, of selling gasoline from such tanks and cans in quantities desired by the purchaser. There was nothing to show whether the first kind of business was done on orders lodged before importation or after.

The Court, however, said:

"As to the gasoline brought into the State in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in *Standard Oil Co.* v. *Graves,* 249 U. S. 389, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another State into his own State for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved."

If the orders for such sales in original packages were given before importation, the conclusion reached by the Court that they were protected against an excise or license tax is in accord with all of the cases already cited, though the fact that they were delivered in the original packages would not give them any additional immunity. It should be noted that in this opinion, the case of *Wagner* v. *Covington,* 251 U. S. 95, is quoted approvingly and followed although in that case a tax was upheld on merchandise brought in from Ohio by the seller and sold there in the original packages. In the absence of specification as to when ordered, we can not be sure that the case was wrongly decided, but only that the language used contained implications which can not be sustained.

The case of *Bowman* v. *Continental Oil Co.* was the same case as the *Askren Case,* the representatives of the State having changed. The *Askren Case* had come here on an appeal from an interlocutory injunction and was

decided on the averments of the bill. When the case went back, an answer was filed and the case was heard and it turned out that only five per cent. of the business was in tank cars and unbroken packages sold, and that 95 per cent. was in sales of gasoline in quantities desired. The main point decided in the *Bowman Case* was that a license tax law which imposed a lump tax as a condition of doing business, part of which it was unlawful under the Federal Constitution to tax, must be declared void, though the other part of the business might have been properly the subject of such a tax. As to the excise tax, the Court directed the injunction to issue with respect to the imposition upon "sales of gasoline brought from without the State into the State of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels, or other packages, and in the same form and condition as when received by plaintiff in that State." If this covered gasoline that was ordered by the purchaser before importation, it was right. If it covered gasoline, whether in original packages or not, which was sold after it reached its destination, then it is not in accord with the law as we understand it to be under the authorities we have cited. There is nothing in the case as disclosed in the statements of facts either in the *Askren* or the *Bowman Case* to show what the fact was in this regard.

It is hardly to be supposed that the Court intended in these cases to overrule or narrowly to distinguish the cases of *Woodruff* v. *Parham, Hinson* v. *Lott, Brown* v. *Houston, Pittsburg & Southern Coal Co.* v. *Bates, American Steel & Wire Co.* v. *Speed,* and *Wagner* v. *Covington,* without mentioning them, especially when we find that in *Texas Co.* v. *Brown,* 258 U. S. 466, 476, they are quoted approvingly and followed. That case involved the question whether an inspection law resulting in receipts greatly in excess of the cost of inspection, and construed

by the Georgia Supreme Court to be an excise tax, was valid in its application to oil shipped into Georgia from Texas and stored in Georgia for distribution and sale. It was held to be a valid tax. The case was rightly decided; and for the right reason; but in seeking to distinguish the previous cases, the opinion uses this language:

"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."

Upon full consideration and after a reargument, we can not think this extension of the exemption referred to, if intended to apply to oil sold after arrival in the State, to be justified either in reason or in previous authority, and to this extent the opinions in the cases cited are qualified.

The cases all involved the validity of statutes providing for excessive inspection fees and the question of saving the statute as an excise law applicable to part of the sales of the oil was an incidental one. The facts upon which the line between taxable and non-taxable sales could be correctly drawn do not appear fully in any of the cases, or to have been discussed by counsel. This is what has led to a confusion as to the real distinctions and to observations in the opinions which unless much restricted in their application constitute a departure from theretofore established principles.

In *Woodruff* v. *Parham* (p. 137), Mr. Justice Miller gives an illustration of the injustice which would arise if the constitutional immunity from state taxation as to

imports from abroad were to be held to apply to imports from one State to another. It correctly describes the result if the interstate commerce clause were to afford the same immunity:

"The merchant at Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

This argument is as strong today as when it was written and it would be a source of confusion and injustice if through too broad expressions in a few opinions, a different conclusion from that to which it should carry us, were to obtain.

The decree of the District Court is

Affirmed.

MR. JUSTICE McREYNOLDS, concurring.

I am unable to concur in all said to support the conclusion adopted by the Court. To me the result seems out of harmony with the theory upon which recent opinions proceed. There is unfortunate confusion concerning the general subject and certainly some pronouncement that can abide is desirable.

Apparently no great harm, and possibly some good, will follow a flat declaration that irrespective of analogies and

for purposes of taxation we will hold interstate commerce ends when an original package reaches the consignee and comes to rest within a State, although intended for sale there in unbroken form. It may be said that the effect on interstate commerce is not substantial and too remote, notwithstanding the rather clear logic of *Brown* v. *Maryland,* 12 Wheat. 419, to the contrary and the much discussed theory respecting freedom of interstate commerce from interference by the States, announced and developed long after *Woodruff* v. *Parham* (1868), 8 Wall. 123. Logic and taxation are not always the best of friends.

CHAS. WOLFF PACKING COMPANY *v.* COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 739. Argued April 27, 1923.—Decided June 11, 1923.

1. Legislative authority to abridge freedom of contract can be justified only by exceptional circumstances, and the restraint must not be arbitrary or unreasonable. P. 533.
2. Businesses said to be clothed with a public interest justifying some public regulation, may be divided into three classes:

(*a*) Those which are carried on under authority of a public grant of privileges expressly or impliedly imposing the affirmative duty of rendering public service demanded by any member of the public,—e. g., the business of a common carrier, or a public utility.

(*b*) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary regulation of all trades and callings by Parliament or Colonial legislatures,—e. g., inns, cabs, and grist mills.

(*c*) Other businesses which have come to have such a peculiar relation to the public that government regulation has been superimposed upon them,—where the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to regulation to the extent of such interest. P. 535.

3. A declaration by a legislature that a business has become affected by a public interest is not conclusive of the question whether attempted regulation on that ground is justified. P. 536.
4. In the present day one does not devote one's property or business to public use, or clothe it with a public interest, merely by making commodities for, and selling them to, the public, in the common callings. P. 537.
5. The option to deal or abstain from dealing, usually distinguishes private from quasi-public occupations. P. 537.
6. Whether the public has become so peculiarly dependent on a particular business that the owner, by engaging therein, subjects himself to intimate public regulation, must be determined upon the facts of each case. P. 538.
7. The extent to which a business which has become "clothed with a public interest" may be regulated depends upon the nature of the business, its relation to the public and the abuses reasonably to be feared. P. 539.
8. Assuming that the business of manufacturing and preparing food for human consumption may be put in the third class of quasi-public businesses noted above,—par. 2(c)—the Industrial Relations Act of Kansas, in seeking, as a measure for protection of public peace, health and general welfare, to enforce continuity and efficiency of the business by compelling employer and employees to submit controversies over wages to state arbitration, and in requiring the employer to pay the wages so fixed (even if confiscatory), and in forbidding the employee to join in strikes against them,— exceeds the limit of permissible regulation and deprives the employer of property, and both employer and employee of liberty, without due process of law, in violation of the Fourteenth Amendment. P. 540.
9. Public regulation can secure continuity in a business against owner and employee only when the obligation of continued service is direct and is assumed when the business is entered upon. Pp. 541, 543.
10. Where the theory and purpose of a statute depend upon compulsion of both employer and employee, its effect upon the employee may be considered when its constitutionality is attacked by an employer. P. 541.
11. The compulsory arbitration attempted under the Kansas statute in this case was not justifiable on the ground of temporary emergency. P. 542. *Wilson* v. *New*, 243 U. S. 332, distinguished.

111 Kans. 501, reversed.

This case involves the validity of the Court of Industrial Relations Act of Kansas. Chapter 29, Special Session, Laws of 1920. The act declares the following to be affected with a public interest: First, manufacture and preparation of food for human consumption; second, manufacture of clothing for human wear; third, production of any substance in common use for fuel; fourth, transportation of the foregoing; fifth, public utilities and common carriers. The act vests an Industrial Court of three judges with power upon its own initiative or on complaint to summon the parties and hear any dispute over wages or other terms of employment in any such industry, and if it shall find the peace and health of the public imperiled by such controversy, it is required to make findings and fix the wages and other terms for the future conduct of the industry. After sixty days, either party may ask for a readjustment and then the order is to continue in effect for such reasonable time as the court shall fix, or until changed by agreement of the parties. The Supreme Court of the State may review such orders and in case of disobedience to an order that court may be appealed to for enforcement.

The Charles Wolff Packing Company, the plaintiff in error, is a corporation of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It has $600,000 capital stock and total annual sales of $7,000,000. More than half its products are sold beyond the State. It has three hundred employees. There are many other packing houses in Kansas, of greater capacity. This is considered a small one.

In January, 1921, the president and secretary of the Meat Cutters Union filed a complaint with the Industrial Court against the Packing Company respecting the wages its employees were receiving. The Company appeared and answered and a hearing was had. The court made findings, including one of an emergency, and an order as

to wages, increasing them over the figures to which the Company had recently reduced them. The Company refused to comply with the order and the Industrial Court then instituted mandamus proceedings in the Supreme Court to compel compliance. That court appointed a commissioner to consider the record, to take additional evidence and report his conclusions. He found that the Company had lost $100,000 the previous year, and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the Industrial Court. The Supreme Court overruled his report and held that the evidence showed a sufficient emergency.

The prescribed schedule of wages and the limitation of hours and the rate of pay required for overtime resulted in an increase in wages of more than $400 a week.

It appeared from the evidence that the Company and plant were under the control of, and in business association with, what were called "The Allied Packers," who have plants in various cities and compete with the so-called Big Five Packers, the largest in the country, that the products of the Wolff Packing Company are sold in active competition with such products made by other concerns throughout the United States. It appeared further that about the time of this controversy, a strike was threatened in the packing houses of the Big Five which the President of the United States used his good offices to settle. The chief executive of the Wolff Company testified that there had been no difficulty in securing all the labor it desired at the reduced rates offered. The Industrial Court conceded that the Wolff Company could not operate on the schedule fixed without a loss, but relied on the statement by its president that he hoped for more prosperous times.

The Packing Company brings this case here on the ground that the validity of the Industrial Court Act was

upheld although challenged as in conflict with the provision of the Fourteenth Amendment that no State shall deprive any person of liberty or property without due process of law.

Mr. D. R. Hite and *Mr. John S. Dean,* with whom *Mr. Harry W. Colmery* was on the briefs, for plaintiff in error.

Mr. John G. Egan and *Mr. Chester I. Long,* with whom *Mr. Charles B. Griffith,* Attorney General of the State of Kansas, *Mr. Randal C. Harvey* and *Mr. Austin M. Cowan* were on the briefs, for defendant in error.

The State's power extends to the promotion of public convenience or general prosperity,—to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people. *Bacon* v. *Walker,* 204 U. S. 311.

A decision of the highest court of the State, declaring a use to be public in its nature, will be accepted by this Court, unless clearly not well founded. *Jones* v. *Portland,* 245 U. S. 217; *Green* v. *Frazier,* 253 U. S. 233.

It has been held by this Court that a state statute is valid which permitted the condemnation of land for the construction of an irrigation ditch to supply water for the uses of one person, *Clark* v. *Nash,* 198 U. S. 361; and that a State may authorize a condemnation of a right of way for an aerial or bucket line to serve in the operation of a gold mine. *Strickland* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527. See *Mount Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U. S. 32.

The fire insurance business may be regulated as affected with a public interest. *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389; *La Tourette* v. *McMaster,* 248 U. S. 465. And so may the banking business. *Noble State Bank* v. *Haskell,* 219 U. S. 104. The charges of a public stockyards company may be regulated. *Cotting* v. *Godard,* 183 U. S. 79.

In *Jones* v. *Portland, supra,* this Court held that the business of furnishing fuel to the citizens of Portland, Maine, was a public use, and that it was within the province of the State to provide by statute for the establishment of municipal fuel yards. In *Green* v. *Frazier,* 253 U. S. 233, it was held within the province of the State to engage in the business of dealing in foodstuffs and providing aid to citizens to build houses.

Phenomenal developments of the past fifty years have completely changed the customs, practices and manner of living of the American people. The meat industry has been completely revolutionized. The business of killing the live stock and of manufacturing the carcass into food for human consumption has been highly specialized and centralized and is controlled by a few great corporations employing hundreds of thousands of workmen operating in the great commercial centers and shipping their food products all over this country and to foreign countries. Many millions of our people are wholly dependent upon the continuous and efficient operation of the packing industry for their daily ration of meat. Millions of live-stock growers are dependent upon the continuous and efficient operation of the same industry for a market for their live stock. All this has impressed with a public interest the packing industry.

Much space is spent in the printed argument of opposing counsel on the constitutionality of the act so far as it affects the milling industry and the clothing industry. Neither of those questions is here for decision. The only question which this Court will determine is the constitutionality of the act as applied to this plaintiff in error. The Industrial Court Act is not open to attack in this case upon grounds which might possibly arise, but which do not affect the party questioning its constitutionality. *Arizona Employers' Liability Cases,* 250 U. S. 400.

The packing industry is affected with a public interest. It has been made the subject of congressional action, as

evidenced by the Packers and Stockyards Act of 1921. *Stafford* v. *Wallace,* 258 U. S. 495.

The packing industry being affected with a public interest, it is therefore subject to regulation by the State. *Munn* v. *Illinois,* 94 U. S. 113. It is argued, however, by the Packing Company that its plant is comparatively small and does not stand at the gateway of commerce, as the warehouses did in the *Munn Case.* That, however, is an old contention which has been met by this Court and overruled. *Brass* v. *North Dakota,* 153 U. S. 391.

The power to regulate an industry is not dependent upon its size.

The history of the packing industry shows that in 1886 and 1904 there were serious strikes, attended by disturbances of the peace, loss of life and shortage in meat production. There have been for years frequent labor controversies and disturbances in that business.

The order of the Industrial Court was but temporary, made to meet an emergency, and did not run as long as did the rates provided in the Adamson Law, (*Wilson* v. *New,* 243 U. S. 332,) which were for a period of six to eleven months. This Court has frequently held that a test should be made to ascertain whether or not an order made fixing rates is confiscatory.

In the compulsory insurance cases the working conditions of strictly private industries were regulated, and the employer was obliged to add, to the wages paid, the insurance premium paid on each employee necessary to provide compensation for the injured employee—and this regardless of the question of negligence. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Thornton* v. *Duffy,* 254 U. S. 361. In the workmen's compensation cases, *Arizona Employers' Liability Cases, supra,* the State by law added, to the cost of labor paid by the manufacturer, compensation for injuries occurring without fault of the employer, which had theretofore been borne by the em-

ployees. Thus the wages paid were in fact increased by legislative act. What had theretofore been borne by the workmen out of their wages was passed to the employer, to be paid by him in addition to the other wages paid. If the legislature can increase the cost of labor to the manufacturer by making him bear the cost of injuries arising out of accidents, then why cannot the State under similar circumstances raise wages of employees slightly in the face of an emergency?

The Packing Company insists that under the doctrine of *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396, the operation of a public utility cannot be compelled at a loss. That is correct. The order in this case does not require appellant to operate. The Packing Company can cease to operate if it does so in good faith and not for the purpose of evading the orders of the Industrial Court. That is recognized in the law itself. It can also reduce the number of employees which it hires, if it does so in good faith and not for the purpose of evading an order entered pursuant to the act.

It has been repeatedly recognized by this Court that the State has an interest in the working conditions and hours of labor in mills and manufacturing establishments and dangerous industries. The packing industry is both a dangerous industry and a manufacturing establishment. The power of the Government to prevent strikes dangerous to public peace and welfare has been recognized. *In re Debs,* 158 U. S. 564; *Wilson* v. *New,* 243 U. S. 332; *United States* v. *Railway Employees' Dept., A. F. L.,* 283 Fed. 479. That States have this power must be conceded. It must therefore be admitted that a State has the power to do that which is necessary to make effective its exercise of authority in this respect. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549.

It would be futile to give the Industrial Court authority to settle industrial disputes and not give it the

power to prescribe a temporary minimum wage. It would likewise be futile to give to the Industrial Court the power to prescribe hours of labor and a minimum wage scale, if the company could make the award ineffective by reducing the number of hours of employment to a nominal amount each month.

In *Wilson* v. *New*, 243 U. S. 332, the majority opinion recognized that the Adamson Act amounted to compulsory arbitration, which Congress had the authority to enact.

The Supreme Court of Kansas has determined that an emergency existed in the present case. That determination must stand unless palpably wrong. In the emergency rent cases it was recognized that the legislative branch of government had the power to regulate a business in order to tide over a public emergency. *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242.

The burden was upon the Packing Company to establish that the order of the Industrial Court was confiscatory. The bare presentation of evidence showing deficits in operation is not proof of confiscation.

The order of the Industrial Court, if a proper exercise of the police power over a business affected with a public interest, does not become unconstitutional by virtue of any loss of profits to the Packing Company. On this phase of the case the Packing Company's contention amounts to this: if a business is not making a profit the State is deprived of the power to regulate it in the interest of the public health, the public morals, the public safety, the public peace, and the public welfare. We do not understand such to be the effect of the decisions of this Court. The same contentions have been raised as to every regulation made under the police power since the enactment of the Fourteenth Amendment. *Mugler* v. *Kansas*,

123 U. S. 623; *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U. S. 306; *Hadacheck* v. *Los Angeles,* 239 U. S. 394.

Financial impossibility does not violate the Fourteenth Amendment, if the act and order in question are otherwise a proper exercise of the police power of the State. *Hebe Co.* v. *Shaw,* 248 U. S. 297.

The police power "is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good." *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Pierce Oil Corporation* v. *Hope,* 248 U. S. 498.

Within the doctrine of *Noble State Bank* v. *Haskell,* 219 U. S. 104, the increase was so slight and the advantage to the public and the Packing Company so great in improving the working conditions and the efficiency of its employees, that the taking, if any, did not fall within the Fourteenth Amendment. We insist, however, that in the proper exercise of the police power, a State is not limited in its application to such industries or concerns as are making a profit. The law cannot be made applicable to those concerns which are making a profit, and inapplicable to those who are losing. *Arizona Employers' Liability Cases,* 250 U. S. 400; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Powell* v. *Pennsylvania,* 127 U. S. 678; *Murphy* v. *California,* 225 U. S. 623; *Reinman* v. *Little Rock,* 237 U. S. 171.

The Packing Company objects to the act because it is claimed it does not affect employers and their employees alike. "To complain of a ruling, one must be made a victim of it." *Lehon* v. *Atlanta,* 242 U. S. 53.

The classification specified in the Industrial Court Act, § 30, is reasonable and proper.

The question for determination in this case is whether or not the legislative action has a reasonable relation to

the governmental authority to further public health, public morals, public safety, public peace, public convenience and the public general prosperity. If it has, the doctrine of freedom of contract cannot make the act unconstitutional. *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549.

The employer has no vested right in the conditions which obtained at the common law and prior to the enactment of the statute. In *Wilson* v. *New,* 243 U. S. 332, freedom of contract with reference to wages was taken away from the railroads in an emergency. Freedom of contract as to wages has also yielded to state action in those matters held not to be against the governmental power, but in aid thereof, and as to which the Government could act, such as: Measuring coal before screening, so as better to fix the miners' wages, *McLean* v. *Arkansas,* 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338; redeeming in cash store-orders issued for wages, *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; paying employees in cash at certain rates when they are discharged, *St. Louis, etc. Ry. Co.* v. *Paul,* 173 U. S. 404; *Keokee Co.* v. *Taylor,* 234 U. S. 224, and at all times as often as twice a month, *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, and in quantity rates as coal is screened, instead of weight before screening, or weight as ascertained in some other way, *McLean* v. *Arkansas,* 211 U. S. 539; *Schmidinger* v. *Chicago,* 226 U. S. 578; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338; barring a railway in a personal injury suit from pleading as a defense the receipt of some fraternal benefit, *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549, and by adding to the cost of manufacturing in addition to wages, compensation to the employees for injuries occurring in the course of employment, without regard to the question of negligence, *Arizona Employers' Liability Cases,* 250 U. S. 400; *Mountain Timber Co.* v.

Washington, 243 U. S. 219; *Thornton* v. *Duffy,* 254 U. S. 361.

Freedom of contract as to hours and conditions of labor has had to yield to the governmental power where the police power has prescribed: Eight-hour day as basic day, with overtime thereafter, *Wilson* v. *New,* 243 U. S. 332; ten-hour day in mills, factories and manufacturing establishments, and time and a half for overtime, *Bunting* v. *Oregon,* 243 U. S. 426; sixteen hours continuous service on railroads, *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Comm.,* 221 U. S. 612; *Missouri, Kansas & Texas Ry. Co.* v. *United States,* 231 U. S. 112; eight hours per day in mines and smelters, *Holden* v. *Hardy,* 169 U. S. 366; maximum hours for labor for women, *Muller* v. *Oregon,* 208 U. S. 412; *Bosley* v. *McLaughlin,* 236 U. S. 385; *Miller* v. *Wilson,* 236 U. S. 373; *Riley* v. *Massachusetts,* 232 U. S. 671; eight-hour day on public work, *Atkin* v. *Kansas,* 191 U. S. 207; liability for injury under workmen's compensation act, regardless of question of negligence, *Arizona Employers' Liability Cases,* 250 U. S. 400; *New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Same* v. *Bianc,* 250 U. S. 596; the time and place of paying seaman's wages, *The Bark Eudora,* 190 U. S. 169.

This yielding freedom of contract as to working conditions is also exemplified in the various factory acts and safety appliance laws which have been sustained, but as to which citation of authority is unnecessary.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the Court.

The necessary postulate of the Industrial Court Act is that the State, representing the people, is so much interested in their peace, health and comfort that it may compel those engaged in the manufacture of food, and clothing, and the production of fuel, whether owners or

workers, to continue in their business and employment on terms fixed by an agency of the State if they can not agree. Under the construction adopted by the State Supreme Court the act gives the Industrial Court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. *Block* v. *Hirsh*, 256 U. S. 135, 157. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.

These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer* v. *Nebraska, ante*, 390. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins* v. *Children's Hospital*, 261 U. S. 525.

It is argued for the State that such exceptional circumstances exist in the present case and that the act is neither arbitrary nor unreasonable. Counsel maintain:

First. The act declares that the preparation of human food is affected by a public interest and the power of the legislature so to declare and then to regulate the business is established in *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; and *Block* v. *Hirsh*, 256 U. S. 135.

Second. The power to regulate a business affected with a public interest extends to fixing wages and terms of employment to secure continuity of operation. *Wilson* v. *New*, 243 U. S. 332, 352, 353.

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State* v. *Edwards*, 86 Me. 102; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 254.

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn* v. *Illinois*, 94 U. S. 113; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Budd* v. *New York*, 117 N. Y. 1, 27; s. c. 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *German Alliance Insurance Co.*

v. *Lewis,* 233 U. S. 389; *Van Dyke* v. *Geary,* 244 U. S. 39, 47; *Block* v. *Hirsh,* 256 U. S. 135.

It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

It is urged upon us that the declaration of the legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the Court and that nothing but the clearest reason to the contrary will prevail with the Court to hold otherwise. To this point, counsel for the State cite *Clark* v. *Nash,* 198 U. S. 361; *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527; *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 600; *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.,* 233 U. S. 211; *Jones* v. *Portland,* 245 U. S. 217, and *Green* v.

Frazier, 253 U. S. 233. These cases are not especially helpful in determining how a business must be devoted to a public use to clothe it with a public interest so as to permit regulation of rates or prices. They were of two classes, one where condemnation proceedings were opposed on the ground that private property could only be taken for a public use and the use contemplated by the legislature was not a public one. The other was of tax suits in which the validity of the tax was denied because the use for which the tax was levied was not a public one. "Public use" in such cases would seem to be a term of wider scope than where it is used to describe that which clothes property or business "with a public interest." In the former, the private owner is fully compensated for his property. In the latter, the use for which the tax is laid may be any purpose in which the State may engage, and this covers almost any private business if the legislature thinks the State's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation.

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes, *United States* v. *Trans-Missouri*

Freight Association, 166 U. S. 290, 320; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, it usually distinguishes private from quasi-public occupations.

In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are countrywide, a short supply is not likely, and the danger from local monopolistic control less than ever.

It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects

himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly

extreme contention. *Civil Rights Cases,* 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. By § 6 reasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health and general welfare, and all are forbidden to hinder, limit or suspend them. Section 7 gives the Industrial Court power, in case of controversy between employers and workers which may endanger the continuity or efficiency of service, to bring the employer and employees before it and, after hearing and investigation, to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed and, while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.

There is no authority of this Court to sustain such exercise of power in respect to those kinds of business affected with a public interest by a change *in pais,* first fully recognized by this Court in *Munn* v. *Illinois, supra,* where it said (p. 126):

" Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, the extent of the interest he has thus created. *He may withdraw his grant by discon-*

tinuing the use; but so long as he maintains the use, he must submit to the control."

These words refute the view that public regulation in such cases can secure continuity of a business against the owner. The theory is that of revocable grant only. *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345. If that be so with the owner and employer, *a fortiori* must it be so with the employee. In involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.

We are considering the validity of the act as compelling the employer to pay the adjudged wages, and as forbidding the employees to combine against working and receiving them. The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The State can not be heard to say, therefore, that upon complaint of the employer, the effect upon the employee should not be a factor in our judgment.

Justification for such regulation is said to be found in *Wilson* v. *New*, 243 U. S. 332. It was there held that in a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial paralysis and grave loss and suffering over-

hanging the country, Congress had power to prescribe wages not confiscatory, but obligatory on both for a reasonable time to enable them to agree. The Court said that the business of common carriers by rail was in one aspect a public business because of the interest of society in its continued operation and rightful conduct and that this gave rise to a public right of regulation to the full extent necessary to secure and protect it; that viewed as an act fixing wages it was an essential regulation for protection of public right, that it did not invade the private right of the carriers because their property and business were subject to the power of government to insure fit relief by appropriate means and it did not invade private rights of employees since their right to demand wages and to leave the employment individually or in concert was subject to limitation by Congress because in a public business which Congress might regulate under the commerce power.

It is urged that, under this act, the exercise of the power of compulsory arbitration rests upon the existence of a temporary emergency as in *Wilson* v. *New*. If that is a real factor here as in *Wilson* v. *New*, and in *Block* v. *Hirsh*, 256 U. S. 135, 157 (see *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393), it is enough to say that the great temporary public exigencies recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted. Here it is said to be the danger that a strike in one establishment may spread to all the other similar establishments of the State and country and thence to all the national sources of food supply so as to produce a shortage. Whether such danger exists has not been determined by the legislature but is determined under the law by a subordinate agency and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor.

The small extent of the injury to the food supply of Kansas to be inflicted by a strike and suspension of this packing company's plant is shown in the language of the Kansas Supreme Court in this case (*Court of Industrial Relations* v. *Packing Co.,* 111 Kans. 501):

"The defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this State would not greatly inconvenience the people of Kansas; yet the plant manufactures food products and supplies meat to a part of the people of this State, and, if it should cease to operate, that source of supply would be cut off."

The Supreme Court's construction of the operation and effect of the act is controlling. The language quoted shows how drastic and all-inclusive it is.

But the chief and conclusive distinction between *Wilson* v. *New* and the case before us is that already referred to. The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Railroad Commission,* 254 U. S. 513, it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable.

The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of

the plaintiff in error whose classification as public is at the best doubtful. It is not too much to say that the ruling in *Wilson* v. *New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.

We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law.

The judgment of the court below must be

Reversed.

KENTUCKY FINANCE CORPORATION *v.* PARAMOUNT AUTO EXCHANGE CORPORATION.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 17. Argued October 5, 1922.—Decided June 11, 1923.

1. A corporation which goes into a State other than that of its creation for the lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, is a person within the jurisdiction of that State, within the meaning of the Fourteenth Amendment, for all the purposes of that undertaking, and entitled to the equal protection of the laws. P. 549.
2. As applied to such a case, a statute under which the foreign corporation, not domesticated or doing business in the State, or having property there other than that so sought to be recovered, may be compelled, as a condition to the maintenance of its action, to send its officer, with its papers and books bearing on the matter in controversy, from its domicile to the State where the action is brought, in order to submit to an adversary examination before answer, but which does not subject non-resident individuals to such

examination, except when served with notice and subpoena within the State, and then only in the county where service is had, and which limits such examinations, in the case of residents of the State, individual or corporate, to the county of their residence, violates the Equal Protection Clause. *Id.*

171 Wis. 586, reversed.

ERROR to a judgment of the Supreme Court of Wisconsin, sustaining two orders, one for examination of the plaintiff before answer, and the second striking out its complaint and dismissing its action for failure to comply with the first.

Mr. Albert K. Stebbins, with whom *Mr. Jackson B. Kemper* was on the brief, for plaintiff in error.

Mr. Walter H. Bender for defendant in error.

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

The plaintiff in error, a Kentucky corporation, brought an action of replevin in a state court at Milwaukee, Wisconsin, against the defendant in error, a Wisconsin corporation, to recover an automobile,—the right of recovery asserted in the complaint being put on the ground that the plaintiff was the owner and entitled to the possession of the automobile, that one Allen had unlawfully taken it from the plaintiff's possession at Louisville, Kentucky, had fraudulently removed it to Milwaukee and had there wrongfully delivered it to the defendant and that the defendant was unjustly withholding it from the plaintiff under some groundless claim derived from Allen. The defendant appeared and obtained from the court an order requiring the plaintiff's secretary, who resided at Louisville and was in the plaintiff's service there, to appear in Milwaukee at a fixed time before a designated court commissioner, to bring with him all papers, files and records of the plaintiff which were under his control and relevant

to the controversy, and then and there to submit to an examination by the defendant. The order was sought and granted on the ground that the examination would better enable the defendant to plead to the complaint, which as yet it had not done. The plaintiff was not engaged in any business in Wisconsin, nor had it complied with the law of that State prescribing conditions on which it might do so. It had no property in the State other than the automobile and it had gone into the State only for the purpose of instituting and prosecuting the action to repossess itself of that vehicle. Its secretary was not within the State; nor did it have any representative there other than the attorneys who were prosecuting the action in its behalf. For itself and its secretary it consented that such an examination as was sought might be had at Louisville at any time, and before any officer, the court might designate, but it objected to any order requiring that the examination be had in Milwaukee. The objection was overruled and the court put in the order a direction that the defendant tender to the plaintiff for its secretary the railroad fare from the southern boundary of Wisconsin to Milwaukee and return, being $4.74, and one day's witness fee, being $1.50. The tender was made and declined and the secretary, with the plaintiff's approval, refused to comply with the order. Because of this the court, on the defendant's motion and over the plaintiff's objection, made a further order striking the plaintiff's complaint from the files and dismissing its cause of action with costs. On appeal to the Supreme Court of the State both orders were sustained over the plaintiff's contention that they and the statute under which they were made violate the due process and equal protection clauses of the Fourteenth Amendment. 171 Wis. 586. To obtain a review of the judgment of the Supreme Court the case was brought here on writ of error under § 237 of the Judicial Code.

The statutory provisions whose validity is questioned are parts of a procedural measure, embodied in the 1917 edition [1] of the Wisconsin Statutes, abrogating prior modes of obtaining a discovery under oath and providing for an adversary examination of a "party, his or its assignor, officer, agent, or employe, or of the person who was such officer, agent, or employe, at the time of the occurrence" involved,—the examination to be had at any time after the case is begun and to take the form of a deposition "upon oral interrogatories" and be transmitted to the court like other depositions. The provisions in question are subdivision 7 of § 4096 and subdivision 2 of § 4097, which read as follows:

"In case a foreign corporation is a party, the examination of its president, secretary, other principal officer, assignor or agent or employe, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in any county of this state. The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena."

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[1] After the proceedings in the Milwaukee court some changes were made in this procedural measure, but the changes do not affect the orders in question.

"If any officer, agent, or employe, or any person who was such officer, agent or employe of a foreign corporation, at the time of the occurrence of the facts made the subject of the examination, be lawfully required to appear and testify, as provided in this chapter, either within or without the state, shall neglect or refuse so to do; or, if such person, when lawfully required, shall refuse and neglect to have with him any papers, books, files, records, things, and matters in the possession of such party relevant to the controversy, such party may be punished as for a contempt and in the discretion of the court, the pleading of such foreign corporation stricken out, and judgment given against it as upon default or failure of proof."

When the order for the examination was made other parts of the statute, applicable to all suitors other than foreign corporations, provided, notably subdivisions 3 and 6 of § 4096, that where the party against whom the examination was sought was a resident of the State the examination could be had only in the county of his residence, and where the party was a non-resident the examination could be had in the State only if he could be personally served therein with notice and subpoena and then only in the county where such service was had. In *George* v. *Bode,* 170 Wis. 411, the Supreme Court of the State held that an examination within the State could not be ordered against a party, other than a foreign corporation, residing outside and on whom personal service could not be had therein, the court saying in that connection: "The examination may be taken in this State *if* he can be personally served with notice and subpoena; the inevitable inference is that it is only if he can be so served that he can be so examined. If the provisions of sub. 3 meant that the court might fix a time and place for his examination within this State regardless of the personal service of notice and subpoena, then the pro-

visions of sub. 6 regarding nonresidents would be wholly unnecessary. These considerations move us to construe the statute as not empowering the court to order the examination of a nonresident to take place within this State when he cannot be personally served with notice and subpoena."

By subdivision 7 of § 4096, before quoted, an exception was made as to foreign corporations whereby examinations within the State might be ordered and compelled against them regardless of their non-residence and of any inability to obtain service on them in the State. Thus they were subjected to a rule much more onerous than that applicable to non-resident individuals in like situations and also more onerous than that applicable to resident suitors, whether individuals or corporations. The Supreme Court justified this difference in legislative treatment and also the order for an examination in this case on the ground that they amounted to no more than a reasonable exercise of the authority of the State over a non-resident corporation coming voluntarily into the State to seek a remedy in her courts against a resident defendant.

We take a different view of the matter. According to the sworn complaint, to the allegations of which due regard must be had, the automobile belonged to the plaintiff. It had been unlawfully taken from the plaintiff's possession in Kentucky and put in the defendant's possession in Wisconsin. It did not get into the latter State through any act of the plaintiff; nor did the acts by which it got there make it any the less the plaintiff's property. Only by going into that State and there instituting an action of replevin against the wrongful possessor could the plaintiff repossess itself of its property. Unless it took that course its property would be lost. The state court whose aid it invoked was one whose jurisdiction was general and adequate for the purpose. In the cir-

cumstances, the right to bring the action was plain. See *Charter Oak Life Insurance Co.* v. *Sawyer,* 44 Wis. 387; *Chicago Title & Trust Co.* v. *Bashford,* 120 Wis. 281; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197. To have denied that right would in effect have deprived the plaintiff of its property and have been an intolerable injustice. That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight with indifference. It was a "person" within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pacific R. R. Co.,* 118 U. S. 394, 396; *Covington & Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 592; *Smyth* v. *Ames,* 169 U. S. 466, 522; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg,* 238 U. S. 56. The latter clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws", meaning, of course, the protection of laws applying equally to all in the same situation. The words "within its jurisdiction" are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. See *Southern Ry. Co.* v. *Greene,* 216 U. S. 400; *Blake* v. *McClung,* 172 U. S. 239. And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that State than an individual would have been in the same circumstances; for, as was held in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 154, "a State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause.

Judgment reversed.

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE HOLMES concurs.

To sustain the contention that the statute violates the due process clause, it would be necessary to hold that under no conceivable circumstances could the trial court

have reasonably required the non-resident plaintiff who invoked its process to submit within the State to examination as a witness and to an inspection of relevant books and papers. If the order for examination was legal it was proper to dismiss the suit in case the order was disobeyed. That there may be cases in which oral examination of a plaintiff in the presence of defendant and by counsel familiar with the matter in issue is essential to an adequate presentation of the facts cannot be doubted. If so, it is within the power of a State to require that a plaintiff shall submit to such preliminary examination somewhere. Whether this was a case requiring such examination could be determined properly only upon hearing the parties; and for such hearing opportunity was given by the judge of the trial court. If this was a case in which oral examination and inspection of the documents was essential to an adequate presentation of the matter in controversy, it was necessary, in order to secure it, that either the plaintiff's secretary should go to Milwaukee for examination, or that defendant and counsel should go to Louisville. Whether, under such circumstances, the plaintiff should in fairness be required to come to the place where it instituted suit or the defendants be obliged to go with counsel to the plaintiff's place of residence, was, likewise, a matter which could properly be determined only upon hearing the parties; and this opportunity was given by the judge of the trial court. It cannot be that the due process clause of the Fourteenth Amendment deprives a State of the power to authorize its courts to so mould their process as to secure, in this way, the adequate presentation of a case.

To sustain the contention that the statute denies to plaintiff equal protection of the laws would seem to require the Court to overrule *Blake* v. *McClung,* 172 U. S. 239, 260, 261, and many other cases. The plaintiff, a foreign corporation not doing business within the State

of Wisconsin, was not a person "within its jurisdiction." Moreover, the statutory provision complained of put nonresidents substantially upon an equality with residents. Compare *Kane* v. *New Jersey*, 242 U. S. 160, 167. No question of interstate commerce is involved. In my opinion the equal protection clause does not prevent Wisconsin from moulding, in the case of foreign corporations, the details of its judicial procedure to accord with the requirements of justice.

COMMONWEALTH OF PENNSYLVANIA *v.* STATE OF WEST VIRGINIA.

STATE OF OHIO *v.* STATE OF WEST VIRGINIA.

IN EQUITY.

Nos. 15 and 16, Original. Argued December 8, 9, 1921; restored to docket for reargument January 9, 1922; reargued February 28, March 1, 1922; restored to docket for reargument November 13, 1922; reargued April 20, 1923.—Decided June 11, 1923.

1. A justiciable controversy between States, in the sense of the Judiciary Article, is presented when the plaintiff State, relying on the Commerce Clause of the Constitution, seeks to enjoin the defendant State from consummating a purpose, evinced by her statutory enactment, and about to be carried out by her officials, of withdrawing natural gas from an established current of commerce moving from her territory into that of the plaintiff, when such withdrawal is likely to be productive of great injury to the interests of the plaintiff as the proprietor of public institutions and schools in which the gas is largely used, and to private consumers, including most of the inhabitants of many urban communities and a substantial part of the population of the plaintiff State, whose health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. P. 591.
2. Suits by Pennsylvania and Ohio to enjoin West Virginia from enforcing an act of her legislature (c. 71, Acts 1919,) intended, through regulation of pipe line companies, to compel the retention

within West Virginia of all natural gas there produced, that might be required for local needs, were not premature in not awaiting an actual test of the act or an order of the public service commission vested by it with functions for its enforcement, since the act contains procedural, penal and remedial provisions adequate to accomplish its purpose, and the situation when the suits were brought was such that, directly and immediately, it would work a large curtailment of the volume of gas moving into the complaining States and, in a few years, with increasing demand and decreasing production, would work a practical cessation of the interstate stream which it was the object of the suits to protect. P. 592.

3. In such suits, neither the pipe line companies transporting and supplying the gas, nor consumers in the defendant State who would be benefited by an enforcement of the act, were essential parties. P. 595.
4. A State wherein natural gas is produced and is a recognized subject of commercial dealings may not require of those producing and transporting it that, in its sale and disposal, consumers in that State shall be accorded a preferred right of purchase over consumers in other States, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other States, to consumers there. P. 595.
5. The purpose of the Commerce Clause is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity of regulation. It means, that, in the matter of interstate commerce, we are a single Nation—one and the same people. P. 596.
6. The transmission of natural gas from one State to another, for sale and consumption in the latter, is interstate commerce, and a state law, whether of the State where the gas is produced or of that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce—a prohibited interference. P. 596.
7. The power of a State to require gas pipe-line companies to furnish reasonably adequate service within reasonable territorial limits, will not enable her to enforce preference to local consumption at the expense of interstate business which has grown up with her sanction and encouragement. P. 597.
8. Interference with interstate commerce in natural gas cannot be justified upon the ground that it is a measure designed to conserve the gas, as a natural product of the State in the interest of her

people, because the gas has become a necessity and the supply is no longer sufficient to satisfy local needs and be used abroad. P. 598. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229.

9. The Court, on full consideration, having reached the conclusion that the West Virginia Act is unconstitutional, and that its intended enforcement will subject the complaining States to injury of serious magnitude, operating with obvious inequity against them,—the appropriate decree is one declaring the act invalid, and enjoining its enforcement, leaving any needed regulation of the interstate commerce involved to be sought elsewhere. P. 600.

Decrees for complainants.

THESE were two suits, brought originally in this Court, to enjoin the defendant State from enforcing an enactment of her legislature (c. 71, Acts 1919,) upon the ground that it would curtail or cut off the supply of natural gas produced within her territory and carried by pipe lines into the territory of the plaintiff States, and there sold and used for fuel and lighting purposes. The act, and the facts constituting the situation to which it applied, are fully analyzed in the opinion.[1]

Mr. John W. Davis and *Mr. George E. Alter,* Attorney General of the Commonwealth of Pennsylvania, with whom *Mr. John G. Price,* Attorney General of the State of Ohio, *Mr. A. Leo Weil, Mr. E. E. Corn, Mr. Freeman T. Eagleson* and *Mr. R. G. Altizer* were on the briefs, for plaintiffs.[2]

[1] After the first argument, the Court, on January 9, 1922, ordered the cases restored to the docket for reargument with special reference to the questions whether the suit was not prematurely brought and whether the bill presents a cause justiciable between the two States parties to the action. See 257 U. S. 620. After reargument, the cases were again, on November 13, 1922, restored to the docket for reargument before a full bench.

[2] At the first hearing, the case was argued by *Messrs. Alter* and *Weil* on behalf of the Commonwealth of Pennsylvania, and by *Messrs. Price* and *Eagleson* on behalf of the State of Ohio. At the second hearing, the case was argued by *Mr. Davis* on behalf of both States and by *Mr. Alter* on behalf of Pennsylvania.

The Act of West Virginia is an unconstitutional interference with established courses of interstate commerce.

The course of the gas from the well to the ultimate consumers in Pennsylvania and Ohio is determined by existing contract relations, public service duties in other States, long-established courses of business and the physical structures adapted thereto. The gas that goes into other States is actually in interstate commerce from the time it leaves the wells until it reaches the ultimate consumers. *United Fuel Gas Co.* v. *Hallanan*, 78 W. Va. 396; 257 U. S. 277; *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U. S. 23.

The whole design of the West Virginia statute is to divert or retain for the benefit of West Virginia consumers natural gas that in the absence of the statute would go to consumers in the other States through these established channels of interstate commerce. This intention is made manifest:

(*a*) By the consideration of the extent and character of the industry to which it applies, from which it appears that the full supply of gas that the statute requires to be furnished can be furnished only at the expense of consumers in other States. (*b*) By the history of the efforts of other States and of West Virginia to secure for themselves the exclusive or preferential enjoyment of their natural products, of which the present act is the logical development. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, and cases there cited; *United Fuel Gas Co.* v. *Hallanan, supra.* (*c*) By the very terms of the act, which in effect if not in words, require that all gas produced in West Virginia shall be supplied to West Virginia consumers so far as they want it for any purpose, domestic, industrial, or other. (*d*) By the admissions in the answers, which in effect state that the purpose of the act is to supply fully the requirements of West Virginia consumers out of the abundance of gas produced in the State now going to supply consumers in other States.

The statute, to the extent that it requires natural gas that otherwise would go to other States to be diverted or retained for the use of West Virginia consumers, is equivalent to a prohibition upon the transmission of such gas to such other States and is void as a discrimination against interstate commerce. *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, and cases there cited; *Ward* v. *Maryland,* 12 Wall. 418; *Woodruff* v. *Parham,* 8 Wall. 123; *Welton* v. *Missouri,* 91 U. S. 275; *Guy* v. *Baltimore,* 100 U. S. 434; *Walling* v. *Michigan,* 116 U. S. 446; *Minnesota* v. *Barber* 136 U. S. 313; *Brimmer* v. *Rebman,* 138 U. S. 78.

It may be conceded that state regulations that have to do primarily with matters of local concern, calling imperatively for regulation, and that do not discriminate against or burden interstate commerce, are unobjectionable. *Pennslyvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23. It is an open question, not involved in this case, whether West Virginia, in the absence of congressional action, could prescribe regulations more directly affecting interstate commerce and designed to secure equality among consumers and the most advantageous use of the gas produced in her borders irrespective of state lines, for example, regulations designed to secure a preference for domestic consumers everywhere over industrial consumers. There is no discrimination in favor of consumers in Pennsylvania and Ohio and the act under consideration is not designed to prevent such discrimination. Its intention and necessary effect are to produce discrimination in favor of West Virginia.

The theory that there was an antecedent duty resting on the natural gas companies in West Virginia to supply fully the requirements of their West Virginia consumers before supplying gas for the use of consumers in other States does not rest on any special provisions contained in their charters, or on any contract obligations

into which they have entered. The preëxisting obligation, if any, must be inferred from the fact that the companies in question had the power of eminent domain under the West Virginia law and were engaged in the business of supplying gas to the public in West Virginia.

The obligations of the companies in West Virginia to supply gas for the use of consumers in Pennsylvania and Ohio were assumed before there was any question of the sufficiency of their supplies of gas both to meet fully the requirements of their West Virginia consumers and to meet fully the obligations assumed by them to furnish gas to or for the use of consumers in other States. If the order in time of the assumption of obligations were a matter of importance, the fact is that in large measure the obligations to furnish gas for use in other States antedated the obligations assumed to furnish gas in West Virginia. But it is believed that the order in time is of no consequence. The public service duties in West Virginia and elsewhere and the contract obligations were rightfully undertaken and were on a parity. When, by reason of subsequent events, the supply of gas has become insufficient to meet fully the wants of West Virginia consumers and the commitments for the supply of consumers in other States, the burden of the shortage must be borne on an equitable basis that recognizes this parity of obligation.

The fact that the companies in West Virginia were organized under the laws of that State, or were permitted to do business there and were given the power of eminent domain or were denominated common carriers, does not invalidate contracts made by them to deliver gas in interstate commerce or import into their interstate contracts and commitments a condition that they shall be subject to a prior obligation on the part of the West Virginia companies to supply fully the requirements of West Virginia consumers. A railroad organized under the laws

of a State and engaging in interstate commerce is not under an implied duty to devote its facilities to meeting fully the requirements of intrastate traffic in case they are insufficient to fully meet both intrastate and interstate requirements. Neither a public service corporation nor other corporation should assume obligations that it is unable to perform. But the situation here does not concern the propriety of a public service corporation's extending its service or entering into contracts and commitments that will interfere with its due performance of the public service duties to which it is already subject, but has to do with a system that already exists and has existed for many years and has supplied adequate service in all the States alike.

The act cannot be sustained on the ground that it is the exercise by West Virginia of a right to impose new duties on corporations of her creation or which she permits to do business within the State, or on any similar ground.

The question whether West Virginia might originally have imposed upon corporations of her creation or upon corporations which she permitted to do business within the State the condition that they should supply fully the requirements of West Virginia consumers before taking any gas out of the State is not involved. On principle the validity of such a statute may well be doubted. There is here, however, an existing system of interstate contracts, an established course and flow of interstate commerce, and West Virginia cannot under the guise of imposing new duties on corporations of her creation or new conditions on foreign corporations doing business within the State work a discrimination against or impose burdens upon this interstate commerce. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1.

The statute in fact applies to individuals and partnerships as well as to corporations; it applies not only to

those who are engaged in the business of furnishing gas to the public, but to all those who are furnishing or are required by the common law or by statute to furnish gas for the use of the public or any part of the public; it requires every person or corporation who is furnishing gas in any place to furnish it in every place that can be reached directly or indirectly by the lines of such person or corporation, and every person, firm or corporation who is furnishing gas for special purposes to furnish it for all purposes. It fastens not merely upon part but upon all the gas produced by any of the persons named, "to the extent of his supply produced in this state." It gives to the West Virginia consumer a preferential right which in times of scarcity must surely blossom into absolute monopoly. It can be sustained only on the theory that the right of all the persons and corporations to whom it applies to engage in interstate commerce in natural gas and all contracts entered into by them in furtherance of such commerce are subject to the prior performance by such persons and corporations of every obligation in favor of West Virginia consumers that the legislature of West Virginia may see fit at any time to impose. But such a theory substantially claims for West Virginia the right to refuse to allow her natural gas to be taken out of the State, which was the very right denied to Oklahoma in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229.

There is no time after the gas comes into the possession of the companies in West Virginia when it is not in interstate commerce. When it first comes out of the ground or is first purchased from the local producer it comes into the possession of the public utility company, dedicated, so far as concerns the proportion thereof necessary to fulfill interstate contracts and obligations, to interstate commerce. The proportion that has an interstate destination is fixed from the first moment by existing contracts and relations. *United Fuel Gas Co.* v. *Hallanan*, 87 W. Va. 396; 257 U. S. 277.

But it may be said that the obligation of the statute goes back of the production or purchase by the West Virginia utility company, so that the gas first comes into existence as a possible subject of interstate commerce already charged with the obligation created by the statute. The answer to this suggestion is that the commerce clause is not confined in its operation to commodities in transit in interstate commerce. It renders void legislation that would forbid the putting of property into interstate commerce or the acquisition of property for delivery in fulfillment of interstate commerce contracts just as effectively as it renders void legislation interfering with the transportation of goods after they are in interstate commerce. The State may put many restrictions upon the production of gas, or on the manufacture of beer or on any other subjects of production and manufacture; it may in the exercise of its police powers prohibit altogether the manufacture of things deemed noxious and any resulting effect on interstate commerce is indirect and incidential; but if the State permits the production, or creation, or acquisition of a subject of commerce, it cannot limit such subject of commerce to intrastate commerce. It can no more by discriminatory legislation forbid the creation of a subject of interstate commerce than it can forbid its transportation. *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Geer* v. *Connecticut,* 161 U. S. 519.

The bill of complaint in each case presents a cause justiciable between the two States parties to the action.

Pennsylvania and Ohio sue to protect themselves and their citizens in the enjoyment of the natural gas service that has grown up under the free flow of interstate commerce against interference with that service by the wrongful act of West Virginia. The right they assert is their right and the rights of their citizens to receive natural gas that would come to them in the ordinary course of

interstate commerce following its accustomed channels and unimpeded by any illegal obstruction. They do not set up any title by contract or grant in the gas produced in West Virginia but each State rests its cause on the fact that there has grown up and is established a definite course of interstate commerce through the pipe line companies of West Virginia and the distributing systems in the plaintiff State, on which its institutions and inhabitants are dependent for their supply of fuel and which course of interstate commerce is threatened by the act of West Virginia. In a broad sense, the unlawful obstruction of interstate commerce threatened by West Virginia would constitute a nuisance, which each State has the right to have enjoined. The cause presents all the elements necessary to sustain an ordinary cause of action between individuals, to wit, a wrongful and unlawful act and special injury. The relation of cause and effect between the act threatened by West Virginia and the injury to the plaintiff States and their citizens would be immediate, whether the gas passes from its source in West Virginia to the consumers in the plaintiff States through the lines of a single company, or successively through the lines of several companies, and whatever the arrangements may be between the successive companies through whose lines it may pass. It is sufficient that the course of the gas from its source in West Virginia to the consumers in the plaintiff States is so fixed by existing facilities, business arrangements, contracts and custom as to establish the relation of cause and effect between the threatened interference on the part of West Virginia and the apprehended injury to the plaintiff States and their citizens.

The cause falls within the class of controversies justiciable between States.

The decisions indicate that the jurisdiction embraces every controversy between States determinable by any

existing or discoverable rule which may be deemed to fix their relative rights; in other words, every controversy which if it arose between independent States might be determined by arbitration and even controversies which as between independent States would not be justiciable because involving questions of independence or sovereignty or other matters of vital interest. Indeed, it would seem that the jurisdiction must include every controversy growing out of a grievance of one State against another, for a State asserting a grievance must base it upon the violation of some existing or assumed principle fixing their relative rights. If the principle exists and the violation is proved a cause of action is made out; while if the principle does not exist, judgment must go against the complaining State upon the merits. *Cohens* v. *Virginia,* 6 Wheat. 264; *Rhode Island* v. *Massachusetts,* 12 Pet. 657; *Kansas* v. *Colorado,* 206 U. S. 46.

But whatever limits there may be upon the jurisdiction of the Supreme Court in controversies between States to which no existing rule of international or municipal law is applicable, the decided cases appear clearly to establish that every controversy between States is justiciable when (1) it involves a claim which if it arose between independent sovereignties might properly be prosecuted by diplomatic representation, reprisal or war, and (2) which is determinable by existing rules of international or municipal law. *Missouri* v. *Illinois,* 180 U. S. 208; 200 U. S. 496; *Kansas* v. *Colorado,* 185 U. S. 125; 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230; 237 U. S. 474; *New York* v. *New Jersey,* 256 U. S. 296.

The controversies between Pennsylvania and West Virginia and between Ohio and West Virginia are clearly justiciable within the principles so established. In each case there is a controversy between two States, involving a grievance asserted by one against the other. The asserted grievance is that the State complained against is

threatening to do something that is forbidden by the Constitution governing the relations between the States and which will cause injury to the complaining State and its citizens. The Constitution itself and a long line of decisions interpreting the meaning of the Commerce Clause furnish the rules of law for the determination of the controversy.

To the suggestion that the suit cannot be maintained because it is brought to redress the grievance of individual citizens there are two answers: (1) Each of the plaintiff States sues as well in its own behalf in the capacity of owner and proprietor of its institutions, etc., and guardian of their inmates as in the capacity of representative or *parens patriæ* of its citizens. (2) In suing in a representative capacity the States do not represent individual citizens but the consuming public served by the public utilities companies that derive their gas from West Virginia.

While a State may not sue in this Court to promote purely private interests, it may properly sue to protect the health and comfort of its inhabitants and the value of their property, though in its sovereign capacity or in its capacity as proprietor it has no interest in the controversy, and though the danger it seeks to avert does not threaten all of its inhabitants, or does not threaten all of them in like degree. *Missouri* v. *Illinois,* 180 U. S. 208; 200 U. S. 496; *Kansas* v. *Colorado,* 185 U. S. 125; 206 U. S. 46; *New York* v. *New Jersey,* 256 U. S. 296. The line between the cases in which a State may bring suit as representative of its citizens and the cases in which it will be regarded as not a real party to the controversy is not hard to find. A State may not use its power of eminent domain or its taxing power for the benefit of an individual or for the benefit of defined individuals, however numerous. It may, however, use its power of eminent domain and its taxing power for the benefit of the public. But

the public does not mean necessarily all the people. So a State may maintain a suit for the benefit of the public though the public immediately concerned is less than all. The same principles that determine in other fields of action what are public and what are private purposes will serve to determine the cases in which a State may sue as representative of its citizens. Pennsylvania and Ohio sue for the benefit of all their citizens who are or may be dependent on the public service companies obtaining their supplies of natural gas from West Virginia. These citizens constitute the same public in whose behalf these States authorize their public service companies to exercise the power of eminent domain, and in whose behalf they assume the right to regulate the rates and service of the public service companies. This great class, including a great proportion of the population of each State, must be regarded not as the mere sum of the individuals of which it is at any given time composed, but as a part or factor of the community itself.

It is too late to question the right of a State to maintain a suit in this Court based on the Commerce Clause of the Constitution to protect its own proprietary rights. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 9 How. 647; 11 How. 528; 13 How. 518; 18 How. 421.

The Commerce Clause establishes, in the absence of congressional action to the contrary, the right to free trade between the States. It is a right which is the subject no less of judicial than of legislative protection. Whenever it is interfered with by state action, those injured, whether individuals or a State in its proprietary capacity, are entitled to resort to the courts for relief. In addition a State may sue as the representative of her citizens when there is special injury done or threatened to the special public whose interest and welfare it is the function of the State to safeguard.

The law of West Virginia is wrongful; through its effect upon an established and definite course of interstate

commerce it reaches into the territory of the plaintiff States, and there does injury to the plaintiff States and their citizens. The liability of West Virginia to suit rests upon the same principle declared in *Kansas* v. *Colorado,* 206 U. S. 46, 97, 98.

Rhode Island v. *Massachusetts,* 12 Pet. 657, determined for all time that controversies between States are not excluded from the cognizance of this Court because they involve questions that are political in their nature, and *Missouri* v. *Illinois,* 180 U. S. 208; 200 U. S. 496; *Kansas* v. *Colorado,* 185 U. S. 125; 206 U. S. 46, and *New York* v. *New Jersey,* 256 U. S. 296, are illustrations of the fact that a State is not immune from suit on account of the extra-territorial effect of its own laws, because such laws also immediately affect persons or property within its own jurisdiction, and have a final object which if sought to be attained by lawful means would be a proper aim for state legislation.

These suits are not prematurely brought.

Mr. George M. Hoffheimer, with whom *Mr. Edward T. England,* Attorney General of the State of West Virginia, *Mr. Fred O. Blue, Mr. Philip P. Steptoe* and *Mr. William S. John* were on the briefs, for defendant.[3]

In neither case does the bill present a cause justiciable between the two States.

Whether a suit is against a State, in the constitutional sense, is a matter of substance and effect, not to be determined by the names of the parties.

Conceding that no hard and fast line has yet been drawn delimiting the justiciable and the non-justiciable between States, *Missouri* v. *Illinois,* 180 U. S. 208, 241, we think that a brief survey of the cases and the mode of

[3] At the first hearing the case was argued on behalf of the State of West Virginia by *Messrs. Hoffheimer, Blue* and *Steptoe.* At the second hearing it was argued by *Messrs. Blue* and *Hoffheimer.*

their disposition, *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 287, 297, readily marks the present litigation as falling within the latter category. It is not the "subject of judicial cognizance," *Hans* v. *Louisiana,* 134 U. S. 1, 15; *Louisiana* v. *Texas,* 176 U. S. 1, 15; *Missouri* v. *Illinois,* 180 U. S. 208, 233, or "susceptible of judicial solution." *Louisiana* v. *Texas,* 176 U. S. 1, 18, 22; *Missouri* v. *Illinois,* 180 U. S. 208, 233, 234.

Of the cases of which this Court has taken original jurisdiction the most numerous have been those relating to the boundaries or territorial integrity.

In another class of cases jurisdiction was exercised because of a nuisance by the invasion of the plaintiff States by sewerage or disease germs polluting their waters and soil, to the injury, actual or threatened, of the lives, health and property of the citizens of those States. Examples are *Missouri* v. *Illinois,* 180 U. S. 208; 200 U. S. 496; and *New York* v. *New Jersey,* 256 U. S. 296. Falling within the same category is *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230.

These nuisance cases are identical in principle with the boundary cases. The sovereign rights and territorial integrity of a State may be as effectually invaded or infringed by the casting or precipitation thereon of intangible, but nevertheless noxious, bacteria or gases as by visible seizure of its lands. *Kansas* v. *Colorado,* 185 U. S. 125; 206 U. S. 46, was similar in aspect. In *Pennsylvania* v. *Wheeling and Belmont Bridge Co.,* 13 How. 518, the suit was treated "as brought to protect the property of the State."

Another class of cases has been those of contract,—of indebtedness from one State to another, or to the creditors of the latter, from the debts to whom the plaintiff was entitled to exoneration at the hands of the defendant. *South Dakota* v. *North Carolina,* 192 U.S. 286; *Virginia* v. *West Virginia,* 206 U. S. 290; 220 U. S. 1; 238 U. S. 202;

United States v. *North Carolina,* 136 U. S. 211; *United States* v. *Michigan,* 190 U. S. 379. Comparison of *South Dakota* v. *North Carolina,* and *Virginia* v. *West Virginia,* with *New Hampshire* v. *Louisiana,* 108 U. S. 76, indicates that jurisdiction in the former cases was predicated upon the property rights in the plaintiff States or the protection of their corporate credit.

But we have found no instance in which this Court has entertained original jurisdiction predicated solely upon the right of the plaintiff State as *parens patriae,* or as the representative of its citizens, to enforce their private grievances or to protect their private claims arising out of the enforcement of the law of another State, in the absence of a special or additional right of the character above indicated in the plaintiff State itself. Vide, *New Hampshire* v. *Louisiana,* 108 U. S. 76; *New York* v. *Louisiana,* 108 U. S. 76; *Louisiana* v. *Texas,* 176 U. S. 1; *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 220 U. S. 277; *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 220 U. S. 290. And see: *North Dakota* v. *Chicago & N. W. Ry. Co.,* 257 U. S. 485; *Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518, 559; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 20.

From the foregoing it is evident that a suit by one State against another cannot be predicated upon the mere relation of *parens patriae;* that something more than a willingness or desire to vindicate the supposed rights of the plaintiff's citizens is requisite; and that the multiplicity or unanimity of complaints by the citizens of the one State against the acts of the other cannot, by a process of aggregation or combination, be erected into a controversy between States or present a cause justiciable between such States.

It follows that no justiciable cause arises by reason of the alleged threatened deprivation or shortage of gas supply to the inhabitants of the plaintiff States. And

much the more is this true in respect of the alleged infringement of constitutional guaranties of companies engaged in gas transportation, or of citizens of the plaintiff States alleged to have made investments in West Virginia, "since it is a well settled rule of this Court that it only hears objections to the constitutionality of a law from those who are affected by its alleged unconstitutionality in the features complained of." "The plaintiffs must show that their own rights are infringed." *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571; *New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531; *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282.

If original jurisdiction is attempted to be sustained because of the supply of West Virginia gas to municipalities or public institutions in Ohio and Pennsylvania, the jurisdiction is equally negatived by the above cited cases. *Louisiana* v. *Texas,* 176 U. S. 1, 18; *Missouri* v. *Illinois,* 180 U. S. 208, 249; *Kansas* v. *Colorado,* 185 U. S. 125, 145.

The alleged right to West Virginia gas claimed by the plaintiffs for themselves and their inhabitants, if such right exists, is a right, not against the State of West Virginia, but against the gas companies to whom the plaintiffs and their inhabitants look for their gas supply. If the right exists against the West Virginia public service gas companies by whom the gas is furnished, either directly or remotely, it is manifest that the right can rise no higher than that of the companies themselves. As against the State of West Virginia the claim in substance is, not that West Virginia has directed its action against the plaintiffs, but that by the exercise of governmental power against the public service companies within the boundaries of West Virginia, the plaintiffs are, or may be, affected consequentially.

Whether the West Virginia companies shall furnish gas to or for the plaintiffs, is at most a matter of controversy between such companies and the plaintiffs, and not a controversy between the plaintiffs and West Virginia, within the meaning of the Constitution; and the question whether West Virginia may validly regulate its public service corporations in the manner attempted by the statute in litigation, involves a controversy between West Virginia and such corporations, and is not a controversy between States within the meaning of the Constitution.

The suits were not necessarily premature merely because no action was taken by West Virginia or its Public Service Commission under the statute. The suits were premature in the sense that, at the time of their commencement, the practical operation of the statute had not been tested, and no threatened injury of serious magnitude was clearly or convincingly proved, or susceptible of clear or convincing proof. *Grand Trunk Ry. Co.* v. *Michigan Railroad Comm.,* 231 U. S. 457; *Kansas* v. *Colorado,* 206 U. S. 46, 117; *Missouri* v. *Illinois,* 200 U. S. 496, 521; *New York* v. *New Jersey,* 256 U. S. 296; and other cases.

These cases must be considered in the light of the peculiar nature of gas and of the gas companies, and the exceptional rules of law applicable thereto. *Brown* v. *Spilman,* 155 U. S. 665; *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300; *Westmoreland Gas Co.* v. *Dewit,* 130 Pa. St. 235; *Bacon* v. *Walker,* 204 U. S. 311.

The statute does no more than to declare, and to prescribe appropriate procedure for the enforcement of, the obligation of each public service gas company to furnish reasonably adequate service within reasonable territorial limits. It does not require unreasonable service or unreasonable extension by any company.

The public service gas companies were and are obligated, irrespective of the statute in contest, to furnish

West Virginia consumers a reasonably adequate supply of gas, and they cannot lawfully abandon or disable themselves from performing the obligation.

It was within the right and power of the State to regulate the gas companies. The right and power are based on: (1) The implied condition accompanying the grant of rights and privileges to the companies; (2) the reserved power to alter or repeal corporation charters and laws; and (3) the police power.

The statute is a legitimate exercise of the police power.

From the social and economic dependency on gas in reasonably adequate volume, the domestic and industrial evils resulting from the lack of such service, and the "fact accomplished" that there is now, and for several years has been, insufficient West Virginia gas to permit at once the full measure of service in West Virginia and the other States to which it was and is transported, admittedly there must be, in the nature of things, a limitation upon the service and consumption of gas, in respect of either the purposes of the consumption or the territorial area of supply.

In this situation, it was and is incumbent on some one to formulate and enforce suitable regulations. And the Congress not having acted, even in respect of the interstate transportation of gas (Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544; *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, 30), the exercise of a regulatory power must emanate either from the State or from the gas companies.

As to the police power over the general subject, see *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61.

The police power is "one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." *District of*

Columbia v. *Brooke,* 214 U. S. 138, 149. As said in *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 66, 77, "this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and . . . all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548."

The public welfare to which the protection of the power extends, embraces not only public health, morals, and safety, but also the public convenience and the general prosperity. *Chicago, Burlington & Quincy R. R. Co.* v. *Illinois,* 200 U. S. 561; *Bacon* v. *Walker,* 204 U. S. 311; *Eubank* v. *Richmond,* 226 U. S. 137; *Sligh* v. *Kirkwood,* 237 U. S. 52; *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 66.

The scope of this power, and its flexibility in meeting and dealing with modern conditions, are illustrated in *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, where state regulation of fire insurance rates was upheld; and, again, in *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539; *Caldwell* v. *Sioux Falls Stockyards Co.,* 242 U. S. 599; and *Merrick* v. *Halsey,* 242 U. S. 568, upholding "Blue Sky laws."

Measures to safeguard the business prosperity of the State are exampled by the prohibition of monopolies and combinations in restraint of trade, *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86; *Grenada Lumber Co.* v. *Mississippi,* 217 U. S. 433; *Standard Oil Co.* v. *Missouri,* 224 U. S. 270; *International Harvester Co.* v. *Kentucky,* 234 U. S. 199; of unfair competition, *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; and of the sale or shipment of products detrimental to the business reputation of an important industry, *Sligh* v. *Kirkwood,* 237 U. S. 50.

If it be true that in any instance the State may legislate in the interest of the health and general business prosperity of its inhabitants, it must follow that health may be preserved against injury by cold as well as by disease

or adulteration of food, and that the industry of the State may be protected as well from destruction by deprivation of necessary fuel as from mere injury by practices hurtful to its trade or reputation. Upon this ground, aside from any peculiar relations or obligations affecting public service corporations, it is plain that the State may legislate in defense of its people and its industries in prevention of a real and present danger arising from deprivation of gas.

Nor is it an answer that the State did not interpose earlier. While the gas supply was adequate there was no occasion for the exertion of the State's power. And regardless of this, the delay did not detract from the power. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Thornton* v. *Duffy,* 254 U. S. 361, 369.

Assuming, as we have already shown, that the supply of industrial gas is, by the holding out by the gas companies of their readiness and willingness to furnish such gas (subject only to the needs of domestic consumers) and by the settled law of West Virginia, a public service, *Clarksburg Light Co.* v. *Public Service Comm.,* 84 W. Va. 638; *Kelly Axe Mfg. Co.* v. *Public Service Comm.,* 87 W. Va. 105; *Mill Creek Coal Co.* v. *Public Service Comm.,* 84 W. Va. 662; there is no distinction in principle between that service and the domestic service. Between the supply of gas for domestic purposes and for industrial use there is but one difference. The service differs only in degree of necessity because the hardship is personally more acute in case of failure of the domestic supply than where the failure pertains to the industrial supply. This, of course, constitutes a sufficient basis for classification, preferential to the domestic consumer. The uses to which gas may be applied in West Virginia was and is a local question for the determination of the legislature of that State; and the objections of the plaintiffs go, as said in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 211, " not to the

power to make the regulations, but to their wisdom." *Lindsley* v. *Nat. Carbonic Gas Co.*, 220 U. S. 61, 76, 77; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300.

As to forebodings that the enforcement of the statute as to industrial consumers will absorb all the West Virginia gas, these are wholly speculative, and "mere prophecies which are ventured." *Tanner* v. *Little*, 240 U. S. 369, 385.

If a decision of the Commission as to reasonable adequacy, in respect of either volume or economy of consumption, is deemed erroneous, the gas companies will have their day in court. Such questions can be answered when they arise.

The burden being on the plaintiffs to show a violation of constitutional guaranties there can be no declaration of unconstitutionality upon mere loose opinion or conjecture.

The plaintiffs claim through the gas companies, and have no higher right or title to relief.

The statute works no impairment of obligation of contracts, nor does it deprive of property without due process of law, nor deny equal protection of the laws.

If the State may validly compel the rendition of adequate service to its people by public service corporations operating within its borders, the State's authority cannot be defeated by expenditures in aid of evasion of that service, or contracts or arrangements having that result.

The contention that the seven companies engaged in business, and that their pipe lines and pump stations were constructed and are used as facilities for the service of consumers in foreign States, is fallacious.

If fairly compensated, the gas companies are not entitled to refuse to West Virginia an adequate service merely because a greater remuneration can be obtained elsewhere.

Whatever may be the result in reference to property devoted to the service of consumers in other States or to

contracts made with them, or consequentially affecting their service, the constitutional power of West Virginia, nevertheless, remains clear and certain. The expenditures for that property and those contracts were made subject to the police power of the State and find no protection in the constitutional provisions against the impairment of the obligation of a contract or the deprivation of property without due process of law or any other guaranty of the State or Federal Constitution. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549; *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 67; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 348; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342; *Union Dry Goods Co.* v. *Georgia Public Service Corp.,* 248 U. S. 372; *Erie R. R. Co.* v. *Board of Public Utility Commissioners,* 254 U. S. 394.

What has been said above applies equally to the claim of abridgment of privileges and immunities of citizens of other States or of the United States. *Barbier* v. *Connolly,* 113 U. S. 27; *Western Union Tel. Co.* v. *Commercial Mill Co.,* 218 U. S. 406.

The plaintiff States are not citizens of any State or of the United States, *Stone* v. *South Carolina,* 117 U. S. 430; *Postal Tel. Cable Co.* v. *Alabama,* 155 U. S. 487; *Title Guaranty & Surety Co.* v. *Idaho,* 240 U. S. 136; and the gas companies are not citizens within the privileges and immunities clauses of the Federal Constitution. *Blake* v. *McClung,* 172 U. S. 239; *Western Turf Association* v. *Greenberg,* 204 U. S. 359; *Selover* v. *Walsh,* 226 U. S. 112.

The statute does not regulate interstate commerce.

We think that to the objection, based on the Commerce Clause, there are several answers:

(1) The West Virginia public service corporations have no right to engage in interstate commerce, except in subordination to the performance of their duties to the State;

(2) If interstate commerce is affected, the effect is only indirect and incidental, and therefore, in the absence of congressional enactment, the effect is not violative of the Commerce Clause; and

(3) The duties of these corporations to the State in respect of their gas exist not only during interstate commerce therein, but also before the entry of the gas into that commerce; and the gas enters interstate commerce subject to those duties and the operation of the statute.

The question here is, not whether a State may prohibit or restrict the transportation of natural gas from its territory into another State, but whether the State may require companies—owing to its people the obligation of adequate service—to perform that service, even though the performance may involve the intrastate consumption of gas which otherwise might be transported to another State.

If the gas companies owe a duty to the people of West Virginia, the performance of that duty cannot be evaded merely because they prefer to enter into interstate commerce rather than to perform it. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 348; *Manufacturers Light Co.* v. *Ott,* 215 Fed. 940, 951; *South Covington Ry. Co.* v. *Kentucky,* 252 U. S. 399; *Erie R. R. Co.* v. *Public Commissioners,* 254 U. S. 394.

If it be true, that a gas company, or its business, or the commodity in which it deals, is affected by the public interest, precedents are not wanting to show that the principles relating to interstate commerce in ordinary goods and chattels are inapplicable. *Geer* v. *Connecticut,* 161 U. S. 519; *New York* v. *Hesterberg,* 211 U. S. 31.

It is no answer to what has been said that if a State can compel a supply of gas to its citizens and thereby prevent its exportation to another State, the other State may

impose a similar restriction on the interstate shipment of corn, wheat, lumber or other commodities. Those commodities lack entirely the exhaustibility and other peculiarities of gas. Until their production or distribution shall become affected with a public interest in the sense that the gas business is so affected, no such case will occur. *Tanner* v. *Little,* 240 U. S. 369; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389.

In *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, neither the corporations and individuals who were plaintiffs, nor their gas, could be said to be affected with a public use, since the persons themselves were not engaged in the business of public gas supply in Oklahoma, and their gas was required by no present necessity in that State. The Oklahoma statute was not in substance, or even ostensibly, enacted in regulation of a public utility, so as to render merely indirect or incidental any decrease in the volume of gas transported out of the State. On the contrary, the principal and direct design of the Oklahoma statute was to prevent exportation of gas. *Haskell* v. *Kansas Natural Gas Co.,* 224 U. S. 217, 221.

The later decisions in *Public Utilities Comm.* v. *Landon,* 249 U. S. 236, and *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U. S. 23, as well as *Franke* v. *Johnstown Fuel Supply Co.,* 70 Pa. Super. Ct. 446, recognize the local character of gas supply and its regulation, even though the gas has been in interstate commerce.

Interference, if any, with interstate commerce is indirect and incidental. The direct purpose of the law is to compel the performance of a public duty by those obligated to perform it, and by a legitimate exercise of the police power to protect against the injury to persons and property consequent on the failure to perform the public duty. Conceivably, interstate commerce might not be affected at all, and this is presently true, if, as the evi-

dence indicates, the gas companies hold in reserve sufficient territory to supply the deficit without subtracting from the quantity of gas transported to other States. But even if the quantity of gas entering into interstate commerce should be diminished as a consequence of the statute, the authorities well establish that the Commerce Clause would not stand in the way. To argue to the contrary would be to contend that the State would stand powerless to relieve its citizens from the most flagrant discrimination, or even against a total deprivation of gas, at the hands of its public service corporations, which, for gain, preferred to serve consumers in other States.

The validity of state legislation incidentally or indirectly affecting interstate commerce, even though it diverts to the local need commodities or facilities which otherwise might go into or aid interstate commerce, has repeatedly been upheld. *Minnesota Rate Cases,* 230 U. S. 352; *Kidd* v. *Pearson,* 128 U. S. 1; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238; *Geer* v. *Connecticut,* 161 U. S. 519; *New York* v. *Hesterberg,* 211 U. S. 31; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 348; *Sligh* v. *Kirkwood,* 237 U. S. 52; *Jamieson* v. *Indiana Natural Gas Co.,* 128 Ind. 555.

The police power of the State embraces, to this extent of indirect or incidental interference, commodities which are actually in interstate commerce. The fact that they are in such commerce does not necessarily withdraw them from the operation of reasonable state laws. The repeatedly held valid state inspection and labelling laws, designed to promote public health and safety, though applied to commodities in original packages, are a commonplace example. The rule is the same as to the instrumentalities of interstate commerce.

Though interstate commerce be incidentally or indirectly affected, the police power of the State includes the

authority to compel a reasonably adequate service to the communities within it at the hands of a public service corporation, though it is engaged in interstate commerce; and up to the point where reasonably adequate local facilities are afforded by a public service corporation, the State may exercise a free hand. Until that point is passed, interstate commerce is not unconstitutionally infringed. *Chicago, Burlington & Quincy R. R. Co.* v. *Railroad Commission,* 237 U. S. 220; *Mobile, etc. R. R. Co.* v. *Mississippi,* 210 U. S. 187; *Gladson* v. *Minnesota,* 166 U. S. 427; *Lake Shore, etc. Ry. Co.* v. *Ohio,* 173 U. S. 285; *Wisconsin, etc. R. R. Co.* v. *Jacobson,* 179 U. S. 287; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corp. Comm.,* 206 U. S. 1; *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612; *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262; *Washington* v. *Fairchild,* 224 U. S. 510; *Grand Trunk Ry. Co.* v. *Michigan R. R. Comm.,* 231 U. S. 457; *Chicago, M. & St. P. Ry. Co.* v. *Iowa,* 233 U. S. 334; *Michigan Central R. R. Co.* v. *Railroad Comm.,* 236 U. S. 615; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.,* 238 U. S. 275; *Seaboard Air Line Ry. Co.* v. *Railroad Comm.,* 240 U. S. 324.

But the objection that interstate commerce is interfered with, fails entirely when the transaction is analyzed in point of time. The duty of reasonably adequate service rests on the gas company in its character of a public service corporation. It exists prior to and contemporaneously with its acquisition of the gas, wherewith it is to perform its duty.

That the production of gas, or coal, or any other commodity, though intended for interstate commerce, is not interstate commerce, is now settled. See *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Public Utilities*

Co. v. *Landon,* 249 U. S. 236; *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U. S. 23; *Franke* v. *Johnstown Fuel Supply Co.,* 70 Pa. Super. Ct. 446.

Before gas can enter into interstate commerce, it must become property susceptible of such commerce. Until it is reduced to possession by being brought into the well or to the surface of the earth, there is no property in it, save as a qualified right thereto as part of the land. *Walls* v. *Midland Carbon Co.,* 254 U. S. 300; *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229; *Peoples Gas Co.* v. *Tyner,* 131 Ind. 281; *Hall* v. *Vernon,* 47 W. Va. 295.

Until reduced to possession, the gas is part of the real estate. *Brown* v. *Spilman,* 155 U. S. 665; *Carter* v. *Tyler County Court,* 45 W. Va. 806; *Preston* v. *White,* 57 W. Va. 278; *Warren* v. *Boggs,* 83 W. Va. 89; and other cases.

It follows, therefore, that at the very moment when gas produced by or for a public service gas company becomes property, and the subject of commerce, it finds the gas company incumbered with the obligation of public service, and subject to the statute. This is true, even though the gas is straightway discharged into the pipe line. It is the more clearly true of those wells which are shut in either upon completion of the drilling or in order to rest them after a period of use.

In this aspect there is no distinction between the gas produced by the gas company itself and that purchased from other producers. *Coe* v. *Errol,* 116 U. S. 517; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366.

Hallanan v. *United Fuel Gas Co.,* 257 U. S. 277, did not directly involve the question of adequacy of public service in West Virginia by the United Fuel Gas Company. We think that with the added element of the duty of public service on the part of the owner of the pipe line, the pipe

line is properly viewed, not only as an instrumentality of transportation, but also as a reservoir for the distribution of the gas, both that supplied within the State and that destined for other States. And in this light a situation is presented more nearly like that involved in *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; *Bacon* v. *Illinois,* 227 U. S. 504; *General Oil Co.* v. *Crain,* 209 U. S. 211; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82.

We think, too, the fact that in the *Hallanan Case,* much the greater part of the gas was destined to other States, as was the condition of most of the grain in *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, creates a distinction. These cases may apply when most of a commodity is to be taken to another State. But the question remains whether they apply to gas in a pipe line, most of which is intended for consumption within the State; and whether they will govern even in the ultimate time when by reason of the continuing depletion of the gas ninety-nine per cent. of the gas in a particular pipe line remains in West Virginia and one per cent. goes elsewhere.

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

These are suits, one by the Commonwealth of Pennsylvania and the other by the State of Ohio, to enjoin the State of West Virginia from enforcing an act passed by her legislature (c. 71, Acts 1919) which the complainants believe will largely curtail or cut off the supply of natural gas heretofore and now carried by pipe lines from West Virginia into their territory and there sold and used for fuel and lighting purposes. Although distinct, the suits are so much alike that they have been presented at the bar substantially as a single case. They will be dealt with accordingly in this opinion.

The West Virginia Act is set forth at length in the margin.[1] The complainants challenge its validity on the ground that it directly interferes with interstate commerce and therefore contravenes the commerce clause of

[1] The Act was passed February 10, 1919, went into effect May 11, 1919, and reads as follows:

"Section 1. That every person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use, or for the use of the public, or any part of the public, whether for domestic, industrial or other consumption, within this state, shall to the extent of his supply of said gas produced in this state, (whether produced by such person or by any other person), furnish for public use within the territory of this state, and for the use of the public and every part of the public within the territory of this state, in or from which such gas is produced, or through which said gas is transported, or which is served by such person, a supply of natural gas reasonably adequate for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this state, and for which said consumer or consumers therein shall apply and be ready and willing to make payment at lawful rates.

"Sec. 2. That in case any person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use within this state, or for the use of the public or any part of the public within this state, shall have a production or supply of natural gas which is, or probably will be, insufficient to furnish for such use, (for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed by the public or any part of the public), within the territory in this state served by such person, then and in that event the public service commission shall have authority, and the same is hereby conferred on it, upon the application of any such person or any of his consumers within this state and after due hearing upon notice and proof to the satisfaction of the commission that public convenience and necessity so require, to order any other person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use within this state, and producing or furnishing natural gas for public use in said territory or transportng the same through said territory, to furnish to such person having such in-

the Constitution of the United States; and they rest their right to relief on the grounds that to enforce the act will subject them to irreparable injury in respect of many of their public institutions and governmental agencies, which

sufficient production or supply, natural gas for the purpose of supplying such deficiency, at and during such times, upon and at such just and reasonable terms, conditions and rates, and in such amounts, as the commission shall prescribe. And whenever, after such hearing upon notice and proof, the commission shall determine that public convenience and necessity so require, the commission shall have authority to provide for and compel the establishment of a reasonable physical connection or connections between the lines, pipes or conduits of such person having such excess supply of gas and the lines, pipes or conduits of the person having such deficiency of supply, and to require the laying and construction of such reasonable extensions of lines, pipes or conduits as may be necessary for the establishment of such physical connection or connections, and to ascertain, determine and fix the just and reasonable terms and conditions of such connection or connections, including just and reasonable rules and regulations and provisions for the payment of the costs and expense of making the same or for the apportionment of such cost and expense as may appear just and reasonable. *Provided, however,* that no person shall, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing, or required by law to furnish, natural gas for public use, except to the extent that the person so ordered to furnish natural gas shall, at the time, have a production or supply of natural gas in excess of the quantity sufficient to furnish a reasonably adequate supply to his consumers within this state; nor shall any person, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing or required by law to furnish, natural gas for public use in a territory within this state, if and when the said person having said excess shall, to the extent of such excess, be ready and willing to furnish, and within such time as the commission shall prescribe shall actually furnish, to the consumers within said territory a reasonably adequate supply of natural gas.

"Sec. 3. That insofar as the same shall not be in conflict with this act, all of the authority, powers, jurisdiction and duties conferred and imposed on the public service commission by the act entitled, 'An act to create a public service commission and to prescribe its powers

long have been and now are using this gas, and will subject them to further and incalculable injury in that (a) it will imperil the health and comfort of thousands of their people who use the gas in their homes and are largely

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and duties, and to prescribe penalties for the violations of the provisions of this act,' passed February twenty-first, one thousand nine hundred and thirteen, as amended by the act entitled, 'An act to amend and re-enact sections one, two, three, four, five, nine, ten, fourteen, fifteen and twenty-two, of chapter nine of the acts of one thousand nine hundred and thirteen, creating a public service commission, prescribing its powers and duties, and penalties for violation of the provisions of said chapter, and to add thereto six sections to be known as sections twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, enlarging the powers and duties of said public service commission, prescribing additional penalties and giving to the commission power to punish for contempt,' passed February tenth, one thousand nine hundred and fifteen, are hereby conferred and imposed on the public service commission in respect to the subject matter of this act, or any part thereof.

"Sec. 4. That in case of violation of any provision of this act any person aggrieved or affected thereby may complain thereof to the public service commission in like manner, and thereupon such procedure shall be had, as is provided in respect to other complaints to or before said commission, and all such proceedings and remedies may be taken or had for the enforcement or review of the order or orders of said commission, and for the punishment of the violation of such order or orders, as are provided by law in respect to other orders of said commission. In case of the violation of any provisions of this act, the public service commission, or any person aggrieved or affected by such violation, in his own name, may apply to any court of competent jurisdiction by a bill for injunction, petition for writ of mandamus or other appropriate action, suit or proceeding, to compel obedience to and compliance with this act, or to prevent the violation of this act, or any provision thereof, pending the proceedings before said commission, and thereafter until final determination of any action, suit or proceeding for the enforcement or review of the final order of said commission; and such court shall have jurisdiction to grant the appropriate order, judgment or decree in the premises.

"Sec. 5. That if any person subject to the provisions of this act shall fail or refuse to comply with any requirement of the commis-

dependent thereon, and (b) will halt or curtail many industries which seasonally use great quantities of the gas and wherein thousands of persons are employed and millions of taxable wealth are invested.

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sion hereunder, such person shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense; and such person, or the officers of the corporation, where such person is a corporation, may be indicted for their failure to comply with any requirement of the commission under the provisions of this act, and upon conviction thereof, may be fined not to exceed five hundred dollars, and in the discretion of the court, confined in jail not to exceed thirty days. Every day during which any person, or any officer, agent or employee of such person, shall fail to observe and comply with any order or direction of the commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation of such order or direction of this act, as the case may be.

"Sec. 6. That any person claiming to be damaged by any violation of this act may bring suit in his own behalf for the recovery of the damage from the person or persons so violating the same in any circuit court having jurisdiction. In any such action the court may compel the attendance of the person or persons against whom said action is brought, or any officer, director, agent or employee of such person or persons, as a witness, and also require the production of all books, papers and documents which may be useful as evidence, and in the trial thereof such witness may be compelled to testify, but any such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.

"Sec. 7. That the word 'person' within the meaning of this act shall be construed to mean, and to include, persons, firms and corporations.

"Sec. 8. That the sections, provisions and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be unconstitutional or for any reason invalid or un[en]forceable, the remaining parts thereof shall be and remain in full force and effect.

"Sec. 9. That all acts and parts of acts in conflict with this act are hereby repealed."

The conditions out of which the suits have arisen and the facts material to their disposal are as follows:

Natural gas is found at pronounced depths in porous strata—usually sand rock—constituting a natural reservoir and is brought to the surface and reduced to possession through wells drilled into the containing strata. When a surface owner thus reduces it to possession he becomes its owner and it becomes a subject of commerce, like any product of the forest, field or mine. In the enclosing strata it is under great pressure, called rock pressure, which causes it to flow out rapidly when the strata are penetrated. If one surface owner drills wells and begins to draw off the gas, others desiring to exercise their common right must take the same course, for otherwise the gas under their lands may be drained out by those wells. After the gas is drawn from the enclosing strata there is no practicable mode of storing and holding it. It must be used promptly. Its chief use consists in producing heat and light by burning it. The points of use generally are in centers of population or of industry more or less remote from the places of production. The intervening transmission is effected through pipe lines. The normal rock pressure will carry the gas considerable distances and when that pressure wanes or is inadequate it can be supplemented by using compressors.

In West Virginia the production of natural gas began as much as thirty years ago and for the last fourteen years has been greater than in any other State. The producing fields include thirty-two of her fifty-five counties. At first the gas was produced only in the course of oil operations, was regarded as a nuisance and was permitted to waste into the air. But it soon came to be regarded as valuable for heating and lighting, and the economy and convenience attending its use made it a preferred fuel. Its use within the State became relatively general, but was far less than the production, so the producers turned

to neighboring States, notably Pennsylvania and Ohio, for a further market.

West Virginia sanctioned that effort. She permitted the formation under her laws of corporations for the purpose of constructing pipe lines from her gas fields into other States and carrying gas into the latter and there selling it. She also permitted corporations of other States to come into her territory for that purpose. And she extended to all these companies the use of her power of eminent domain in acquiring rights of way for their pipe lines. In no way did she then require, or assert any power to require, that consumers within her limits be preferred over consumers elsewhere. The effort to find a further market succeeded, and the gas came to be extensively carried into Pennsylvania as far as Pittsburgh and into Ohio as far as Cleveland, Toledo and Cincinnati. In that way the entire production was made of value to the producers. Land owners and lessees in the gas fields were greatly benefited and the taxable wealth of the State was largely increased. Approximately $300,000,000 were invested in the business—fully one-half in West Virginia. More than 7,000 miles of the pipe lines are in that State,—2,000 miles being trunk lines.

Some of the pipe lines reach from the producing fields to the areas of consumption in Pennsylvania and Ohio. Some connect at or near the state line with others leading to the consuming areas. All are so operated that there is a continuous flow of gas from points of production to points of use. Branch lines divert some of the gas at intervening points, but without changing the general flow. Several lines cross and recross the state boundary repeatedly.

The pipe lines are all operated as public utilities, that is, in supplying gas to the public, and this is true in Pennsylvania and Ohio as well as in West Virginia. The lines long have been and now are supplying gas to the

three States for use in their charitable, educational and penal institutions, to their counties and municipalities for use in county, city and school buildings, to local utilities serving particular communities, to the people generally in many cities and towns for use in their homes, places of business and offices, and, in seasons when there is an adequate supply, to industrial plants for use in their operation. The predominant use is for fuel purposes, that for lighting being relatively small. All gas going into Pennsylvania and Ohio is carried and supplied under prior engagements respecting its disposal,—most of it under long time contracts exacted or preferred by the purchasers or consumers.

Experience in other gas fields has shown that multiplied and prolonged drafts on the natural supply will exhaust it. Since 1916 it has been apparent that the older portions of the West Virginia fields are approaching exhaustion and that production in those fields has reached and passed its maximum. The newer portions, however, in the judgment of informed operators, will make the fields commercially productive for several years more.

Latterly during the colder months—from November 1 to May 1—the combined needs of domestic and industrial consumers have been largely in excess of the production, and the pipe line companies generally have adopted and are pursuing the policy of preferring domestic consumers during those months. All the long time contracts contain provisions admitting of such a preference. During other months, when there is little occasion for heating homes and offices, the needs of domestic consumers drop so materially that much gas may be and is supplied for industrial use without affecting the domestic use. But increased population, enlarged industry—particularly in West Virginia—and the advantages inhering in the gas as a fuel have finally resulted in a gross demand, which cannot be satisfied even in the

summer months. The present actual consumption is all that the production will sustain. The pipe line companies cannot supply more gas in West Virginia without cutting down what they carry into Pennsylvania and Ohio; nor can they carry more into Pennsylvania and Ohio without cutting down what they supply in West Virginia. In short, the situation is such that to constrain the companies to supply more gas in any one of the three States necessarily will constrain them to supply less in the other two.

In 1918, 265 billion cubic feet of gas were produced in West Virginia, 38 billion were consumed within the State without becoming available to the public and 227 billion became available in the hands of the pipe line companies. The companies supplied 70 billion to consumers in the State and carried 157 billion to consumers outside. They also brought 4 billion into the State from gas fields outside and to that extent enlarged the amount supplied to local consumers. Of that amount, 21 billion went into domestic use and 53 billion into industrial use. The major part of the gas carried into Pennsylvania went to industrial consumers, and the major part of that carried into Ohio went to domestic consumers.

The gas carried outside the State is sold for more than that used therein, but this naturally would be so, considering the additional pipe lines, compressors and labor employed in the longer transmission. The proportion marketed beyond the State has not varied much. It now is practically what it was ten years ago. Nor has there been any discrimination against consumers inside the State. They have been dealt with on the same plane as others. The companies have declined to quit the existing service to communities and consumers outside and to serve only those inside, but there is nothing invidious in this. It is in the line of fair treatment rather than discrimination.

The gas carried into Pennsylvania and Ohio, respectively, and there supplied to the State and her municipal agencies for strictly public use is not negligible, but amounts to billions of cubic feet per year. It is the fuel with which food is cooked and water heated for thousands of dependents in charitable and penal institutions, with which hundreds of school houses are heated and made comfortable for thousands of children, and with which municipal water works are operated in several cities, notably Cincinnati and Toledo. The heating and other appliances have been adjusted to its use and to make the changes incident to substituting other fuel would involve an expenditure in each State of a very large sum of public money.

In Pennsylvania the gas is used by 300,000 domestic consumers caring for 1,500,000 people, and in Ohio by 725,000 domestic consumers caring for 3,625,000 people. This is where no other natural gas service is available. To change to other fuel would require an adjustment of heating and cooking appliances at an average cost of more than $100 for each domestic consumer, or an aggregate cost exceeding $30,000,000 in Pennsylvania and $72,500,000 in Ohio.

The act whose enforcement is sought to be enjoined was passed by the legislature of West Virginia February 10, 1919, and went into effect May 11th following.[2] These suits were brought eight days thereafter by direction of the legislatures of the complainant States, and by leave of this Court. Interlocutory injunctions were prayed and granted at the outset and are still in force.

Three questions bearing on the propriety of entertaining the suits were raised soon after the suits were begun

[2] Under the state constitution the act went into effect on the expiration of ninety days after its "passage" by the legislature as distinguished from its approval by the governor. *State* v. *Mounts*, 36 W. Va. 179.

and consideration of them was postponed to the final hearing.

The first question is whether the suits involve a justiciable controversy between States in the sense of the Judiciary Article of the Constitution. We are of opinion that they do and that every element of such a controversy is present.

Each suit presents a direct issue between two States as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other. The complainant State asserts and the defendant State denies that such a withdrawal is an interference with interstate commerce forbidden by the Constitution. This is essentially a judicial question. It concededly is so in suits between private parties, and of course its character is not different in a suit between States.

What is sought is not an abstract ruling on that question, but an injunction against such a withdrawal presently threatened and likely to be productive of great injury. The purpose to withdraw is shown in the enactment of the defendant State before set forth and is about to be carried into effect by her officers acting in her name and at her command. The State is the principal and the action of her officers rightly may be imputed to her, even though a suit for an injunction might lie against them.

The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury.

Each State uses large amounts of the gas in her several institutions and schools,—the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more. To substitute another form of fuel will involve very large public expenditures.

The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law.

In principle these views have full support in prior decisions, such as *Missouri* v. *Illinois,* 180 U. S. 208, 241; s. c. 200 U. S. 496, 518; *Kansas* v. *Colorado,* 185 U. S. 125, 141–143; s. c. 206 U. S. 46, 95–99; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237; *New York* v. *New Jersey,* 256 U. S. 296, 301, and *Wyoming* v. *Colorado,* 259 U. S. 419, 464. The defendant State relies on such cases as *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Louisiana* v. *Texas,* 176 U. S. 1; *Kansas v. United States,* 204 U. S. 331; *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 220 U. S. 277, and *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162, but the facts on which they turned, as the opinions show, were so widely different from those here that they are not in point.

The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor

had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.

Turning to the act, we find that by its first section it lays on every pipe line company a positive duty,—to the extent of its supply of gas produced in the State, whether produced by it or others,—to satisfy the needs, whether for domestic, industrial or other use, of all intending consumers, whether old or new, who are willing to pay for the gas and want it for use within the section of the State in which it is produced, in that through which it is transported or in that wherein it is supplied to others. This is a substantive provision whose terms are both direct and certain, and to which immediate obedience is commanded. No order of the commission is required to give it precision or make it obligatory, and it leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force. It imposes an unconditional and mandatory duty, as counsel for the State admit, and obviously is intended to enforce a preferred recognition and satisfaction of the needs of consumers within the State, present and prospective, regardless of the effect on the interstate stream or on consumers outside the State.

The second section invests the commission with authority,—on finding after notice and hearing that a company supplying gas for local needs is or probably will be without an adequate supply for the purpose,—to order another company having gas in excess of what is required for its "consumers within this State" to furnish

the company whose supply is or will be inadequate with gas to make up the deficiency, or in the alternative to undertake itself to supply such local needs "to the extent of such excess." This provision, like the first, shows the purpose to give local consumers, present and prospective, a preferred status and to permit surplus gas only to be carried into other States.

The fourth section empowers the commission to entertain complaints by persons aggrieved or affected by any "violation" of the act and to require that the violation be discontinued and the act obeyed, subject to a right of review in the courts, and also provides means of compelling obedience to the act pending the proceedings before the commission and until the decision on review.

Other sections contain penal and remedial provisions designed to make those just described effective. One in the fifth section declares that "every day" during which any company, or any of its officers, agents or employees, "shall fail to observe and comply with any order or direction of the commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation." Another in the sixth section subjects any company violating the act to an action for damages by anyone claiming to have been wronged by the violation.

We regard it as entirely clear that the act is intended to compel the retention within the State of whatever gas may be required to meet the local needs for all purposes, and that its procedural, penal and remedial provisions are amply adequate to accomplish that result. And we think it equally clear from the allegations in the bills, now established by the evidence, that the situation when the suits were brought was such that the act directly and immediately would work a large curtailment of the volume of gas moving into the complainant States. Indeed, the conclusion is unavoidable that with the increasing demand in West Virginia and the decreasing production

the act in a few years would work a practical cessation of the interstate stream.

It must be held therefore that the suits were not brought prematurely.

The third question is whether the requisite parties have been brought into the suits. It is objected that the pipe line companies have not been brought in. But there is nothing which makes their presence essential. The complainant States make no complaint and seek no relief against them. They are supplying gas in those States and evidently will continue to do so, if not restrained or prevented by the defendant State. It is only with her that the complainant States are in controversy. It also is objected that the consumers in the defendant State who will be benefited if the act is enforced have no representation in the suits. But this is a misconception. They are represented by that State, and there is nothing in the situation requiring that they be specially represented or brought in. With equal basis it could be objected in a suit to prevent the enforcement of a statute reducing railroad freight rates, or in one to prevent the enforcement of a municipal ordinance reducing telephone or electric light rates, that shippers or users who would be benefited by the reduction must be specially represented or brought in. Such an objection would of course be untenable; and so of the objection here.

We turn now to the principal issue, whether a State wherein natural gas is produced and is a recognized subject of commercial dealings may require that in its sale and disposal consumers in that State shall be accorded a preferred right of purchase over consumers in other States,—when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other States to consumers there. Of course, in the last analysis, the question is whether the enforced withdrawal for the bene-

fit of local consumers is such an interference with interstate commerce as is forbidden to a State by the Constitution. The question is an important one; for what one State may do others may, and there are ten States from which natural gas is exported for consumption in other States. Besides, what may be done with one natural product may be done with others, and there are several States in which the earth yields products of great value which are carried into other States and there used. But, notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications,—some so closely in point that the discussion here may be relatively brief.

By the Constitution, Art. I, § 8, cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it. Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against such commerce. *Ward* v. *Maryland,* 12 Wall. 418, 430; *Welton* v. *Missouri,* 91 U. S. 275, 280; *Webber* v. *Virginia,* 103 U. S. 344, 350; *Coe* v. *Errol,* 116 U. S. 517, 525–526; *Guy* v. *Baltimore,* 100 U. S. 434, 442–443; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 498.

Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary opera-

tion prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290–291; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78. The West Virginia act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant States, and therefore will work a serious interference with that commerce.

But it is urged that there are special considerations which take the act out of the general rule and sustain its validity, even though there be an interference.

One of these is that the pipe line companies are engaged in supplying the gas to the public in West Virginia, that this is a quasi-public business and that the act does no more than require the companies to furnish a reasonably adequate service within reasonable territorial limits. It is true that the business is of a quasi-public character, but it is so in Pennsylvania and Ohio as well as in West Virginia. The obligations inhering in it and the power to insist on an adequate service are the same in all three States. The supply of gas necessarily marks the extent of the service that can be rendered. Much of the business is interstate and has grown up through a course of years. West Virginia encouraged and sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an attempt to

regulate the interstate business to the advantage of the local consumers. But this she may not do. A direction to one of her railroads when short of facilities for moving coal to haul intrastate coal to the exclusion of interstate coal would not be different in kind or force.

Another consideration advanced to the same end is that the gas is a natural product of the State and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere. A contention, in essence the same, was presented and considered in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, a case involving the validity of an Oklahoma statute designed to accomplish the retention of natural gas within the State. In the District Court the case had been heard on bill and answer, a proceeding in which the allegations of fact in the answer are taken as true. The hearing resulted in a decree adjudging the statute invalid and enjoining its enforcement. The decree was affirmed here. In the answer, as the opinion shows, it was alleged that physical conditions made it apparent that the gas field was of relatively short duration, that cities were near the field and their people needed the gas, that the State embodied only prairie land devoid of timber and there was no local fuel supply excepting coal and natural gas, that the production of coal was growing rapidly more costly, that "substantially, the only natural, practical, usable fuel, both for domestic and industrial use, is natural gas," and that if pipe lines, such as the plaintiffs were intending to construct and put in operation, were permitted to carry gas into other States the supply would be speedily ex-

hausted. Referring to these allegations and to a contention that the ruling principle of the statute was conservation of a needed natural resource, the Court said (p. 255):

"The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every

other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court."

Finally, it is urged that this Court can not prescribe and execute regulations respecting the apportionment and use of the gas among the three States, and therefore that the bills should be dismissed. The conclusion does not follow from the premise. The object of the suits is not to obtain decretal regulations, but to enjoin the enforcement of the West Virginia act on the ground that it is an unconstitutional enactment and its intended enforcement will subject the complainant States to injury of serious magnitude. On full consideration, we reach the conclusion that the act is unconstitutional, that the apprehensions of the complainant States respecting the injury which will ensue from its enforcement are well founded and that it obviously will operate most inequitably against those States. In this situation the appropriate decree is one declaring the act invalid and enjoining its enforcement. To dismiss the bills and leave the act to be enforced would be quite inadmissible. If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides.

Decrees for complainants.

MR. JUSTICE HOLMES.

The statute seeks to reach natural gas before it has begun to move in commerce of any kind. It addresses itself to gas hereafter to be collected and states to what uses it first must be applied. The gas is collected under and subject to the law, if valid, and at that moment it is not yet matter of commerce among the States. I think that the products of a State until they are actually started to a point outside it may be regulated by the

State notwithstanding the commerce clause. In *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, it was held that the State might levy an occupation tax upon the mining of iron ore equal to six per cent. of the value of the ore produced during the previous year, although substantially all the ore left the State and was put upon cars for that purpose by the same single movement by which it was severed from its bed. There could not be a case of a State's product more certainly destined to interstate commerce. It was put upon the cars by the same act by which it was produced. But as it was not yet in interstate commerce the tax was sustained. I know of no relevant distinction between taxing and regulating in other ways. *McCulloch* v. *Maryland,* 4 Wheat. 316, 431.

But the States have been held authorized to regulate in other ways more closely resembling the present. In *Sligh* v. *Kirkwood,* 237 U. S. 52, a state law was sustained that made it criminal to sell or offer for shipment citrus fruits that were immature or otherwise unfit for consumption. That, upon grounds of local policy, intercepted before it got into the stream, what would have been an object of interstate commerce. The local interest in the present case is greater and more obvious than in that of green oranges. Again, the power of the State to preserve a food supply for its people by game laws notwithstanding an indirect interference with interstate commerce is established. *Geer* v. *Connecticut,* 161 U. S. 519, 534. *Silz* v. *Hesterberg,* 211 U. S. 31, 42. If there is any difference between the property rights of the State in game and in gas still in the ground it does not concern the plaintiffs and it is plain from the decisions cited that they do not depend upon a speculative view as to title. See *Missouri* v. *Holland,* 252 U. S. 416, 434. The right of the State so to regulate the use of natural gas as to prevent waste was sustained as against the

Fourteenth Amendment in *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, and I do not suppose that the plaintiffs would have fared any better had they invoked the commerce clause. I need do no more than refer to prohibition of manufacture of articles intended for export, such as colored oleomargarine; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 245; or spirits. The result of that and other cases has been expressed by this Court more than once in the form of a general recognition of the right of a State to make "reasonable provision for local needs"; *Minnesota Rate Cases*, 230 U. S. 352, 402, 410, 411; and the right has been recognized even when the interference with interstate commerce is direct, as when an interstate train is required to stop to accommodate passengers who do not leave the State. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 173 U. S. 285. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 246 U. S. 58.

I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages. If the gas were used only by private persons for their own purposes I know of no power in Congress to require them to devote it to public use or to transport it across state lines. It is the law of West Virginia and of West Virginia alone that makes the West Virginia gas what is called a public utility, and how far it shall be such is a matter that that law alone decides. I am aware that there is some general language in *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255, a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the northwest its timber, &c. But I confess I do not see what is to hinder. Certainly if the owners of the mines or the forests saw fit not to export their products the Constitution would not make them do it. I see nothing in that instrument that would produce a different result if the State gave the owners

motives for their conduct, as by offering a bonus. However far the decision in the case referred to goes it cannot outweigh the consensus of the other decisions to which I have referred and that seem to me to confirm what I should think plain without them, that the Constitution does not prohibit a State from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 357.

I agree substantially with my brothers MCREYNOLDS and BRANDEIS, but think that there is jurisdiction in such sense as to justify a statement of my opinion upon the merits of the case. I think that the bill should be dismissed.

MR. JUSTICE MCREYNOLDS, dissenting.

It seems to me quite clear that the record presents no justiciable controversy; certainly none within the original jurisdiction of this Court.

For the manifest purpose of protecting local consumers, West Virginia commanded her public service corporations not to transport natural gas beyond the borders of the State until they had satisfied the reasonable requirements of the people therein. Thereupon, complainants came here by original bills and alleged that if the statute were enforced they and their inhabitants could not obtain enough gas for their imperative demands from the divers pipe lines theretofore accustomed to supply them. They ask us to declare the enactment invalid because of conflict with the commerce clause of the Federal Constitution and to restrain its enforcement. If the pipe lines hereafter fail to comply with their contracts, of course, they may be proceeded against in a proper forum; but to say that they probably will fail because

of the statute and then to demand that the law-making power be enjoined is not to set up a real controversy cognizable in any court.

If West Virginia should prohibit the drilling of new gas wells, I hardly suppose complainants could demand an injunction here even if it were admitted that their supplies would be cut off. But why not, under the doctrine announced? Production has been permitted for years and appealing hardships would follow its cessation. And suppose West Virginia should repeal the charters of all her public service corporations now transporting gas and thereby disable them, could we interfere upon the demand of another State who claimed that she would suffer?

As originally adopted, the Constitution provided—"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction." *Chisholm* v. *Georgia*, 2 Dall. 419, declared that a citizen of one State could proceed against another State by original action here. In *Louisiana* v. *Texas*, 176 U. S. 1, Mr. Chief Justice Fuller pointed out the character of controversies between States over which this Court has original jurisdiction. With emphasis he declared that vindication of the freedom of interstate commerce is not committed to any State as *parens patriae*. Unless this ruling is to pass into the discard, it follows that neither of the complainants has any higher standing than one of her citizens with a contract for gas would have if there were no Eleventh Amendment. It is unnecessary to argue that the framers of the Constitution never intended to empower this Court, at the suit of an individual, to enjoin a State from enforcing regulations prescribed for her own public service corporations. And yet, that possibility must be affirmed under the doctrine now announced.

Concluding his opinion in *Chisholm* v. *Georgia* (1793), Mr. Justice Iredell exclaimed—"I pray to God, that if the Attorney General's doctrine, as to the law, be established by the judgment of this Court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant." A like prayer seems not inappropriate here and now.

MR. JUSTICE BRANDEIS, dissenting.

The statement made by Mr. Justice Holmes seems to me unanswered. But, like Mr. Justice McReynolds, I think that there are reasons why the bills should be dismissed without passing upon the constitutional question presented.

Natural gas in quantity is produced in thirty-two of the fifty-five counties of West Virginia. One-half of the inhabitants of that State have for years been dependent upon it for domestic uses; and it has been supplied to nearly two thousand industrial establishments. Sixty-seven concerns are engaged in the business of distributing this natural gas to the public. Most of them are corporations organized under the laws of West Virginia. A few are organized under the laws of some other State. Some are unincorporated. Each had, prior to the Act of February 17, 1919, hereinafter referred to, been declared by statute to be a public service corporation [1] endowed with the power of eminent domain. Each was under the common-law duty of furnishing to the public,

[1] "The words 'Public Service Corporation' used in this act shall include all persons, associations of persons, firms, corporations, municipalities and agencies engaged or employed in any business herein enumerated, or in any other public service business whether above enumerated or not, whether incorporated or not." Acts, 1913, c. 9, § 3; Acts, 1915, c. 8, § 3; Acts, 1921, c. 150, § 3. See Acts 1919, c. 71, § 3.

throughout the West Virginia territory in which it does business, adequate service. *Carnegie Natural Gas Co.* v. *Swiger*, 72 W. Va. 557; *Clarksburg Light & Power Co.* v. *Public Service Commission*, 84 W. Va. 638. And as to each this duty has been confirmed by the legislation of that State.

Prior to the World War the production of natural gas in West Virginia and the demand were such that large quantities could be exported by its public service corporations to other States without thereby lessening the ability of these concerns to give adequate service to their West Virginia customers. During the war the demand, both within and without the State, increased greatly; and thereafter the supply became smaller. Of the net supply of West Virginia natural gas available for distribution by its public service corporations, 77.1 per cent. was exported in the year 1916; 80.1 per cent. in 1917; 76.7 per cent. in 1918.[2] The West Virginia consumers complained that the amount furnished them was inadequate; and that they were being discriminated against by West Virginia gas companies in the interest of residents of other States.[3]

[2] A large part of the gas produced is not available for distribution to the public. Much is consumed within the State for field purposes—such as drilling and cleaning out wells or the operation of compressor or pump stations to transport the gas. The producer must, also, under reservations in the leases, ordinarily deliver to the landowner free gas service.

[3] The temptation to discriminate may have been great. For Pennsylvania and Ohio communities formerly supplied from local production of natural gas could, if this is no longer possible, afford to pay a very high price for gas rather than to discard existing gas appliances and to instal new ones which would be required if oil or coal were to be substituted as fuel. In 1921 the average price per M cubic feet for domestic consumption was 26 cents in West Virginia, 44 cents in Pennsylvania and 42 cents in Ohio. For industrial consumption it was 16 cents in West Virginia; 32 cents in Pennsylvania; and 34 cents in Ohio. United States Geological Survey, "Natural Gas in 1919–1921," published May 22, 1923.

Some of the companies which exported gas sought to justify the inadequacy of their service to West Virginia customers by asserting that they were under contract, or other duty, to supply West Virginia gas to distributing companies or consumers in other States; and that the aggregate demand of their customers in the several States exceeded the available supply. Only twelve of the sixty-seven West Virginia public service corporations took part in the export business. The remaining fifty-five were engaged solely in distribution within the State; and many of these were dependent largely upon the other twelve for their gas supply. Some of these fifty-five companies sought to justify their inadequate service by the fact that, because of the demands for gas to be exported to the other States, the corporations on which they were dependent denied them their full supply.

West Virginia consumers insisted that the common law forbade its public service companies to so disable themselves from performing their duty to give adequate service within the State; and contended that the exporting public service corporations which habitually supplied the local distributing companies could not justify furnishing a reduced supply by setting up their contracts to furnish supplies to concerns in other States. These contentions were denied by the exporting companies; and it was asserted that they could not legally be controlled in this respect by the Public Service Commission of West Virginia. To remove all doubt concerning the statutory powers of the Commission and to ensure adequate service to West Virginia consumers, the legislature of the State enacted c. 71 of the Acts of 1919, approved on February 17 of that year, to take effect ninety days after its passage. That statute declared these rules of substantive law:

(a) That no public service corporation engaged in distributing natural gas produced within the State shall, by exporting its supply to other States, disable itself from

performing its duty to give adequate service within West Virginia.

(b) That any such public service corporation whose gas supply is insufficient to afford such service to its customers, may, under prescribed conditions, call upon any other public service corporation within the same territory which has a surplus supply, to furnish to it such part of this surplus as may be required to enable it to give adequate service.

Before the effective date of that act, the State of Pennsylvania and the State of Ohio each filed in this Court a bill in equity against the State of West Virginia, in which it prayed that the act be declared void, because obnoxious to the Federal Constitution, and that all West Virginia officials be enjoined from attempting in any way to enforce the statute. As a basis for the relief each bill set forth the extensive use of natural gas by state institutions, by their several municipalities, and by millions of residents; and it alleged that serious injury would result if these consumers were deprived of the West Virginia supply. The Ohio bill alleged also that cutting off the West Virginia supply of natural gas would greatly reduce the value of public service properties, would reduce taxable values of these and other properties, and would thereby deprive the State of important revenues. It prayed, specifically, that the plaintiff State, and its residents, be declared to have no adequate remedy at law; that West Virginia and its officials be enjoined from interfering with the transportation of natural gas for use in Ohio; and that pending the suit an injunction be granted against their instituting in any court of the State of West Virginia any suit under the statute against any "person, company or corporation which is engaged in the production or transportation of natural gas out of the State of West Virginia and into the State of Ohio." No public official or producer, exporter or distributor of gas or consumer (other than

these States) was made party plaintiff or defendant in either bill. A temporary injunction issued in each case upon the filing of the bill. In each a motion to dismiss, an answer, and a replication were filed. Without disposing of the motions to dismiss, the parties proceeded to take the evidence and, thereafter, submitted the cases for final hearing.

Several objections made to the maintenance of these suits may be passed without discussion. It will be assumed that the constitutional question submitted is not to be deemed merely a political one, as in *Georgia* v. *Stanton,* 6 Wall. 50, and *Massachusetts* v. *Mellon, ante,* 447. It will be assumed that the alleged right to acquire by purchase and to bring into a State natural gas produced elsewhere is—despite a fundamental difference [4]—to be treated as similar legally to the right asserted in *Kansas* v. *Colorado,* 185 U. S. 125; 206 U. S. 46, to have the water of an interstate stream continue to flow into a State; or the right recognized in *Missouri* v. *Illinois,* 180 U. S. 208; *New York* v. *New Jersey,* 256 U. S. 296, and *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, to have the waters and the air within one State kept reasonably free from pollution originating in another. It will be assumed, further, that the use of natural gas in Pennsyl-

[4] The State has a property interest in running water naturally flowing into it and in the public waters and air within its boundaries. *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237. If the running water is withheld, its property is taken. If the public waters or the air is polluted, its territorial integrity is invaded. But the alleged right to purchase in interstate commerce and to import a natural resource is, in no sense, a right of the State. It would be described appropriately as a privilege of citizens of the United States. Compare *Louisiana* v. *Texas,* 176 U. S. 1, 24, 25. Such privileges the State is not charged by the Federal Constitution with the duty to enforce; and the fact that the institution of these suits was specially authorized by the legislatures of Pennsylvania and of Ohio can be of no legal significance.

vania and in Ohio is shown to be so general as to bring these suits within the rule acted upon in the cases just cited and to render inapplicable the rule declared in *Kansas* v. *United States,* 204 U. S. 331, and *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 220 U. S. 277, 286, 289, where the suits were dismissed because brought in aid of interests deemed private. And finally it will be assumed—although this is still more doubtful—that a State which has permitted one of its natural resources to be freely dealt in as an article of interstate commerce may not thereafter prohibit all export thereof, although it appears that the whole of the remaining supply will be required to satisfy the needs of its own citizens. These objections raised by defendant will not be considered; because there are other objections which, in my opinion, present insuperable obstacles to the maintenance of the suits.

First. This Court is without jurisdiction of the subject-matter.

The bills present neither a "case," nor a "controversy," within the meaning of the Federal Constitution. *Marbury* v. *Madison,* 1 Cr. 137; *Muskrat* v. *United States,* 219 U. S. 346, 356, 359; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158. They are not proceedings "instituted according to the regular course of judicial procedure" to protect some right of property or personal right. They are, like *McChord* v. *Louisville & Nashville R. R. Co.,* 183 U. S. 483, 495, an attempt to enjoin, not executive action, but legislation. They are instituted frankly to secure from this Court a general declaration that the West Virginia Act of February 17, 1919, is unconstitutional. Compare *Giles* v. *Harris,* 189 U. S. 475, 486. The well settled rule that the Court is without power to entertain such a proceeding applies equally, whether the party invoking its aid is a State or a private person. And the rule cannot be overcome by giving to

pleadings the form of a bill in equity for an injunction. Compare *Fairchild* v. *Hughes,* 258 U. S. 126; *Atherton Mills* v. *Johnston,* 259 U. S. 13, 15; *Texas* v. *Interstate Commerce Commission, supra.*

Moreover, it is not shown that there is, in a legal sense, danger of invasion of the alleged rights. It is shown that the States of Pennsylvania and Ohio are, in their public institutions, themselves consumers of West Virginia gas—a "makeweight" as suggested in *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237. And it is shown that these and many other consumers within the plaintiff States would suffer serious injury if the West Virginia supply were cut off. But it is not shown that discontinuance of the supply is threatened or that there is, in a legal sense, danger that the supply will be stopped. The mere enactment of the statute, obviously, does not constitute a threat to interrupt the flow of gas into the plaintiff States. The importation into Ohio and Pennsylvania is conducted, not by the State of West Virginia, but wholly by twelve privately owned public service corporations. If the importation ceases it will be, primarily at least, because of acts or omissions of these twelve corporations. Yet there is not even an allegation that these corporations threaten, or intend, to discontinue the importation; or that they will be compelled to do so unless the State of West Virginia is enjoined from enforcing the statute.

On the other hand, it clearly appears that, under the laws of West Virginia, there can be no present danger that any of these twelve corporations will be summarily prevented by that State from continuing in full volume the export of gas or will be compelled to reduce it. The only restriction, if any, imposed by the Act of 1919 upon exportation of gas is that which may result from the requirement that West Virginia public service corporations shall not, by means of export, disable themselves from performing their duties to consumers and to other dis-

tributing companies within the State. Before there can be, in a legal sense, danger that restriction will result, it must appear that one or more of the twelve exporting companies is disabling itself by such exportation, or is about to do so; and also that some state official is about to take effective action to prevent the exportation. But under the legislation of West Virginia many things would have to happen and much time must elapse before any of the exporting corporations would be under any legal duty to discontinue or lessen their exports, and still more time before it could actually be prevented from exporting gas. For, under West Virginia legislation, no executive officer and no court has power or jurisdiction to declare, or to enforce performance of, such alleged duty of a public service corporation until primary resort has been had to the Public Service Commission and the application to it has been acted upon, either by granting or by denying relief. *United Fuel Gas Co.* v. *Public Service Commission,* 73 W. Va. 571; *State* v. *Bluefield Water Works Co.,* 86 W. Va. 260; *Kelly Axe Manufacturing Co.* v. *United Fuel Gas Co.,* 87 W. Va. 368. The act establishing the Commission prescribes the methods and the remedies which are to be pursued in order to enforce the duty to give adequate service. C. 9, Acts of 1913, §§ 11 and 18; c. 8, Acts of 1915, §§ 23, 24; c. 71, Acts of 1919; c. 150, Acts of 1921; *Manufacturers' Light & Heat Co.* v. *Ott,* 215 Fed. 940. If it is claimed that there is failure to give adequate service, a petition may be filed before the Commission to secure it. After notice to and hearing of the corporation by the Commission an order may be made. Until the Commission issues some order which purports to restrict in some way the discretion theretofore exercised by a corporation in respect to exports, every such concern is, under the Act of 1919, legally as free to continue the transportation of gas to Pennsylvania and to Ohio as if that statute had not been passed.

It is possible that the Commission would never be called upon to act.[5] It is possible that if called upon, the Commission would refuse to make an order. It is possible that if the Commission made an order, the order would be of such a character as not to affect seriously the interests which plaintiffs seek to protect. And it is possible that if any order were made, the state court would suspend its operation and would eventually annul it. The act makes such careful provision for judicial review of the orders of the Commission and for postponing the incidence of penalties or other liabilities until

[5] The Attorney General of Ohio states in his brief: "The supply of gas was adequate, both for consumption inside the State of West Virginia and for transportation to other States, until during the time of the world war in 1917 and 1918. (Record, pages 331 and 334.) By reason of the vast demand for gas for industrial consumption, which occurred as a result of the war, and which drew upon the lines of the gas companies during the summer as heavily as, or more heavily than during the winter, the gas companies had no opportunity to rest their wells or to accumulate a surplus of gas, as they had been in the habit of doing, in accord with good practice, under normal conditions. The federal government, through the fuel administration, gave orders to the gas companies to supply essential industrial plants with all the gas possible. Wells were drilled and turned into lines which, under normal conditions, would have been held in reserve, to assure a future supply. (Record, pages 333, 334.) The supply of gas has never been adequate for all purposes, during periods of maximum demand, since that time."

It may be that production will increase. The war has closed. The excessive post war activities of 1919 and early 1920 ceased, and were followed by a period of industrial depression. There may again be opportunity for periodic rest which gas wells, as well as human beings, appear to need; and thus, seemingly exhausted wells may be restored. Furthermore, hitherto undeveloped gas areas may be worked or more wells may be drilled in areas already developed; or new areas may be opened. For of the 2,725,798 acres of the gas territory held by the sixty-seven public service corporations of the State in 1919, a large part are still undeveloped.

Moreover, the demand may lessen. Except in times of emergency, use of natural gas by the industries will be determined largely by

after such review can be had, that there could never be occasion for invoking in respect to this statute the doctrine of *Ex parte Young,* 209 U. S. 123.[6] For the Commission is without power to enforce an order or to impose a penalty. To overcome disobedience, or disregard, of an order, resort must, under the West Virginia statutes, be had to the courts; and to this end an original proceeding must be instituted. Whether the suit to enforce obedience is brought by the Commission or by others, the corporation is given opportunity to defend on the ground that the order is, for any rea-

its relative cost as compared with coal or oil. The demands of economy in manufacture may alone compel a reduction of its use in industry and thus, for some time, leave the supply ample for domestic purposes. In 1920 Pennsylvania used for manufacturing purposes three times as much natural gas as it imported from West Virginia in 1921. U. S. Geological Survey, "Natural Gas, 1919–1921," published May 22, 1923, pp. 347, 355. Domestic consumption amounts to only 30 or 40 per cent of the total consumption. U. S. Geological Survey, "Natural Gas, 1919–1921," *supra,* p. 352. Moreover, the present large waste may be stopped. The waste in Ohio in 1919 was 12 per cent.; in 1920 it was 18 per cent.; in 1921 it was 19 per cent. On the other hand in West Virginia the waste in 1919 was only 1 per cent.; in 1920 and 1921 only 2 per cent. "Natural Gas," *supra,* p. 352.

[6] The situation is wholly unlike that presented in *Savage* v. *Jones,* 225 U. S. 501, 520, 521, which is relied upon by plaintiffs. There the suit was against the State Chemist, the executive official vested with power to act, and he had "threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the State and had distributed broadcast throughout the State warning circulars."

Moreover, even if the West Virginia statute were construed as imposing penalties for disobedience so severe and menacing as to require the interposition of a federal court, it would be the public service corporations of West Virgnia—not the States of Pennsylvania and Ohio—which would thereby be denied due process of law under the doctrine of *Ex parte Young.* And it is those corporations which would have to sue, as in *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, here relied upon by plaintiffs.

son, invalid. Or it may itself inaugurate the proceeding by bringing suit to have the order annulled. *Randall Gas Co.* v. *Star Glass Co.*, 78 W. Va. 252, 256; *United Fuel Gas Co.* v. *Public Service Commission*, 73 W. Va. 571. Moreover, a final order of the Commission is not enforceable, even by a court, until thirty days after entry have elapsed. That period is allowed within which any party feeling aggrieved may apply to the court for suspension of the order; and if such application is made, a speedy hearing must be given (§ 16).

Up to the time when these suits were begun no action of any kind had been taken in relation to matters dealt with by the Act of February 17, 1919, either by the Commission, by any other board or official of the State, by any corporation, or by any other person who could ever be affected by any provision of the statute. And no action could have been taken; for the act was then not yet in effect. How then can it be said that, in any legal sense, the Pennsylvania and Ohio consumers were in present danger of irreparable injury? Plaintiffs' fears were at best premature. This Court held in *Oregon* v. *Hitchcock*, 202 U. S. 60, 70, that it would not, even at the instance of a State, take upon itself the decision of questions committed to another department of our Government and thus anticipate the action of the federal executive. The reasons are equally strong against our interfering, in advance of decision, with the executive of a State in a matter committed to its determination. If these were private suits relief would necessarily be denied. Compare *First National Bank of Albuquerque* v. *Albright*, 208 U. S. 548; *South Carolina* v. *Georgia*, 93 U. S. 4, 14. As the suit is that of one State against another, even greater caution should be exercised by this Court before assuming to act. *Missouri* v. *Illinois*, 200 U. S. 496, 520, 521; *Kansas* v. *Colorado*, 206 U. S. 46, 117; *New York* v. *New Jersey*,

256 U. S. 296, 309. The objection here is not, as in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 238—that those interested should be left to an action at law for redress of any injuries which may be suffered. It is that the "judicial stage" of the controversy had not been reached when these suits were begun; and, indeed, has not been since. See *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 228; *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134, 137.

Second. There is a fatal lack of necessary parties. It is only by failure of the twelve exporting companies to continue the exportation of gas that the plaintiffs, and other consumers or the distributing companies in Pennsylvania or Ohio, can be injured. Primarily at least, it is the rights of these twelve corporations, if of anyone, which would be invaded by enforcing the statute; and rights of consumers and of distributing corporations of Pennsylvania and of Ohio are derivative merely. Whether the West Virginia corporations may furnish gas to the plaintiff States, and whether those corporations may be regulated as the statute attempts, are at most controversies between West Virginia and those corporations. They have not submitted their rights to adjudication in these suits. It is intimated that these corporations wish to have the act declared void. But we may not assume that such is their wish. Conceivably a decision holding the act valid might benefit them; since it might relieve them from improvident contracts with distributing companies in Pennsylvania and Ohio. Or it may be that some of the twelve corporations would be benefited and others injured by any decision made of the question presented. Unless the twelve corporations are legally represented either by the plaintiff or the defendant, they would not be bound by a decree in either of these suits. *New Orleans Water Works Co.* v. *New Orleans*, 164 U. S. 471, 480. That neither plaintiff nor defendant legally

represents them is clear.[7] And since they would not be bound, this Court should not entertain a suit to decide the question presented. For, as was held in *California* v. *Southern Pacific Co.*, 157 U. S. 229, and *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 246, it does not comport with the gravity and finality which should characterize an adjudication in the exercise of the original jurisdiction of this Court to proceed, at the instance of a State, in the absence of parties whose rights would be actually passed upon and be in effect determined, even though they might not be technically bound in subsequent litigation in this, or some other tribunal. Compare *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158.

The remaining fifty-five West Virginia gas corporations which do not export any gas are also vitally interested in the question submitted. So far as their interest is the general one *qua* consumer, it might be represented by the Public Service Commission; and to that end the Commission (not the State) should, perhaps, have been made party defendant. But many of these gas corporations appear to have specific interests which a decision might affect directly. They have contracts with the exporting companies for their supply of gas; and the obligations under these contracts would be different if the act is held valid than if it were held to be void. A decision to the effect that the prohibition of exports declared in the act is void might seriously impair their contract rights.

[7] "It is not sufficient to say that the Attorney General, or the Governor, or even the Legislature of the State, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a State, when it voluntarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy." *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 246.

Moreover, § 8 of the act provides:

"That the sections, provisions and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be unconstitutional or for any reason invalid or unenforceable, the remaining parts thereof shall be and remain in full force and effect."

Surely the statute may be valid as to some exporting companies; for the action in exporting may be *ultra vires*. Or certain West Virginia distributing companies may have acquired preferential rights to the supply of gas. How can the Court determine, in view of this provision, that the act is void, *in toto,* when it has not before it the parties to be affected thereby and the facts which only they as litigants would be able to present? Therefore, even if it appeared that rights of the plaintiffs—or of those whom they legally represent—were in present danger of irreparable injury resulting from wrongful acts of defendant, these suits should not be maintained.

Third. But if all other obstacles could be overcome, this Court, sitting as a court of equity, should dismiss the bills, because it would be unable to grant the only relief appropriate. This Court, sitting in equity, clearly should not lend its aid to enable West Virginia public service corporations to discriminate against West Virginia consumers in the interest of Ohio and Pennsylvania consumers. Therefore, an appropriate decree should be framed so as to require each of the West Virginia corporations to treat West Virginia customers at least as well as it does those outside of the State and the decree should not leave any West Virginia public service corporation free to export gas in disregard of the duty not to discriminate against the public in that State. But

natural gas is produced also in Pennsylvania and Ohio; and the local production furnishes a large part of the supplies consumed in those States.[8] Furthermore, West Virginia gas is exported also to Maryland, Indiana and Kentucky; and in two of those States natural gas is produced in quantity.[9] Clearly the Court should, in no event, go further than to compel West Virginia to share its production equitably with other States now dependent upon it for a part of their gas supply. But in order to determine what is equitable, (that is, what part of the West Virginia production that State might require its public service corporations to retain and what part they should be free to export to other States) it would obviously be necessary to marshal the resources and the demands, or needs, of the six States, and to consider, in respect to each, both the conduct of the business therein and the circumstances attending its development. The factors necessary to be considered in determining what division of the West Virginia production would be fair, the conditions under which the determination would have to be made, and the character of the questions to be decided are such that this Court would be obliged to refuse to undertake the task. For this reason, the bills should be dismissed, even if it were held both that rights legally represented by plaintiffs were in present danger of irreparable injury by wrongful acts of defendant and that there was not a fatal lack of necessary parties. To

[8] In 1920 the production in Pennsylvania was 125,787,000 M cubic feet, and the consumption 161,397,000 M. In 1920 Ohio production was 58,938,000 M cubic feet and the consumption 136,872,000 M. U. S. Geological Survey, "Natural Gas 1919–1921," p. 345, published May 22, 1923.

[9] The 1920 production in Kentucky was 3,345,000 M cubic feet; the consumption 15,297,000 M. The Indiana production 1,779,000 M; the consumption 4,435,000 M. The Maryland production is negligible. U. S. Geological Survey Bulletin, "Natural Gas in 1919–1921," *supra*, p. 345.

do justice as between the several States the following enquiries would be essential:

(a) The potential as well as the actual production in each State would have to be ascertained. The actual production during earlier years, and approximately the current production, could be ascertained from data which are regularly collected by the United States Geological Survey and by the public utility commissions of the several States. But to ascertain the potential production, searching enquiry would have to be made into the methods of production pursued; and, among other things, to what extent recent production has been secured by forcing the wells; what the likelihood is that production lessened by forcing wells will be restored by allowing periods of rest; and to what extent recent reduced outputs may have been attributable to failure to sink enough wells or to open additional territory.[10] It would be necessary to enquire also into the extent and character of the existing gas reserves, wherever situated and by whomsoever owned. In ascertaining the extent of the gas territory not yet developed, it would be necessary to enquire to what extent the reserve is controlled by, or is otherwise available to, the several public service corporations of the several States; the cost of developing particular fields and of marketing the supply therefrom; what the relation of such undeveloped territory is to that then being worked and to that already exhausted; and to what extent and how rapidly the development of new areas and new sources of supply should properly proceed.

(b) The demand, actual and potential, in each State would have to be determined. In determining the demand, the Court could not confine its enquiry to ascer-

[10] Some idea may be formed of the scope of this enquiry by examining the data concerning the natural gas operations collected by the United States Geological Survey.

taining the amount then used or called for. The rates charged in the several communities must also be considered. For upon these, as well as upon the relative cost of other kinds of fuel, would depend in large part the extent of the demand; particularly by the industries. The character of the use and the circumstances under which it had been developed would, likewise, be important factors in deciding what distribution would be equitable. Among other things, it would be necessary to determine to what extent there was, as in Ohio, a high percentage of waste; and what investment had been made in distributing mains and in customers' appliances and when and under what circumstances these investments had been made. For, while a long established local distributing company might reasonably be required to restrict its business to existing customers and even to the existing needs of such, a like restriction would be a great hardship, if applied to new companies which had not yet brought their business to a paying basis.

(c) No determination concerning production and none concerning demand could afford a stable basis for future action; for no factor entering into the determination would be constant. Investigations into supply and demand would have to be pursued continuously; and recurrent decisions as to distribution would be required. Thus, the estimate of the undeveloped gas territory must be ever changing; for new discovery may open territory theretofore unknown; and the sinking of test wells may establish the fact that territory previously deemed valuable will be wholly unproductive. In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry; and in none is continuous supervision and control required in so high a degree.

(d) The decisions to be made would be of the character which calls for the informed judgment of a board of

experts. The tribunal would have to determine, among other things, whether inadequate service was due in the several States to inadequate supply or to improvident use by some consumers; whether to overcome inadequacy of supply new territory should be developed or more wells be sunk in old territory; whether, in view of prospective needs of the several communities, it would not be better that the reserves should be husbanded and that the uses to which gas may be put be curtailed. It would, thus, be called upon to review—and perhaps to control—the business judgment of those managing the companies. Pro rata distribution among all users of the gas from time to time available would obviously not result in equitable distribution. For domestic users, and also many industrial ones, would, if their gas supply were uncertain, find it necessary to assure themselves of an adequate supply for heating, cooking and power, of either oil or some other kind of fuel; and the expense of producing the necessary alternative appliances would be large. The tribunal would have to decide, also, many other serious questions of the character usually committed for determination to public utility commissions, and the difficulties involved in these decisions would be much enhanced by differences in the laws, rules and practices of the several States regarding the duties of natural gas companies to furnish adequate service.[11]

[11] For instance: If it should appear that the potential supply in Pennsylvania is ample for all present needs, but that its concerns prefer to husband their resources for the remoter future, would it be unjust discrimination on the part of the West Virginia companies to deny to their customers within the State an adequate supply while supplying to Pennsylvania distributing companies an amount of gas which these might have produced from reserves within Pennsylvania? Or if Kentucky had ample supplies and undeveloped fields, but sought gas from West Virginia because the Kentucky companies did not have the funds, or the inclination, to make, at the time, a large investment required to secure a supply within that State, would, under those

Clearly, this Court could not undertake such determinations. To make equitable distribution would be a task of such complexity and difficulty that even an interstate public service commission with broad powers, perfected administrative machinery, ample resources, practical experience and no other duties, might fail to perform it satisfactorily. As this Court would be powerless to frame a decree and provide machinery by means of which such equitable distribution of the available supply could be effected, it should, according to settled practice, refuse to entertain the suits. Compare *Marble Co.* v. *Ripley*, 10 Wall. 339, 358; *Texas & Pacific Ry. Co.* v. *Marshall*, 136 U. S. 393, 406; *Giles* v. *Harris*, 189 U. S. 475, 487, 488.

COMMONWEALTH OF PENNSYLVANIA *v.* STATE OF WEST VIRGINIA.

STATE OF OHIO *v.* STATE OF WEST VIRGINIA.

IN EQUITY.

Nos. 15 and 16, Original. Decree entered June 11, 1923.

Decree, declaring c. 71, Laws of West Virginia of 1919, unconstitutional; enjoining that State and her officials from enforcing it; apportioning costs; and fixing the pay of the commissioner who took and reported the evidence.

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circumstances, West Virginia companies be justified in supplying the Kentucky demand while leaving that of its West Virginia customers unsatisfied? Should distributing companies in Pennsylvania, Ohio, Kentucky and Indiana be permitted to extend their mains or add new customers after West Virginia had recognized the insufficiency of the supply to satisfy the needs of consumers within the State? And what shall be deemed the existing demand of a State? Is existing demand to be limited to customers already connected? And does it mean the amount theretofore taken by such customers or that which they may wish to take through existing appliances?

These suits having been heretofore submitted on the pleadings and the evidence, and the Court being now fully advised in the premises,

It is considered, ordered and decreed as follows:

1. That the Act passed by the Legislature of the defendant State February 10, 1919, which is set forth in the bills of complaint in these suits and known as Chapter 71 of the West Virginia Acts of 1919, is a void and inoperative enactment because it contravenes the limitations which the Constitution of the United States places upon state action in respect of commerce among the several States;

2. That the defendant State, and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce, that Act;

3. That the aggregate costs in these suits be apportioned among and paid by the parties thereto as follows: The State of West Virginia one-half; the Commonwealth of Pennsylvania one-fourth and the State of Ohio one-fourth;

4. That Levi Cooke, Esquire, the commissioner by whom the evidence in these suits was taken and reported to this Court, shall receive and be paid the sum of six thousand dollars in full compensation for the services rendered and the expenses incurred by him in that connection, and that this sum be taxed as part of the aggregate costs in the two suits and be paid by the parties in the proportions just named;

5. That the Clerk of this Court transmit to the Chief Magistrates of the Commonwealth of Pennsylvania and the States of Ohio and West Virginia copies of this decree duly authenticated under the seal of this Court.

GEORGIA RAILWAY & POWER COMPANY ET AL. *v.* RAILROAD COMMISSION OF THE STATE OF GEORGIA ET AL.

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

No. 298. Argued November 29, 1922.—Decided June 11, 1923.

1. In valuing the physical properties of a public utility corporation as a basis for fixing rates, the present cost of reproduction, less depreciation, is an important element, but not the only element, to be considered. P. 629. *Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276, distinguished.
2. The value of a gas company's property for rate-making purposes, does not include the worth of its franchise to use the city streets, amounting to a perpetual permit but not to a monopoly. P. 632.
3. Nor may past losses, due to insufficiency of previous rates, be capitalized as part of the property on which the fair return is to be based. *Id.*
4. In such inquiries, the federal corporate income tax is to be treated as an operating charge, to be deducted in arriving at the probable net income. P. 633.
5. Taking into consideration the exemption of dividends from the normal federal income tax payable by stockholders, a rate fixed for a gas company which allows it a return of 7¼%, *held,* not confiscatory. *Id.*
6. A decree refusing an interlocutory injunction against enforcement of a rate challenged by a public utility corporation as confiscatory, should be affirmed in the absence of any error by the court below other than possible error in prophecy or of judgment in passing upon the evidence, and when the evidence does not compel a conviction that the rate will prove inadequate. P. 634.

278 Fed. 242, affirmed.

APPEAL from a decree of the District Court refusing an interlocutory injunction in a suit to enjoin enforcement of a gas rate fixed by the appellee Commission.

Mr. L. Z. Rosser and *Mr. Robert G. Dodge,* with whom *Mr. Jack J. Spalding, Mr. Walter T. Colquitt, Mr. J.*

Prince Webster and *Mr. Linton C. Hopkins* were on the briefs, for appellants.

In rate cases the value of the property is to be determined as of the time of the inquiry. *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388; *Lincoln Gas Co.* v. *Lincoln*, 223 U. S. 349.

Cost is not the test. If the value of the property at the time of the inquiry is less than its cost, the Company cannot complain that the rate does not yield an adequate return upon the cost of the property. *San Diego Land Co.* v. *National City*, 174 U. S. 739; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201.

If, on the other hand, the value of the property has appreciated, a rate which yields a reasonable return on the cost is nevertheless confiscatory if it does not produce a fair return upon the present value. *San Diego Land Co.* v. *Jasper, supra; Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Minnesota Rate Cases*, 230 U. S. 352; *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318.

Reproduction cost, less depreciation, furnishes the approved measure of valuation. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178; *Consolidated Gas Co.* v. *Newton*, 267 Fed. 231; 258 U. S. 165.

The method of taking pre-war costs, plus the cost of later additions, is improper. *St. Joseph Ry. Co.* v. *Public Service Comm.*, 268 Fed. 267; *Landon* v. *Court of Industrial Relations*, 269 Fed. 433; *Potomac Electric Power Co.* v. *Public Utilities Comm.*, 276 Fed. 327; *Public Service Ry. Co.* v. *Board of Public Utilities Commrs.*, 276 Fed. 979; *Petersburg Gas Co.* v. *Petersburg*, 132 Va. 82.

In the case at bar the Commission held, in effect, that increased reproduction cost due to conditions incident to

so abnormal an event as the World War is an exception to the general rule and cannot be taken into account. It is, of course, true that rates are established with some idea of permanency and that, if the value of the property at the moment a rate is established is inflated from some transitory cause, the rate is not necessarily confiscatory because it does not yield a full return on this inflated valuation. This Court cannot, however, fail to take notice of the fact that the price level of the latter part of 1921, considerably lower as it was than the prevailing level of the preceding two or three years, was vastly higher than any pre-war level and seems to have become stabilized to a very considerable degree since 1921. *Joplin Ry. Co.* v. *Public Service Comm.*, 267 Fed. 584; *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256.

To value gas property in 1921 in the dollars of 1914 is palpably unjust and improper. *Elizabethtown Gas Co.* v. *Public Utility Commrs.*, 95 N. J. L. 18.

The mistake in valuing the physical property was reflected in the estimate of going concern value and the amount allowed for annual depreciation.

The allowance for working capital was figured on an improper basis and is wholly inadequate.

Without reference to further errors of the Commission the new rate is shown to be confiscatory.

The value of the franchise should have been included in the valuation. *Atlanta* v. *Gas Light Co.*, 71 Ga. 106; *West River Bridge Co.* v. *Dix,* 6 How. 507; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 661; *New York Electric Lines* v. *Empire City Subway,* 235 U. S. 179; *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58.

In the legislation of Georgia, franchises of this character are fully recognized as property.

There seems to be no logical reason why the value of franchises should not be included in a valuation for rate

purposes; and indeed it has been several times decided that they are properly to be included. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Spring Valley Waterworks Co.* v. *San Francisco*, 124 Fed. 574; *Joaquin & Kings River Co.* v. *Stanislaus County*, 191 Fed. 875; *Louisville & Nashville R. R. Co.* v. *Railroad Commission*, 196 Fed. 800. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, distinguished.

Past losses should have been taken into consideration.

The court below improperly disallowed the federal income tax as a deduction from gross income.

Upon the evidence the court should have issued the injunction prayed for notwithstanding that there had been no actual trial of the rate.

Mr. E. J. Reagan for appellees.

Mr. Wm. Chamberlain, by leave of court, filed a brief as *amicus curiæ*.

Mr. Justice Brandeis delivered the opinion of the Court.

The gas supply of Atlanta is furnished by the Georgia Railway & Power Company. Authority to fix public utility rates is vested by law in the Railroad Commission. On September 20, 1921, the Commission called upon the Georgia Company to show cause why the then maximum rate, $1.65 per 1000 cubic feet, should not be reduced; and hearings were duly had. The company insisted that under the proposed rate the net income would be less than 3 per cent. on what it claimed to be the fair value of the property. The Commission concluded that the net income under the proposed rate would be about 8 per cent. on the value found by it. This difference in their views as to the percentage of probable return arose mainly from their difference as to the value of the property. The

company claimed that it was at least $9,500,000. The Commission found that it was $5,250,000. On December 30, 1921, it ordered that the price of gas be reduced to $1.55.

The Georgia Company and the Atlanta Gas Light Company, its lessor, then brought, in the federal court for the Northern District of Georgia, this suit to enjoin enforcement of the order, claiming that the rate prescribed is confiscatory. The case was heard upon application for an interlocutory injunction by three judges under § 266 of the Judicial Code. The court did not approve in all respects the views expressed by the Commission; but it found that "even were there considerable error in fixing values by the Commission, the rate would not appear to be clearly confiscatory" and that enforcement of the order ought not be enjoined until the reduced rate had been tried. It, therefore, refused the interlocutory injunction; and the case is here on appeal under § 238 of the Judicial Code.

First. The objections mainly urged relate to the rate-base; and one of them is of fundamental importance. The companies assert that the rule to be applied in valuing the physical property of a utility is reproduction cost at the time of the enquiry less depreciation. The 1921 construction costs were about 70 per cent. higher than those of 1914, and earlier dates when most of the plant was installed. So much of it as was in existence January 1, 1914, was valued at an amount which was substantially its actual cost or its reproduction cost as of that date. The companies claim that it should have been valued at its replacement cost in November, 1921—the time of the rate enquiry; and that the great increase in construction costs was ignored in determining the rate base.

The case is unlike *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276. Here the Commission gave careful considera-

tion to the cost of reproduction; but it refused to adopt reproduction cost as the measure of value. It declared that the exercise of a reasonable judgment as to the present "fair value" required some consideration of reproduction costs as well as of original costs, but that "present fair value" is not synonymous with "present replacement cost", particularly under abnormal conditions. That part of the rule which declares the utility entitled to the benefit of increases in the value of property was, however, specifically applied in the allowance of $125,000 made by the Commission to represent the appreciation in the value of the land owned. The lower court recognized that it must exercise an independent judgment in passing upon the evidence; and it gave careful consideration to replacement cost. But it likewise held that there was no rule which required that in valuing the physical property there must be "slavish adherence to cost of reproduction, less depreciation." It discussed the fact that since 1914 large sums had been expended annually on the plant; that part of this additional construction had been done at prices higher than those which prevailed at the time of the rate hearing; and it concluded that "averaging results, and remembering that values are . . . matters of opinion, . . . no constitutional wrong clearly appears."

The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct. As was said in *Minnesota Rate Cases*, 230 U. S. 352, 434: "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

What these relevant facts are had been stated in *Smyth* v. *Ames*, 169 U. S. 466, 546, 547:

" . . . the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

And in *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 52, it had been made clear " that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase."

The rule laid down in these cases was expressly recognized as controlling, both by the Commission and by the lower court. Evidence bearing on most of the facts there declared to be relevant facts was before them. The court states, and the record establishes, that the " opinion of the . . . Commission . . . evinces a full and conscientious consideration of the evidence." The opinion of the court shows that it also made careful examination of the evidence submitted and that it recognized the applicable rules of law. While it differed from the Commission in some matter of detail, it sustained the latter's finding that the value was $5,250,000. The question on which this Court divided in the *Southwestern Bell Telephone Case, supra,* is not involved here.

Second. Two objections to the valuation relate to the exclusion of items from the rate base, namely: the franchise to do business in Atlanta, said to be worth $1,000,000, and so-called losses from operations during recent years, alleged to aggregate $1,000,000. These items were properly excluded. The franchise in question is not a monopoly. It is merely a perpetual permit, granted by the legislature in 1856, to maintain gas mains in the streets, alleys, and public places of Atlanta without the necessity of securing the consent of the municipality. That such franchises are to be excluded in fixing the rate base was settled by *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655, 669; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 169, and *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388. The allowance for the franchise made in *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 43, 44, 48, was rested on special grounds which do not exist in this case. That past losses are not to be capitalized as property on which the fair return is based was held in *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 14; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388. Here this conclusion seems even clearer than it was in those cases. The losses under consideration in the case at bar were obviously not a part of development cost. They were due to insufficiency of previous rates.

Third. Two further objections to the rate base relate to items of property included in it, which are alleged to have been undervalued. The companies contend that the working capital required was $420,000, whereas only $266,677 was allowed. They also contend that the "going concern" value is at least $750,000, whereas only $441,629 was allowed. These are findings of fact made by the Commission and approved by the lower court. We are not satisfied that either finding is erroneous.

Fourth. The companies contend that there was error, also, in estimating the amount of the probable net in-

come. One objection relates to the federal corporate income tax (10 per cent.) assumed to be $45,364. The Commission treated the tax as a proper operating charge. The court disallowed it; and thus increased its estimate of probable net income. In this the court erred. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388. Its estimate of " $424,150 as the probable income per year under the new rate, with no allowance made for increased consumption or reduced cost of production that seem quite probable " should therefore be reduced to about $380,000. This is the amount indicated by the Commission's findings.

The other objections relate to the amount of the depreciation charge. The companies say the rate should be 2½ per cent. The Commission and the court allowed only 2 per cent. This question is one of fact, and we are not convinced that it was wrongly decided below. The amount of the depreciation charge is also objected to on the ground that the percentage should have been figured on a larger value. This objection depends upon the value to be placed upon the physical property which has already been discussed.

Fifth. The probable return based on the value and the probable income found by the Commission would be nearly 7¼ per cent. It must be borne in mind, as pointed out in *Galveston Electric Co.* v. *Galveston, supra*, that, since dividends from the corporation are not included in the income on which the normal federal tax is payable by stockholders, the tax exemption is, in effect, an additional return on the investment. A return of 7¼ per cent.—in addition to this tax exemption—can not be deemed confiscatory. The solicitude of the Commission to secure to the companies a fair return is shown by its treatment of them during the three years preceding the order here in question. Long prior to 1918, the gas rate had been fixed

by the utility at one dollar. Operating and construction costs having risen owing to the world war, the Commission raised the rate to $1.15 effective September 1, 1918; to $1.35 effective October 1, 1920; to $1.90 effective March 1, 1921. After costs had fallen materially, the rate was reduced to $1.65 June 1, 1921; and the order to reduce it to $1.55 was entered, effective January 1, 1922. In making each of these changes the Commission fixed a rate which it estimated would permit the company to earn a return of about 8 per cent. on the fair value of the property. Each change of rate was made upon careful consideration. If there was error, it was error in prophecy or error of judgment in passing upon the evidence. 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; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 401, 402. Moreover, the decree is merely interlocutory.

Affirmed.

Mr. Justice McKenna, dissenting.

I am constrained to dissent on the authority of *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276; and *Bluefield Water Works & Improvement Co. v. Public Service Commission,* decided today, *post,* 679.

These two cases follow other cases which they cited, including that of *Smyth* v. *Ames,* decided a quarter of a century ago, declaring the rule of regulation to be, that in order to fix a rate for the use of property devoted to the public service, the property must be estimated "at the time it is being used for the public." And again, "that the value of the property is to be determined as of the time when the inquiry is made regarding rates."

The Commission in the present case conceded the rule, and violated it, and upon a unique justification. It said "The human race is only recovering from an experience the like of which the world never before endured—a world war—a world upheaval—an economic cataclysm. There are no stable measures of value today." Upon this the Commission departed from the values which then prevailed, and from those that the rule of law prescribed, that is, the values prevailing *at the time the property was being used for the public,* and reverted to the values which obtained January 1, 1914,—values that had not existed for over seven years, and no prophecy could say when, if ever, they would exist again.[1]

To separate the Company from the conditions which existed at the time of regulation was arbitrary and condemned the Company to accept an inadequate return upon the value of its property, not only for the then time, but for an indefinite future time. Similar action was condemned in the *Telephone Case*—no "economic cataclysm" repelling. Similar action was condemned in the *Bluefield Case*—no "economic cataclysm" repelling.[2] May I ask what had become of the "cataclysm"? Had it settled in Georgia in conscious indulgence to life and

[1] An expert witness of the Commission testified as follows: "I do not incline to the extreme high values of the war time period, but believe that when business does resume prices will again stabilize at figures considerably lower than the peak of 1920, but far above any pre-war level."

[2] The lower federal courts have not felt the bewildering effect—impotent effect I might say—that the Commission discovered in the post-war conditions. *St. Joseph Railway, etc., Co.* v. *Public Service Commission,* 268 Fed. 267; *Landon* v. *Court of Industrial Relations,* 269 Fed. 433, 444; *Potomac Electric Power Co.* v. *Public Utilities Commission,* 276 Fed. 327; *Public Service Ry. Co.* v. *Board of Public Utilities Commissioners,* 276 Fed. 979. And a state court has been equally free from confusion. *Petersburg Gas Co.* v. *Petersburg,* 132 Va. 82.

business in other parts of the country from its bewildering influence?

The contrariety of decision cannot be reconciled. To anticipate a possible criticism, however, I should say a distinction is attempted to be made between this case and the *Telephone Case,* a distinction, I think, not sustained by the record. It is said that the present case is unlike the *Telephone Case,* in that, "here the Commission gave careful consideration to the cost of reproduction; but it refused to adopt reproduction cost as the measure of value." The omission was the Commission's error—it was in disregard of the rule of the cases, disregard of the value of the utility at the time of its regulation—the time it was being used by the public. And such value was available. The problem was direct and simple—with no baffling element in it. It was only to find the reproduction cost of the utility, and this, necessarily, was constituted of the cost of its materials, and the cost of their fabrication, less an estimate of depreciation from the new. These costs and depreciations representing its value at the moment of time it was being regulated and being used by the public, such moment being the time prescribed by the law for the determination of its value—the determination of that upon which the rate for its use was to be based.

There was nothing obscure or puzzling about it. The cost of the materials and of their fabrication was as much a measure of the value of the utility when reproduced as the cost of materials and their fabrication were a measure of the value of the utility when it was produced—a measure of value of reproduction and production. A measure, it is true, of different degree which it was the duty of the Commission to regard, and because the Commission did not regard it, that is, because it did not consider the values at the time it was acting, its action was condemned. There are words in the

Telephone Case that are pertinent here. Here, as there, a Commission undertook to value the property of a utility without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing at a prior time. And it may be said here, as it was said there, "as a matter of common knowledge these increases were large."

The error in this case being of like kind to that which was committed by the Commission in that case, it should be visited by the same treatment, that is, a reversal of its action.

It is supposed that this case and the *Telephone Case* cannot coexist as declarations of law, without explanation. No attempt, however, is made to justify this case and the *Bluefield Case*. It seems to be taken for granted that they can coexist in the books in harmonious association. Can they?

For answer, it is worth one's while to inquire what the *Bluefield Case* decides. It is said in the opinion that "The record [in the case] clearly shows that the commission [whose action is reviewed] in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous." Citing the *Telephone Case* as well as other cases.

From this error all of the other errors in the case followed and it, and they, constituted the mistake of the Supreme Court of West Virginia in sustaining the action of the Commission, and the ground of reversal of the Supreme Court.

The cases, this and the *Bluefield Case*, are identical in errors. In this case the values that existed at the time

of regulation were wholly disregarded, and those of seven years before, those which existed in 1914, that is, before the war, were deliberately selected. This action was affirmed, as I have pointed out, by the District Court from whose decree this appeal was taken. The decree is affirmed, which is the affirmance of the action of the Commission.

In the *Bluefield Case* the value of the utility at the time of regulation "appears", according to the declaration of the Court, "to have been wholly disregarded".

The Supreme Court of West Virginia affirmed the action of the Commission. This Court in its opinion of today reverses that judgment, which is a reversal of the action of the Commission.

It will be observed the Commissions did exactly the same thing, and yet the action of one is affirmed, and the action of the other reversed. This contrariety of decision I cannot reconcile. There should be reversal of both or the affirmance of both if their identities are to be observed. I, therefore, must dissent from one or the other of the cases, and as the *Bluefield Case* has the support of the *Telephone Case,* I dissent from the present case, there being a majority against it, and those cases, besides, expressing my view of the law.

It may be said that if I get rid of the Commission's action, I must take account of the District Court's judgment of it upon an independent consideration of the record. I realize that the challenge has serious strength, but as the Court's opinion is very long, I can only meet the challenge by what I consider the error of the opinion. The Court disregarded, as the Commission did, the rule of law that the value of the Company's utility should be at the time it was being regulated, that is, at the time it was being used. The Court, however, did not entirely agree with the Commission. It said "in ascertaining the present value of physical properties, though correct

rules were announced by the Commission, we do not think they were exactly followed." And again, "The Commission did not allow the appreciation claimed on the investment since 1914, nor did it deduct from the investments of 1919 and 1920 and 1921, which were nearly a million dollars their admitted reproduction loss, but it did allow the appreciation in market price of real estate."

The last observation I do not pass upon as it has no consequential bearing on the question in the case. And I proceed to say that I have the impression that the Court's decision on the Commission's action was influenced by the Court's constitutional views. The Court said that "A rate established as reasonable, whether by the company or by the Commission is not guaranteed by the Commission or by the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business" to which the company had devoted its property.

If this is an intimation that the Court was of the view that even if the action of the Commission resulted in a return to the utility of less than that which would be fair and reasonable it would not encounter the opposition of the Constitution, such view was error and, laboring under the error, I can understand that the Court was not anxiously concerned to investigate the grounds of the Commission's action—not concerned with the "risk of the business."

There are questions upon other elements of value upon which I do not consider it necessary to pass.

I think the order denying the preliminary injunction should be reversed.

LION BONDING & SURETY COMPANY *v.* KARATZ.

DEPARTMENT OF TRADE & COMMERCE OF THE STATE OF NEBRASKA ET AL. *v.* HERTZ ET AL., AS RECEIVERS OF LION BONDING & SURETY COMPANY.

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

Nos. 574, 467. Motion to modify decrees submitted May 21, 1923. Denied June 4, 1923.—Opinion rendered June 11, 1923.

Where lower federal courts have entertained suits of which they had no jurisdiction, as federal courts, and appointed receivers, the jurisdiction of this Court, on appeal, is to correct their errors in assuming jurisdiction and granting relief; it has no jurisdiction, in ordering the suits dismissed, to allow compensation, expenses and counsel fees to the receivers, or to direct a party to take proceedings in a state court having jurisdiction of the property in question, for the purpose of protecting creditors who filed their claims in the federal court. P. 641.

Motion denied.

MOTION to modify the decrees rendered by this Court pursuant to its decision of these cases, *ante*, 77.

Mr. Bruce W. Sanborn, Mr. William G. Graves, Mr. Samuel G. Ordway and *Mr. William R. Kueffner,* for respondents, in support of the motion.

Mr. O. S. Spillman, Attorney General of the State of Nebraska, *Mr. John F. Stout, Mr. Halleck F. Rose, Mr. Arthur R. Wells, Mr. Paul L. Martin* and *Mr. Amos Thomas,* for petitioners, in opposition to the motion.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The decision in these cases rendered April 23, 1923, *ante*, 77, reversed the decrees with costs and directed that the bills be dismissed. Before the mandate issued Hertz and

Levin, the receivers appointed by the federal court for Minnesota, applied for modification of the decrees. They ask approval of the disbursements for expenses of the receivership paid by them out of monies realized from assets of the Lion Bonding & Surety Company. They ask approval of charges made by counsel employed in certain ancillary proceedings which these counsel propose to deduct from funds collected in another district. They ask that payment be directed of other additional expenses incurred in connection with the original receivership and the ancillary receiverships, aggregating $3,384.55. They also ask that they and their general counsel be paid compensation for services rendered during the two years which have elapsed since their appointment as receivers. The amounts involved in these several requests aggregate nearly $30,000. There are still some assets of the corporation within the District of Minnesota and in two other districts in which Hertz and Levin were appointed ancillary receivers. The aggregate value of these assets appears to be less than the aggregate amount now claimed. The receivers pray for a general direction that payment be made out of funds of the insolvent estate now being administered by the state court.

The receivers also call attention to the fact that the time allowed creditors for filing claims under the decree of the Nebraska court elapsed May 1, 1922; that many creditors filed their claims only in the federal court; that these claims will be barred from sharing in the distribution to be made, unless an order is entered allowing such claims to be filed in the state court; and they ask that this Court direct the Department of Trade and Commerce of Nebraska to take such proceedings in the state court as may be necessary to secure to such creditors the right to share in the assets of the corporation.

This Court is without power to grant any part of the relief sought. The District Court was without jurisdic-

tion as a federal court to appoint receivers in, or otherwise to entertain, the Karatz suit. For this reason, among others, the Hertz suit, a dependent bill, was dismissed. As the lower federal courts lacked jurisdiction, they are necessarily without power to make any charge upon, or disposition of, the assets within their respective districts.[1] Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court.[2] Where a case is dismissed for want of jurisdiction as a federal court, there is not even power to award costs against the defeated party.[3] The case at bar is unlike *Palmer* v. *Texas*, 212 U. S. 118, 132, upon which the receivers rely. In that case the costs and expenses of a receiver erroneously appointed by the federal court were directed to be paid out of funds realized in that court. There the Circuit Court had jurisdiction as a federal court; but the decree appointing the receiver was reversed, because it was erroneous.

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[1] Compare *Missouri* v. *Angle*, 236 Fed. 644; 224 Fed. 525; *Hawes* v. *First National Bank of Madison*, 229 Fed. 51; *In re Standard Fuller's Earth Co.*, 186 Fed. 578.

[2] *In re Diamond's Estate*, 259 Fed. 70; *In re Williams*, 240 Fed. 788; *In re Standard Fuller's Earth Co.*, 186 Fed. 578; *In re Rogers*, 116 Fed. 435. Compare *In re Watts*, 190 U. S. 1; *Randolph* v. *Scruggs*, 190 U. S. 533.

[3] *Inglee* v. *Coolidge*, 2 Wheat. 363, 368; *McIver* v. *Wattles*, 9 Wheat. 650; *Strader* v. *Graham*, 18 How. 602; *Citizens' Bank* v. *Cannon*, 164 U. S. 319. In removal cases the rule was changed by Act of March 3, 1875, c. 137, § 5, 18 Stat. 470, 472; *Josslyn* v. *Phillips*, 27 Fed. 481; *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379; *Mattingly* v. *North Western Virginia R. R. Co.*, 158 U. S. 53. Although the dismissal below is for want of jurisdiction, costs in this Court may be allowed, because it has jurisdiction to review. *Winchester* v. *Jackson*, 3 Cr. 514; *Montalet* v. *Murray*, 4 Cr. 46; *Halsted* v. *Buster*, 119 U. S. 341; *Blacklock* v. *Small*, 127 U. S. 96, 105.

Obviously, this Court has no power to direct the Department of Trade and Commerce of Nebraska to apply to the state court for the order allowing creditors to prove their claims in that court. Our jurisdiction is limited in this proceeding to the correction of the errors committed by the lower federal courts in taking jurisdiction and in granting relief. The only course open to the creditors, as to the receivers and their counsel, is to apply to the state court.

Motion denied.

AMERICAN BANK & TRUST COMPANY ET AL. *v.* FEDERAL RESERVE BANK OF ATLANTA ET AL.

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

No. 717. Argued April 30, May 1, 1923.—Decided June 11, 1923.

1. It is within the statutory powers of a federal reserve bank to collect checks on state banks within its district, which are not members of the federal reserve system, or affiliated with it through establishment of an exchange balance, and which refuse to assent to clearance at par, provided the checks be payable on presentation and can in fact be collected consistently with the legal rights of the drawees without paying an exchange charge. P. 646.
2. Loss of income resulting to country banks from the exercise of this right without malice or coercion, is *damnum absque injuria*. P. 648.

284 Fed. 424, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree made by the District Court after final hearing, in a suit brought by numerous state banks against the Federal Reserve Bank of Atlanta and its officials. The case was here before on a decree sustaining a demurrer to the bill. 256 U. S. 350.

Mr. Alexander W. Smith, with whom *Mr. Orville A. Park* and *Mr. Theodore H. Smith* were on the brief, for appellants.

Mr. John W. Davis, with whom *Mr. Hollins N. Randolph, Mr. Robert S. Parker* and *Mr. Montgomery B. Angell* were on the brief, for appellees.

Mr. Justice Brandeis delivered the opinion of the Court.

After the decision in this case reported in 256 U. S. 350, an answer was filed which denied, in large part, the allegations of the bill. Then, by an amended answer, the Federal Reserve Bank disclaimed any intention of demanding payment in cash, when presenting checks at the banks, and averred its willingness to accept payment in drafts, either on the drawee's Atlanta correspondent or on any other solvent bank, if collectible at par. The District Court heard the case upon the evidence. It found that the Federal Reserve Bank was not inspired by any ulterior purpose to coerce or to injure any non-member bank which refused to remit at par. It found that the evidence was insufficient to sustain any charge that the Federal Reserve Bank was exercising its rights so as to injure or oppress plaintiff banks. And it found, specifically, that the evidence did not sustain the charge that the Federal Reserve Bank accumulated checks upon non-member country banks until they reached a large amount and then caused the checks to be presented for payment over the counter, in order to compel plaintiff banks to keep in their vaults so much cash that they would be obliged either to agree to remit at par or to go out of business. With regard to publication on the par list of the names of non-assenting banks, the District Court held that the evidence did not justify a finding that such publication was made in order to injure or oppress plaintiff

banks. But it was of opinion that insertion of their names might lead to the belief that the plaintiff banks had agreed to remit at par. An injunction was, therefore, granted against inclusion of their names on the par list. The relief sought was in all other respects denied. The decree left the Federal Reserve Bank free to publish that it would make collection at par of checks upon any bank in any town, thus including those in which plaintiffs had their respective places of business. 280 Fed. 940. These findings were approved by the Circuit Court of Appeals; and the decree was affirmed. 284 Fed. 424.

The case is here on an appeal taken by the plaintiffs. The evidence was conflicting. No adequate reason is shown why the concurrent findings of fact made by the two lower courts should not be accepted by us. *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, 145. Whether on the undisputed facts plaintiffs were entitled to additional relief is the main question for decision. In order to decide that question it is necessary to consider the course of business formerly prevailing and the changes wrought by the attempt to introduce universal par clearance and collection of checks through the federal reserve banks.

A large part of the checks drawn on country banks are sent to payees who reside in places other than that in which the drawee bank is located. Payment of such a check is ordinarily secured through the payee's depositing it in his local bank for collection. This bank ordinarily used, as the means for presenting the check to the drawee, a clearing house and/or correspondent banks. Formerly when the check was so presented, the drawee ordinarily paid, not in cash, but by a remittance drawn on his balance in some reserve city or by a credit with some correspondent. This process of collection yielded to the country bank a two-fold profit. It earned some profit by the small service charge called exchange, which

it made for the remittance or the credit. And it earned some profit by using the depositor's money during the period (sometimes weeks) in which the check was travelling the often circuitous route, with many stops, from the payee's bank to its own, and also while the exchange draft was being collected. These avenues to profit are, in large measure, closed by the federal reserve banks' course of action. These banks do not pay any exchange charges to the drawee. And their superior facilities so shorten the time required to collect checks that the drawee bank's balances available for loans are much reduced. Largely because of the fact that the reserve banks thus make the collection without any deduction for exchange, most checks on country banks are now routed through the reserve banks. Although there is, as the District Court found, no intentional accumulation or holding of checks in order to embarrass, the advantages offered by the federal reserve banks have created a steady flow in increased volume of checks on country banks so routed. That the action contemplated by the Federal Reserve Bank will subject the country banks to certain losses is clear.[1] In order to protect them from the resulting loss it would be necessary to prevent the federal reserve banks from accepting the checks for collection. For these banks cannot be compelled to pay exchange charges or to abandon superior facilities.

The contention is that the injunction should issue, because it is *ultra vires* the federal reserve banks to collect checks on banks which are not members of the system or affiliated with it, through establishing an exchange balance, and which have definitely refused to assent to clearance at par. It is true that Congress has created in the reserve banks institutions special in character, with lim-

[1] It is said that introduction of a universal system of par clearance and collection of checks through the federal reserve banks would bring compensatory advantages to the country banks.

ited functions and with duties and powers carefully prescribed. Those in respect to the collection of checks are clearly defined. The original act (Act of December 23, 1913, c. 6, § 13, 38 Stat. 251, 263) authorized the reserve banks to "receive from any of its member banks, and from the United States, deposits of . . . checks . . . upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve banks deposits of . . . checks . . . upon solvent member or other Federal reserve banks, payable upon presentation."

By the amendment to § 13 of September 7, 1916, c. 461, 39 Stat. 752, the class of checks receivable was extended to "checks payable upon presentation within the district." By the amendment to § 13 of June 21, 1917, c. 32, § 4, 40 Stat. 232, 235, the class of banks from which checks might be received "solely for collection" was extended. By the latter amendment the facilities offered by the federal reserve banks were made available also to such non-members as became affiliated with the federal reserve system by establishing the required balance "to offset the items in transit." It is true, also, that in practice this amendment might result in excluding checks on particular banks from the class collectible through the federal reserve banks. For it enacted the clause which prohibits payment of exchange charges by federal reserve banks. And as this prohibition would prevent reserve banks from using the usual channels in making collection of checks drawn on those country banks which insist upon exchange charges, the reserve bank might find it impossible or unwise, as a matter of banking practice, to collect such checks at all. But the class of checks to which the reserve bank's collection service might legally be applied, was left by the amendment as those "payable upon presentation within its district." Wherever collection can be made by the federal reserve bank, without paying exchange, neither

the common law, nor the Federal Reserve Act precludes their undertaking it; if it can be done consistently with the rights of the country banks already determined in this case. 256 U. S. 350.

Federal reserve banks are, thus, authorized by Congress to collect for other reserve banks, for members, and for affiliated non-members, checks on any bank within their respective districts, if the check is payable on presentation and can in fact be collected consistently with the legal rights of the drawee without paying an exchange charge. Within these limits federal reserve banks have ordinarily the same right to present a check to the drawee bank for payment over the counter, as any other bank, state or national, would have. For § 4, (38 Stat. 251, 254) provides that the federal reserve banks shall have power:

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this Act and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this Act."

The findings of fact negative the charges of wrongful intent and of coercion. The Federal Reserve Bank has formally declared that it is willing, when presenting checks, to accept in payment a draft of the drawee bank upon its Atlanta correspondent or a draft upon any other solvent bank—if collectible at par. Country banks are not entitled to protection against legitimate competition. Their loss here shown is of the kind to which business concerns are commonly subjected when improved facilities are introduced by others, or a more efficient competitor enters the field. It is *damnum absque injuria.* As the course of action contemplated by the Federal Reserve Bank is not *ultra vires,* we need not consider whether lack of power, if it had existed, would have entitled plaintiffs to relief. Compare *National Bank* v. *Matthews,* 98 U. S. 621; *Blair* v. *Chicago,* 201 U. S. 400, 450.

Some minor objections are urged. The Federal Reserve Bank of Atlanta serves, directly, only the Sixth Reserve District, which includes Georgia. It is contended that the decree should be reversed because the District Court refused to allow the intervention as plaintiffs of banks located outside of that district; because that court refused to admit evidence of the activities engaged in by other federal reserve banks in other districts under the approval of the Federal Reserve Board; and because the court admitted certain joint answers to interrogatories propounded under Equity Rule 58. We cannot say that the trial court abused the discretion vested in it, or erred, in so ruling.

Affirmed.

FARMERS AND MERCHANTS BANK OF MONROE, NORTH CAROLINA, ET AL. *v.* FEDERAL RESERVE BANK OF RICHMOND, VIRGINIA.

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

No. 823. Argued April 30, May 1, 1923.—Decided June 11, 1923.

1. Many state banks, in satisfying checks drawn upon them by their depositors and sent through other banks for collection, were accustomed to remit by draft on their reserves elsewhere and to make a small charge, called exchange, deducted from the remittance. The Federal Reserve Board, and the federal reserve banks, being forbidden to pay exchange charges, but believing it their duty to accept checks on any bank for collection and to make par clearance and collection of checks universal throughout the United States, adopted the practice of causing checks drawn on state banks which refused par clearance to be presented to such banks at the counter for payment in cash. To protect North Carolina banks from serious loss of income which would ensue from this practice, both through reduction of exchange charges and through transference of income-producing assets to their vaults, the legislature of that State enacted, (Pub. Laws 1921, c. 20) that any check drawn

upon a local bank (other than checks in payment of obligations to the federal or state governments,) unless specified to the contrary on its face by the maker, should be payable, at the option of the drawee, in exchange drawn on the drawee's reserve deposits, when such check was presented by or through any federal reserve bank, postoffice, or express company, or their agents, and, further, that state banks might charge a fee, within specified limits, on remittances covering checks. *Held:*

(a) That the North Carolina Act does not violate the provision of the Federal Constitution, Art. I, § 10, cl. 1, which prohibits a State from making anything except gold and silver coin a tender in payment of debts. P. 659.

(b) That it does not deprive the respondent Federal Reserve Bank, without due process of law, of its right to engage in the business of collecting checks payable on presentation within its district, (which it claims it may make a source of revenue), nor of its liberty of contract, by compelling it to accept payment in drafts, good or bad, and so driving it from that branch of business. The statute is not to be construed as authorizing payment in bad drafts, and is an exercise of police power not offensive to the due process clause. P. 660.

(c) That it does not deprive the Federal Reserve Bank of equal protection of the laws, by obliging it to accept payment in drafts, while leaving other banks free to demand cash; since it was reasonable classification for the legislature to limit the regulation to the particular, existing condition sought to be remedied. P. 661.

(d) That it does not conflict with duties imposed by Congress on the Federal Reserve Board and the federal reserve banks. P. 662.

2. Neither § 13, nor any other provision of the Federal Reserve Act, imposes on reserve banks any obligation to receive for collection checks for which it is impossible to obtain payment except by incurring serious expense, as by presenting them by special messenger at a distant place. P. 662.

3. In declaring that reserve banks may receive checks on non-member banks "payable on presentation", the Federal Reserve Act, § 13, as amended, would seem to imply that the checks must be payable in cash, or in such funds as are deemed by the reserve bank an equivalent. P. 663.

4. The federal reserve legislation does not impose on the Federal Reserve Board or the federal reserve banks a duty to establish in the United States a universal system of par clearance and collection of checks. P. 664.

5. The contention that Congress imposed this duty is irreconcilable with the provision of the Hardwick Amendment to § 13 (Act of June 21, 1917, c. 32, § 4, 40 Stat. 232) allowing members and affiliated non-members to make a limited charge (except to federal reserve banks) for "payment of checks and . . . remission therefor by exchange or otherwise." P. 666.
6. The Hardwick Amendment in no way interferes with the right of a depositor in a non-affiliated state bank to agree with his bank that his checks in certain cases (unless otherwise indicated on their face) should be payable, at its option, by exchange. P. 667.

183 N. Car. 546, reversed.

CERTIORARI to a decree of the Supreme Court of North Carolina reversing a decree which perpetually enjoined the respondent Federal Reserve Bank from refusing to accept payment of checks on petitioner banks in exchange drafts, as permitted by a North Carolina statute, and from returning, as dishonored, checks for which payment had been tendered only in that way.

Mr. Alexander W. Smith and *Mr. John J. Parker*, with whom *Mr. Gillam Craig* was on the brief, for petitioners.

Mr. John W. Davis and *Mr. Henry W. Anderson*, with whom *Mr. M. G. Wallace, Mr. H. G. Connor, Jr.*, and *Mr. C. W. Tillett, Jr.*, were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Legislature of North Carolina provided by § 2 of c. 20, Public Laws of 1921, entitled "An Act to promote the solvency of state banks":

"That in order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said drawee

bank when any such check is presented by or through any Federal Reserve Bank, postoffice, or express company, or any respective agents thereof."

Section 1 authorizes banking institutions chartered by the State to charge a fee not in excess of one-eighth of one per cent. on remittances covering checks, the minimum fee on any remittance therefor to be ten cents. Section 4 exempts from the operation of §§ 1 and 2 all checks drawn in payment of obligations to the federal or the state government. Whether this statute conflicts with § 13 of the Federal Reserve Act (December 23, 1913, c. 6, 38 Stat. 251, 263; as amended September 7, 1916, c. 461, 39 Stat. 752; June 21, 1917, c. 32, § 4, 40 Stat. 232, 234) or otherwise with the Federal Constitution is the question for decision.

The legislation arose out of the effort of the Federal Reserve Board to introduce in the United States universal par clearance and collection of checks through federal reserve banks. See *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350. The Federal Reserve Bank of Richmond serves the Fifth Federal Reserve District which includes North Carolina. Upon the enactment of this statute the bank gave notice that it considered the legislation void under the Federal Constitution; that, when presenting checks to North Carolina state banks for payment over the counter, it would refuse to accept exchange drafts on reserve deposits as required by § 2; and that it would return as dishonored checks for which only exchange drafts had been tendered in payment. Some checks were returned thus dishonored; and to enjoin such action, this suit was brought in a court of the State by the Farmers and Merchants Bank of Monroe and eleven other state banks. Two hundred and seventy-one more joined later as plaintiffs. So far as appears, none of them was a member of the federal reserve system or was affiliated with it. The trial court granted a per-

petual injunction. The Supreme Court of the State reversed the decree, 183 N. Car. 546; and the case is here on writ of certiorari, 261 U. S. 610. Defendant admits that, if the North Carolina statute is constitutional, plaintiffs are entitled to an injunction.

To understand the occasion for the statute, its operation and its effect, the applicable banking practice must be considered.[1] Par clearance does not mean that the payee of a check who deposits it with his bank for collection will be credited in his account with the face of the check if it is collected. His bank may, despite par clearance, make a charge to him for its service in collecting the check from the drawee bank. It may make such a charge although both it and the drawee bank are members of the federal reserve system; and some third bank which aids in the process of collection may likewise make a charge for the service it renders. Such a collection charge may be made not only to member banks by member banks, national or state, but it may be made to member banks also by the federal reserve banks for the services which the latter render. The collection charge is expressly provided for in § 16 of the Federal Reserve Act (38 Stat. 268) which declares that:

"The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal reserve bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal reserve bank."

[1] See Annual Reports of the Federal Reserve Board, 1914, pp. 19, 20, 174; 1915, pp. 14–17; 1916, pp. 9–12; Regulation I, Series of 1916, p. 169; 1917, pp. 23, 24; Regulation J, Series of 1917, pp. 181–183; 1918, pp. 74–77; 204–206; 810, 811, 817, 821; 1919, pp. 40–44; 222–228; 1920, pp. 63–69; 1921, 68–73; 228–230; Letter from the Governor of the Federal Reserve Board of January 26, 1920, Senate Document No. 184, 66th Cong., 2d sess.; also "Par Clearance of Checks," by C. T. Murchison, 1 No. Car. Law Review 133.

Par clearance refers to a wholly different matter. It deals not with charges for collection, but with charges incident to paying. It deals with exchange. Formerly, checks, except where paid at the banking house over the counter, were customarily paid either through a clearing house or by remitting, to the bank in which they had been deposited for collection, a draft on the drawee's deposit in some reserve city. For the service rendered by the drawee bank in so remitting funds available for use at the place of the deposit of the check, it was formerly a common practice to make a small charge, called exchange, and to deduct the amount from the remittance. This charge of the drawee bank the Federal Reserve Board planned to eliminate and, in so doing, to concentrate in the twelve federal reserve banks the clearance of checks and the accumulation of the reserve balances used for that purpose. The Board began by efforts to induce the banks to adopt par clearance voluntarily.[2] The attempt was not successful. The Board then concluded to apply compulsion. Every national bank is necessarily a member of the federal reserve system; and every state bank with the requisite qualifications may become such. Over members the Board has large powers, as well as influence. The first step in the campaign of compulsion was taken in the summer of 1916, when the Board issued a regulation requiring every drawee bank which is a member of the federal reserve system to pay without deduction, all checks upon it presented through the mail by the federal reserve bank of the district. The operation of this requirement was at first limited in scope by the fact that the original act (§ 13) authorized the reserve banks to collect only those checks which were drawn on member banks and which were deposited by a member bank or another reserve

[2] See Report, Federal Reserve Board, 1915, pp. 14–17; *ibid.* 1916, pp. 9–11.

bank or the United States. Few of the many state banks had then elected to become members. In September, 1916, § 13 was amended so as to authorize a reserve bank to receive for collection from any member (including other reserve banks) also checks drawn upon non-member banks within its district. Thereby, the Federal Reserve Board was enabled to extend par clearance to a large proportion of all checks issued in the United States. But the regulation (J) then issued expressly provided that the federal reserve banks would receive from member banks, at par, only checks on those of the non-member banks whose checks could be collected by the federal reserve bank at par. It was recognized that non-members were left free to refuse assent to par clearance. By December 15, 1916, only 37 of the state banks within the United States, numbering about 20,000, had become members of the system; and only 8,065 of the state banks had assented to par clearance.

Reserve banks could not, under the then law, make collections for non-members. It was believed that if Congress would grant federal reserve banks permission to make collection also for non-members, the Board could offer to all banks inducements adequate to secure their consent to par clearance. A further amendment to § 13 was thereupon secured by Act of June 21, 1917, c. 32, § 4, 40 Stat. 232, 234, which provided, among other things, that federal reserve banks:

"Solely for the purposes of exchange or of collection, may receive from any nonmember bank . . . deposits of . . . checks . . . payable upon presentation . . .: *Provided,* Such nonmember bank . . . maintains with the Federal reserve bank of its district a balance sufficient to offset the items in transit held for its account by the Federal reserve bank."

To this provision, which embodied the legislation proposed by the Federal Reserve Board, there was added,

while in the Senate, another proviso, relating to the exchange charge, now known in a modified form as the Hardwick Amendment, which declares:

"That nothing in this or any other section of this Act shall be construed as prohibiting a member or nonmember bank from making reasonable charges, to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per $100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; but no such charges shall be made against the Federal reserve banks."

Thus a federal reserve bank was authorized to receive for collection checks from non-members who maintained with it the prescribed balance; and strenuous efforts were then made to induce all state banks to so arrange. But the law did not compel state banks to do this. Many refused; and they continued to insist on making exchange charges. On March 21, 1918, the Attorney General, 31 Ops. Atty. Gen. 245, 251, advised the President:

"The Federal reserve act, however, does not command or compel these State banks to forego any right they may have under the State laws to make charges in connection with the payment of checks drawn upon them. The act merely offers the clearing and collection facilities of the Federal reserve banks upon specified conditions. If the State banks refuse to comply with the conditions by insisting upon making charges against the Federal reserve banks, the result will simply be, so far as the Federal Reserve Act is concerned, that since the Federal reserve banks can not pay these charges they can not clear or collect checks on banks demanding such payment from them."

The Federal Reserve Board and the federal reserve banks were thus advised that they were prohibited from

paying an exchange charge to any bank. But they believed that it was their duty to accept for collection any check on any bank; and that Congress had imposed upon them the duty of making par clearance and collection of checks universal in the United States. So they undertook to bring about acquiescence of the remaining state banks to the system of par clearance.[3] Some of the non-assenting state banks made stubborn resistance.[4] To overcome it the reserve banks held themselves out as prepared to collect at par also checks on the state banks which did not assent to par clearance. This they did by publishing a list of all banks from whom they undertook to collect at par, regardless of whether such banks had agreed to remit at par or not. This resulted in drawing to the federal reserve banks for collection the large volume of checks which theretofore had come to the drawee bank by mail from many sources and which had been paid by remittances drawn on the bank's balance in some reserve city. If a state bank persisted in refusal to remit at par, the reserve banks caused these checks to be presented, at the drawee bank, for payment in cash over the counter. The practice adopted by the reserve banks would, if pursued, necessarily subject country banks to serious loss of income. It would deprive them of their income from exchange charges; and it would re-

[3] North Carolina was placed on the par list on November 15, 1920. There were on January 1, 1921, in the United States, 30,523 banks, state and national. Of these 1,755 state banks had refused to enter the par list. About 250 of the banks so refusing were in North Carolina. During the year 1921 the number which refused to consent to par clearance increased to 2,353. Annual Report of Federal Reserve Board, 1921, p. 71.

[4] See *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta, supra; Brookings State Bank* v. *Federal Reserve Bank of San Francisco,* 277 Fed. 430; 281 Fed. 222; *Farmers' & Merchants' Bank of Catlettsburg, Ky.* v. *Federal Reserve Bank of Cleveland,* 286 Fed. 610.

duce their income-producing assets by compelling them to keep in their vaults in cash a much larger part of their resources than theretofore. That such loss must result was admitted. That it might render the banks insolvent was clear. But the federal reserve banks insisted that no alternative was left open to them, since they had to collect the checks and were forbidden to pay exchange charges. The state banks denied that the federal reserve banks were obliged to accept these checks for collection; and insisted that federal reserve banks should refrain from accepting for collection checks on banks which did not assent to par clearance.

It was to protect its state banks from this threatened loss, which might disable them, that the legislature of North Carolina enacted the statute here in question.[5] It made no attempt to compel the federal reserve bank to pay an exchange charge. It made no attempt to compel a depositor to accept something other than cash in payment of a check drawn by him. It merely provided that, unless the drawer indicated by a notation on the face of the check that he required payment in cash, the drawee bank was at liberty to pay the check by exchange drawn on its reserve deposits. Thus the statute merely sought to remove (when the drawer acquiesced) the absolute requirement of the common law that a check presented at the bank's counter must be paid in cash. It gave the drawee bank the option to pay by exchange only in certain cases; namely, when the check was "presented by or through any Federal Reserve Bank, postoffice, or ex-

[5] Statutes similar in purpose were enacted in Alabama, Florida, Georgia, Louisiana, Mississippi, South Dakota and Tennessee. See Annual Report of Federal Reserve Board, 1921, p. 70; Alabama, Gen. & Loc. Acts, 1920, No. 35; Florida, Laws, 1921, c. 8532; Georgia, Laws, 1920, p. 107; Louisiana, Acts, 1920, No. 23; Mississippi, Laws, 1920, c. 183; South Dakota, Laws, 1921, c. 31; Tennessee, Pub. Acts, 1921, c. 37.

press company, or any respective agents thereof." The option was so limited, because the only purpose of the statute was to relieve state banks from the pressure which, by reason of the common-law requirement, federal reserve banks were in a position to exert and thus compel submission to par clearance. It was expected that depositors would coöperate with their banks and refrain from making the prescribed notation; and that when the reserve banks were no longer in a position to exert pressure by demanding payment in cash, they would cease to solicit, or to receive, for collection checks on non-assenting state banks. Thus, these would be enabled to earn exchange charges as theretofore. Such was the occasion for the statute and its purpose. Whether this legislative modification of the common-law rule which requires payment in cash violates the Federal Constitution is the question for decision. That it does is asserted on five grounds.

First. It is contended that in authorizing payment of checks by draft on reserve deposits § 2 violates the provision of Article I, § 10, cl. 1, of the Federal Constitution, which prohibits a State from making anything except gold and silver coin a tender in payment of debts. This claim is clearly unfounded. The debt of the bank is solely to the depositor. The statute does not authorize the bank to discharge its obligation to its depositor by an exchange draft. It merely provides that, unless the depositor in drawing the check specifies on its face to the contrary, he shall be deemed to have assented to payment by such a draft. There is nothing in the Federal Constitution which prohibits a depositor from consenting, when he draws a check, that payment may be made by a draft. And, as the statute is prospective in its operation, *Denny* v. *Bennett,* 128 U. S. 489; *Abilene National Bank* v. *Dolley,* 228 U. S. 1, 5, there is no constitutional obstacle to a State's providing that, in the absence of

dissent, consent shall be presumed. Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge. See *Ogden* v. *Saunders,* 12 Wheat. 213, 231; *Von Hoffman* v. *Quincy,* 4 Wall. 535, 550. If, therefore, the provision of § 2 authorizing payment by exchange draft is otherwise valid, it is binding upon the drawer of the check. Since it binds the drawer, it binds the payee and every subsequent holder, whether he be a citizen of North Carolina or of some other State, and wherever the transfer of the check was made. *Brabston* v. *Gibson,* 9 How. 263. For the holder of a check has, in the absence of acceptance by the drawee bank, no independent right to require payment under the general law. *Bank of The Republic* v. *Millard,* 10 Wall. 152. He takes it subject to the construction and with rights conferred by the laws of North Carolina, the place of the bank's contract and of performance. *Pierce* v. *Indseth,* 106 U. S. 546. Compare *Rouquette* v. *Overmann,* L. R. 10 Q. B. 525.

Second. It is contended that § 2 violates the due process clause. The argument is that defendant is a federal corporation authorized to engage in the business of collecting checks payable upon presentation within the district, a business common to all banking institutions; that the right to engage in this branch of the business is a valuable property right; that while defendant has, in the past, not made any charge for such collections, it has the right to do so, and could make this branch of its business an important source of revenue; that to compel defendant to accept in payment of checks exchange drafts on reserve deposits, whether good or bad, deprives it of liberty of contract, and in effect of an important branch

of its business, since that of collecting checks cannot be conducted under such limitations. To this argument the answer is clear. The purpose of the statute, as its title declares, was to promote the solvency of state banks. We should, in the absence of controlling decision of the highest court of the State to the contrary, construe the statute not as authorizing payment in a "bad" draft, but as authorizing payment in such exchange drafts only as had customarily been used in remitting for checks. So construed the statute is merely an exercise of the police power, by which the banking business is regulated for the purpose of protecting the public, and promoting the general welfare. *Noble State Bank* v. *Haskell,* 219 U. S. 104, 575. The regulation here attempted is not so extreme as inherently to deny rights protected by the due process clause. Compare *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549, 567, 568; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 162. If the regulation exceeds the State's power to protect the public, it must be because some other provision of the Federal Constitution is violated by the means adopted or by the manner in which they are applied.

Third. It is contended that the statute is obnoxious to the equal protection clause. The argument is that the Federal Reserve Bank of Richmond is obliged to accept payment in exchange drafts, whereas other banks with whom it might conceivably compete may demand cash, except in those cases where they present the check through an express company or the postoffice. It is well settled that the legislature of a State may (in the absence of other controlling provisions) direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81; *Missouri Pacific Ry. Co.* v. *Mackey,* 127 U. S. 205. If the legislature finds that a particular instrument of trade war is being used

against a policy which it deems wise to adopt, it may direct its legislation specifically and solely against that instrument. *Central Lumber Co.* v. *South Dakota, supra*, p. 160. If it finds that the instrument is used only under certain conditions, or by a particular class of concerns, it may limit its prohibition to the conditions and the concerns which it concludes alone menace what it deems the public welfare. The facts recited above disclose ample ground for the classification made by the legislature. Hence, there was no denial of equal protection of the law. There remains to consider whether § 2 exceeds the State's power, because Congress has imposed specifically upon federal reserve banks duties, the performance of which § 2 obstructs; and that in this way, it conflicts with the Federal Reserve Act. This is the ground on which the invalidity of the North Carolina act has been most strongly assailed.

Fourth. One contention is that § 2 conflicts with the Federal Reserve Act because it prevents the federal reserve banks from collecting checks of such state banks as do not acquiesce in the plan for par clearance. The argument rests on the assumption that the Federal Reserve Bank of Richmond is obliged to receive for collection any check upon any North Carolina state bank, if such check is payable upon presentation; and is obliged to collect the same at par without allowing deductions for exchange or other charge. But neither § 13, nor any other provision of the Federal Reserve Act, imposes upon reserve banks any obligation to receive checks for collection. The act merely confers authority to do so. The class of cases to which such authority applies was enlarged from time to time by Congress. But in each amendment, as in § 13, the words used were "may receive"—words of authorization merely. It is true that in statutes the word "may" is sometimes construed as "shall". But that is where the context, or the subject-matter, compels

such construction. *Supervisors* v. *United States*, 4 Wall. 435. Here it does not. This statute appears to have been drawn with great care. Throughout the act the distinction is clearly made between what the Board and the reserve banks "shall" do and what they "may" do.[6]

Moreover, even if it could be held that the reserve banks are ordinarily obliged to collect checks for authorized depositors, it is clear that they are not required to do so where the drawee has refused to remit except upon allowance of exchange charges which reserve banks are not permitted to pay. There is surely nothing in the act to indicate that reserve banks must undertake the collection of checks in cases where it is impossible to obtain payment except by incurring serious expense; as, in presenting checks by special messenger at a distant point. Furthermore, the checks which the act declares reserve banks may receive for collection are limited to those "payable on presentation." The expression would seem to imply that the checks must be payable either in cash or in such funds as are deemed by the reserve bank to be

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[6] In the original Federal Reserve Act (38 Stat. 251) "may" is used in §§ 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 21, 22, 24, 25, 26, 28. "Shall" is used in those sections and also in §§ 1, 6, 7, 20, 23, 27, 29. Thus: Sec. 2: "The Secretary . . . shall designate . . . cities to be known as Federal reserve cities, and shall divide the continental United States . . . into districts. . . . The districts . . . may be readjusted. . . . Such districts shall be known as Federal reserve districts and may be designated by number"; Sec. 3: "Each Federal reserve bank shall establish branch banks within the Federal reserve district in which it is located and may do so in the district of any Federal reserve bank which may have been suspended"; Sec. 5: "outstanding capital stock shall be increased . . . as member banks increase their capital stock . . . and may be decreased as member banks reduce their capital stock . . . "; Sec. 13: " . . . may receive . . . deposits . . . may discount . . . shall at no time exceed"; Sec. 16: "Every Federal reserve bank shall maintain reserves . . . "; "Every Federal reserve bank shall receive on deposit."

an equivalent. A check payable at the option of the drawee by a draft on distant reserves would seem not to be within the limited class of checks referred to in the act. The argument for the Federal Reserve Bank is not helped by reference to the incidental power conferred by § 4. It is only "such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this [the Federal Reserve] Act" which are granted. No duty or right of the federal reserve bank to collect checks is obstructed by the North Carolina statute which merely gives to the drawee bank the right to pay in the customary exchange draft, where its depositor has, by the form used in drawing the check, consented that this be done.

Fifth. The further contention is made that § 2 conflicts with the Federal Reserve Act because it interferes with the duty of the Federal Reserve Board to establish in the United States a universal system of par clearance and collection of checks. Congress did not in terms confer upon the Federal Reserve Board or the federal reserve banks a duty to establish universal par clearance and collection of checks; and there is nothing in the original act or in any amendment from which such duty to compel its adoption may be inferred. The only sections which in any way deal either with clearance or collection are 13 and 16. In neither section is there any suggestion that the Reserve Board and the reserve banks shall become an agency for universal clearance. On the contrary § 16 strictly limits the scope of their clearance functions. It provides that the Federal Reserve Board: "may at its discretion exercise the functions of a clearing house for such Federal reserve banks . . . and may also require each such bank to exercise the functions of a clearing house for its member banks."

There is no reference whatever to "par" in § 13, either as originally enacted or as amended from time to time.

There is a reference to "par" in § 16; and it is so clear and explicit as to preclude a contention that it has any application to non-member banks; or to the ordinary process of check collection here involved. Section 16 (38 Stat. p. 268) declares:

"Every Federal reserve bank shall receive on deposit at par from member banks or from Federal reserve banks checks and drafts drawn upon any of its depositors, and when remitted by a Federal reserve bank, checks and drafts drawn by any depositor in any other Federal reserve bank or member bank upon funds to the credit of said depositor in said reserve bank or member bank. Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds, or for exchange sold to its patrons."

The depositors in a federal reserve bank are the United States, other federal reserve banks, and member banks. It is checks on these depositors which are to be received by the federal reserve banks. These checks from these depositors the federal reserve banks must receive. And when received they must be taken at par. There is no mention of non-member banks in this section. When, in 1916, § 13 was amended to permit federal reserve banks to receive from member banks solely for collection other checks payable upon presentation within the district;—and when, in 1917, § 13 was again amended to permit such receipt solely for collection also from certain non-member banks—§ 16 was left in this respect unchanged. In other respects § 16 was amended both by the Act of 1916 and by the Act of 1917. The natural explanation of the omission to amend the provision in § 16 concerning clearance is that the section has no application to non-member banks,—even if affiliated.

Moreover, the contention that Congress has imposed upon the Board the duty of establishing universal par

clearance and collection of checks through the federal reserve banks is irreconcilable with the specific provision of the Hardwick Amendment which declares that even a member or an affiliated non-member may make a limited charge (except to federal reserve banks) for "payment of checks and . . . remission therefor by exchange or otherwise." The right to make a charge for payment of checks, thus regained by member and preserved to affiliated non-member banks, shows that it was not intended, or expected, that the federal reserve banks would become the universal agency for clearance of checks. For, since against these the final clause prohibited the making of any charge, then if the reserve banks were to become the universal agency for clearance, there would be no opportunity for any bank to make as against any bank a charge for the "payment of checks." The purpose of Congress in amending § 13 by the Act of 1917 was to enable the Board to offer to non-member banks the use of its facilities which it was hoped would prove a sufficient inducement to them to forego exchange charges; but to preserve in non-member banks the right to reject such offer; [7] and to protect the interests of member and affiliated non-member banks (in competition with the non-affiliated state banks) by allowing also those connected with the federal system to make a reasonable exchange charge to others than the reserve banks. The power of the Federal Reserve Board to establish par clearance was, thus, limited by the unrestricted right of unaffiliated non-member banks to make a charge for exchange and the restricted

[7] The governor of the Federal Reserve Board stated in his letter to the Senate, January 26, 1920, Sen. Doc. 184, 66th Cong., 2d sess., p. 6: "That a relatively small number of non-member banks should not want to become members of the clearing system, or should not want to remit at par is, of course, their own concern, and the Federal Reserve Board and the Federal reserve banks have not and will not dispute their right to decline to do so."

right of members and affiliated non-members to make the charge therefor fixed as reasonable by the Federal Reserve Board. No bank could make such a charge against the federal reserve banks—because these were prohibited from paying any such charge. Member and non-member affiliated banks, because they were such, performed the service for the federal reserve banks without charge. Unaffiliated non-member banks were under no obligation to do so. Thus construed, full effect may be given to all clauses in the Hardwick Amendment as enacted. It in no way interferes with the right of a depositor in a non-affiliated state bank to agree with his bank that the checks which he might draw should (unless otherwise indicated on their face) be payable, at the option of the drawee, in exchange in certain cases.

The North Carolina statute here in question does not obstruct the performance of any duty imposed upon the Federal Reserve Board and the federal reserve banks. Nor does it interfere with the exercise of any power conferred upon either. It is therefore consistent with the Federal Reserve Act and with the Federal Constitution.

Reversed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE SUTHERLAND dissent.

JOSLIN MANUFACTURING COMPANY *v.* CITY OF PROVIDENCE ET AL.

SCITUATE LIGHT & POWER COMPANY *v.* CITY OF PROVIDENCE ET AL.

JOSLIN *v.* CITY OF PROVIDENCE ET AL.

ERROR TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND.

Nos. 219, 220, 221. Argued April 19, 20, 1923.—Decided June 11, 1923.

1. A State, in authorizing the appropriation of waters under its primary control by a city, may require the city to furnish necessary water to other municipalities within the drainage area at fair wholesale rates, without requiring them to bear a proportionate part of the cost of acquiring the water supply and of constructing and maintaining the works. P. 673.
2. Section 18, c. 1278, Pub. Laws of Rhode Island, 1915, authorizing the City of Providence to furnish water to incorporated water companies, for use within the drainage areas where there is no public water supply, merely gives the city an opportunity to dispose of water, which for the time it may not need, for compensation, as an incident to the main purposes of the legislation. P. 674.
3. This provision is separable from other provisions of the act involved in this case, and its constitutionality should not be decided in the absence of any attempt to carry it out. P. 675.
4. Injury to a business carried on upon lands taken for public use does not constitute an element of just compensation, in the absence of a statute allowing it. P. 675.
5. A statute providing for the taking of land for public use does not deny the equal protection of the laws by granting the owner of any business on the land established prior to the passage of the act the right to recover for injury thereto, while withholding such compensation from those whose businesses have been established since. P. 675.
6. A statute for the taking of lands for public use does not deny the equal protection of the laws by extending to mill owners the privilege of recovering the cost of moving their machinery to a new loca-

tion within defined geographical limits and not extending it to those desirous of moving to locations not within those limits. P. 676.

7. A statute providing for the taking of lands for public use by a city does not deprive the city taxpayers of property without due process of law by making the city liable to property owners for consequential damages, within the limits of equity and justice, in addition to the just compensation required by the Constitution. P. 676.
8. The taking of property for public use by a State or one of its municipalities need not be accompanied or preceded by payment; the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. P. 677.
9. This requirement being met, a city, after passing of title and before offer or payment of compensation, may be authorized to make dispositions by lease or otherwise, and to remove buildings and improvements, in ways incidental to the administration of the statute under which the property was taken. P. 678.
10. The legislature, without allowing the property owner opportunity for hearing and decision by an impartial tribunal, may constitutionally empower a city to decide *ex parte* what property, within a definitely restricted area, is necessary to be taken for the city's authorized public use. P. 678.

44 R. I. 31, affirmed.

Error to decrees of the Superior Court of Rhode Island dismissing bills brought to enjoin the City of Providence and the members of the Water Supply Board from taking possession of, or interfering with, property of the plaintiffs, under an act of the legislature authorizing the city to obtain a water supply. The decrees were entered after constitutional questions raised had been certified to the State Supreme Court and its decision certified, with return of the record, to the court below.

Mr. Robert H. McCarter, with whom *Mr. Francis I. McCanna, Mr. Alfred G. Chaffee* and *Mr. James Harris* were on the briefs, for plaintiffs in error.

Mr. Albert A. Baker, with whom *Mr. Elmer S. Chace* was on the brief, for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These are suits in equity brought by the several plaintiffs in error in the Superior Court of Rhode Island, to enjoin the defendants in error from taking possession of or interfering with their property. The proceedings complained of, were taken under an act of the state legislature, purporting to authorize the City of Providence to obtain a supply of pure water. Public Laws, c. 1278, approved April 21, 1915. The Water Supply Board, whose members are made parties defendant, is directed by the act to investigate and determine whether a part of the north branch of the Pawtuxet River and the tributary watershed would be the most available and desirable source of water supply for the City of Providence and for any territories now supplied, or hereafter supplied under the provisions of the act, by means of the waterworks of said city. The board, if it approve the source, is to make a plan, locating storage reservoirs and an aqueduct to carry water therefrom to the city waterworks. § 3.

Thereupon the board is authorized to purchase for and in the name of the city such lands and interests and water rights as may be necessary, when the city council shall have made provision for the necessary funds. § 4.

The city is authorized to acquire by condemnation any lands and interests included within a definitely limited area, which the city council shall deem necessary for the purposes stated in the act. § 5.

The city is further authorized by condemnation to acquire the waters or any part thereof, included within the area, and any water or flowage rights or privileges appurtenant thereto. § 6.

The owner of any mill upon land taken, may surrender the machinery therein to the city within six months after the taking, whereupon the city shall become liable to pay its fair value at the time of delivery as part of the dam-

ages for such taking; or such special damages as may be suffered as a result of a compulsory removal before the expiration of a reasonable time. If the machinery be not surrendered, the reasonable cost of removing it to a new location within the New England States and setting it up is to be paid by the city as part of the damages. § 12.

The city is also required to pay the fair market value of furniture and building equipment, contained in any building belonging to the town of Scituate, which may be surrendered (§ 11); the cost of additional police protection in any town or city in consequence of carrying on construction work (§ 14); damages for decrease in value of lands not taken but contiguous to lands which are taken (§ 15), and limited damages in certain cases for loss of employment due to the taking of the manufacturing establishment in which claimant is employed (§ 17).

The owner of any business, on lands within certain localities, established prior to the passage of the act, is given the right to recover for injury thereto. § 16.

Certain municipalities and districts within the drainage areas described, when necessary are allowed to take and receive water from the city waterworks for domestic and municipal purposes upon payment therefor at fair wholesale rates or charges, which, in case of disagreement, are to be determined by arbitration. The city is also authorized, under specified limitations, to furnish water to any incorporated water company, for use in any territory included within the drainage areas where there is no public water supply. § 18.

In case any lands purchased or condemned are not required for waterworks purposes, but are held to protect and preserve the waters from pollution, the city is authorized to lease them under specified restrictions. § 21.

Whenever the city council shall resolve to condemn any property it is required to have filed, in the office of the clerk of the town or city where any of the lands lie, a

statement giving a description of the property taken. Thereupon the title shall vest in the city in fee simple, except where a less estate is specified. The city is authorized to take possession, but not to do so without the consent of the owner, until after the expiration of a year from the date of filing such statement. Payment for the property taken is to be made forthwith if the city and the owner agree upon the price. If not, the owner is authorized within one year after notice of the taking, or, if not notified, within two years from the date of filing the statement, to have an assessment of damages by a jury, or at his option, by a commission, upon petition to the Superior Court. Upon the entry of judgment the owner may have execution issued against the city. § 23.

Buildings or improvements on lands actually taken may be sold, disposed of or removed when necessary to prevent obstruction to the work. § 25.

The city is given power to borrow all money necessary to secure such water supply, including lands, etc., either by purchase or condemnation and to issue bonds and notes therefor. § 26.

The plaintiff in error in No. 219 has a number of cotton mills and other property interests within the area sought to be condemned, and is a taxpayer in the City of Providence. The plaintiff in error in No. 220 has, within the same area, water powers and privileges and numerous parcels of land upon which are power plants, transmission lines, fixtures and machinery, used in the business of generating and distributing electricity for light, heat and power. Plaintiff in error in No. 221 has a residence and numerous buildings and improvements, together with water rights and privileges connected therewith, situated in the same area, and is a taxpayer in the City of Providence.

The Water Supply Board, acting under this statute, prepared a description and plat of the lands proposed to

be taken, which was submitted to the city council for action. The council adopted a resolution asserting a taking of lands and interests within the defined area, including property of the plaintiffs in error, the title so taken, so far as material here, being in fee simple.

Plaintiffs in error having challenged the constitutionality of the act, the Superior Court certified the three cases to the State Supreme Court for a determination of the questions, in accordance with the provisions of a state statute. General Laws, c. 298, § 1. The Supreme Court decided that the statute was not in conflict with the Constitution of the United States; and thereupon the record, with its decision certified thereon, was sent back to the Superior Court for further proceedings. The last named court dismissed the bills and from its decree the case comes here on writ of error.

The legislation is assailed as contravening the provisions of the Fourteenth Amendment of the Federal Constitution.

First. It is contended that the statute imposes a burden upon the taxpayers of the City of Providence by authorizing an expenditure, which in part is for the benefit of other municipalities or of companies outside the city, that are either not required to contribute to such expenditure or whose contributions do not constitute just compensation. The basis of this complaint, in so far as it relates to other municipalities and districts, is that they are given the right to take water upon payment of fair wholesale rates therefor, and that these rates need bear no relation to the additional cost incident to the contingency of their coming in.

That the taxpayers of one municipality may not be taxed arbitrarily for the benefit of another may be assumed; but that is not the case here presented. The communities to be supplied are those within the drainage area of the waters authorized to be taken. These waters

are under the primary control of the State and in allowing the City of Providence to appropriate them, it was entirely just and proper for the legislature to safeguard the necessities of other communities who might be dependent thereon, and to that end to impose upon the City of Providence such reasonable conditions as might be necessary and appropriate. Municipalities are political subdivisions of the State and are subject to the will of the legislature, *Trenton* v. *New Jersey, ante,* 182, and may be compelled not only to recognize their legal obligations but to discharge obligations of an equitable and moral nature as well. *Guthrie National Bank* v. *Guthrie,* 173 U. S. 528, 537. The requirement here in question is one well within the rule. Specifically, it is objected that the act does not require these other communities to bear a proportionate part of the cost of acquisition, construction and maintenance. The special facts which led the legislature to direct payment at wholesale rates, instead of upon the basis of sharing in the cost of the enterprise, or of some other, we need not consider. It may have been, as suggested, that there were inherent difficulties in the way of making such an apportionment. But it is enough to say that the method selected is one within the scope of legislative discretion and not obnoxious to the Federal Constitution. See *County of Mobile* v. *Kimball,* 102 U. S. 691, 703–704; *Williams* v. *Eggleston,* 170 U. S. 304; *Davidson* v. *New Orleans,* 96 U. S. 97, 106. The legislature is not precluded from putting a burden upon one municipality because it may result in an incidental benefit to another. *County of Mobile* v. *Kimball, supra,* at pp. 703–704. Moreover, we cannot assume that the fair wholesale rates to be paid by these outside communities will be less than just compensation for what they get.

The provision in respect of furnishing water to water companies within the area defined is not compulsory, but

permissive, and leaves the city free to fix terms and conditions. It simply gives the city an opportunity to dispose of water, which for the time being it may not need, for compensation; something that is purely incidental to the main purposes of the legislation. No constitutional objection to it is now perceived. *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.,* 142 U. S. 254, 273; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 72, 73; *Rochester* v. *Briggs,* 50 N. Y. 553, 563. In any event, it is a separable provision and it will be time enough to consider the question of its constitutionality when some attempt is made to carry it into effect.

Second. The act, it is asserted, denies the equal protection of the laws, among other things, by permitting the owner of a business established prior to the passage of the act to recover for injury thereto while withholding such compensation from one whose business has been established since; and by allowing a mill owner to recover the cost of removing his machinery to a new location within the New England States, while denying a similar right to one desiring to move to a location elsewhere. It is further asserted by plaintiffs in error, in their capacity as taxpayers, that the effect of allowing these and other consequential damages is to deprive them of their property without due process of law.

Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation (*Cox* v. *Philadelphia, etc., R. R. Co.,* 215 Pa. St. 506; 2 Lewis on Eminent Domain, 3d ed., § 727), in the absence of a statute expressly allowing it. *Whiting* v. *Commonwealth,* 196 Mass. 468; *Oakland* v. *Pacific Coast Lumber Co.,* 171 Cal. 392, 398. This statute therefore does not deny a right; it grants one, and limits it to a business already established. We cannot say that such a classification is unreasonable or

arbitrary—and certainly, it is not clearly so. The law-making body legislated with reference to an existing situation. One who came after the enactment and established a business did so with notice that the extra-constitutional compensation provided for would not apply to him. In the difference between an owner who had established a business without notice that his property would be required for public use and one who proceeds in the face of such notice, the legislature evidently found a sufficient and proper basis for classification, and we are not prepared to say that its conclusion was so palpably arbitrary as to fall within the prohibitions of the Fourteenth Amendment. See *Arkansas Natural Gas Co.* v. *Arkansas Railroad Commission*, 261 U. S. 379, and cases cited.

If the geographical limitation upon the liability to pay for the removal of machinery, could be said to bring about a classification, the principles just discussed would control; but, in fact, there is no classification. The right is extended to all mill owners, who choose to avail themselves of it, to recover the cost of removal within the defined territory. Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute (2 Lewis on Eminent Domain, 3d ed., § 728); and it was not an unconstitutional exercise of power for the legislature, in creating the right, to define its extent. Other provisions of the statute alleged to be discriminatory cannot be differentiated in principle from those just discussed.

In respect of the contention that the statute extends the right to recover compensation so as to include these and other forms of consequential damages and thus deprives plaintiffs in error, as taxpayers of the city, of their property without due process of law, we need say no more than that, while the legislature was powerless to diminish the constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension

of it, within the limits of equity and justice, so as to include rights otherwise excluded. As stated by the Supreme Court of Massachusetts in *Earle* v. *Commonwealth,* 180 Mass. 579, 583, speaking through Mr. Justice Holmes, who was then a member of that court: "Very likely the . . . rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law."

Third. We next consider the contention that the act permits the taking of property and grants the power to lease, sell or dispose of it without an offer to pay compensation therefor or a determination of it in advance. It has long been settled that the taking of property for public use by a State or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. *Sweet* v. *Rechel,* 159 U. S. 380, 400, 404, 407; *Williams* v. *Parker,* 188 U. S. 491, 502–503; *Crozier* v. *Krupp,* 224 U. S. 290, 306; *Bragg* v. *Weaver,* 251 U. S. 57, 62; *Hays* v. *Port of Seattle,* 251 U. S. 233, 238; *Adirondack Ry. Co.* v. *New York,* 176 U. S. 335, 349. Under the provisions of § 23 of the statute, if the owner and the city agree upon the amount, payment is to be made forthwith. If they do not agree, the owner at any time within a year after notice of the taking, or, if not notified, at any time within two years after the public filing of the statement thereof, may proceed in the Superior Court by petition to have the compensation assessed by a jury, or, at his option, by a commission. For a year in the meantime, he may not be deprived of possession without his consent. As an additional guar-

anty that the judgment obtained will be paid—and paid promptly—the owner under the statute may have execution issued against the city. These provisions adequately fulfill the requirement in respect of the ascertainment and payment of just compensation, within the principles established by the decisions of this Court last above cited.

Nor is there anything in the complaint that the city, after taking but before payment, is authorized to lease, sell or dispose of any lands taken and held to protect the purity of the water supply, and to remove buildings or improvements which interfere with the progress of the work. That these are simply incidents in the administration of the statute and in the management of property, title to which has passed to the city, which are of no concern to plaintiffs in error and which in no manner affect the validity of the act, is too clear to require anything beyond statement. See *Sweet* v. *Rechel, supra,* pp. 404, 407.

Fourth. Finally, the validity of the act is challenged as denying due process of law, on the ground that the question of the necessity for taking the property has not been determined by the legislature itself, but is relegated to the city to decide *ex parte,* without appeal or opportunity for hearing and decision by an impartial tribunal. That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. *Adirondack Ry. Co.* v. *New York, supra,* at p. 349; *Shoemaker* v. *United States,* 147 U. S. 282, 298; *United States* v. *Gettysburg Electric Ry. Co.,* 160 U. S. 668, 685; *Boom Co.* v. *Patterson,* 98 U. S. 403, 406. Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. *Bragg* v. *Weaver, supra,* at p. 58; *Sears* v. *Akron,* 246 U. S. 242, 251.

The question is purely political, does not require a hearing, and is not the subject of judicial inquiry. The

legislature here, while investing the city with the authority to determine it, in each instance, has carefully circumscribed the power by limiting its exercise within a definitely restricted area. The city may take less than this area, but cannot take more.

The decree of the state court is

Affirmed.

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.

No. 256. Argued January 22, 1923.—Decided June 11, 1923.

1. A judgment of the highest court of a State which upholds an order of a state commission fixing the rates of a public utility company over the objection that the rates are confiscatory and the order hence violative of the Fourteenth Amendment, is reviewable here, on the constitutional question, by writ of error. P. 683.
2. In estimating the value of the property of a public utility corporation, as a basis for rate regulation, evidence of present reproduction costs, less depreciation, must be given consideration. P. 689. *Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276.
3. A public utility corporation, challenging as confiscatory rates imposed by a state commission, is entitled, under the due process clause of the Fourteenth Amendment, to the independent judgment of the court as to both law and facts. *Id.*
4. Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service of the utility to the public, are unjust, unreasonable and confiscatory; and their enforcement deprives the public utility company of its property, in violation of the Fourteenth Amendment. P. 690.
5. A public utility is entitled to such rates as will permit it to earn a return on the value of the property it employs for the convenience of the public equal to that generally being made at the same time, and in the same region of the country, on investments

in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. P. 692.

6. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain its credit, and enable it to raise the money necessary for the proper discharge of its public duties. *Id.*
7. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally. *Id.*
8. In this case, 6% was inadequate to constitute just compensation. P. 695.

89 W. Va. 736, reversed.

ERROR to a judgment of the Supreme Court of Appeals of West Virginia, sustaining an order of a state commission fixing water rates, in a suit brought by the plaintiff in error to set the order aside.

Mr. Alfred G. Fox, with whom *Mr. Joseph M. Sanders* was on the briefs, for plaintiff in error.

Mr. Russell S. Ritz for defendants in error.

The judgment of the Supreme Court of Appeals of West Virginia herein does not declare valid any statute of the State or any authority exercised under the State, which is repugnant to the Constitution, treaties, or laws of the United States.

The most that can be claimed is that the Commission, acting under lawful authority in reaching the conclusion from a disputed state of facts, found and fixed the value of plaintiff's property for rate making purposes at an amount less than some other tribunal may have fixed and determined from a like state of facts. A judgment based upon such a state of facts does not raise such a federal question as gives a right of review from this Court to the highest court of the State by a writ of error.

The Public Service Commission and the Supreme Court of Appeals acted under valid state authority. The authority or law under which these respective tribunals exercised jurisdiction not being repugnant to any federal law, what conclusions they may have reached from a given state of facts which furnishes the basis for the judgment complained of herein, does not present a question subject to be reviewed by writ of error. Such questions can be reviewed only on petition for a writ of certiorari. *Zucht* v. *King,* 260 U. S. 174; *Stadelman* v. *Miner,* 246 U. S. 544; *Philadelphia & Reading Coal Co.* v. *Gilbert,* 245 U. S. 162; *Ireland* v. *Woods,* 246 U. S. 323.

It is not here contended that a public utility is not entitled to a fair return upon the fair and reasonable value of all of its plant and property then used and useful in the public service, but we submit that the fair and reasonable value of a public utility's plant and property is not to be ascertained by adopting only one method of valuation to the exclusion of all other known methods and elements of value. A valuation of a public utility, such as would be fair to the public as well as the utility, should take into consideration the original cost or investment in the utility; the market value of its stocks or bonds, if any; the probable earning capacity of the property; the various rates it has received and the rate it is receiving; the amounts necessary to meet operating expenses; the ability of the utility to adequately perform the public service; the history of the operations of the utility; and perhaps other elements; and after taking all of these into consideration, fix a value that will be fair both to the public and to the utility. *Smyth* v. *Ames,* 169 U. S. 466; *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439; *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19.

If by taking one element or method of value a conclusion is reached which is out of all proportion with a conclusion that may be reached by taking other methods, then that measure or method should be adopted which will, after taking into consideration all of the elements of value, make a fair and reasonable value on the utility's property, used and useful in the public service.

The reproduction theory of public utility valuation has been usually resorted to by the public to safeguard itself against values of public utilities, based upon inflated and watered stock investments, purporting to represent original cost. Practically all, if not all, of the decisions of this Court, in which this theory of valuation was even considered, were cases of this character; and even in them this Court has never held that the reproduction new theory at present prices was an exclusive method by which public utility values are to be determined. *Smyth* v. *Ames, supra;* Whitten, Valuation Public Service Corporations, c. V, p. 82, et seq.; 2 Wyman, Public Service Corporations, c. 32; *Coal & Coke Ry. Co.* v. *Conley,* 67 W. Va. 129; *Minnesota Rate Cases,* 230 U. S. 352.

If determining public utility values for rate-making purposes is to be accomplished by using the reproduction new theory at present prices, to the exclusion of every other element and method of values, then it may well be seen to what uncertain, as well as unfair, consequences it may lead. If the market is abnormally low and a valuation on this theory is made at such a time, without taking into consideration past costs or other elements of value, it would be manifestly unfair to the utility. Likewise, if this theory of valuation is used at a time of abnormally high prices in the market, such as was produced by the World War, and all other methods and elements of values are excluded, then it would be most unfair to the public, who would be expected to pay rates

of return upon such unfair value so reached. *Potomac Electric Power Co.* v. *Public Utilities Comm.*, 276 Fed. 330; *New York Pub. Serv. Comm.* No. 5, P. U. R. 930; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165.

Mr. Justice Butler delivered the opinion of the Court.

Plaintiff in error is a corporation furnishing water to the city of Bluefield, West Virginia, and its inhabitants. September 27, 1920, the Public Service Commission of the State being authorized by statute to fix just and reasonable rates, made its order prescribing rates. In accordance with the laws of the State (§ 16, c. 15–0, Code of West Virginia) the company instituted proceedings in the Supreme Court of Appeals to suspend and set aside the order. The petition alleges that the order is repugnant to the Fourteenth Amendment, and deprives the company of its property without just compensation and without due process of law and denies it equal protection of the laws. A final judgment was entered denying the company relief and dismissing its petition. The case is here on writ of error.

1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the State, on the ground of repugnancy to the Federal Constitution.

The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the State. The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court. The motion to dismiss will be denied. See *Oklahoma Natural Gas Co.* v.

Russell, 261 U. S. 290, and cases cited; also *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

2. The commission fixed $460,000 as the amount on which the company is entitled to a return. It found that under existing rates, assuming some increase of business, gross earnings for 1921 would be $80,000 and operating expenses $53,000, leaving $27,000, the equivalent of 5.87 per cent., or 3.87 per cent. after deducting 2 per cent. allowed for depreciation. It held existing rates insufficient to the extent of $10,000. Its order allowed the company to add 16 per cent. to all bills, excepting those for public and private fire protection. The total of the bills so to be increased amounted to $64,000. That is, 80 per cent. of the revenue was authorized to be increased 16 per cent., equal to an increase of 12.8 per cent. on the total,—amounting to $10,240.

As to value. The company claims that the value of the property is greatly in excess of $460,000. Reference to the evidence is necessary. There was submitted to the commission evidence of value which it summarized substantially as follows:

a. Estimate by company's engineer on basis of reproduction new, less depreciation, at prewar prices.....	$624,548.00
b. Estimate by company's engineer on basis of reproduction new, less depreciation, at 1920 prices.....	$1,194,663.00
c. Testimony of company's engineer fixing present fair value for rate making purposes.....	$900,000.00
d. Estimate by commission's engineer on basis of reproduction new, less depreciation at 1915 prices, plus additions since December 31, 1915, at actual cost, excluding Bluefield Valley Water Works, water rights and going value	$397,964.38

e. Report of commission's statistician showing investment cost less depreciation $365,445.13

f. Commission's valuation, as fixed in Case No. 368 ($360,000) plus gross additions to capital since made ($92,520.53) $452,520.53

It was shown that the prices prevailing in 1920 were nearly double those in 1915 and prewar time. The company did not claim value as high as its estimate of cost of construction in 1920. Its valuation engineer testified that in his opinion the value of the property was $900,000,—a figure between the cost of construction in 1920, less depreciation, and the cost of construction in 1915 and before the war, less depreciation.

The commission's application of the evidence may be stated briefly as follows:

As to "a", supra. The commission deducted $204,000 from the estimate (details printed in the margin),[1] leaving approximately $421,000 which it contrasted with the estimate of its own engineer, $397,964.38 (see *"d", supra*). It found that there should be included $25,000 for the Bluefield Valley Water Works plant in Virginia, 10 per cent. for going value, and $10,000 for working capital. If these be added to $421,000 there results $500,600. This may be compared with the commission's final figure, $460,000.

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[1] Difference in depreciation allowed $49,000
Preliminary organization and development cost 14,500
Bluefield Valley Water Works Plant 25,000
Water rights 50,000
Excess overhead costs 39,000
Paving over mains 28,500

[*sic*] $204,000

As to "b" and "c", supra. These were given no weight by the commission in arriving at its final figure, $460,000. It said:

"Applicant's plant was originally constructed more than twenty years ago, and has been added to from time to time as the progress and development of the community required. For this reason, it would be unfair to its consumers to use as a basis for present fair value the abnormal prices prevailing during the recent war period, but when, as in this case, a part of the plant has been constructed or added to during that period, in fairness to the applicant, consideration must be given to the cost of such expenditures made to meet the demands of the public."

As to "d", supra. The commission taking $400,000 (round figures) added $25,000 for Bluefield Valley Water Works plant in Virginia, 10 per cent. for going value, and $10,000 for working capital, making $477,500. This may be compared with its final figure, $460,000.

As to "e", supra. The commission on the report of its statistician found gross investment to be $500,402.53. Its engineer applying the straight line method found 19 per cent. depreciation. It applied 81 per cent. to gross investment and added 10 per cent. for going value and $10,000 for working capital, producing $455,500.[2] This may be compared with its final figure, $460,000.

As to "f", supra. It is necessary briefly to explain how this figure, $452,520.53, was arrived at. Case No. 368 was a proceeding initiated by the application of the company for higher rates, April 24, 1915. The commission made a valuation as of January 1, 1915. There were presented two estimates of reproduction cost less depreciation, one by a valuation engineer engaged by the com-

[2] As to "e". $365,445.13 represents investment cost less depreciation. The gross investment was found to be $500,402.53, indicating a deduction on account of depreciation of $134,957.40, about 27 per cent. as against 19 per cent. found by the commission's engineer.

pany and the other by a valuation engineer engaged by the city, both "using the same method." An inventory made by the company's engineer was accepted as correct by the city and by the commission. The method "was that generally employed by courts and commissions in arriving at the value of public utility properties under this method", and in both estimates "five year average unit prices" were applied. The estimate of the company's engineer was $540,000 and of the city's engineer, $392,000. The principal differences as given by the commission are shown in the margin.[3] The commission disregarded both estimates and arrived at $360,000. It held that the best basis of valuation was the net investment, i. e., the total cost of the property less depreciation. It said: "The books of the company show a total gross investment since its organization, of $407,882.00, and that there has been charged off for depreciation from year to year the total sum of $83,445.00, leaving a net investment of $324,427.00. . . . From an examination of the books . . . it appears that the records of the company have been remarkably well kept and preserved. It, therefore, seems that when a plant is developed under these conditions the net investment which of course means the total gross investment less depreciation is the very best basis of valuation for rate making purposes and that the other methods above referred to should

[3]

	Company engineer.	City engineer.
1. Preliminary cost	$14,455	$1,000
2. Water rights	50,000	Nothing.
3. Cutting pavements over mains	27,744	233
4. Pipe lines from gravity springs	22,072	15,442
5. Laying cast iron street mains	19,252	15,212
6. Reproducing Ada Springs	18,558	13,027
7. Superintendence and Engineering	20,515	13,621
8. General contingent cost	16,415	5,448
	$189,011	$63,983

be used only when it is impossible to arrive at the true investment. Therefore, after making due allowance for capital necessary for the conduct of the business and considering the plant as a going concern, it is the opinion of the commission that the fair value for the purpose of determining reasonable and just rates in this case of the property of the applicant company, used by it in the public service of supplying water to the City of Bluefield and its citizens, is the sum of $360,000.00, which sum is hereby fixed and determined by the Commission to be the fair present value for the said purpose of determining the reasonable and just rates in this case."

In its report in No. 368, the commission did not indicate the amounts respectively allowed for going value or working capital. If 10 per cent. be added for the former, and $10,000 for the latter (as fixed by the commission in the present case) there is produced $366,870, to be compared with $360,000, found by the commission in its valuation as of January 1, 1915. To this it added $92,520.53 expended since, producing $452,520.53. This may be compared with its final figure, $460,000.

The State Supreme Court of Appeals holds that the valuing of the property of a public utility corporation and prescribing rates are purely legislative acts not subject to judicial review except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds; and that findings of fact by the commission based on evidence to support them will not be reviewed by the court. *Bluefield* v. *Water Works Co.*, 81 W. Va. 201, 204; *Coal and Coke Co.* v. *Public Service Commission*, 84 W. Va. 662, 678; *Charleston* v. *Public Service Commission*, 86 W. Va. 536.

In this case (89 W. Va. 736) it said (p. 738):

"From the written opinion of the commission we find that it ascertained the value of the petitioner's property for rate making [then quoting the commission] 'after

maturely and carefully considering the various methods presented for the ascertainment of fair value and giving such weight as seems proper to every element involved and all the facts and circumstances disclosed by the record.'"

The record clearly shows that the commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous. *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission, ante,* 276. Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289, and cases cited.

We quote further from the court's opinion (pp. 739, 740):

"In our opinion the commission was justified by the law and by the facts in finding as a basis for rate making the sum of $460,000.00 . . . In our case of *Coal & Coke Ry. Co.* v. *Conley,* 67 W. Va. 129, it is said: 'It seems to be generally held that, in the absence of peculiar and extraordinary conditions, such as a more costly plant than the public service of the community requires, or the erection of a plant at an actual, though extravagant, cost, or the purchase of one at an exorbitant or inflated price, the actual amount of money invested is to be taken as the basis, and upon this a return must be allowed equivalent to that which is ordinarily received in the locality in which the business is done, upon capital invested in similar enterprises. In addition to this, consideration must be given to the nature of the investment, a higher rate

being regarded as justified by the risk incident to a hazardous investment.'

"That the original cost considered in connection with the history and growth of the utility and the value of the services rendered constitute the principal elements to be considered in connection with rate making, seems to be supported by nearly all the authorities."

The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary. "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." *Smyth* v. *Ames,* (1898) 169 U. S. 466, 547.

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public. . . .

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase." *Willcox* v. *Consolidated Gas Co.,* (1909) 212 U. S. 19, 41, 52.

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Minnesota Rate Cases,* (1913) 230 U. S. 352, 434.

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." *Smyth* v. *Ames, supra,* 546, 547.

". . . . The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." *Minnesota Rate Cases, supra,* 454.

In *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission, supra,* applying the principles of the cases above cited and others, this Court said:

"Obviously, the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum . . . It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of today."

It is clear that the court also failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and before the war, and failed to give weight to cost of reproduction less depreciation on the basis of 1920 prices, or to the testimony of the company's valuation engineer, based on present and past costs of construction, that the property in his opinion, was worth $900,000. The final figure, $460,000, was arrived at substantially on the basis of actual cost less depreciation plus ten per cent. for going value and $10,000 for working capital. This resulted in a valuation considerably and materially less than would have been reached by a fair and just consideration of all the facts. The valuation cannot be sustained. Other objections to the valuation need not be considered.

3. *Rate of return.* The state commission found that the company's net annual income should be approximately $37,000, in order to enable it to earn 8 per cent. for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent. for depreciation, there remains 6 per cent. on $460,000, amounting to $27,600 for return. This was approved by the state court.

The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in

highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

In 1909, this Court, in *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 48–50, held that the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and that no proper rate can be established for all cases; and that, under the circumstances of that case, 6 per cent. was a fair return on the value of the property employed in supplying gas to the City of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain and risk reduced almost to a minimum—as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise.

In 1912, in *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655, 670, this Court declined to reverse the state court where the value of the plant considerably exceeded its cost, and the estimated return was over 6 per cent.

In 1915, in *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 172, this Court declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum upon the value would not be confiscatory.

In 1919, this Court in *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256, 268, declined on the facts of that case to approve a finding that no rate yielding as much as 6 per

cent. on the invested capital could be regarded as confiscatory. Speaking for the Court, Mr. Justice Pitney said:

"It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

In 1921, in *Brush Electric Co.* v. *Galveston*, the United States District Court held 8 per cent. a fair rate of return.[4]

In January, 1923, in *Minneapolis* v. *Rand*, the Circuit Court of Appeals of the Eighth Circuit (285 Fed. 818, 830) sustained, as against the attack of the city on the ground that it was excessive, 7½ per cent., found by a special master and approved by the District Court as a fair and reasonable return on the capital investment—the value of the property.

Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In

[4] This case was affirmed by this Court, June 4, 1923, *ante*, 443.

this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclusive, about 4.4 per cent., without allowance for depreciation. In 1919 the net operating income was approximately $24,700, leaving $15,500, approximately, or 3.4 per cent. on $460,000 fixed by the commission, after deducting 2 per cent. for depreciation. In 1920, the net operating income was approximately $25,465, leaving $16,265 for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent. upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service.

The judgment of the Supreme Court of Appeals of West Virginia is reversed.

Mr. Justice Brandeis concurs in the judgment of reversal for the reasons stated by him in *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri, supra.*

CITY NATIONAL BANK OF EL PASO, TEXAS, *v.* EL PASO & NORTHEASTERN RAILROAD COMPANY ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 309. Argued March 12, 1923.—Decided June 11, 1923.

Where a bank was accustomed, through an agent, to make interstate shipments of cattle to another bank in care of a commission company, sending its drafts on the commission company for the pur-

chase price, with bill of lading attached, to the consignee bank, with instructions to release the cattle on payment of the drafts, and had ratified delivery of shipments to the commission company before payment of such drafts, and where, on making a further shipment, the direction in care of the commission company was, by mutual mistake of the agent and the receiving carrier, omitted from the bill of lading but at the command of the agent was noted on the way bill, and the terminal carrier delivered the cattle of this shipment to the commission company without surrender of the bill of lading or payment of the draft, and the draft was not paid, *held*, that the terminal carrier had a right to assume that delivery might properly be made to the commission company, and that delivery so made was delivery to the consignee bank; hence the provisions of the Carmack Amendment had no application.
225 S. W. 391, affirmed.

CERTIORARI to a judgment of the Court of Civil Appeals of Texas, affirming a judgment for the respondent railroad companies in an action by the petitioner bank to recover for their alleged failure to make delivery of a shipment of cattle in accordance with a bill of lading issued by the initial carrier.

Mr. A. H. Culwell for petitioner.

Mr. William R. Harr, with whom *Mr. W. A. Hawkins, Mr. Del W. Harrington* and *Mr. Charles H. Bates* were on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was commenced in the District Court of El Paso County by the petitioner to recover $10,101.18 for alleged failure to deliver, in accordance with a shipping contract, 847 head of cattle shipped October 27, 1911, by the petitioner from El Paso, Texas, to Kansas City, Missouri, over the connecting lines of railway of respondents,[1] there to be delivered to the First National Bank of

[1] The other respondents are: El Paso & Southwestern Company, El Paso & Northeastern Railway Company, El Paso & Rock Island

that city. Judgment for the respondent was affirmed by the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas (225 S. W. 391). The Supreme Court of the State denied a writ of error. On petitioner's application, asserting that federal rights claimed by it in the state courts under the Carmack Amendment (c. 3591, 34 Stat. 595) are denied by the judgment, the case was brought here on certiorari.

The petitioner declared upon alleged failure of respondents to deliver the cattle to the First National Bank of Kansas City, in accordance with a bill of lading issued by the initial carrier; it alleged the value of the cattle to be $20,000, and claimed $10,101.18 on account of failure by the carriers to deliver the cattle to the consignee named.

The shipment in question was the last of 18 or 20 trainload shipments of cattle by petitioner from El Paso to Kansas City. The record shows that for some time prior to the date of this shipment, one Cameron had been buying cattle in the interior of Mexico and shipping them to Juarez, whence they entered the United States at El Paso. A bank of Chihuahua furnished the money to pay for the cattle. That bank consigned them to petitioner at El Paso, making draft with bill of lading attached, for the amount of the purchase price. After the cattle were delivered to the petitioner on the American side, it paid the draft and refunded the purchase price to the Chihuahua bank. It then shipped the cattle to Kansas City for sale. J. P. Peters was a cattle broker doing business in Kansas City under the name of J. P. Peters Commission Company. His son, J. A. Peters, was employed by Cameron. He also acted for the petitioner, and all of the shipments were handled exclusively by him as its agent. All of the previous shipments were delivered to the commission com-

Railway Company, Chicago, Rock Island & El Paso Railway Company, Chicago, Rock Island & Gulf Railway Company, and Chicago, Rock Island & Pacific Railway Company.

pany upon arrival at Kansas City, and, with the exception of some of the earliest, were shipped by him to the First National Bank of Kansas City "care of the J. P. Peters Commission Company." This practice was adopted because the bank was closed at the time one of the earlier shipments arrived, and the day's market was lost.

At the time of the shipment in question, a bill of lading was issued by the receiving carrier signed by its agent and by the "City National Bank, By J. A. Peters, Shipper." The waybill contemporaneously made designated the consignee "First National Bank, Kansas City, Mo., care J. P. Peters Commission Company. . . ." The petitioner made a draft, with bill of lading attached, on the commission company and forwarded it to the bank at Kansas City, with directions to release the cattle on payment of the draft, and to wire petitioner for instructions, if the draft was not paid. The terminal carrier delivered the cattle to the commission company without surrender of the bill of lading or the payment of the draft. The bank returned the bill of lading and the draft to the petitioner. The draft has never been paid in full, and this action is to recover the amount remaining unpaid. The jury found that, at the time of the execution of the bill of lading, it was agreed between the petitioner, acting through J. A. Peters, and the receiving carrier, that the cattle should be consigned by bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company; that through mutual mistake, the bill of lading omitted the words "care of the J. P. Peters Commission Company," and that the petitioner through its said agent, directed the agent of the receiving carrier to note on the waybill that the cattle were consigned to the First National Bank of Kansas City, care of the J. P. Peters Commission Company. The jury also found that prior shipments of cattle above referred to had been delivered by the terminal carrier to the com-

mission company before the payment of drafts to which the bills of lading were attached, and that the First National Bank acquiesced in and ratified such deliveries; that in reliance on such acquiescence and ratification, the terminal carrier delivered the shipment in question to the commission company without the surrender of the bill of lading, and that such acquiescence or ratification was reasonably sufficient to induce the belief that the commission company was authorized to receive the cattle for the bank.

The petitioner complained that the carrier failed to deliver the cattle to the bank named as consignee or to the petitioner. If delivery was made to that bank, or to the petitioner, or on its order, the carriers did not commit any breach alleged, and there can be no recovery.[2] And if, as in the case of previous shipments, the contract had read "First National Bank of Kansas City, Mo., care of J. P. Peters Commission Company", delivery to the commission company would have been performance of the agreement. See *Ela* v. *American Merchants' Union Express Co.*, 29 Wis. 611, 616; *Bell* v. *Windsor & Annapolis Ry. Co.*, 24 N. S. 521. The bank had ratified the delivery of prior shipments to the commission company before payment of drafts accompanying bills of lading. The terminal carrier had a right to assume that delivery of this shipment properly might be made to the commission company. J. A. Peters acted for the petitioner in making all of the shipments. He directed the prior shipments to be made to the consignee bank in care of the commission company. At his instance the waybill directed delivery of this shipment to the named consignee in care of the commission company. His orders and directions were binding on the petitioner. Thus in legal

[2] See decision of this case in Court of Civil Appeals, 225 S. W. 391, 400, holding that the petition alleging failure to deliver to consignee would not support recovery for a delivery without surrender of bill of lading.

effect the petitioner at the time it made the shipment expressly ordered delivery to be made to the consignee bank in care of the commission company, and caused the agent of the receiving carrier to so direct on the waybill. We think it must be held that, under these circumstances, delivery to the commission company was delivery to the consignee bank.

This being so, the provisions of the Carmack Amendment have no application.

The judgment of the Court of Civil Appeals is affirmed.

RINDGE COMPANY ET AL. *v.* COUNTY OF LOS ANGELES.

ERROR TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE, OF THE STATE OF CALIFORNIA.

No. 237. Argued April 26, 1923.—Decided June 11, 1923.

1. Whether a use for which private property is taken is public or private is a judicial question the determination of which is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions, and regard with great respect the judgments of state courts upon what should be deemed public uses. P. 705.
2. It is not essential that the entire community, or even a considerable portion, should directly enjoy an improvement in order to constitute a public use. P. 706.
3. A taking of land for a highway extension is a taking for a public use, even though the extension lie wholly within the tract of a single landowner, and terminate at his boundaries and connect with no public road save at its beginning, if it be susceptible of present use not only by those gaining access from the highway but by persons living on or adjacent to the tract with access by private ways, and of future use by those living beyond its terminus, through future road construction. P. 706.
4. A highway may be legally laid out extending to a state or county line even though there be at the time no connecting highway in

the adjoining State or county, in reasonable anticipation of future connections and future public use. P. 707.

5. Public use of a road is not limited to its use as a mere business necessity or ordinary convenience, but includes its use as a scenic highway, for the public enjoyment, recreation and health. P. 707.

6. The necessity for appropriating private property for a public use is a legislative question which may be determined by a municipality to which the legislature has delegated the power; and the Fourteenth Amendment does not entitle the owner to a hearing before the determination is made. P. 708.

53 Cal. App. 166, affirmed.

ERROR to judgments of the District Court of Appeal of California which affirmed judgments condemning private lands as county highways.

Mr. Edward Stafford and *Mr. Nathan Newby,* with whom *Mr. W. H. Anderson, Mr. J. A. Anderson* and *Mr. Grant Jackson* were on the briefs, for plaintiffs in error.

Mr. Paul Vallee, with whom *Mr. A. J. Hill* was on the brief, for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This record includes two cases which were tried together in the state courts and have been heard together here.

The writs of error are brought to review judgments of the District Court of Appeal affirming judgments of the Superior Court of Los Angeles County, California, condemning lands of the plaintiffs in error for use by the County as public highways; which they insist have deprived them of their property without due process of law and in violation of the Fourteenth Amendment.[1]

[1] After these judgments of affirmance petitions to have the cases heard and determined by the Supreme Court of California were denied by that court.

The two fundamental questions involved are whether the uses for which these lands have been taken are public uses authorized by law; and whether the taking was necessary to such uses.

Section 1241 of the California Code of Civil Procedure includes "highways" among the "public uses" for which the right of eminent domain may be exercised. Section 1241, as amended in 1913, provides that before property can be taken it must appear that the use to which it is to be applied is one authorized by law and that the taking is necessary to such use; provided, *inter alia,* that when the legislative body of a county has, by resolution adopted by vote of two-thirds of its members, found and determined that the public interest and necessity require the construction by the county of any proposed public improvement located within its limits and that designated property is necessary therefor, such resolution shall be "conclusive evidence" of the public necessity for such improvement, that such property is necessary therefor, and that such improvement is located in the manner most compatible with the greatest public good and the least private injury. Stats. 1913, p. 549.

The plaintiffs in error are the owners of a large tract of land lying on the shore of the Pacific Ocean, known as the Malibu Ranch, extending in an easterly and westerly direction about twenty-two miles and varying in width from one-half mile to one and one-half miles. It lies at the base of a high and rugged mountain range which parallels the shore at a distance of from three to four miles, its northern line extending along the slope and foothills of this mountain range, and is traversed by many ridges and intervening canyons leading from the mountains toward the shore. It lies about ten miles west of Santa Monica, one of the principal cities of Los Angeles County, situated on the coast to the southwest of the City of Los Angeles, and is mainly in Los Angeles County, but extends

about a mile and a half into Ventura County, the adjoining county on the west. It is traversed lengthwise by a private road of the ranch owners which was formerly used by farmers and settlers living north of the ranch on the slope of the mountains and west of the ranch in Ventura County, but which has been for several years closed by the ranch owners to the public.[2]

In 1916 and 1917 the Board of Supervisors, the legislative body of Los Angeles County, without notice to the ranch owners, adopted, by the required vote, two resolutions declaring that the public interest and necessity required the construction of the two highways now in controversy "for public highway purposes" and that it was necessary for such "public uses" that the lands included therein be acquired by the county; and directing that condemnation proceedings be instituted for such purposes. One of these proposed highways, which is known in the record as the "main road," commences at the eastern boundary of the ranch, where it connects with and forms a continuation of a much traveled public county highway running along the shore of the ocean from Santa Monica, and extends lengthwise through the ranch in a westerly direction to the Ventura County line, where it terminates within the boundaries of the ranch. The other is a branch from this main road, extending to the northern boundary of the ranch, where it terminates. There are no connecting public roads either at the western termination of the main road or the northern termination of the branch road.

These condemnation proceedings were thereupon instituted in the Superior Court of the County. They were

[2] There has been much litigation between the ranch owners and the county and federal authorities as to the public use of roads and ways across this ranch, in which, prior to these proceedings, the ranch owners have been successful. In this litigation are *United States* v. *Rindge* (D. C.), 208 Fed. 611, and *People* v. *Rindge*, 174 Cal. 743.

vigorously resisted by the ranch owners, who denied the County's right of condemnation. Certain special defenses which they interposed, alleging that the main road would furnish no way of necessity or convenience for public use or travel, were stricken out by the court. Upon a preliminary trial as to the right of condemnation, the trial judge, after the resolutions of the Board had been introduced in evidence by the County, ruled that while they were not conclusive evidence of the matters specified in the proviso to § 1241 of the Code, they were *prima facie* evidence thereof. And the ranch owners then, without objection or limitation, introduced a large mass of evidence in support of all of their defenses, including the matters which had been alleged in the special defenses that had been stricken out; and a large mass of rebuttal evidence was then introduced by the County: the testimony on both sides relating to all the matters which had been or now are in issue in the cases.

The trial judge reviewed the evidence, and, manifestly without reference to any presumption arising under his ruling as to the *prima facie* evidence furnished by the resolutions, decided all the questions submitted in favor of the County: and made specific findings that the public interest and necessity required the acquisition of these public highways; that the use to which they were to be applied was authorized by law; that they would afford accommodation to the traveling public; and that they were located as required. Thereafter, the amount of landowners' compensation and damages having been determined by a jury—as to which no question is made—judgments condemning these lands for public highways were entered.

On appeals taken by the ranch owners the District Court of Appeal held that the taking of the property for these highways was for a public use; that the proviso to § 1241 of the Code was not obnoxious to any provision of

the State or Federal Constitutions, and under it the resolutions were conclusive evidence of the matters specified; that in any event the ranch owners had not been prejudiced by the rulings of the trial court as to the effect of this proviso as they had been permitted to introduce full and complete evidence on these subjects; and that they had not been prejudiced by the striking out of their special defenses not only because the resolutions were conclusive evidence that the taking was necessary, but also because every material issue tendered by these special defenses was otherwise raised by the pleadings and they had been permitted to offer evidence touching every matter contained therein; and it thereupon sustained the findings of the trial court and affirmed the judgments of condemnation. *Los Angeles County* v. *Rindge Co.*, 53 Cal. App. 166.

The ranch owners urge here, in substance: That the use for which their property was taken was not a public use authorized by law, and their special defenses raising this question as to the main road were erroneously stricken out; that their property was taken without any public necessity, and, the proviso to § 1241 of the Code purporting to make the resolutions conclusive evidence thereof being in violation of the state constitution and of the Fourteenth Amendment and constituting neither conclusive nor *prima facie* evidence, the burden of disproving this public necessity was erroneously cast upon them; and that in consequence the judgments of condemnation deprived them of their property in violation of the due process and equal protection clauses of the Fourteenth Amendment.

1. *Authorized public use.* The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in

view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 158, 160; *Hairston* v. *Danville Railway*, 208 U. S. 598, 606, 607. That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial. The California Code specifically declares "highways" to be "public uses" for which the right of eminent domain may be exercised. Here, the Board of Supervisors, familiar with local conditions, has declared these highways to be for public uses; and the local and appellate state courts have likewise held them to be for public uses authorized by law.

The ranch owners concede that a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use. Their real contention is that these particular roads, while called highways, are "highways" in name merely, that is, that they are shams under the name of public improvements, which cannot, in fact, furnish ways of convenience or necessity to the traveling public. This argument is based upon the fact that they extend through the ranch alone, the main road terminating within its boundaries, and connect with no other public roads at their western and northern ends. These roads will, however, be open to the general public to such extent as it can and may use them. The people to the eastward in Santa Monica, Los Angeles and other cities will have access to them and to the people living on the ranch through the connecting road from Santa Monica. The people living on the ranch will have egress over them. The people living north of the terminus of the crossroad, who now have no adequate outlet, will have access to it through private roads and ways and may then travel over these two roads to Los Angeles and other cities for marketing produce and other purposes; and the

people in these cities will have reciprocal access to them for purposes of trade and otherwise. It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use. *Fallbrook Irrigation District* v. *Bradley, supra,* p. 161. In like manner, if Ventura County should hereafter extend the main road to the western end of the ranch the people living beyond it, who now have no practical outlet, would be furnished a similar means of egress, with reciprocal ingress to them by the people living in the cities to the east. A highway can be legally laid out terminating at a state line even though there be no connecting highway in the adjoining State and no definite official action has been taken to establish such connecting highway; otherwise great embarrassment and difficulty would be experienced in establishing highways across state lines. *Rice* v. *Rindge,* 53 N. H. 530, 531. So, as to county highways. Public road systems, it is manifest, must frequently be constructed in instalments, especially where adjoining counties are involved. In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered. *Central Pacific Railway* v. *Feldman,* 152 Cal. 303, 309.

But aside from these considerations, these roads, especially the main road, through its connection with the public road coming along the shore from Santa Monica, will afford a highway for persons desiring to travel along the shore to the county line, with a view of the ocean on the one side, and of the mountain range on the other, constituting, as stated by the trial judge, a scenic highway of great beauty. Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. Thus, the con-

demnation of lands for public parks is now universally recognized as a taking for public use. *Shoemaker* v. *United States,* 147 U. S. 282, 297. A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery. *Higginson* v. *Nahant,* 11 Allen (Mass.) 530, 536. The Riverside Drive in New York is as essentially a highway for public use as Broadway; the Speedway in this city, as Pennsylvania Avenue. And manifestly, in these days of general public travel in motor cars for health and recreation, such a highway as this, extending for more than twenty miles along the shores of the Pacific at the base of a range of mountains, must be regarded as a public use.

For these reasons we conclude that these highways will, as found by the trial judge, afford accommodation to the traveling public, and that the taking of land for them is a taking for a public use authorized by the laws of California.

The ranch owners were not prejudiced by the action of the trial court in striking out their special defenses in this behalf, since, under the general issues, they were entitled, as held by the District Court of Appeal, and were in fact permitted, to introduce all their evidence bearing upon this question.

2. *Public necessity for the taking.* We necessarily accept, as a matter of state law, the holding of the District Court of Appeal that the proviso to § 1241 of the Code made the resolutions of the Board of Supervisors conclusive evidence as to the necessity of taking these particular highways and the other matters therein specified. So construed it was held by that court not to be objectionable to any provision of the State or Federal Constitutions. By this we are controlled so far as the provisions

of the state constitution are concerned. *Fallbrook Irrigation District* v. *Bradley, supra,* p. 155; *Georgia Railway* v. *Decatur, ante,* 432. And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." *Bragg* v. *Weaver,* 251 U. S. 57, 58. "That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . . Neither is it any longer open to question in this Court that the legislature may confer upon a municipality the authority to determine such necessity for itself. . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." *Joslin Mfg. Co.* v. *Providence, ante,* 668. And, clearly, the fact that the resolutions are made conclusive evidence by the statute only when adopted by a two-thirds vote, and as applied to an improvement lying within the county, does not constitute an unjust or unreasonable classification.

And since the resolutions were conclusive evidence as to the necessity for the taking of these public highways, the ranch owners were not prejudiced by the ruling of the trial judge which treated them as *prima facie* evidence merely and allowed them full opportunity to introduce their evidence upon the subject. A litigant can

be heard to question the validity of a statute only when and in so far as it is applied to his disadvantage. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289.

We therefore conclude that the property of the ranch owners has been taken for highways constituting a public use authorized by law, and upon a public necessity for the taking duly established, and that they have not been deprived of their property in violation of the Fourteenth Amendment. The judgments of the District Court of Appeal are accordingly

Affirmed.

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

MILHEIM ET AL. *v.* MOFFAT TUNNEL IMPROVEMENT DISTRICT ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 791. Motion to dismiss or affirm submitted February 20, 1923.—Decided June 11, 1923.

1. A federal question which requires analysis and exposition for its decision is not frivolous and withstands a motion to dismiss the writ of error. P. 716.
2. But a motion to affirm should be granted if the questions on which decision depends are so wanting in substance as not to need further argument. Rule 6, § 5. P. 717.
3. Determination of the judicial question whether a use is public or private is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of the courts and the declaration of the legislature of a State as to what should be deemed a public use in the State. P. 717.
4. The construction and maintenance of a tunnel for railroad, telegraph and telephone lines, for the transmission of electric power, and the transportation of water and automobiles and other vehicles

(Colo. Laws, Ex. Sess., 1922, c. 2, p. 88), *held* a public use warranting the exercise of the state power of taxation, through assessments levied on the private lands benefited by the improvement, to aid in defraying its cost. Pp. 717, 720.

5. A tunnel constructed and maintained by a State with the design of leasing it, at a just rental based on the cost, to a railroad corporation, for operation in the service of the public as part of its line, and of thus promoting the efficiency of the railroad as an important common carrier and of preventing its abandonment, is a public improvement for public purposes. P. 718.
6. If a proposed improvement is one which a State has authority to make and pay for by assessments on property benefited, the legislature may determine by the statute imposing the tax what lands may be, and are in fact, benefited; and its determination is conclusive and cannot be assailed under the Fourteenth Amendment unless it is a flagrant abuse and so arbitrary as to amount to a mere confiscation of particular property. P. 721.
7. Where a Commission, authorized to appraise the benefits to be assessed on lands to meet the cost of a public tunnel improvement, adopted a tentative *ad valorem* basis, subject to modification and correction before confirmation, *held*, that landowners who did not see fit to avail themselves of their opportunity to object and be heard, could not attack the appraisals as arbitrary in a suit for an injunction. P. 722.

72 Colo. 268, affirmed.

ERROR to a decree of the Supreme Court of Colorado, affirming a decree of the State District Court, which dismissed the complaint, after full hearing, in a suit brought by landowners to enjoin proceedings taken for the assessment of their property to defray costs of a public tunnel improvement.

Mr. Edwin H. Park for Milheim et al., plaintiffs in error.

Mr. Barnwell S. Stuart for White et al., plaintiffs in error.

Mr. Norton Montgomery for defendants in error. *Mr. Erskine Myer* and *Mr. David P. Howard* were also on the briefs.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The defendants in error move to dismiss the writ of error or affirm the judgment.

This is a suit challenging the constitutionality of an act of the State of Colorado creating a tunnel improvement district (Sess. Laws, Ex. Sess., 1922, c. 2, p. 88), and the proceedings thereunder.

This act, which is known as the Moffat Tunnel Act, declares that to provide an avenue of communication by a transportation tunnel through the Continental Divide at or near James Peak will reduce the barrier to commercial intercourse between the eastern and western portions of the State, facilitate communication in all seasons, and promote the health, comfort, safety, convenience and welfare of the people of the State, and will be of especial benefit to the property in certain designated boundaries within which such tunnel is to be located. To that end it creates "The Moffat Tunnel Improvement District," a body corporate, comprising all of the territory thus designated, and being all or portions of nine counties east and west of the Divide, extending between and including the City and County of Denver on the east and Routt County in the northwestern corner of the State, a total distance of about two hundred and fifty miles. The District is to be managed by a Board, called the "Moffat Tunnel Commission," which is required to construct such a tunnel through the Divide, with its equipment and approaches, at about 9200 feet above sea level, in such manner that it may be used for standard gauge railroads, telegraph and telephone lines, the transmission of power, and the transportation of water, automobiles and other vehicles.

The Commission is authorized to issue District bonds to the amount of $6,720,000 to pay for the cost of the tunnel, expenses, and interest on the bonds during its construction; to maintain the tunnel; and to contract

with persons and corporations for its use for the specified purposes, without monopoly by any use, person or corporation, until its capacity has been reached, at annual rentals apportioned to the respective values of the separate uses, and constituting a fair and just proportion of the total amount required to pay interest on the bonds, provide for their retirement and maintain the tunnel; prior users to be reimbursed by subsequent users in an equitable proportion of the amount previously paid for retirement of the bonds and interest.

The Commission is authorized to levy special assessments upon all real estate within the District—except governmental property which is exempted—for the purpose provided in the act, such special assessments to be made in proportion to the benefits to each piece of real estate accruing by reason of the improvements and in accordance with the rules of apportionment adopted by the Commission. It may at any time appraise the benefits which will result to such several parcels of real estate from the organization of the District and the construction of the tunnel, and, after such appraisal of benefits, levy special assessments, to the extent of such benefits upon all such real estate; and may for such purposes adopt rules providing, *inter alia,* for notice and hearing to all owners affected thereby. And if the revenues from the tunnel are not sufficient to pay interest due on the bonds in any year, provide for their retirement, pay expenses and maintain the tunnel, in order to prevent the occurrence of a deficit, the Commission is required to levy special assessments sufficient in amount, annually if necessary, upon all such real estate, in the manner provided.

It is expressly declared that the special benefits accruing to the assessable real estate within the District are in excess of the cost of the improvements and of the assessments provided for against such real estate.

In each year in which an assessment is made the Commission is required to appoint a time and place at which it will hear objections to the assessments, giving prior notice thereof by publication in two issues a week apart in a newspaper of general circulation published in each county. Any real estate owner claiming that his property has been assessed too highly, erroneously or illegally, may before such hearing file written objections to such assessment. At the hearing the Commission shall hear such evidence as may be offered concerning the correctness or legality of such assessments, and may modify or amend the same. Any property owner may appeal from the finding of the Commission as to such assessments to the district court of the county; but the court shall not disturb the findings of the Commission unless manifestly disproportionate to the assessments imposed upon other property in the District. The findings of the Commission if not appealed from, or the findings of the district court in case of an appeal, shall be final and conclusive evidence that such assessments have been made in proportion to the benefits conferred upon each tract of real estate by reason of the improvements, and constitute a lien thereon until paid.

The Commission, having been duly organized under the act, fixed the definite location of the tunnel, adopted preliminary plans for its construction in such manner as to provide for the various specified uses, estimated its cost, and resolved to issue District bonds in the authorized amount to pay for its construction. After making an investigation and examination of the real estate in the District, and taking the testimony of a great many witnesses from all parts of the District, engaged in various kinds of business, it determined the aggregate value of the real estate within the District subject to assessment to be $298,544,996—mainly in accordance with the assessed valuations for taxes—and further determined, sub-

ject to correction and confirmation after hearing the property owners affected, that the value of each parcel of such real estate would by reason of the organization of the District and the construction of the tunnel be increased at least to the extent of fifteen per cent. And it thereupon appraised the benefits to the several parcels of such real estate at such percentage of their value, as the basis of special assessments to be thereafter made under the provisions of the act. It also fixed a time and place at which it would hear objections filed by any property owner to the appraisal of benefits thus made, upon evidence and argument, before confirmation thereof, and gave public notice of such hearing by publication in the manner specified in the act. This notice recited the proceedings which the Commission had taken, including the appraisal of benefits which it had made as the basis for special assessments, and stated that any appraisal of benefits found upon such hearing to be incorrect or inequitable, would be modified or amended, and that, after making all proper corrections, the appraisals would be confirmed.

Thereupon, before the date set for such hearing, two of the plaintiffs in error, owning lands within the District, without filing with the Commission any objections to the appraisal of benefits, filed their complaint in a District Court of the State, in behalf of themselves and all similar landowners, against the Improvement District and the Tunnel Commission; alleging, *inter alia,* that the tunnel was not intended as a public highway for the use of the general public, but for the benefit of the Denver & Salt Lake Railroad, commonly known as the Moffat Road; that the benefits to their real estate and the other real estate in the District had been arbitrarily appraised and that no special benefits would accrue to their property or other property similarly situated; that the act and the proceedings taken and threatened by the Commission

thereunder violated various provisions of the state constitution and would deprive them of their property without due process in violation of the Fourteenth Amendment; and praying that the defendants be enjoined from proceeding with the enforcement of the act and that all the proceedings of the Commission be declared null and void. The defendants in their answers denied these allegations. The other plaintiffs in error, also owning lands within the District, who likewise had filed no objections with the Commission, subsequently intervened as plaintiffs in the action.

The case was heard by the District Court upon the pleadings and proof. The issues, both of fact and law, including those relating to the appraisal of benefits, were found for the defendants; and the complaint was accordingly dismissed.

Upon writ of error taken, the Supreme Court of Colorado sustained the District Court in all respects and affirmed its judgment. 72 Colo. 268.

The landowners urge here, as grounds of error, in substance, that the act and the proceedings taken and permitted thereunder violate the Fourteenth Amendment in that: (a) the purpose of the act is not public in the sense warranting the exercise of the power of taxation, but is essentially private; (b) the act authorizes the imposition of the entire taxes upon the lands within the District, without regard to their relation to the tunnel or the benefit to be derived from it, and, there being no special benefits to such lands justifying such taxation, such classification is entirely arbitrary; and (c) the Commission has arbitrarily and unreasonably adopted an *ad valorem* basis for the appraisal and apportionment of benefits to the several parcels of land within the District, without reference to the actual benefits to each.

The federal question presented, being one which requires analysis and exposition for its decision, is not friv-

olous; and the motion to dismiss the writ of error is accordingly denied. *Louisville Railroad* v. *Melton,* 218 U. S. 36, 39.

The motion to affirm the judgment should, however, be granted if the questions on which the decision depends are found to be so wanting in substance as not to need further argument. Rule 6, § 5; *Hodges* v. *Snyder,* 261 U. S. 600, and cases therein cited.

1. *Public Purpose.* The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State. *Rindge Co.* v. *Los Angeles, ante,* 700, and cases therein cited. And like respect should be accorded to the declarations of the legislative body of the State. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 160. Here the legislature, familiar with the local conditions, has declared that the construction of the tunnel will benefit the people of the State; and both the local court of the State and its Supreme Court have held its construction to be for a public purpose.

It is urged by the landowners that the tunnel, considered as an isolated transportation unit, will serve no useful public purpose. This is obvious, but not to the point. It is intended to furnish an avenue or highway which shall be leased to public transportation agencies. A structure intended for such use is unquestionably a public improvement for a public use. Thus subway tunnels constructed by municipalities for lease to street railway and rapid transit lines for use as common carriers are public improvements for public purposes, for which the power of taxation may be exercised. *Sun Printing Co.* v. *City of New York,* 152 N. Y. 257, 265; *Prince* v.

Crocker, 166 Mass. 347, 361; *Browne* v. *Turner,* 176 Mass. 9, 12; *Larsen* v. *San Francisco,* 182 Cal. 1, 9. And see, by analogy, as to ship canals, *Cook* v. *Port of Portland,* 20 Oreg. 580.

They, however, contend that the tunnel must be deemed for a private, rather than for a public purpose, because it is located so as to be practically a part of the line of the Moffat Road, and is intended for its use, the real object of the act being, as expressed by the Governor, to save this railroad to the people of the State.[1] There is virtually no denial of this; and evidently this was the motive which led to the passage of the act and is the primary purpose for which the tunnel is to be constructed. This, however, is not a private purpose. The use of the tunnel by the Moffat Road will be for a beneficial public purpose. This railroad runs from Denver, on the east of the Continental Divide, to Routt County in the northwestern corner of the State, a distance of 255 miles. It crosses the Divide by a circuitous route above this tunnel, with steep grades and heavy curves. In the winter seasons this portion of its line is almost impassable. Its operations result in heavy losses, and it is now in an embarrassed financial condition and unable to build the tunnel. Without the use of the tunnel, the railroad must, it seems, be abandoned; and this avenue of communication between different portions of the State will be lost. The use of the tunnel will reduce the elevation, grades and curvature of the railroad, shorten its line about

[1] The Governor, in his message to the special session of the legislature which passed this act, in stating the two matters for which he had called the session, said: "Conditions have arisen which threaten the complete abandonment of a transportation line upon which several counties of the State depend, and your immediate action authorizing the issuance of bonds for the construction of a tunnel through the mountain range is necessary if the Moffat railroad is to be saved to the people of this State."

23 miles, and save it large amounts annually. Evidently the preservation of this railroad, a common carrier of persons and property, as a means of communication between the eastern and northwestern portions of the State, is a matter of great public importance; and a tunnel enabling it to provide quicker and cheaper transportation during all seasons of the year will greatly promote the public welfare.

Even if this act specifically directed that the tunnel be leased to the Moffat Road for railroad purposes (a just rental based on the cost of constructing and maintaining the tunnel being provided), as the tunnel would be operated by the railroad as a public highway for the carriage of passengers and freight, it would be a public improvement for a public use. The test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated. See *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32. A subway tunnel constructed by a city under an act authorizing its construction for the specific purpose of being leased to a designated rapid transit company, is a lawful public improvement for a public use. *Browne* v. *Turner, supra*, pp. 12, 13. As a railroad is a highway for public use, although owned by a private corporation, a State may impose or authorize a tax in aid of its construction and in furtherance of such public use. *Olcott* v. *Supervisors*, 16 Wall. 678, 695-696; *Pine Grove* v. *Talcott*, 19 Wall. 666, 676, 678; *Wisconsin Railroad* v. *Jacobson*, 179 U. S. 287, 297; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 292, 293. "Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. . . . No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. . . . If there be any purpose for which taxation would

seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. . . . When, therefore, it is settled that a railroad is a highway for public uses, there can be no substantial reason why the power of the State to tax may not be exerted in its behalf." *Olcott* v. *Supervisors, supra,* pp. 695, 696. "Though the corporation was private, its work was public, as much so as if it were to be constructed by the State." *Pine Grove* v. *Talcott, supra,* p. 676. The use of a spur track is none the less public because it is located to reach a private industry whose proprietors contribute to the cost. *Hairston* v. *Danville Railway,* 208 U. S. 598, 608. So here, although this tunnel be designed for lease to the Moffat Road, it will be a highway for public uses, as much so as if it were operated by the State, and a public improvement for public purposes.

Furthermore, while the saving of the Moffat Road to the people of the State seems to have been the prime motive which induced the passage of the act, it specifically provides for the use of the tunnel by any and all railroads and other public utilities, to the extent of its capacity, each paying an annual rental apportioned to the respective values of the separate uses, and constituting a fair and just proportion of the total amount required to pay interest on the bonds, provide for their retirement and maintain the tunnel. And the evidence strongly indicates that the tunnel may and will be used, to like advantage, by the Denver & Rio Grande Railroad, extending from Denver to Salt Lake City, with a great shortening and improvement of its line. It will also serve as a means of transporting water from the Fraser River on the west of the Divide to the City of Denver, for telegraph and telephone lines and the transmission of power; and for the transportation of automobiles and vehicles,

which are now unable to cross the Divide during several months of the year. These are all public purposes of much importance.

We conclude that the purpose for which the tunnel is to be constructed is not private, but public, and such as warrants the exercise by the State of the power of taxation.

2. *Classification as to special benefits.* It is contended that no special benefits of a direct and immediate character will accrue from the tunnel to the lands lying within the District, as distinguished from the other lands in the State, and that hence the classification made by the act in providing for the assessments solely upon the lands within the District, is entirely unreasonable and arbitrary. It is well settled, however, that if a proposed improvement is one which the State has authority to make and pay for by assessments on property benefited, the legislature in the exercise of the taxing power has authority to determine by the statute imposing the tax, what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the Fourteenth Amendment unless it is wholly unwarranted and a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property. *Spencer* v. *Merchant,* 125 U. S. 345, 356; *Fallbrook Irrigation District* v. *Bradley, supra,* p. 174; *Wagner* v. *Baltimore,* 239 U. S. 207, 218, 220; *Houck* v. *Little River Drainage District,* 239 U. S. 254, 262, 265; *Branson* v. *Bush,* 251 U. S. 182, 190.

The legislature not only provided for the assessment of the lands within the District, but specifically declared that the tunnel would be of especial benefit to such lands and that the special benefits accruing to them are in excess of the cost of the tunnel and of the assessments provided for against them.

The District consists of the City and County of Denver on the east; a strip of land from six to eight miles in width extending through four counties on both sides of the Moffat Road to the crest of the Divide; and three entire counties and a portion of another county, which are traversed and reached by the Moffat Road and extend to the northwestern corner of the State. In short, the District includes the lands contiguous to the Moffat Road. The lands lying in the strip extending from Denver to the Divide are mainly agricultural lands; those lying to the west of the Divide, while largely devoted to stock raising, have valuable timber, and the two counties lying farthest to the northwest have valuable coal deposits. The testimony in the trial court fairly indicates that the lands within this District, on both sides of the Divide, including those owned by the plaintiffs in error, will, generally speaking, by reason of their proximity to the Moffat Road and the increased facilities of transportation across the Divide by which the western counties may be able to market their products to the east and the eastern counties obtain an outlet to the northwest, receive special benefits from the operation of the tunnel, of a reasonably direct and immediate character, resulting in increased value of the lands, in excess of those received by other lands in the State, and that the legislative classification is, on the whole, substantially just and reasonable.

The legislature declared that there will be such special benefits. The trial court, familiar with local conditions, after hearing evidence on this question, found that there would be such special benefits and sustained the legislative classification; and the Supreme Court of the State has affirmed its action. To the extent that there may be inequalities in the benefits received by the several parcels of land within the District, they are to be apportioned by the Commission in the manner provided by the act, with a right of appeal to the local courts for the correction of errors in such apportionments.

And certainly, under all the circumstances, and regarding the District as a whole, the evidence does not justify us in setting aside the conclusion reached by the trial court upon the weight of the evidence, or in characterizing the action of the legislature in creating this separate District upon which the assessments should be made, as arbitrary, capricious or confiscatory. The legislative determination and classification must, accordingly, be upheld.

3. *Appraisal of benefits.* It is contended that the Commission arbitrarily adopted an *ad valorem* basis of appraisal for the apportionment of benefits to the several parcels of land within the District, without reference to the actual benefits to each. This argument erroneously assumes that the Commission had finally adopted such an *ad valorem* basis for its appraisal. This is not the case. It had merely adopted a tentative *ad valorem* basis, subject to modification and corrections, before final confirmation, after the hearing of objections filed by landowners; of which public notice was given. These landowners did not seek to have the Commission modify or correct this tentative basis of apportionment or file any objections to the appraisal of benefits to their properties. Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. Having failed to object to the tentative *ad valorem* basis adopted by the Commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint. Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to com-

plain of such assessments as unconstitutional. *Farncomb* v. *Denver*, 252 U. S. 7, 11.

The judgment of the Supreme Court of Colorado was plainly right; and as the questions presented do not require further argument, the alternative motion of the defendants in error is granted, and the judgment is

Affirmed.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

No. 18, Original. Order entered June 11, 1923.

Order providing for release of certain lands from the receivership herein, upon stated conditions.

On consideration of the motion of the United States for a release from the existing receivership of the following described lands lying on the north side of the medial line of Red River, that is to say:

(1) Lot 4 of Section 34 in Township 4 South of Range 14 West embraced in Allotment No. 3385, Comanche, 1910, to Day Tah-Too-Ah-Ni-Pah;

(2) Lot 1 of Section 33 in Township 4 South of Range 14 West embraced in Allotment No. 3303, Kiowa, 1910, to Ray Do-Yah;

(3) Lot 6 of Section 5 in Township 5 South of Range 14 West embraced in Allotment No. 3293, Kiowa, 1910, to Maggie Turtle Mountain Reid; and

(4) Lot 5 of Section 5 and Lot 3 of Section 8 in Township 5 South of Range 14 West embraced in Allotment No. 3413, Comanche, 1910, to Robert To-Quothy,

It is ordered as to each of these tracts that the same, including so much of the bed of Red River as lies in front thereof and north of the medial line of the river, be released from the receivership, and the possession be sur-

rendered by the receiver, upon fulfillment as to such tract of the following conditions, and not otherwise:

(a) The execution and presentation to the receiver of satisfactory agreements, approved by the Secretary of the Interior, establishing the side lines, from the surveyed upland on the north bank to such medial line, between such tract and the adjoining tracts on either side; and

(b) The payment to the receiver of such sum or balance as may at the time be owing to the receiver on account of oil wells (whether productive or otherwise) drilled or completed on such tract and within such side lines under the supervision or administration of the receiver,—such sum or balance to include all expenditures and advancements of the receiver, whether for materials, labor, receivership expenses or otherwise, in respect of such wells.

DECISIONS PER CURIAM, FROM APRIL 10, 1923, TO AND INCLUDING JUNE 11, 1923, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 805. LEHIGH & HUDSON RIVER RAILWAY COMPANY *v.* FLORENCE M. OTTERSTEDT, ON BEHALF OF HERSELF AND MINOR CHILDREN. Petition for a writ of certiorari to the Third Department, Appellate Division, of the Supreme Court of the State of New York. April 16, 1923. Petition for a rehearing herein granted. *Mr. John J. Beattie* for petitioner. *Mr. E. Clarence Aiken* for respondent. [See 261 U. S. 619; also *post*, 747.]

No. 634. STEFANO SANGUINETTI *v.* UNITED STATES. Appeal from the Court of Claims. Motion submitted April 9, 1923. Decided April 16, 1923. Motion to reinstate this case on the docket granted. *Mr. Benjamin Carter* for appellant. *The Attorney General* for the *United States.* [See 261 U. S. 626.]

No. —, Original. *Ex parte:* IN THE MATTER OF ADOLPH PALEAIS, PETITIONER. April 16, 1923. Motion for leave to file petition for a writ of habeas corpus denied, without prejudice to an application to the District Court. *Mr. Barnett E. Kopelman* and *Mr. Joseph G. M. Browne* for petitioner.

No. 367. VICTOR RAYMOND HAMMAER *v.* UNITED STATES. Error to the District Court of the United States for the District of Oregon. Submitted April 9, 1923. Decided April 16, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Zucht* v. *King*, 260 U. S. 174. *Mr. Will R. King* and *Mr. Paul Dormitzer* for

plaintiff in error. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Clifford H. Byrnes* for the United States.

No. 370. CHARLES I. STAGER *v.* UNITED STATES. Appeal from the Court of Claims. Submitted April 9, 1923. Decided April 16, 1923. *Per Curiam.* Affirmed upon the authority of *Nicholas* v. *United States,* 257 U. S. 71. *Mr. Edwin R. Wakefield* for appellant. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Lovett* for the United States.

No. 366. J. A. CAMPBELL *v.* STATE OF NORTH CAROLINA. Error to the Supreme Court of the State of North Carolina. Submitted April 10, 1923. Decided April 16, 1923. *Per Curiam.* Affirmed upon the authority of *Vigliotti* v. *Pennsylvania,* 258 U. S. 403. *Mr. Theodore F. Davidson* and *Mr. Louis M. Bourne* for plaintiff in error. *Mr. James S. Manning* and *Mr. Frank Nash* for defendant in error.

No. 522. JAY BURNS BAKING COMPANY ET AL. *v.* SAMUEL R. MCKELVIE, AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL. Error to the Supreme Court of the State of Nebraska. April 16, 1923. *Per Curiam.* Motion to substitute the new governor, Charles W. Bryan, for the ex-governor, Samuel R. McKelvie, and to substitute the new secretary of the department of agriculture, Grant Shumway, for the ex-secretary, Leo B. Stuhr, is granted on the ground that such substitution is authorized by § 8546, Comp. Stats. Neb. 1922, as construed and applied by the Supreme Court of Nebraska. *Mr. Matthew A. Hall* and *Mr. Carrol S. Montgomery* for plaintiffs in error. No appearance for defendants in error. [See 261 U. S. 608.]

No. 978. MAGNUM IMPORT COMPANY, INC. *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 979. MAX L. COHN, TRADING AS MACLEN IMPORT COMPANY, *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 980. ARTHUR BAUM ET AL., TRADING AS BEAUTEX COMPANY, *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 981. MAGNUM IMPORT COMPANY, INC. *v.* HOUBIGANT, INC.; and

No. 982. IVORY NOVELTIES TRADING COMPANY, INC. *v.* FRANCOIS JOSEPH DE SPOTURNO COTY. Argued on return to rule to show cause April 16, 17, 1923. Order entered April 17, 1923. On consideration of the petitions for suspending orders herein, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petitions be, and the name are hereby, denied. *Mr. Charles H. Tuttle,* with whom *Mr. Isaac Reiss* and *Mr. William J. Hughes* were on the briefs, for petitioners. *Mr. Asher Blum,* with whom *Mr. Hugo Mock* was on the briefs, for Coty. *Mr. George S. Hornblower,* with whom *Mr. Lindley M. Garrison* and *Mr. Raoul E. Desvernine* were on the brief, for Houbigant, Inc. [See *ante,* 159, *post,* 738.]

No. —, Original. *Ex parte:* IN THE MATTER OF TAUBEL-SCOTT-KITZMILLER COMPANY, PETITIONER. April 30, 1923. The motion for leave to file a petition for a writ of prohibition herein is denied. *Mr. Frank J. Hogan* for petitioner.

No. 288. JOE BONNER *v.* J. C. MIDDLEBROOKS, SHERIFF OF JONES COUNTY, GEORGIA. Appeal from the District Court of the United States for the Southern District of Georgia. Argued April 25, 1923. Decided April 30, 1923. *Per Curiam.* Dismissed with costs for want of jurisdic-

tion upon the authority of *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham*, 253 U. S. 193, 195. *Mr. John Randolph Cooper*, with whom *Mr. W. O. Cooper, Jr.*, was on the brief, for appellant. *Mr. George M. Napier* and *Mr. Seward M. Smith*, for appellee, submitted.

No. 880. Charles Glen Collins *v.* Victor Loisel, United States Marshal for the Eastern District of Louisiana. Appeal from the District Court of the United States for the Eastern District of Louisiana. Argued May 4, 1923. Decided May 4, 1923. *Per Curiam.* Judgment affirmed with costs, and mandate ordered to issue forthwith. *Mr. J. Zach Spearing* for appellant. *Mr. Robert H. Marr* appeared for appellee. [See *ante*, 426.]

No. 665. Laura Lyon *v.* Charles B. Lohmiller, as Superintendent and Disbursing Agent, etc. Appeal from the District Court of the United States for the District of Nebraska. Motion to dismiss or affirm submitted April 30, 1923. Decided May 7, 1923. *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, etc., Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 137; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20, 24. (2) *Anchor Oil Co.* v. *Gray*, 256 U. S. 519, 522; *Blanset* v. *Cardin*, 256 U. S. 319. *Mr. Charles J. Kappler* and *Mr. Hiram Chase* for appellant. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Riter* and *Mr. H. L. Underwood* for appellee.

No. 96. TAGGARTS PAPER COMPANY *v.* STATE OF NEW YORK. Error to the Court of Claims of the State of New York. Argued April 26, 27, 1923. Decided May 7, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *New York Central R. R. Co.* v. *New York,* 186 U. S. 269, 273; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 326, 331; *Thomas* v. *Iowa,* 209 U. S. 258, 263. *Mr. Adelbert Moot* and *Mrs. Helen Z. M. Rodgers,* with whom *Mr. William L. Marcy* was on the briefs, for plaintiff in error. *Mr. Irving I. Goldsmith,* with whom *Mr. Carl Sherman* and *Mr. Claude T. Dawes* were on the brief, for defendant in error.

No. 556. WILLIAM C. OLANDER *v.* T. P. HOLLOWELL. Error to the Supreme Court of the State of Iowa. Motion to dismiss or affirm submitted May 7, 1923. Decided May 21, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Empire State-Idaho Mining Co.* v. *Hanley,* 205 U. S. 225, 232; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Robert Healy* for plaintiff in error. *Mr. Maxwell A. O'Brien, Mr. B. J. Flick* and *Mr. Ben J. Gibson* for defendant in error.

No. 409. UNION STOCK YARDS COMPANY OF OMAHA, LTD. *v.* MAYHALL & NEIBLE, A COPARTNERSHIP, ET AL., ETC. Error to the Supreme Court of the State of Nebraska. Motion to dismiss submitted May 7, 1923. Decided May 21, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,*

252 U. S. 1, 5–6. *Mr. Norris Brown* and *Mr. Irving F. Baxter* for plaintiff in error. *Mr. A. A. McLaughlin, Mr. Francis A. Brogan, Mr. Alfred G. Ellick, Mr. Anon Raymond, Mr. Bruce Scott* and *Mr. Byron Clark* for defendants in error. [See *post*, 757.]

No. 629. A. N. Leecraft *v.* Texas Company. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted April 30, 1923. Decided May 21, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618, 621; (2) *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *American Smelting Co.* v. *Colorado*, 204 U. S. 103. *Mr. George F. Short* and *Mr. C. W. King* for plaintiff in error. *Mr. C. B. Ames* for defendant in error.

No. 919. First National Bank in St. Louis *v.* State of Missouri at the information of Jesse W. Barrett, Attorney General. Error to the Supreme Court of the State of Missouri. Argued May 7, 1923. Order entered May 21, 1923. It is ordered that this cause be restored to the docket for reargument, at the next term, on the issue whether the State had authority to institute and maintain a proceeding to question compliance by a national bank with its charter. *Mr. Frank H. Sullivan*, with whom *Mr. James C. Jones, Mr. Wm. J. Hughes* and *Mr. Lon O. Hocker* were on the briefs, for plaintiff in error. *Mr. Merrill E. Otis* and *Mr. Harold R. Small*, with whom *Mr. Jesse W. Barrett, Mr. Wm. T. Jones, Mr. Marion C. Early, Mr. Sam Jeffries* and *Mr. Edward J. Foristel* were on the briefs, for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF HENRY WOODHOUSE, ETC., PETITIONER. June 4, 1923. Motion for leave to file petition for writ of mandamus herein denied. *Mr. Henry Woodhouse* pro se.

No. 552. GUARANTY TITLE & TRUST CORPORATION, RECEIVER, ETC. *v.* UNITED STATES. Appeal from the Court of Claims. Motion submitted May 21, 1923. Order entered June 4, 1923. Motion of Norfolk Hampton Roads Company for leave to intervene as a party appellee in this case granted. The appellant to give bond in the amount of $3,000, bond to run in the name of the United States for the benefit of the Norfolk Hampton Roads Company to secure the payment of costs of the appeal as well as interest on $33,000, constituting that part of the judgment recovered by the Norfolk Hampton Roads Company, payment of which has been withheld in consequence of the appeal. *Mr. H. H. Rumble* for Norfolk Hampton Roads Company. *Mr. R. B. Tunstall, Mr. Edward R. F. Wells* and *Mr. Wm. Leigh Williams* for appellant. *The Attorney General* for the United States.

No. 574. LION BONDING & SURETY COMPANY *v.* A. H. KARATZ; and

No. 467. DEPARTMENT OF TRADE & COMMERCE OF THE STATE OF NEBRASKA ET AL. *v.* A. J. HERTZ ET AL., AS RECEIVERS OF LION BONDING & SURETY COMPANY. Certiorari to the Circuit Court of Appeals for the Eighth Circuit. Motion submitted May 21, 1923. Decided June 4, 1923. Motion to modify decree denied. *Mr. Bruce W. Sanborn, Mr. William G. Graves, Mr. Samuel G. Ordway* and *Mr. William R. Kueffner,* for respondents, in support of the motion. *Mr. Halleck F. Rose, Mr. O. S. Spillman, Mr. John F. Stout, Mr. Arthur R. Wells, Mr. Paul L. Mar-*

tin and *Mr. Amos Thomas,* for petitioners, in opposition to the motion. [See *ante,* pp. 77, 640.]

No. —, Original. *Ex parte:* IN THE MATTER OF JESSE C. RUMSEY, PETITIONER. June 4, 1923. Motion for leave to file a petition for a writ of habeas corpus herein denied. *Mr. Jesse C. Rumsey* pro se.

No. 876. JAMES C. DAVIS, AS AGENT, ETC. *v.* W. M. SCROGGINS. Error to the Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss or affirm submitted May 7, 1923. Decided June 4, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 3 of the Act of September 6, 1916, c. 448, 39 Stat. 726, 727. *Mr. Ras Young* and *Mr. George Thompson* for plaintiff in error. *Mr. Cone Johnson, Mr. James W. Edwards* and *Mr. Fred V. Hughes* for defendant in error.

No. —, Original. UNITED STATES *v.* STATE OF OKLAHOMA. June 11, 1923. Motion for leave to file bill of complaint herein denied. *The Attorney General, Mr. Solicitor General Beck* and *Mr. Alfred A. Wheat* for the United States.

No. —. W. J. BLAIR *v.* F. RORER'S ADMINISTRATOR ET AL. June 11, 1923. Motion for leave to file a petition for a writ of error herein to the Supreme Court of Appeals of the State of Virginia denied. *Mr. Aubrey E. Strode* for plaintiff in error.

No. 274. WILLIAM RANDALL ET AL. *v.* BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA. Error to

the Supreme Court of Indiana. Motion submitted June 4, 1923. Decided June 11, 1923. Motion for leave to file a petition for a writ of error to the Appellate Court of the State of Indiana denied. *Mr. Otto Gresham* for plaintiffs in error. *Mr. Clyde H. Jones* and *Mr. D. P. Flanagan* for defendant in error. [See 261 U. S. 252.]

No. 498. James K. Cochran and Harris Kobey *v.* Coulton M. Becker. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion submitted June 4, 1923. Decided June 11, 1923. Motion to rescind judgment and for stay of mandate herein denied. *Mr. Harris Kobey* pro se. *Mr. Oliver J. Miller* for defendant in error. [See 261 U. S. 607.]

No. 640. United States ex rel. Catoni Tisi, alias Lista Cortina, *v.* Robert E. Tod, Commissioner of Immigration at the Port of New York. Appeal from the District Court of the United States for the Southern District of New York. Motion submitted June 4, 1923. Decided June 11, 1923. Motion to reinstate this case on the docket granted. *Mr. Isaac Shorr* and *Mr. Walter Nelles* for appellant. *The Attorney General* for appellee. [See 261 U. S. 626.]

No. 87. McLane Tilton *v.* Felix M. Drennen, as Receiver, etc. Appeal from the Circuit Court of Appeals for the Fifth Circuit. Stipulation submitted June 4, 1923. Order entered June 11, 1923. On consideration of the stipulation to reinstate this cause on the docket and reverse on confession of error, it is now here ordered that said cause be reinstated on the docket; and that the decree be reversed upon such confession of error. *Mr. Forney Johnston* for appellant. *Mr. H. L. Stevens* and *Mr. Joseph E. Johnson* for appellee. [See 261 U. S. 624.]

No. 656. EIGHTH AVENUE RAILROAD COMPANY *v.* JOB E. HEDGES, AS RECEIVER OF THE NEW YORK RAILWAYS COMPANY; and

No. 657. NINTH AVENUE RAILROAD COMPANY *v.* JOB E. HEDGES, AS RECEIVER OF THE NEW YORK RAILWAYS COMPANY. Appeals from the Circuit Court of Appeals for the Second Circuit. Motion to dismiss submitted June 4, 1923. Decided June 11, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Shulthis* v. *McDougal*, 225 U. S. 561, 568; *Hull* v. *Burr*, 234 U. S. 712, 720; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444; *Begg* v. *City of New York*, *ante*, 196. *Mr. Michel Kirkland* and *Mr. Morgan J. O'Brien* for appellants. *Mr. Walter Howe* and *Mr. Bronson Winthrop* for appellee.

PETITIONS FOR CERTIORARI GRANTED, FROM APRIL 10, 1923, TO AND INCLUDING JUNE 11, 1923.

No. 924. THOMAS HAMMERSCHMIDT ET AL. *v.* UNITED STATES. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Joseph W. Sharts* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States.

No. 935. HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE, *v.* LOUIS STEARN. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. John C. Hayes* for petitioner. *Mr. Charles P. Hine* for respondent.

No. 936. HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE, *v.* JOHN G. WHITE. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. John C. Hayes* for petitioner. *Mr. John G. White, Mr. A. V. Cannon* and *Mr. W. H. Annat* for respondent.

No. 953. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* O. J. NICHOLS. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Edgar W. Camp, Mr. Robert O. Brennan, Mr. Gardiner Lathrop* and *Mr. Paul Burks* for petitioner. *Mr. Lyndol L. Young* for respondent.

No. 984. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA *v.* SOUTHERN PACIFIC COMPANY ET AL;

No. 985. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; and

No. 986. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA *v.* LOS ANGELES & SALT LAKE RAILROAD COMPANY. April 23, 1923. Petition for writs of certiorari to the Supreme Court of the State of California granted. *Mr. Hugh Gordon* for petitioner. *Mr. C. W. Durbrow, Mr. E. W. Camp, Mr. A. S. Halsted* and *Mr. Charles H. Bates* for respondents.

No. 998. JACOB GOLDMAN, RECEIVER, *v.* FRANK M. MCKEY, TRUSTEE. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Lewis F. Jacobson* for petitioner. *Mr. Frederick D. Silber* and *Mr. Clarence J. Silber* for respondent.

No. 1003. THOMAS AGNELLO ET AL. *v.* UNITED STATES. April 30, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. George Gordon Battle* for petitioners. *Mr. Solicitor General Beck* for the United States.

No. 974. WILLIAM H. EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE, ETC. *v.* JOSEPH JERMAIN SLOCUM ET AL. May 7, 1923. Petition for a writ of certiorari to the Circuit of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck* for petitioner. *Mr. Robert Thorne* for respondents.

No. 978. MAGNUM IMPORT COMPANY, INC. *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 979. MAX L. COHN, TRADING AS MACLEN IMPORT COMPANY, *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 980. ARTHUR BAUM ET AL., TRADING AS BEAUTEX COMPANY, *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 981. MAGNUM IMPORT COMPANY, INC. *v.* HOUBIGANT, INC., and

No. 982. IVORY NOVELTIES TRADING COMPANY, INC. *v.* FRANCOIS JOSEPH DE SPOTURNO COTY. May 7, 1923. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles H. Tuttle* and *Mr. William J. Hughes* for petitioners. *Mr. Hugo Mock, Mr. Asher Blum* and *Mr. Frederic D. McKenney* for respondents in Nos. 978, 979, 980 and 982. *Mr. Lindley M. Garrison, Mr. George S. Hornblower, Mr. Raoul E. Desvernine* and *Mr. Frederic D. McKenney* for respondent in No. 981. [See *ante,* 159, 729.]

No. 994. UNITED STATES *v.* GULF REFINING COMPANY. May 7, 1923. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Solicitor General Beck* for the United States. *Mr. R. L. Batts* and *Mr. Frank M. Swacker* for respondent.

No. 915. YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, ET AL. *v.* ORA DAVIS ET AL. May 21, 1923. Petition for rehearing granted; and petition for a writ of certiorari to the Supreme Court of the State of Ohio granted. *Mr. Frank Davis, Jr., Mr. Henry A. Williams, Mr. Guy W. Mallon* and *Mr. James I. Boulger* for petitioners. *Mr. Arthur I. Vorys* for respondents. [See *post*, 745.]

No. 1041. LOUIS B. MACKENZIE v. A. ENGELHARD & SONS COMPANY. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. William Marshall Bullitt* for petitioner. No appearance for respondent.

No. 1052. A. ENGELHARD & SONS COMPANY *v.* LOUIS B. MACKENZIE. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. R. A. McDowell* for petitioner. No appearance for respondent.

No. 1012. WESTERN UNION TELEGRAPH COMPANY *v.* J. A. CZIZEK. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Francis Raymond Stark* and *Mr. Beverly L. Hodghead* for petitioner. No appearance for respondent.

No. 1004. JAMES C. DAVIS, AGENT, ETC. *v.* R. L. CORNWELL. May 21, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Montana granted. *Mr. I. Parker Veazey, Jr.*, and *Mr. A. A. McLaughlin* for petitioner. *Mr. Edwin L. Norris* and *Mr. George E. Hurd* for respondent.

No. 1008. CHUNG FOOK *v.* EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION, ETC. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. George W. Hott* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Charles H. Weston* for respondent.

No. 1018. ERIE RAILROAD COMPANY *v.* MARTIN KIRKENDALL. June 4, 1923. Petition for a writ of certiorari to the Court of Appeals, Eighth Judicial District, of the State of Ohio, granted. *Mr. Edward A. Foote* for petitioner. *Mr. E. P. Chamberlin* for respondent.

No. 1031. GREAT NORTHERN RAILWAY COMPANY *v.* GALBREATH CATTLE COMPANY ET AL. June 4, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Montana granted. *Mr. I. Parker Veazey, Jr.*, and *Mr. F. G. Dorety* for petitioner. *Mr. E. E. Enterline* and *Mr. Samuel Herrick* for respondents.

No. 1035. MISSOURI PACIFIC RAILROAD COMPANY *v.* R. L. HANNA. June 4, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas granted. *Mr. Edward J. White* and *Mr. Thomas B. Pryor* for petitioner. No appearance for respondent.

No. 1039. CLARENCE D. KELLER ET AL., ETC. *v.* ADAMS-CAMPBELL COMPANY, INC., ET AL. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles E. Townsend* for petitioners. No appearance for respondents.

No. 1054. JAMES C. DAVIS, AGENT, ETC. *v.* J. M. CURRIE. June 11, 1923. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted. *Mr. Thomas W. Davis* and *Mr. Douglas McKay* for petitioner. No appearance for respondent.

No. 1059. JAMES C. DAVIS, AGENT, ETC. *v.* JOHN O'HARA. June 11, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska granted. *Mr. A. A. McLaughlin, Mr. N. H. Loomis* and *Mr. C. A. Magau* for petitioner. *Mr. Benjamin S. Baker* for respondent.

No. 1082. HERMAN G. GERDES, AS TRUSTEE IN BANKRUPTCY OF ABRAHAM LUSTGARTEN, BANKRUPT, *v.* ABRAHAM LUSTGARTEN. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Moses Cohen* for petitioner. *Mr. Lawrence J. Bershad* for respondent.

No. 1110. PEOPLE OF THE STATE OF NEW YORK *v.* LOUIS JERSAWIT, AS TRUSTEE IN BANKRUPTCY OF AJAX DRESS COMPANY, INC. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Robert P. Beyer* and *Mr. C. T. Dawes* for petitioner. *Mr. Harry B. Singer* for respondent.

No. 1113. THOMAS A. DELANEY *v.* UNITED STATES. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Michael M. Doyle* and *Mr. Lawrence M. Fine* for petitioner. No brief filed for the United States.

PETITIONS FOR CERTIORARI DENIED, FROM APRIL 10, 1923, TO AND INCLUDING JUNE 11, 1923.

No. 883. GOSHO COMPANY, INC. *v.* SOUTHERN PACIFIC COMPANY. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. W. Flournoy* for petitioner. *Mr. C. F. R. Ogilby* and *Mr. William F. Herrin* for respondent.

No. 890. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AGENT, *v.* MICHAEL J. HANLON. April 16, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Thomas Patterson* for petitioner. No appearance for respondent.

No. 893. VULCANITE ROOFING COMPANY, INC. *v.* COMMONWEALTH STEAMSHIP COMPANY, LTD. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Oscar R. Houston, Mr. D. Roger Englar* and *Mr. Henry H. Little* for petitioner. *Mr. John M. Woolsey* and *Mr. Edward R. Baird, Jr.,* for respondent.

No. 894. BROWN-CRUMMER COMPANY *v.* W. M. RICE CONSTRUCTION COMPANY. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Fifth Circuit denied. *Mr. Oscar O'Neill Touchstone* for petitioner. *Mr. Francis M. Etheridge, Mr. Joseph M. McCormick* and *Mr. Snowden M. Leftwich* for respondent.

No. 905. PUGET SOUND POWER & LIGHT COMPANY *v.* CITY OF SEATTLE ET AL. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. James B. Howe* for petitioner. *Mr. Walter B. Beals* and *Mr. Robert H. Evans* for respondents.

No. 908. M. MCGIRR'S SONS COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY ET AL. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John Vance Hewitt* for petitioner. *Mr. Chauncey I. Clark* for respondents.

No. 909. HARLEY-DAVIDSON MOTOR COMPANY ET AL. *v.* ECLIPSE MACHINE COMPANY ET AL. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Melville Church, Mr. William S. Hodges* and *Mr. Edwin B. H. Tower, Jr.*, for petitioners. *Mr. Charles L. Sturtevant* and *Mr. Archibald Cox* for respondents.

No. 913. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* ROBERT B. CALDWELL. April 16, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Homer Hall, Mr. A. A. McLaughlin* and *Mr. N. S. Brown* for petitioner. *Mr. John G. Parkinson* for respondent.

No. 914. ORLANDO LEE CLEVELAND *v.* ROBERT MATTINGLY, JUDGE, ETC. April 16, 1923. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. T. Morris Wampler* for petitioner. No appearance for respondent.

No. 929. CENTRAL UNION TRUST COMPANY OF NEW YORK *v.* WILLIAM H. EDWARDS, AS COLLECTOR, ETC. April 16, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John M. Perry* and *Mr. Arthur H. Van Brunt* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for respondent.

No. 965. DUNCAN BEATON *v.* DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY. April 16, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Frederick M. Miner* for petitioner. *Mr. W. D. Bailey, Mr. Oscar Mitchell* and *Mr. A. C. Gillette* for respondent.

No. 969. CUNO H. RUDOLPH ET AL., COMMISSIONERS, ETC. *v.* CHARLES E. HUNT ET AL. April 16, 1923. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. F. H. Stephens, Mr. R. L. Williams* and *Mr. George P. Barse* for petitioners. No appearance for respondents.

No. 873. T. J. BELL *v.* UNITED STATES. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jed C. Adams*

and *Mr. W. B. Harrell* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 896. James C. Davis, as Agent, etc. *v.* Charles Hareford. Error to the Supreme Court of the State of Arkansas. April 23, 1923. Petition for a writ of certiorari herein denied. *Mr. A. W. Smith, Mr. Vincent M. Miles, Mr. Thomas B. Pryor* and *Mr. A. A. McLaughlin,* for plaintiff in error, in support of the petition. *Mr. Robert A. Rowe,* for defendant in error, in opposition to the petition.

No. 915. Young Men's Christian Association of Columbus, Ohio, et al. *v.* Ora Davis et al. April 23, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Frank Davis, Jr., Mr. Henry A. Williams, Mr. Guy W. Mallon* and *Mr. James I. Boulger* for petitioners. *Mr. Arthur I. Vorys* for respondents. [See *ante,* 739.]

No. 920. New York Life Insurance Company *v.* Marion C. Slocomb. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis H. Cooke* for petitioner. *Mr. Arthur E. Griffin* for respondent.

No. 921. New York Life Insurance Company *v.* Grace G. Rutherford. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis H. Cooke* for petitioner. No appearance for respondent.

No. 930. LE VERRA M. MCNULTY, BY C. N. MCNULTY, HER NEXT FRIEND, *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry E. Lutz* for petitioner. *Mr. Frank A. Kemp, Jr.*, and *Mr. Gardiner Lathrop* for respondent.

No. 937. ROBERT W. HUNT ET AL. *v.* GEORGE H. CLAPP;

No. 938. ROBERT W. HUNT ET AL. *v.* RALPH W. HARBISON;

No. 939. ROBERT W. HUNT ET AL. *v.* MARY L. HENRY, EXECUTRIX, ETC.;

No. 940. ROBERT W. HUNT ET AL. *v.* GEORGE H. CALVERT;

No. 941. ROBERT W. HUNT ET AL. *v.* HARRY S. CALVERT;

No. 942. ROBERT W. HUNT ET AL. *v.* GEORGE H. THEISS, SURVIVING EXECUTOR, ETC.;

No. 943. ROBERT W. HUNT ET AL. *v.* D. F. COLLINGWOOD;

No. 944. ROBERT W. HUNT ET AL. *v.* E. W. GWINNER;

No. 945. ROBERT W. HUNT ET AL. *v.* R. B. MONTGOMERY;

No. 946. ROBERT W. HUNT ET AL. *v.* GEORGE N. GLASS; and

No. 947. ROBERT W. HUNT ET AL. *v.* W. A. HARBISON. April 23, 1923. Petition for writs of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Horace G. Stone* and *Mr. Louis G. Richardson* for petitioners. *Mr. David A. Reed* and *Mr. George H. Calvert* for respondents.

No. 949. WALKER GRAIN COMPANY, BANKRUPTS, ET AL. *v.* GREGG GRAIN COMPANY ET AL. April 23, 1923. Peti-

tion for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bernard Titche* for petitioners. *Mr. Mark McMahon* for respondents.

No. 971. JEANETTE L. MACKELVIE *v.* MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY. April 23, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William Wallace, Jr.*, for petitioner. *Mr. Charles E. Hughes, Jr.*, for respondent.

No. 995. GALVESTON CAUSEWAY CONSTRUCTION COMPANY ET AL. *v.* GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. *Per Curiam*, April 30, 1923, amended June 4, 1923. The petition for certiorari in this case is denied. *Mr. Presley K. Ewing, Mr. Wilmer S. Hunt* and *Mr. Joseph A. McCullough* for petitioners. No appearance for respondents.

No. 899. CHARLES E. ALBURY *v.* BENJAMIN E. DYSON, UNITED STATES MARSHAL, ETC. April 30, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. J. Barco* and *Mr. Harry Hawkins* for petitioner. No brief filed for respondent.

No. 805. LEHIGH & HUDSON RIVER RAILWAY COMPANY *v.* FLORENCE M. OTTERSTEDT, ON BEHALF OF HERSELF AND MINOR CHILDREN. April 30, 1923. Petition for a writ of certiorari to the Third Department, Appellate Division, of the Supreme Court of the State of New York denied. *Mr. John J. Beattie* for petitioner. *Mr. E. Clarence Aiken* for respondent. [See *ante*, 727.]

No. 922. IKE WINDSOR *v.* UNITED STATES. April 30, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Gordon* for petitioner. No brief filed for the United States.

No. 959. UNITED STATES FIDELITY & GUARANTY COMPANY *v.* ROBERT S. BLAKE, A MINOR, ETC.; and

No. 960. UNITED STATES FIDELITY & GUARANTY COMPANY *v.* GRACE TWIGGS BLAKE. April 30, 1923. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maurice McMicken* and *Mr. Joseph A. McCullough* for petitioner. No appearance for respondents.

No. 972. NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY *v.* JOHN I. DOLAN, COLLECTOR OF TAXES, ETC. Error to the Supreme Court of the State of Delaware. April 30, 1923. Petition for a writ of certiorari herein denied. *Mr. William C. Fitts, Mr. Horace Greeley Eastburn* and *Mr. Overton Harris,* for plaintiff in error, in support of the petition. *Mr. Reuben Satterthwaite, Jr.,* for defendant in error.

No. 975. I. T. S. RUBBER COMPANY *v.* UNITED STATES RUBBER COMPANY. April 30, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles A. Brown* for petitioner. *Mr. Livingston Gifford* and *Mr. Charles S. Jones* for respondent.

No. 990. EMANUEL BOOKBINDER *v.* UNITED STATES. April 30, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Mr. A. Mitchell Palmer and *Mr. Frank Davis, Jr.*, for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 954. FOUR-IN-ONE COAL COMPANY *v.* ELI H. BROWN. May 7, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Emile Steinfeld* and *Mr. D. A. Sachs, Jr.*, for petitioner. No appearance for respondent.

No. 961. TONY PANZICH ET AL. *v.* UNITED STATES. May 7, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank P. Doherty* for petitioners. No brief filed for the United States.

No. 968. C. W. JOHNSON, TRUSTEE IN BANKRUPTCY, ETC. *v.* GRAINGER & COMPANY. May 7, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. D. A. Sachs, Jr.*, and *Mr. Emile Steinfeld* for petitioner. No appearance for respondent.

No. 983. MOE H. BARON ET AL. *v.* UNITED STATES. May 7, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edmund H. Moore* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 989. A. BALDINI *v.* UNITED STATES. May 7, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mrs. Annette*

Abbot Adams for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 1002. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* ELLEN A. LONG, ADMINISTRATRIX, ETC. May 7, 1923. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Charles C. Paulding* and *Mr. Leroy B. Williams* for petitioner. *Mr. George H. Bond* and *Mr. A. Lee Olmsted* for respondent.

No. 1009. GEORGE R. BROADWELL *v.* BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA. May 7, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. George P. Glaze* for petitioner. No appearance for respondent.

No. 1011. SAMUEL KRIVIT ET AL. *v.* UNITED STATES. May 7, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Louis Marshall* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 1023. RAY LEVINSON *v.* WILLIAM A. GREENE, TRUSTEE, ETC.; and

No. 1024. MANHATTAN INVESTMENT COMPANY *v.* WILLIAM A. GREENE, TRUSTEE, ETC. May 7, 1923. Petitions for writs of certiorari to the Supreme Court of the State of Washington denied. *Mr. Walter B. Allen* and *Mr. Robert Ash* for petitioners. *Mr. Joseph W. Cox* for respondent.

No. 973. CITY OF LOS ANGELES ET AL. *v.* MONO POWER COMPANY ET AL. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. B. Mathews* for petitioners. *Mr. Charles F. Potter* for respondents.

No. 977. FREDERICK M. DYER ET AL. *v.* COMMONWEALTH OF MASSACHUSETTS. May 21, 1923. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied. *Mr. Boyd B. Jones* and *Mr. Philip N. Jones* for petitioners. *Mr. Jay R. Benton* and *Mr. Henry C. Attwill* for respondent.

No. 988. THOSMIL HOLDING CORPORATION *v.* INTERSTATE COAL & DOCK COMPANY. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Howard Thayer Kingsbury* for petitioner. *Mr. F. K. Pendleton* for respondent.

No. 1001. MORRIS S. RACHMIL *v.* UNITED STATES. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. S. C. Sugarman* for petitioner. No brief filed for the United States.

No. 1006. IMPORTERS STEAMSHIP COMPANY, CLAIMANT, ETC., ET AL. *v.* HOUSTON MARINE ENGINEERING WORKS ET AL. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James B. Stubbs* for petitioners. *Mr. H. C. Hughes, Mr. Lewis R. Bryan* and *Mr. Sewell Myer* for respondents.

No. 1010. PERKINS GLUE COMPANY *v.* STANDARD FURNITURE COMPANY. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas Ewing* and *Mr. Gorham Crosby* for petitioner. *Mr. James A. Watson* for respondent.

Nos. 1019 and 1020. CLAUDE A. P. TURNER *v.* FLAT SLAB PATENTS COMPANY. May 21, 1923. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank A. Whiteley* for petitioner. *Mr. Amasa C. Paul* and *Mr. Edward Rector* for respondent.

No. 1026. GUSTAVE PORGES, ON BEHALF OF HIMSELF AND OTHERS, ETC. *v.* JAMES R. SHEFFIELD, TRUSTEE, ETC.; and

No. 1027. BARON EDMOND JAMES DE ROTHSCHILD ET AL. *v.* JAMES R. SHEFFIELD, TRUSTEE, ETC. May 21, 1923. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. B. Kerr, Mr. Henry G. Gray, Mr. Sol M. Stroock* and *Mr. George Zabriskie* for petitioners. *Mr. Alfred A. Cook* and *Mr. Harold Nathan* for respondent.

No. 1028. FRIEDLANDER BROTHERS, ETC., ET AL. *v.* CITY OF MOULTRIE ET AL. May 21, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied. *Mr. I. J. Hofmayer* and *Mr. James R. Pottle* for petitioners. No appearance for respondents.

No. 1032. ETHEL JAMES *v.* JAMES C. DAVIS, AS AGENT, ETC. May 21, 1923. Petition for a writ of certiorari to

the Supreme Court of the State of Alabama denied. *Mr. W. A. Denson* for petitioner. *Mr. S. R. Prince* for respondent.

No. 1048. BURNS BROS. *v.* STEAM TUG INTERSTATE NO. 1, HER ENGINES, ETC., ET AL. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Mark Ash* and *Mr. Edward Ash* for petitioner. *Mr. George V. A. McCloskey* for respondents.

No. 916. J. P. HUGHES *v.* UNITED STATES BORAX COMPANY. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion to waive Rule 37, denied. *Mr. Albert E. Sherman* for petitioner. *Mr. James F. Peck* and *Mr. Woodson P. Houghton* for respondent.

No. 1037. GRAHAM, CHISHOLM & COMPANY ET AL. *v.* JOHN FIRTH. May 21, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied, because of failure to file the petition within the time prescribed by the statute. *Mr. Ralph Wolf* for petitioners. *Mr. Bernard S. Barron* for respondent.

No. 887. BROMWELL BRUSH & WIRE GOODS COMPANY *v.* STATE BOARD OF CHARITIES & CORRECTIONS OF KENTUCKY. Error to the Circuit Court of Appeals for the Sixth Circuit. June 4, 1923. Petition for a writ of certiorari herein denied. *Mr. Harvey Myers,* for plaintiff in error, in support of the petition. *Mr. Thomas B. McGregor* for defendant in error.

No. 964. ALBERT EICKEL, BANKRUPT, *v.* A. ROBINSON, TRUSTEE OF THE ESTATE OF ALBERT EICKEL, BANKRUPT. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas W. Gregory* for petitioner. *Mr. George E. Shelley* for respondent.

No. 1005. J. L. LANCASTER ET AL., RECEIVERS, ETC. *v.* BEN E. FITCH. June 4, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Mr. F. H. Prendergast* for petitioners. *Mr. Walter C. Clephane* and *Mr. J. Wilmer Latimer* for respondent.

No. 1033. LILLEY BUILDING & LOAN COMPANY *v.* NEWTON M. MILLER, AS COLLECTOR, ETC. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John F. Wilson, Mr. Province M. Pogue* and *Mr. Oscar W. Newman* for petitioner. *Mr. Solicitor General Beck* for respondent.

No. 1034. JACQUES ROUSSO *v.* FIRST NATIONAL BANK IN DETROIT ET AL. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joshua R. H. Potts* for petitioner. No appearance for respondents.

No. 1038. G. S. SWANSON ET AL. *v.* JACK SARJA. June 4, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. George Francis Williams, Mr. Henry C. Clark, Mr. G. S. Swanson* and *Mr. H. A. Swanson* for petitioners. No appearance for respondent.

No. 1040. UNITED STATES *v.* GIUSEPPE GANCI. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States. *Mr. M. Michael Edelstein* for respondent.

No. 1043. FARMERS LOAN & TRUST COMPANY OF NEW YORK *v.* WILCOX COUNTY, GEORGIA. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John R. F. Smith* for petitioner. No appearance for respondent.

No. 1046. LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA *v.* BOARD OF COUNTY COMMISSIONERS OF COLUMBIANA COUNTY, OHIO, ET AL.; and

No. 1047. AETNA CASUALTY & SURETY COMPANY *v.* BOARD OF COUNTY COMMISSIONERS OF COLUMBIANA COUNTY, OHIO, ET AL. June 4, 1923. Petitions for writs of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Bert W. Gearhart* and *Mr. George T. Farrell* for petitioners. No appearance for respondents.

No. 1053. GOLDWYN PICTURES CORPORATION ET AL. *v.* HOWELLS SALES COMPANY ET AL. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles E. Kelley* and *Mr. William J. Hughes* for petitioners. *Mr. Charles H. Tuttle* for respondents.

No. 1056. GRACE PEMBERTON *v.* MORRIS FERTILIZER COMPANY. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Cir-

cuit denied. *Mr. A. H. King, Mr. George C. Bedell* and *Mr. Roswell King* for petitioner. *Mr. Peter O. Knight, Mr. C. Fred Thompson* and *Mr. A. G. Turner* for respondent.

No. 1062. MORSE DRY DOCK & REPAIR COMPANY *v.* JOHN DANIELSON, AN INFANT, ETC.;

No. 1063. MORSE DRY DOCK & REPAIR COMPANY *v.* EILEN S. WARREN, ADMINISTRATRIX, ETC.; and

No. 1064. MORSE DRY DOCK & REPAIR COMPANY *v.* WILLIAM J. CONNELLY. June 4, 1923. Petitions for writs of certiorari to the Supreme Court of the State of New York denied. *Mr. Charles J. McDermott* for petitioner. *Mr. Harold R. Medina* for respondents.

No. 1065. BENJAMIN F. ZUCKER *v.* UNITED STATES. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel S. Koenig* and *Mr. Elijah N. Zoline* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 1071. EDWARD FOX ET AL. *v.* UNITED STATES. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles B. Stafford* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 1075. RUDOLPH SCHLIEFER *v.* UNITED STATES. June 4, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank A. Harrigan* for petitioner. No brief filed for the United States.

No. 1076. NEW YORK CENTRAL RAILROAD COMPANY *v.* FLORENCE M. CUDDEBACK, AS ADMINISTRATRIX, ETC. June 4, 1923. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Daniel M. Beach* for petitioner. *Mr. Arthur E. Sutherland* for respondent.

No. 1077. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS *v.* JOHN HOSEY. June 4, 1923. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied. *Mr. J. Q. Mahaffey* for petitioner. *Mr. S. P. Jones* for respondent.

No. 1045. T. R. BENNETT, SUPERINTENDENT OF BANKS FOR THE STATE OF GEORGIA, *v.* JOHN E. SCHWARZ ET AL. June 4, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied for lack of a final decree. *Mr. George M. Napier* and *Mr. Paul E. Seabrook* for petitioner. *Mr. H. Wiley Johnson* for respondents.

No. 1060. WILLIS A. MURRAY *v.* UNITED STATES. June 4, 1923. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied, and motion for leave to proceed in forma pauperis in this case granted as to costs incurred. *Mr. George S. Shinn* and *Mr. Harry S. Barger* for petitioner. No brief filed for the United States.

No. 409. UNION STOCK YARDS COMPANY OF OMAHA, LTD. *v.* MAYHALL & NEIBLE, A COPARTNERSHIP, ET AL. Error to the Supreme Court of the State of Nebraska. Motion submitted June 4, 1923. Decided June 11, 1923. Motion to reinstate petition for a writ of certiorari herein denied. *Mr. Norris Brown* and *Mr. Irving F. Baxter* for

plaintiff in error. *Mr. A. A. McLaughlin, Mr. Francis A. Brogan, Mr. Alfred G. Ellick, Mr. Anon Raymond, Mr. Bruce Scott* and *Mr. Byron Clark* for defendants in error. [See *ante,* 731; and 260 U. S. 742.]

No. 967. A. J. Hillegass et al. *v.* Bertha Rohm, Administratrix, etc. June 11, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. A. J. Hillegass* and *Mr. Jo V. Morgan* for petitioners. No appearance for respondent.

No. 1066. Simon A. Miller *v.* United States. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph H. Stewart* for petitioner. No brief filed for the United States.

No. 1067. National Surety Company *v.* Edward H. Childs, Trustee in Bankruptcy of J. Menist Company, Inc. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William J. Griffin, Mr. George Pfeil* and *Mr. Frank M. White* for petitioner. *Mr. Moses Cohen* for respondent.

No. 1069. William B. Moses *v.* Lalime & Partridge, Inc., et al. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Frederic P. Warfield* for petitioner. *Mr. Marcus B. May* for respondents.

No. 1078. Sunrise Pictures Corporation *v.* Isaac Silverman. June 11, 1923. Petition for a writ of cer-

tiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Joseph Lilly* for petitioner. *Mr. Joseph B. Kaufman* for respondent.

No. 1079. FEDERAL TRADE COMMISSION *v.* MENNEN COMPANY. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Solicitor General Beck, Mr. Alfred A. Wheat, Mr. W. H. Fuller* and *Mr. Adrien F. Busick* for petitioner. *Mr. Gilbert H. Montague* for respondent.

Nos. 1085 to 1089. UNITED STATES, OWNER, ETC. *v.* MORRIS E. HENDERSON ET AL., TRADING AS PHOENIX PAINT & VARNISH COMPANY. June 11, 1923. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Solicitor General Beck, Mr. Alfred A. Wheat* and *Mr. F. R. Conway* for the United States. *Mr. Otto Wolff, Jr.,* for respondents.

No. 1093. SANDUSKY CEMENT COMPANY *v.* A. R. HAMILTON & COMPANY. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alton C. Dustin* and *Mr. C. M. Horn* for petitioner. No appearance for respondent.

No. 1094. MARY E. MCCAMPBELL *v.* NEW YORK LIFE INSURANCE COMPANY. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hal Browne* and *Mr. Henry P. Burney* for petitioner. No appearance for respondent.

No. 1098. LOCOMOTIVE STOKER COMPANY *v.* ELVIN MECHANICAL STOKER COMPANY. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Ap-

peals for the Third Circuit denied. *Mr. Frederic D. McKenney, Mr. Louis K. Gillson* and *Mr. Paul Synnestvedt* for petitioner. *Mr. J. Snowden Bell, Mr. Drury W. Cooper* and *Mr. Frederick P. Whittaker* for respondent.

No. 1101. JOSE TAYA'S SONS COMPANY, CLAIMANT OF THE STEAMSHIP ASUARCA, ETC. *v.* JEAN B. M. DUCHE ET AL. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John M. Woolsey* and *Mr. Robert S. Erskine* for petitioner. *Mr. D. Roger Englar* and *Mr. T. Catesby Jones* for respondents.

No. 1105. UNITED STATES EX REL. JOSEPH FELD, BY NEXT FRIEND, SAMUEL FELD, *v.* ROBERT L. BULLARD, MAJOR GENERAL, UNITED STATES ARMY. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. B. B. Pettus* and *Mr. E. F. Colladay* for petitioner. *Mr. Solicitor General Beck* for respondent.

No. 1112. MERL B. INKS *v.* UNITED STATES. June 11, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles P. R. McCaulay* for petitioner. No brief filed for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 10, 1923, TO AND INCLUDING JUNE 11, 1923.

No. 456. EUGENE SCHAEFER ET AL., TRUSTEES, ETC. *v.* THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES. Appeal from the Circuit Court of Appeals for the Second Circuit. April 16, 1923. Dis-

missed with costs, on motion of counsel for appellants. *Mr. Swagar Sherley* for appellants. *The Attorney General* for appellee.

No. 384. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY *v.* RAILROAD COMMISSION OF GEORGIA ET AL. Appeal from the District Court of the United States for the Northern District of Georgia. April 18, 1923. Dismissed with costs, on motion of counsel for appellant. *Mr. Sanders McDaniel* for appellant. *Mr. J. Prince Webster* for appellees.

No. 293. RATON WATER WORKS COMPANY *v.* CITY OF RATON. Appeal from the District Court of the United States for the District of New Mexico. April 23, 1923. Dismissed with costs, on motion of counsel for appellant. *Mr. Abram J. Rose* for appellant. No appearance for appellee. [See 261 U. S. 627.]

No. 226. FRED W. SCHUTZ ET AL. *v.* JUSTUS S. WARDELL, U. S. COLLECTOR, ETC. Error to the District Court of the United States for the Northern District of California. April 30, 1923. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Delger Trowbridge, Mr. Charles F. Consaul,* and *Mr. Charles C. Heltman* for plaintiffs in error. *The Attorney General* for defendant in error.

No. 957. MISSOURI PACIFIC RAILROAD COMPANY *v.* MRS. LULU MORGAN. Petition for a writ of certiorari to the Court of Appeal for the Second Circuit, State of Louisiana. April 30, 1923. Dismissed with costs, on motion of counsel for petitioner. *Mr. Henry Bernstein* and *Mr. Patrick H. Loughran* for petitioner. No appearance for respondent.

No. 375. HARRY PALMER *v.* STATE OF INDIANA. Error to the Supreme Court of the State of Indiana. May 2, 1923. Dismissed with costs, per stipulation. *Mr. Henry Adamson* for plaintiff in error. No appearance for defendant in error.

No. 1050. ELIZABETH W. PLATT ET AL. *v.* DAVID R. FRANCIS ET AL. Error to the Circuit Court of the City of St. Louis, State of Missouri. May 3, 1923. Docketed and dismissed with costs, on motion of *Mr. George H. Lamar* for defendants in error.

No. 1114. J. W. RUSSELL *v.* JAMES E. SEARGEANT, TRUSTEE IN BANKRUPTCY, ETC. Error to the Supreme Court of the State of Washington. June 4, 1923. Docketed and dismissed with costs, on motion of *Mr. J. W. Cox* for defendant in error.

No. 835. JOSEPH PHIPPS ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. June 4, 1923. Dismissed, per stipulation. *Mr. John G. Parkinson* for petitioners. *Mr. W. F. Dickinson, Mr. John E. Dolman* and *Mr. M. L. Bell* for respondent.

No. 1091. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* MICHAEL J. HANLON. Error to the Supreme Court of the State of Pennsylvania. June 4, 1923. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Thomas Patterson* for plaintiff in error. No appearance for defendant in error.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1922.

Original Docket.

Cases pending at beginning of term	20
New cases docketed during term	9
Cases finally disposed of	5
Cases not finally disposed of	24

Appellate Docket.

Cases pending at beginning of term	417
New cases docketed during term	711
Cases finally disposed of	760
Cases not finally disposed of	368

The number of pending cases, original and appellate, was thus reduced by 45.

Interlocutory decisions, and adverse decisions upon applications for leave to file, as in mandamus, prohibition, etc., are not here included.

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2. *Id. Injunction.* Practical test unnecessary when injury certain and imminent. *Pennsylvania* v. *West Virginia*.... 553

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2. *Id. Non-Justiciable Controversy.* No original jurisdiction of suit brought in this Court by State to decide abstract question of power of Congress to appropriate money to aid States in protecting health of mothers and infants. *Massachusetts* v. *Mellon*..... 447

3. *Id. Interest of State.* State cannot, as *parens patriae,* sue in this Court to protect her citizens from operation of federal statute upon ground that, as applied to them, it is unconstitutional. *Id.*

4. *Federal and State Courts; Comity.* Books and papers in possession of receiver in bankruptcy appointed by federal court cannot be taken by subpoena issuing from state court, unless federal court, exercising its discretion with due regard for comity, consents. *Dier* v. *Banton*..... 147

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2. *Id. Continuity of Act.* To be determined by Congress; not affected by cessation of warfare, joint resolution declaring war at end, or President's peace proclamation. *Id.*

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1. *Federal Regulation; Grain Exchange.* Flow of grain from western to eastern States and foreign countries through Chicago, where it is sold on exchange and reshipped, is interstate commerce; power of Congress to regulate conduct of exchanges. *Chicago Board of Trade* v. *Olsen*..... 1

2. *Id. Through Shipments; Temporary Interruptions.* Storage, inspection, weighing, grading, mixing, changing of ownership or consignee of grain, under through interstate billing giving shipper right to do those things in transit and reship to original or new destination at original rate, do not remove grain from interstate commerce and federal regulatory power. *Id.*

3. *Id. Mixing Grain; Reshipment of Substitute.* Does not destroy interstate movement. *Id.*

4. *Id. State Taxation.* When goods may be in interstate commerce, subject to federal regulation, and still, by temporary stoppage, become subject to state taxation. *Id.*

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6. *Id. Occupation Tax; Original Packages.* State occupation tax, levied on all wholesale dealers in oil and measured by a per cent. of gross amount of respective sales within State, is not invalid, as burden on interstate commerce, when applied to local sales in original packages, of oil previously shipped into the State and stored by dealer as part of stock in trade.
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7. *Id. Taxation. Mining,* of ore, even when substantially all ore mined is immediately and continuously loaded and shipped into other States to satisfy existing contracts, is not interstate commerce and is subject to local taxation. *Oliver Iron Co.* v. *Lord* 172

8. *Id. Income from Railroad Property,* within State, taxable by State, without considering other income of corporation or deducting capital charges. *Atlantic Coast Line R. R.* v. *Daughton* 413

9. *Id. North Carolina Constitution.* Tax on income of railroad property held consistent with Commerce Clause and state constitution. *Id.*

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3. *Adding to Burden.* Statute void which seeks to make agreed maximum rates applicable to enlarged municipality. *Id.*

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2. *National Banks; Unclaimed Deposits; Escheat.* State law escheating unclaimed deposits is void as applied to national bank. *First Natl. Bank* v. *California*..... 366

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3. *Imports; Immunity from Tax.* Distinction between imports and articles in interstate commerce, as to tax immunity. *Sonneborn Bros.* v. *Cureton*..... 506

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2. *National Public Interest; Grain Exchange.* By reason of its relation to interstate commerce, the business of the Chicago Board of Trade is affected by national public interest and subject to regulation by Congress. *Chicago Board of Trade* v. *Olsen* 1

3. *Id. Regulation; Effect on Members; Due Process.* Regulation, by Grain Futures Act, requiring grain exchange to admit representatives of producers as members and forbidding any rule against return to producers of commissions earned by representatives, does not deprive exchange members of property without due process, though value of memberships diminished. *Id.*

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4. *Due Process; Foreclosure; Restriction of Defenses. Porto Rico Law,* providing for summary foreclosure of mortgages without allowing other defenses than payment, but leaving mortgagor plenary opportunity to assert other objections by separate suit, does not deprive him of property without due process. *Bianchi* v. *Morales* 170

5. *Just Compensation. Measured* by value of property at time of taking; not by higher prices owner was obliged to pay. *Vogelstein & Co.* v. *United States* 337

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7. *Id. Domestic and Export Markets.* Owner entitled to higher, export price obtainable. *Id.*

8. *Self-incrimination. Bankrupt* cannot resist delivery of books and papers to trustee in bankruptcy or affix conditions as to their use. *Ex parte Fuller* 91

9. *Id. Bankrupt,* cannot prevent production of his books, by receiver in bankruptcy, before grand jury in state court. *Dier* v. *Banton* 147

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4. *Id. Liberty of Contract,* how far subject to impairment. *Id.*

5. *Compelling Continuity of Business; Emergency.* Kansas statute requiring manufacturers of food and their employees to submit controversies over wages to state arbitration, and requiring employer to pay wages fixed and forbidding strikes, is unconstitutional. *Id.*

6. *Federal Reserve Bank; Check Collection.* State law allowing state banks to pay checks in exchange when presented by Federal Reserve Bank, or through post office or express company, and when not made payable otherwise by maker, does not deprive Reserve Bank of business rights and liberty of contract without due process or of equal protection. *Farmers Bank* v. *Federal Reserve Bank*..... 649

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7. *Foreign Language Law.* State laws forbidding teaching of foreign languages in public and private schools, invasive of liberty and void.
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8. *Workmen's Compensation; Alien Beneficiaries.* Validity of compensation acts irrespective of dependents to whom payment due being residents or citizens of State. *Madera Co.* v. *Industrial Accident Comm*..... 499

9. *Jury Trial.* Deprivation of, in state court, does not violate Federal Constitution. *Wagner Elec. Co.* v. *Lyndon*. 226

10. *Public Utility Rates. Fair Return* on value of property devoted to public service essential. *Southwestern Tel. Co.* v. *Pub. Serv. Comm*..... 276

11. *Id. Valuation; Profits.* Principles determining valuation; and what is adequate return. *Id.*

12. *Id. Expenditures. Discretion of Board of Directors,* as to what is proper operation expense, cannot be overridden by state commission. *Id.*

13. *Id. Valuation. Evidence,* of present reproduction cost, less depreciation, must be considered. *Bluefield Co.* v. *Public Service Comm*..... 679

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15. *Id.* What are sufficient rates. *Id.*

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17. *Id. Franchise,* to use streets; when not included in valuation. *Id.*

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19. *Id. Federal Income Tax.* Included as operating charge. *Id.*

20. *Id. Exemption of Stockholders* from income tax, considered in estimating fair return. *Id.*

21. *Id. Contract Rates.* Contract between street railway and municipality remains binding though agreed rates become inadequate. *Georgia Ry.* v. *Decatur*..... 432
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23. *Id. Highways.* Extent of use, present and prospective, and objects of use, which may constitute a public use. *Id.*, 700.

24. *Id. Necessity for Taking,* a legislative question, determinable by authorized municipality without hearing owner. *Id.*

25. *Municipal Tunnel,* to be leased to railroads (or even a particular railroad) and for telegraph, telephone and power lines, and for vehicles and for water transportation, is a public use warranting assessments on lands benefited, to pay cost. *Id.*, 710.

26. *Id. Lands Benefited and Assessable.* Legislative determination of, conclusive unless flagrant and arbitrary. *Id.*

27. *Id. Objection to Assessment. Waiver of,* by landowner who does not make it in assessment proceeding but attacks assessment, as arbitrary, by injunction suit. *Id.*

28. *Water Rates; Rights of City.* State may compel one city to furnish water to another at wholesale rates without bearing proportionate part of cost of water works. *Joslin Co.* v. *Providence*..... 668

29. *Condemnation. Injury to Business,* not an element of compensation. *Id.*

30. *Id. Consequential Damages. Taxpayers,* of city, not deprived of property without due process by law requiring city to pay consequential damages. *Id.*

31. *Id. Payment,* need not accompany or precede taking. Rights pending payment, to lease, remove buildings and deal with property in incidental ways. *Id.*

32. *Id. Necessity,* of taking; power to decide delegable to city, without hearing owner. *Id.*

33. *Income from Property. Taxation of,* as distinguished from income of owner, is constitutional. *Atlantic Coast Line R. R.* v. *Daughton*..... 413

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34. *Sidewalk Assessment.* Objection to, *held* frivolous, where owner given opportunity under state law to be heard and did not avail himself of right. *Campbell* v. *City of Olney*.... 352

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36. *Condemnation; Rights of Property Owners.* Not undue, in statute allowing damages, to discriminate between businesses established on land before passage of act authorizing taking, and those established later, or to define territorial limits to which owners may remove machinery and be paid for cost of moving. *Joslin Co.* v. *Providence*..... 668

37. *Foreign Corporation,* entering State to bring suit to recover property fraudulently taken there, is within the jurisdiction of the State, under this Amendment, for that purpose. *Kentucky Co.* v. *Paramount Exchange*..... 544

38. *Id. Examination before Trial.* Statute requiring foreign corporation, suing in state court, to bring books and be examined in state before answer, but not making similar requirement of other corporations and individuals, is invalid. *Id*

39. *Rates; Right to Review.* State law providing for revision of street railway rates by commission not unduly discriminatory in excepting those fixed by existing contracts with municipalities. *Georgia Ry.* v. *Decatur*..... 432

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41. *Income from Railroads, Tax on,* in North Carolina, *held* not to deny equal protection by not allowing, in the computation, certain deductions allowed other corporations and individuals, and in exacting accounts not required of certain short-line railroads. *Atlantic Coast Line R. R.* v. *Daughton*. 413

42. *Mining Tax.* Minnesota tax measured by value of ore mined, not offensive to this clause or to Minn. Const., Art. 9, § 1, requiring uniformity of taxes on same class of subjects, because it does not apply to mere development work or to contractors who work for mine owner. *Oliver Iron Co.* v. *Lord*..... 172

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43. *Id. Deductions,* allowed, of royalties and expenses, *held* not productive of unreasonable discrimination. *Id.*

44. *Id. Hypothetical Discrimination,* which can not operate under conditions of mining actually existing in the State, does not sustain attack on taxing statute. *Id.*

XIV. **Eighteenth Amendment.** See **Intoxicating Liquors.**

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2. *Id. "Territory;" Domestic Ships.* Amendment includes land subject to jurisdiction of United States, ports, bays, harbors and arms of sea, and marginal belt of sea extending one marine league from coast, but not domestic merchant ships on high seas or in foreign waters. *Id*

3. *Id. Foreign Merchant Ships,* within territorial waters of United States, subject to Amendment. *Id.*

4. *Id. Sea Stores,* carrying of liquors as, for beverage purposes, by foreign or domestic merchant ships, forbidden by Amendment. *Id.*

5. *Id. Enforcement.* Amendment leaves all fines, penalties and forfeitures to legislative action. *Id.*

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1. *Consideration; Mutuality.* Contract for purchase of coal by Government at stated price per ton which does not require Government to take, or limit its demand to, any ascertainable quantity, is unenforceable, for lack of consideration and mutuality.

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2. *Id. Performance.* Such contract, however, becomes valid and binding to extent to which it is performed, and party

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who, abandoning an earlier protest, voluntarily delivers coal under contract, is limited to contract price, and cannot recover more. *Id.*

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3. *Opium.* Under Act Jan. 17, 1914, smoking opium, forbidden importation, must be manifested. *Id.*

4. *Id. Penalty; Rev. Stats., § 2809.* Penalty for importing merchandise not on manifest, applies to illegal importation of opium. *Id.*

5. *Id.* Penalty measured by foreign value of opium imported. *Id.*

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3. *Injunction; Federal Appropriation; Taxpayer Suit.* Suit by federal taxpayer to enjoin enforcement of federal act appropriating money upon ground of unconstitutionality, cannot be maintained, for want of equity. *Massachusetts* v. *Mellon*..... 447

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