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UNITED STATES REPORTS

VOLUME 265

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1923

FROM APRIL 28, 1924, TO AND
INCLUDING JUNE 9, 1924

ERNEST KNAEBEL
REPORTER

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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.

HARLAN F. STONE, 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, 1923.

CUNNINGHAM, TRUSTEE OF PONZI, *v.* BROWN ET AL.

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

No. 213. Argued March 12, 1924.—Decided April 28, 1924.

1. Where a person obtained money by fraudulent representations from many others upon his time notes for the amounts borrowed and fifty per cent., but, to stimulate public confidence, gave it out that he would return the amount borrowed on any note at any time before its maturity and pursued that practice, *held*, that lenders who took advantage of this offer and secured repayment shortly before his bankruptcy, when they had reason to believe him insolvent, were not thereby rescinding their contracts for the fraud and reclaiming their own funds, but were creditors equally with the others who filed their claims for reimbursement in the bankruptcy proceedings; and that the repayments thus made were illegal preferences recoverable by the bankrupt's trustees. P. 10.
2. Facts *held* to sustain a finding that parties obtaining repayments had reason to believe the payor insolvent. *Id.*
3. Where the funds of a bankrupt consisted entirely of money borrowed from many persons by fraud, a lender who rescinded and secured repayment out of the same bank account in which his and other like loans were deposited by the bankrupt, could not justify the repayment, against the charge of illegal preference, upon the theory of a resulting trust, or lien, if the repayment was made after the account had been exhausted by payments to other lenders and after it had been replenished by the bankrupt with other portions of the borrowed funds. P. 11.

4. In such a situation, the ruling in *Clayton's Case,* 1 Merivale, 572, that defrauded claimants were entitled to be paid inversely to the order in which their moneys went into a common fund, has no application; and likewise the ruling in *Knatchbull* v. *Hallett,* L. R. 13 Ch. D. 696, that where a fund is composed partly of a defrauded claimant's money and partly of that of the wrongdoer, it will be presumed that, in the fluctuations of the fund, it was the wrongdoer's purpose to draw out first the money to which he was honestly entitled, and that the claimant may assert an equitable lien on the residue. P. 12.
5. A minor is not exempt from defeat of an unlawful preference under § 60b of the Bankruptcy Act. P. 13.

284 Fed. 936, reversed.

CERTIORARI to review decrees of the Circuit Court of Appeals affirming decrees of the District Court which dismissed the bills in six suits, brought by the trustees of a bankrupt, under § 60b of the Bankruptcy Act, to recover payments made by the bankrupt, upon the ground that they were unlawful preferences.

Mr. Edward F. McClennen, with whom *Mr. William R. Sears* and *Mr. Clarence M. Gordon* were on the brief, for petitioner.

Mr. John H. Devine, with whom *Mr. Walter A. Buie, Mr. Edward A. Counihan, Jr.,* and *Mr. Joseph P. Dexter* were on the brief, for Crockford, Murphy and Holbrook, respondents.

The fraud in these cases consisted in Ponzi's receiving the respondent's money when he was hopelessly insolvent, he knowing the fact and concealing his condition from the respondents, innocent depositors. *In re Stewart,* 178 Fed. 463, and cases there cited.

When the respondents' money was thus obtained, it was impressed with a trust for their benefit which attached to the general fund with which Ponzi's moneys were mingled, and this trust followed that fund so long as the trust moneys were not exhausted. *In re Stewart,*

supra; Cheney v. *Dickinson,* 172 Fed. 109; *Friend* v. *Talcott,* 228 U. S. 27; *St. Louis & San Francisco Ry. Co.* v. *Johnston,* 133 U. S. 566; *In re Hamilton Carpet Co.,* 117 Fed. 774; *In re Gold,* 210 Fed. 410.

The respondents would have the right to have their money back even if Ponzi had not deposited the identical money he received from them but had substituted other moneys belonging to himself. *National Bank* v. *Insurance Co.,* 104 U. S. 54.

In these cases, however, it is clear and undisputed that the very moneys of which Ponzi defrauded the respondents were deposited by him in the Hanover Trust Company and that the checks they received and cashed were drawn upon his account in that bank.

The right of the respondents to recover their property cannot be impaired by the trustee. *Bussing* v. *Rice,* 2 Cush. 48; *Cf. Tiffany* v. *Boatman's Institution,* 18 Wall. 375; *Goodwin* v. *Massachusetts Loan Co.,* 152 Mass. 189. See also *Peoples National Bank* v. *Mulholland,* 228 Mass. 152; *Watchmaker* v. *Barnes,* 259 Fed. 783.

Respondents were not creditors. *Richardson* v. *Shaw,* 209 U. S. 365; *Donaldson* v. *Farwell,* 93 U. S. 631.

Ponzi stood to them in a relation of a trustee *ex maleficio.* Pomeroy's Eq. Juris., 2d ed., § 1053.

The respondents never submitted themselves to the jurisdiction of the bankruptcy court, and the money which they received was not impressed with any lien or trust in favor of the trustees in bankruptcy.

If the respondents were never creditors of Ponzi's estate in bankruptcy, but merely *cestuis que trustent,* their taking back their moneys out of Ponzi's hands in no manner diminished his estate.

Indeed, it seems from all the evidence that until the election of some of Ponzi's customers to prove their claims in bankruptcy, there was no property in the estate upon which the bankruptcy court could lay hold. Until then,

all the property Ponzi had consisted of trust money. Certainly the bankrupt's estate was not diminished by the payments to the respondents.

There can be no preference without a depletion of the bankrupt's estate. *In re Schwab,* 258 Fed. 772. See *Gorman* v. *Littlefield,* 229 U. S. 19; Bankruptcy Act, as amended June 25, 1910, § 60 (a) and (b); *Putnam* v. *United Trust Co.,* 223 Mass. 199; *Rogers* v. *American Halibut Co.,* 216 Mass. 227.

The only evidence on which the petitioner can rely to establish that the respondents had reasonable cause to believe a preference would be effected, is the newspaper report. That the respondents, or any of them, saw that report is purely conjectural. *Rogers* v. *American Halibut Co., supra.*

The following cases, although decided before the amendment of 1910 to the Bankruptcy Act, seem to be in point upon the question as to what constitutes reasonable cause to believe that the debtor was insolvent and that a preference would be effected by payment to the creditors. *Grant* v. *National Bank,* 97 U. S. 80; *In re First National Bank of Louisville,* 155 Fed. 100; *Curtiss* v. *Kingman,* 159 Fed. 880; *Tumlin* v. *Bryan,* 165 Fed. 166.

The burden was on the trustees. *Importers & Traders National Bank* v. *Peters,* 123 N. Y. 272; *National Bank* v. *Insurance Co.,* 104 U. S. 54; *Southern Cotton Oil Co.* v. *Elliotte,* 218 Fed. 567; *In re Mulligan,* 116 Fed. 715; *Ellicott* v. *Kuhl,* 16 N. J. Eq. 333; *Hewitt* v. *Hayes,* 205 Mass. 356; *Smith* v. *Mottley,* 150 Fed. 266; *Ryder* v. *Hathaway,* 21 Pick. 298; *Tumlin* v. *Bryan,* 165 Fed. 166; *In re Leech,* 171 Fed. 622; *Turner* v. *Schaeffer,* 249 Fed. 654.

Mr. Louis Goldberg for Brown, respondent.

The trustees must show by a preponderance of proof, that the money transferred was the property of Ponzi,

and that there thereby was consummated a depletion of the funds available for general creditors. The presumption is, where money charged with a trust *ex maleficio* is mingled with the general funds of the debtor, that the debtor first exhausts his own before paying out trust funds.

The defendant having exercised his right to rescind, the money was his own property, and he could maintain his title against all persons except one receiving it for value *bona fide* without notice. *Atwood* v. *Dearborn,* 1 Allen, 483; *National Bank v. Insurance Co.,* 104 U. S. 54; *Bussing* v. *Rice,* 2 Cush. 48; *Tiffany* v. *Boatman's Institution,* 18 Wall. 375; *Goodwin* v. *Massachusetts Loan Co.,* 152 Mass. 189; *Peoples National Bank* v. *Mulholland,* 228 Mass. 152; *Watchmaker* v. *Barnes,* 259 Fed. 783.

Having received back his own property, Brown is not a creditor, and consequently the transfer did not operate to diminish the bankrupt's estate. *Hewitt* v. *Hayes,* 205 Mass. 356.

The suit of the plaintiff lacks the ground of liability that the person receiving the transfer had reasonable ground for believing that preference had been made.

The rescinding party has merely exercised the right of reclamation. Consequently he is chargeable with no knowledge as to his relative rights as against persons who, as against him, have no rights at all.

Granted that the defendant Brown had reasonable cause to believe that Ponzi was insolvent, and that he, Brown, had obtained a greater proportion than those who proved their claims in bankruptcy, this does not show reasonable cause to believe that a preference has been made.

This case, as dealing with a preference, is not a bankruptcy case proper. Loveland, Bankruptcy, 4th ed., § 541; *Pond* v. *New York Exchange Bank,* 124 Fed. 992; Bankruptcy Act, § 60b.

This not being a strictly federal question, the District Court and the Circuit Court of Appeals will give effect to the common law of Massachusetts, the State in which the alleged preference was made. This fundamental principle is ignored by the petitioners, who in effect ask this Court to overrule the decision of the Circuit Court of Appeals for the First Circuit in *Empire State Surety Co.* v. *Carrol County,* 194 Fed. 593.

Clayton's Case, 1 Merivale, 572, is inapplicable. *Hewitt* v. *Hayes,* 205 Mass. 356; *Empire State Surety Co.* v. *Carrol County, supra. In re Mulligan,* 116 Fed. 715, distinguished. See *Knatchbull* v. *Hallett,* 13 Ch. Div. 696; *National Bank* v. *Insurance Co.,* 104 U. S. 54.

The main issue becomes a moot question as to the infant defendant, Brown. *MacGreal* v. *Taylor,* 167 U. S. 688; *Knudson* v. *General Motorcycle Co.,* 230 Mass. 54; *Jacobs* v. *Saperstein,* 225 Mass. 300; *Rogers* v. *American Halibut Co.,* 216 Mass. 227; *Hewitt* v. *Boston Straw Board Co.,* 214 Mass. 260; *Cohen* v. *Small,* 120 App. Div. 211; *Reber* v. *Ellis Bros.,* 185 Fed. 313.

To repeat, a preference suit is not a bankruptcy proceeding. The statute merely lays down the terms on which the right of action is predicated, leaving the rest to the substantive law of the forum. *Christopher* v. *Norvell,* 201 U. S. 216, distinguished.

By demanding and receiving his money back, Brown was only exercising his right of rescission as a minor, under the age of twenty-one; and therefore no transfer was effected.

It is obvious that the dealings between Ponzi and Brown amounted to a contract, and a contract not for necessaries.

A contract of this nature the defendant had a legal right to cancel at any time during his minority, and a reasonable time thereafter.

Brown avoided the contract by withdrawing his money, thus leaving all the parties concerned in the same status

as if there had been no transaction at all. This is based on the theory that the contracts of minors are voidable until avoided.

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

These were six suits in equity brought by the trustees in bankruptcy of Charles Ponzi to recover of the defendants sums paid them by the bankrupt within four months prior to the filing of the petition in bankruptcy, on the ground that they were unlawful perferences. All the trustees have died or resigned pending the litigation, and Cunningham, having been substituted for the last survivor, is now the sole trustee. The actions were tried together in the District Court, and were argued together in the Circuit Court of Appeals, and all the bills were dismissed in both courts. The facts and defenses are the same in all the cases, except that, in that of Benjamin Brown, there was an additional defense that he was a minor when the transactions occurred. We have brought the cases into this Court by writ of certiorari.

The litigation grows out of the remarkable criminal financial career of Charles Ponzi. In December, 1919, with a capital of $150, he began the business of borrowing money on his promissory notes. He did not profess to receive money for investment for account of the lender. He borrowed the money on his credit only. He spread the false tale that on his own account he was engaged in buying international postal coupons in foreign countries and selling them in other countries at 100 per cent. profit, and that this was made possible by the excessive differences in the rates of exchange following the war. He was willing, he said, to give others the opportunity to share with him this profit. By a written promise in ninety days to pay them $150 for every $100 loaned, he induced thousands to lend him. He stimulated their avidity by

paying his ninety-day notes in full at the end of forty-five days, and by circulating the notice that he would pay any unmatured note presented in less than forty-five days at 100% of the loan. Within eight months he took in $9,582,000 for which he issued his notes for $14,374,000. He paid his agents a commission of 10 per cent. With the 50 per cent. promised to lenders, every loan paid in full with the profit would cost him 60 per cent. He was always insolvent and became daily more so, the more his business succeeded. He made no investments of any kind, so that all the money he had at any time was solely the result of loans by his dupes.

The defendants made payments to Ponzi as follows:

Benjamin Brown, July 20th	$600
Benjamin Brown, July 24th	600
H. W. Crockford, July 24th	1,000
Patrick W. Horan, July 24th	1,600
Frank W. Murphy, July 22nd	600
Thomas Powers, July 24th	500
H. P. Holbrook, July 22nd	1,000

By July 1st, Ponzi was taking in about one million dollars a week. Because of an investigation by public authority, Ponzi ceased selling notes on July 26th, but offered and continued to pay all unmatured notes for the amount originally paid in, and all matured notes which had run forty-five days, in full. The report of the investigation caused a run on Ponzi's Boston office by investors seeking payment and this developed into a wild scramble when, on August 2nd, a Boston newspaper, most widely circulated, declared Ponzi to be hopelessly insolvent, with a full description of the situation written by one of his recent employees. To meet this emergency, Ponzi concentrated all his available money from other banks in Boston and New England in the Hanover Trust Company, a banking concern in Boston, which had been his chief depository. There was no evidence of any gen-

eral attempt by holders of unmatured notes to secure payment prior to the run which set in after the investigation July 26th.

The money of the defendants was paid by them between July 20th and July 24th and was deposited in the Hanover Trust Company. At the opening of business July 19th, the balance of Ponzi's deposit accounts at the Hanover Trust Company was $334,000. At the close of business July 24th it was $871,000. This sum was exhausted by withdrawals of July 26th of $572,000, of July 27th of $288,000, and of July 28th of $905,000, or a total of more than $1,765,000. In spite of this, the account continued to show a credit balance because new deposits from other banks were made by Ponzi. It was finally ended by an overdraft on August 9th of $331,000. The petition in bankruptcy was then filed. The total withdrawals from July 19th to August 10th were $6,692,000. The claims which have been filed against the bankrupt estate are for the money lent and not for the 150 per cent. promised.

Both courts held that the defendants had rescinded their contracts of loan for fraud and that they were entitled to a return of their money, that other dupes of Ponzi who filed claims in bankruptcy must be held not to have rescinded, but to have remained creditors, so that what the latter had paid in was the property of Ponzi, that the presumption was that a wrongdoing trustee first withdrew his own money from a fund mingled with that of his *cestui que trustent,* and therefore that the respective deposits of the defendants were still in the bank and available for return to them in rescission, and that payments to them of these amounts were not preferences but merely the return of their own money.

We do not agree with the courts below. The outstanding facts are not really in dispute. It is only in the interpretation of those facts that our difference of view arises.

In the first place, we do not agree that the action of the defendants constituted a rescission for fraud and a restoration of the money lent on that ground. As early as April, his secretary testifies, Ponzi adopted the practice of permitting any who did not wish to leave his money for forty-five days to receive it back in full without interest, and this was announced from time to time. Two of the defendants expressly testified to this. It was reiterated in the public press in July and by the investigating public authorities. There is no evidence that these defendants were consciously rescinding a contract for fraud. Certainly Ponzi was not returning their money on any admission of fraud. The lenders merely took advantage of his agreement to pay his unmatured notes at par of the actual loan. Such notes were paid under his agreement exactly as his notes which were matured were paid at par and 50 per cent. The real transaction between him and those who were seeking him is shown by the fact that there were five hundred to whom he gave checks in compliance with his promise and who were defeated merely because there were no more funds.

The District Court found that when these defendants were paid on and after August 2nd, they had reason to believe that Ponzi was insolvent. The statute, § 60b of the Bankruptcy Act, as amended June 25, 1910, c. 412, 36 Stat. 838, 842, requires that, in order that a preference should be avoided, its beneficiary must have reasonable cause to believe that the payment to him will effect a preference, that is that the effect of the payment will be to enable him to obtain a greater percentage of his debt than others of the creditors of the insolvent of the same class. The requirement is fully satisfied by the evidence in this case, no matter where the burden of proof. On the morning of August 2nd, when news of Ponzi's insolvency was broadly announced, there was a scramble and

a race. The neighborhood of the Hanover Bank was crowded with people trying to get their money and for eight days they struggled. Why? Because they feared that they would be left only with claims against the insolvent debtor. In other words, they were seeking a preference by their diligence. Thus they came into the teeth of the Bankrupt Act and their preferences in payment are avoided by it.

But even if we assume that the payment of these unmatured notes was not according to the contract with Ponzi and that what the defendants here did was a rescission for fraud, we do not find them in any better case. They had one of two remedies to make them whole. They could have followed the money wherever they could trace it and have asserted possession of it on the ground that there was a resulting trust in their favor, or they could have established a lien for what was due them in any particular fund of which he had made it a part. These things they could do without violating any statutory rule against preference in bankruptcy, because they then would have been endeavoring to get their own money, and not money in the estate of the bankrupt. But to succeed they must trace the money and therein they have failed. It is clear that all the money deposited by these defendants was withdrawn from deposit some days before they applied for and received payment of their unmatured notes. It is true that by the payment into the account of money coming from other banks and directly from other dupes the bank account as such was prevented from being exhausted; but it is impossible to trace into the Hanover deposit of Ponzi after August 1st, from which defendants' checks were paid, the money which they paid him into that account before July 26th. There was, therefore, no money coming from them upon which a constructive trust, or an equitable lien could be fastened. *Schuyler* v. *Littlefield,* 232 U. S. 707; *In re*

Mulligan, 116 Fed. 715; *In re Matthews' Sons,* 238 Fed. 785; *In re Stenning* (1895), 2 Ch. 433. In such a case, the defrauded lender becomes merely a creditor to the extent of his loss and a payment to him by the bankrupt within the prescribed period of four months is a preference. *Clarke* v. *Rogers,* 228 U. S. 534; *In re Dorr,* 196 Fed. 292; *In re Kearney,* 167 Fed. 995.

Lord Chancellor Eldon, in *Clayton's Case* (1816 Ch.), 1 Merivale, 572, held that, in a fund in which were mingled the moneys of several defrauded claimants insufficient to satisfy them all, the first withdrawals were to be charged against the first deposits and the claimants were entitled to be paid in the inverse order in which their moneys went into the account. Ponzi's withdrawals from his account with the Hanover Trust Company on July 26, 27 and 28, were made before defendants had indicated any purpose to rescind. Ponzi then had a defeasible title to the money he had received from them and could legally withdraw it. By the end of July 28th, he had done so and had exhausted all that was traceable to their deposits. The rule in *Clayton's Case* has no application.

The courts below relied on the rule established by the English Court of Appeals in *Knatchbull* v. *Hallett,* L. R. 13 Ch. D. 696, in which it was decided by Sir George Jessel, Master of the Rolls, and one of his colleagues, that where a fund was composed partly of a defrauded claimant's money and partly of that of the wrongdoer, it would be presumed that in the fluctuations of the fund it was the wrongdoer's purpose to draw out the money he could legally and honestly use rather than that of the claimant, and that the claimant might identify what remained as his *res* and assert his right to it by way of an equitable lien on the whole fund, or a proper *pro rata* share of it. *National Bank* v. *Insurance Co.,* 104 U. S. 54, 68; *Hewitt* v. *Hayes,* 205 Mass. 356. To make the rule applicable here, we must infer that in the deposit and withdrawal

of more than three millions of dollars between the deposits of the defendants prior to July 28th, and the payment of their checks after August 2nd, Ponzi kept the money of defendants on deposit intact and paid out only his subsequent deposits. Considering the fact that all this money was the result of fraud upon all his dupes, it would be running the fiction of *Knatchbull* v. *Hallett* into the ground to apply it here. The rule is useful to work out equity between a wrongdoer and a victim; but when the fund with which the wrongdoer is dealing is wholly made up of the fruits of the frauds perpetrated against a myriad of victims, the case is different. To say that, as between equally innocent victims, the wrongdoer, having defeasible title to the whole fund, must be presumed to have distinguished in advance between the money of those who were about to rescind and those who were not, would be carrying the fiction to a fantastic conclusion.

After August 2nd, the victims of Ponzi were not to be divided into two classes, those who rescinded for fraud and those who were relying on his contract to pay them. They were all of one class, actuated by the same purpose to save themselves from the effect of Ponzi's insolvency. Whether they sought to rescind, or sought to get their money as by the terms of the contract, they were, in their inability to identify their payments, creditors and nothing more. It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law. Those who were successful in the race of diligence violated not only its spirit but its letter and secured an unlawful preference.

We do not see that a minor whose money could not be identified is in a better situation than that of the other defendants. Like them, on August 2nd, he was only a creditor of Ponzi, and was moved to avoid insolvency by a preference just as they were. A minor is not exempt

from the defeat of an unlawful preference by § 60b of the Bankruptcy Act as amended.

The decrees are reversed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* OSBORNE, AS TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL.

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* OSBORNE, AS STATE TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY *v.* OSBORNE, AS STATE TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL.

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

Nos. 219, 224, 225. Argued April 14, 15, 1924.—Decided April 28, 1924.

Where railroad companies, complaining of systematic and intentional discrimination by a state board in the assessment of taxes, were allowed no remedy by the state law other than a writ of error from the State Supreme Court to correct only errors of law apparent on the face of the record prepared by the board itself, with no supersedeas pending review to prevent infliction of penalties on their agents for failure to pay the tax, *held*, that the remedy was not adequate and that the case was cognizable by the District Court in suits for injunction. P. 15.

Reversed.

APPEALS from decrees of the District Court which dismissed the suits brought by the appellant companies to restrain collection of state taxes, upon the ground that their remedy at law was adequate.

Mr. Bruce Scott, with whom *Mr. Timothy Byron Clark, Mr. Jesse L. Root, Mr. J. W. Weingarten* and *Mr. J. C. James* were on the briefs, for appellant in No. 219.

Mr. Wymer Dressler, with whom *Mr. R. L. Kennedy, Mr. R. N. Van Doren, Mr. James B. Sheean* and *Mr. F. W. Sargent* were on the briefs, for appellants in Nos. 224 and 225.

Mr. Geo. W. Ayres and *Mr. Hugh La Master,* Assistant Attorneys General of the State of Nebraska, with whom *Mr. O. S. Spillman,* Attorney General, was on the briefs, for appellees.

Mr. Justice Holmes delivered the opinion of the Court.

These are bills in equity brought to restrain the collection of taxes upon the respective railroad companies for the year 1922 on the ground that the farm lands in Nebraska were systematically and intentionally undervalued while the railroad properties were valued at their full worth and more. After a hearing by three Judges sitting under § 266 of the Judicial Code, it was held that the plaintiffs "had an adequate remedy at law under the statutes of the State of Nebraska in prosecuting error proceedings to the Supreme Court of the State of Nebraska" and for that reason a preliminary injunction was denied. Appeals were taken and the correctness of the above ruling is the only question here. It is not disputed that the proceedings in the Supreme Court of the State are purely judicial, so that *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, does not apply to this case. *Bacon* v. *Rutland R. R. Co.,* 232 U. S. 134. *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 48.

The Board of Equalization and Assessment equalizes the assessments of other property made in the Counties

and itself determines the assessments upon railroads. When it has made its final order it certifies it to the counties and the county treasurers thereupon issue distress warrants and notify agents of delinquent corporations to pay over all moneys of the corporation in their hands not exceeding the amount of the tax. A failure of the agent to do so is made a misdemeanor and is punished by a fine. There is no provision for a supersedeas pending proceedings before the Supreme Court, and none by which the plaintiffs can pay under protest and bring an action at law. *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 296, 297. Yet if the Board is guilty of the conduct charged in the bill, the only remedy given by the statute is a writ of error to take to the Supreme Court a record prepared by the Board. Compiled Stats. 1922, § 5901.

If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 486. But the writ of error of course can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. *Smyth* v. *Ames*, 169 U. S. 466, 516. *St. Louis-San Francisco Ry. Co.* v. *McElvain*, 253 Fed. 123, 136. *Franklin* v. *Nevada-California Power Co.*, 264 Fed. 643, 645. That however is not the only objection. On a writ of error the Court is confined to the record. The most that it could do, it would seem, would be, if errors appeared on the face of the record, to set aside an excessive valuation and remit the matter to the same Board to try again, which is hardly satisfactory, if the Board is seeking to evade the law. *United States* v. *Osage County*, 251 U. S. 128, 133, 134. When such a charge as the present is made it can be tried fully and fairly only by a Court that can hear any and all competent evidence, and that is not bound by findings of

the implicated board for which there is any evidence, always easily produced. We are of opinion that there is jurisdiction in equity over the case stated by the bill and that therefore the Judges "should dispose of the application for a temporary injunction on the merits and otherwise proceed with the suit in regular course." *Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282, 287.

Decrees reversed.

STATE OF MISSOURI AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH *v.* DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 762. Argued April 11, 1924.—Decided April 28, 1924.

1. The Act of September 26, 1918, c. 177, § 2, 40 Stat. 967, amending § 11(k) of the Federal Reserve Act, authorizes a national bank having the permit of the Federal Reserve Board, to act as executor, if trust companies competing with it have that power by the law of the State in which the bank is located, whether the exercise of such power by the national bank is contrary to the state law or not. P. 23.
2. The power of Congress to grant such accessory functions to national banks, to sustain them in the competition of the banking business, cannot be controlled by state laws. *First National Bank* v. *Fellows,* 244 U. S. 416. P. 24.
3. The authority given by the act is independent of regulations adopted by the State to secure the trust funds in the hands of its trust companies. *Id.*

302 Mo. 130, reversed.

ERROR to a judgment of the Supreme Court of Missouri which denied the bank's application for a writ of mandamus to compel a probate court to issue to it letters testamentary, it having been appointed executor by a will.

Mr. Justin D. Bowersock, with whom *Mr. John C. Landis, Jr., Mr. William T. Jones, Mr. Henry L. McCune, Mr. Armwell L. Cooper, Mr. I. P. Ryland* and *Mr. Samuel McReynolds* were on the brief, for plaintiff in error.

I. When Congress enters any field over which it is given jurisdiction by the Constitution, it appropriates that field to the fullest extent necessary to insure the complete exercise of its sovereignty. Its enactments are the supreme law of the land, paramount to any state law or authority. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Smith* v. *Alabama,* 124 U. S. 465; *Mondou* v. *N. Y., N. H. & H. R. R. Co.,* 223 U. S. 1.

II. Congress has jurisdiction to establish and regulate national banks, and its action in that regard, if constitutional, is entirely independent of and superior to all state laws. *McCulloch* v. *Maryland, supra; Osborn* v. *Bank,* 9 Wheat. 738; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275; *Farmers' & Mechanics' Bank* v. *Dearing,* 91 U. S. 29; *Easton* v. *Iowa,* 188 U. S. 220; *Van Reed* v. *People's National Bank,* 198 U. S. 554.

III. The act of Congress granting trust powers to national banks is constitutional and such power cannot, therefore, be nullified, impeded, burdened or controlled by state law or authority, except as permitted by Congress. *First National Bank* v. *Fellows,* 244 U. S. 416.

IV. Such powers have been granted to relator in so far as they are not in contravention of state or local law, and the power to act as executor (included therein) is not in contravention of the laws of Missouri.

1. This is a federal and not a state question. Congress has here provided for the exercise of certain functions "when not in contravention of state or local law" and has laid down certain conditions under which it "shall not be deemed to be in contravention of state or local law within the meaning of this Act." Manifestly, the funda-

mental question is what intention Congress expressed by the language of the act. The law of the State enters into consideration only incidentally as affecting that expressed intention. It might well be that an act would, as a mere question of state law, contravene such law, and yet not do so within the meaning of the act of Congress.

If this were not true, a State might enact a law expressly forbidding national banks to act as executor, and the State Supreme Court might hold that the exercise of such power was therefore in contravention of state law. See *Andrews* v. *Hovey,* 124 U. S. 694; *The J. E. Rumbell,* 148 U. S. 1; *Scott* v. *McNeal,* 154 U. S. 34.

2. Even aside from the provisions of the amendment of September 26, 1918, there is no law in Missouri inconsistent with the appointment of a national bank as executor.

3. The question is, however, forclosed in Missouri by the amendment to the Federal Reserve Act, enacted September 26, 1918. *In re Mollineaux,* 179 N. Y. S. 90; *Estate of Stanchfield,* 171 Wis. 553; *Hamilton* v. *State,* 94 Conn. 648; *Turner's Estate,* 277 Pa. St. 110; *Fidelity National Bank & Trust Co.* v. *Enright,* 264 Fed. 236; *Fellows* v. *First National Bank,* 192 Mich. 640.

4. The amendment of 1918 is more than a mere definition of terms. In effect it is a legislative declaration and clarification of the law as laid down in the original enactment.

5. The question for determination is reduced to this: Do the laws of Missouri authorize or permit the exercise of trust powers, including the power to act as executor, by state banks, trust companies or other corporations which compete with national banks? This question is answered in the affirmative by the statutes of the State.

V. Cases distinguished: *People* v. *Brady,* 271 Ill. 100; cf. *People* v. *Russel,* 283 Ill. 520; *Appeal of Woodbury,* 78 N. H. 50; *Aquidneck National Bank* v. *Jennings,* 44 R. I. 435.

Mr. Solicitor General Beck, with whom *Mr. Walter Wyatt* and *Mr. Edgar W. Freeman* were on the brief, for the United States, as *amicus curiae,* by special leave of Court.

By the Act of September 26, 1918, Congress declares that national banks may exercise trust powers if such exercise is not in contravention of state laws; but it goes further and provides in unmistakable language that the exercise of trust powers by national banks shall not be deemed in contravention of the laws of a State within the meaning of the act if the laws of such State permit the exercise of those powers by state corporations which compete with national banks.

Under this act, if state corporations which compete with national banks may act in a fiduciary capacity, national banks may do so.

Neither a state legislature nor the state courts may place national banks in a class by themselves and decide whether or not they shall be permitted to act in a fiduciary capacity.

So interpreted, the act of Congress is constitutional. The exercise of trust powers is reasonably incidental to the operation of a national bank. *First National Bank* v. *Fellows,* 244 U. S. 416. When a State creates competitors of national banks it thereby engenders in Congress an implied authority to protect those banks by empowering them to meet their competitors on an equal footing. Under such circumstances, Congress may constitutionally authorize national banks to act in a fiduciary capacity. *Fellows Case, supra.* An attempt by a State to define the duties of national banks or to control the conduct of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge

the duties for which they were created. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283; *McClellan* v. *Chipman,* 164 U. S. 347; *First National Bank* v. *Missouri,* 263 U. S. 640.

Missouri trust companies are authorized to exercise wide trust powers and engage in the banking activities which are the usual and characteristic functions of commercial banks, such as national banks. Section 11799 of the Banking Laws of Missouri (Revision of 1919); *Denny* v. *Jefferson County,* 272 Mo. 436. Thus they inevitably come into competition with the national banks in that State.

Mr. Morton Jourdan and *Mr. Charles H. Mayer,* for defendant in error, submitted.

That an act of Congress, within the field covered by its constitutional power, is the supreme law of the land; that Congress has complete constitutional power to establish and regulate national banks, and that the act of Congress granting trust powers to national banks is constitutional and cannot be nullified or controlled by the States, are three propositions contended for by the plaintiff in error, which are conceded by the defendant in error.

The Missouri Supreme Court committed no error in holding that the exercise of the office of executor, here sought to be exercised, would be in contravention of the state law.

The power to regulate descents and distributions and the devolution of estates is exclusively within the State. *Overby* v. *Gordon,* 177 U. S. 214; *Pennoyer* v. *Neff,* 95 U. S. 714.

Executors and administrators are instruments through which the States regulate and control descents, distributions and the devolution of estates, and therefore, it seems to us, the State must have the right to determine what instruments may be used, without contravening the state law. *First National Bank* v. *Fellows,* 244 U. S. 416.

The amendment to § 11(k) of the Federal Reserve Act was not intended to and did not deprive the States of this right.

Inasmuch as the act, before and after amendment, conferred no power directly upon national banks, but conferred a mere administrative power upon the Federal Reserve Board, it would seem that the second paragraph of the amendment was intended as an interpretation of the act for the benefit of the Federal Reserve Board, and was not intended to render meaningless and to destroy one of the principal provisions of the original act, which provision was retained in the act as amended.

Unless the clause "when not in contravention of state law" is to be held to be meaningless, then the Missouri Supreme Court had the duty and the right of determining whether or not the appointment of a national bank as executor in Missouri was in contravention of state law; and, therefore, the Court committed no error in declining to issue its mandamus. *First National Bank* v. *Fellows,* 244 U. S. 416; *People* v. *Brady,* 271 Ill. 100; *Appeal of Woodbury,* 78 N. H. 50; *First National Bank* v. *Missouri,* 263 U. S. 640; *Aquidneck National Bank* v. *Jennings,* 44 R. I. 435.

Mr. Justice Holmes delivered the opinion of the Court.

The relator, the Burnes National Bank of St. Joseph, was appointed executor by a citizen of Missouri who died on November 27, 1922, leaving a will. The Bank applied to the proper Probate Court for letters testamentary, but was denied appointment on the ground that by the laws of Missouri national banks were not authorized to act as executors. Thereupon it applied to the Supreme Court of the State for a writ of mandamus to the Judge of the Probate Court and an alternative writ was issued. The respondent demurred, the demurrer was sustained and the

peremptory writ was denied. 302 Mo. 130. A writ of error was allowed by the Chief Justice of the State Court. The Bank claims the capacity to fill the office under the statutes of the United States.

By the Act of September 26, 1918, c. 177, § 2, 40 Stat. 967, 968, amending § 11(k) of the Federal Reserve Act, the Federal Reserve Board was empowered "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator . . . or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." If the section stopped there the decision of the State Court might be final, but it adds the following paragraph, "Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act." This says in a roundabout and polite but unmistakable way that whatever may be the state law, national banks having the permit of the Federal Reserve Board may act as executors if trust companies competing with them have that power. The relator has the permit, competing trust companies can act as executors in Missouri, the importance of the power to the sustaining of competition in the banking business is so well known and has been explained so fully heretofore that it does not need to be emphasized, and thus the naked question presented is whether Congress had the power to do what it tried to do.

The question is pretty nearly answered by the decision and fully answered by the reasoning in *First National*

Bank of Bay City v. *Fellows,* 244 U. S. 416. That case was decided before the amendment to the Federal Reserve Act that we have quoted and came here on the single issue of the power of Congress when the state law was not contravened. It was held that the power "was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful." 244 U. S. 420. The power was asserted and it was added that "this excluded the power of the State in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function." 244 U. S. 425. Now that Congress has expressed its paramount will this language is more apposite than ever. The States cannot use their most characteristic powers to reach unconstitutional results. *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1. *Pullman Co.* v. *Kansas,* 216 U. S. 56. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. There is nothing over which a State has more exclusive authority than the jurisdiction of its courts, but it cannot escape its constitutional obligations by the device of denying jurisdiction to courts otherwise competent. *Kenney* v. *Supreme Lodge of the World,* 252 U. S. 411, 415. So here—the State cannot lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain.

The fact that Missouri has regulations to secure the safety of trust funds in the hands of its trust companies does not affect the case. The power given by the act of Congress purports to be general and independent of that circumstance and the act provides its own safeguards. The authority of Congress is equally independent, as otherwise the State could make it nugatory. Since the decision in *First National Bank of Bay City* v. *Fellows,*

244 U. S. 416, it generally has been recognized that the law now is as the relator contends. *Turner's Estate,* 277 Pa. St. 110, 116. *Estate of Stanchfield,* 171 Wis. 553. *Hamilton* v. *State,* 94 Conn. 648. *People* v. *Russel,* 283 Ill. 520, 524. *In re Mollineaux,* 179 N. Y. S. 90. *Fidelity National Bank & Trust Co.* v. *Enright,* 264 Fed. 236.

Judgment reversed.

MR. JUSTICE SUTHERLAND, dissenting.

The real question here, as I understand it, is not whether Congress may safeguard national banks against ordinary state legislation of a discriminative character; but whether Congress may intrude upon and prohibit the exercise of the *governmental powers* of a State to the extent that such exercise discriminates against such banks in favor of competing state corporations. The authority of the *Fellows Case,* I think, is pressed too far. The statute there under review simply made national banks competent to act as executors, etc., "when not in contravention of State or local law." The statute did not attempt to override the will of the State in that respect, but expressly recognized its control and authority. The State Supreme Court conceded that the powers thus conditionally conferred by the federal statute, in fact, would not be in contravention of the state law, but held that Congress was without constitutional authority, because the functions sought to be given to such banks were subjects of state regulation. That view of the matter was rejected; but, putting aside some expressions not necessary to the decision, I do not think the case can be regarded as authority for the conclusion apparently now reached: that Congress may so limit the power of a State, against its expressly declared will to the contrary, that it may confer the right to act as executors and administrators upon state corporations which compete with national banks, only upon condition that the same right be con-

ferred upon the latter. Certainly, that precise question was not there presented for decision.

It is fundamental, under our dual system of government, that the Nation and the State are supreme and independent, each within its own sphere of action; and that each is exempt from the interference or control of the other in respect of its governmental powers, and the means employed in their exercise. *Bank of Commerce* v. *New York City,* 2 Black, 620, 634; *South Carolina* v. *United States,* 199 U. S. 437, 452, *et seq.; Farrington* v. *Tennessee,* 95 U. S. 679, 685. "How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, *or by what officers;* and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other." *Tarble's Case,* 13 Wall. 397, 407–8. Except as otherwise provided by the Constitution, the sovereignty of the States "can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power." *Worcester* v. *Georgia,* 6 Pet. 515, 570.

In *Bank of Commerce* v. *New York City, supra,* pp. 633–4, a tax case, this Court said: "That government whose powers, executive, legislative or judicial . . . are subject to the control of another distinct Government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the Government, and the employment of them, are liable to constant interruption and possible annihilation. . . . But of what avail is the function or the means if another Government may tax it at discretion? It is apparent that the power, function, or means, however important and vital, are at the mercy of that Government. And it must be always

remembered, if the right to impose a tax at all exists on the part of the other Government, 'it is a right which in its nature acknowledges no limits.' And the principle is equally true in respect to every other power or function of a Government subject to the control of another."

It is settled beyond controversy, that the right of a State to pass laws, to administer them through courts of justice, and to employ agencies for the legitimate purposes of state government cannot be taxed, *Veazie Bank* v. *Fenno,* 8 Wall. 533, 547; and that rule is but an application of the general and broader rule, which forbids any interference by the federal government with the governmental powers of a State. The settlement of successions to property on death is a subject within the exclusive control of the States and entirely beyond the sphere of national authority. See *Tilt* v. *Kelsey,* 207 U. S. 43, 55–6; *Plummer* v. *Coler,* 178 U. S. 115, 137. Upon the death of the owner his property passes under the control of the State and remains there until all just charges against it can be determined and paid and those who are entitled to become its new owners can be ascertained. The duty and power of the State to provide a tribunal for the accomplishment of these ends, *Tilt* v. *Kelsey, supra,* it follows, cannot be abridged by federal legislation.

The right of the owner to direct the descent of his property by will or permit it under statute, as well as the right of a legatee, devisee or heir to receive the property, are rights exclusively derived from and regulated by the State. *Plummer* v. *Coler, supra,* p. 137. During the process of administration the estate, in contemplation of law, is in the custody of the court exercising probate powers, and of this court the executor or administrator is an officer. *Yonley* v. *Lavender,* 21 Wall. 276, 280. "An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court;

it is the possession of the court. . . ." *Byers* v. *McAuley,* 149 U. S. 608, 615.

In the present case the state legislature, as conclusively determined by the State Supreme Court, has excluded not only national banks but state banks from assuming the functions of executors and administrators, which functions, for reasons satisfactory to itself, it has allowed trust companies to exercise. This determination of the State to grant the right to one and not the other, when it might have excluded both, is plainly the assertion of a governmental policy upon a matter within its exclusive control, with which the federal government has no authority to meddle. Congress may, of course, confer upon national banks the capacity to act as administrators and executors, but I do not think it is within the constitutional authority of that body to make such legislation binding upon the State against its will. The decision just rendered perhaps does not go that far; but it does uphold the power of Congress to impose its will upon the State in this respect if the State, in the exercise of its exclusive authority over the devolution of estates of deceased persons, permits any corporation which competes with national banks to exercise the powers mentioned. This contingency seems to me a slender distinction upon which to found a denial of the State's power. It may be conceded that a State is precluded from enforcing legislation which discriminates against national banks, in respect of private banking or business operations; but a very different situation is presented when the discrimination arises in respect of the governmental operations of the State. A State, for example, cannot be sued in its own courts without its consent; but is it powerless to consent to such suits by financial corporations of its own creation except upon condition that it extends a similar privilege to competing national banks? Legislation requiring all residents of a State to deposit their funds only in state insti-

tutions would undoubtedly be bad against federal legislation to the contrary; but is it beyond the power of the state legislature to subject public moneys—state, county or municipal—to such a restriction? A State may not unconditionally require private debts to be paid only in gold and silver; but, in the exercise of its sovereign power of taxation, it may limit the payment of taxes to gold and silver, if it sees fit, in spite of a federal law making currency a legal tender, and, as this Court has said: "It is not easy to see upon what principle the national legislature can interfere with the exercise . . . of this power." *Lane County* v. *Oregon*, 7 Wall. 71, 77. In my opinion, the exercise of the powers conferred upon trust companies by the legislation here under review, is governmental in its nature; and the fact that the statute discriminates in that matter against national banks (as, also, it does against state banks) is a negligible incident, which does not affect the validity of the statutory limitation.

The probate courts of a State have only such powers as the state legislature gives them. They are wholly beyond the jurisdiction of Congress, and it does not seem to me to be within the competency of that body, on any pretext, to compel such courts to appoint as executor or administrator one who the state law has declared shall not be appointed.

The particular invasion here sanctioned may not be of great moment; but it is a precedent, which, if carried to the logical extreme, would go far toward reducing the States of the Union to the status of mere geographical subdivisions. The case is one, to use the phrase of Mr. Justice Brewer in *Fairbank* v. *United States*, 181 U. S. 283, 291–2, for the application of the maxim, *obsta principiis*, not *de minimis non curat lex*.

I am authorized to say that MR. JUSTICE MCREYNOLDS concurs in this dissent.

SUPREME LODGE, KNIGHTS OF PYTHIAS, *v.* MEYER.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 214. Argued March 12, 1924.—Decided April 28, 1924.

1. While proceedings in the federal courts are not within the terms of Art. IV, § 1; of the Constitution, they nevertheless must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another State. P. 33.
2. Where statutes of two States, couched in the same terms, receive different constructions by the courts of their respective localities, the constructions become parts of the respective statutes, which are to be treated accordingly as different laws. P. 34.
3. In an action to recover insurance under a benefit certificate, issued by a fraternal order created by an act of Congress which provided that its constitution, and the amendments thereof, should not conflict with the laws of any State, a defense based on the refusal of the insured to pay increased dues as required by an amendment adopted by the order, was overruled by the Supreme Court of Nebraska upon the ground that the order had not a "representative form of government" within the meaning of a statute of Nebraska in force when the new rates were adopted. *Held:*

(a) The meaning attributed by the Nebraska Supreme Court to the Nebraska statute must be accepted by this Court, on review, as though it had been specifically expressed in the statute. P. 32.

(b) A decree of the federal court in Indiana, holding that the order had a "representative form of government" within the meaning of a similar statute of that State, was not binding in the Nebraska litigation, because the two issues—the meaning of the Nebraska statute and the meaning of the Indiana statute—were not the same. P. 33.

4. Under Jud. Code, § 237, as amended by the Act of September 6, 1916, certiorari and not error is the remedy to review a state decision on a right claimed under a federal statute or authority, where the validity of the statute or authority itself is not in question. P. 36.

109 Neb. 108, affirmed.

ERROR and certiorari to a judgment of the Supreme Court of Nebraska affirming a judgment for the plaintiff, Meyer, in an action to recover insurance under a benefit certificate issued by the plaintiff in error.

Mr. W. J. Connell and *Mr. Sol H. Esarey,* with whom *Mr. T. P. Littlepage, Mr. George A. Bangs* and *Mr. Ward H. Watson* were on the brief, for plaintiff in error.

Mr. D. W. Livingston, with whom *Mr. C. F. Reavis* was on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case is here on error and also upon petition for writ of certiorari. Consideration of the latter was postponed until hearing on the merits.

Defendant in error was the beneficiary named in a benefit certificate of life insurance issued to one of its members, by the plaintiff in error, a fraternal order created by Act of Congress of June 29, 1894, c. 119, 28 Stat. 96. Upon the death of the assured an action was brought in a state court by the beneficiary to recover the amount of the insurance, and judgment was rendered in his favor. On appeal to the State Supreme Court the judgment was affirmed on the authority of the decision of the same court on a former appeal.

After the insurance policy had gone into effect, the Supreme Lodge, by an amendment, increased the dues from $5.70 per month to $26.30 per month. Prior to the effective date of the new rates the assured had paid all dues assessed under the old rates. After such date he refused to pay at the new rates, upon the ground, among others, that in disregard of a state statute, the society was not operating under a representative form of government when the rates were increased; but he regularly and duly tendered payment at the old rates.

Section 4 of the Congressional Act provides: "That said corporation shall have a constitution, and shall have power to amend the same at pleasure: *Provided,* That such constitution or amendments thereof do not conflict with the laws of the United States or of any State." A statute of Nebraska in force at the time the new rates were adopted, defines a fraternal benefit society as a corporation, etc., organized and carried on for the sole benefit of its members and their beneficiaries and not for profit, and provides: "Each such society shall have a lodge system, with ritualistic form of work and representative form of government." § 1, c. 47, Laws of 1897, p. 266.

According to the stipulation of facts, the Supreme Lodge when it made the amendment increasing rates, "was composed of 163 members and that of such members, nine were Past Supreme Chancellors and eight were Supreme Officers of the defendant; 98 were holders of certificates in the Insurance Department and 146 were delegates elected by the various Grand Lodges within the order;" all of whom participated in enacting the amendment. On the first appeal, the State Supreme Court, after a full discussion of the question and of the facts, and a review of its earlier decisions, held that the body, above described, did not constitute a representative form of government, within the meaning of the state statute. 104 Neb. 505. Upon rehearing the court adhered to this conclusion, *Id.* 511; and, upon the second appeal, again affirmed it. 109 Neb. 108.

Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, *Leffingwell* v. *Warren,* 2 Black, 599, 603; *Green* v. *Lessee of Neal,* 6 Pet. 291, 297–300. And we follow

the state construction even though it may not agree with our own opinion. *Supervisors* v. *United States,* 18 Wall. 71, 82. *Shelby* v. *Guy,* 11 Wheat. 361, 367; *Tioga R. R.* v. *Blossburg & Corning R. R.,* 20 Wall. 137, 143. No question is raised as to the necessity for compliance with the provisions of the state statute; but the defense pleaded and relied upon is that the matter was concluded by a decree of the Federal District Court of Indiana, affirmed by the Circuit Court of Appeals, *Holt* v. *Supreme Lodge Knights of Pythias,* 235 Fed. 885, establishing the validity and enforceability of the increased rates; that such decree was binding, as *res adjudicata,* upon Meyer, the plaintiff; and that the court below, in declining to so consider it, denied full faith and credit to the judicial proceedings of another State, in contravention of Art. IV, § 1, of the Constitution of the United States and of § 905, Revised Statutes.

While the judicial proceedings of the federal courts are not within the terms of the constitutional provision, such proceedings, nevertheless, must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another State. *Hancock National Bank* v. *Farnum,* 176 U. S. 640, 644; *Embry* v. *Palmer,* 107 U. S. 3, 9. It appears from the record in the *Holt Case,* which was in evidence and is in the record here, that the court expressly found that the society was, during its entire existence, operating under a representative form of government. We assume, for present purposes, that the plaintiff is bound by that decree; but the question—and the vital question—still remains, is the issue the same? We are of the opinion that it is not the same and that the plea of *res adjudicata* fails.

The principal place of business of the order was in Indiana; and the question presented in the *Holt Case,* which was brought in Indiana, evidently was whether

there was a representative form of government within the meaning of the statute of that State, § 5043, 2 Burns' Indiana Stats., 1914, p. 882, since the federal statute made no requirement on the subject, and the finding, unless to satisfy the Indiana law, would have been meaningless. The question of compliance with the statute of Nebraska or those of other States was not involved. The Indiana statute is reproduced in the margin,[1] and, as will be seen, differs from the Nebraska statute in that the former specifically defines what shall constitute a representative form of government, while the latter does not. But if we assume, for the moment, that the two statutes are alike, nevertheless, our determination must be the same. It was within the competency of the federal court to construe the Indiana statute in one way, and it was equally within the competency of the Nebraska Supreme Court to construe the Nebraska statute in an opposite way; and, since the construction becomes part of the statute and is to be read as though in its text, in the one case as in the other, the result is that they are, in effect, not the same, but different

[1] § 5043. ". . . Each association shall have a lodge system with ritualistic form of work and a representative form of government. Any association having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by such association to hold regular or stated meetings at least once in each month, shall be deemed to be operating under the lodge system. Any association shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected by the members through a delegate convention system, together with such other members as may be prescribed by its constitution and laws: *Provided*, That the elective representatives shall constitute a majority in number and have not less than a majority of the votes, nor less than the votes required to amend its constitution and laws . . ."

statutes. In *Christy* v. *Pridgeon,* 4 Wall. 196, 203, this Court said:

"Nor does it matter that in the courts of other States, carved out of territory since acquired from Mexico, a different interpretation may have been adopted. If such be the case, the courts of the United States will, in conformity with the same principles, follow the different ruling so far as it affects titles in those States. The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other."

In *Louisiana* v. *Pilsbury,* 105 U. S. 278, 294, it was said:

"So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it." *Shelby* v. *Guy, supra; May* v. *Tenney,* 148 U. S. 60, 64; *Detroit* v. *Osborne,* 135 U. S. 492, 498; *Chicago Union Bank* v. *Kansas City Bank,* 136 U. S. 223, 235. It follows that there is not identity of issue in the two cases, since, so far as this Court is concerned, the statutes which determine it are of exactly opposite import. In principle, it is the same as though the Indiana statute, which controlled the question decided in the first suit, had been superseded by a later Indiana enactment to the contrary effect, and a second suit, arising under and controlled by the later enactment, was brought, involving the same question. The intervention of the new and antagonistic statute in either case furnishes a new basis for the litigation, and the issue is no longer the same. *Memphis City Bank* v. *Tennessee,* 161 U. S. 186,

192; *Utter* v. *Franklin,* 172 U. S. 416, 424; *Erskine* v. *Steele County,* 87 Fed. 630, 636; affirmed 98 Fed. 215, 220.

Prior decisions of this Court are pressed upon our attention, of which *Supreme Lodge, Knights of Pythias* v. *Mims,* 241 U. S. 574, and *Supreme Council of the Royal Arcanum* v. *Green,* 237 U. S. 531, are examples. They are not in point. Neither the effect of state statutes imposing conditions like the one here under review, nor the question in respect of identity of issue, upon which the plea of *res adjudicata* in the present case turns, was involved or considered.

Under § 709, Revised Statutes, Jud. Code § 237, this case would be properly here upon writ of error, *Pittsburgh, &c. Ry. Co.* v. *Long Island Loan & Trust Co.,* 172 U. S. 493, 508; *Hancock National Bank* v. *Farnum, supra; Embry* v. *Palmer, supra;* but, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, the remedy is by certiorari. We therefore dismiss the writ of error, grant the petition for certiorari, *Yazoo & M. V. R. R. Co.* v. *Clarksdale,* 257 U. S. 10, 15–16; and, for the reasons given above, affirm the judgment of the State Supreme Court.

Affirmed.

The separate opinion of Mr. Justice McReynolds.

Claiming as beneficiary, Meyer brought an action upon a policy issued by the Supreme Lodge in the District Court, Otoe County, Nebraska.

The declaration alleges: "That the defendant is, and at all times herein mentioned was, a fraternal order or organization maintaining a life insurance department for its members, organized and existing under an act of the United States Congress, in the District of Columbia, and having its principal offices and place of business in the City of Indianapolis, in the State of Indiana, and duly authorized to transact its business in the State of Nebraska. That on and prior to the 11th day of June, 1885,

Louis J. Meyer, a resident of Otoe County, Nebraska, was a member of a subordinate lodge of the defendant, and on said date the said defendant issued and delivered to the said Louis J. Meyer in Otoe County, Nebraska, its membership certificate No. 4651, by the terms of which it insured the life of the said Louis J. Meyer in the sum of $2,000.00, and agreed in the event of his death to pay that sum to a beneficiary therein named. That on or about the 31st of May, 1910, the said Louis J. Meyer surrendered said certificate to the defendant for the sole purpose of changing the beneficiary therein named, and thereafter the defendant issued in lieu thereof to the said Louis J. Meyer its certificate of membership dated June 30, 1910, numbered 4651, insuring the life of the said Louis J. Meyer in the sum of $2,000.00, by the terms of which the defendant agreed that in the event of the death of the said Louis J. Meyer to pay to George O. Meyer, this plaintiff, the sum of $2,000.00, a copy of which membership certificate is hereto attached, marked Exhibit 'A,' and made a part hereof." And further that the assured died April 11, 1916, after performing all things required of him.

Certificate No. 4651—Exhibit A—recites that Louis J. Meyer had been accepted as a member of the insurance department and the Supreme Lodge promised to pay the designated beneficiary two thousand dollars, subject to certain conditions and payment of $5.70 each month. Also, "the member holding this certificate shall make all monthly payments as they may be due from him, and also make any extra or special monthly payments required from him. . . . His rate of contribution hereunder may be changed, increased or adjusted at any time in accordance with the laws of this society when deemed necessary to carry out the purposes of the insurance department."

The defense was that by a duly adopted rule, or law, the Supreme Lodge had increased the monthly rates for

the time subsequent to January 1, 1911, and assured had refused to pay them.

The act of Congress which incorporated the Supreme Lodge among other things provided, "That said corporation shall have a constitution, and shall have power to amend the same at pleasure: *Provided,* That such constitution or amendments thereof do not conflict with the laws of the United States or of any State." Act of June 29, 1894, c. 119, 28 Stat. 96, 97. Under this federal charter it might amend its statutes, or by-laws; and the change of rates was effective unless prohibited by statute as to Nebraska members. The obligation of the contract between the lodge and the assured presents a question of federal law. *Supreme Council of the Royal Arcanum* v. *Green,* 237 U. S. 531; *Hartford Life Insurance Co.* v. *Ibs, id.* 662; *Supreme Lodge, Knights of Pythias* v. *Mims,* 241 U. S. 574. This is plain under the last cited case, which reviewed and reversed the judgment of the Texas court denying the validity of the by-law here questioned.

The court below held that under c. 47, Laws of Nebraska, 1897, the action of the Supreme Lodge in undertaking to increase rates was without effect because the association did not have a "representative form of government." And this makes it necessary to inquire whether that act is fairly susceptible of the construction adopted by the state court. Generally this Court accepts the construction of a local statute approved by the state court of last resort, but the rule does not apply where this is fanciful and amounts to a mere subterfuge. *Leathe* v. *Thomas,* 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend, id.* 359, 367; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 164; *Superior Water Co.* v. *Superior,* 263 U. S. 125, 136.

Chapter 47 contains twenty-four sections. The first declares: "A fraternal beneficiary association is hereby

declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and representative form of government." The remaining sections relate to the organization and government of domestic corporations and provide for reports by and the licensing and duties of such corporations when organized in other States. Section 16: "Any such association refusing or neglecting to make the report as provided in this act shall be excluded from doing business within this state. The auditor of public accounts must, within sixty days after the failure to make such report, or in case any such society shall exceed its powers, or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of this act, give notice in writing to the attorney general, who shall immediately commence an action against such society to enjoin the same from carrying on any business. . . ." There is nothing in the act which excludes an association with a government like that of plaintiff in error. It does not undertake to invalidate contracts of such companies after licenses have been issued to them. Nor do I find that the laws of the State inhibited the auditor from licensing an association with a non-representative form of government.

It is stipulated and agreed "that the defendant [plaintiff in error] is a fraternal order or organization, maintaining a life insurance department for its members, existing under an act of the United States Congress in the District of Columbia, having its principal place of business in the City of Indianapolis and State of Indiana, and authorized to transact business in the State of Nebraska during the period covered by the pleadings in this case." With knowledge of its form of government the duly designated official licensed it to do business within the State.

Attributing a fanciful meaning to the term "representative form of government," the court below declared that the challenged by-law was not adopted as required by the Nebraska statute and therefore was without force within that State. This was the excuse offered for annulling an agreement entered into by an association incorporated under federal law and duly licensed by the State.

A view of the statute is enough to show that it did not undertake to prescribe rules for the internal government of foreign corporations licensed to do business within the State or to control agreements between such corporations and their members.

Moreover, it seems impossible reasonably to conclude that plaintiff in error had no "representative form of government" because a few officers, by virtue of their positions, constituted a small minority (10%) of the law-making body, otherwise composed of elected representatives. And certainly the conclusion of the court is not strengthened by the opinion which advances the following as the reason therefor:—"To retain the exercise of governmental authority in the hands of the people is the modern trend. Extended argument is not needed to establish this fact. Witness the election of United States senators by direct vote; the direct primary; and the initiative and referendum. Fraternal societies are no exception to the rule."

In the circumstances I think we should refuse to accept a ruling so obviously contrary to reason, treat it as a mere subterfuge, and hold that under *Supreme Lodge, Knights of Pythias* v. *Mims, supra,* the rates were properly increased and by failing to pay them the assured surrendered all rights under the policy.

SUPREME LODGE, KNIGHTS OF PYTHIAS, *v.* EISER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 215. Argued March 12, 1924.—Decided April 28, 1924.

Decided upon the authority of *Supreme Lodge, Knights of Pythias* v. *Meyer, ante,* 30.
109 Neb. 110, affirmed.

Mr. W. J. Connell and *Mr. Sol H. Esarey,* with whom *Mr. T. P. Littlepage, Mr. George A. Bangs* and *Mr. Ward H. Watson* were on the brief, for plaintiff in error.

Mr. D. W. Livingston, with whom *Mr. C. F. Reavis* was on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case is in all respects the same as No. 214, *Supreme Lodge, Knights of Pythias,* v. *Meyer,* just decided, *ante,* 30, and upon the authority of that case the judgment of the State Supreme Court is

Affirmed.

NEW YORK CENTRAL RAILROAD COMPANY *v.* UNITED STATES.

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

No. 169. Argued January 17, 1924.—Decided April 28, 1924.

1. The acts of Congress and orders of the Interstate Commerce Commission respecting power brakes should be liberally construed to relieve trainmen of the labor and danger involved in the use of hand brakes and to promote the safety of trains and of persons and property thereon. P. 44.

2. Under the amended Safety Appliance Act, which, as supplemented by the Commission's order, requires that 85 per cent. of the cars in any train shall be equipped with power brakes operated by the engineer and that all power-braked cars "associated together with" such minimum shall have their brakes so used and operated,—cars whose power brakes become disabled en route cannot lawfully be hauled to destination past an available repair station, even in a train of which 85 per cent. of the cars still have operable power brakes, if the former are so interspersed and associated with the latter that they form part of the air line by which the power brakes of the latter are operated. P. 45.

QUESTION certified by the Circuit Court of Appeals under § 239, Judicial Code, upon review of a judgment of the District Court in favor of the United States, in an action to recover penalties from the Railroad Company for violations of the Safety Appliance Act.

Mr. S. H. West for the New York Central Railroad Company.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Monroe C. List* was on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought in the District Court for the Western District of Pennsylvania to recover penalties prescribed by the Safety Appliance Acts (Act of March 2, 1893, c. 196, 27 Stat. 531, as amended April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943). Judgment went in favor of the United States. The case was taken by defendant to the Circuit Court of Appeals on writ of error, and that court, under § 239 of the Judicial Code, certified a question of law to this Court. It is this: "May an interstate carrier lawfully operate a car equipped with power brakes past an available repair station to destination when its power brakes, becoming

out of order in transit, have been cut out of the power brake system of the train and when more than eighty-five per centum of the remaining[1] cars of the train are equipped with power brakes controlled by the engineer of the locomotive?"

On November 10, 1920, the train, which is mentioned in the first cause of action set forth in the complaint, was made up on defendant's railroad at Coalburg, Ohio. It consisted of 63 cars, all of which were equipped with air brakes; and it was moved over the defendant's lines via Erie, Pennsylvania, to Buffalo, New York. All the air brakes and air brake appliances were in working order when the train left Coalburg, and were operated by the engineer on the locomotive. Some time after leaving Coalburg, the air brakes on three cars became defective, so that they could not be used. Because of the liability of such brakes to stick and cause delay and damage to the train, the trainmen cut them out from their connection with the line of air hose by turning the cut-out cocks in the cross-over pipes. This made it impossible for the engineer to operate the brakes on these cars, but did not interfere with his use of the brakes on the 60 other cars. He did use and operate them independently of the defective brakes, and thereby controlled the speed of the train without requiring the brakemen to use the hand brakes for that purpose. The three cars with defective brakes were the tenth, fortieth and forty-fourth cars in the train, counting from the head end. At Erie defendant had repair men and materials available for the repair of the defective brakes. The train was run past the repair station to Buffalo in the condition stated above. The train mentioned in the second cause of action had 80 cars, and the facts with respect to it are in substance the same as the foregoing.

[1] The question is considered as if the word "remaining" were stricken out.

The pertinent provisions of the acts of Congress are: ". . . It shall be unlawful for any common carrier . . . to use . . . any locomotive . . . not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." § 1, c. 196, Act of March 2, 1893, 27 Stat. 531. ". . . Whenever . . . any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; . . ." § 2, c. 976, Act of March 2, 1903, 32 Stat. 943. ". . . All cars must be equipped with . . . efficient hand brakes; . . ." § 2, c. 160, Act of April 14, 1910, 36 Stat. 298. Penalties are prescribed by c. 87, Act of April 1, 1896, 29 Stat. 85, and § 4, c. 160, Act of April 14, 1910, 36 Stat. 298.

Pursuant to authority conferred upon it by the Act of 1903, the Interstate Commerce Commission, November 15, 1905, ordered that the minimum prescribed by the act be increased to 75 per cent; and, on June 6, 1910, ordered it increased to 85 per cent.

Defendant contends that, within the meaning of § 2 of the Act of March 2, 1903, the cars having air brakes which were out of order were not "power-braked cars" while in that condition, and that the law did not require their brakes to be operated by the engineer, as at all times power brakes on more than 85 per cent. of all the cars in the train were so operated.

The acts of Congress and orders of the Commission above referred to should be liberally construed to relieve

trainmen of the labor and danger involved in the use of hand brakes to control the speed of trains and to promote the safety of trains and of persons and property thereon. *Chicago, M. & St. P. Ry. Co.* v. *Voelker,* 129 Fed. 522, 527; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17. It is the purpose, as soon as practicable, to require all cars to be equipped with power brakes. See *In re Power or Train Brakes,* 11 I. C. C. 429. At the time in question, the requirements were that all cars be equipped with hand brakes; that at least 85 per cent. of all cars in any train be equipped with power brakes and operated by the engineer, and that all power-braked cars associated together with such minimum have their brakes so used and operated.

Only two classes of cars are contemplated by the act,—those equipped with hand brakes and power brakes, and those equipped with hand brakes only. When the train started from Coalburg, undeniably all were then "power-braked cars." The failure of the brakes to work did not take the cars out of that class.

Hand-braked cars lawfully may be hauled in trains having the prescribed number of cars equipped with power brakes operated by the engineer. The law does not require that the brakes on all power-braked cars in the train shall be so operated. See *Lyon* v. *Railway,* 77 S. Car. 328, 339; *United States* v. *Chesapeake & Ohio Ry. Co.,* 247 Fed. 49, 51; *United States v. Baltimore & Ohio R. R. Co.,* 176 Fed. 114, 119. It does not require the extra switching which would be necessary to associate together all power-braked cars in the train, and some of them may be separated from the prescribed minimum by hand-braked cars. See *In re Power or Train Brakes, supra.* Hand-braked cars have no air line, and it is necessary that they be placed in the train to the rear of the power-braked cars making up the prescribed minimum. The cars having power brakes which became defective and were cut out

formed a part of the air line and were located at intervals in the train. The air line through each of these cars was used to operate brakes on other cars after as well as before the cut-out cocks were turned. Clearly, they were associated together with the other cars equipped with power brakes. The act specifically requires that all power-braked cars so associated shall have their brakes used and operated by the engineer. Defendant's contention would permit the hauling, in association with cars having their power brakes operated by the engineer, of 15 per cent. of the cars in a train with power brakes in bad order and cut out. This would nullify the provision of § 2 of the Act of 1903. It must be held that the running of the train from Erie to Buffalo in the condition above described was a violation of the law. See *Pennsylvania Co.* v. *United States,* 241 Fed. 824, 830; *Virginian Ry. Co.* v. *United States,* 223 Fed. 748; *United States* v. *Great Northern Ry. Co.,* 229 Fed. 927.[2]

The unlawfulness of the operation resulted from the association in the air line of cars having defective brakes with cars having brakes operated by the engineer. The cutting out of the defective brakes, leaving the cars on the air line, did not terminate the association. While on the air line having their brakes cut out, such cars are to be distinguished from hand-braked cars. Because they have no power line, it is impossible, within the meaning of the act, to associate hand-braked cars with cars equipped with power brakes operated by the engineer. And, when not a part of the air line, power-braked cars whose brakes will not work are not so associated. When placed to the rear of the cars having their brakes operated by the engineer, the air line on such cars cannot be used to operate any brakes on the train. Having inoperative brakes and being so located, they are not associated with the prescribed

[2] Cf. *United States* v. *Chesapeake & Ohio Ry. Co.,* 247 Fed. 49; *United States* v. *Baltimore & Ohio R. R. Co.,* 176 Fed. 114.

minimum; and § 2 of the Act of 1903 does not require that they shall have their brakes operated by the engineer.

The question whether it was a violation of law to haul defective cars to Erie, the place of the first repair station, while associated in the train with the prescribed minimum is not involved in this case, and we express no opinion upon it.

The answer to the question certified is:

No, unless placed in the train to the rear of all cars having their brakes operated by the engineer.

COOK *v.* TAIT, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND.

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

No. 220. Argued April 15, 1924.—Decided May 5, 1924.

Congress has power to tax the income received by a native citizen of the United States domiciled abroad from property situated abroad. P. 54.

286 Fed. 409, affirmed.

ERROR to a judgment of the District Court, dismissing on demurrer an action to recover money paid, under protest, as income taxes.

Mr. Charles Claflin Allen, Jr., and *Mr. Charles Claflin Allen*, with whom *Mr. Frederic N. Watriss* was on the briefs, for plaintiff in error.

I. Congress has no power to impose a tax upon income received by a native citizen of the United States who was at the time when the income was received permanently resident and domiciled in the Republic of Mexico, when such income was derived solely from real and personal property permanently located at all times with-

out the territorial jurisdiction of the United States and solely within the territorial jurisdiction of the Republic of Mexico.

A. This proposition involves solely the question of the power to levy the tax and not the mode of its exercise. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601; *Brushaber* v. *Union Pac. R. R. Co.,* 240 U. S. 1; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103; *Eisner* v. *Macomber,* 252 U. S. 189; *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Evans* v. *Gore,* 253 U. S. 245; *Nicol* v. *Ames,* 173 U. S. 509; *United States* v. *Phellis,* 257 U. S. 156.

B. The power of taxation, inherent in sovereignty, is limited to the territorial jurisdiction of the sovereign, and the attempt to impose a tax upon property, persons or business beyond that jurisdiction is void. I Cooley, Taxation, p. 249; *McCulloch* v. *Maryland,* 4 Wheat. 316; *United States* v. *Rice,* 4 Wheat. 247; *Loughborough* v. *Blake,* 5 Wheat. 317; *State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Dewey* v. *Des Moines,* 173 U. S. 193; *De Lima* v. *Bidwell,* 182 U. S. 1; *United States* v. *Hayward,* 2 Gall. 485; *St. Louis* v. *The Ferry Co.,* 11 Wall. 423; *Tappan* v. *Merchants' National Bank,* 19 Wall. 490; *Louisville Ferry Co.* v. *Kentucky,* 188 U. S. 385; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194.

(1) The subject of the tax is the right to the rents and profits from the property realized in the shape of income; this is a property right having its situs in the Republic of Mexico. *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435; *Maguire* v. *Trefry,* 253 U. S. 12; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601; *Brushaber* v. *Union Pac. R. R. Co.,* 240 U. S. 1; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Greiner* v. *Lewellyn,* 258 U. S. 384; *Eisner* v. *Macomber,* 252 U. S. 189; *Evans* v. *Gore,* 253 U. S. 245; Revenue Act of 1921, § 210; Sixteenth Amendment; *Nicol* v. *Ames,* 173 U. S. 509; *The Exchange,* 7 Cr. 116; *Selliger* v. *Kentucky,* 213 U. S. 200;

Union Refrigerator Transit Co. v. *Kentucky,* 199 U. S. 194; *Louisville Ferry Co.* v. *Kentucky,* 188 U. S. 385; *Thirty Hogsheads of Sugar* v. *Boyle,* 9 Cr. 191; *United States* v. *Rice,* 4 Wheat. 247; *Fleming* v. *Page,* 9 How. 603.

(2) The person of plaintiff in error is not within the jurisdiction of the United States for purposes of taxation. See authorities cited *supra,* under B(1).

(3) Citizenship of a native American is neither property nor a privilege granted by Congress and therefore cannot afford any basis for the tax in the instant case. *United States* v. *Rice,* 4 Wheat. 247; *Downes* v. *Bidwell,* 182 U. S. 282; *Collector* v. *Day,* 11 Wall. 113; *Louisville Ferry Co.* v. *Kentucky,* 188 U. S. 385; *Shaffer* v. *Carter,* 252 U. S. 37; Const., Art. I, § 8, par. 1; Art. I, § 2, cl. 3; Art. I, § 9, cl. 4; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Loan Association* v. *Topeka,* 20 Wall. 655; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; Moore, American Notes to Dicey on Conflict of Laws, pp. 783, 800.

C. The United States not having the power to impose the tax, its imposition and collection is a mere extortion under the guise of taxation and violates the rights of the plaintiff in error guaranteed him under the Fifth Amendment. *State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Shaffer* v. *Carter,* 252 U. S. 37; *Dewey* v. *Des Moines,* 173 U. S. 193.

D. The tax is in violation of the natural and inherent rights of plaintiff in error and is contrary to the rights reserved—independently of citizenship—by the first ten amendments to the Constitution, and especially the Fifth, Ninth and Tenth Amendments. *Downes* v. *Bidwell,* 182 U. S. 282; *Fong Yue Ting* v. *United States,* 149 U. S. 715.

II. The tax assessed is not within the statute.

A. The statute does not contain express declaration of authority to impose the tax and will be strictly construed in favor of the taxpayer. Revenue Act, 1921, § 210, 42

Stat. 233; Revenue Act, 1913, § 2–A, Subdiv. 1, 38 Stat. 166; Revenue Act, 1916, § 1–A, 39 Stat. 756; Revenue Act, 1918, § 210, 40 Stat. 1057; *Mutual Benefit Life Ins. Co.* v. *Herold,* 198 Fed. 199; s. c., 201 Fed. 918; *Eidman* v. *Martinez,* 184 U. S. 578; *United States* v. *Goelet,* 232 U. S. 293.

B. The statute must be construed as including only property and persons within the constitutional power of Congress to reach, so as to keep the statute in harmony with the Constitution. *McCullough* v. *Virginia,* 172 U. S. 102; Sedgwick, Construction (Pomeroy), 2d ed., p. 206.

Mr. Solicitor General Beck for defendant in error.

I. The Constitution confers on Congress a broad power to lay and collect taxes.

Referring to this power, this Court said in the *License Tax Cases,* 5 Wall. 462: "It is given in the Constitution with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

The rule announced in these cases was restated and affirmed in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429. To the same effect are *Nicol* v. *Ames,* 173 U. S. 509; *Knowlton* v. *Moore,* 178 U. S. 41; and *Flint* v. *Stone Tracy Co.,* 220 U. S. 107. See *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1.

II. The tax imposed on the plaintiff is not unconstitutional because it applies to income from property outside of the United States.

This Court has decided (*Brushaber Case, supra*) that even before the adoption of the Sixteenth Amendment Congress might tax all property and the income from all property. *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103.

All taxes are personal obligations of the citizen, even though measured in amount by his property or the income

thereof. Taxes are not imposed upon property as such but upon its owner.

The contention that taxing the income is not authorized by the Sixteenth Amendment, if well founded, would apply equally to a citizen residing in the United States, and deriving his entire income from sources outside of the United States; and yet unquestionably Congress has such power of taxation over citizens residing within the United States. How can the duty of the citizen to support the government which protects him depend upon his place of residence? Wherein does the Constitution impose such a limitation upon the power of Congress to tax?

The Sixteenth Amendment made it immaterial whether income were or were not derived from property.

III. The courts have clearly indicated that Congress may tax the income of one who is subject to its jurisdiction, although that income is derived from sources outside of the United States. *Nevada Bank* v. *Sedgwick,* 104 U. S. 111; *Memphis & Charleston R. R. Co.* v. *United States,* 108 U. S. 228; 26 R. C. L., pp. 85, 86; *United States* v. *Erie Ry. Co.,* 106 U. S. 327; *United States* v. *Goelet,* 232 U. S. 293; *United States* v. *Bennett,* 232 U. S. 299; *Porto Rico Coal Co.* v. *Edwards,* 275 Fed. 104.

IV. Decisions relating to state legislation taxing persons or property beyond the borders of those States are inapplicable. *United States* v. *Bennett, supra.*

V. The jurisdiction of a national sovereign over its subjects is not confined to its territorial domain. I Hyde, Int. Law, pp. 410–412, 423, 435–446. Treason may be punished no matter where the treasonable acts have occurred. 35 Henry VIII, c. 2; Criminal Code, § 1. This is also true of conspiracy, *United States* v. *Bowman,* 260 U. S. 94; of cannibalism, *Regina* v. *Dudley,* 15 Cox C. C. 624; and by English law it is true of offenses by Crown officials. 11 William III, c. 12; 42 Geo. III, c. 85, § 1. Subjects who go to uncivilized countries take their national law with

them. I Hyde, *supra,* p. 451. Our Criminal Code (§§ 308, 309) forbids the sale of arms, liquors, or opium to the aboriginal natives of Pacific islands which are not in the possession of or under the protection of any civilized power; and an act of Congress (March 3, 1915, c. 74, §§ 1–13, 38 Stat. 817) regulates the practice of pharmacy and the sale of poisons in consular districts in China. Under treaties the United States has established consular courts for American citizens in several countries. So also, personal representatives of a sovereign, members of the diplomatic corps, carry their national law with them, and they are immune from the operation of the laws of the country to which they are sent. I Hyde, *supra,* pp. 746–763.

Counsel for the plaintiff urge that the imposition of such a tax upon him would be subversive of the sovereignty of Mexico. The rules of international law, however, indicate that there is no subversion of the sovereignty of the country when a resident alien obeys the command of his own national sovereign, unless the command of his sovereign conflicts with the command of the local sovereign.

VI. The leading text writers upon international law concede that a national sovereign has the power to impose taxes upon its nonresident citizens regardless of the sources from which such incomes are derived. I Oppenheim, Int. Law, p. 195; Bar, Int. Law, 2d ed., p. 247; Story, Conflict of Laws, 7th ed., pp. 21, 22, 682; I Westlake, Int. Law, pp. 111, 112, 206, 208; I Hyde, Int. Law, p. 362; Webster, The Law of Citizenship, 1891, pp. 167, 168.

The payment of an income tax by a nonresident citizen is looked upon as *prima facie* evidence of citizenship. The failure to pay such an income tax is, *inter alia,* of considerable weight in determining that the nonresident citizen has given up his allegiance to the United States. Borchard, Diplomatic Protection of Citizens Abroad, pp. 694–697, 706, 728 *et seq.;* Mr. Fish, Secretary of State,

to Mr. MacVeagh, December 13, 1870, Foreign Relations, 1871, pp. 887–888; *The Charming Betsy,* 2 Cr. 64.

As pointed out in *Minor* v. *Happersett,* 21 Wall. 162, a citizen owes allegiance to his nation and is entitled to its protection.

VII. The imposition of the tax is not in derogation of any rights of the plaintiff under the first ten amendments. *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, 24; *Heald* v. *District of Columbia,* 259 U. S. 114, 124.

VIII. The Revenue Act of 1921 applies to the plaintiff.

Mr. Justice McKenna delivered the opinion of the Court.

Action by plaintiff in error, he will be referred to as plaintiff, to recover the sum of $298.34 as the first installment of an income tax paid, it is charged, under the threats and demands of Tait.

The tax was imposed under the Revenue Act of 1921, which provides by § 210 (42 Stat. 227, 233): "That, in lieu of the tax imposed by section 210 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 8 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided,* That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum." [1]

[1] The following regulation, No. 62, promulgated by the Commissioner of Internal Revenue under the Revenue Act of 1921, provides in Article 3: "Citizens of the United States except those entitled to the benefits of section 262 . . . wherever resident, are liable to the tax. It makes no difference that they may own no assets within the United States and may receive no income from sources within the United States. Every resident alien individual is liable to the tax, even though his income is wholly from sources outside the United States. Every nonresident alien individual is liable to the tax on his income from sources within the United States."

Plaintiff is a native citizen of the United States and was such when he took up his residence and became domiciled in the City of Mexico. A demand was made upon him by defendant in error, designated defendant, to make a return of his income for the purpose of taxation under the Revenue Laws of the United States. Plaintiff complied with the demand, but under protest, the income having been derived from property situated in the City of Mexico. A tax was assessed against him in the sum of $1,193.38, the first installment of which he paid, and for it, as we have said, this action was brought.

The question in the case, and which was presented by the demurrer to the declaration is, as expressed by plaintiff, whether Congress has power to impose a tax upon income received by a native citizen of the United States who, at the time the income was received, was permanently resident and domiciled in the City of Mexico, the income being from real and personal property located in Mexico.

Plaintiff assigns against the power not only his rights under the Constitution of the United States but under international law, and in support of the assignments cites many cases. It will be observed that the foundation of the assignments is the fact that the citizen receiving the income, and the property of which it is the product, are outside of the territorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or to put the contention another way, as to the existence of the power and its exercise, the person receiving the income, and the property from which he receives it, must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases. In *United States* v. *Bennett*, 232 U. S. 299, the power of the United States to tax a foreign built yacht owned and used during the taxing period outside of the

United States by a citizen domiciled in the United States was sustained. The tax passed on was imposed by a tariff act,[2] but necessarily the power does not depend upon the form by which it is exerted.

It will be observed that the case contained only one of the conditions of the present case, the *property* taxed was outside of the United States. In *United States* v. *Goelet,* 232 U. S. 293, the yacht taxed was outside of the United States but owned by a citizen of the United States who was "permanently resident and domiciled in a foreign country." It was decided that the yacht was not subject to the tax—but this as a matter of construction. Pains were taken to say that the question of power was determined "wholly irrespective" of the owner's "permanent domicile in a foreign country." And the Court put out of view the situs of the yacht. That the Court had no doubt of the power to tax was illustrated by reference to the income tax laws of prior years and their express extension to those domiciled abroad. The illustration has pertinence to the case at bar, for the case at bar is concerned with an income tax, and the power to impose it.

We may make further exposition of the national power as the case depends upon it. It was illustrated at once in *United States* v. *Bennett* by a contrast with the power of a State. It was pointed out that there were limitations upon the latter that were not on the national power. The taxing power of a State, it was decided, encountered at its borders the taxing power of other States and was limited by them. There was no such limitation, it was pointed

[2] Section 37, Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 112, provided in part as follows: "There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton."

out, upon the national power; and the limitation upon the States affords, it was said, no ground for constructing a barrier around the United States "shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in "mistaking the scope and extent of the sovereign power of the United States as a nation and its relations to its citizens and their relations to it." And that power in its scope and extent, it was decided, is based on the presumption that government by its very nature benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it "belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial." In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax.

Judgment affirmed.

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

HESTER *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

No. 243. Submitted April 24, 1924.—Decided May 5, 1924.

1. In a prosecution for concealing spirits, admission of testimony of revenue officers as to finding moonshine whiskey in a broken jug and other vessels near the house where the defendant resided and as to suspicious occurrences in that vicinity at the time of their visit, *held* not violative of the Fourth or Fifth Amendments, even though the witnesses held no warrant and were trespassers on the land, the matters attested being merely acts and disclosures of defendant and his associates outside the house. P. 58.
2. The protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," does not extend to open fields. *Id.*

Affirmed.

ERROR to a judgment of the District Court sentencing the plaintiff in error who was convicted by a jury of concealing distilled spirits, in violation of Rev. Stats., § 3296.

Mr. Richard A. Ford for plaintiff in error. *Mr. H. P. Burbage* was also on the brief.

Mr. Solicitor General Beck and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The plaintiff in error, Hester, was convicted of concealing distilled spirits &c. under Rev. Stats., § 3296. The case is brought here directly from the District Court on the single ground that by refusing to exclude the testimony of two witnesses and to direct a verdict for the defendant, the plaintiff in error, the Court violated his

rights under the Fourth and Fifth Amendments of the Constitution of the United States.

The witnesses whose testimony is objected to were revenue officers. In consequence of information they went toward the house of Hester's father, where the plaintiff in error lived, and as they approached saw one Henderson drive near to the house. They concealed themselves from fifty to one hundred yards away and saw Hester come out and hand Henderson a quart bottle. An alarm was given. Hester went to a car standing near, took a gallon jug from it and he and Henderson ran. One of the officers pursued, and fired a pistol. Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also. The jug and bottle both contained what the officers, being experts, recognized as moonshine whiskey, that is whiskey illicitly distilled; said to be easily recognizable. The other officer entered the house, but being told there was no whiskey there left it, but found outside a jar that had been thrown out and broken and that also contained whiskey. While the officers were there other cars stopped at the house but were spoken to by Hester's father and drove off. The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself

does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* CENTRAL IRON & COAL COMPANY.

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

No. 198. Argued February 19, 1924.—Decided May 5, 1924.

1. No contract of a carrier can reduce the amount of charges legally payable to it under its tariff for an interstate shipment, or release from liability a shipper who has assumed their payment; nor can any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by the person liable. P. 65.
2. But, in the absence of a governing tariff provision, delivery of the goods for shipment does not necessarily import an obligation of the shipper to pay the freight charges, and the carrier and shipper are free to contract as to when and by whom payment shall be made, subject to the rule against discrimination. P. 66.
3. Where bills of lading acknowledged receipt of goods from the shipper but provided for delivery to the order of another as consignee, were not signed by the shipper, and contained no express agreement on his part to pay or guarantee payment of the freight charges, and there was evidence that the goods were sold and shipped by the shipper to the consignee upon agreement between them that the latter should pay those charges, and were transferred by the consignee with the bills of lading to a third party who received delivery from the carrier, *held*, that a finding that the

shipper did not assume the primary obligation to pay the freight charges was justified. P. 67.

4. To enforce payment of freight charges by a shipper only secondarily liable, the carrier must first make effort to collect from those primarily liable. P. 69.

5. A consignee, by accepting the shipment, becomes liable as a matter of law for the full amount of the tariff charges, whether they are demanded at the time of delivery or later. *Pittsburgh, etc. Ry. Co.* v. *Fink,* 250 U. S. 577. P. 70.

284 Fed. 250, affirmed.

ERROR to a judgment of the Circuit Court of Appeals, affirming a judgment by the District Court for the defendant Coal Company in an action by the railroad to recover the difference between the amount chargeable under its tariff for an interstate shipment and a less amount collected.

Mr. Homer W. Davis, with whom *Mr. Gardiner Lathrop* and *Mr. Edward S. Jouett* were on the briefs, for plaintiff in error.

Prior to the passage of the Interstate Commerce Act, it was uniformly held that the shipment of goods under a bill of lading containing no express provision requiring payment of freight by the consignor, impliedly bound him so to do, irrespective of whether or not he was the owner of the goods shipped. *Wooster* v. *Tarr,* 8 Allen, 270; *Blanchard* v. *Page,* 8 Gray, 281; *Holt* v. *Westcott,* 43 Me. 445; *Portland Flouring Mills Co.* v. *British & Foreign Marine Ins. Co.,* 130 Fed. 860; Hutchinson, Carriers, 3d ed., § 810; 7 Amer. & Eng. Enc. L., 2d ed., p. 260; Elliott, Railroads, § 1659.

The reasons which obtained prior to the Interstate Commerce Act for holding a shipper primarily liable were augmented by its passage. In this case the consignor is liable under the admitted facts. *Pittsburgh, etc. Ry. Co.* v. *Fink,* 250 U. S. 577; *New York Central, etc. R. R. Co.* v. *York & Whitney Co.,* 230 Mass. 206; s. c., 256 U. S.

406. Although these decisions relate only to the consignee's liability, their reasoning applies to this case, and they plainly show that instances of occasional hardship must not be allowed to stand in the way of the collection of tariff rates and the enforcement of the provisions of the Interstate Commerce Act, which has for its object the abolition of the numerous abuses which existed before it was enacted.

Only a nominal hardship is imposed on a consignor by holding him liable for an undercharge when the consignee is solvent.

It seems pertinent to observe that if, as claimed by the consignor and found by the courts below, the ultimate consignee was solvent up to the time suit was brought, then any hardship which either consignor or the bill of lading consignee would suffer, should the consignor by the judgment of this Court be now held liable, is the result of the course pursued by the consignor in this case.

It is undisputed that demand was made on the consignor before suit was brought and that the consignor had a contract for the sale of the coke f. o. b. Holt, Alabama, to the firm of Tutwiler & Brooks of Birmingham, Alabama, the bill of lading consignee.

Instead of paying the undercharge and making collection from either Tutwiler & Brooks or the Smelter Corporation, the consignor, so far as the record shows, did nothing before, or for over fifteen months after, the suit was brought, when it filed a demurrer to the complaint.

If, as testified, the Smelter Corporation was solvent up to January, 1920, and for three months thereafter, and during that time could have been forced to pay the amount due on execution, there is no reason why the consignor and Tutwiler & Brooks could not have made collection during that period from the Smelter Corporation, since the purchase of goods f. o. b. a given point with directions to the consignor to ship to some other point, and the payment of

the purchase price, unquestionably binds the purchaser to see that the consignor or the party from whom the goods are purchased is not thereafter held liable for the freight charges.

Neither estoppel nor election can become the means of avoiding payment of tariff rates. *Pittsburgh, etc., Ry. Co.* v. *Fink,* 250 U. S. 577.

No reason is given by the court below in explanation of its position that, while by conduct a carrier could not raise an estoppel which would release a consignor, yet by the same kind of conduct it could make an election which would have that effect.

It has frequently been held that the doctrine of election of remedies is simply an application of the law of estoppel. *Crockett First National Bank* v. *Barse Live Stock Commission Co.,* 198 Ill. 232; *Baker* v. *Edwards,* 176 N. C. 229; *Warriner* v. *Fant,* 114 Miss. 174; *Bierce, Ltd.* v. *Hutchins,* 205 U. S. 340.

Certainly, any election must arise out of some act of the party who has the choice of remedies, and not out of an act or change in the financial responsibility of someone else, and in either of those cases the only act of the Railroad Company would be to collect part of the charges upon delivery at destination.

Furthermore, election applies in the case of inconsistent and not alternative remedies. *Friederichsen* v. *Renard,* 247 U. S. 207. In the case of consignor and consignee, it would not be inconsistent to sue both of them at the same time for freight charges, although recovery from either would bar the suit against the other. The rights of the carrier to hold either or both are alternative or cumulative. *Central R. R. Co.* v. *MacCartney,* 68 N. J. L. 165. *Yazoo & Mississippi Valley R. Co.* v. *Zemurray,* 238 Fed. 789, distinguished.

The Interstate Commerce Commission and numerous courts have passed on the question involved in this case

in the light of the Interstate Commerce Act, and almost without exception hold that the consignor must pay if the consignee does not. *Great Northern Ry. Co.* v. *Hyder,* 279 Fed. 783; *New York Central R. R. Co.* v. *Federal Sugar Refining Co.,* 235 N. Y. 182; *Cleveland, etc. Ry. Co.* v. *Southern Coal & Coke Co.,* 147 Tenn. 433; *New York, etc. R. R. Co.* v. *Tonella,* 79 N. H. 464; *Wells Fargo & Co.* v. *Cuneo,* 241 Fed. 727; *Boise Commercial Club* v. *Adams Express Co.,* 17 I. C. C. 115; *Boston & Maine R. R.* v. *National Orange Co.,* 232 Mass. 351; *Great Northern Ry. Co.* v. *Hocking Valley Fire Clay Co.,* 166 Wis. 465; *Chicago, etc. Ry. Co.* v. *Peterson,* 168 Wis. 193; *Baltimore & Ohio S. W. Ry. Co.* v. *New Albany Box & Basket Co.,* 48 Ind. App. 647; *Atchison, T. & S. F. Ry. Co.* v. *Stannard & Co.,* 99 Kans. 720; *Jelks* v. *Philadelphia & Reading Ry. Co.,* 14 Ga. App. 96.

It is true that, in practically all of the above cases, there was no dispute but that the consignee was insolvent, because it is not the practice to collect undercharges from consignors when there is any reasonable prospect of making collection from the consignee.

But all the cases referred to were decided on the ground that there was, and must be, to enforce the Interstate Commerce Act, an absolute liability on the part of the consignor to pay if the consignee does not.

The consignee was not solvent when this suit was brought, except in the sense that one may be said to be solvent until adjudged otherwise.

Mr. Henry A. Jones, with whom *Mr. Allan C. Rearick, Mr. A. C. Travis, Mr. De Vane K. Jones* and *Mr. Adrian Van de Graaff* were on the briefs, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the Court.

In January, 1917, the Central Iron & Coal Company sold Tutwiler & Brooks ten carloads of coke to be deliv-

ered f. o. b. cars at the seller's plant in Holt, Alabama. Before delivery by the seller, the purchasers sold the coke to the Great Western Smelters Corporation of Mayer, Arizona. Thereafter, under instructions from Tutwiler & Brooks, and upon their agreement to pay the freight, the Central Company delivered, at its plant, the cars of coke to the Louisville and Nashville Railroad; directed shipment thereof to Mayer over that railroad and connecting lines; and took bills of lading which it delivered immediately to Tutwiler & Brooks. That firm made a draft for the purchase price on the Smelters Corporation, with bills of lading attached. The corporation paid the draft; received the bills of lading; and, upon surrendering them to the delivering carrier and payment to it of the freight demanded, obtained possession of the coke. The amount of the freight then demanded and paid was $5,082.15. The freight legally payable, according to the tariff, was $8,545.61.

The undercharge was apparently not discovered until January, 1920. The Louisville and Nashville then made demand upon the Central Company for the amount ($3,463.46). Payment being refused, this action to recover it was brought in the federal court for the Northern District of Alabama, Western Division. Each party requested a directed verdict. It was directed for the defendant; judgment entered thereon was affirmed by the Circuit Court of Appeals, 284 Fed. 250; and the case is here on writ of error under § 241 of the Judicial Code. Most of the facts were agreed. The bills of lading acknowledged receipt of the coke from the Central Company; stated that the coke was "consigned to Order Of Tutwiler & Brooks, Destination Mayer, Arizona, . . . Notify Great Western Smelters Corporation"; and provided, among other so-called conditions, that "The owner or consignee shall pay the freight, and average, if any, . . . and, if required, shall pay the same before

delivery."[1] There was no suggestion that Tutwiler & Brooks were insolvent. Whether collection could then have been made from the Smelters Corporation is a matter as to which there was conflicting evidence.[2]

The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink,* 250 U. S. 577; *New York Central, etc. R. R. Co.* v. *York & Whitney Co.,* 256 U. S. 406. Compare *St. Louis Southwestern Ry. Co.* v. *Spring River Stone Co.,* 236 U. S. 718. But delivery of goods to a carrier for shipment does not, under the Interstate Com-

[1] The bills of lading also contained these clauses: "If charges are to be prepaid, write or stamp here. Received $..... to apply in prepayment of..... To be prepaid....." The blanks were not filled by writing or stamp. The form of bills of lading used was what is known as the standard form order bill of lading. But the goods shipped were made deliverable to the order of a named consignee. Compare *Pere Marquette Ry. Co.* v. *French & Co.,* 254 U. S. 538, 539, 540.

[2] The corporation was not then technically insolvent. That is, no proceeding in bankruptcy had been instituted by or against it; there was no outstanding unsatisfied execution; and the corporation was still in possession of some unencumbered property. If the error had been discovered within a few months after delivery of the coke, the delivering carrier might easily have obtained payment of the amount of the undercharge by applying to that purpose funds of the Smelters Corporation then on deposit with it.

merce Act, impose upon a shipper an absolute obligation to pay the freight charges.[3] The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination.[4] The carrier was at liberty to require prepayment of freight charges; or to permit that payment to be deferred until the goods reached the end of the transportation. *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 656. Where payment is so deferred, the carrier may require that it be made before delivery of the goods; or concurrently with the delivery; or may permit it to be made later. Where the payment is deferred, the contract may provide that the shipper agrees absolutely to pay the charges; or it may provide merely that he shall pay if the

[3] See Interstate Commerce Commission Conference Ruling No. 314, Bulletin No. 7, issued August 1, 1917: "The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case." This ruling, which was adopted May 1, 1911, and "interpreted" May 4, 1918, was amended, on March 6, 1922, by calling attention to the provision inserted in the Uniform Domestic Bill of Lading prescribed October 21, 1921. By that provision the consignor may (see Section 7 of Conditions and clause on face of bill) relieve himself of all liability for freight charges. *In the Matter of Bills of Lading,* 52 I. C. C. 671, 721; 64 I. C. C. 347; *ibid,* 357; 66 I. C. C. 63.

[4] But see § 3 of the Interstate Commerce Act, as amended February 28, 1920, c. 91, § 405, 41 Stat. 456, 479. *In re Section 3, etc., (Regulations for Payment of Rates and Charges)* 57 I. C. C. 591.

Compare *Hocking Valley Ry. Co.* v. *United States,* 210 Fed. 735, 741; *Boise Commercial Club* v. *Adams Express Co.,* 17 I. C. C. 115, 121.

consignee does not pay the charges demanded upon delivery of the goods. Or the carrier may accept the goods for shipment solely on account of the consignee; and, knowing that the shipper is acting merely as agent for the consignee, may contract that only the latter shall be liable for the freight charges. Or both the shipper and the consignee may be made liable. Nor does delivery of goods to a carrier necessarily import, under the general law, an absolute promise by the shipper to pay the freight charges. We must, therefore, determine what promise, if any, to pay freight charges was, in fact, made by the Central Company.

To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract.[5] Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf; and a promise by him to pay therefor is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer. But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise, that the shipper of the goods was not acting on his own behalf; that this fact was known by the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever

[5] *Pollard* v. *Vinton,* 105 U. S. 7, 8; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Knight,* 122 U. S. 79, 87; *In the Matter of Bills of Lading,* 52 I. C. C. 671, 681. Compare *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584.

therefor;[6] or that he should assume only a secondary liability. In this case, the bills of lading acknowledge receipt of the coke from the Central Company. But it did not sign them. Nor was it described therein as the consignor. There was no clause by which the shipper agrees expressly either to pay the freight charges or to guarantee their payment. The goods received were not declared to be deliverable to the Central Company's order. On the contrary, the form of the bills of lading indicated that it was neither the owner nor the person on whose behalf the shipment was being made; and that Tutwiler & Brooks were either the owners or the persons in whose behalf the shipment was being made. On these facts, the trial court was justified in finding that the Central Company did not assume the primary obligation to pay the freight charges.[7]

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[6] *Union Freight R. R. Co.* v. *Winkley,* 159 Mass. 133; *Thomas* v. *Snyder,* 39 Pa. St. 317, 322; *Wayland's Adm'r.* v. *Mosely,* 5 Ala. 430; *Chicago, Rock Island & Gulf Ry. Co.* v. *Floyd,* 161 S. W. (Tex. Civ. App.) 954. See *Barker* v. *Havens,* 17 Johns. 234, 237; *Grant* v. *Wood,* 21 N. J. L. 292, 300. Compare *Cincinnati, N. O. & T. P. Ry. Co.* v. *Vredenburgh Saw Mill Co.,* 13 Ala. App. 442.

[7] In most of the cases in the state courts and the lower federal courts, relied upon by the carrier, either the facts on which the shipper was held liable differed materially from those of the case at bar; or because of the manner in which it was presented, the question of law was different.

In *Chicago, Indianapolis & Louisville Ry. Co.* v. *Peterson,* 168 Wis. 193, the bill of lading contained an express agreement that the charges were guaranteed by the shipper. See also *Chicago & Northwestern Ry. Co.* v. *Queenan,* 102 Neb. 391, 393, 398. In *New York Central R. R. Co.* v. *Federal Sugar Refining Co.,* 235 N. Y. 182; *New York Central R. R. Co.* v. *Philadelphia & Reading Coal & Iron Co.,* 286 Ill. 267; and *Portland Flouring Mills Co.* v. *British & Foreign Marine Ins. Co.,* 130 Fed. 860, the goods were deliverable to the shipper's order. In *New York, New Haven, & Hartford R. R. Co.* v. *Tonella,* 79 N. H. 464, the goods were deliverable to a named consignee, but the shipper was described as consignor and owner. In *Coal & Coke Ry. Co.* v. *Buckhannon River Coal & Coke Co.,* 77

It is urged that, if the Central Company was not under a primary obligation to pay the freight charges, it was secondarily liable, because collection from the Smelters Corporation of the balance remaining due had become impossible before the undercharge was discovered. But the trial judge was not compelled so to find. There was evidence that such collection had not become impossible. Confessedly no effort was made to collect from it. Nor was any effort made to collect from Tutwiler & Brooks. Moreover, if a secondary obligation of the Central Company was to be implied from the fact of its causing the

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W. Va. 309; *Northern Pacific Ry. Co.* v. *Pleasant River Granite Co.*, 116 Me. 496, 498; *Montpelier & Wells River R. R.* v. *Bianchi & Sons*, 95 Vt. 81, the goods were deliverable to a named consignee, but the bill of lading was signed by the shipper in his own name. In *Boston & Maine R. R.* v. *National Orange Co.*, 232 Mass. 351, the goods were deliverable to a named consignee, but he was the agent of the shipper, who was also the owner. *Atlas S. S. Co.* v. *Colombian Land Co.*, 102 Fed. 358. In *Wooster* v. *Tarr*, 8 Allen, 270, and *Great Northern Ry. Co.* v. *Hocking Valley Fire Clay Co.*, 166 Wis. 465, the consignee was named, but there was not in the bill of lading (or otherwise) any indication to the carrier that the shipper was not acting on his own behalf. In *Jelks* v. *Philadelphia & Reading Ry. Co.*, 14 Ga. App. 96, the consignee was named but refused to accept the shipment. In *New York Central R. R. Co.* v. *Warren Ross Lumber Co.*, 234 N. Y. 261; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Greenberg*, 139 Minn. 428, and *Waters* v. *Pfister & Vogel Leather Co.*, 176 Wis. 16, it was the consignee who was held liable. In *Georgia R. R.* v. *Creety*, 5 Ga. App. 424, the shipper appears to have been also owner and consignee. In *Cleveland, C. C. & St. L. Ry. Co.* v. *Southern Coal & Coke Co.*, 147 Tenn. 433, 442, 452; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Stannard & Co.*, 99 Kan. 720, 725; *Yazoo & M. V. R. Co.* v. *Picher Lead Co.*, 190 S. W. (Springfield, Mo., Ct. App.) 387; *Baltimore & Ohio Southwestern Ry. Co.* v. *New Albany Box and Basket Co.*, 48 Ind. App. 647; and *Wells Fargo & Co.* v. *Cuneo*, 241 Fed. 727, 729, it is erroneously assumed that the mere fact of delivery of goods for shipment imports, under the Interstate Commerce Act, as matter of law, an absolute promise to pay the freight charges, and/or that an agreement to the contrary is void.

coke to be received for transportation, the promise was not necessarily one to pay at any time any freight charges which the carrier might find it impossible to collect from the consignee or his assign. The court might have concluded that it guaranteed merely that the consignee or his assign would accept the shipment. For, under the rule of the *Fink Case*, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act.

Affirmed.

NORFOLK & WESTERN RAILWAY COMPANY *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA ET AL.

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

No. 187. Argued January 22, 1924.—Decided May 5, 1924.

1. A State constitutionally may require a railroad carrier to provide suitable facilities reasonably necessary for the removal from its premises of freight carried by it for its customers. P. 74.
2. Facts *held* to justify an order of a state commission requiring a railroad company to construct and maintain a crossing for the use of vehicles to haul such freight across its tracks. P. 72.
3. An order of this kind did not violate the constitutional rights of the carrier by requiring the shipper at whose instance it was made to supply a gate to the crossing, to be kept locked by him when the crossing was not in use, and to provide a watchman to give notice of approaching trains while the crossing was being used by him for transportation of goods across the tracks in vehicles; the carrier not being prevented thereby from permitting use of the crossing for other purposes or installing a watchman of its own. P. 75.

91 W. Va. 414, affirmed.

ERROR to a judgment of the Supreme Court of Appeals of West Virginia sustaining an order of the Public Service

Commission, in proceedings instituted by the Railway Company to set it aside as repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

Mr. John H. Holt, with whom *Mr. Lucian H. Cocke, Jr., Mr. Lucian H. Cocke* and *Mr. Theodore W. Reath* were on the briefs, for plaintiff in error.

Mr. Randolph Bias, for Followay, defendant in error. *Mr. Lafe Chafin* was also on the brief.

Mr. Justice Butler delivered the opinion of the Court.

John Followay, one of the defendants in error, a merchant at a village called Blackberry City in Mingo County, West Virginia, filed complaint with the Public Service Commission of that State, praying that the Norfolk & Western Railway Company, plaintiff in error, be required to furnish a suitable crossing and to provide reasonable facilities for the use of shippers at that place. After a hearing, at which much evidence was introduced, the commission made an order which directed the railway company to construct and maintain a roadway for vehicles across its tracks at McCarr Siding. It limited the use of the crossing to the transportation of freight consigned to the complainant and other shippers, and required that the entrance to the crossing at the north side of the track be closed by a gate to be furnished by complainant and to be by him kept locked, except when the crossing was being so used; and directed that, while the crossing was being used by complainant for the transportation of goods across the tracks in vehicles, he should provide a watchman to give notice of approaching trains.

The company instituted proceedings in the Supreme Court of Appeals to suspend and set aside the order, and

there contended that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment. The contention was overruled, and the order was affirmed. *Norfolk & Western Ry. Co.* v. *Public Service Commission,* 91 W. Va. 414. Plaintiff in error seeks to have the judgment reversed on the ground of such repugnancy.

It is provided by statute that every railroad company may be required by the commission to establish and maintain such suitable public facilities and conveniences as may be reasonable and just. § 4, c. 15–0, Barnes' Code, 1918; *Norfolk & Western Ry. Co.* v. *Public Service Commission, supra,* 419.

The facts may be briefly stated. At McCarr Siding, there are four parallel tracks,—an eastbound main line, a westbound main line, a track between these, and a branch line extending across the Tug River. There is also a spur track extending southeasterly from the main line tracks to the tipple of the Allburn Coal Corporation and intersecting the approach to the proposed crossing about 200 feet therefrom.

The railroad tracks are on the north bank of the Tug River which at this place is the boundary between West Virginia and Kentucky. The village adjoins the company's right of way on the north and is located on a bluff considerably higher than the railroad tracks. Its population is about 100. Complainant's store is on a hillside a short distance north of the tracks. The Allburn Coal Corporation owns a doubledecked bridge across the river almost directly opposite the store. The upper level of the bridge is used for transportation of coal, and the lower level is used for pedestrian and vehicular travel. Though privately owned, it has been used by the public for a number of years as a part of the traveled way between the village and the territory south of the river. By reason of a sharp curve in the tracks and a deep cut, the

view of the crossing is obstructed, so that enginemen on approaching trains can see it for only a short distance.

McCarr Siding was established for the accommodation of the Allburn Coal Company about 10 or 12 years prior to the filing of the complaint. The tariffs of the railway company and its shipping instructions state that the siding is a carload billing point. It is also a prepay station to which freight in carload and less than carload lots may be shipped, to be delivered at the risk of consignees. The coal company and complainant receive by far the larger part of the freight. The amount received by others is small. When the mines of the Allburn Coal Corporation are fully operated, eight or ten carloads of coal are loaded daily. Other outgoing shipments, consisting principally of boxes, containers and household goods, are also made. The siding is a flag station for three passenger trains, two eastbound and one westbound daily. For that purpose it serves about 1000 people living in the vicinity, including many on the Kentucky side of the river. From 10 to 30 people get on and off trains at McCarr daily. Mail for the village is carried by railroad and delivered at the siding.

Complainant has been engaged in business in the village for many years. He handles merchandise in substantial volume. His freight bill amounts to about $300 a month. The goods come in less than carload and in carload lots and are delivered by the company at the siding. Most of them are brought from the west. Less than carload lots are deposited by the company on the ground on the south side of the tracks opposite his place of business, and carloads are delivered at approximately the same place. It is necessary for him to move his freight across the four intervening tracks. No station facilities have ever been furnished at the siding, and the commission found that the company's failure to afford reasonable facilities for the removal of complainant's freight

from its premises causes him damage, delay and inconvenience.

Because of the danger attending the use of the crossing, the railway company, shortly before the commencement of these proceedings, planted posts about five feet apart for a distance of about 50 feet along the right of way on the north side of its tracks to obstruct the crossing and prevent its use for vehicular traffic. This compelled complainant to carry the freight consigned to him by hand across the tracks at a cost greatly in excess of the expense of hauling it in vehicles.

The State, in the exercise of its police power, directly or through an authorized commission, may require railroad carriers to provide reasonably adequate and suitable facilities for the convenience of the communities served by them. But its power to regulate is not unlimited. It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business. *Mississippi Railroad Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388, 390, 391. The validity of regulatory measures may be challenged on the ground that they transgress the Constitution; and thereupon it becomes the duty of the court, in the light of the facts in the case, to determine whether the regulation is reasonable and valid or essentially unreasonable, arbitrary and void. *Wisconsin, Minnesota & Pacific R. R.* v. *Jacobson*, 179 U. S. 287, 297, 301; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504. Railroad carriers may be compelled by state legislation to establish stations at proper places for the convenience of their patrons. *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53, 63. Any measure promulgated by the State to require a railroad company to provide suitable facilities reasonably necessary for the removal from its premises of freight carried by it for its customers does not create a new duty or impose any unnecessary burden.

The facts in this case clearly show the need of some facilities at McCarr Siding for the use of the patrons of the railroad. The order directing the company to construct and maintain a crossing for the use of vehicles to haul the freight across the tracks is a light burden upon the carrier and cannot be said to be unreasonable and arbitrary. It need not be considered whether the company, in the interest of the safety of those using the crossing, lawfully might have been required to furnish the gate and provide the watchman.

To support its contention that the order is unconstitutional, the company asserts that the order takes from it and gives to complainant the control of the crossing; that it prevents the use of the crossing without the consent and participation of complainant, and compels the company to enter into an arrangement or agreement with complainant making him its agent to control the use of the crossing and to guard it while being used. These contentions are without merit. The order does not impair or interfere with the company's right to permit the crossing to be used for purposes other than those specified in the order or prevent the company from guarding the crossing by watchmen or otherwise as it sees fit. Manifestly the limitation upon the use of the crossing and the imposition of duties on the complainant in respect of the gate and the guarding of the crossing were for the benefit of the company. The effect of these provisions was to relieve the carrier of a part of the burden and expense of providing facilities deemed reasonable and necessary for the removal of freight consigned to complainant and others at the siding. We find nothing in the order that deprives the company of its property without due process of law or denies to it the equal protection of the laws.

Judgment affirmed.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 15, Original. Orders entered May 5, 1924.

1. Order to show cause why prosecution of an action brought against the receiver in this case should not be enjoined.
2. Order fixing time for filing suggestions, contentions, and arguments, (1), respecting the distribution and incidence of receivership expenses, including those incurred, and losses sustained, from unremunerative wells; and, (2), respecting authority for receiver to reimburse operators and drillers of wells in certain cases.

PER CURIAM.

It appearing from the twelfth report made by the receiver in this cause that an action recently was commenced against him in the District Court of Wichita County, Texas, by J. H. Duhon and H. J. Kebideaux to recover from him certain moneys for the drilling of a river-bed well, now known as No. 168 and also as Delta Well, which had been drilled prior to the receivership; and it being asserted that such action was commenced in disregard of the exclusive jurisdiction of this Court over the said receivership and the said receiver:

It is ordered that the said J. H. Duhon and H. J. Kebideaux show cause in this Court on Monday the 26th day of May, 1924, why they should not be enjoined from prosecuting or maintaining the said action in the District Court of Wichita County, Texas, unless in the meantime they shall have dismissed that action and filed in this Court due proof of such dismissal.

PER CURIAM.

After considering the twelfth report of the receiver herein and the earlier reports referred to therein, it is

ordered that all parties in interest be accorded until and including the 23d day of May, 1924, to prepare and file with the clerk in printed form such suggestions, contentions and supporting arguments as they severally may desire to present respecting the following subjects:

1. The extent to which and the manner in which the expenses of conducting and administering the receivership shall be spread over the several impounded funds in the receiver's custody and over the several areas and tracts from which such funds were derived, and also the proportions in which such expenses shall be deducted from the payments ultimately to be made to the several claimants who may be entitled to receive those funds from the receiver.

2. The mode of distributing or disposing of expenses incurred and losses sustained in respect of wells which have proved unremunerative.

3. Whether the order of June 1, 1921, [which] authorizes the receiver to make certain payments reimbursing operators and drillers of river-bed wells (256 U. S. 607) shall be changed and enlarged so as to include and cover river-bed wells which subsequently proved to be unremunerative in instances where the same operator had drilled or was in process of drilling other river-bed wells which have proved productive and have yielded funds from which such reimbursement may be made,—reference being particularly had to wells numbered 149, 150, 151, 155, 161 and 163, described on pages nine and ten of the Receiver's Tenth Report.

4. Whether the order of June 1, 1921, just mentioned, shall be further changed and enlarged so as to include and cover river-bed well No. 139, otherwise known as the Burk-Senator Well.

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

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

No. 565. Argued March 4, 1924.—Decided May 12, 1924.

1. Where a New York Commission, made a defendant in the District Court, was later abolished by c. 134, New York Laws 1921, *held*, that its joinder, or exclusion by summons and severance, was not necessary to sustain an appeal by its codefendants from an order taxing costs. P. 81.
2. An order of the District Court taxing costs in an equity suit otherwise ended, has the finality requisite for review by appeal. P. 82.
3. The rule of the federal courts forbidding appeals from decrees for costs only does not apply when the power of the court to assess the items in question, and not merely the exercise of its discretion, is in issue. *Id.*
4. The District Court, finding a statutory gas rate confiscatory, enjoined public officials from enforcing it, but, as a condition, required the plaintiff gas company to impound with a special master all sums collected from consumers in excess of the rate, pending determination of the case on appeal, and, later, for the protection of the plaintiff and to benefit consumers, permitted the plaintiff to withdraw the fund so accumulated by substituting surety bonds, conditioned for its return with substantial interest should the rate be upheld. The injunction having been affirmed, *held*, that the premiums paid for the bonds were taxable, and rightly taxed, against the defendants, as costs in conformity with a usage of that district. P. 84.

291 Fed. 704, affirmed.

APPEAL from a decree of the District Court taxing costs. For other phases of the suit, see 258 U. S. 165, 259 U. S. 101, and 264 U. S. 571.

Mr. Harry Hertzoff, with whom *Mr. George P. Nicholson, Mr. Carl Sherman,* Attorney General of the State of

New York, *Mr. Wilber W. Chambers* and *Mr. James A. Donnelly* were on the brief, for appellants.

This is a final order within the decisions. *Odell* v. *Batterman,* 223 Fed. 292; *Central Trust Co.* v. *United States Light & Heating Co.,* 223 Fed. 420; *Georgia Railway & Power Co.* v. *Decatur,* 262 U. S. 432.

This Court has jurisdiction of the entire case and of all questions involved in it. *Farmers' Loan & Trust Co., Petitioner,* 129 U. S. 206; *Citizens' Bank* v. *Cannon,* 164 U. S. 319; *Ex parte Hughes,* 114 U. S. 548.

The court below had the right, in granting the injunction, to direct the impounding of the difference between the statutory rate and that allowed under the injunction.

There is no rule of this Court authorizing or permitting sums paid for surety bonds, to be taxed as costs. Rev. Stats., §§ 823, 983; *Edison* v. *American Mutoscope Co.,* 117 Fed. 192. An examination of *The Volund,* 181 Fed. 643; *The Hurstdale,* 171 Fed. 607; and *The John D. Dailey,* 158 Fed. 642, discloses that the reason for allowing premiums on surety bonds was that they were given in accordance with Rule XXI of the Admiralty Rules for the Southern District of New York.

In *Lee Injector Mfg. Co.* v. *Penberthy Injector Co.,* 109 Fed. 964, the taxation of surety premiums was disallowed. See *In re Michigan Central R. R. Co.,* 124 Fed. 727; *The Governor Ames,* 187 Fed. 48; *The Texas,* 226 Fed. 897; *Parkerson* v. *Borst,* 256 Fed. 827.

The substitution of surety bonds in place of cash was solely for the benefit of appellee, and for that reason the item should not have been allowed.

The appellants have already had substantial costs imposed upon them by reason of the order permitting appellee to take down the impounded moneys.

Had appellee coöperated with the appellants in advancing the appeal there would have been no necessity for expending part of the sums for premiums on surety bonds.

Mr. John A. Garver, for appellee, submitted.

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

This was an equitable action to enjoin the continued enforcement of c. 125 of the Laws of New York of 1906, which fixed at 80 cents a thousand feet the price at which gas was to be furnished to private consumers in the various boroughs in the City of New York, on the ground that the rate was confiscatory and violated the rights of the Company under the due process clause of the Fourteenth Amendment of the Federal Constitution.

The main controversy was settled in favor of the Company by this Court in March, 1922. 258 U. S. 165. Upon another appeal, we directed a reduction of the Master's fees by $28,750. 259 U. S. 101. When the case reached the District Court for further proceedings, the defendants made a motion to retax costs, objecting to half a dozen items charged. The court allowed certain exceptions but overruled others. The only one overruled and here insisted on is for $76,086.00 for premiums paid by the Company to surety companies for bonds securing the repayment of a large amount of money impounded with the special master.

When the District Court found that a rate of 80 cents was confiscatory, it granted an injunction to prevent the Attorney General of the State, the District Attorney of New York County, and the Public Service Commission from enforcing such a rate, but as a condition of such injunction, it required the Company to impound with a special master all sums charged for gas to consumers over and above the 80-cent rate until the issue could be finally settled in this Court. This Court, although it found error in certain other limitations of the order, held that so much of it was within the court's discretion. 258 U. S. 165. The plaintiff, after the order of impounding

was made, secured leave from the court to substitute the surety bonds in lieu of cash. In granting this leave, the District Judge said:

"The plaintiff urges with force, I think, that to impound all the moneys over eighty cents for a period perhaps of a year will cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys if adequate security can be otherwise provided."

The bonds were required to secure not only the cash for which they were substituted but interest at seven per cent. to become part of the fund. The court continued:

"I have required a substantial rate of interest because the plaintiff will be in effect using the consumers' money. On the one hand the consumer profits by getting more than he could from the banks, on the other the plaintiff profits by being relieved from high rates of interest. The rate at which the plaintiff has sold its bonds is seven per cent. and on short financing the rates are much higher. I think that seven per cent. should be the rate, even though the plaintiff must pay a premium to get the bond; it will recover back all that the consumers are not eventually entitled to."

From the final decree of the District Court fixing the costs, an appeal was taken to this Court. To that appeal the Public Service Commission of New York, as defendant in the suit, was not made a party and no summons and severance was issued against it. Accordingly the

appeal was dismissed in the following *per curiam,* 264 U. S. 571:

"Dismissed for the want of jurisdiction upon authority of *Masterson* v. *Herndon,* 10 Wall. 416; *Hardee* v. *Wilson,* 146 U. S. 179, 180; *Sipperley* v. *Smith,* 155 U. S. 86, 89; *Maytin* v. *Vela,* 216 U. S. 598, 601."

Upon a petition for rehearing the appellants bring to the knowledge of this Court that by c. 134 of the Laws of 1921, the Public Service Commission for the First District which was here concerned was abolished, and that, therefore, the appellants were not required by summons and severance to exclude from the future capacity to appeal, a defunct state board originally joined with them as a codefendant. *Mercantile Trust Co.* v. *Kanawha & Ohio Ry. Co.,* 58 Fed. 6, 14. We think the abolition of the Public Service Commission made it unnecessary to make it a party to this appeal and that the dismissal heretofore entered for lack of service of a summons and severance upon it should be set aside.

The appellee insists that the appeal must be dismissed, first, because it is not from a final decree, and, second, because no appeal lies from a decree for costs alone.

First. If the subject matter is appealable at all, there would seem to be no doubt that the decree has all the characteristics of finality. An execution can issue at once to collect the costs as taxed, including the item here complained of. *Trustees* v. *Greenough,* 105 U. S. 527; *Farmers' Loan & Trust Co., Petitioner,* 129 U. S. 206; *In re Michigan Central R. R. Co.,* 124 Fed. 727, 731.

Second. Is the order of the District Court for this controverted item appealable? There is no doubt that, as a general rule, an appeal does not lie from a decree solely for costs, and if an appeal on the merits be taken and affirmed, it will not be reversed on a question of costs. *Canter* v. *American Insurance Co.,* 3 Pet. 307, 319; *Elastic Fabrics Co.* v. *Smith,* 100 U. S. 110, 112; *Paper-Bag*

Cases, 105 U. S. 766, 772; *City Bank of Fort Worth* v. *Hunter,* 152 U. S. 512, 516; *Stuart* v. *Boulware,* 133 U. S. 78; *Du Bois* v. *Kirk,* 158 U. S. 58, 67; *Citizens' Bank* v. *Cannon,* 164 U. S. 319, 323; *Wingert* v. *First National Bank,* 223 U. S. 670, 672.

Questions of costs in admiralty and equity are discretionary and the action of the court is presumptively correct. *United States* v. *Brig Malek Adhel,* 2 How. 210, 237; *The Scotland,* 118 U. S. 507, 519. The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. *Ex parte Peterson,* 253 U. S. 300, 316; and see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 460.

The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the rule is not absolute and should not be enforced when the trial court assumes the power to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. Thus in *Trustees* v. *Greenough,* 105 U. S. 527, an appeal was allowed from a decree in equity solely for costs when the question was whether they could be properly paid out of a fund in the control of the court. So in *In re Michigan Central R. R. Co.,* 124 Fed. 727, an intervener was allowed to appeal from a decree of a trial court, allowing costs in favor of the clerk, when it was objected that neither by statute nor general law could such costs be

allowed by the court in favor of the clerk. The question is fully considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion by Judge Lurton, afterwards Mr. Justice Lurton, of this Court. The many cases cited in which appeals from decrees for costs had been denied were distinguished as involving a question not of positive law, but of discretion. We think the distinction made in that case a sound one and that as the question is here presented, the appeal is a proper one.

The question is whether premiums for bonds paid by a party litigant to preserve his rights and save him from loss under the orders of court pending the litigation, can be taxed as costs against the defeated party. There has been considerable difference of opinion among the District Courts and the Circuit Courts of Appeals on this subject. This Court has never considered it. *The South Portland,* 95 Fed. (D. C.) 295; *Jacobsen* v. *Lewis Klondike Expedition Co.,* 112 Fed. 73 (C. C. A., Ninth Circuit); *Edison* v. *American Mutoscope Co.* (C. C.), 117 Fed. 192; *The John D. Dailey* (D. C.), 158 Fed. 642; *The Bencliff* (D. C.), 158 Fed. 377; *The Hurstdale* (D. C.), 171 Fed. 607; *The Volund* (C. C. A., Second Circuit), 181 Fed. 643; *Jones* v. *Edward B. Smith Co.* (C. C.), 183 Fed. 990; *The Europe* (C. C. A., Ninth Circuit), 190 Fed. 475, 481, are cases in which either by rule of court or through usage, such costs have been taxed in admiralty cases or equity causes. In *Lee Injector Mfg. Co.* v. *Penberthy Injector Co.* (C. C. A., Sixth Circuit), 109 Fed. 964; *The Governor Ames* (C. C. A., First Circuit), 187 Fed. 40, 48; *The Texas* (C. C. A., Third Circuit), 226 Fed. 897, 905; *Parkerson* v. *Borst* (C. C. A., Fifth Circuit), 256 Fed. 827; *In re Hoyt,* 119 Fed. 987 (D. C.), and in *The Willowdene,* 97 Fed. 509 (D. C.), it is held that where the disbursement is not made as the result of any rule of practice and there is no statute, rule, or usage by which it is made a part of the taxable costs of the case, it cannot be allowed. In

The Texas, supra, the Circuit Court of Appeals of the Third Circuit, after expressing its approval of the view that a rule of court or a practice equivalent thereto is necessary to justify the taxation of such costs, said:

"But we may also say that we think such a rule or practice has become so desirable that we feel confident the court below will take an early opportunity to conform its procedure in this respect to the custom prevailing in other districts."

The District Judge, in passing on the issue, said that it had been the custom in the Second Circuit to allow as costs, premiums on stipulations given to release vessels from arrest, citing *The Volund, supra; The Hurstdale, supra; The John D. Dailey, supra;* that Judge Lacombe in *Edison* v. *American Mutoscope Co., supra,* had allowed as costs premiums upon a supersedeas bond in an equity case, and that there had been a uniform usage for the fourteeen years during which he had sat in that District to allow such items.

We think that under the usage thus shown in the Second Circuit, the District Court had power to assess these premiums as costs in this suit in equity. It is apparent from the circumstances already set forth that the order made by the District Court under which these bonds were secured and substituted for cash was not only in the interest of the Company but of the consumers in whose behalf the defendants below were contending. Had the state authorities prevailed in this Court, they would have secured from the surety companies on these bonds for distribution among the customers not only the amount of money impounded but also seven per cent. interest thereon to compensate them for the taking of their money and the delay in its return. As the cause went against them, it was not an abuse of discretion to hold that the defendants who have conducted the litigation and lost should pay the costs of an arrangement made in their interest, because of an expense with which the Company

had been unjustly burdened. It may be that in a circuit and district where no usage or rule of court exists, such costs may not be taxed. We are not called upon to decide that. It is enough, that we may decide this appeal, to hold that it was not an abuse of discretion or a violation of law for the District Court in the Second Circuit to allow the item.

By the Act of August 13, 1894, c. 282, 28 Stat. 279, Congress has made elaborate provision for the safe use of surety companies as security upon bonds required in court and other proceedings, and while it does not exclude individual sureties, it offers a most convenient and stable means of obtaining indemnity against the default of parties. This is much to be preferred to individual sureties because a properly conducted surety company makes it its business promptly to investigate and to meet its liabilities. Acceptance of the service of such companies is, of course, upon the basis of a regular rate of compensation, and where a party litigant has, because of the claim of the opposing party, been compelled to furnish such security, and it turns out that it was wrongly required, a rule of court or usage which imposes the expense of the security on the defeated party is not unreasonable.

The decree of the District Court is affirmed.

EX PARTE: IN THE MATTER OF SKINNER & EDDY CORPORATION, PETITIONER.

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE COURT OF CLAIMS.

No. 28, Original. Argued, on return to rule to show cause, April 14, 1924.—Decided May 12, 1924.

1. The right of a plaintiff to dismiss a suit, if it exists, is absolute, independent of the reasons offered and not affected by concealment or misstatement of reasons. P. 93.

2. The rule of the federal courts at law and in equity governing the right of a plaintiff to dismiss without prejudice, should obtain in the Court of Claims. Pp. 92, 94.
3. A plaintiff in the Court of Claims may dismiss without prejudice when the Government has filed no counterclaim, and will not be prejudiced, legally, by the dismissal. *Id.*
4. Where a plaintiff, after dismissing its suit in the Court of Claims, began a suit in a state court against the Shipping Board on the same causes of action, which remained pending, *held,* that the subject matter was withdrawn from the cognizance of the Court of Claims by Jud. Code, § 154, and that it could not resume its jurisdiction by setting aside the dismissal retroactively. P. 95.
5. An order of the Court of Claims attempting to reinstate a dismissed case in plain violation of the plaintiff's right to dismiss it, and an effect of which would be to deprive the plaintiff of the right of trial by jury in a state court, may be corrected by mandamus. P. 96.

Writ absolute.

RULE on the Court of Claims directing it to show cause why it should not be required by mandamus, or by prohibition, to restore an order dismissing a suit, to set aside another vacating the first, and to abstain from attempting exercise of further jurisdiction in the case.

Mr. Louis Titus and *Mr. George Donworth,* with whom *Mr. J. Barrett Carter* and *Mr. Livingston B. Stedman* were on the brief, for petitioner.

The petitioner had the right to dismiss its suit. *Veazie* v. *Wadleigh,* 11 Pet. 55; *Confiscation Cases,* 7 Wall. 454; *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473; *Detroit* v. *Detroit City Ry. Co.,* 55 Fed. 569; *Cowham* v. *McNider,* 261 Fed. 714; *McCabe* v. *Southern Ry. Co.,* 107 Fed. 213; *Youtsey* v. *Hoffman,* 108 Fed. 699; *United States* v. *Norfolk & Western Ry. Co.,* 118 Fed. 554; *Pennsylvania Globe Gaslight Co.* v. *Globe Gaslight Co.,* 121 Fed. 1015; *Morton Trust Co.* v. *Keith,* 150 Fed. 606; *Thomson-Houston Elec. Co.* v. *Holland,* 160 Fed. 768; *McGowan* v. *Columbia, etc. Assn.,* 245 U. S. 352.

The contracts set out in the petition, upon which both the claim of petitioner and the counterclaim of the United States are based, are contracts with the Fleet Corporation, not contracts with the United States; therefore the Court of Claims has no jurisdiction over either the original claim or the counterclaim.

Every question as to liability under these contracts is settled by the decision of this Court in the combined cases of *Sloan Shipyards Corporation, Astoria Marine Iron Works,* and *Wood, Trustee,* 258 U. S. 549.

Action in the Court of Claims is barred by § 154 of the Judicial Code. *United States* v. *Wardwell,* 172 U. S. 48; *Finn* v. *United States,* 123 U. S. 227; *Corona Coal Co.* v. *United States,* 263 U. S. 537.

A counterclaim by the Government can only be allowed against a claimant against the Government. Jud. Code, § 145.

The question of the remedy on the claims arising under contracts made by the Fleet Corporation is a question of jurisdiction which gravely affects claimants who may pursue a remedy upheld as proper by this Court. It is of the utmost importance that the rule of *stare decisis* be adhered to in such cases, and that therefore the decision of this Court in the *Sloan Case* be followed in all like cases.

The wrongful order of court deprived petitioner of its right to trial by jury and the writ asked is a proper remedy for this wrong. *Ex parte Simons,* 247 U. S. 231; *Ex parte Peterson,* 253 U. S. 300.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. Chauncey G. Parker, Mr. Henry M. Ward* and *Mr. George M. Anderson* were on the brief, for respondents.

The Court of Claims had jurisdiction of the suit and of the counterclaim. Jud. Code, § 145, par. 2. It is

therefore immaterial whether the counterclaim grows out of contract or tort; it may be pleaded with the same effect in either case. *Allen* v. *United States,* 17 Wall. 207; *McElrath* v. *United States,* 102 U. S. 426.

Whenever the Government pleads a counterclaim in the Court of Claims, it acquires a substantial right, and the plaintiff's right to dispose of his case in any way he may see fit is accordingly qualified. If the Court of Claims has no jurisdiction of a claim presented, the counterclaim follows the fate of the claim, and will be dismissed with it. *Baltimore and Ohio R. R. Co.* v. *United States,* 34 Ct. Cls. 484. But if the Court of Claims has jurisdiction of the claim, the counterclaim becomes part of the suit, and unless the United States consents to its dismissal, it must be prosecuted to a conclusion. *Huske* v. *United States,* 46 Ct. Clms. 35. The counterclaim, it is true, was not filed before the suit was dismissed, but notice of it had been given with a request to allow it to be filed. Under the statute the Government had an absolute right to file its counterclaim. There is no rule in the Court of Claims limiting the time within which a counterclaim may be filed.

This Court does not prescribe the rules of practice in the Court of Claims. It is therefore submitted that, in so far as the rules of the Court of Claims are not inconsistent with law, the Court of Claims must be presumed to know its own rules and to interpret them correctly. The applicable rule of law was settled many years ago in *Huske's Case, supra.* The point is also directly covered in *McElrath* v. *United States,* 102 U. S. 426.

Under the decisions and uniform practice of the Court of Claims, a claimant is not permitted to dismiss his claim except by order of the court made after due notice to the United States. It is not even essential that a counterclaim should be filed in order to permit the United States to prove offsets against the claimant. *Wisconsin Central*

R. R. Co. v. *United States,* 164 U. S. 190; *Huse* v. *United States,* 222 U. S. 496.

The Court of Claims had jurisdiction to reconsider and annul its order of dismissal. *Ayres* v. *Wiswall,* 112 U. S. 187; *Bronson* v. *Schulten,* 104 U. S. 410; *In re Metropolitan Trust Co.,* 218 U. S. 312; *Goddard* v. *Ordway,* 101 U. S. 745; *Ex parte Lange,* 18 Wall. 163.

Under Rule 90 of the Court of Claims, a motion for a new trial (other than those made under § 175, Jud. Code,) shall be filed within sixty days from the time the judgment of the court is announced.

By § 138, Jud. Code, the court holds one term each year beginning on the first Monday of December. A case may be reinstated after the term has expired for much less cause than seems to exist in this case. *Wetmore* v. *Karrick,* 205 U. S. 141; *Murray* v. *United States,* 46 Ct. Clms. 94; *McMillan* v. *United States,* 49 Ct. Clms. 379.

The provisions of § 154, Jud. Code, are matters of defense and cannot be invoked to deprive the Court of Claims of jurisdiction of a counterclaim.

This Court has repeatedly held that a new trial may be granted under § 175, Jud. Code, by the Court of Claims after a case has reached it on appeal, the appeal decided, and the mandate issued, the only limitation upon its jurisdiction being that the motion for a new trial must be filed within two years next after the judgment is rendered. *Belknap* v. *United States,* 150 U. S. 588; *In re District of Columbia,* 180 U. S. 250; *Fuller* v. *United States,* 182 U. S. 562; *Sanderson* v. *United States,* 210 U. S. 168.

A decision of the Court of Claims granting, upon motion of the United States, a new trial, while a claim is pending before it, or on appeal from it, or within two years next after the final disposition of the claim, cannot be revised in this Court. *Young* v. *United States,* 95 U. S. 641.

The remedy of the petitioner is not by mandamus or prohibition but by appeal from such judgment as the

Court of Claims may enter on the counterclaim. *Ex parte United States*, 263 U. S. 389.

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

This is a petition for a writ of mandamus directed to the Court of Claims to restore its order of April 30, 1923, dismissing the suit of the Skinner & Eddy Corporation against the United States, and to set aside its order of November 28, 1923, vacating the order of dismissal, and to prohibit the court from attempting to exercise further jurisdiction in the case. The judges of the Court of Claims have made a response to a rule to show cause.

On June 15, 1921, the petitioner brought this suit against the United States in the Court of Claims for $17,493,488.97. The cause of action was based on balances alleged to be due for the construction of certain ships, for bonuses for advanced deliveries of others, and for extra labor, extra work, and repairs on other vessels, all for the United States. The principal part of the claim grew out of the cancellation of two contracts between the petitioner and the United States Emergency Fleet Corporation "representing the United States." The largest item of the claim was for anticipated profits on 25 vessels. On August 15, 1921, no plea, answer or notice of any counterclaim having been filed by the Government, a general traverse was entered by the Clerk of the Court under its Rule No. 34. No further pleadings were filed and no proceedings were had of any kind until April 11, 1923, when petitioner filed its motion to dismiss the suit without prejudice. The petitioner based the motion on the ground that it had begun its suit under the Act of June 15, 1917, c. 29, 40 Stat. 182, 183, as amended by § 2, par. c, of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 989; that, as interpreted by this Court, these acts required the claims to be first presented to the President

for him to determine the just compensation, prior to the filing of a suit, and that as this claim was not presented to the President, the Court of Claims had no jurisdiction. On April 12th, the Government moved to withdraw its general traverse and for leave to file its answer and cross bill. The motions were argued and on April 30, 1923, the court made an order granting the petitioner's motion and dismissed its petition.

On May 1, 1923, one day after the dismissal, the petitioner filed a suit against the United States Shipping Board Emergency Fleet Corporation in the state court of Washington at Seattle, on substantially the same causes of action as those sued for in the Court of Claims, but omitting certain phases of damages claimed, for $9,129,401.14.

On June 9, 1923, at the same term of the court, the Government moved for a reargument of petitioner's motion to dismiss without prejudice, and to allow the Government to file a counterclaim. The motion was inadvertently overruled October 22, 1923, but upon restoration and reargument, the order of dismissal was vacated and leave was given to the Government to file its counterclaim.

It is intimated on behalf of the Government that the reason given by the petitioner for its motion to dismiss in April, 1923, was not a genuine one. The petitioner offers that and others. Others are that under the decision of this Court in *Sloan Shipyards Corporation* v. *Emergency Fleet Corporation,* 258 U. S. 549, and *Emergency Fleet Corporation* v. *Sullivan,* 261 U. S. 146, it was doubtful whether under the contracts sued on a recovery could be had against the Government in the Court of Claims, and second, that it was doubtful whether under *Russell Motor Co.* v. *United States,* 261 U. S. 514, there could be any recovery for anticipated profits under the cancelled contracts which was the basis for nearly half of the claim.

We think this mandamus must be granted. At common law a plaintiff has an absolute right to discontinue or dis-

miss his suit at any stage of the proceedings prior to verdict or judgment, and this right has been declared to be substantial. *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473; *Confiscation Cases,* 7 Wall. 454, 457; *Veazie* v. *Wadleigh,* 11 Pet. 55; *United States* v. *Norfolk & Western Ry. Co.,* 118 Fed. 554.

It is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing. *McGowan* v. *Columbia, etc., Association,* 245 U. S. 352, 358. In *Pullman's Palace Car Co.* v. *Central Transportation Co.,* 171 U. S. 138, 146, this statement of the rule in *City of Detroit* v. *Detroit City Ry. Co.,* 55 Fed. 569, was approved:

"It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co.* v. *Union Rolling-Mill Co.,* 109 U. S. 702. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

Cowham v. *McNider,* 261 Fed. 714; *Thomson-Houston Electric Co.* v. *Holland,* 160 Fed. 768; *Morton Trust Co.* v. *Keith,* 150 Fed. 606; *Pennsylvania Globe Gaslight Co.* v. *Globe Gaslight Co.,* 121 Fed. 1015; *Youtsey* v. *Hoffman,* 108 Fed. 699; *McCabe* v. *Southern Ry. Co.,* 107 Fed. 213.

The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one can not affect his right.

The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an

opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree.

We do not perceive in the circumstances of this case any such ground for making an exception to the general rule, as was shown in *Western Union Tel. Co.* v. *American Bell Tel. Co.*, 50 Fed. 662, 664, or in *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, or *Manufacturing Co.* v. *Waring*, 46 Fed. 87, or *Electrical Co.* v. *Brush Co.*, 44 Fed. 602, or in *Bank* v. *Rose*, 1 Rich. Eq. 292, or *Booth* v. *Leycester*, 1 Keen, 247.

Under § 145 of the Judicial Code, the Court of Claims is given jurisdiction to hear and determine all counterclaims on the part of the Government "against any claimant against the Government in said court." Under Rule 34 of that court, notice of such counterclaim must be filed within 60 days after the service of the petition on the Attorney General. In this case, no such counterclaim was filed and a general traverse was noted by the clerk. Eighteen months elapsed and nothing was done when the petitioner moved to dismiss without prejudice, and then the Government without proffering any actual counterclaim asked for leave to file one, objecting to dismissal. The case was dismissed but six months later it was restored and a counterclaim filed.

The Government had not when the case was dismissed given any time or expense to the preparation and filing of a cross bill or of the evidence to sustain it. It had not taken any action in respect to the cause which entitled it to say that it would be prejudiced by a dismissal within the meaning of the authorities. It suddenly was awakened by the motion to dismiss to the fact that by eighteen months' delay, it was losing a possible opportunity to litigate a cross claim in the Court of Claims and without a

jury. We think the same rule should obtain in the procedure of the Court of Claims as in federal courts of law and equity in respect to the dismissal of cases without prejudice.

But there is a special reason why the rule must be enforced in this case. By § 154 of the Judicial Code, it is provided that:

"No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

The day after the dismissal of this suit in the Court of Claims, April 30, 1923, the petitioner filed suit in a state court of Washington for something more than nine millions of dollars for the same causes of action as those sued for in the Court of Claims except the claims for anticipated profits. That suit and the section of the Code just quoted necessarily prevent the petitioner from suing on those claims in the Court of Claims, and exclude its jurisdiction of them, because the Fleet Corporation which is sued in the Washington court was certainly acting or professing to act, mediately or immediately, under the authority of the United States. The jurisdiction of these claims by the Court of Claims having been parted with by the order of dismissal in April can not be resumed by a retroactive order of the subsequent November, in view of the restrictive provisions of § 154, which, by reason of the Washington suit, intervene and apply. *Corona Coal Co.* v. *United States,* 263 U. S. 537.

It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedial process which is awarded, not as a matter of

right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 312; *Arant* v. *Lane,* 249 U. S. 367, 371. It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated. Added to this is the consideration which has been regarded as furnishing a substantial ground for the extraordinary process of the writ that the petitioner by a denial of his right to dismiss in the Court of Claims will be deprived of a right of trial by jury in the state court of Washington. *Ex parte Peterson,* 253 U. S. 300, 305; *Ex parte Simons,* 247 U. S. 231, 239.

Writ absolute.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY *v.* DOLAN, COLLECTOR OF TAXES FOR THE SOUTHERN DISTRICT OF THE CITY OF WILMINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF DELAWARE.

No. 275. Argued May 2, 1924.—Decided May 12, 1924.

The charter of Wilmington, Delaware, provides for the assessment for taxation of telegraph lines in the city at not less than $6,600 nor more than $7,300 for each mile of the streets used, the rate of tax being the same as in other cases. *Held,* not a property but a privilege tax, within the power of the State as applied to a local corporation, and not repugnant to the due process or equal protection clauses of the Fourteenth Amendment. P. 97.

121 Atl. 18, affirmed.

ERROR to a judgment of the Supreme Court of Delaware affirming a recovery by a tax collector in an action to collect a tax.

Mr. Overton Harris and *Mr. Horace Greeley Eastburn* for plaintiff in error.

Mr. Caleb S. Layton, with whom *Mr. James R. Morford* was on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the collector of taxes, the defendant in error, to recover taxes due to the City of Wilmington for the years 1913 to and through 1918. The defendant Telegraph Company, the plaintiff in error, demurred to the declaration on the ground that the statute imposing the taxes deprived it of its property without due process of law and denied to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. The demurrer was overruled and judgment was rendered for the plaintiff by the Superior Court and the judgment was affirmed by the Supreme Court of the State. 121 Atl. 18.

The statute in question is an Act of April 7, 1913, amending § 80 of the charter of the City of Wilmington. Laws 1913, c. 205. It authorizes an assessment of telegraph lines in the city at not less than six thousand six hundred dollars and not more than seven thousand three hundred dollars for each mile of the streets used. The rate of taxation on these sums is the same as that for other taxes and neither that nor the modes of determining the amount between the limits fixed is complained of. But it is argued that this is a property tax upon the company's poles and lines, and that it fixes an arbitrary valuation upon them without giving the Company a chance to be heard at any time before the tax is levied. It is argued further that the Company is denied the equal protection of the laws when it and a few others are sin-

gled out and other Delaware property is valued on the actual facts.

The State Court met this argument by holding that the tax was a license or privilege tax and therefore not open to the objections urged. The Company answers that this is characterization of the statute, not construction, and that upon the issue of constitutionality this Court must determine the nature of the tax for itself and is not bound by the name given to it below. *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346, 348. The proposition is true, but when the State Court after a candid discussion that manifests no disposition to escape constitutional limits, has come to the conclusion reached here, we should be slow to differ from it upon a matter having so many purely local elements, even if we did not think it right, as we do. *Clyde* v. *Gilchrist,* 262 U. S. 94, 97.

The Company is a Delaware Corporation and there is no doubt that the State may impose the present tax if it has not used a wrong form of words in doing it. It might impose it as a condition of the grant of the franchise enjoyed by the corporation. It might authorize Wilmington to impose it for the privilege of occupying the streets. The State Court relies mainly on the latter ground. We shall not repeat the arguments of that Court drawn from the history of the legislation concerned and the fact that the last preceding form of this section was admitted to lay a privilege tax. It is enough to refer to its further argument that the valuation expressed in the act is not a valuation of the Company's property, which the Company says is worth only about $500 a mile, but a valuation of the privilege granted. The statute does not tax by the poles, the Company's property, but by the mile, the measure of occupation of the streets. Underground wires are worth more and are taxed less. The supposed discrimination is based upon the same grounds. Telegraph

companies occupy the streets with their poles and may be required to pay for it. Therefore we have no need to decide how far the State might go in discouraging some particular activity, if so minded, by taxes as well as by penalties. *Hammond Packing Co.* v. *Montana,* 233 U. S. 331. Neither shall we consider how far a legislature may go when it deals with specified lands. *Valley Farms Co.* v. *Westchester,* 261 U. S. 155.

Judgment affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* PRUDE.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 272. Submitted May 1, 1924.—Decided May 12, 1924.

1. A decision of a State Supreme Court denying an interstate carrier an immunity based upon a stipulation on an interstate passenger ticket *held* reviewable by certiorari and not by writ of error. P. 100.
2. A ticket for interstate passage over several railroads bore a printed stipulation limiting the selling carrier's liability to its own lines. *Held,* that by accepting and using the ticket, though without reading it, a passenger must be presumed to have agreed to the stipulation, thereby establishing a contract, *prima facie* valid, and binding in a state court. P. 101.

156 Ark. 583, reversed.

ERROR and certiorari to a judgment of the Supreme Court of Arkansas affirming a judgment for damages in an action against the above named railroad company for an assault committed on the plaintiff while traveling over the line of a connecting carrier.

Mr. Edward J. White and *Mr. Thomas B. Pryor* for plaintiff in error and petitioner.

Mr. S. S. Hargraves, Mr. S. H. Mann, Sr., and *Mr. S. H. Mann, Jr.,* for defendant in error and respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The writ of error was improvidently granted and must be dismissed. The application for the writ of certiorari is granted. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592. Act September 6, 1916, c. 448, 39 Stat. 726; Jud. Code, § 237.

Respondent purchased from petitioner a round-trip coupon ticket issued at its office in Forrest City, Ark., which authorized her to travel over its line to Texarkana, Ark., thence over the Texas Pacific Railroad to Longview, Tex., and from the latter point over the International & Great Northern Railroad to Houston, Tex., and return via the same route. Claiming that while on the line of the last-named company she was assaulted by the auditor, she instituted an action to recover damages from the selling carrier in the Circuit Court for St. Francis County, Ark.

Defending, the carrier set up and established that the ticket called for passage over three independent lines and contained the following: "In selling this ticket and checking baggage hereon, the selling carrier acts only as agent and is not responsible beyond its own lines." And it maintained that any assault upon respondent was by the auditor of the International & Great Northern Railroad Company for whose acts petitioner was not responsible.

The ticket was purchased over the telephone. When respondent reached the depot she paid the purchase price and was handed the ticket in an envelope. She did not sign or inspect it.

The trial court denied a peremptory instruction in favor of petitioner, and the case was sent to the jury upon the theory that the assault constituted a breach of the initial carrier's contract for safe transportation. Judgment went in favor of respondent for both compensatory

and punitive damages, and was affirmed as to the former by the Supreme Court of Arkansas. This was error.

An interstate carrier is entitled to the presumption that its business is being conducted lawfully. Acceptance and use of the ticket sufficed to establish an agreement, *prima facie* valid, which limited the selling carrier's liability. Mere failure of the passenger to read matter plainly placed before her cannot overcome the presumption of assent. *New York Central & Hudson River R. R. Co.* v. *Beaham,* 242 U. S. 148, 151; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury,* 254 U. S. 357, 360.

Reversed.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* WELLS ET AL.

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

No. 232. Argued April 23, 1924.—Decided May 12, 1924.

1. The rolling stock of a railroad, and traffic balances owing it, are not exempt from attachment or garnishment merely because the former are used, and the latter derived, in interstate commerce. P. 103.
2. A state statute permitting a citizen and resident of another State to prosecute a cause of action which arose elsewhere, against a railroad corporation of another State, which is engaged in interstate commerce and neither owns nor operates a railroad, nor has consented to be sued, in the State where the action is brought, is so far, invalid. *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312. *Id.*
3. Judgments obtained by garnishment and constructive service, against a foreign railroad corporation and a local railroad corporation, as garnishee, on such a cause of action, *held* void as an unreasonable interference with interstate commerce, and their enforcement subject to be enjoined in a suit by the foreign corporation in a federal court against the judgment creditor and his attorney. *Id.*

285 Fed. 369, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court, which dismissed a bill to enjoin the enforcement of judgments.

Mr. A. H. Culwell, with whom *Mr. J. W. Terry* and *Mr. Gardiner Lathrop* were on the brief, for petitioner.

Mr. George E. Wallace, for respondents, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Wells, a citizen and resident of Colorado employed by the Atchison, Topeka & Santa Fe Railway Company, was injured while performing his duties in New Mexico. He sued the company in a state court of Texas, but could not make personal service upon it within that State.[1] Wells procured from the same court a writ of garnishment to a Texas railroad company whose line connected with the Santa Fe; which had in its possession Santa Fe rolling stock; and which owed to it large sums on traffic balances. Thereafter, constructive service was made upon the Santa Fe, by serving one of its officers in Kansas and by publication in a Texas newspaper. The Santa Fe did not appear in the action; and judgment in the sum of $4,000 and costs was entered against it by default. Objection by the garnishee to the jurisdiction having been overruled, a judgment was entered that Wells recover from it this sum with interest and costs, in satisfaction of his judgment against the Santa Fe. To enjoin the enforcement of these judgments, suit was brought by the Santa Fe in the federal court for western Texas against Wells. who had meanwhile become a resident of that State, and his counsel. The case was heard on agreed facts; and a decree dismissing the bill was affirmed by the United States Circuit Court of Appeals for the Fifth Cir-

[1] See *Atchison, T. & S. F. Ry. Co.* v. *Weeks,* 254 Fed. 513.

cuit. 285 Fed. 369. It is here on writ of certiorari under § 240 of the Judicial Code. 261 U. S. 612.

The rolling stock held by the garnishee was then being used in interstate commerce and the amount due on traffic balances arose out of transactions in such commerce. These facts did not render the property immune from seizure by attachment or garnishment. *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.,* 217 U. S. 157. But the writ of garnishment is void because of the purpose for which it was invoked. The Santa Fe is a Kansas corporation. It had not been admitted to Texas as a foreign corporation. It had not consented to be sued there. It did not own or operate any line of railroad within the State; and had no agent there. The Texas statutes concerning garnishment were construed and applied in the Wells suit so as to permit a citizen and resident of another State to prosecute in Texas a cause of action which arose elsewhere against a railroad corporation of another State, which is engaged in interstate commerce, which neither owns nor operates a railroad in Texas, and which has not consented to be sued there. For the reasons stated in *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312 (decided since the entry of the judgment here under review) such a suit necessarily and unreasonably burdens interstate commerce; and the statute as construed and applied is invalid.

Relief against the void judgments entered was properly sought by the Santa Fe in the federal court. *Simon* v. *Southern Ry. Co.,* 236 U. S. 115; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175. See *Essanay Film Co.* v. *Kane,* 258 U. S. 358, 360. The garnishment was void because seizure of the rolling stock and credits for the purpose of compelling the Santa Fe to submit to the jurisdiction of the court in the Wells suit interfered unreasonably with interstate commerce. The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare *Fire-*

stone Tire & Rubber Co. v. *Marlboro Cotton Mills,* 282 Fed. 811, 814. Nor could its right not to be sued there be affected by anything which the garnishee did or omitted to do. Moreover, the garnishee's objection to the jurisdiction (on grounds later upheld by this Court in the *Farmers Co-operative Co. Case*) had been overruled by the state court. We have no occasion, therefore, to consider further the scope or the provisions of the statutes concerning garnishment.

Reversed.

TRANSPORTES MARITIMOS DO ESTADO *v.* ALMEIDA.

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

No. 265. Submitted April 30, 1924.—Decided May 12, 1924.

1. The defense of sovereign immunity by a defendant in the District Court does not present a question of federal jurisdiction reviewable here on direct appeal. *Oliver American Trading Co.* v. *United States of Mexico,* 264 U. S. 440. P. 105.
2. This is equally true whether the claim of immunity be contested because of the character of the defendant or because the immunity is alleged to have been waived. *Id.*

Writ of error dismissed and cause transferred.

ERROR to a judgment of the District Court for the plaintiff, Almeida, in his action for wages as a seaman.

Mr. F. Dudley Kohler for plaintiff in error.

Mr. Silas B. Axtell for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Almeida, a seaman, brought this action for wages against Transportes Maritimos do Estado on the common law side of the federal court for southern New York. The

defendant appeared generally; answered that it was a department of the Government of the Republic of Portugal; offered evidence in support of the allegation; and claimed the immunity of a sovereign from all process. The District Judge entered judgment for the plaintiff in an amount stipulated by counsel; allowed a direct writ of error from this Court; and issued the certificate of a jurisdictional question provided for in § 238 of the Judicial Code.

This Court is without jurisdiction of the writ of error. It was settled in *Oliver American Trading Co.* v. *United States of Mexico,* 264 U. S. 440 (decided since the entry of judgment below) that the claim of sovereign immunity does not present a question of federal jurisdiction within the meaning of § 238. This is equally true whether the claim of immunity is contested because of the character of the defendant or because the immunity is alleged to have been waived. The question involved here is not that presented in *The Pesaro,* 255 U. S. 216, and *The Carlo Poma,* 255 U. S. 219. There, the question requiring decision was whether Congress had conferred upon the district court sitting in admiralty power to entertain a suit against a "general ship engaged in the common carriage of merchandise by water, for hire" which, at the time of the arrest, was owned by the Italian Government and was in its possession. That question being one of the jurisdiction of the court as a federal court, the direct appeal was sustained in *The Pesaro* and the appeal to the Circuit Court of Appeals was ordered dismissed in *The Carlo Poma.* A related question was presented in *The Sao Vicente,* 260 U. S. 151, which was likewise a suit in admiralty. There, the writ of certiorari was dismissed. Compare *Ex parte Transportes Maritimos do Estado,* 264 U. S. 105.

As the writ of error from this Court was improvidently allowed, the case must be transferred to the Circuit Court

of Appeals for the Second Circuit. Section 238 (a) of the Judicial Code, Act of September 14, 1922, c. 305, 42 Stat. 837. *Smith* v. *Apple,* 264 U. S. 274.

It is so ordered.

BROOKS-SCANLON CORPORATION *v.* UNITED STATES.

UNITED STATES *v.* BROOKS-SCANLON CORPORATION.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 337, 385. Argued January 8, 1924.—Decided May 12, 1924.

1. Orders of the Emergency Fleet Corporation directed to a shipbuilder expropriated a vessel in process of construction under a contract between the builder and the plaintiff, together with the materials purchased by the builder for its completion, the benefits and advantages of payments made, and of plans, specifications and prior inspection service provided, by the plaintiff, and placed the Fleet Corporation in the plaintiff's shoes with respect to the past and future execution of the contract by the builder. The United States thus obtained the ship early and the benefit of prices much lower than those prevailing at time of requisition. *Held:*

(a) That the plaintiff's rights under the contract with the builder were taken. P. 119.

(b) That the just compensation to which the plaintiff was entitled did not depend upon the title to the materials used in the construction, and was not to be gauged by the progress payments made, or by the compensation payable if the Government had merely canceled the contract; but was to be measured by the value of the plaintiff's rights under the contract at the time of the taking. P. 121.

(c) Just compensation is the sum which, considering all the circumstances, uncertainties of the war, etc., probably could have been obtained for an assignment of the plaintiff's rights under the contract, i. e., the sum that would in all probability result from fair negotiations between an owner willing to sell and a purchaser desirous of buying. P. 123.

(d) The value of such ships at the time of requisition, the then probable value at the time fixed for delivery, the contract price, payments made and to be made, the time to elapse before completion and delivery, the possibility that, by reason of the Government's activity in controlling materials, the contractor might not have been able to complete the ship on time, loss of the use of money to be sustained, other expenditures to be made between requisition and delivery,—all should be given consideration in determining the plaintiff's loss caused by the taking. P. 125.

2. Replacement cost not necessarily the sole measure of or guide to value in ascertaining just compensation. *Id.*

58 Ct. Clms. 274, reversed.

APPEAL and cross appeal from a judgment of the Court of Claims in an action to recover a balance alleged to be due as just compensation for the taking by the Shipping Board of the plaintiff's rights under a contract for the construction of a ship.

Mr. John Junell, with whom *Mr. William A. Lancaster, Mr. David F. Simpson* and *Mr. Edward P. Sanborn* were on the brief, for Brooks-Scanlon Corporation.

Plaintiff's contract was property within the protection of the Fifth Amendment. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685; *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390; *West River Bridge Co.* v. *Dix,* 6 How. 507; *Chicago, B. & Q. Ry. Co.* v. *Drainage Commrs.,* 200 U. S. 561.

The President was authorized to requisition it.

The contract was taken. The defendant made itself the successor of the plaintiff under the contract—the owner of plaintiff's rights. It could have become such owner in no way other than by the condemnation and taking of the contract.

When the defendant displaced the plaintiff under the contract and took that place itself, and exercised all the rights the plaintiff had under it, and agreed to pay to the builder, and did pay, the balance of the installments

of the contract price, it took over and appropriated the contract and all the rights and interests the plaintiff had in it.

The defendant could not take the uncompleted ship, as it did do, and order the builder to complete the construction in accordance with the contract, plans and specifications, pay the builder the balance of the contract price, appropriate the amount which had been paid by the plaintiff, and receive from the builder the ship completed in accordance with the contract with no change whatever except a slight change for the military protection of the vessel, without taking the contract within the meaning of the Fifth Amendment.

The defendant took and used the plaintiff's plans and specifications, its service of inspection and classification of the vessel, its insurance while under construction, the guaranty of materials and labor, the vessel when completed, the payments made by the plaintiff to the builder, all of which were valuable rights of the plaintiff under the contract; and there was no provision of the Act of June 15, 1917, under which these rights could have been taken without taking the contract itself. They were essential parts of the contract and could not have been separated from it.

Although under the contract the legal title to the ship during its construction was in the Shipbuilding Corporation, the plaintiff then had such substantial rights and equities in the uncompleted ship as the courts recognize and protect.

The parties to the contract evidently understood this, for they provided in it that the builder should keep the vessel insured at all times during the construction in an amount at least equal to payments made by the plaintiff, with loss if any payable as their interests might appear.

A ship is personal property of such peculiar character that both in England and in this country an action for

specific performance of contracts relating to it will lie. *Lynn* v. *Chaters,* 2 Keen, 521; *Claringbold* v. *Curtis,* 21 L. J. Ch. N. S. 541; *Duff* v. *Fisher,* 15 Cal. 381; *Peer* v. *Kean,* 14 Mich. 354; *Menier* v. *Donald,* 165 N. Y. S. 50; *Great Lakes Transp. Co.* v. *Scranton Coal Co.,* 239 Fed. 603.

The contract and the rights of the plaintiff thereunder were so connected with and involved in the ship itself, that the requisition of the vessel under construction was a taking and appropriation of the contract, and all plaintiff's rights under it, including its equitable rights and interests.

This is true whether the United States made use of the contract thereafter or made it valueless to the plaintiff. *United States* v. *Lynah,* 188 U. S. 445; *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *Chappell* v. *United States,* 34 Fed. 673; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

It was conceded by the defendant and found by the Court of Claims that the Government did requisition the ship under construction. It requisitioned then the plaintiff's equitable rights and interests in the ship springing out of the contract in any event. And if, by taking the ship, it rendered the contract and the obligation of the Shipbuilding Corporation under it valueless to the plaintiff, it thereby appropriated the contract, whether it used the contract thereafter or not.

Omnia Commercial Co. v. *United States,* 261 U. S. 502, does not rule the case at bar.

In that case no specific steel plate had been appropriated to the plaintiff's contract, and no part of the purchase price had been paid. The Omnia Company had no equitable title or interest in the steel plate, and specific performance of its contract could not be enforced.

There the United States dealt only with the Steel Company. Here it dealt with both parties to the contract.

There the United States did not step into the shoes of the plaintiff under the contract and use it; the contract was made simply unenforceable as between the Omnia Company and the Steel Company. Here the contract was kept alive for the use of the Government and used.

There the damages resulting to the Omnia Company were merely consequential. Here the loss to the plaintiff was the natural, direct and inevitable result of what the defendant did.

There the contract was destroyed under the police power of the United States. Here the contract was taken under the right of eminent domain.

This suit is a part of the authorized procedure initiated by the United States for the condemnation of the ship and all the rights and interests of the plaintiff under the contract. *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299.

The value to the plaintiff of the contract, and its rights and interest in the ship under the contract, was the difference between the value of the ship when requisitioned and the amount which the plaintiff was then required under the contract to pay in order to get it.

Just compensation is the value to the owner at the time of the taking of the property taken. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299; *United States* v. *Rogers,* 257 Fed. 397; *Sanitary District of Chicago* v. *Pittsburgh Ry. Co.,* 216 Ill. 574; *United States* v. *New River Collieries Co.,* 262 U. S. 341.

The plaintiff is entitled to interest as a part of its just compensation upon the value of the property taken from the date of the requisition. *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299; *United States* v. *Benedict,* 261 U. S. 294; *Prince Line* v. *United States,* 283 Fed. 535; *United States* v. *Rogers,* 255 U. S. 163.

Mr. Henry M. Ward, with whom *Mr. Solicitor General Beck, Mr. Chauncey G. Parker* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, were on the brief, for the United States.

The findings of fact clearly show that plaintiff's contract with the shipbuilder was not requisitioned.

If plaintiff's contentions should prevail, and this Court should hold (a) that the contract was, in fact and in law, requisitioned, and (b) that the just compensation for such requisition is the value of the contract at the date thereof, which is the same as the then value of the ship, which concededly was requisitioned, and (c) that plaintiff is entitled to interest upon such value from that date,—the United States will in this case be required to pay the plaintiff upwards of $975,000 additional, with interest for over six years. Furthermore, cases in which others have filed a brief as *amici curiae* involve several millions more, while the amount involved in other similar cases now pending in the Court of Claims is, as justly remarked by this Court in *Omnia Commercial Co.* v. *United States,* 261 U. S. 513, "appalling."

It is, therefore, important to note the intent of the Fleet Corporation, as evidenced by its action as the delegate of the President under the Act of June 15, 1917. This action completely negatives plaintiff's contention that its contract was requisitioned.

The order is explicit in its specification of the property requisitioned. While it refers to "contracts requisitioned" and to "ships and contracts taken over," the contracts referred to are clearly, from the context, the commitments (necessarily by contract) for the materials, etc.

It seems clear from the facts found that the Fleet Corporation had no intention of requisitioning the plaintiff's contract, and that both as matter of fact and of law it did not do so and that this was clearly understood by the plaintiff at the time. It does not appear from the

findings that the plaintiff then contended that its contract was requisitioned. On the contrary, it acquiesced in the requisition of the ship and furnished, as requested, a statement of the amounts which it had paid to the shipbuilder, in apparent reliance upon the intention of the Fleet Corporation to reimburse it for such expenditures.

While, by a subsequent contract of December 8, 1917, the United States, through the Fleet Corporation, agreed with the Shipbuilding Company that it should be credited under the terms of the construction contract then made with the amounts paid prior to August 3, 1917, by the plaintiff, these amounts of money were in no sense requisitioned from the shipbuilder, much less were they requisitioned from the plaintiff. As between the shipbuilder and the United States, the latter agreed to indemnify the shipbuilder against the claim of the plaintiff. As between the United States and the plaintiff, the former stated in the letter of August 28, 1917, that it was its intention to reimburse the plaintiff for all amounts paid by plaintiff to the shipbuilder as soon as such amounts should be ascertained. This intention was carried out by the Shipping Board when it made an award to the plaintiff of the moneys which it had actually paid to the shipbuilder, and in addition also for the increase in the value of materials assumed to have been purchased with these particular moneys; but it is clear that the United States did not requisition anything whatsoever from the plaintiff. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, distinguished.

This case is controlled by the decision of this Court in *Omnia Commercial Co.* v. *United States,* 261 U. S. 502. In that case, at the time of the requisition of the steel from the steel company, the plaintiff or its assignors had paid large sums to the steel company on account of the purchase of the steel and had sold the same to responsible parties, and from these sales would have realized a profit of nearly a million dollars.

If the action were maintainable on the theory of requisition of the plaintiff's contract, the judgment should be reversed and the claim dismissed, because at the date of the alleged requisition the contract was without value.

The amount of just compensation to which a plaintiff is entitled when his property is taken for public use is the market value of the property at the date of taking. The Court may properly take judicial notice of the historical fact that on August 3, 1917, or within a few days thereafter, every ship of over 2,500 deadweight tons capacity was requisitioned by the Fleet Corporation in behalf of the United States under the Act of June 15, 1917, by requisition orders substantially identical with the one issued to the shipbuilder in this case. Under these circumstances, it can hardly be properly contended that the contract had any market value, for it was a contract impossible of performance. It may be that if there had been a free market and the ship had then been completed, the ship would have had this value, but the Court of Claims does not find as a fact that the contract on the date of requisitioning of the ships was of any value.

The Court may, however, properly take judicial notice of the further historical fact that, at or about the time of the requisitioning of these ships, all shipbuilding material throughout the United States was likewise requisitioned by the Government, and particularly all steel and the entire steel industry were requisitioned, and no private shipbuilder was permitted to acquire any steel for shipbuilding for any but government ships. Assuming then merely for the argument that there is a basis for the plaintiff's contention that the shipbuilding contract was requisitioned, the contract at the date of requisition was valueless because it could not be performed by the shipbuilder. *Vogelstein & Co.* v. *United States,* 262 U. S. 337; *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Pine Hill Co.* v. *United States,* 259 U. S. 191.

The theory of the plaintiff confounds the subject matter of the contract with the covenants of performance.

The court below erred in allowing interest (partly compounded) on the theory that the payments made by the plaintiff to the shipbuilder were requisitioned.

Mr. Charles S. Haight, Mr. T. M. Cunningham, Jr., Mr. William B. King, Mr. John J. Fitzgerald and *Mr. Wharton Poor,* by leave of Court, filed a brief as *amici curiae.*

Mr. Ira Jewell Williams, Mr. Carlos Berguido, Jr., Mr. John H. Stone, Mr. F. R. Foraker and *Mr. Francis Shunk Brown,* by leave of Court, filed a brief as *amici curiae.*

Mr. Justice Butler delivered the opinion of the Court.

This case arises out of the exertion of the power of requisition conferred on the President by c. 29, 40 Stat. 182, approved June 15, 1917, known as the Emergency Shipping Act.[1] There is involved the question whether

[1] "The President is hereby authorized and empowered . . .

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

"(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

"(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

a certain contract for the construction of a ship was requisitioned; and if it was, upon what basis is just compensation to be ascertained.

The act empowered the President (a) to order from any person for government use ships or ship material of kind and quantity usually produced by such person; (b) to requisition contracts for the building of ships; (c) to require the owner of any shipbuilding plant to place at the disposal of the United States the whole or any part of the output of the plant; (d) to requisition any shipbuilding plant or part thereof; (e) to requisition any ship in process of construction; and compliance with all orders issued under the act was made obligatory. By executive order of July 11, 1917, he delegated these powers to the United States Shipping Board Emergency Fleet Corporation. On August 3, 1917, the claimant was the assignee

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"(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. . . .

"Whenever the United States shall cancel, modify, suspend or requisition any contract, . . . it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory 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 therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: . . ."

and owner of a contract by which the New York Shipbuilding Corporation agreed to construct a ship, known as hull #193. The contract was made March 28, 1916; and after some modification, it provided for the construction of a ship of 8597 deadweight tons, to be completed and delivered on or before February 1, 1918. The contract price was $831,630.

Prior to August 3, 1917, the claimant or its assignor had secured the services of an architect, furnished plans and specifications to the builder, employed a bureau to inspect the work as it progressed, and had paid to the builder on account of the contract price instalments amounting to $419,500, which, with interest paid, architect's fees, and the value of the plans and specifications, amounted to $473,710.58, exclusive of the cost of inspection.

Immediately after the execution of the contract, the builder ordered all materials required, for which sufficient data then existed, and, before August 3, 1917, completed its orders for substantially all that were needed to perform the contract. Between 35 and 40 per cent. of the required materials had been delivered to the builder ready for use, and, on that date, the ship was about 19 per cent. completed. The Court of Claims found that all materials so ordered were delivered at the prices fixed in the orders and were used in the construction of the ship; and that nothing was purchased after that date, except materials used for construction, at a cost of $31,000, ordered for military protection. At that time claimant held on deposit in various solvent banks a sum of money sufficient to pay all the remaining instalments of the contract price; and the builder was ready and willing to perform the contract.

On August 3, 1917, the Emergency Fleet Corporation served on the builder its order and notice requisitioning all of the ships, including hull #193, under construction in

the builder's shipyard, and the materials necessary for their completion. The order required the builder to complete the ships. It stated that compensation would be paid for "ships, materials, and contracts requisitioned." The builder was required to furnish plans and specifications of the requisitioned ships, and a statement of the payments made and amounts still due, and other information "necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts."

On August 22, the Fleet Corporation caused its district officer to deliver to the builder a formal written notice which recited that the ships had been requisitioned, and that an order had been given the builder to complete them, and ordered the builder to "proceed . . . in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917 . . . "; and stated, "For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid: . . ." The builder accepted the order. The Fleet Corporation gave directions to the claimant not to make, and to the builder not to accept from claimant, any further payments on account of the contract.

On August 28, the Fleet Corporation notified the claimant that it had issued to the builder notice of requisition, and inclosed a copy. The letter advised that the Fleet Corporation's district officer had been authorized to take over claimant's inspection officers. It requested a verified statement of the payments made to the builder prior to requisition. It said: "It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if . . . such payments are found in order and in conformity with the contract requirements." It re-

quested a statement of indirect expenditures, such as the cost of superintendence, original design and interest on funds already paid, and said that the owner might submit any other matters deemed pertinent; that it presumed that it was addressing those entitled to receive compensation on account of the requisition of the vessels, and asked that there be included in claimant's answer "all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law."

On December 8, 1917, the Fleet Corporation made a contract with the builder and the American International Corporation relating to the completion and disposal of hull #193 and other ships requisitioned. It required the builder to complete the ship "in accordance with the specifications annexed to the respective contracts under which such hulls were being constructed for the former owners prior to August 3, 1917. . . ." It also provided that the Fleet Corporation should have credit for all sums theretofore received by the builder from former owners. The Fleet Corporation agreed to indemnify the builder from all loss or liability arising out of claims of the former owners occasioned by the requisition order, or any subsequent acts or orders.

January 23, 1920, the Fleet Corporation awarded claimant $442,683.82 as just compensation. It paid the builder for construction of the ship $412,130 which, added to the award, makes $854,813.82. This would be the total cost to it of the ship if its award as to compensation were accepted. The contract price was $831,630. The cost of construction for military protection was $31,000. The Court of Claims found that at the time of the requisition, the value of such ships was $200 per deadweight ton, and was the same on February 1, 1918. The Court of Claims also found that claimant had paid to the builder $239,500 in cash, $180,000 in notes, and $28,433.33 interest on notes,

making $447,933.33; and that it also paid architect's fees amounting to $5,500, and furnished plans and specifications of the value of $20,277.25, making in all $473,710.58. The amount of the award was unsatisfactory to claimant, and 75 per cent. of it, $332,012.87, was paid. The judgment was for $231,549.12.[2]

Both parties appeal.

Did the United States requisition claimant's contract?

The act of Congress conferred upon the President the power to take claimant's contract; and also to take the ship materials and the ship in process of construction. It required compliance with all orders issued under it. No question is raised or involved as to the obligation of the builder to comply with orders given it to complete the ship in accordance with the contract. It was ordered to do so, and it accepted the order. We are not here concerned with

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[2] Claimant paid out:

Architect's fees	$5,500.00
Cash to builder	239,500.00
Notes to builder	180,000.00
Interest on notes	28,433.33
Total	$453,433.33
Value of plans and specifications	20,277.25
	$473,710.58
Less 75 per cent. of award	332,012.87
Balance	$141,697.71

Interest was computed and allowed as follows:

On $473,710.58 minus $28,433.33, or $445,277.25, from August 3, 1917 (date of requisition) to February 24, 1920 (date of payment of 75 per cent. of award), $68,350.06.

On $445,277.25 minus $332,012.87, or $113,264.38, from February 24, 1920, to April 23, 1923 (date of judgment), $21,501.35.

Total of interest	$89,851.41
Added to	141,697.71
Produces amount of judgment	$231,549.12

its rights or obligations, but the orders given the builder show that expropriation of claimant's contract and rights was intended. By its orders the Fleet Corporation put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had. The credit for, and advantages under the contract resulting from, payment of $419,500, made by claimant to builder were taken. The use of the plans and specifications for the construction of the ship as well as the benefit of inspection prior to the requisition date, August 3, 1917, were also taken over. The contract was not terminated. The direct and immediate result of the requisition orders and acts of the Fleet Corporation was to take from claimant its contract and its rights thereunder. Because of material ordered and furnished and work performed prior to requisition, the United States was enabled to obtain the ship earlier than it could have caused a like ship to have been planned and built, and secured the benefit of prices prevailing immediately after the making of the contract, when the builder ordered materials for the construction of the ship. At the time of requisition, costs were higher than the contract prices. At that time, and on February 1, 1918, the date fixed for completion, the value of such ships was greatly in excess of the contract price, and in excess of the amount awarded to claimant plus the amount paid by the Fleet Corporation to the builder.

Omnia Commercial Co. v. *United States,* 261 U. S. 502, does not support the contention that claimant's contract was not expropriated. There, claimant had a contract giving it an opportunity to purchase a large quantity of steel plate from a steel company at a price under the market. If the contract had been carried out, large profits would have resulted. Before any deliveries were made, the United States requisitioned the steel company's entire production of steel plate. No specific steel plate had been

appropriated to the contract, and no part of the purchase price had been paid. The action taken by the United States applied to the steel company only and created no relations with the claimant. The contract was not kept alive nor resorted to in order to determine anything involved in the transaction between the United States and the steel company; the benefit of the low prices was not taken; no payments made on account of the purchase price were taken; nothing belonging to the Omnia Company was taken. Damages claimed were held too remote. The differences between that case and this are essential and obvious.

The situation in this case is well stated in the dissenting opinion of the Chief Justice of the Court of Claims: "If the plaintiff had voluntarily assigned its contract with the builder to the Government, and the latter had expressly assumed the unfulfilled obligations and later received the completed vessel, it would not more effectively have acquired plaintiff's contract, its rights, and obligations than actually resulted from what was done in this case. The Government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modification); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit."

It must be held that the claimant's contract, and its rights and interests thereunder, were expropriated.

Upon what basis is just compensation to be ascertained?

The expropriation enabled the Fleet Corporation to obtain the ship when completed by paying the builder the instalments of the contract price remaining unpaid at the time of the requisition. The builder was not entitled to more, because the Fleet Corporation took over the contract and succeeded to the rights of claimant.

The award by the Fleet Corporation was made up of two items: one was stated to be the "computed value" of material in the yard of the builder at the time of requisition, and the other the amount of progress payments "in excess of the cost of the materials requisitioned." The Court of Claims held that the materials were not the property of the claimant, but belonged to the builder, and should not have been taken into account in arriving at the compensation due the plaintiff. But we are of opinion that the amount of claimant's compensation did not depend upon the legal title to the materials during construction; that the progress payments did not constitute the amount claimant was entitled to have, and that the award was erroneous, because of failure to find the value of claimant's contract rights taken.

The judgment of the Court of Claims was based upon the assumption that the money paid by claimant in furtherance of planning and building the ship was expropriated. In the opinion, it is said, "And the plaintiff is entitled to recover the amounts of money requisitioned and appropriated by the United States." But plainly there was no requisition of money.

The United States contends that nothing whatever was requisitioned from the plaintiff, and that the judgment should be reversed and the claim dismissed unless claimant shall be held entitled to compensation for cancelation of its contract; and that, in such event, it should have judgment only for an amount sufficient with what already has been paid to it to make up "the amount actually invested in the ship taken."[3] As we hold that claimant's contract rights were expropriated, it is not necessary to consider what would be just compensation in case of mere cancelation of the contract.

[3] The figure contended for is $425,000, made up of $419,500, paid by claimant to builder, and $5,500, architect's fee. Nothing is included to cover the value of plans, interest or cost of inspection.

The contract rights of claimant taken are to be distinguished from its expenditures for the production of the ship. The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things. It is the property and not the cost of it that is protected by the Fifth Amendment. *Minnesota Rate Cases,* 230 U. S. 352, 454. By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the instalments remaining to be paid under the contract. It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340; *United States* v. *New River Collieries Co.,* 262 U. S. 341, 344; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 306; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 341. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line Ry. Co.* v. *United States, supra; United States* v. *Benedict,* 261 U. S. 294, 298; *Brown* v. *United States,* 263 U. S. 78.

Claimant insists that just compensation is the value of the contract and its rights and interests thereunder, and is measured by the difference between the value of the ship, as found by the court, at the time of the taking and on the date specified for delivery, and the amount which claimant was then required under the contract to pay in order to get the ship.

We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably

could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy.

In re Mersey Docks and Admiralty Commissioners, [1920] 3 K. B. 223, is a case quite similar to this. There, the Admiralty requisitioned a barge nearing completion, altered her construction, and paid, or undertook to pay, the builder the original contract price. It was impossible for the Board, for whom the barge was being constructed, to replace her by another at a cost less than three times the contract price of the original barge. By agreement, the ascertainment of compensation to be paid by the Admiralty to the Board was referred to an arbitrator. The Board claimed the difference between the contract price and cost of replacing the barge, regard being had to the fact that replacement would be impossible for three years; and also claimed compensation for loss of services during the period required for replacement. The Admiralty contended that the measure of compensation should be the difference between the contract price and value of the vessel when taken. A special case was stated by the arbitrator. The Earl of Reading, Lord Chief Justice, gave judgment, and held that the Board was entitled to recover the difference between the contract price and the increased cost of replacing the barge; that the Board was not entitled to any compensation for loss of services, the damage being too remote. He said (p. 233): "On a broad view of the facts and without undue regard to minute details, the Court has to determine upon what principle the compensation to be awarded to the Board ought to be measured. In my judgment it is sufficient for the purpose of this case to say that the Board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1917, replaced by

the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labour and materials which has continued up to the present time. . . . I can see no very material difference between the respective principles contended for by counsel on behalf of the Board and counsel on behalf of the Admiralty. In truth I think that both these principles lead to the same conclusion."

This Court has held in many cases that replacement cost is to be considered in the ascertainment of value,[4] but that it is not necessarily the sole measure of or guide to value. We are of opinion that value, so far as material, rather than replacement cost should be taken into account, for the ascertainment of just compensation. If the ship had been complete and ready for delivery at the time of requisition, claimant's just compensation would be the value of the ship, less the unpaid balance of the contract price. But the ship was not ready, and the builder was not bound to deliver before February 1, 1918. Claimant had a right to its delivery at that time, and the builder was ready to perform the contract. The Court of Claims, being of opinion that claimant's contract was not taken, did not find its value at the time of taking, and failed to find facts from which such value appears. Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of

[4] *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 287, and cases cited; *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 689; *Georgia Ry. & Power Co.* v. *Railroad Commission,* 262 U. S. 625, 629.

such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking (*Minnesota Rate Cases, supra,* 451; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 76; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *Monongahela Navigation Co.* v. *United States, supra,* 343), that is, the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken. *United States* v. *New River Collieries Co., supra,* 343; *Seaboard Air Line Ry. Co.* v. *United States, supra,* 305.

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

MR. JUSTICE SUTHERLAND took no part in the consideration of this case.

The separate opinion of MR. JUSTICE McREYNOLDS.

This case is of special importance because of the immense sums involved in similar pending claims. Ten ships—some larger than No. 193—were requisitioned at Camden alone. Speaking with constraint, the findings of the Court of Claims leave much to be desired for ready understanding; but enough appears, I think, to support its final judgment.

Through change of name, the Brooks-Scanlon Corporation became successor to Carpenter-O'Brien Company and

party to the written contract of March 28, 1916, under which the New York Shipbuilding Corporation undertook to construct at its Camden yard a steamship of about eighty-five hundred tons (Freighter No. 193), according to designated plans, on or before February 1, 1918. $595,000, payable in installments, was the price first stated; prior to May 25, 1917, because of changes, this was increased to $811,130. The East Coast Transportation Company and the New York Shipbuilding Company were the original contracting parties. The Brooks-Scanlon Corporation acquired the former's interests—the New York Shipbuilding Corporation those of the latter.

The Act of Congress approved June 15, 1917, c. 29, 40 Stat. 182, provides: "The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person. (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material. (c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order. (d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant. (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now con-

structed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. . . .

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory 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 therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. . . .

"The cost of purchasing, requisitioning, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction and the expediting of construction of ships thus under construction shall not exceed the sum of $250,000,000, exclusive of the cost of ships turned over to the Army and Navy. . . ."

July 11, 1917, the President delegated his powers granted by the statute, to the United States Shipping Board Emergency Fleet Corporation—the "Fleet Corporation." Purporting to act as thus authorized, and referring to ten vessels then under construction at the Camden Yard, the Fleet Corporation notified the New York Shipbuilding Corporation, August 3, 1917: "All power-driven cargo-carrying, and passenger ships above

2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States. On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch. The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned. You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts. You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation."

August 18, 1917, the Fleet Corporation addressed a letter to the East Coast Transportation Company (predecessor of Brooks-Scanlon Corporation) giving notice of the requisition-order of August 3rd, and on August 28, 1917, served on the Carpenter-O'Brien Company a substantially identical letter, which stated—

"On August 3, 1917, the United States Emergency Fleet Corporation issued to the New York Shipbuilding Corporation the notice or requisition set forth in enclosure 'a'.

"In response to this communication the New York Shipbuilding Corporation, the shipbuilders, informed us

that the East Coast Transportation Company, as owners, or representatives of owners, had entered into a contract with them for the following vessel:

"Hull No. 193; type, cargo; d. w. ton, 8,100; date of contract, 3–28–16 (assigned 5–24–17).

"Under date of August 23rd you advised that this contract had been assigned to you.

"The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the district officer, Mr. G. R. McDermott, at room 302, 1319 F St. N. W., Washington, D. C., the names of your representatives and their compensation, sending a duplicate to this office. Your cooperation with the corporation is invited.

"The corporation will consider payments to the contractor accruing since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

"You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

"It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if after investigation of data submitted by you such payments are found in order and in conformity with the contract requirements.

"At your further and early convenience you are requested to submit to the corporation a statement of such

indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

"It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

"The consummation of the orders herein and heretofore transmitted will be made the subject of later appropriate corporate action."

August 22, 1917, the Fleet Corporation, through General Manager Capps, forwarded the following letter to Agent McDermott; and, as directed, the latter promptly delivered a copy thereof to the New York Shipbuilding Corporation with request that it govern itself accordingly.

"Dear Sir:

"Referring to the vessels under construction in the yard of New York Shipbuilding Corporation, Camden, N. J., requisitioned under the corporation's order of August 3rd, precedent to the final examination of the contract for the vessels in question, you are requested to inform the shipbuilder as follows:

"The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you

are further ordered by the President of the United States, represented by this corporation, to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

"All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this corporation for that purpose.

"For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid: Provided, That on acceptance in writing of this order you agree that on final acceptance of the vessel to give a bill of sale to the United States in satisfactory form, conveying all your right, title, and interest in the vessel, together with your certificate that the vessel is free from liens, claims or equities, with the exception of those of the owner, and then only to those set forth in the contract. Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order.

"This order applies only to vessels actually under construction and in accepting it the corporation expects you to inform it of the actual stage of construction of each vessel or the part to be assembled therein on the date of requisitioning, August 3, 1917. The corporation reserves the right to decide whether or not a vessel was actually under construction on August 3, 1917, on consideration of the ascertained facts.

" In replying to this communication, please arrange to specify separately the vessels to which this order refers, and refer to the corresponding contract in sufficient terms for identification of it.

" Please furnish a copy of this to New York Shipbuilding Corp., and ask for an early reply.

Very truly yours,

W. L. CAPPS, General Manager."

Replying, September 20, 1917, the Shipbuilding Corporation advised the Emergency Fleet Corporation—

" Referring to the order dated August 22, 1917, made by United States Shipping Board Emergency Fleet Corporation, and delivered to this company, we beg to say:

" We understand that by the Act of Congress of June 15, 1917, entitled 'An Act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes,' and the Executive order dated July 11, 1917, made by the President with respect to said act, and transmitted to us by the Emergency Fleet Corporation under date of August 3, 1917, we are under obligation to comply with the order of the Emergency Fleet Corporation dated August 3, 1917, requisitioning ships at this company's plant.

" This corporation, therefore, accepts United States Shipping Board Emergency Fleet Corporation's order dated August 22, 1917, for the completion of the vessels under contract in this yard on August 3rd, 1917, known as hull No. —, and agrees that, upon the completion and acceptance of said vessels and upon complete payment [by] United States Shipping Board Emergency Fleet Corporation, together with such additional compensation as may be agreed upon, this company will execute and deliver to the United States of America a bill of sale conveying all this company's right, title, and interest in the vessels without prejudice to any claim of the person or corporation

who originally contracted for the construction of said vessels, and those claiming rights under such original contractor, together with our certificate that the vessels are free from liens, claims, or equities except such liens, claims, or equities as may be asserted by, or exist in favor of, the person or corporation who originally contracted for the construction of the vessels, and those claiming rights under such original contractor."

September 13, 1917, the Fleet Corporation telegraphed the Shipbuilding Corporation: "Do not accept further payment from former owners on account of requisitioned ships. This is mandatory."

December 8, 1917, the Shipbuilding Corporation and the Fleet Corporation agreed—

"On and prior to August 3, 1917, the Shipbuilding Corporation was constructing under private contract with the corporations named below (hereinafter called 'former owners') ships bearing the hull numbers of the type and for the contract prices set opposite their respective names. . . . [There were 10 of them.]

"Due to war conditions, such contract prices have proved and will prove to be less than the actual cost of constructing such ships. On August 3, 1917, all of such ships, together with the materials assembled therefor, were requisitioned by the Fleet Corporation, acting in accordance with the provisions of the Urgent Deficiency Act of June 15, 1917, and the Executive order of July 11, 1917. The Shipbuilding Corporation by such requisition was directed to complete such ships on behalf of the United States.

"The parties hereto desire to fix the just compensation to be paid to the Shipbuilding Corporation in accordance with the provisions of such Urgent Deficiency Act, and to that end the Fleet Corporation is willing to increase such contract prices. . . .

"The Fleet Corporation hereby agrees to pay to the Shipbuilding Corporation as just compensation for the

completion of said ten ships, hulls Nos. . . . the entire cost of construction of said ships, figured from the commencement by the Shipbuilding Corporation of the construction of said ten ships up to the times of completion thereof respectively, and in addition thereto with respect to each ship ten dollars ($10) per dead-weight ton for profit. There shall be credited, however, in favor of the Fleet Corporation all sums heretofore received by the Shipbuilding Corporation on account of the construction of such ten ships respectively, either from the former owners or from the Fleet Corporation."

The amended petition, filed June 12, 1920—prior to our decision of *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 513—and upon which the cause was tried, alleges—

"That said builder, the New York Shipbuilding Company, had, up to the 3d day of August, 1917, duly contracted for all of the materials, equipment and supplies sufficient to complete said ship as specified in said contract, and that a large portion of such material, equipment and supplies had been duly prepared and delivered to the yard of said builder on said day, and that the remainder thereof, sufficient to complete said ship, had been duly contracted for by said builder and was, thereafter, delivered under the provisions of said contracts and entered into the construction and completion of said ship; and that said builder had performed and caused to be performed a large amount of labor under said contract upon, in and about the construction of said ship, and that said builder had duly paid for said contracts for material, equipment and supplies, the delivery thereof, and for the labor furnished and performed in and about such construction by moneys so paid to said builder by said owner as herein stated; and that said builder, on the 3d day of August, 1917, on its part, had fully complied with the terms of said contract, and was then and was always thereafter

ready, able and willing to complete the same in all particulars. . . .

"That on June 15, 1917, by Chapter 29, 40th Statutes at Large, 182, Congress authorized the President, among other things to modify, suspend and cancel or requisition any existing or future contract for the building, production or purchase of ships or materials, etc., and further to purchase, requisition or take over the title to or the possession of, for use or operation by the United States, any ship then constructed or in the process of construction, or thereafter constructed, or any part thereof, or the charter of said ship. In further accordance with said act the President, by order dated July 11, 1917, deputed to the United States Shipping Board Emergency Fleet Corporation full power to act thereunder including the power to provide just compensation therefor, and the said corporation, by its order of August 3, 1917, on behalf of the United States, took over all the property of the claimant in or under said contract, including the said ship under construction and all materials, machinery, equipment, outfit and commitments therefor, and all labor performed thereon necessary for its completion, meaning thereby everything in existence and as expressed in said order 'required to complete the construction of said requisitioned ships under construction,' as will more fully appear by reference to the order of W. L. Capps, General Manager, which reads as follows. [Here follows copy of requisition-notice to the Shipbuilding Corporation dated August 3rd and enclosed in letter of August 28th addressed to Carpenter-O'Brien Company.] . . .

"That said requisition order was fully complied with and all of the property of said owner, the claimant herein, hereinbefore described, was taken by the said United States Shipping Board Emergency Fleet Corporation for and on behalf of the United States, and was thereafter retained by and used for the purposes of the United States

as provided by law. And that the said owner was thereby and thereafter deprived of all of its use and value. That said ship so taken was then under construction by said builder and thereafter was fully completed without change of plans or specifications from those set forth in the said construction contract as amended and supplemented, and that the said materials, equipment, outfit and supplies, and the said commitments and contracts for materials, equipment, outfit and supplies as described in said requisition order and paid for by the said owner and taken as aforesaid, were actually used in the construction and completion of said ship and were substantially sufficient to so construct, complete, equip and supply said ship as described in said plans and specifications as amended and supplemented. . . .

"That a fair and reasonable value of the said property so requisitioned and taken, and of which said owner was deprived on said 3d day of August, 1917, as aforesaid, was, at the rate of two hundred fifty dollars ($250) per ton for 8,597 dead weight tons, the sum of two million, one hundred forty-nine thousand, two hundred fifty dollars ($2,149,250) less the sum of four hundred twelve thousand, one hundred thirty dollars ($412,130) as aforesaid, (required to be paid by said owner to said builder under the provisions of said construction contract as amended and supplemented, in order to fully complete, supply and equip said ship in accordance with the terms and conditions of said construction contracts hereinbefore set forth), so that the total amount due to said claimant on the said 3d day of August, 1917, on account of the transactions hereinbefore set forth was the sum of one million, seven hundred thirty-seven thousand, one hundred twenty dollars ($1,737,120)."

The ship was finally completed and delivered September 20, 1918.

Departing from the theory of the complaint, petitioner now maintains that its right and interest in the shipbuild-

ing contract were expropriated by the United States for public use; that the contract itself was requisitioned, not frustrated; and that compensation must be made for the full value of the contract as of the date when so taken. The Court of Claims denied this demand, but held petitioner should receive the sum of partial payments which it made to the shipbuilder under the contract prior to the requisition order of August 3, 1917, with interest.

I can find no sufficient basis for holding that the Fleet Corporation expropriated the claimant's contract or intended so to do, or consciously assumed liability for the value thereof. Claimant never had either title to or possession of the vessel. It was only a responsible party to an executory contract for construction, always subject to frustration by condemnation of the vessel.

The order of August 3rd, addressed only to the Shipbuilding Corporation, plainly recites that "all power-driven cargo-carrying, and passenger ships above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States." On that date the Shipbuilding Corporation had possession of the ship as well as title thereto. The United States then assumed control and the immediate result was to frustrate the building contract. Frustration by the exercise of the power of eminent domain was an implied condition. The United States became liable to the owner—the Shipbuilding Corporation—for the value of property actually taken. What that value was we need not inquire; the builder accepted the requisition-order and the agreement of December 8th, and does not now seek to recover more.

Certainly, no notice concerning requisition went to the Brooks-Scanlon Corporation prior to the letters of August 18th and 28th, whereas the building contract had been frustrated by taking the ship on August 3rd.

The communication of August 22nd to the Shipbuilding Corporation referred to the vessels in the yard as having been "requisitioned under the corporation's order of August 3rd, precedent to the final examination of the contract for the vessels in question," and "title thereto taken over by the United States"; directed their completion in conformity with contract, etc., which existed on that date; and stated that "for the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid," with a certain important proviso.

On September 20th the Shipbuilding Corporation recognized that the ship had been requisitioned by the order of August 3rd and promised to complete upon payment of compensation named in original contract and "such additional compensation as may be agreed upon."

The telegram of September 13th referred to "requisitioned ships." The contract of December 8th recites that "on August 3, 1917, all of such ships, together with the materials assembled therefor, were requisitioned by the Fleet Corporation."

The notices addressed to East Coast Transportation Company and Carpenter-O'Brien Company, August 18th and 28th, indicate that on August 3rd the Fleet Corporation was unaware of the parties to or the terms of the building contract. These notices declared a purpose to "consider payments to the contractor accruing since the date of requisition," and an intention "to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder;" and further, "it will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above."

The reported facts seem inconsistent with any definite purpose by the Fleet Corporation to requisition the con-

tract, as distinguished from the vessel itself—certainly, there was no apparent reason for any such action. It expressed a purpose to reimburse for payments made under the building contract and to consider such sums when seeking to determine compensation for the shipbuilder. It also demanded that the builder should complete the vessel as provided by the contract. The builder acquiesced, and its rights are not now in controversy. The right of the claimant to reimbursement for the actual payments which it made under the contract prior to frustration is not challenged; it was properly considered in adjusting the sums to be paid to all parties. I can see no sufficient reason for awarding the value of a contract which perhaps might have been realized if the United States had not exercised their clear right to take over the partially completed vessel. No such claim was advanced by the petition; there was ample power in the Fleet Corporation to frustrate the building contract; and there seems no necessity for interpreting its action as accomplishing more. The Fleet Corporation evidently intended to requisition the vessel; and when claimant filed its petition in 1920 it does not seem to have thought the contract had been requisitioned. A few vague and general words used in the hurry of the times and without full information ought not to place an enormous, wholly unnecessary and unanticipated burden on the public treasury.

The amended petition upon which the cause was tried proceeds upon the theory that claimant was *owner* of the vessel; that prior to August 3, 1917, the builder had duly contracted for all necessary material and supplies to complete the ship, performed much labor thereon, and had paid for all these things out of moneys received from the *owner*. It distinctly alleges: That the Fleet Corporation, "by its order of August 3, 1917, on behalf of the United States, took over all the property of the claimant in or under said contract, including the said ship under con-

struction and all materials, machinery, equipment, outfit and commitments therefor, and all labor performed thereon necessary for its completion, meaning thereby everything in existence and as expressed in said order 'required to complete the construction of said requisitioned ships under construction.' . . . That said requisition order was fully complied with and all of the property of said owner, the claimant herein, hereinbefore described, was taken by the said United States Shipping Board Emergency Fleet Corporation for and on behalf of the United States, and was thereafter retained by and used for the purposes of the United States as provided by law."

The court below—rightly, I think—declared: "The intent and purpose of the Shipping Board was, therefore, to requisition ships under construction, which was done in unmistakable language. It is admitted that the ships under construction, the materials, and so forth in the yard of the New York Shipbuilding Corporation were the property of that corporation, and the title to that property was in the Shipbuilding Corporation alone. Among the ships under construction so requisitioned was hull 193, which the Shipbuilding Corporation was building for the Carpenter-O'Brien Corporation, but it is not contended by the plaintiff that it had any title to or interest in said ship or the materials for its completion. All the interest it had was the right to the delivery of the ship when it should be completed. It follows that the United States did not take or requisition the ship or materials from the Carpenter-O'Brien Corporation nor did the United States take over or requisition the contract which the Carpenter-O'Brien Corporation had with the Shipbuilding Corporation.

"It was made plain to the Carpenter-O'Brien Corporation that the United States did not intend to requisition the contract, for on August 28, 1917, after notifying the

Carpenter-O'Brien Corporation that it had taken over and requisitioned this ship from the Shipbuilding Corporation, the Shipping Board by letter of that date stated what its intention was. A copy of said letter is set forth in full in Finding VI. As further evidence showing the intention of the Shipping Board, reference is made to the letter of the board to G. R. McDermott, its officer, and which was communicated to the Shipbuilding Corporation. A copy of this letter is set forth in Finding VIII. And as final evidence that the United States did not requisition the contract, and never intended to, the United States entered into a contract with the Shipbuilding Corporation for the completion of all ships under construction in its yard, included in which ships was hull 193, thereby making its own contract for the completion of this ship. This contract is set out in Finding XVI. It is true that the plaintiff by reason of the requisitioning of the ship by the United States was deprived of the right to have delivered to it the ship when completed.

"But there has been in this case no direct taking of the contract. The injury inflicted upon the plaintiff is a consequential injury resulting from the exercise of a lawful power in the requisitioning of the ship under construction. The requisitioning has worked indirectly harm and loss to the plaintiff, but not such harm and loss as can be held to obligate the Government to pay for it. The action of the Government may have destroyed the worth of the contract, but the law affords no remedy. The Government by requisitioning the subject matter of the contract does not thereby take the contract. The subject matter in this case was the ship under construction, and that was what the Government requisitioned, not the contract which was the agreement and obligation to perform. The performance of the contract in this case was frustrated and not appropriated. 'Frustration and appropriation are essentially different things.' *Omnia Commercial Company* v. *United States*," *supra*.

The principles involved have been so recently discussed in *Omnia Commercial Co.* v. *United States,* that it seems unnecessary to restate them. We there said: "In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government. The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things."

The evidence fails to show any definite purpose by the Fleet Corporation to requisition the contract. Up to the time of instituting suit the claimant evidently was unaware of any such requisition. And it seems to me clear enough that the court below rightly concluded that the demand now advanced is without merit.

MR. JUSTICE SANFORD concurs in this opinion.

HECHT ET AL., TRUSTEES, *v.* MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

HOWARD ET AL., TRUSTEES, *v.* MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

HOWARD ET AL., TRUSTEES, *v.* CASEY, FORMER ACTING COLLECTOR OF INTERNAL REVENUE.

CROCKER ET AL., TRUSTEES, *v.* MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

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

Nos. 99, 100, 101, 119. Argued May 3, 1923.—Decided May 12, 1924.

1. The special excise tax laid by the Revenue Act of 1916 on "every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory," did not apply to associations, such as "Massachusetts Trusts," not organized under, or deriving any quality or benefit from, a statute. *Eliot* v. *Freeman*, 220 U. S. 178. P. 151.
2. In adopting language used in an earlier act, Congress must be regarded as adopting also the construction given that language by this Court. P. 153.
3. The special excise laid by § 1000 (a) of the Revenue Act of 1918 (40 Stat. 1057) on every "domestic corporation,"—the act (§ 1) defining the term "corporation" as including "associations, joint-stock companies, and insurance companies," and the term "domestic," when applied to a corporation or partnership, as meaning "created or organized in the United States,"—extends to organizations exercising the privilege of doing business as associations under the common law. P. 154.
4. Organizations, known as "Massachusetts Trusts," created by trust agreements, whereby property was conveyed to and managed in business operations by trustees, the shares of the *cestuis que trustent* being represented by transferable certificates entitling holders to

share ratably in the income and, upon termination of the trust, in the proceeds of the property, *held* "associations" created or organized in the United States and engaged in business, within the meaning of the Revenue Act of 1918, *supra, loc. cit. Crocker* v. *Malley*, 249 U. S. 223, distinguished. P. 156.

5. The Revenue Act of 1918 bases the special excise tax of a domestic association upon the average value of its "capital stock" including surplus and undivided profits. *Held*, that, in the absence of a fixed share capital, the "capital stock" is the net value of the property owned by the association and used in its business. P. 162.
6. Where taxes were unlawfully assessed under the Revenue Act of 1916, and paid under protest, the Government was entitled to retain the money in part satisfaction of a lawful retroactive assessment for the same period under the Revenue Act of 1918. P. 163.

281 Fed. 363, affirmed in part and reversed in part.

CERTIORARI to judgments of the Circuit Court of Appeals which reversed judgments of the District Court in favor of the present petitioners, in their actions to recover moneys paid, under protest, as special excise taxes.

Mr. Edward F. McClennen, with whom *Mr. William H. Dunbar* and *Mr. Allison L. Newton* were on the brief, for petitioners in Nos. 99, 100 and 101.

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

Mr. Harrison M. Davis, with whom *Mr. Felix Rackemann* was on the brief, for petitioners in No. 119.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These four cases, which were heard together, involve the question whether the trustees of three "Massachusetts Trusts" are subject to the special excise taxes imposed upon certain "associations" by the Revenue Act of 1916

(39 Stat. 756, c. 463), and the Revenue Act of 1918[1] (40 Stat. 1057, c. 18), based upon the value of their capital stock.

The petitioners in Case No. 99 are the trustees of the "Hecht Real Estate Trust"; in Nos. 100 and 101, the trustees of the "Haymarket Trust"; and in No. 119, the trustees of the "Crocker, Burbank & Co. Ass'cn." Excise taxes were assessed against them under these acts and paid under protest.[2] They then brought suits for refund in the Federal District Court in Massachusetts, and had recoveries. 276 Fed. 830. The judgments in their favor were reversed by the Circuit Court of Appeals. 281 Fed. 363. And these writs of certiorari were granted. 260 U. S. 715, 717.

The "Massachusetts Trust" is a form of business organization, common in that State,[3] consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the prop-

[1] The date of this Act is February 24, 1919.

[2] In No. 99 the trustees of the Hecht Trust were assessed under the Act of 1916 with taxes for the six months ending June 30, 1917, and the year ending June 30, 1918; and under the Act of 1918 for the years ending June 30, 1919, and June 30, 1920. In No. 100 the trustees of the Haymarket Trust were assessed under the Act of 1916 with a tax for the year ending June 30, 1919; and in No. 101 they were assessed under the Act of 1918 with an additional tax for the year ending June 30, 1919, and a tax for the year ending June 30, 1920. In No. 119 the trustees of the Crocker Association were assessed under the Act of 1916 with a tax for the year ending June 30, 1919, and under the Act of 1918 with an additional tax for the same year.

[3] Such trusts also exist in other States. See generally, as to their characteristics, Sears' "Trust Estates as Business Companies," and Wrightington's "Unincorporated Associations."

erty is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created. *Williams* v. *Milton,* 215 Mass. 1, 6; *Frost* v. *Thompson,* 219 Mass. 360, 365; *Dana* v. *Treasurer,* 227 Mass. 562, 565; *Priestley* v. *Treasurer,* 230 Mass. 452, 455.

These trusts—whether pure trusts or partnerships—are unincorporated. They are not organized under any statute; and they derive no power, benefit or privilege from any statute. The Massachusetts statutes, however, recognize their existence and impose upon them, as " associations," certain obligations and liabilities.[4]

The Hecht Real Estate Trust was established by the members of the Hecht family upon real estate in Boston used for offices and business purposes, which they owned as tenants in common. It is primarily a family affair. The certificates have no par value; the shares being for

[4] By c. 441 of the Acts of 1909, the trustees of " a voluntary association under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares," are required to file copies of the instrument of trust with designated public officers; and by c. 184 of the Acts of 1916, such associations may be sued for debts, obligations, or liabilities, and their property may be subjected to attachment and execution as if they were corporations. See 2 General Laws, 1921, c. 182.

one-thousandths of the beneficial interest. They are transferable; but must be offered to the trustees before being transferred to any person outside of the family. The trustees have full and complete powers of management; but no power to create any liability against the certificate holders. There are no meetings of certificate holders; but they may, by written instrument, increase the number of trustees, remove a trustee, appoint a new trustee if there be none remaining, modify the declaration of trust in any particular, terminate the trust, or give the trustees any instructions thereunder.

The Haymarket Trust is strictly a business enterprise. It was established by the original subscribers who furnished the money for the purchase of a building in Boston used for store and office purposes. The shares are of the par value of $100 each. Except as otherwise restricted, the trustees have general and exclusive powers of management, but no power to bind the certificate holders personally. At any annual or special meeting of the certificate holders, they may fill any vacancies in the number of trustees, depose any or all the trustees and elect others in their place, authorize the sale of the property or any part thereof, and alter or amend the agreement of trust.

The Crocker, Burbank & Co. Ass'cn. is also a business enterprise. It was formerly entitled The Wachusett Realty Trust. The certificates have no par value; the shares being for ninety-six thousandths of the beneficial interest in the property. The trustees originally held the fee of certain lands subject to a long lease and the stock of a Massachusetts corporation engaged in manufacturing paper and owning and operating several mills. In *Crocker* v. *Malley,* 249 U. S. 223 (1919), in which the original trust instrument was before the Court, it was held that the trustees were not subject as to the dividends received from the corporation to the tax imposed by the Income Tax Act of 1913 upon the net income of "every corporation,

joint-stock company or association, . . . organized in the United States," but were subject only to the duties imposed by the Act upon trustees. The original trust agreement involved in that case has now, however, been modified, with the assent of the certificate holders. By this modification "the form of (the) organization" was specifically "changed to that of an association," under its present name. The trustees were authorized to surrender the stock of the manufacturing corporation, to acquire instead its entire property, and to carry on the business theretofore conducted by it, or any substantially similar business. The title to all the trust property "and the right to conduct all the business" were vested exclusively in the trustees, who were authorized to designate from their number a president and other officers and to prescribe their duties. The certificate holders were authorized, at any meeting, to remove any trustee and elect trustees to fill any vacancies. Since the modification of the trust agreement the trustees have carried on the manufacturing business in substantially the same manner as it was formerly conducted by the corporation.

To determine rightly the scope and effect of the Revenue Acts now in question it is necessary to bear in mind the previous legislation on the same subject, and the interpretation given it by the decisions of this Court.

Section 38 of the Act of August 5, 1909, c. 6, 36 Stat. 11, 112—commonly called the Corporation Tax Law—provided: "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory . . . , or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing busi-

ness . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources . . . ; or if organized under the laws of any foreign country, . . . from business transacted and capital invested within the United States and its Territories. . . ." [5]

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911), the Court, in sustaining the constitutionality of this section of the Act, said that the domestic corporations, joint stock companies or associations, as well as the insurance companies, "must be such as are now or hereafter organized under the laws of the United States or of any State or Territory", and that the tax was imposed "upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described", that is, "upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises."

In *Eliot* v. *Freeman*, 220 U. S. 178, 185 (1911), it was held that this excise tax did not apply to two typical Massachusetts trusts. The Court said: "Under the terms of the Corporation Tax Law, corporations and joint stock associations must be such as are 'now or hereafter organized under the laws of the United States or of any State or Territory. . . .' The language . . . 'now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment. . . . The description of the corporation or joint stock association as one organized under the laws of a State at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations. . . . Entertaining the view that it was the

[5] Provisions referring to Alaska and the District of Columbia and to certain deductions, which are immaterial for present purposes, are omitted in this and subsequent citations.

intention of Congress to embrace within the corporation tax statute only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law, we are of opinion that the real estate trusts involved in these two cases are not within the terms of the act."

We come now to the consideration of the Acts involved in the present cases.

1. *Revenue Act of 1916.*—Section 407, Title IV, of this Act provides (39 Stat. 789) that: "Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, *now or hereafter organized under the laws of the United States, or any State or Territory* . . . , shall pay annually a special excise tax with respect to the carrying on or doing business . . . , equivalent to 50 cents for each $1,000 of the fair value of its capital stock," including the surplus and undivided profits, but less an exemption of $99,000 from the capital stock.

And, in a separate paragraph, that "Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States shall pay annually a special excise tax . . . , equivalent to 50 cents for each $1,000 of the capital actually invested in the transaction of its business in the United States."

Section 10, Title I, also provides that there shall be paid annually a tax of two per centum upon the net income received "by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized."

The bill as introduced in the House of Representatives contained this provision for an income tax, but no pro-

vision for an excise tax. It was amended in the Senate so as to impose on every corporation, joint-stock company or association, as defined and limited in § 10, Title I, that is, "organized in the United States, no matter how created or organized", a special tax of 50 cents for each $1,000 "of capital, surplus and undivided profits used in any of the activities or functions of their business." The Chairman of the Senate Committee on Finance, in reporting the bill with this amendment, referred to it as "imposing a small tax upon corporations in the nature of a license tax for doing business." The House, however, did not agree to this amendment. And later, pursuant to the report of a Conference Committee, there was inserted in the bill, in lieu of the Senate amendment, the provision for a special excise tax now contained in § 407 of the Act, in which the words "no matter how created or organized" were omitted, and the words "organized under the laws of the United States, or any State or Territory", which had been contained in the Act of 1909, were inserted. 64th Cong. 1st sess., H. R. 16763, and Sen. Rep. No. 793, Pt. 1, p. 2; 53 Cong. Rec., Pt. 11, p. 10663, and Pt. 13, p. 14020.

It thus appears that Congress intended to make a clear distinction between the provisions relating to the income tax and to the excise tax, and purposely framed them, as shown by the amendment incorporated in the bill before its final passage, so that while the income tax provision should apply to all domestic corporations, joint-stock companies or associations, no matter how created or organized, the excise tax provision should only apply to such as were organized under statutory law. See *United States* v. *Press Publishing Co.*, 219 U. S. 1, 13; *United States* v. *St. Paul Railway*, 247 U. S. 310, 318.

The words, "now or hereafter organized under the laws of the United States, or any State or Territory", appear in the Act of 1916 in precisely the same place with reference

to the preceding words "every corporation, joint-stock company or association" as in the Act of 1909, and are separated from them in like manner by the phrase "and every insurance company", followed by the like comma. And it is clear that in the intermediate phrase "now or hereafter organized in the United States for profit and having a capital stock represented by shares", the words "in the United States" were inserted in the Act of 1916 after the word "organized" merely by reason of the fact that this Act refers to domestic and foreign corporations, joint-stock companies and associations in two separate paragraphs instead of in the same paragraph as in the Act of 1909. The words "organized in the United States" have no different effect, as applied to domestic corporations, joint-stock companies and associations, from the word "organized" as used in the Act of 1909, and in no wise remove the ensuing general limitation that they must be such as are "organized under the laws of the United States, or any State or Territory."

And since these limiting words, when used in the Act of 1909, had been held by this Court, in *Eliot* v. *Freeman,* to show the intention of Congress to embrace within the statute only such corporations and joint-stock associations as "are organized under some statute, or derive from that source some quality or benefit not existing at the common law," they must be given the same meaning and effect when used in the Act of 1916. In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment. *Sessions* v. *Romadka,* 145 U. S. 29, 43; *Latimer* v. *United States,* 223 U. S. 501, 504. And here the legislative history of the excise tax provision of the Act of 1916, and the marked contrast between its language and that of the income tax provision of the same Act, plainly show, aside from this rule of statutory construction, that this is what Congress in fact intended.

We conclude that as the trusts involved in these four cases are not organized under any statute and derive from such source no quality or benefit, they are not within the terms of the excise tax provision of the Act of 1916.

2. *Revenue Act of 1918.*—Section 1 of this Act provides (40 Stat. 1057) that when used in the Act—the "term 'corporation' includes associations, joint-stock companies, and insurance companies"; the "term 'domestic' when applied to a corporation or partnership means *created or organized in the United States*"; and the "term 'foreign' . . . means created or organized outside the United States".

Section 1000(a) provides that in lieu of the tax imposed by § 407 of the Revenue Act of 1916—"Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business,[6] equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year," including the surplus and undivided profits, as is in excess of $5,000; and every "foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year."[7]

By § 1400(a), Title IV of the Revenue Act of 1916—including § 407 relating to excise taxes—is specifically repealed, except for the assessment and collection of taxes accrued thereunder and the imposition and collection of penalties and forfeitures.

Reading together the defining and enacting sections of the Act it is as if § 1000(a) provided in terms that: Every

[6] Sub-section (c) provides that the tax imposed by this section shall not apply in any year to any corporation which is not engaged in business.

[7] These excise tax provisions of the Revenue Act of 1918 are reënacted, in like terms, in the Revenue Act of 1921, 42 Stat. 227, 294.

corporation, association, joint-stock company and insurance company, "created or organized in the United States", shall pay a special excise tax, as prescribed, with respect to the carrying on or doing business. And it must be given effect as thus read.

The terms of this Act are in marked and significant contrast with those of the Acts of 1909 and 1916. Not only is the Act of 1916 specifically repealed, but the well-defined words of limitation "organized under the laws of the United States, or any State or Territory", that had been used in that Act as well as in the Act of 1909, are omitted; and in lieu thereof the excise tax is extended, broadly, to every "association" created or organized in the United States and carrying on or doing business therein. And thereby, in our opinion, the intention of Congress is plainly shown to extend the tax from one imposed solely upon organizations exercising statutory privileges, as theretofore, to include also organizations exercising the privilege of doing business as associations at the common law.

It is true that the Chairman of the Ways and Means Committee of the House of Representatives in a statement as to "the general principles of the bill",—which included many kinds of taxes—while saying that the committee had made an important change in the rates and exemptions in the capital stock tax, made no reference to any enlargement of the class of organizations to which the tax would apply; and that the Chairman of the Senate Committee on Finance, in reporting on the bill, while stating that it "provided for the continuance of the capital stock tax on the basis of the fair average value of the capital stock of the corporation," and made certain changes in rates, likewise made no reference to any such enlargement in the scope of its provisions. 56 Cong. Rec., Pt. 12, App. p. 698; 65th Cong. 3d sess., Sen. Rep. No. 617, p. 17. We cannot, however, regard the slight negative inference which might

be drawn from the failure of these chairmen to point out the enlargement of the class of organizations made subject to the excise tax, as sufficient to overcome the evidence of the legislative intention drawn from the plain and unambiguous language of the Act itself, emphasized by the contrast with that of the Act of 1916 which it supplanted.

Nor can we agree with the contention that the definition clause of the Act is not to be held applicable to the excise tax provision on the ground that the Act consolidated many former taxing acts and its general definitions may have been inadvertently extended to the excise tax provision without any actual intention of departing from the language of the former statute in this respect. This is not a mere revision and consolidation of former statutes to which a new interpretation is not to be given without some substantial change in phraseology. *McDonald* v. *Hovey,* 110 U. S. 619; *Buck Stove Co.* v. *Vickers,* 226 U. S. 205. It is a new statute, supplanting and changing the former statutes in many respects, and in which there is a significant change of phraseology, incorporated in the general definition clause made applicable, expressly, to every provision of the Act.

Nor does the language of the Act in this respect call for the application of the established rule that in the interpretation of statutes levying taxes their provisions are not to be extended by implication beyond the clear import of the language used, and in case of doubt are to be construed most strongly against the Government and in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Merriam,* 263 U. S. 179, 187. Here the language of the Act is specific, leaving no substantial doubt as to its meaning; and the taxpayers are seeking by implication to limit its clear import.

3. We also conclude that these three trusts are "associations" created or organized in the United States and engaged in business, within the meaning of the Act. The trustees of the Hecht and Haymarket Trusts insist that

they are not such "associations". The trustees of the Crocker Association on the other hand admitted in the Circuit Court of Appeals and at the bar, that since the modification of the original trust agreement, the trust constitutes an "association".

The word "association" appears to be used in the Act in its ordinary meaning. It has been defined as a term "used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." 1 Abb. Law Dict. 101 (1879); 1 Bouv. Law Dict. (Rawle's 3rd Rev.) 269; 3 Am. & Eng. Enc. Law (2d ed.) 162; and *Allen* v. *Stevens* (App. Div.), 54 N. Y. S. 8, 23, in which this definition was cited with approval as being in accord with the common understanding. Other definitions are: "In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation." Webst. New Internat. Dict. "[U. S.] An organized but unchartered body analogous to but distinguished from a corporation." Pract. Stand. Dict. And see *Malley* v. *Bowditch* (C. C. A.), 259 Fed. 809, 812; *Chicago Title Co.* v. *Smietanka* (D. C.) 275 Fed. 60: also *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 392, in which unincorporated labor unions were held to be "associations" within the meaning of the Anti-Trust Law.

We think that the word "association" as used in the Act clearly includes "Massachusetts Trusts" such as those herein involved, having quasi-corporate organizations under which they are engaged in carrying on business enterprises.[8] What other form of "associations", if any, it includes, we need not, and do not, determine.

[8] In the present cases the Circuit Court of Appeals said: "It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been

It is true that in *Eliot* v. *Freeman, supra,* at p. 186, it was said that the two trusts there involved could "hardly be said to be organized, within the ordinary meaning of that term." However, the decision was based solely upon the ground that they were not subject to the tax imposed by the Act of 1909 because they were not organized under any statute; and the inference from the entire opinion is that if the Act had not required such a statutory organization they would have been held to be within its terms. And we think that the present trusts are both "created" and "organized" in the United States within the meaning of the Act.

The trustees of the Hecht and Haymarket Trusts earnestly rely, however, upon the decision in *Crocker* v. *Malley, supra,* as conclusively determining that they cannot be held to be "associations" unless the trust agreements vest the shareholders with such control over the trustees as to constitute them more than strict trusts within the Massachusetts rule. This case arose under § II, G(a), of the Income Tax Act of 1913 imposing a tax upon the net income of "every corporation, joint-stock company or association . . . organized in the United States, no matter how created or organized." Section II, D, provided that trustees or other fiduciaries were exempt from

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indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance. At least two substantial text-books have been written on the law concerning such organizations and dealing with their advantages for general business purposes. . . . In *Dana* v. *Treasurer,* 227 Mass. 562, 565, it appears that the Amoskeag Manufacturing Company, commonly known to be one of the largest enterprises in New England, is so organized. The Pepperell Manufacturing Company, before this court in *Malley* v. *Bowditch, supra,* had a capitalization of over $7,500,000; the Crocker Trust operates large paper manufacturing mills, employing about 1,000 men, with gross assets of over $10,000,000." 281 Fed. at p. 370.

this tax upon dividends received from corporations taxable upon their net income. The precise question was whether the trustees of The Wachusett Realty Trust were subject to the income tax upon dividends received from a Massachusetts corporation that was itself taxable upon its net income. The trustees insisted that they were not an "association" subject to this tax, under G(a), but merely trustees and entitled to the exemption as fiduciaries under D. The trust had been created by a Maine corporation which contemplated dissolution, for the benefit of its shareholders. It had transferred to the trustees the fee of certain lands leased to a Massachusetts manufacturing corporation engaged in operating several mills, and also the stock in that corporation which it held. The purpose of the trust was to convert this property into money and distribute the net proceeds to the beneficiaries, within a period left to the discretion of the trustees. Meanwhile they were to distribute the net income, but could apply any funds for the repair and development of the property or the acquisition of other property, pending conversion and distribution. Their function, as emphasized in the opinion, was not to manage the mills, but simply to collect the rents and income, with a large discretion in its application. The beneficiaries had no control except in certain matters in which their consent was required.

The Court, after stating that the declaration of trust on its face was "an ordinary real estate trust of the kind familiar in Massachusetts," and that there could be "little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more," said that "as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability the language of the statute must make the intention clear;" and that "it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they

have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. . . . We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G(a)."

This opinion is based primarily upon the view that the Income Tax Act, considering its purpose, did not show a clear intention to impose upon the trustees as an "association" a double liability in reference to the dividends on stock in the corporation that itself paid an income tax, when considered as "trustees" they were by another provision of the Act exempt from such payment. And the language used *arguendo* in reaching this conclusion that the trustees could not be deemed an association unless all trustees with discretionary powers are such, and that there was no ground for grouping together the beneficiaries and trustees in order to turn them into an association—is to be read in the light of the trust agreement there involved, under which the trustees were, in substance, merely holding property for the collection of the

income and its distribution among the beneficiaries, and were not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187, 190. And see *Smith* v. *Anderson,* L. R., 15 Ch. Div. 247.

It results that *Crocker* v. *Malley* is not an authority for the broad proposition that under an Act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts Trust engaged in the carrying on of business in a quasi-corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an "association" within the meaning of its provisions.

We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the Act of 1918; this being true independently of the large measure of control exercised by the beneficiaries in the *Hecht* and *Haymarket* cases, which much exceeds that exercised by the beneficiaries under the Wachusett Trust. We do not believe that it was intended that organizations of this character—described as "associations" by the Massachusetts statutes and subject to duties and liabilities as such—should be exempt from the excise tax on the privilege of carrying on their business merely because such a slight measure of control may be vested in the beneficiaries that they might be deemed strict trusts within the rule established by the Massachusetts courts.

That the Crocker Association is engaged in carrying on business within the meaning of the Act, is obvious. And so of the Hecht and Haymarket Trusts. A corporation

owning and renting an office building is engaged in business within the meaning of an excise statute. *Flint* v. *Stone Tracy Co., supra,* p. 171; *Zonne* v. *Minneapolis Syndicate, supra,* at p. 190.

4. It is urged, however, by the trustees of the Crocker Association that they are not subject to an excise tax under the Act of 1918, because the tax imposed on a domestic "association" is measured by "the fair average value of its capital stock"; the argument being that this tax, of necessity, can apply only to "associations" having a fixed "capital stock" represented by shares, that is, a designated share capital whose amount is fixed by the articles of association or trust agreement. Hence, it is insisted, the tax cannot apply to this Association, which, it is claimed, has no "capital stock" within the meaning of the Act. The trustees of the Hecht Trust do not make this contention.

The certificates in this Association, as stated, have no par value; the shares being for ninety-six thousandths of the beneficial interest in the property. No "capital" account is kept by the trustees; but they have a profit and loss account, in which they are charged with all the property transferred to them, at a valuation, against which liabilities and reserves are shown, the balance being carried as the net interest of the shareholders. And their books show the "dividends" disbursed to shareholders. The amount of the present tax was assessed by the Collector by taking the fair value of the assets of the Association over its liabilities, and calling the difference its capital stock.

It is true that, generally speaking, in the technical sense, the capital stock of a corporation is a sum fixed by its corporate charter as the amount paid or to be paid in by the stockholders for the prosecution of the business of the corporation and the benefit of its creditors. 1 Cook on Corporations, 7th ed., 38, and cases cited in note 2.

However, in statutes relating to taxation, sometimes drawn without regard to the technical meaning of the words, the courts will construe "capital stock" to mean the actual property of the corporation, when necessary to carry out the intent of the statute. *Ib.* p. 39; *Security Co.* v. *Hartford,* 61 Conn. 89, 101; *Henderson Bridge Co.* v. *Commonwealth,* 99 Ky. 623, 641. And see *People* v. *Coleman,* 126 N. Y. 433, 439.

We think that in the Act of 1918, in which the tax upon an association is based upon the average value of its "capital stock," including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted, in their entirety, and, in the absence of a fixed share capital, as equivalent to the capital invested in the business, that is, the net value of the property owned by the association and used in its business. As was said by the Circuit Court of Appeals, the phrase in the statute as to "'including surplus and undivided profits' puts beyond doubt the question of the congressional intent to measure this tax by business and financial realities, not by bookkeeping forms or mere names." And this construction is in harmony with the provision as to the excise tax on a foreign association, which is fixed upon the value "of the capital actually invested in the transaction of its business in the United States."

We therefore conclude that the Crocker Association was also subject to the tax, and that this was properly measured by the Collector by the net value of its property—no question being made as to the correctness of his valuation.

5. A question remains in Cases Nos. 100 and 119—which has not been argued by counsel—as to the taxes for the years ending June 30, 1919, which were assessed against the trustees of the Haymarket Trust and the Crocker Association under the Act of 1916, and paid by them before the passage of the Act of 1918. The latter Act, which was approved and became effective February

24, 1919, was retroactive in its provisions and covered the year ending June 30, 1919 (40 Stat. 1126). Thereafter additional taxes were assessed against the trustees, representing the differences between the amount of the taxes which they had paid under the Act of 1916 and those prescribed by the Act of 1918. See note 2, p. 146, *supra*.

In view of the retroactive provision of the Act of 1918, we are of opinion that the taxes for the year ending June 30, 1919, cannot now be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States. See *Anderson* v. *Loan & Trust Co.* (C. C. A.), 241 Fed. 322, 325, and *New York Life Ins. Co.* v. *Anderson* (C. C. A.), 263 Fed. 527, 530; also *Crocker* v. *Malley*, *supra*, at p. 235.

The decrees of the Circuit Court of Appeals are accordingly affirmed in cases Nos. 100, 101, and 119; and in No. 99 affirmed as to the taxes assessed for the years ending June 30, 1919, and June 30, 1920, and reversed as to those assessed for the six months ending June 30, 1917, and the year ending June 30, 1918.

Affirmed in part.
Reversed in part.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS took no part in the decision of these cases.

UNITED STATES *v.* FERRIS.

APPEAL FROM THE COURT OF CLAIMS.

No. 217. Argued April 8, 1924.—Decided May 26, 1924.

An army officer was not "serving with troops operating against an enemy," within the meaning of § 7 of the Act of April 26, 1898, c. 191, 30 Stat. 364, while exercising a command in a camp of instruction in this country during the late war in Europe. P. 166. 57 Ct. Clms. 566, reversed.

APPEAL from from a judgment of the Court of Claims which sustained the claim of an army officer for increased pay and allowances.

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

Mr. Morrison Shafroth, by leave of Court, filed a brief as *amicus curiae.*

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

This was a suit by the plaintiff, a Lieutenant-Colonel of Field Artillery, National Army, in the service of the United States, to recover increased pay and allowances for exercising a command as Colonel of Field Artillery from August 27, 1917, to January 5, 1918. His action is

based on § 7 of the Act of Congress of April 26, 1898, c. 191, 30 Stat. 364, 365, as follows:

"That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised. . . ."

There is no dispute that the claimant is in every respect within the provision of this act except in the requirement that he was "serving with troops operating against an enemy." The Court of Claims held that this requirement was complied with, and gave judgment. 57 Ct. Clms. 566. The counsel for the Government oppose this view and seek by this appeal to reverse the judgment.

The claimant exercised his command as Colonel over the 315th Field Artillery, which was part of the 80th Division of the National Army. The division was organized and trained at Camp Lee, Virginia, and later on became a part of the American Expeditionary Force and engaged in action with the enemy.

During the whole period from August 22, 1917, to January 5, 1918, in which the claimant acted as Colonel, the regiment was stationed at Camp Lee, Petersburg, Virginia, and this camp was used as a camp of instruction.

Was this officer serving with troops operating against an enemy? The requirement is that the service shall not only be in time of war, but also with troops operating against the enemy. Troops in instruction camps across the ocean from the field of war can not in any proper sense be held to be operating against the enemy. Camp instruction is doubtless a necessary preliminary step to effective operation against the enemy, but it does not constitute such operation. This act was passed during the Spanish War and the Court of Claims rested its con-

clusion on the opinion of the Attorney General, 22 Ops. Atty. Gen. 95, in which he held that troops assembled in camps of instruction in the United States were to be considered as operating against an enemy under the statute. We think that the construction is so at variance with the ordinary meaning of the language that we can not follow it. It can hardly be said to have become the basis for a long executive construction and practice, because the Spanish War was soon over and the question of its application did not arise until the recent great war. We agree with the opinion of the Paymaster General in 1898 in this matter. He said:

"As yet, although war has been declared to exist between Spain and the United States, there are, in my opinion, with the exception of the troops embarked for the Philippine Islands, no troops 'operating against an enemy'. There is, within our borders, no enemy, within the meaning of the law, for troops to operate against. An army has been called together, and is being drilled, disciplined, and prepared to operate against an enemy, but until that army embarks for a foreign country, or until an enemy appears on our shores, and the army confronts it, it is held that no officer can receive the pay of a higher grade by virtue of anything in the act referred to."

The judgment of the Court of Claims is reversed.

UNITED STATES EX RELATIONE THE BALDWIN COMPANY *v.* ROBERTSON, AS COMMISSIONER OF PATENTS, AND R. S. HOWARD COMPANY.

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

No. 251. Argued April 29, 1924.—Decided May 26, 1924.

1. A decree of the Court of Appeals of the District of Columbia directing dismissal of a bill for want of jurisdiction upon a construction of the Trade Mark Act, is reviewable here by appeal, under Jud. Code, § 250. P. 176.
2. Under § 9 of the Trade Mark Act, the registrant of a trade-mark who successfully resisted an application to cancel before the Commissioner but was defeated on his opponent's appeal to the Court of Appeals of the District of Columbia, may maintain a bill under Rev. Stats., § 4915, to enjoin the Commissioner from canceling the registration. *American Steel Foundries* v. *Robertson,* 262 U. S. 209. P. 177.
3. A bill brought under Rev. Stats., § 4915, to enjoin the Commissioner of Patents from canceling a trade-mark registration pursuant to a decision of the Court of Appeals, is not barred by Rev. Stats., § 4894, where the delay beyond the period there prescribed was justified by the taking of an appeal to this Court which was, however, dismissed for want of jurisdiction. P. 181.

287 Fed. 942; 52 App. D. C. 368, reversed; certiorari denied.

APPEAL from a decree of the Court of Appeals of the District of Columbia reversing a decree of the Supreme Court of the District, which enjoined the cancellation of a trade-mark registration, and directing that the bill be dismissed for want of jurisdiction.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery, Mr. Lawrence Maxwell* and *Mr. John E. Cross* were on the brief, for appellant.

Mr. Samuel S. Watson for appellees.

In an action under the patent laws there is no appeal to this Court. *Chott* v. *Ewing,* 237 U. S. 197; *Hutchin-*

son, Pierce & Co. v. *Loewy,* 217 U. S. 457; *Gompers* v. *United States,* 233 U. S. 604; *Chapman* v. *United States,* 164 U. S. 436.

Section 4915, Rev. Stats., does not authorize this action. It is a statutory provision to secure a purely statutory right; that is, to secure a patent. Its language is unmistakably plain. As pointed out in *Greenwood* v. *Dover,* 194 Fed. 90, the section has come down to us without substantial change from the time when there was no review by any court or judge of decisions of the Commissioner of Patents. Its language goes back to the Patent Act of 1836, when there was first created a board of examiners.

In *Butterworth* v. *Hoe,* 112 U. S. 50, and in *United States* v. *Duell,* 172 U. S. 576, this Court summarized all the instrumentalities provided by Congress since the foundation of the Government for the granting of patents and traced the development of appeals, viz:

In 1793 appeals might be taken to three arbitrators; in 1836 appeals might be taken to the Board of Examiners composed of three disinterested persons whose decision was to be certified to the Commissioner of Patents, who "shall be governed thereby in further proceedings to be had on such application," and remedy by bill in equity was first provided; in 1839, somewhat modified in 1849 and 1852, appeal was provided from the Commissioner to one of the judges of the Circuit Court of the District of Columbia; in 1870 an appeal was provided from the decision of the Commissioner to the Supreme Court of the District sitting in banc "whose decision was to govern further proceedings in the case"; in 1893 appeals were transferred from the Supreme Court of the District sitting in banc to the Court of Appeals of the District, which is the present status.

While Congress provided for the granting of patents in 1790 (c. 7, 1 Stat. 109), it made no enactment in any way relating to trade-marks until 1870, and no valid en-

actment prior to 1881. There is a wide and substantial difference between patents and trade-marks. *Butterworth* v. *Hoe, supra; Trade-Mark Cases,* 100 U. S. 82.

The registration of a trade-mark is solely a statutory privilege and the statutory limitations are strictly construed.

By the Trade Mark Act, Congress granted power to cancel trade-mark registrations exclusively to the Commissioner of Patents, subject only to review by the Court of Appeals of the District of Columbia. Prior to the Act of 1905, there was no provision for canceling a trade-mark registration, and there was no direct review, judicial or administrative, by appeal or otherwise, of decisions of the Commissioner upon matters relating to the registration of trade-marks. *South Carolina* v. *Seymour,* 153 U. S. 353. No court has ever assumed the right to cancel a trade-mark registration, except the Court of Appeals of the District by the procedure expressly provided by the Trade Mark Act itself. Section 13 of that act provides for the cancellation of a trade-mark registration by the Commissioner when the registrant was not entitled to the use of the trade-mark. By § 9, appeal may be taken from the Commissioner to the Court of Appeals of the District.

The "use" referred to has been repeatedly held "to mean the right of exclusive use." *Magic Curler Co.* v. *Porter,* C. D. 1907, 163. The remedy is full, fair and summary, with appeal from the examiner to the Commissioner, and with no time limit for the application, *Planten* v. *Gedney,* 224 Fed. 382.

Section 22 provides for the cancellation of trade-mark registrations when there are interfering registrations by suit in equity. This section corresponds to § 4918, Rev. Stats., applicable to interfering patents. The Trade Mark Act fully provides for every case, both when the Commissioner wrongfully refuses to register a trade-mark

and when he erroneously grants registration. No trade-mark registration has ever been canceled under § 4915, Rev. Stats.; no patent has ever been canceled under § 4915, Rev. Stats.

Except in the case of interfering patents, it is settled law that patents for inventions may be canceled only by the United States, and only under the general principles of equity, and this right is solely within the power of the United States. It has been settled that § 4915, Rev. Stats., does not authorize an action to cancel a patent, even by the United States. *Mowry* v. *Whitney,* 14 Wall. 434; *United States* v. *American Bell Tel. Co.,* 128 U. S. 315; *Same* v. *Same,* 159 U. S. 548; *Briggs* v. *United Shoe Machinery Co.,* 239 U. S. 48.

To interpret § 4915 as authorizing the action at bar, which is to enjoin the cancellation of a trade-mark registration, requires a rewriting of § 4915, and the incorporation into the section of both words and subject matter entirely foreign to its present plain language. Such an interpretation "is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. This is no part of our duty." *Trade-Mark Cases,* 100 U. S. 82; *Hill* v. *Wallace,* 259 U. S. 44; *United States* v. *Temple,* 105 U. S. 97; *United States* v. *First Natl. Bank,* 234 U. S. 245.

As far as counsel has been able to discover, there has been only one decision which even touches the question at bar, by any court, during the years since trade-marks have been registered, and that was in the recent case of *Loughran* v. *Quaker City Chocolate Co.,* 286 Fed. 694, in which the court held that § 4915, Rev. Stats., did not authorize an action to cancel a trade-mark registration, although it held that § 4915 authorized an application to secure registration of a trade-mark.

It is respectfully submitted that *Atkins & Co.* v. *Moore,* 212 U. S. 285, and *American Steel Foundries* v. *Robert-*

son, 262 U. S. 209, have no application, having to do solely with securing the registration of a trade-mark, while the case at bar has to do with the cancellation of a registration; that is, to enjoin a cancellation.

If § 4915, Rev. Stats., does not authorize an action to cancel a patent, much less can it be interpreted to authorize an action to cancel the registration of a mark; and much less still to authorize an action to enjoin the cancellation of a registration of a mark which the Court of Appeals of the District has adjudged should be canceled.

In *Westinghouse Elec. Co.* v. *Ohio Brass Co.* 186 Fed. 518, 520, which was an action for a patent under § 4915, Rev. Stats., the court said: "The right to retry the merits of an application for a patent, by bill in equity, . . . is purely statutory, and is subject to such restrictions as Congress may prescribe."

The Supreme Court of the District is without cognizance of the class of cases to which this case belongs, without power to adjudicate concerning the subject matter here involved. *Cooper* v. *Reynolds,* 10 Wall. 308; *In re Sawyer,* 124 U. S. 200.

There is no presumption of jurisdiction where a court, although one of general jurisdiction, is called upon to exercise special statutory powers, *Galpin* v. *Page,* 18 Wall. 350; nor is there ever any presumption that Congress intended to provide a further review or a retrial. *Ferry* v. *United States,* 85 Fed. 550; *Reynolds* v. *Stockton,* 140 U. S. 254.

Respondent contends that all provisions provided by Congress for the cancellation of trade-mark registrations are contained in §§ 13 and 9 of the Trade Mark Act of 1905, and that these provisions are exclusive, whether regarded as judicial or administrative, except as provided by § 22 of the act, which is applicable only when there are interfering registrations.

It is familiar doctrine that where a right, privilege or remedy is created by statute, the provisions of the statute govern, limit and control the right or remedy and are exclusive. *Wilder Mfg. Co.* v. *Corn Products Co.,* 236 U. S. 165.

By the Trade Mark Act itself Congress regulated the whole subject of cancellation of trade-mark registrations, which was a subject matter entirely within its control and discretion, *United States* v. *American Bell Tel. Co.,* 167 U. S. 224; *United States* v. *Duell,* 172 U. S. 576, 589; the provisions which Congress made are comprehensive; they embrace the whole subject; it is respectfully submitted that these provisions are exclusive.

It is plain that the cancellation provision "was a new remedy", provided as a part of the registration statute itself, "and as the mode of pursuing it was specially pointed out, that mode must be pursued", and that "the remedy thus prescribed is exclusive of all others". *Arnson* v. *Murphy,* 109 U. S. 238; *Middletown Natl. Bank* v. *Toledo, etc., Ry. Co.,* 197 U. S. 394; *Cook County Bank* v. *United States,* 107 U. S. 445; *Jackson* v. *Cravens,* 238 Fed. 117; *Butterworth* v. *Hoe,* 112 U. S. 50; *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356; *Hills & Co.* v. *Hoover,* 220 U. S. 329; *Blumenstock Bros.* v. *Curtis Publishing Co.,* 252 U. S. 436.

If the trade-mark registration statutes are to be regarded as administrative provisions, the courts have no jurisdiction to review their quasi-judicial decisions beyond what is expressly conferred by the Trade Mark Acts themselves. *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428; *United States* v. *Duell,* 172 U. S. 576; *Ness* v. *Fisher,* 223 U. S. 683; *Fong Yue Ting* v. *United States,* 149 U. S. 698.

If it be held that § 4915, Rev. Stats., authorizes this action, it is respectfully submitted that the case at bar was not brought in time.

It has been settled by the decisions of this Court that an action under § 4915 must be brought within one year from the date of the decision of the Court of Appeals of the District in the Patent Office proceeding, unless excuse "to the satisfaction of the court" is pleaded and shown. None is here pleaded. *Gandy* v. *Marble,* 122 U. S. 432; Rev. Stats., § 4894, as amended by Act of March 3, 1897, c. 391, 29 Stat. 694; *Butterworth* v. *Hoe,* 112 U. S. 50; *American Steel Foundries* v. *Robertson,* 262 U. S. 209; *Coleman* v. *American Mach. Co.,* 235 Fed. 531; *McKnight* v. *Metals Co.,* 128 Fed. 51; *In re Hien,* 166 U. S. 432; *Westinghouse Elec. Co.* v. *Ohio Brass Co.,* 186 Fed. 518; *Sutton* v. *Wentroath,* 247 Fed. 493.

The appeals of the Baldwin Company to this Court, which were dismissed for want of jurisdiction, and its applications for writs of certiorari, which were denied (256 U. S. 35), cannot be held to have extended the time within which to file the bill of complaint at bar. *Westinghouse Elec. Co.* v. *Ohio Brass Co., supra; McMillan Contracting Co.* v. *Abernathy,* 263 U. S. 438. Obviously, a litigant, by choosing a wrong court or a wrong remedy, cannot continue a litigation indefinitely when the statutes provide otherwise, as might be done if the time limit could be extended by selecting the wrong court. If this could be done, the statute which limits the time would be a dead letter. *Credit Co.* v. *Arkansas Central Ry. Co.,* 128 U. S. 258, 261; *Conboy* v. *First Natl. Bank,* 203 U. S. 141, 145; *Blaffer* v. *New Orleans Water Co.,* 160 Fed. 389. It is the date of the decision of the Court refusing the patent which is the controlling date. *Gandy* v. *Marble, supra,* 439, 440; *Mattullath Aeroplane Co.* v. *Newton,* 1921 C. D. 103; 279 O. G. 730; *Coleman* v. *American Co.,* 235 Fed. 531; *In re Hien,* 166 U. S. 432.

When the time is limited by act of Congress, it is absolute when the right is strictly statutory. It is jurisdictional. *The Bayonne,* 159 U. S. 687; *Stevens* v. *Clark,*

62 Fed. 321; *Credit Co.* v. *Arkansas Central Ry. Co.*, 128 U. S. 258; *In re McCall*, 145 Fed. 898.

Rules or orders of the courts do not enlarge the time limited by acts of Congress. *Conboy* v. *First Natl. Bank*, 203 U. S. 141; *Credit Co.* v. *Arkansas Central Ry. Co.*, 128 U. S. 258; *United States* v. *Fidelity & Deposit Co.*, 155 Fed. 117; *Arnson* v. *Murphy*, 109 U. S. 238.

As an action under § 4915, Rev. Stats., is "a part of the application for a patent" (*American Steel Foundries* v. *Robertson*, 262 U. S. 209), it is governed by the rules applicable thereto.

The time to take appeals from the Patent Office to the Court of Appeals of the District (40 days) is strictly enforced. *Burton* v. *Bentley*, 14 App. D. C. 471; *Ross* v. *Loewer*, 9 App. D. C. 563; *In re Hien*, 166 U. S. 432. Time is reckoned from the date of the decision of the Court of Appeals and not from the time that notice of the decision is sent to, or received by, the party against whom made (*Burton* v. *Bentley, supra,*) and the running of the time is not suspended by filing a petition for a rehearing. *Ross* v. *Loewer, supra.*

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

The Baldwin Company filed its bill in the Supreme Court of the District of Columbia against the Commissioner of Patents, seeking to enjoin that officer from canceling two registrations of trademarks for pianos of which the complainant claims to be the rightful owner. The trademarks were one for the word "Howard", accompanied by the initials V. G. P. Co. arranged in a monogram dated March 8, 1898, and the other the word "Howard" printed or impressed in a particular and distinctive manner dated October 17, 1905. The R. S. Howard Company came into the case as an intervener and filed an answer denying the right of the complain-

ant to continue to enjoy such registrations and resisting the injunction to prevent the cancellation. The Commissioner of Patents as defendant also filed an answer denying the right of the complainant to the relief sought. The intervener also filed a motion to dismiss the bill for lack of jurisdiction in the court to entertain it. The court denied the motion to dismiss the bill and enjoined cancellation pending the final disposition of the cause. An appeal from this interlocutory order was taken under § 7 of the Act of February 9, 1893, establishing the Court of Appeals for the District of Columbia (27 Stat. 434, c. 74). The Court of Appeals reversed the Supreme Court and remanded the cause with instructions to dismiss the bill. Appeal to this Court was sought and allowed under § 250 of the Judicial Code, which provides as follows:

"Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

"First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

. . . .

"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

The errors assigned were the holding that the Supreme Court was without jurisdiction to entertain the suit, and the direction to dismiss the bill on that account. In addition to the appeal, the appellee in the Court of Appeals petitioned for a certiorari which is now pending.

As the decree of the Court of Appeals directs the dismissal of the bill for lack of jurisdiction, it is a final de-

cree. *Shaffer* v. *Carter,* 252 U. S. 37, 44. As the court based its conclusion upon the construction of § 9 of the Trade Mark Act (33 Stat. 727), and § 4915, Rev. Stats., which was specifically drawn in question by the intervener, and necessarily by the defendant in his answer in denying the complainant's right to relief as claimed by him in his bill under said two sections, we think the appeal was rightly allowed and that the petition for certiorari should be denied.

The controversy between the parties litigant has had several phases. In August, 1914, R. S. Howard Company sought to cancel the registration of the two trademarks of Baldwin & Company, already referred to, by application to the Commissioner. The Commissioner refused, but upon appeal to the Court of Appeals of the District, the decision of the Commissioner was reversed and this was duly certified to the Commissioner. 48 App. D. C. 437. The Baldwin Company appealed to this Court and filed an application for a certiorari as well. The appeal was dismissed and the certiorari denied on the ground that the certificate of the Court of Appeals to the Commissioner was not a final judgment, reviewable here upon appeal or certiorari. 256 U. S. 35. This was April 11, 1921, and on May 7, 1921, the Baldwin Company filed the original bill in this case in the Supreme Court of the District against the Commissioner of Patents, seeking an injunction against the canceling of the trademarks in question. By an amended bill, there was set forth the record in a suit between R. S. Howard Company and Baldwin Company in New York, resulting in an injunction against the use of the word Howard without prefix or suffix by the R. S. Howard Company in sales of pianos. 233 Fed. 439; 238 Fed. 154.

The main question we have here to consider is whether, by the statutes applicable to procedure in settling controversies over the registration of trademarks in inter-

state and foreign trade, a remedy by bill in equity to enjoin the Commissioner of Patents from canceling a registered trademark is given to the owner of the trademark so registered. We are to find the answer in § 9 of the Trade Mark Act (33 Stat. 727, c. 592) and in § 4915 of the Revised Statutes. Section 9 provides as follows:

"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 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, Rev. Stats., provides as follows:

"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 ex-

penses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

We have held that the assimilation of the practice in respect of the registration of trademarks to that in securing patents as enjoined by § 9 of the Trade Mark Act makes § 4915, Rev. Stats., providing for a bill in equity to compel the Commissioner of Patents to issue a patent, applicable to a petition for the registration of a trademark when rejected by the Commissioner. *American Steel Foundries* v. *Robertson,* 262 U. S. 209; *Baldwin Co.* v. *Howard Co.,* 256 U. S. 35, 39 ; *Atkins & Co.* v. *Moore,* 212 U. S. 285, 291.

The present case presents this difference. The defeated party in the hearing before the Commissioner is not asking registration of a trademark but is seeking to prevent the cancellation of trademarks already registered. Section 9 provides for appeals to the District Court of Appeals not only for a defeated applicant for registration of a trademark, but also for a dissatisfied party to an interference as to a trademark, a dissatisfied party who has filed opposition to the registration of a trademark and a dissatisfied party to an application for the cancellation of the registration of a trademark. It seems clear that the complainant below was a dissatisfied party to an application for the cancellation of the registration of a trademark. We think that both the applicant for cancellation and the registrant opposing it are given the right of appeal to the District Court of Appeals under that section.

The next inquiry is whether, in addition to such appeal and after it proves futile, the applicant is given a remedy by bill in equity as provided for a defeated applicant for a patent in § 4915, Rev. Stats. We have in the cases cited given the closing words of § 9 a liberal construction in the view that Congress intended by them to give every

remedy in respect to trademarks that is afforded in proceedings as to patents, and have held that under them a bill of equity is afforded to a defeated applicant for trademark registration just as to a defeated applicant for a patent. It is not an undue expansion of that construction to hold that the final words were intended to furnish a remedy in equity against the Commissioner in every case in which by § 9 an appeal first lies to the Court of Appeals. This necessarily would give to one defeated by the Commissioner as a party to an application for the cancellation of the registration of a trademark, after an unsuccessful appeal to the advisory supervision of the Court of Appeals, a right to resort to an independent bill in equity against the Commissioner to prevent cancellation.

It is pointed out, as militating against our interpretation of § 9 and an assimilation of trademark procedure to that in the case of patents, that, after a patent issues, there is no proceeding provided by which a patent can be canceled except on suit of the United States. *Mowry* v. *Whitney*, 14 Wall. 434, 439; *United States* v. *American Bell Tel. Co.*, 128 U. S. 315, 368, 370; *United States* v. *American Bell Tel. Co.*, 159 U. S. 548, 555; *Briggs* v. *United Shoe Machinery Co.*, 239 U. S. 48, 50. That is true; but a registration of a trademark may be canceled, and the purpose of Congress by § 9 of the Trade Mark Act was to give to defeated applicants in the Court of Appeals the same resort to a court of equity as was given to defeated applicants for patents *so far as the same was applicable*. The applicants in § 9 were of four kinds and to each of them were intended to be accorded the same resort to the Court of Appeals and the same remedy in equity as to the applicant for a patent in § 4915. The inherent differences between trademarks and patents should not prevent our giving effect to the remedial purpose of Congress in carrying out the analogies between the two classes of privileges to secure a common procedure.

The argument is made that § 9 should not be held to authorize the use of a suit in equity for all of the four cases in which appeals are provided to the Court of Appeals from the Commissioner and are unsuccessful, because by § 22 of the same act there is a special provision for a remedy in equity where there are interfering registered trademarks. It is said this excludes the inference that such a remedy is also provided in § 9, on the principle *expressio unius exclusio alterius.* An examination of § 22 shows that it refers to an independent suit between claimants of trademarks both of which have already been registered. The Commissioner is not a party to such litigation but is subject to the decree of the court after it is entered. It is just like the proceeding in § 4918 to settle controversies between interfering patents already granted by the Patent Office. Section 9 of the Trade Mark Act is wider than § 22 in its scope. It includes one who applies for registration of an unregistered trademark which interferes with one already registered.

On the whole, we think that our decision in *American Steel Foundries* v. *Robertson,* 262 U. S. 209, leads us necessarily to sustain the jurisdiction of the Supreme Court of the District to entertain this bill.

Finally, it is objected that this bill was not in time. It was filed more than two years and two months after the decision of the Court of Appeals in the first appeal from the Commissioner of Patents. It is contended that under *Gandy* v. *Marble,* 122 U. S. 432, § 4894 Rev. Stats. applies to any bill in equity under § 4915 and compels the dismissal of the bill if it is not prosecuted within one year after the adverse decision in the Court of Appeals, unless it appears to the satisfaction of the court that the delay was unavoidable. *In re Hien,* 166 U. S. 432, 438; *American Steel Foundries* v. *Robertson,* 262 U. S. 209, 212, 213. There was here, however, justification for the delay, in the appeal taken to this Court which was dismissed. 256

U. S. 35. That decree was entered April 11, 1921, and this bill was filed within thirty days thereafter. We think there was no laches or abandonment.

The decree of the Court of Appeals is reversed and the cause is remanded to the Supreme Court of the District for further proceedings.

Reversed.

Dissenting, MR. JUSTICE MCREYNOLDS.

HAMMERSCHMIDT ET AL. *v.* UNITED STATES.

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

No. 254. Argued April 29, 30, 1924.—Decided May 26, 1924.

1. Section 37 of the Criminal Code (Rev. Stats., § 5440) punishing conspiracy "to defraud the United States in any manner or for any purpose," does not embrace a conspiracy to defeat the purpose of the Selective Draft Act by inducing persons to refuse to register under it. P. 185.
2. To "defraud" the United States means to cheat the Government out of property or money, or to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. P. 188.
3. But mere open defiance of the governmental purpose to enforce a law by urging those subject to it to disobey it, is not a "fraud" in this sense. *Id. Haas* v. *Henkel*, 216 U. S. 462, explained; *Horman* v. *United States*, 116 Fed. 350, limited.

287 Fed. 817, reversed.

CERTIORARI to review a judgment of the Circuit Court of Appeals affirming a conviction and sentence in a prosecution for conspiracy to defraud the United States by dissuading persons, by handbills, etc., from registering for military service.

Mr. Ed. F. Alexander, with whom *Mr. Joseph W. Sharts* was on the brief, for petitioners.

Mr. Assistant Attorney General Davis, with whom *Mr. Solicitor General Beck* and *Mr. Clifford H. Byrnes,* Special Assistant to the Attorney General, were on the brief, for the United States.

The facts charged in the indictment constitute a conspiracy to defraud the United States.

The purpose of the statute is to secure the wholesome administration of the laws and affairs of the United States. *United States* v. *Moore,* 173 Fed. 122; *United States* v. *Stone,* 135 Fed. 392.

It is not limited to conspiracies to deprive the United States of property or money, but is broad enough to cover any conspiracy to defraud the United States of any right, including the obstruction of the lawful functions of any department of the Government. *Haas* v. *Henkel,* 216 U. S. 462; *Hyde* v. *Shine,* 199 U. S. 62; *United States* v. *Foster,* 233 U. S. 515; *United States* v. *Keitel,* 211 U. S. 370; *United States* v. *Sacks,* 257 U. S. 37; *United States* v. *Janowitz,* 257 U. S. 42; *Firth* v. *United States,* 253 Fed. 36; *United States* v. *Galleanni,* 245 Fed. 977. The conspirators may not escape the consequences of their agreement to do an illegal thing because they did not resort to deception or trickery. *Haas* v. *Henkel, supra; United States* v. *Slater,* 278 Fed. 266; *Edwards* v. *United States,* 249 Fed. 686; *Horman* v. *United States,* 116 Fed. 350.

The Selective Service Act, among other things, required that all male citizens between the ages of twenty-one and thirty should register for service in the military and naval forces of the United States.

In the face of this statute petitioners caused to be printed, with the idea of distributing to the public at large, several thousand handbills attacking the Draft Act and counseling or commanding to "refuse to register for conscription." The indictment avers that a number of them were distributed. The conduct of petitioners con-

stituted a conspiracy to defraud the United States in that the intention and necessary effect of their agreement and acts was to obstruct and defeat the purpose of a measure enacted by Congress for the preservation of the Government. Such conduct was not within the criminal provisions of the Selective Service Act (§§ 5 and 6), and at the time of the offense the Espionage Act had not been enacted.

It is argued that petitioners did not conspire to impair the functions of "the department of military registration." The indictment is not so narrow. It charges a conspiracy to impair the function of registration. Such function is a mutual and reciprocal obligation, requiring (1) that persons within the terms of the Draft Law present themselves for registration, and (2) that the government officials examine applicants and make a record of their qualifications for military service. The duties of registration officials are a part of such function only. The term obviously refers to the entire activity of registration and includes whatever is done by the applicants as well as the acts of government employees who examine applicants and make a record of the information so obtained. It is, therefore, fallacious to contend that there was no interference with the function of registration because petitioners did not hinder or obstruct registration officials in the performance of their office.

The real question is whether a conspiracy organized for the express purpose of depriving the Government, through the distribution of circulars and other literature containing gross misstatements of fact, of the services of those upon whom the country must rely in the hour of national peril, does not, if consummated, thereby defraud the United States in the broad sense in which the term defraud is used in § 37 of the Penal Code.

[The form of the indictment, and a defense based on the First Amendment were also discussed.]

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

This is a review by certiorari of the conviction of thirteen persons charged in one indictment with the crime of violating § 37 of the Penal Code. The charge was that the petitioners wilfully and unlawfully conspired to defraud the United States by impairing, obstructing and defeating a lawful function of its government, to wit: that of registering for military service all male persons between the ages of twenty-one and thirty as required by the Selective Service Act of May 18, 1917, c. 15, 40 Stat. 76, through the printing, publishing and circulating of handbills, dodgers and other matter intended and designed to counsel, advise and procure persons subject to the Selective Act to refuse to obey it. A demurrer to the indictment was overruled and trial and conviction followed. By exception and assignment of error the question is properly made whether a crime described as above can be said to be a conspiracy to defraud the United States. The Sixth Circuit Court of Appeals affirmed the conviction. 287 Fed. 817.

The indictment was framed and the argument of the Government in support of the conviction is based on the language of this Court in *Haas* v. *Henkel,* 216 U. S. 462, 479, construing § 5440, Rev. Stats. (now § 37 of the Penal Code) which reads as follows:

"If two or more persons conspire . . . to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc.

The opinion was delivered by Mr. Justice Lurton and the words relied on are:

"The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing

or defeating the lawful function of any department of Government."

This language it is contended necessarily embraces a conspiracy to defeat the selective draft by inducing the persons required to register under it to defeat its purpose by refusing to register.

We think the words relied on can not be given such a wide meaning when we consider the case to which they were applied, and when we replace them in the context. The Court was dealing with an appeal in a *habeas corpus* case to test the validity of an order of removal of the appellant under § 1014, Rev. Stats. The main question was whether the indictments under which the removal was ordered charged an offense against the United States. They charged two sets of conspiracies. One was that the defendant with two others, one an associate statistician in the Department of Agriculture, conspired to obtain secret official information which the statistician in violation of his official duty was to give out to his co-conspirators concerning the cotton crop reports in advance of the time they were to be published according to law; another was that the statistician was to falsify one of the reports of which his associates were to be advised in advance ; another was that the defendant and one associate were to bribe the statistician to make the false report and publish it in advance. The second conspiracy involving the defendant, the statistician, and other persons was similar in detail to the first. All of the information in advance of the official publication was to be used for speculative purposes in the open market. The opinion describes the official machinery in the Agricultural Department for acquiring the information upon which the cotton reports each month were based, and shows that they were approved by the Secretary, and that by regulation the employees were required to keep them and their details secret until duly published, and points out that

they were of great value and vitally affected the market price of the cotton crop.

The appellant in that case urged that the conspiracy to defraud the United States, punished in the section, must result in financial loss to the Government. It was this contention which the Court was meeting, and upon this point it said:

"These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons and explanations involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result", and then follows the sentence already quoted upon which the Government relies.

It is obvious that the writer of the opinion and the Court were not considering whether deceit or trickery was essential to satisfy the defrauding required under the statute. The facts in the case were such that that question was not presented. The deceit of the public, the trickery in the advance publication secured by bribery of an official, and the falsification of the reports, made the fraud and deceit so clear as the gist of the offenses actually charged that their presence was not in dispute. The sole question was whether the fraud there practised must have inflicted upon the Government pecuniary loss, or whether its purpose and effect to defeat a lawful function of the Government and injure others thereby was enough. That was all that Mr. Justice Lurton's words can be construed to mean. The cases in which this case has been referred to involved unquestioned deceit or false pretense, and it was only cited in them to the point that financial

loss of the Government is not necessary to violate the section. *United States* v. *Foster,* 233 U. S. 515, 526; *United States* v. *Barnow,* 239 U. S. 74, 79. See also *United States* v. *Plyler,* 222 U. S. 15, in respect to § 5418, Rev. Stats.

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. It is true that the words " to defraud " as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds. In *Horman* v. *United States,* 116 Fed. 350, § 5480, Rev. Stats., as amended March 2, 1889, c. 393, 25 Stat. 873, making it a crime to devise any scheme or artifice to defraud by use of the mails and opening correspondence with any person, and to mail a letter in execution thereof, was held to be violated by the sending of a letter threatening to blacken the character of another unless that other paid the blackmailer money. It was held that the word " scheme " in that section was of broader meaning and did not necessarily involve trickery or cunning in the scheme, if use of the mails was part of it; that intent to defraud in such a statute was satisfied by the wrongful purpose of injuring one in his property rights. The question had much consideration. The decision, however, went to the verge and should be con-

fined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. Section 5480 has since been again amended to make its scope clearer. Its construction in the *Horman Case* can not be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it.

We think the demurrer to the indictment in this case should have been sustained and the indictment quashed.

Judgment reversed.

UNITED STATES *v.* SUPPLEE-BIDDLE HARDWARE COMPANY

APPEAL FROM THE COURT OF CLAIMS.

No. 477. Argued April 9, 1924.—Decided May 26, 1924.

1. The "Revenue Act of 1918" (passed February 24, 1919), in the income tax provisions applicable to corporations, adopts the definition of gross income applicable to individuals (§ 213), which excludes "the proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured". *Held*, that there was no purpose, in the exemption, to distinguish between individual beneficiaries and corporate beneficiaries, and that the proceeds of insurance taken by a corporation on the life of an important official, to secure its financial position and indemnify itself against loss of earning power in case of his death, were not taxable as income under the act. P. 194.
2. Assuming that Congress could tax proceeds of such indemnity life insurance as income, its purpose to do so should be express, in view of the popular conception of life insurance as resulting in a single addition to the resources of the beneficiary and not in a periodical return. P. 195.
3. A construction of a war taxing act as imposing both an income and an estate tax on the proceeds of life insurance should be avoided unless required in express terms. *Id.*

58 Ct. Clms. 343, affirmed.

APPEAL from a judgment of the Court of Claims allowing recovery of money paid under protest as an income tax.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Fred E. Hamilton* were on the brief, for the United States.

Under the terms of the Revenue Act of 1918, the proceeds of life insurance payable to corporate beneficiaries are taxable as income.

The definition of gross income in the case of a corporation is exactly the same as in the case of an individual. It includes gains, profits, and income derived from any source whatever, and the specific mention of certain forms of income cannot narrow the meaning of this all-inclusive language. The proceeds of these insurance policies represented a gain, a profit, and an income growing out of the transaction of a business carried on for gain or profit. If the general language admits of any doubt, the specific language removes the doubt. That Congress, in all legislation passed since the Sixteenth Amendment, regarded the proceeds of life insurance policies as a form of income which they had authority to tax is shown by a comparison of the language used in the various acts. Act of October 3, 1913, c. 16, § II, subd. b, 38 Stat. 114; T. D. 2090, December 14, 1914; Act of September 8, 1916, c. 463, § 4, 39 Stat. 756; Act of October 3, 1917, c. 63, 40 Stat. 300; Revenue Act of 1918, § 213; Act of November 23, 1921, c. 136, 42 Stat. 227.

First, the proceeds of life insurance policies were exempt when paid to individual beneficiaries, and this restricted exemption was continued until after the armistice. Then the exemption was further extended to include policies payable to the estate of the insured, and, finally, after the war was over and the necessity for extreme taxation had passed, the restrictions were wholly removed, and they are now wholly exempt.

The proceeds of the policies are included by direct language and the court below has been forced to resort to implication in order to exclude them. Everything not excluded is taxed. Everything not specifically excluded is income. Everything is included that the statute does not exempt, and the first item exempted is the proceeds of life-insurance policies paid upon the death of the insured to individual beneficiaries or their estates. The construction of the act by the Court of Claims fails wholly to give effect to the words "individual beneficiaries or to the estate of the insured." This language surely has a different meaning from the language employed in the Acts of 1913, 1916, and 1917. According to the reasoning of the Court of Claims, these words have no meaning, and the Act of 1918 means the same as the Acts of 1913 and 1921.

See *Commercial Health & Accident Co.* v. *Pickering,* 281 Fed. 539.

The omission of the words "individual beneficiaries" in the Act of 1921 does not amount to a legislative construction of the Act of 1918 and to a declaration that it was never the intention of Congress to attempt to tax such proceeds of insurance as income. *United States* v. *Field,* 255 U. S. 257; *Shwab* v. *Doyle,* 258 U. S. 529; *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602; *New York Trust Co.* v. *Eisner,* 256 U. S. 345.

Proceeds of insurance policies on the lives of officers of a corporation taken out by it for its benefit constitute income within the meaning of the Sixteenth Amendment when received by the corporation. *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509; *United States* v. *Phellis,* 257 U. S. 156; *Connecticut Mutual Life Ins. Co.* v. *Schaefer,* 94 U. S. 457; *Marvin* v. *Mayesville Street R. R. Co.,* 49 Fed. 436.

Mr. Frank Davis, Jr., and *Mr. Frederic L. Clark,* with whom *Mr. A. Mitchell Palmer* and *Mr. William D. Harris* were on the brief, for appellee.

The proceeds of life insurance are not within the definition of gross income as found in § 213 of the Revenue Act of 1918 and such proceeds are not taxable under said act. *Towne* v. *Eisner,* 245 U. S. 418; *Eisner* v. *Macomber,* 252 U. S. 189.

Life insurance proceeds are not "income" within the meaning of the Sixteenth Amendment and are therefore not taxable.

Mr. Henry Necarsulmer and *Mr. Max J. Kohler,* by leave of Court, filed a brief as *amici curiae.*

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

The Supplee-Biddle Hardware Company sued the United States in the Court of Claims to recover $55,153.89, with interest, as taxes illegally assessed on the proceeds of two life insurance policies paid to it as the beneficiary on the death in 1918 of the insured, Robert Biddle, 2nd. Biddle was elected President of the Company in February, 1917. He was then thirty-seven years of age, in good health, and had for nearly twenty years held various offices in the Biddle Hardware Company, which had merged with the appellee company in January, 1914. He was a man of ability, energy and initiative and was so regarded in the hardware trade. The returns from the Company's business under Biddle's management had been much increased. At the instance of the Board of Directors and the expense of the Company, he took out the two policies for $50,000 each. They were term policies for five years. The Company intended thus to make secure its financial position, and to indemnify itself against losses to its earning power in the event of Biddle's death.

The Revenue Act of 1918, which was passed February 24, 1919 (40 Stat. 1057, c. 18), in prescribing the income to be taxed, deals first with individuals, from § 212 to

§ 228, inclusive. Then follows provision for the rate of income tax on corporations, beginning with § 230. Section 233(a) says "That in the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in section 213," with certain exceptions not here material. Section 213 defines the gross income for individuals as follows:

"That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever . . . ; but

"(b) Does not include the following items, which shall be exempt from taxation under this title:

"(1) The proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured."

The Treasury Department, construing these sections, held that the proceeds of insurance policies paid to a beneficiary which was a corporation, were not exempted and were included as "gains . . . from any source whatever." Under this ruling the appellee was forced to pay a tax of $84,737.95 on the proceeds of the two policies of $97,947.28. The Commissioner of Internal Revenue reduced this amount by $29,584.06 in accordance with the powers conferred upon him by §§ 327 and 328 of the Revenue Act of 1918 to reduce the rate of taxation in cases of unusual hardship. There remained, however, the sum of $55,153.89, which tax the appellee paid under

protest, and for this with interest, the Court of Claims gave judgment to the appellee.

We think the Treasury Department erred in assuming that Congress intended by §§ 233 and 213 to distinguish between individual beneficiaries and corporate beneficiaries in including the proceeds of life insurance policies as within gross income. We think the two sections have no such purpose. Section 213 primarily applies only to the taxing of individuals. The union of proceeds of life insurance payable to individual beneficiaries and to the estate of the assured was thus intended to emphasize the exclusion from taxation in the hands of individuals of all such proceeds and to leave no doubt of it. The meaning is the same as if the clause had read " the proceeds of life insurance shall not be included in gross income whether they are paid to individual beneficiaries or to the estate of the assured." When Congress came to deal with the gross income of corporations, it made use of § 213 by reference and grafted it on to § 233. It is reasonable that the purpose of § 213 to exclude entirely the proceeds of life insurance policies from taxation in the case of individuals should be given the same effect in adapting its application to corporations, and that such proceeds should be so excluded whether by the direction of the insured they were to go to specially named beneficiaries or were to inure to the estate of the insured.

Nor do we find any difficulty with the expression in paragraph (b) which *exempts* proceeds of life insurance from gross income. The word is used not to indicate that they would be otherwise included in the income to be taxed, but only to make clear that the gross does not include them.

It is earnestly pressed upon us that proceeds of life insurance paid on the death of the insured are in fact capital and can not be taxed as income under the Sixteenth Amendment. *Eisner* v. *Macomber,* 252 U. S. 189, 207;

Merchants' Loan & Trust Co. v. *Smietanka,* 255 U. S. 509, 518. We are not required to meet this question. It is enough to sustain our construction of the act to say that proceeds of a life insurance policy paid on the death of the insured are not usually classed as income.

Life insurance in such a case as the one before us is valid and is not a wagering contract. There was certainly an insurable interest on the part of the Company in the life of Biddle. *Mutual Life Insurance Co.* v. *Board,* 115 Va. 836; *Keckley* v. *Coshocton Glass Co.,* 86 Oh. St. 213; *Mechanicks National Bank* v. *Comins,* 72 N. H. 12; *United Security Life Ins. & Trust Co.* v. *Brown,* 270 Pa. St. 264. Life insurance in such a case is like that of fire and marine insurance, a contract of indemnity. *Central Bank of Washington* v. *Hume,* 128 U. S. 195. The benefit to be gained by death has no periodicity. It is a substitution of money value for something permanently lost either in a house, a ship, or a life. Assuming without deciding that Congress could call the proceeds of such indemnity, income, and validly tax it as such, we think that in view of the popular conception of the life insurance as resulting in a single addition of a total sum to the resources of the beneficiary, and not in a periodical return, such a purpose on its part should be express, as it certainly is not here.

This view is strengthened by the fact that under § 402, p. 1097, of the same Revenue Law of 1918, a decedent's estate tax is levied, with rates ranging from one per centum to twenty-five per centum on the net estate which is made to include (par. f) "the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." The result of the construction put by the Government upon §§ 233, 230 and 213

would be to impose a double tax on the proceeds of the two policies in this case over and above $40,000, i. e., an income tax and an estate tax. Such a duplication even in an exigent war tax measure is to be avoided unless required by express words.

The judgment of the Court of Claims is affirmed.

PACIFIC TELEPHONE & TELEGRAPH COMPANY *v.* KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

Nos. 540 and 789. Argued April 17, 1924.—Decided May 26, 1924.

1. When the jurisdiction of a state court to review orders of a commission fixing rates is confined to determining on the record certified by the commission whether the order is lawful and reasonable and whether evidence was improperly excluded, without power to pass on the weight or sufficiency of evidence or to enter any new order in lieu of the one appealed from, the remedy is purely judicial, and need not be invoked by a party complaining of the rates fixed as confiscatory, before seeking relief in a federal court. Remington's Comp. Washington Stat. 1922, § 10428, considered. P. 200.
2. A state statute empowering a commission after hearing to refuse an increase of rates proposed by a public utility, cannot, by forbidding supersedeas until a final judicial decree has been rendered in the state courts, prevent recourse to a federal court for temporary relief by injunction. P. 201.
3. Under the law of Washington, Rem. Comp. Stat. 1922, § 10441, providing for revision of administrative valuations of the property of public utilities, the function of the state courts is not merely judicial but also legislative, since they can pass upon the weight of evidence, and can set aside a valuation and make a new one. *Keller* v. *Potomac Co.*, 261 U. S. 428. *Id.*
4. The fact that a public utility had resorted to the state courts, acting legislatively, to change a valuation of its property, would not bar it from seeking relief in the federal court against rates based on the valuation as approved by the state courts. P. 203.

5. Comity usually prevents seeking such relief in a federal court before the legislative remedy in the state courts has been exhausted. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210. P. 203.
6. But when a public utility, by reason of an order reinstating rates which it sought to increase, is suffering daily from confiscation, and under the state law (Rem. Comp. Stat. 1922, § 10429) no stay is allowable pending revision by the state courts, comity does not prevent relief by a federal court. P. 204.
7. A litigant whose constitutional rights are being invaded and to whom a statute denies a supersedeas in the state tribunals may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288. P. 205.
8. Where appeal from an order refusing an interlocutory injunction is followed by an appeal from a final decree dismissing the bill, on the same ground, the first appeal should be dismissed and relief be granted under the second. *Id.*

Reversed.

APPEALS from decrees of the District Court refusing an interlocutory injunction and dismissing the bill, in a suit to enjoin interference with increases of telephone rates.

Mr. Otto B. Rupp, with whom *Mr. Frank T. Post, Mr. H. D. Pillsbury, Mr. C. M. Bracelen* and *Mr. W. V. Tanner* were on the briefs, for appellant.

Mr. John H. Dunbar, Attorney General of the State of Washington, *Mr. Thos. J. L. Kennedy* and *Mr. Alex M. Winston,* with whom *Mr. H. C. Brodie, Mr. J. M. Geraghty* and *Mr. E. K. Murray* were on the briefs, for appellees.

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

These are two appeals from the District Court in the same case involving the question of the confiscatory char-

acter of rates for telephone service within the State of Washington and in the cities of Seattle and Tacoma, to which rates the appellant company is limited by a refusal of the Department of Public Works to permit an increase thereof. The Pacific Telephone & Telegraph Company is a corporation of California authorized to do business in Washington and owning a plant covering the State. It owns all the stock of the Home Telephone Company which owns and operates the Spokane Exchange. A similar question as to confiscatory rates has arisen in respect to that company and that exchange, but a separate bill was filed by that company and is considered on appeal in a case reported next after this.

This bill by the Pacific Company seeks an injunction against the Department of Public Works of the State to prevent it from interfering with the maintenance and collection of the increased rates the Company proposes in all parts of Washington except Spokane. A court of three judges was organized to hear the application for a temporary order. The suit depended for jurisdiction both on the diverse citizenship of the parties and upon the averment that the order of the Department of Public Works if enforced would deprive the company of its property without due process of law, in violation of the Fourteenth Amendment. The court set aside the temporary restraining order issued by the District Judge on the filing of the bill and denied the application for temporary injunction. Appeal was taken direct to this Court under § 266, Jud. Code, as amended by the Act of March 3, 1913, c. 160, 37 Stat. 1013. After the denial of the temporary injunction, the District Judge heard the case on a motion to dismiss the bill and granted the motion, and from this final decree a second appeal was taken.

The bill of complaint shows that on August 8, 1919, the Public Service Commission of the State, the predecessor of the Department of Public Works, made an order

prescribing maximum rates and charges to be charged by the Pacific Company on and after that date within the State of Washington which are made an exhibit to the bill; that on September 20, 1922, the company filed a schedule of rates with the Department of Public Works increasing rates to be charged for exchange telephone service in all the exchanges owned by the company in Washington; that the Department on September 24, 1922, suspended the rates for thirty days, and that after numerous hearings as to their reasonableness, the Department by a majority of two members on March 31, 1923, denied the increase. The bill further averred that the fair and reasonable value of the property of the company in Washington, not including the Spokane plant, was $35,616,896, which includes $20,852,067 for the Seattle plant, and $3,457,290 for that of Tacoma, and that this estimate includes nothing for franchises and nothing for going concern; that the fair annual return which the company was entitled to earn was eight per cent. on this value, whereas the actual return was as follows:

	Cost.	Fair value.
Year 1919, State of Washington	4.97%	3.67%
Year 1919, City of Seattle	3.97%	2.66%
Year 1919, City of Tacoma	.98%	.81%
Year 1920, State of Washington	4.42%	3.33%
Year 1920, City of Seattle	1.85%	1.29%
Year 1920, City of Tacoma	.89%	.74%
Year 1921, State of Washington	3.30%	2.58%
Year 1921, City of Seattle	.69%	.52%
Year 1921, City of Tacoma	.58%	.48%
Year 1922, State of Washington	3.17%	2.58%
Year 1922, City of Seattle	.19%	.15%
Year 1922, City of Tacoma	.89%	.75%

that such returns were confiscatory and a violation of the rights of the company under the Fourteenth Amendment; that therefore the order of March 31, 1923, was void; that the company had no adequate remedy at law; that, if an attempt were made to enforce the rates it proposed to

make, the Department of Public Works and others in state authority, defendants, would, unless restrained by the court, institute proceedings to compel compliance with the confiscatory schedule, and that the company and its officers and employees would be subjected to a multiplicity of suits, and incur criminal penalties prescribed by the laws of the State.

By the statutes of Washington (§ 10428, Remington's Comp. Stat. 1922), any complainant affected by any order of the Commission (now the Department), may within thirty days apply to the Superior Court of the proper county for a writ of review "for the purpose of having its reasonableness and lawfulness inquired into and determined." The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the Commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the Commission to receive the evidence and enter a new order. The court may remand any case reversed by it to the Commission for further action. It is clear that the function to be performed by the Superior Court under this section is judicial. It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the Commission and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. The court does not act legislatively.

Instead of applying to the Superior Court of the State therefore, application was made by the bill herein to the Federal District Court within the thirty days to restrain the order of the Department as violative of the Fourteenth Amendment.

By § 10424, Remington's Comp. Stat. 1922, relating to the filing of tariffs increasing rates and providing for a

hearing on such proposed increase and the suspension of the schedule pending the hearing, it is declared that:

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

It is apparent from these provisions that, after the Commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service. It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the federal constitutional question the federal court of equity was available to it. The state statute forbidding a stay of proceedings until a final judicial decree was rendered, of course, could not prevent a federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required. The conditions set out in the bill, therefore, seem to have made a case ripe for federal relief. *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134; *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 48.

But it is urged that such relief is premature because the rates, increase of which was refused, were reasonable, and afforded an adequate return on the value of the property of the company used in the public service as fixed by the Commission in accord with the statutory procedure for that purpose, and that the company still has a right to appeal from the valuation of the Commission to the Superior and Supreme Courts on the legislative question of that valuation.

Section 10441 of the State of Washington (Remington's Comp. Stat., 1922) has elaborate provisions for the fixing

of the value of the property and equipment of a public service company. The company is given thirty days' notice of a hearing and is entitled to adduce evidence and to have it transcribed and certified. The Commission is to render findings of fact in writing concerning all matters concerning which evidence may be introduced tending to show the value of the company's property used for the public convenience. The company believing the findings to be unfair, unwarranted or unjust, may go into the Superior Court and have a writ of review of such findings and their correctness, reasonableness and lawfulness inquired into and determined, and if the court finds them to be "unjust, incorrect, unreasonable, unlawful or not supported by the evidence," it shall make "new and correct findings" unless it sets them aside for refusing to receive proper evidence, and returns them for new findings thereon. The company is given the right of appeal to the Supreme Court of the State which is given the same power as the Superior Court as to the findings of the Commission. The findings of the Commission as corrected by the courts are made admissible in evidence in any action or proceeding except in matters of taxation, and are to be conclusive evidence of the facts found under conditions then existing and can only be controverted by showing a subsequent change of conditions. Provision is made for further hearings to ascertain betterments, improvements, extensions and additions, and the values of the property used by the company for interstate and for intrastate business.

It is clear that the function of the courts in fixing the valuation of the property of the public utility is not confined to a judicial review of the work of the Commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller* v. *Potomac Co.*, 261 U. S. 428.

It is thus apparent that the contention of the Department and the state authorities that the company has not exhausted its remedy to secure a change in the valuation of the property by the Superior and Supreme Courts of the State is correct, and that resort to them to change the valuation would be no bar to a resort to a federal court of equity to enjoin the enforcement of rates based upon such valuation after it had been approved by the state courts. It was on this ground that the District Court held both on the application for a temporary injunction before the three judges and upon the final dismissal that the bill was premature, and could not be brought until after the final confirmation of the valuation by the State Supreme Court.

The District Court relied on the case of *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210. In that case, the tribunal which fixed railroad rates that were the subject of controversy consisted not only of a commission but of the Supreme Court of the State on appeal, and the court in reaching its conclusion acted legislatively, as the commission did. It was held that as the complaining company had not exhausted its legislative remedy by appeal to the Supreme Court of the State, for its final action in the fixing of rates, comity, in absence of a controlling right to the contrary, required that the federal court delay remedy by injunction against the rates fixed until the company had invoked the conclusion of the State Supreme Court in respect to them. So here it is contended that until the Superior and Supreme Courts shall have finally considered the correctness of the valuation upon which the adequacy of the rates depends, comity requires that the federal court shall stay its hand.

It is first objected to this view that the constitution of the State of Washington does not authorize its legislature to vest its courts with the legislative power to fix rates, and therefore that, after the Commission had fixed the

valuation, further procedure in fixing valuation was void, and there was no reason either of comity or right which should delay the remedy by a bill in a federal court. *Territory ex rel. Kelly* v. *Stewart,* 1 Wash. 98, 110; *State ex rel. Seattle* v. *Public Service Commission,* 76 Wash. 492, 500. It is our duty to avoid expressing an opinion on such an issue under the constitution of Washington in the absence of a clear decision by its highest court, if we can do so; and we think we can.

In the case before us, the company is shown by the averments of its bill to be suffering daily from confiscation under the rates to which it is now limited. It has done all it could to get relief and can not get it. The rates here in question were in force for more than a year, the company advanced them, the old rates were reinstated by the Department of Public Works. In such a case then there was no chance for a stay. By § 10429 (Remington's Comp. Stat., 1922) the pendency of any writ of review does not of itself stay or suspend the operation of the order of the Commission, but the Superior Court may suspend the order, but no order suspending an order of the Commission relating to rates, etc., can be made unless the court finds that great or irreparable damage would be done to the petitioner, and the section contains the following proviso:

"Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court by such supreme court."

Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded

will not prevent a federal court of equity from suspending the daily confiscation, if it finds the case to justify it. *Oklahoma Gas Co.* v. *Russell,* 261 U. S. 290, 293. In such a case the *Prentis Case* has no application. *Love* v. *Atchison, etc. Ry. Co.,* 185 Fed. 321, 324, 325.

But it is argued that the courts of Washington have inherent power to grant a supersedeas in such a case and that §§ 10429 and 10424, *supra,* are invalid. As we have declined to look into the validity of the legislative functions with which the Washington state courts are vested in the valuation sections, so we decline to examine the validity of these restraints upon those courts to grant stays in cases of rates. A litigant whose constitutional rights are being invaded and to whom a statute denies a supersedeas in the state tribunals may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 296, presents an analogous case.

Nor does the provision of § 266 of the Judicial Code (37 Stat. 1013, c. 160), that a suit in a state court to enforce the rate complained of accompanied by a stay, shall suspend the proceedings in the federal court, prevent the filing and prosecution of this bill, first because no such suit seems to have been brought, and, even if it had been, there certainly has been no stay of proceedings in the state court as provided in that section. *Dawson* v. *Kentucky Distilleries Co., supra.*

We think, therefore, that the District Court erred in denying a temporary injunction under § 266 on the ground that the bill was premature.

But it is said that the appeal from the interlocutory decree in No. 540 was merged in the appeal from the final decree in No. 739, and therefore should be dismissed. A motion was made for this purpose. We think that under

Shaffer v. *Carter,* 252 U. S. 37, 44, this motion should be granted; but it does not change the ultimate result, because the final decree of the District Court dismissing the bill really turned on the same erroneous ruling of its prematurity as that upon which the temporary injunction was denied and must be reversed for the same reason.

After the case was reached in this Court, somewhat extended argument was made in the later appeal to show that the bill was defective in stating a case for equitable relief even if it was not premature. The argument is based on objections which seem to us to be rather makeweights or afterthoughts, and are so unsubstantial that we do not discuss them. The merits of the issue between the parties can be developed after the case is remanded to the District Court for further proceedings.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

HOME TELEPHONE & TELEGRAPH COMPANY OF SPOKANE *v.* KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

Nos. 539 and 790. Argued April 17, 1924.—Decided May 26, 1924.

1. Upon appeal from decrees refusing an interlocutory injunction and dismissing the bill on demurrer, the court will not pass upon an issue not shown by the bill but only by an opposing affidavit used at the injunction hearing. P. 208.
2. Decided (in other respects) upon the authority of *Pacific Telephone Co.* v. *Kuykendall, ante,* 196.

Reversed.

APPEALS from decrees of the District Court refusing an interlocutory injunction and finally dismissing on de-

murrer a bill to enjoin interference with increases of telephone rates.

Mr. Otto B. Rupp, with whom *Mr. Frank T. Post, Mr. H. D. Pillsbury, Mr. C. M. Bracelen* and *Mr. W. V. Tanner* were on the briefs, for appellant.

Mr. John H. Dunbar, Attorney General of the State of Washington, *Mr. Thos. J. L. Kennedy* and *Mr. Alex M. Winston,* with whom *Mr. H. C. Brodie, Mr. J. M. Geraghty* and *Mr. E. K. Murray* were on the briefs, for appellees.

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

These appeals present the same question as that just considered and decided in the appeal of the Pacific Telephone & Telegraph Company against the same appellees. The bill averred that the plaintiff was a corporation of Washington, owning and operating a telephone system in the City of Spokane and territory adjacent thereto, known as the Spokane Exchange; that on September 20, 1922, it filed with the Department of Public Works a schedule of rates by which those of 1919 as approved in that year by the Public Service Commission, the predecessor of the Department of Public Works, were substantially increased; that the Department suspended the new rates and March 31, 1923, finally denied the company its application for increase, thereby limiting it to prior rates alleged to be confiscatory in character. In detail, the bill set out the cost of the Spokane system at over four millions of dollars and its present value at $5,710,684, and averred that a fair return thereon would be 8 per cent; that the actual return therefrom had been:

	On cost	On fair value
Year 1919	2.95%	2.14%
Year 1920	1.79%	1.30%
Year 1921	2.35%	1.71%
Year 1922	3.07%	2.28%

and that the order of March 31, 1923, by which an increase of rates had been denied, operated to limit it to the prior rates which it alleged were and would continue to be confiscatory. The prayer was for a temporary and permanent injunction.

These appeals were heard at the same time with the two just disposed of in the *Pacific Telephone & Telegraph Co. Case, ante,* 196, and the same orders were made therein by the District Court. There is no difference in the cases except that on the motion for a temporary injunction an affidavit of the Assistant Corporation Counsel of Spokane was filed which set forth, among other reasons for denying an injunction, an ordinance of the City of Spokane of April, 1909, in which rates for telephone service by the Home Telephone Company in that city were fixed in a schedule much lower than the one said to be necessary for a fair return, and alleged that the ordinance was still in full force and effect, was a valid contract between the City and the Company, and that thus the bill of the plaintiff must fail. Upon argument and brief in this Court, counsel for the Company insist that, under the decision of the Supreme Court of Washington in *Spokane Falls Gas Light Co.* v. *Kuykendall,* 119 Wash. 107, action of the City in reducing the rates of the ordinance in 1913 and increasing them in 1919 must he held to terminate the contract of the ordinance and bring the rates within the regulation of the Public Service Commission or its successor the Department of Public Works.

It is obvious that upon this appeal we could not safely pass upon an issue raised upon an affidavit and not shown in the bill. The temporary injunction was denied and the bill was dismissed by the District Court on the same ground as that explained at length in the *Pacific Telephone & Telegraph Company Case.* For the same reasons as therein stated we must dismiss the appeal in No. 539 as

merged in No. 790 and reverse the District Court in the latter appeal and remand the case for further proceedings when, upon answer and the merits, the effect of the ordinance referred to and other questions raised in the affidavit can be fully considered.

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

ILLINOIS CENTRAL RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 248. Argued April 28, 1924.—Decided May 26, 1924.

For the purpose of securing the reduced rates for transportation of its property over land-grant railroads, the Government purchased goods for prices f. o. b. at place of shipment, paid the freight, and had shipment made by the sellers with government bills of lading. *Held*, that title passed at place of shipment, although the contracts of sale reserved to the Government the right of inspection and rejection at the place of destination and imposed certain duties there upon the sellers, and that goods so transported, and accepted by the Government, were entitled to the reduced rates of transportation. P. 213.

57 Ct. Clms. 277, affirmed.

APPEAL from a judgment of the Court of Claims rejecting claims for additional compensation for transportation of freight.

Mr. Benjamin Carter for appellant.

The question is whether freights intended for government uses, but which the Government was under no obligation to accept until after they had reached destination, were, while in transit, "property of the United States" and lawful subjects of transportation rates at which, in virtue of land grants, "property of the United

States" should be transported. This and two other cases of other carriers which are before this Court arose out of the contumacy of disbursing officers in claiming for the Government a privilege which had been denied to it by repeated decisions of the Comptroller of the Treasury. That officer had first ruled in favor of the carriers in cases where commercial bills of lading had been used. The first device, then, of officers making shipments, was to require the use of government bills of lading; but the Comptroller held that the rights of the parties were not affected by this detail. Some overzealous officers then had recourse to a form of purchase from producers of the materials by which purchase prices applied at the points of shipment. The shipments were on government bills of lading; but specific stipulations were (1) that, although the Government would pay, or advance, the freight charges, the shipper would be responsible for the shipment, including demurrage charges which might be incurred, and (2) that examination, in one form or another, would be made by the Government's officers after delivery at, or beyond, points of destination, that nothing would be accepted which did not successfully pass this test and that shippers would remove rejected materials and repay the transportation charges on those quantities.

Assuming, from the fact that government bills of lading were used and the fact, in some instances, that the shipper, as well as the consignee, was a government officer, appellant, upon delivering the freights, rendered and collected its bills at land-grant rates. Thereafter, it received intimations regarding the terms of the contract under which the shipments were made and, upon investigation, ascertained the facts here stated.

Land-grant rates are not lawfully applicable to any transportation, even though procured by officers of the United States, except of property of the United States.

Supplies ordered by and shipped to authorized officers of the United States, who were to test or inspect them, at or beyond destinations, and thus determine whether to reject or accept them, did not, while in course of transportation, belong to the United States.

The fixing of purchase prices to apply at points of shipment does not effect a transmission of title to commodities from the producers to the United States if the acceptance of the supplies by the United States depended, by contract, upon questions to be determined by its officers at or beyond destinations of the shipments.

The mere payment of freight charges by a consignee does not divest title to the freights out of the shipper and vest it in the consignee. *Clarkson* v. *Stevens,* 106 U. S. 505; *Gorman* v. *Kennedy,* 126 Mich. 182; *Smart* v. *Batchelder,* 57 N. H. 140; *Cornell* v. *Clark,* 104 N. Y. 451; *Smith* v. *Wisconsin Investment Co.,* 144 Wis. 151; *Wagar* v. *Farren,* 71 Mich. 370; *Pike* v. *Baughn,* 39 Wis. 499; *Blodgett* v. *Hovey,* 90 Mich. 571.

That the Government, by the practice here concerned, obtains the same benefit that would have followed from taking title at points of shipment on land-aided lines and paying land-grant rates, is immaterial. *United States* v. *Union Pacific R. R. Co.,* 249 U. S. 354; *Alabama Great Southern R. R. Co.* v. *United States,* 49 Ct. Clms. 522; *Louisville & Nashville R. R. Co.* v. *United States,* 50 Ct. Clms. 414; 54 Ct. Clms. 161.

The only practical effect of the use made of government bills of lading is to give this Court jurisdiction of transactions more than six years old at the time the suit was instituted. This misapplication by government officers of a government form was a legal fraud upon the railroad company; and, according to the adjudications in like cases, time did not begin to run against the assertion of the railroad's claim so long as its officers were in ignorance of the real facts. *Exploration Co.* v. *United States,* 247 U. S. 435.

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

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The question in the case is whether, in certain shipments of property for use by the United States, title to the property passed at the place of shipment or at the place of delivery. Or to state the question another way, whether the shipments while in transit were the property of the United States and properly transported at land-grant rates, or did not become the property of the United States until after receipt at destination and subject to commercial rates. The latter is the contention of the Railroad Company, although it rendered bills for and accepted payment of them upon the other view. Its explanation is, it believed that that view was correct, that is, believed the shipments were the property of the United States, and, so believing, rendered bills for $40,000 less than it was entitled to, and, so believing, accepted payment of them. For that $40,000, this action was brought. The Court of Claims decided against the Railroad Company and dismissed its petition.

There is no contest of the findings or of the decision of the Court of Claims other than that expressed in the contention above stated.

It appears from the findings that the Railroad Company is a corporation and in the operation of a system of railways, those on which the shipments with which this case is concerned were transported. Three of the railways of the system were constructed with the aid of public lands granted by Congress.

The shipments consisted of certain articles for use in government improvements of the Missouri River.

The contention seems to be that the shipments were to be tested or inspected at or beyond destinations and accepted or rejected there, but while in course of transportation were not to belong to the United States. To sustain this view, *Clarkson* v. *Stevens,* 106 U. S. 505, is cited. The case does not sustain the contention. It was decided that the intention of the parties was determinative, not an arbitrary rule of construction. In the case at bar the findings of the court demonstrate that the Government especially intended to avail itself of the fact that the shipments were to be transported over land-grant roads, and that it was entitled to deductions from the commercial rates.

The years of the shipments and the roads over which they were to be transported are given in Finding V, and the finding recites: "These materials and supplies were all purchased on invitation to bidders, proposals of bidders, and vouchers, on which payments were made to the sellers. The form of invitation on which bids were made invariably read: 'The prices will be for the articles delivered f. o. b. cars at [the place of shipment]. The successful bidder will procure the cars, but the United States will pay the freight and furnish shipping instructions and bills of lading. This arrangement is made to enable the Government to take advantage of land-grant rates, and will not operate to relieve the dealer of any responsibility as shipper that would attach if the delivery had been at destination.' This form of invitation was only used over land-grant or bond-aided roads, and was never used where delivery was to be made at point of use."

And the finding states that "The shipments were all made on Government bills of lading, which were accomplished, the articles inspected, and accepted at points of use by the proper Government officials."

We agree with the Court of Claims that "the United States and the contractors were privileged to write into their contract such terms as they saw fit" and that "pro-

visions for a final inspection at point of delivery or for the rendering of a further service by the contractor at that point were not inconsistent with and could not be invoked to nullify a specific provision under which the title to the property passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable." See *Hatch* v. *Oil Company,* 100 U. S. 124, 134, 135.

As we have seen the Railroad Company made land-grant deductions from commercial rates in the bills it rendered. It does not now show fraud or mistake of fact; its only excuse is that its " officers believed that the shipments belonged to the United States." It is not charged that the belief was engendered by any practices or artifices of the officers of the United States. And it seems to have had continuity for a long time. A finding of the Court of Claims is that " part of the claim presented, amounting to $2,511.68, relating to shipments from October 30, 1911, to March 7, 1912, was barred by the statute of limitations when this suit was commenced, March 23, 1918."

The Government dealt with the consignors as if the property was its—dealt with the Railroad Company as if the property was its, the Government's, and, as we have seen, the Railroad Company dealt with the Government on that assumption, and the contractors dealt with it on that assumption. The incidental regulations between it and the contractors cannot divest that ownership in the interest of the Railroad Company.

Judgment affirmed.

CITY OF OPELIKA *v.* OPELIKA SEWER COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 524. Argued April 8, 9, 1924.—Decided May 26, 1924.

1. A public service corporation is bound by rates fixed by a valid contract between it and a city even if the rates become so unremunerative that, if imposed under the police power, they would be confiscatory in violation of the Fourteenth Amendment. P. 217.
2. Decisions of the Supreme Court of Alabama construing the state constitution and a city charter, as permitting the city to grant a sewer company the right to operate in the city for a term of years at stipulated rates, subject to power in the legislature to revoke the contract, *held* binding in a suit by the company to obtain relief from the rates on the ground that they had become confiscatory. *Id.*

280 Fed. 155, reversed.

APPEAL from a decree of the District Court which enjoined the above-named city from preventing the plaintiff appellee from putting into effect a new schedule of rates.

Mr. J. J. Mayfield for appellant.

Mr. Wm. Findlay Brown for appellee.

The sole question involved is whether the City had the power to fix irrevocable rates by contract. On behalf of the appellee company it is contended that the franchise ordinance of 1901 did not constitute a contract between the City and the Company in so far as it relates to the rates for sewerage service, because: (1) The City had no power to fix irrevocable rates by contract; and (2) even if the Legislature had attempted to grant such power, it would be in violation of § 22 of the constitution of Alabama.

Appellant's argument is based upon the theory that in granting the franchise the City was acting in its private

business capacity and argues that it could not have been acting in its governmental capacity because it has no power conferred upon it by the State to regulate rates. Appellant then assumes from such alleged lack of power that the City must have had the power to contract for irrevocable rates. The charter expressly grants to the City the power to establish and build sewers and regulate the same, which clearly includes the power to grant the franchise to a public utility company and to regulate the rates, but even if no express power to regulate rates is granted, manifestly, a power to contract for irrevocable rates and thus surrender the police power to regulate for the benefit of the public cannot be inferred merely from the absence of an express grant of power to regulate.

Furthermore, the City in exercising the power granted in its charter to establish and build sewers and regulate the same, and to maintain the health and cleanliness in the City and to this end to adopt and maintain an efficient system of sewerage, was clearly acting in its governmental capacity for the protection of the health of its inhabitants—exercising an express governmental power as provided in its charter.

The power of a city to make an irrevocable contract fixing rates cannot be admitted unless its existence is very clear. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265; *Knoxville Water Co.* v. *Knoxville,* 189 U. S. 434; *Detroit* v. *Detroit Citizens' Street Ry. Co.,* 184 U. S. 368; *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517; *Columbus Ry. Co.* v. *Columbus,* 249 U. S. 399; *Muscatine Lighting Co.* v. *Muscatine,* 256 Fed. 929; *Southern Iowa Elec. Co.* v. *Chariton,* 255 U. S. 539; *Birmingham Waterworks Co.* v. *Birmingham,* 211 Fed. 497; *Knoxville Gas Co.* v. *Knoxville,* 261 Fed. 283.

Had the power to fix rates by contract been expressly granted to the City, it would be ineffective, as in violation of § 22 of the constitution of Alabama. *Mobile* v.

Mobile Electric Co., 203 Ala. 574; *Birmingham Co.* v. *Birmingham*, 79 Ala. 465; *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304; *San Antonio* v. *San Antonio Public Service Co.*, 255 U. S. 547; *Southern Iowa Elec. Co.* v. *Chariton*, 255 U. S. 539; *Denver* v. *Stenger*, 277 Fed. 865.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the Opelika Sewer Company to enjoin the City against preventing the plaintiff by various means at its disposal from putting into effect a schedule of rates that the plaintiff has proposed. It is to be taken that the present rates, which the plaintiff seeks to increase, are confiscatory unless the City has a right to insist upon them; and the question before us is whether the City has that right by contract or whether its enforcement of them deprives the plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States as alleged in the bill. *Cincinnati* v. *Cincinnati & Hamilton Traction Co.*, 245 U. S. 446. The District Court held that there was no valid contract and issued an injunction as prayed. The City appealed to this Court.

The Sewer Company is operating under an ordinance of 1902, which purported to grant the right for thirty years, and to authorize the Company to charge not in excess of rates specified in detail. It also provided that the Company should file a written acceptance, which was done, and that the ordinance "shall thereupon become and be a contract between" the Company and the City. There can be no question that the instrument purported to be a contract and that if it was a valid one it bound the Sewer Company not to charge more than the prescribed rates. *Columbus Ry., Power & Light Co.* v. *Columbus*, 249 U. S. 399. Whether it was valid under the laws of Alabama belongs to the Supreme Court of

the State to decide. The Constitution leaves the matter at large. It is true that it provides that no law "making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and [that] every grant of a franchise, privilege or immunity, shall forever remain subject to revocation, alteration or amendment." No doubt it is true also that the Legislature could not make such a grant indirectly by giving power to a city to make it. But we see no reason to doubt that the Legislature without impairing its power to revoke may give a city power to make a contract from which the city of its own motion may not recede. The City has not attempted to recede from it. So we turn to the charter for light.

The charter of February 20, 1899, gives power "to maintain the health and cleanliness of the city, and to this end to adopt and maintain an efficient system of sewerage," § 11; and further on "to establish and build drains, sewers . . . and to regulate the same" and still later to provide for assessing upon adjacent property a part of "the expense of such sewers as the board may from time to time deem necessary for the purpose of receiving sewerage from houses and lots" &c. These provisions suggest that the Legislature expected the work to be done by the City itself. But it is not the interest of either party to maintain that the whole transaction was void and we shall assume that the City had power to make an arrangement with a company to do the work.

The Alabama decisions construe the State Constitution and such charters to allow a contract to be made, subject to being revoked whenever the Legislature of the State may think fit. *Greenville* v. *Greenville Water Works Co.*, 125 Ala. 625, 639. *Weller* v. *Gadsden*, 141 Ala. 642, 655, 659. *Gadsden* v. *Mitchell*, 145 Ala. 137, 157. *Mobile Electric Co.* v. *Mobile*, 201 Ala. 607, 609.

It seems to us that the words of the charter "to establish and build sewers and to regulate the same" are used

with reference to sewers built by the City and the regulation of the City's own property. They do not go far enough to empower it to regulate prices charged by another—and in short we find no grant of that character elsewhere. But, as we have said, the Alabama decisions sustain the conclusion that the City had the power to make the contract upon which it relies. In *Bessemer* v. *Bessemer City Water Works,* 152 Ala. 391, it was held that a city even though having the power to regulate rates could bind itself by contract, but the precise language of the charter does not appear. The Federal Circuit Court of Appeals in the same jurisdiction takes the same view of the Alabama decisions that we have expressed. *Birmingham* v. *Birmingham Waterworks Co.,* 213 Fed. 450, affirming s. c. 211 Fed. 497.

Decree reversed.

DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, *v.* CORONA COAL COMPANY.

CERTIORARI TO THE COURT OF APPEAL OF THE PARISH OF ORLEANS OF THE STATE OF LOUISIANA.

No. 819. Argued May 5, 1924.—Decided May 26, 1924.

An action by the Director General of Railroads, in a state court, to recover for damage done to a railroad wharf while it was under federal control, is not subject to the state statute of limitations. Cf. *Dupont De Nemours & Co.* v. *Davis,* 264 U. S. 456. P. 222.
Reversed.

CERTIORARI to a judgment of the Court of Appeal of the Parish of Orleans, Louisiana, (which the Supreme Court of the State declined to review,) sustaining the defense of prescription in an action for damages brought by the Director General of Railroads.

Mr. Harry McCall, with whom *Mr. George Denégre, Mr. Victor Leovy, Mr. Henry H. Chaffe, Mr. Jas. Hy. Bruns, Mr. E. L. Gladney, Jr., Mr. A. A. McLaughlin* and *Mr. Sidney F. Andrews* were on the brief, for petitioner.

Mr. Richard B. Montgomery, for respondent, submitted.

In Louisiana, the forum governs prescription, even on a judgment of another State. *Brown* v. *Stone,* 4 La. Ann. 235; *Taylor* v. *Hadden,* 7 La. Ann. 272.

The Supreme Court of Louisiana has found no distinction, as to prescription for torts, between public ministerial officers and private individuals. *New Orleans* v. *Southern Bank,* 31 La. 567.

Where a government goes into business in concert, or in competition, with its citizens, or where the mischiefs to be remedied are of such a nature that the State must be necessarily included, the statutes of limitations run against the government. *Calloway* v. *Cossart,* 45 Ark. 88.

The law providing for the taking over of the railroads temporarily by the Government undoubtedly intended the railroads to run as private business and that the Government should not take advantage of its position as a Government to advantage it in dealings with individuals. And in this case the defendant was engaged in the business of the railroad—that is, in landing and removing steamships to load or deliver railroad freight at its own wharf.

The Act of March 21, 1918, c. 25, § 10, 40 Stat. 451, provides: (1) That carriers, while under federal control, are subject to all laws and liabilities as common carriers, except (and this is the only exception) those inconsistent with the act or any other act applicable to federal control or with any order of the President. (2) That actions at law and suits in equity may be brought by and against such carriers and judgments rendered as now provided by

law. (3) That in any action at law or suit in equity against the carrier "no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

This certainly means that the Government is to be in the place of the private owner of the railroad and subject to all existing laws governing the business relations of the railroads, and subject to the same suits and judgments. And it means that, in all actions for or against the carrier, the carrier cannot use the defense that it is an instrumentality or agency of the Government; and this would cover the defense to a plea of prescription. The Government, in taking over the railroads, intended that they should be governed by the laws exactly as when run by private individuals, and it was not intended that the people dealing with the railroads should in one particular alone—and that a most unfair and unjust particular—be met with the defense that the railroad is an agency of the Government, in the case of a plea of prescription.

Matters of taxation, matters essentially governmental, have no bearing on this case.

When the Federal Government, through its representatives, voluntarily invokes the aid of the state court, the state law, as to prescription, not the federal law, prevails.

Mr. Justice Holmes delivered the opinion of the Court.

On March 3, 1923, the Director General of Railroads sued the respondent Coal Company in a City Court of New Orleans, for damages done by it to a railroad wharf on January 9, 1920, while the wharf was under federal control. The Coal Company pleaded the prescription of one year under the statutes of Louisiana. Civil Code, Art. 3536. This defence was upheld by the City Court and by the Court of Appeal and a review was denied by the Supreme Court on the ground that the ruling below

was correct. A writ of certiorari was granted by this Court.

In *Dupont De Nemours & Co.* v. *Davis,* 264 U. S. 456, it was held that the Director General was not barred by the statutes of the United States in an action on behalf of the United States in its governmental capacity to recover upon a liability arising out of his control. The familiar rule was repeated that the United States should not be held to have waived any sovereign right or privilege unless it was plainly so provided. The reasoning of that case excludes the notion that there was any intentional waiver by the United States of its sovereign right to collect its claims, irrespective of any statute, "as soon as practicable." The provisions of § 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456, subjecting carriers "to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except" &c., rightly was said by the counsel for the petitioner to do no more than subject operations of the carriers to existing laws, not to adopt from the States their several limitations to suits that this Government might bring, while the United States applied no limitations of its own. The distinction in the statute between carriers and the Government is pointed out in the above cited case. Also it is established that a state statute of limitations cannot bar the United States, at least when a suit is brought in the United States courts. *United States* v. *Thompson,* 98 U. S. 486. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.,* 118 U. S. 120. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 125. The only question that requires a further word is whether the Courts below were right in thinking that the *lex fori* imposed a different rule if the United States saw fit to sue in a state court.

Perhaps it was not quite fully remembered that the laws of the United States are a part of the *lex fori* of a

State. But however that may be, it has been decided by a series of cases that when the courts of a State are given general jurisdiction over a certain class of controversies the power of the State over its own courts cannot be used to exclude a party from what otherwise is a constitutional right. *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 111. *Kenney* v. *Supreme Lodge of the World,* 252 U. S. 411, 415. *Missouri ex rel. Burnes National Bank* v. *Duncan, ante,* 17. If the section of the Louisiana Code after the limitation that it expresses went on to say that the United States is forbidden to sue in the courts of the State upon such claims over a year old, although but for this limitation it might, the exception could not be maintained. But we hardly believe that if the matter were baldly presented the Code would be construed in that way. The ruling below was based upon the belief, since shown to be mistaken, that the United States had waived its immunity from the state laws.

Judgment reversed.

SALINGER, JR. *v.* LOISEL, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA.

SAME *v.* SAME.

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

SALINGER, JR. *v.* UNITED STATES, AND LOISEL, AS UNITED STATES MARSHAL, EASTERN DISTRICT OF LOUISIANA.

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

Nos. 341, 342, 705. Argued January 14, 15, 1924.—Decided May 26, 1924.

1. Warrants of removal issued in triplicate are in legal effect but a single warrant, and defendant who had secured a *supersedeas* on appeal from an order refusing relief by *habeas corpus* from arrest under one, could not lawfully be arrested under another. P. 228.
2. Where an accused person, on being surrendered by his surety and instituting *habeas corpus* proceedings, is rearrested in removal proceedings, due practice requires that a test of the second confinement, involving only the same questions, be had by amendment of the existing petition in *habeas corpus;* and where a second petition is erroneously brought, the two should be consolidated and heard as one case, thus avoiding the confusion and expense of double appeals. P. 229.
3. The common-law doctrine of *res judicata* does not extend to a decision on *habeas corpus* refusing to discharge a prisoner. P. 230.
4. But, in the exercise of its sound, judicial discretion "to dispose of the party as law and justice may require," (Rev. Stats. § 761,) a federal court may base its refusal to discharge on a prior refusal; and, as a safeguard against abuse of the writ, the applicant in any case may be required to show whether he has made a prior application and, if so, what was done on it. *Id.*
5. Under the Sixth Amendment, an accused cannot be tried in one district under an indictment showing that the offense was committed in another district. P. 232.

6. Nor is there any authority for a removal to a district other than that in which the trial may constitutionally be had. P. 232.
7. Under § 215 of the Criminal Code, to knowingly cause a letter to be delivered by mail, in accordance with the direction thereon, for the purpose of executing a fraudulent scheme, is an offense separate from that of mailing the letter, or causing it to be mailed, for the same purpose; and, where the letter is so delivered as directed, the person who caused the mailing causes the delivery, at the place of delivery, and may be prosecuted in that district although he was not present there. P. 233.
8. Under Jud. Code, § 53, when a district contains several divisions, the trial (in the language of the statute, the "prosecution") of an offense must be in the division where it was committed, unless the accused consents otherwise; but the indictment may lawfully be returned in another division of the same district. P. 235.
9. Resistance to removal having been unreasonably protracted, the Court directs immediate issuance of its mandate, with orders requiring that the accused under his bonds surrender himself within ten days to the marshal in the district of the removal proceeding or the district of the indictment. P. 238.

Nos. 341 and 342, affirmed.
295 Fed. 498 (No. 705,) reversed.

APPEALS from two orders of the District Court refusing release in *habeas corpus;* and certiorari to a judgment of the Circuit Court of Appeals affirming a like order made on a third application.

Mr. B. I. Salinger, with whom *Mr. St. Clair Adams* and *Mr. L. H. Salinger* were on the briefs, for appellant and petitioner.

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

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

These three cases involve certain phases of a protracted resistance by B. I. Salinger, Jr., to an effort by the United

States to have him removed to the District of South Dakota to answer an indictment for a violation there of § 215 of the Criminal Code, which makes it a punishable offense to use the mail for the purpose of executing a scheme or artifice to defraud.

The indictment was returned in the District Court for the District of South Dakota when sitting in the western division, and the offense was charged as committed in the southern division; but the grand jury which returned the indictment had been impaneled from the body of the district regardless of the divisions and instructed to inquire into and make due presentment of offenses committed in any part of the district. After receiving the indictment the court, at the suggestion of the United States Attorney, remitted it to the southern division for trial and other proceedings. A bench warrant was issued for Salinger's arrest, and he appeared before a commissioner in Iowa and gave bond for his appearance in the southern division on the first day of the next term. But he failed to appear, and the bond was declared forfeited.

Later, Salinger being in New York City, a proceeding was begun before a commissioner there for his arrest and removal to South Dakota under § 1014 of the Revised Statutes. He was arrested, taken before the commissioner, and accorded a hearing. The indictment was produced; he admitted he was the person charged; and on the evidence presented the commissioner found there was probable cause and committed him to await the issue of a warrant of removal. He then sued out a writ of *habeas corpus* in the District Court for that district; but after a hearing the court discharged the writ, remanded him to the marshal's custody, and issued a warrant for his removal. On his appeal, that decision was reviewed and affirmed by the Circuit Court of Appeals for the Second Circuit. 288 Fed. 752. He made no attempt to obtain any other or further review. When the mandate of the

Circuit Court of Appeals went down, to avoid being removed in the custody of the marshal, he gave a bond for his appearance two weeks hence in South Dakota. Again he failed to appear, and that bond was declared forfeited.

After giving the bond in New York and before the day stipulated therein for his appearance in South Dakota, Salinger went to New Orleans, appeared with a representative of the surety in that bond before a commissioner there, and was surrendered by the surety's representative to the marshal of that district in the commissioner's presence. Such a surrender in a distant district may not have been in accord with § 1018 of the Revised Statutes and may not have discharged the surety, but nothing turns on that here. The surrender seems to have been made with Salinger's full consent; but, however made, it constituted no obstacle to further proceedings for his removal. The commissioner accordingly directed that he be held in the marshal's custody to await the institution of such a proceeding. He then sued out a writ of *habeas corpus* in the District Court at New Orleans and was admitted to bail pending a hearing on the writ.

In a few days—during which Salinger failed to appear in South Dakota as stipulated in the bond given in New York—a proceeding for his arrest and removal under § 1014 was begun before the commissioner in New Orleans. He was arrested, taken before the commissioner, and accorded a hearing. The indictment was produced; evidence was presented tending to show he was the person charged; and he gave testimony tending to show he was not in South Dakota at the times he was charged with unlawfully using the mail. On all the evidence the commissioner found the requisite identity and probable cause, and committed him to await the issue of a warrant for his removal. He then sued out another writ of *habeas corpus* in the District Court, and was admitted to bail pending a hearing on the writ.

On a hearing in the two cases all the proceedings in South Dakota, New York, the Circuit Court of Appeals for the Second Circuit, and New Orleans which have been recited herein were produced in evidence, and on consideration thereof the court discharged both writs of *habeas corpus,* remanded Salinger to the marshal's custody, and issued a warrant for his removal. Direct appeals to this Court in the two cases were then prayed by Salinger and allowed by the District Court, it being especially directed in both cases that the appeal operate as a supersedeas on Salinger's giving approved bail. The bail was given and approved. These cases are Nos. 341 and 342.

Notwithstanding the supersedeas so effected, Salinger was taken into custody by the marshal under the warrant of removal with a view to executing its command. He then sued out a third writ of *habeas corpus* in the District Court,—his petition therefor being like his earlier petitions, save as in it he additionally complained that his detention under the warrant of removal was in contravention of the supersedeas allowed on the appeals in Nos. 341 and 342. After a hearing the District Court discharged the writ of *habeas corpus* and remanded him to the marshal's custody for removal under the warrant. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, where the decision was affirmed. 295 Fed. 498. The case is here on certiorari, 263 U. S. 683, and is No. 705. Bail in this case was allowed and given here when certiorari was granted.

In disposing of the additional ground of complaint advanced in No. 705 the Circuit Court of Appeals proceeded on the assumption that there were three distinct warrants of removal and that one of these was neither involved in the appeals in Nos. 341 and 342 nor covered by the supersedeas. But the assumption was not well founded. There was but one proceeding for removal before the

commissioner in New Orleans and it was based on the single indictment in South Dakota. There also was but one commitment for removal in that proceeding. The warrant of removal issued by the District Court was based expressly on that commitment; but for reasons not explained the warrant was issued in triplicate. In substance, form and date the three papers were identical. Taken either collectively or separately they embodied a single command, which was that the marshal "forthwith" remove Salinger to South Dakota and there deliver him to the proper authority to be dealt with under the indictment. To execute the command of one triplicate was to execute that of all. In legal effect therefore there was one warrant, not three. One was all that was sought, and no basis was laid for more. The obvious purpose of the supersedeas was to stay the execution of the command for removal pending the appeals to this Court in Nos. 341 and 342, and of course that purpose could not be thwarted by merely duplicating or triplicating the warrant embodying the command. It follows that the additional ground of complaint advanced in No. 705 was well taken. But, as that ground could be effective only during the life of the supersedeas in Nos. 341 and 342, it has no bearing on the decision to be given in them on the right to remove.

Before coming to the questions presented in those cases we think the procedure which was followed in them calls for comment. The first case was begun when Salinger was committed by the commissioner to await a proceeding for his removal. Later when such a proceeding was begun and the commissioner definitely committed him to await the issue of a warrant of removal, that change in the situation should have been shown in the first case by an appropriate amendment or supplement to the petition instead of being made the basis of a new and separate case. And when, in disregard of the propriety of taking that course,

the second case was begun, the two should have been consolidated and conducted as one. The parties were the same and the cases presented a single controversy. Maintaining them separately was productive of confusion and led to two appeals to this Court, when had the right course been taken one appeal plainly would have sufficed and would have lessened by one half the printing and other costs. As it is now, one record is largely a duplication of what appears in the other and both are exceedingly confusing. The course that was taken should not have been selected, nor should the court have permitted it.

In Nos. 341 and 342 the right to arrest and remove in virtue of the indictment was questioned on the same grounds that were set up in the earlier case in New York, where that right was upheld. Because of this situation, counsel for the appellee invoke the doctrine of *res judicata* and insist that the decision in the New York case was a final adjudication of the right and is binding on all other courts, including this Court. We are unable to go so far. At common law the doctrine of *res judicata* did not extend to a decision on *habeas corpus* refusing to discharge the prisoner. The state courts generally have accepted that rule where not modified by statute; the lower federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point. The cases of *Carter* v. *McClaughry,* 183 U. S. 365, 378, and *Ex parte Spencer,* 228 U. S. 652, 658, are notable instances. We regard the rule as well established in this jurisdiction.

But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent

judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on *habeas corpus* came to be relatively narrowed.

The federal statute (§ 761, Rev. Stats.) does not lay down any specific rule on the subject, but directs the court "to dispose of the party as law and justice may require." A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application. *Ex parte Royall,* 117 U. S. 241; *Ex parte Fonda,* 117 U. S. 516; *Ex parte Mirzan,* 119 U. S. 584; *Cook* v. *Hart,* 146 U. S. 183; *In re Frederich,* 149 U. S. 70; *New York* v. *Eno,* 155 U. S. 89; *In re Chapman,* 156 U. S. 211; *Riggins* v. *United States,* 199 U. S. 547; *In re Lincoln,* 202 U. S. 178; *Henry* v. *Henkel,* 235 U. S. 219; *Ex parte Cuddy,* 40 Fed. 62; *In re Simmons,* 45 Fed. 241; *Ex parte Moebus,* 148 Fed. 39; *In re Kopel,* 148 Fed. 505. The decision in the *Cuddy Case* was on a second application, and was given by Mr. Justice Field. While holding the doctrine of *res judicata* inapplicable, he said, "the officers before whom the second application is made may take into consideration the fact that a previous application has been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be

affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it."

In practice the rules we here have outlined will accord to the writ of *habeas corpus* its recognized status as a privileged writ of freedom, and yet make against an abusive use of it. As a further safeguard against abuse the court, if not otherwise informed, may on receiving an application for the writ require the applicant to show whether he has made a prior application and, if so, what action was had on it.

Here the prior refusal to discharge was by a court of coördinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals. Had the District Court disposed of the later applications on that ground, its discretion would have been well exercised and we should sustain its action without saying more. But its decision does not appear to have been put on that ground; and, as circumstances are disclosed which make it appropriate that we consider and pass on two of the objections urged against a removal, we turn to them.

Both objections go to the jurisdiction of the court before which it is proposed to take and try the accused. One is that under the Sixth Amendment to the Constitution there can be no trial in the District of South Dakota because the indictment shows that the offense charged was not committed in that district but in a district in Iowa, and the other that, even if the indictment be taken as charging an offense in the District of South Dakota, it shows that it was returned in a division of that district other than the one in which the offense was committed.

It must be conceded that under the Sixth Amendment to the Constitution the accused can not be tried in one district on an indictment showing that the offense was not committed in that district; and it also must be conceded that there is no authority for a removal to a dis-

trict other than one in which the Constitution permits the trial to be had. We proceed therefore to inquire whether it appears, as claimed, that the offense was not committed in the district to which removal is sought.

The material part of § 215 of the Criminal Code on which the indictment is based reads:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . shall, for the purpose of executing such scheme or artifice . . . place, or cause to be placed, any letter . . . in any post-office, . . . or authorized depository for mail matter, to be sent or delivered, . . . or shall knowingly cause to be delivered by mail according to the direction thereon . . . any such letter, . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

The indictment charges that the defendants, of whom Salinger is one, devised a scheme and artifice to defraud divers persons by means described, and thereafter, for the purpose and with the intent of executing their scheme and artifice, did unlawfully and knowingly "cause to be delivered by mail" according to the direction thereon, at Viborg within the southern division of the District of South Dakota, a certain letter directed to a named person at that place, the letter and the direction being particularly described. The indictment then adds, in an explanatory way (see *Horner* v. *United States,* 143 U. S. 207, 213), that on the day preceding the delivery the defendants had caused the letter to be placed in the mail at Sioux City, Iowa, for delivery at Viborg according to the direction thereon. There were other counts in the indictment but they need not be particularly noticed, for the one just described is a fair sample of all.

Section 215 is a reënactment, with changes, of an earlier statute which made it an offense for the deviser of a scheme or artifice to defraud to place or cause to be placed

in the mail any letter in furtherance thereof, but did not contain the clause making it also an offense for the deviser to cause such a letter " to be delivered by the mail according to the direction thereon." Under the original statute the offense was held to be complete when the letter was placed in the mail depository for transmission, and the place of the deposit was held to be the place of commission, regardless of whether or where the letter was delivered. The appellant insists that the introduction of the new clause into the statute as reënacted is not of material significance here. We are of a different opinion. That clause plainly provides for the punishment of the deviser of the scheme or artifice where he causes a letter in furtherance of it to be delivered by the mail according to the direction on the letter. This is done by way of enlarging the original definition of the offense, the clause dealing with the placing of such a letter in a mail depository being retained. Evidently Congress intended to make the statute more effective and to that end to change it so that, where the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit. A letter may be mailed without being delivered, but, if it be delivered according to the address, the person who causes the mailing causes the delivery. Not only so, but the place at which he causes the delivery is the place at which it is brought about in regular course by the agency which he uses for the purpose. *United States* v. *Kenofskey,* 243 U. S. 440, 443. Were the Government attempting to prosecute at both places, a question might arise as to whether it should be required to elect between them (see *Haas* v. *Henkel,* 216 U. S. 462, 474); but, as there is no such attempt here, that question need not be considered. The appellant relies on *United States* v. *Stever,* 222 U. S. 167, as showing that the offense was committed at the place of the deposit and not at that

of the delivery; but the case is not in point. It arose before the statute was changed. The indictment there was in two counts. One was based on the original statute and was expressly abandoned by the Government. The other was based on another statute relating to the use of the mail in promoting lotteries and other schemes of chance.

We conclude that there is no sound basis for the claim that the indictment shows that the offense was not committed in the district to which removal is sought. An effort was made to strengthen that claim by producing testimony tending to show that Salinger was not in that district at the time. But of that effort it suffices to say that the nature of the offense is such that he could have committed it, or have participated in its commission, even though he was not then in the district. *In re Palliser,* 136 U. S. 257; *Horner* v. *United States,* 143 U. S. 207, 213; *Burton* v. *United States,* 202 U. S. 344, 386.

The objection that the indictment was not returned in the division in which it charges the offense was committed, and therefore that jurisdiction could not be founded on it, is based on a provision of § 53 of the Judicial Code reading as follows:

"When a district contains more than one division, . . . all prosecutions for crimes or offenses shall be had within the division . . . where the same were committed, unless the court, or the judge thereof, upon application of the defendant, shall order the cause to be transferred for prosecution to another division of the district."

South Dakota constitutes a single judicial district with one District Court; but the district is divided into four divisions where sessions are held at times fixed by law, such sessions whether in one division or another being "successive terms of one and the same court." *Hollister* v. *United States,* 145 Fed. 773, 782. A like situation exists in many of the States.

Formerly special statutes applicable to particular districts indicated the division in which criminal proceedings should be had, but the statutes were not uniform. Some provided that crimes and offenses should be "indictable" and triable only in the division where committed, or that all criminal proceedings should "be brought" and had in such division. But the greater number, in varying terms, required that the trial be in that division, unless the accused consented to its being in another. In districts where the latter were in force, it was common to impanel a grand jury from the district at large, to charge such grand jury with the investigation and presentment of offenses committed in any part of the district, and when indictments were returned to remit them for trial and other proceedings to the divisions wherein the offenses were committed, save as the defendant assented to a disposal in another division. The practice is illustrated in *Logan* v. *United States,* 144 U. S. 263, 297, and *Rosencrans* v. *United States,* 165 U. S. 257. The general provision in § 53 here relied on superseded the special statutes. It obviously is less restrictive in its terms than some of them were; and the prevailing practice under it has been like that theretofore followed in districts where the less restrictive provisions were in force. See *Biggerstaff* v. *United States,* 260 Fed. 926; *United States* v. *Chennault,* 230 Fed. 942.

The contention is that the word "prosecution" in the general provision includes the finding and return of an indictment. That the word sometimes is used as including them must be conceded. But there are also relations in which it comprehends only the proceedings had after the indictment is returned. Here we think it is used with the latter signification. It appears twice in the provision, doubtless with the same meaning. The first time is in the clause directing that "all prosecutions" be had in the division where the offense was committed, and the second

is in the clause permitting the court or judge, at the instance of the defendant, to order "the cause to be transferred for prosecution" to another division. The connection in which it appears the second time shows that it refers to the proceedings after the indictment is found and returned, that is to say, after there is a cause susceptible of being transferred. Besides, had Congress intended to put an end to the prevailing practice of impaneling a grand jury for the entire district at a session in some division and of remitting the indictments to the several divisions in which the offenses were committed, unless the accused elected otherwise, it is but reasonable that that intention would have been expressed in apt terms, such as were used in some of the exceptional special statutes. That practice was attended with real advantages which should not be lightly regarded as put aside. In many divisions only one term is held in a year. If persons arrested and committed for offenses in those divisions were required to await the action of a grand jury impaneled there, periods of almost a year must elapse in many instances before a trial could be had or an opportunity given for entering a plea of guilty and receiving sentence.

In our opinion the real purpose of the provision, that which best comports with its terms when taken in the light of the circumstances in which it was enacted, is to require, where a district contains more than one division, that the trial be had in the division where the offense was committed, unless the accused consents to be tried in another. The Circuit Court of Appeals so held in a well considered opinion in *Biggerstaff* v. *United States, supra.* The only decision the other way, of which we are advised, was by the District Court for the Eastern District of Louisiana in *United States* v. *Chennault, supra;* and that court receded from that decision in the cases now before us.

The appellant relies on *Post* v. *United States,* 161 U. S. 583, as making for the contrary conclusion. But it does not do so. The case turned on a special statute, now superseded, declaring that " all criminal proceedings " for offenses in the District of Minnesota " shall be brought, had and prosecuted " in the division in which the same were committed. The difference between that special direction and the general one now before us is so marked that further comment is not required.

Other objections to the removal are urged, but those we have discussed and overruled are all that can with any propriety be regarded as open to consideration on these appeals.

A survey of the records before us shows that the resistance to removal has been unreasonably protracted. The mandate in these cases will issue forthwith and will embody an order requiring, under the bail given on the appeals in Nos. 341 and 342 and under that given on the granting of the writ of certiorari in No. 705, that Salinger surrender himself into the custody of the marshal for the Eastern District of Louisiana, at New Orleans, within ten days from the day the mandate bears date preparatory to a removal under the warrant heretofore issued by the District Judge of that district; or, in the alternative, that he surrender himself within such ten days into the custody of the marshal for the District of South Dakota at some place within that district, to be dealt with according to law.

Judgments in Nos. 341 and 342 affirmed.
Judgment in No. 705 reversed.

WONG DOO *v.* UNITED STATES.

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

No. 736. Argued April 10, 1924.—Decided May 26, 1924.

1. The strict doctrine of *res judicata* does not apply to *habeas corpus*. *Salinger* v. *Loisel, ante,* 224. P. 241.
2. But the court, in its sound discretion, may dismiss a petition for *habeas corpus* because of a prior refusal, when the ground for the second application was set up, with another, in the first, and when the evidence to support it then was withheld without excuse for use on a second attempt if the first failed. *Id.*
3. Where unreasonable delays have been caused by resort to *habeas corpus* proceedings, the mandate of this Court will issue forthwith. *Id.*

293 Fed. 273, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a decision dismissing a petition for *habeas corpus*.

Mr. William J. Dawley and *Mr. Jackson H. Ralston,* with whom *Mr. George W. Hott* was on the briefs, for petitioner.

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

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

This is a second petition for a writ of *habeas corpus* by a Chinese in custody under an order of deportation issued under § 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874.

In the first petition the validity of the order was assailed on two grounds: one that the Secretary of Labor

issued it without lawful jurisdiction, and the other that the administrative hearing on which it rested was not adequate or fair but essentially arbitrary. The return, besides answering the first ground, denied there was in fact any basis for the second. At the hearing in the District Court on these issues the petitioner offered no proof in support of the second ground. The court ruled that the first was not good in law, remanded the petitioner and dismissed his petition. He appealed to the Circuit Court of Appeals, and it affirmed the decision.

Later the second petition was presented to the same District Court. In it the petitioner relied entirely on the second ground set forth before. There was some elaboration in stating it, but no enlargement of the substance. The petitioner sought to distinguish the two petitions by alleging in the second that the earlier one was "based solely" on the jurisdictional objection; but that allegation was not true. The return in the second case fully denied the charge that the administrative hearing was inadequate, unfair and arbitrary; set up the prior petition and the proceedings thereon, and prayed a dismissal of the second petition.

After a hearing, the District Court ruled that the doctrine of *res judicata* applied; held the decision in the first case was conclusive in the second; remanded the petitioner, and dismissed the petition. 283 Fed. 989. On an appeal to the Circuit Court of Appeals that decision was affirmed. 293 Fed. 273.

In *Salinger* v. *Loisel,* just decided, *ante,* 224, we held that in the federal courts the doctrine of *res judicata* does not apply to a refusal to discharge a prisoner on *habeas corpus;* but that in those courts, where the prisoner presents a second petition, the weight to be given to the prior refusal is to be determined according to a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the subject.

It therefore must be held that in this case the courts below erred in applying the inflexible doctrine of *res judicata.* But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus.* No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely. Here the execution already has been postponed almost four years.

We conclude that the judgment was right, although a wrong reason was given for it. The delay resulting from the course pursued by the petitioner has been unreasonable; so the mandate from this Court will issue forthwith.

Judgment affirmed.

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WEISS, COLLECTOR OF INTERNAL REVENUE, *v.* STEARN.

WEISS, COLLECTOR OF INTERNAL REVENUE, *v.* WHITE.

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

Nos. 262 and 263. Argued April 30, 1924.—Decided May 26, 1924.

Pursuant to an agreement, the stockholders of an Ohio corporation deposited with a trustee their certificates for all its capital stock ($5,000,000), and other parties deposited $7,500,000; the depositors organized a new Ohio corporation with authorized capital stock of $25,000,000, and powers like those of the old corporation; the new corporation took over the property, assets and business of the old one, assuming its contracts and liabilities, and delivering certificates for all its stock to the trustee, in payment, and carried on the business under the old management; the old corporation was dissolved; the trustee delivered half of the new stock and the whole $7,500,000 to the old stockholders *pro rata*, and the other half of the new stock to the other depositaries; so that each owner of old stock received cash, and also shares of new stock representing an interest in the corporate property and business half as large as he had before. *Held:*

(1) That the new stock received by the old stockholders, unlike the money, was not the proceeds of a sale but represented part of the same capital investment as their old shares, without any segregated gain taxable as income under the Revenue Act of 1916. P. 252.

(2) The transaction amounted to a financial reorganization under which each stockholder retained half his interest and disposed of the remainder. P. 254.

(3) Questions of taxation must be determined by viewing what was actually done rather than the declared purpose of the participants. *Id.*

(4) When applying the Sixteenth Amendment and income tax laws enacted under it, the courts must regard matters of substance and not of mere form. *Id.*

285 Fed. 689, affirmed.

CERTIORARI to judgments of the Circuit Court of Appeals affirming judgments recovered by the respondents in the District Court in their actions to recover money paid under protest as income taxes.

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

I. The transaction between the respondents and Eastman, Dillon & Company was in fact and legal effect a sale by the respondents of all their stock in the National Acme Manufacturing Company for $300 a share, payable $150 in cash and $150 in securities of another corporation.

The transaction, of course, must be considered in the light of the agreement. That agreement was evidently drawn with care, is free from ambiguity, and expresses clearly a definite intent. The "vendors" agree to and will sell all their shares, and the "purchasers" agree to and will purchase the same from them, as well as any and all shares the holders of which deposit them with the depositary named, for the price of $300 per share, payable one-half in cash and one-half in securities "as hereinafter set forth." The contract was made upon the express condition that it should not become operative unless at least 80 per cent. of the entire outstanding stock should be deposited "for sale." Of course it is apparent that the purpose of Eastman, Dillon & Company, the purchasers, was to become the owners of a half interest in a very profitable business, and we all know that one who holds 50 per cent. of the stock of a corporation practically controls it, where the other half is held by numerous stockholders. The other terms of the agreement show that the purchasers were not buying one-half of the stockholders' stock. They were purchasing the company for the purpose of reorganizing it and placing themselves in control;

so the agreement provides that they shall have an opportunity to investigate the representations made by the vendors with respect to the earnings of the company and the title to the company's property, and, if that examination was unsatisfactory, the purchasers would not be required to carry out the agreement.

The vendors, owning 14,000 shares out of a total issue of 50,000 shares, were to deposit their stock with the depositary, as were all other stockholders who wished to take advantage of the agreement. The stock, as is usual in such transactions, was to be endorsed in blank for transfer, so as to constitute the vendees attorneys in fact and proxies, which would enable them, of course, to vote the stock as it became necessary to transfer the assets to the new company and dissolve the old one. The use of the words "vendors" and "purchasers" throughout the agreement shows that these words were used in no other sense than the usual one of such language in similar agreements. If less than the entire amount of the capital stock of the National Acme Manufacturing Company was deposited, the depositary was to retain ten shares of stock of the new company and $150 in cash on account of each share not deposited until "adjustment for the purchase of such nondeposited stock under the laws of Ohio, or otherwise, can be had." The "purchasers" were to make whatever adjustment might be necessary to acquire such nondeposited stock and to that end might use the shares of stock and money retained by the depositary, and, when the nondeposited stock had been acquired "by the purchasers," the depositary was to turn over to the purchasers any shares or money then remaining in its hands, provided, however, that the vendors, if they desired, should have the right to proceed "in the purchase of such nondeposited stock to the extent and upon the terms which may be deemed equitable" by two gentlemen named, and with the further provision that in lieu of their portion of

the retained stock the purchasers might substitute and deposit such other collateral as might be approved by the two gentlemen. The concluding paragraph of the agreement is also significant, providing for modifications or additions to be made by those gentlemen but denying them power to modify in regard to "prices of the stock sold or time of payment therefor."

II. The excess of both the cash and the value of the National Acme Company's stock, received by the respondents, over the value of the National Acme Manufacturing Company's stock as of March 1, 1913, or, in the case of stock purchased since that date, its cost, was income for the year 1916.

The transaction comes clearly within the language of the act, taxing profits derived from "sales or dealings in property."

The receipt of property may as well constitute income to the taxpayer as the receipt of money. *Peabody* v. *Eisner,* 247 U. S. 347; *Eisner* v. *Macomber,* 252 U. S. 189; *United States* v. *Phellis,* 257 U. S. 156.

Before the transaction, the plaintiffs' stock reflected their original capital investments plus the accretions which had resulted through the old company's business activities and constituted its surplus—a surplus in which they as individual stockholders had no property interest except as it increased the value of their capital. When, however, they sold that stock for its par value and received in addition cash and securities in another corporation, it is clear that they received assets of exchangeable and actual value severed from their capital interests in the old company. *United States* v. *Phellis, supra; Rockefeller* v. *United States,* 257 U. S. 176; *Cullinan* v. *Walker,* 262 U. S. 134; *Eisner* v. *Macomber, supra.* When the exchange had been completed, each stockholder had realized his entire investment and profit in the old company, even though he immediately put part of it into a new venture.

III. The stock received by respondents was, in fact and legal effect, different property from the Company stock which they disposed of.

The ownership by one corporation of the stock of another corporation, or the ownership by the stockholders of one corporation of the stock of another corporation, does not destroy the distinct legal entity of the two corporations. *Pullman's Palace Car Co.* v. *Missouri Pacific Ry. Co.,* 115 U. S. 587; *Peterson* v. *Chicago, etc. Ry. Co.,* 205 U. S. 364.

In cases involving taxation, the courts have consistently refused to disregard the principle of corporate entity. *Eisner* v. *Macomber,* 252 U. S. 189; *Osgood* v. *Tax Commissioner,* 235 Mass. 88; *Stone* v. *Tax Commissioner,* 235 Mass. 93; *United States* v. *Phellis,* 257 U. S. 156.

All the considerations, except that of incorporation under the laws of different States, mentioned by the Court in the *Phellis Case* as supporting the corporate entities of the corporations there in question, are present here. Furthermore, while in the *Phellis Case* the stockholders of the two corporations were identical, in the case at bar the stockholders of the National Acme Manufacturing Company and the National Acme Company were not identical.

Southern Pacific Co. v. *Lowe,* 247 U. S. 330, and *Gulf Oil Corporation* v. *Lewellyn,* 248 U. S. 71, are clearly distinguishable. See *Peabody* v. *Eisner, supra,* p. 349; *Lynch* v. *Hornby,* 247 U. S. 339, 346.

The fact that the respondents acquired no increase in aggregate wealth through the sale or exchange of their stock is not material in determining whether they experienced a realization of profits constituting income. *United States* v. *Phellis, supra,* p. 171.

Mr. Charles P. Hine, with whom *Mr. Amos Burt Thompson* was on the brief, for respondent in No. 262.

I. The contract was not for the sale of the stock to Eastman, Dillon & Company at $300 per share, but was for the sale of a half interest at $150, and the substitution for the other half interest of stock in which Eastman, Dillon & Company never had any interest, legal or equitable. The new stock represented a continuation of the same corporate enterprise and the entire equitable interest in the stock which plaintiff received was at all times owned by him.

The fact that one clause of the contract, pursuant to which the exchange of the stock was made, recited that stockholders in the old company agree to sell their stock "for $300 per share, payable one-half in cash and one-half in securities, as hereinafter set forth," did not make the transaction the equivalent of a sale for cash.

The contract was of a dual nature, being in part a contract for the sale of a half interest to Eastman, Dillon & Company, and in part a reorganization agreement between the old stockholders and Eastman, Dillon & Company, providing for the creation by the vendors and purchasers of a new company to stand in the place of the old, and for the distribution by the trustee of the stock of the new company to the old stockholders and to Eastman, Dillon & Company, in proportion to their respective interests, as fixed by the trust agreement. The transaction as carried out resulted in the sale of such half interest and the continuance of the same business.

II. Plaintiff realized no income from the receipt of stock in the National Acme Company, since his capital interest in the same single corporate enterprise continued without any change in the nature of his investment. *Eisner* v. *Macomber,* 252 U. S. 206; *United States* v. *Phellis,* 257 U. S. 156.

III. The same result could have been attained by a process of internal reorganization, and if this manner of procedure had been adopted, no taxable income would have resulted. See *Cullinan* v. *Walker,* 262 U. S. 134, 137.

IV. The mere difference in corporate entity between the National Acme Manufacturing Company and the National Acme Company is not a sufficient basis for holding that income was realized by the exchange of one stock for the other. *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330.

We must assume that it was the purpose of Congress to refrain from taxing as income derived from a transaction the mere increase in capital value of an investment which after such transaction remains in truth and in substance the same investment as before.

After Eastman, Dillon & Company acquired a one-half interest in the stock of the National Acme Manufacturing Company by depositing the cash consideration therefor, they and the other stockholders of the National Acme Manufacturing Company were to unite in forming a new corporation and in causing the old company to transfer its assets to the new. The new company was therefore a mere agency of the stockholders of the old company and subject in all things to their proper direction and control. The principle of *Southern Pacific Co.* v. *Lowe, supra,* is therefore directly applicable. *Gulf Oil Corporation* v. *Lewellyn,* 248 U. S. 71.

In the present case plaintiff merely received different certificates of stock which represented exactly the same proportionate interest in a corporation having the same stockholders, the same assets, powers, purposes and management as the original company.

V. The rule of construction announced in previous decisions prevents a holding that income was realized by the transaction in the case at bar. *Gould* v. *Gould,* 245 U. S. 151.

Mr. John G. White, with whom *Mr. A. V. Cannon* and *Mr. L. C. Spieth* were on the brief, for respondent in No. 263.

Looking through all the forms and machinery, the real transaction is this: The old stockholders sold half their stock to Eastman, Dillon & Company for $7,500,000, and deposited their stock, transferred in blank, with the depositary, subject to this agreement. Thereby Eastman, Dillon & Company became owners of half the stock of the Manufacturing Company and the old stockholders remained the owners of the other half of the stock of the Manufacturing Company. Then the two sets together, thus constituting the whole body of the stockholders of the Manufacturing Company, organized the new company, and the two sets together constituting the whole body of stockholders of the old company as such, through the corporate action agreed to be taken by the agreement, transferred all its assets to the new company for all the stock of the new company and its assumption of all the debts of the old company. The stockholders of the old company having thus become the owners of all the stock of the new company, and it being part of the agreement that this stock shall be divided ratably among the stockholders of the old company, half of this stock went to Eastman, Dillon & Company, or their nominees, they having become the owners of half of the stock of the old company. Half of it, of course, went to the old stockholders of the old company. This being the nature of the transaction, Eastman, Dillon & Company, for their half of the stock of the old company, got half of the stock of the new company or five new shares for one old, and the old stockholders, for each share of the half of the stock of the old company which they owned, after selling the other half to Eastman, Dillon & Company, got five shares of the new company, the new company having exactly the same powers and the same purposes as the old company, and exactly the same assets and the same liabilities. As a consequence, by this part of the transaction there was neither gain nor loss. Each stockholder

simply had a certificate for a larger number of shares than he had before.

There has been no segregation of any of the assets of either the old company or the new company, no stock issued against any part of the assets of the old company or the new company, but the entire assets of the old company, without addition or diminution, which before was the property of all the stockholders of the old company, became the property of all the stockholders of the new company, and represented by all its stock.

Treating it as a sale to Eastman, Dillon & Company of the entire stock for $7,500,000 of cash and $12,500,000 of stock of the new company, the only profit obtained was from the payment of the cash, for half the stock of the new company was of precisely the same value as half the stock of the old company, represented exactly the same assets, the same liabilities, devoted to the same purposes as before, and hence, so far as the old stock was paid for by the new stock, no profit was made, no gain received, and hence no income.

Taking either line of reasoning,—there was no segregation as to the old stockholders of one-half of their stock of any part of the assets, which all still remained in the corporation, devoted to the same uses and purposes as before, subject to corporate control, without any power on the part of the owners of the stock to segregate any part thereof without corporate action. *Eisner* v. *Macomber,* 252 U. S. 189; *Towne* v. *Eisner,* 245 U. S. 418; *United States* v. *Alpha Portland Cement Co.,* 242 Fed. 978; s. c. 257 Fed. 432; 261 Fed. 339; *Peabody* v. *Eisner,* 247 U. S. 347; *Lynch* v. *Hornby,* 247 U. S. 339; *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330; *Gulf Oil Corporation* v. *Lewellyn,* 248 U. S. 71.

Where there are doubts in the construction of a tax law, they should be resolved in favor of the taxpayer and against the Government. *Gould* v. *Gould,* 245 U. S. 151;

Crocker v. *Malley,* 249 U. S. 223. See further *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330; *Gulf Oil Corporation* v. *Lewellyn,* 248 U. S. 71; *United States* v. *Mellon,* 279 Fed. 910; s. c. 281 Fed. 645.

Mr. Justice McReynolds delivered the opinion of the Court.

Respondents brought separate actions to recover money which they alleged petitioner unlawfully demanded of them as income tax. The question for our decision is this: Did they, by the transactions hereinafter detailed, dispose with profit of all or, as they maintain, of only half their interests in the National Acme Manufacturing Company, within the income provisions, Revenue Act of 1916 (c. 463, 39 Stat. 756, 757). Both courts below upheld their claims and gave judgments for appropriate refunds.

Under a definite written agreement the following things were done—

(A) Respondents and other owners delivered duly endorsed certificates representing the entire capital stock ($5,000,000) of the National Acme Manufacturing Company, incorporated under laws of Ohio—the old corporation—to The Cleveland Trust Company, as depositary. Messrs. Eastman, Dillon & Company deposited $7,500,000 with the same Trust Company. Representatives of both classes of depositors thereupon incorporated in Ohio the National Acme Company—the new corporation—with $25,000,000 authorized capital stock and powers similar to those of the old corporation. Pursuing the definite purpose for which it was organized, the new corporation purchased and took over the entire property, assets and business of the old one, assuming all outstanding contracts and liabilities, and in payment therefor issued to the Trust Company its entire authorized capital stock. It continued to operate the acquired business under the former management, and the old corporation was dissolved.

(B) The Trust Company delivered to Eastman, Dillon & Company certificates for half the new stock—$12,500,000. To the owners of the old stock—to each his pro rata part—it delivered certificates representing the remaining half, together with the $7,500,000 cash received from Eastman, Dillon & Company. The owner of each $100 of old stock thus received $150 cash, also $250 of new stock representing an interest in the property and business half as large as he had before. Prior to the specified transactions his interest in the enterprise was 100/5,000,000; thereafter it became 250/25,000,000, or 50/5,000,000.

The Collector ruled that each old stockholder sold his entire holding, and assessed respondent accordingly for resulting profits. Adopting a different view, the courts below held that he really sold half for cash and exchanged the remainder, without gain, for the same proportionate interest in the transferred corporate assets and business.

We agree with the conclusion reached below. The practical result of the things done was, a transfer of the old assets and business, without increase or diminution or material change of general purpose, to the new corporation; a disposal for cash by each stockholder of half his interest therein; and an exchange of the remainder for new stock representing the same proportionate interest in the enterprise. Without doubt every stockholder became liable for the tax upon any profits which he actually realized by receiving the cash payment. If by selling the remainder he hereafter receives a segregated profit, that also will be subject to taxation.

Petitioner relies upon *United States* v. *Phellis,* 257 U. S. 156, and *Rockefeller* v. *United States, id.* 176; also *Cullinan* v. *Walker,* 262 U. S. 134, which followed them. As the result of transactions disclosed in the *Phellis* and *Rockefeller Cases,* certain corporate assets not exceeding accumulated surplus were segregated and passed to individual stockholders. The value of the segregated thing

so received was held to constitute taxable income. Cullinan's gain resulted from a dividend in liquidation actually distributed in the stock of a holding company incorporated under the laws of a foreign State, not organized for the purpose of carrying on the old business, and which held no title to the original assets.

Eisner v. *Macomber,* 252 U. S. 189, gave great consideration to the nature of income and stock dividends. It pointed out that, within the meaning of the Sixteenth Amendment, income from capital is gain severed therefrom and received by the taxpayer for his separate use; that the interest of the stockholder is a capital one and stock certificates but evidence of it; that for purposes of taxation where a stock dividend is declared, the essential and controlling fact is that the recipient receives nothing out of the company's assets for his separate use and benefit. The conclusion was that, "having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment."

Applying the general principles of *Eisner* v. *Macomber,* it seems clear that if the National Acme Manufacturing Company had increased its capital stock to $25,000,000 and then declared a stock dividend of four hundred per cent., the stockholders would have received no gain—their proportionate interest would have remained the same as before. If upon the transfer of its entire property and business for the purpose of reorganization and future conduct the old corporation had actually received the entire issue of new stock and had then distributed this pro rata among its stockholders, their ultimate rights in the enterprise would have continued substantially as before—the capital assets would have remained unimpaired and nothing would have gone therefrom to any stockholder for his separate benefit. The value of his holdings would not have changed, and he would have retained the same essential rights in respect of the assets.

We can not conclude that mere change for purposes of reorganization in the technical ownership of an enterprise, under circumstances like those here disclosed, followed by issuance of new certificates, constitutes gain separated from the original capital interest. Something more is necessary—something which gives the stockholder a thing really different from what he theretofore had. *Towne* v. *Eisner,* 245 U. S. 418; *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330; *Gulf Oil Corporation* v. *Lewellyn,* 248 U. S. 71. The sale of part of the new stock and distribution of the proceeds did not affect the nature of the unsold portion; when distributed this did not in truth represent any gain.

Considering the entire arrangement we think it amounted to a financial reorganization under which each old stockholder retained half of his interest and disposed of the remainder. Questions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants; and when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder we must regard matters of substance and not mere form.

Affirmed.

Mr. Justice Holmes and Mr. Justice Brandeis dissent on the ground that the case falls within the rule declared in *Cullinan* v. *Walker,* 262 U. S. 134.

HIXON *v.* OAKES.

ERROR TO THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA.

No. 420. Argued April 24, 1924.—Decided May 26, 1924.

A city ordinance forbidding the filling of prescriptions calling for more than eight ounces of alcoholic liquor, manifestly does not infringe any right of the pharmacist granted by the Eighteenth

Amendment or the National Prohibition Act and protected by the Fourteenth Amendment.
Writ of error to review 61 Cal. App. 200, dismissed.

ERROR to a judgment of the District Court of Appeal, of California, remanding the plaintiff in error, in a *habeas corpus* proceeding.

Mr. Ray E. Nimmo for plaintiff in error.

Mr. J. M. Friedlander and *Mr. S. W. Odell* for defendant in error.

Mr. E. C. Brokmeyer, by leave of Court, filed a brief as *amicus curiæ.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Plaintiff in error, a regularly licensed pharmacist, was convicted of violating, September 8, 1921, an ordinance of Los Angeles construed to forbid the filling of a prescription which called for more than eight ounces of alcoholic liquor.

After sentence, under permitted practice, he challenged the validity of the ordinance by a *habeas corpus* proceeding commenced in the District Court of Appeal upon the ground that it "is unconstitutional and void because it is in violation of the terms of the Eighteenth Amendment to the Constitution of the United States, and in violation of the terms of the National Prohibition Act," c. 85, 41 Stat. 305.

Having declared, "the single question presented for decision is whether the ordinance, insofar as it relates to the filling of prescriptions by licensed pharmacists, is valid and enforceable since the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Law, commonly known as the Volstead Act,"

the District Court of Appeal affirmed the validity of the ordinance and remanded plaintiff in error. Thereupon he sued out this writ of error. The assigment of errors alleges a conflict between the ordinance and the Fourteenth as well as the Eighteenth Amendment.

The petition for *habeas corpus* did not mention the Fourteenth Amendment. The opinion of the court below indicates it was there maintained that Congress by the Volstead Act granted some right or privilege which is protected by the Fourteenth Amendment and may not be abridged by State or municipality.

We do not stop to decide whether, considering plaintiff in error's clear right through a new petition to secure from the Supreme Court of California an unembarrassed determination of the question presented below (*Matter of Zany,* 164 Cal. 724), the assailed judgment is one "in the highest court of a State in which a decision in the suit could be had," within § 237, Judicial Code. It is enough now to say that he has failed to raise any substantial federal question; and for that reason the writ of error must be dismissed. Neither the Eighteenth Amendment nor the Volstead Act grants the right to sell intoxicating liquors within a State. And certainly nothing in that act lends color to the suggestion that it endows a pharmacist with the right to dispense liquors for which he may claim the protection of the Fourteenth Amendment.

We go no further than to consider the points definitely raised upon the record and dispose of the present writ.

Dismissed.

DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, *v.* DONOVAN, AS OWNER OF THE DECK SCOW "MARY ETHEL," ET AL.

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

No. 757. Argued April 10, 1924.—Decided May 26, 1924.

1. Under § 10 of the Federal Control Act and General Order 50–A, issued January 11, 1919, by the Director General of Railroads, the Director General was not made suable generally, as the operator of all railroads, but only with special reference to the particular transportation system or "carrier" out of whose operations the liability in question arose. Cf. *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554. P. 263.
2. Therefore, an action against him for alleged negligence in the operations of one carrier cannot be maintained by proof of negligence in the operations of another carrier, both under his control. *Id.*

294 Fed. 525, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court for the present respondent, in a libel brought by him against the Director General of Railroads to recover damages for injury to a vessel resulting from a collision.

Mr. Evan Shelby, with whom *Mr. John E. Walker* was on the brief, for petitioner.

The federal courts, outside of the Second Circuit, and the appellate courts of nine States, have rendered decisions which are opposed to the decision of the court below. *Manbar Coal Co.* v. *Davis,* 297 Fed. 24; *Whalen Paper Mills* v. *Davis,* (Dist. of Col.) 288 Fed. 438; *Granquist* v. *Duluth, etc. Ry. Co.,* 155 Minn. 217; *Payne* v. *Lind,* 106 Oh. St. 14; *Bostwick* v. *Director General,* 220 Mich.

21; *Cardwell* v. *Payne,* 226 Ill. App. 227; *Payne* v. *Lyon,* 154 Ga. 501; *Director General* v. *Monroe,* 28 Ga. App. 6; *Harmon* v. *Hines,* 139 S. Car. 179; *Farr* v. *St. Louis S. W. Ry. Co.,* 154 Ark. 585; *St. Louis, etc. Ry. Co.* v. *McLean,* (Tex.) 253 S. W. 248; *Payne* v. *Coleman,* (Tex.) 232 S. W. 537; *Davis* v. *Dantzler Lumber Co.,* 126 Miss. 812. *Contra, Davis* v. *Alexander,* (Okla.) 220 Pac. 358.

The officials of the Railroad Administration throughout the period of federal control and the succeeding period of liquidation regarded each transportation system under federal control as distinct and separate.

Mr. George V. A. McCloskey for respondents.

The happening of the accident raises a presumption of the petitioner's fault and, as the action is *in personam,* it is for him to show a cause not involving his fault. *The Louisiana,* 3 Wall. 164. The petitioner may not relieve himself from that burden by proving that he struck the blow with his left hand, not with his right; and in the case at bar, his defense hardly amounts to so much.

The petitioner speaks of the operation of the New York Central tug as though the fault were in that; but it was not strictly speaking in operating their own tug, it was in handling the New Haven carfloat, that the New York Central men were negligent.

It was through the instrumentality of the New Haven carfloat that the libelant's scow was damaged, whether the Director General was controlling her movements through servants drawn from that railroad system or from another, and since the suit is *in personam* the Director General is equally liable no matter what set of servants cast the property of the New York, New Haven & Hartford R. R. Co. into collision with the libelant's scow.

More than one service of process on the Director General is not contemplated.

Under petitioner's construction of General Orders 50 and 50–A, duplicate service would have been the rule where more than one railway system was involved and the same construction would upon like reasoning be extended to § 206, Transportation Act, 1920. Neither the General Orders nor the Transportation Act contain a syllable relating to or even suggestive of duplicate service of process. All alike contemplate a single party defendant, though, before federal control, the joinder of two or more railroad companies was frequent.

The plain purpose of General Orders Nos. 50 and 50–A, in providing for service upon operating officials operating for the Director General the railroad in respect of which the cause of action arose, was obviously both to serve the convenience of litigants, who thus could find some one near at hand to serve with process, and to facilitate the preparation of the Director General's defense, by giving notice of the suit to those who were in the best position to have notice of the facts. The provision was certainly not intended to sift jurisdictional points so fine that suit should fail where process was served through one but not through another railroad system in some manner involved.

Unified control intends a single agency in control. Federal Control Act, March 21, 1918, c. 25, § 10, 40 Stat. 451.

General Order No. 50 provided that suit should be brought against the Director General and not otherwise. The act contemplates suit against one party only. There is no provision for service upon him in more than one capacity or for adjustment or adjudgment of responsibility as between the government administration of one railway system and the government administration of another. Final judgments are to be rendered against an agent designated by the President, as such generally, and not in a capacity special to each railroad system, and are

to be paid out of a revolving fund created by § 210. This revolving fund is appropriated for the payment of judgments generally, without distinction in respect of the specific railroad under federal control.

Federal control of the railroads was an exercise of the war power (*Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135,) and the United States thereby became, in the place and stead of the owning companies, the operator of their respective systems of transportation. *Dahn* v. *Davis,* 258 U. S. 421. The United States Railroad Administration has been authoritatively characterized as "one control, one administration, one power, for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided, the private ownership theretofore existing." *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554. In the *Ault Case,* this Court held that statutory penalties for defaults in operation might not be imposed upon the owning company, since its control of the railroad was suspended, nor upon the Director General, since his possession was that of the United States. Reference to the transportation systems as "entities" was made, not in connection with any suggestion of multiple legal personality in the single representative of the Government's unified administration of these systems, but in explaining the statutory language "carriers while under federal control" (Federal Control Act, § 10,) as intending, not the corporations, but their transportation systems. Any suit against the Director General is a suit against the United States. *Dahn* v. *Davis,* 258 U. S. 421. Since the suit is essentially one against the United States, and since the United States took no divided, but a complete, possession and control of the railways for all purposes (*Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135,), it should follow that its agent for that purpose, standing suit as

such, had a capacity as unified as the control he exercised. There is no substance to the theory that between the private litigant and the remedy against the Government there has been interposed a shifting phantasm, a multiple personality under one name, a series of legal entities representative of the Government, not of the owning companies, yet as numerous as the transportation systems. *Globe & Rutgers Fire Ins. Co.* v. *Hines,* 273 Fed. 774; *Red Hook Dredging Corporation* v. *Director General,* (unreported opinion, U. S. D. C., Ward, J., January 20, 1922.)

Remedial provisions, broadly expressed, are not to be narrowly construed.

Mr. Justice McReynolds delivered the opinion of the Court.

June 13, 1919, respondent Donovan, owner of the "Mary Ethel," filed a libel in the United States District Court, Southern District of New York, against the "Director General of Railroads of the United States (New York, New Haven and Hartford Railroad Company)"—for whom James C. Davis, Agent, etc., has been substituted—and another, wherein he asked to recover for damage sustained by his vessel when in collision with the New York, New Haven and Hartford Railroad Company's car float No. 46. He alleged that the collision resulted solely from negligence of the float and those in charge of her; that the President took possession of all systems of transportation, December 28, 1917, through the Director General; and "that at all the times herein mentioned the car float No. 46 was managed, operated and owned by the said New York, New Haven and Hartford Railroad Company under the control or operation of the said Director General of Railroads."

The "Director General of Railroads of the United States (New York, New Haven and Hartford Railroad)" answered and denied liability.

It appeared from the evidence that while moored at Pier 2, Erie Basin, March 28, 1919, the "Mary Ethel" suffered damage by contact with car float No. 46 of the New York, New Haven and Hartford Railroad, negligently cast loose by a New York Central Railroad tug. Both railroads and the tug were then being operated by the Director General.

The District Court found and held: "The last intervening cause of the accident which occurred to the 'Mary Ethel' was the fact that the New York Central came in and after removing the New York Central barge allowed the No. 46 to go adrift, but that fact will not relieve the Director General, operating the New York, New Haven and Hartford Railroad, from liability, inasmuch as he is the same entity that is operating the New York Central."

A decree for the libellant was affirmed by the Circuit Court of Appeals. It said—

"The contention of appellant is, that 'even though it be admitted that the New York Central tug was under the control and operation of the Director General of Railroads operating the New York Central Railroad, the Director General of Railroads operating the New Haven Railroad, being a separate and distinct person, is in no way responsible.'

"Appellant seeks to avoid the decision of this court in *Globe & Rutgers Fire Ins. Co.* v. *Hines, Agent,* 273 Fed. 774, by the effect, as he contends, of *Missouri Pacific Railroad Co.* v. *Ault,* 256 U. S. 554. . . . In our view, the opinion of the Supreme Court sustains the *Globe & Rutgers Fire Ins. Co. Case, supra.* . . .

"The sole point is that the outside litigant, such as this libellant, need look only to the Director General as the party to respond for damage caused by negligence on the part of any of the railroads which he was operating pursuant to the Federal Control Statutes."

We cannot accept the conclusion reached by the court below.

During the year 1919 the United States were in possession and complete control, by the Director General, of the important railroad systems throughout the country. *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135. As the representative of the United States, he was subject to be sued for the purposes, to the extent and under the conditions prescribed by statute and orders issued thereunder—and not otherwise. *DuPont De Nemours & Co.* v. *Davis,* 264 U. S. 456.

Section 10 of the Federal Control Act, approved March 21, 1918, c. 25, 40 Stat. 451, 456, provides that carriers under federal control shall be subject to liability as common carriers under state and federal laws, and that in actions against them no defense shall be made upon the ground that the carrier is an instrumentality of the Federal Government.

General Order 50–A of the Director General, issued January 11, 1919, directs that actions at law, suits in equity or proceedings in admiralty growing out of operation of any system of transportation which might have been brought against the carrier but for federal control, shall be brought against the Director General, and not otherwise; that service of process may be made upon officials operating a railroad for the Director General as formerly permitted in actions against the road; and further, "the pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The effect of § 10 and General Order 50–A were discussed in *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 560; and it was there pointed out that while the transportation systems were controlled and administered by the United States they were treated as separate entities, "regarded much as ships are regarded in admiralty," and "dealt with as active responsible parties answerable for their own wrongs."

As well pointed out in *Manbar Coal Co.* v. *Davis,* Circuit Court of Appeals, Fourth Circuit, 297 Fed. 24, no one was given the right to sue the Director General as operator of all railroads, but his liability was carefully limited to such as would have been incurred by some particular carrier if there had been no federal control.

Here the Director General came into court to defend only against a liability asserted because of the negligence of agents operating the New York, New Haven and Hartford system, and not because of anything which might have been done or omitted by those of another system. In such circumstances, under the statute and orders, we think the court could adjudge no liability against him except such as might have been enforced against the New York, New Haven and Hartford Railroad Company before federal control. Under those conditions the United States consented to be proceeded against. One reason therefor, if any is necessary, seems plain enough. Every system was operated as an entity; its agents and employees knew and carried on its ordinary affairs, but not those of other carriers. The Director General necessarily relied upon the organization of each system, and could demand notice sufficient to set the proper one in motion; otherwise proper defenses might not be presented.

Reversed.

ADAMS EXPRESS COMPANY *v.* DARDEN.

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

No. 226. Argued April 22, 1924.—Decided May 26, 1924.

1. A judgment of the Circuit Court of Appeals in a case involving the liability of a carrier for injury to an interstate shipment under its tariff and shipping agreement and an act of Congress, *held* reviewable by writ of error and not by certiorari. P. 266.
2. The first "Cummins Amendment," (March 4, 1915, c. 176, 38 Stat. 1196,) made the carrier liable for the full actual loss of property shipped, when caused by the carrier, regardless of any agreement or representation of the shipper. *Id.*

So *held* where, without actual fraud, the value declared by the shipping contract on which the charge was based was much less than the actual value, and carried a lower tariff rate, and where the contract was on a form filed as part of the tariff and bore a notice that the true value must be declared.

286 Fed. 61, affirmed; certiorari denied.

ERROR to a judgment of the Circuit Court of Appeals affirming a recovery of damages in the District Court for loss of livestock in transit.

Mr. William L. Granbery for plaintiff in error.

Mr. K. T. McConnico, with whom *Mr. J. S. Laurent* and *Mr. Jno. A. Pitts* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The first Cummins Amendment (March 4, 1915, c. 176, 38 Stat. 1196, 1197) provides that a common carrier receiving property for transportation in interstate commerce "shall issue a receipt or bill of lading therefor"; shall be liable "for the full actual loss, damage, or injury to such

property [shipped] caused by it"; that "no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability hereby imposed"; and that such liability for the full actual loss shall exist "notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." The effect of this act is to nullify provisions limiting liability contained in public tariffs and in bills of lading. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

While this act of Congress was in force, Darden shipped six horses by Adams Express from Latonia, Kentucky, to Windsor, Ontario. Five of the horses were killed in transit. He brought this action to recover their value against that company in the federal court for the Middle District of Tennessee. The jury found that the accident was due to the carrier's negligence; and rendered a verdict for Darden in the sum of $32,500. Judgment entered thereon was affirmed by the Circuit Court of Appeals. 286 Fed. 61. The case was brought here by writ of error under § 241 of the Judicial Code. A petition for a writ of certiorari was also filed; and consideration of it was postponed. The case is properly here on writ of error. Compare *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201. The petition for a writ of certiorari is, therefore, denied.

The company contends that a verdict for it should have been directed, or that the recovery should have been limited to $500, by reason of the following facts: The tariff contained a provision requiring that the actual value of a shipment be declared; and also provided for an addi-

tional charge by way of a graduated percentage, if the value exceeded a stated amount. The tariff rate for shipping a carload of horses valued at $100 each was $165. This rate was named to Darden by the Express Company's agent; that amount was paid; and the company's so-called non-negotiable live-stock contract, prepared by it, recited that the value of the horses was declared by the shipper to be $100 each. The horses were in fact race horses; and were of much greater value than the sum named. This fact was known to the company's agent. The copy of the shipping contract stating $100 to be the declared value of each horse was not seen by Darden until after the accident had occurred. It was not contended that he was guilty of actual fraud in shipping at the rate named.

The main argument for the company appears to be this: The statute requires the shipper to disclose the "real value" of the shipment, and requires the carrier to collect the "real value" rate. Darden paid the rate which, by the tariff, was made applicable only to horses valued at not more than $100 each. The shipping contract recited that the declared value of each horse was $100. To that contract was attached a notice that the shipper "must state the actual value of the shipment, which value must be inserted in the contract." The form of this contract and notice were filed as part of the tariff. Darden was bound to know the provisions of the tariff. To recover he must sue on the shipping contract. By claiming actual value largely in excess of $100, with a view to establishing liability therefor, he attempted not only to vary a written contract, but to secure, by means of a discriminatory rate, an illegal rebate. Thereby, he necessarily disclosed to the courts his unlawful conduct; and the court should refuse its aid, whether the action be deemed one upon an illegal contract or, more generally, a proceeding to enforce rights arising out of an illegal transaction.

The short answer to this, and to the company's other arguments, is furnished by the comprehensive terms of the statute. From them appears the intention of Congress to make the carrier liable for the full actual loss, regardless of any agreement or representation of the shipper. Its purpose is so accurately stated that discussion could not make it clearer. It might confuse. The enactment of the second Cummins Amendment, in the following year (Act of August 6, 1916, c. 301, 39 Stat. 441) indicates merely that the provisions of the 1915 Act proved to be more comprehensive than was found to be desirable.[1] Compare *American Railway Express Co.* v. *Lindenburg,* 260 U. S. 584.

Affirmed.
Certiorari denied.

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

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[1] The 1916 Act excepts from the prohibition of limitation of liability "property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, etc." See *In the Matter of Express Rates, etc.,* 43 I. C. C. 510; *Live Stock Classification,* 47 I. C. C. 335; *J. B. Williams Co.* v. *Hartford & New York Transportation Co.,* 48 I. C. C. 269, 273; *Gold Hunter Mining Co.* v. *Director General,* 63 I. C. C. 234, 241; *Domestic Bill of Lading and Live Stock Contract,* 64 I. C. C. 357, 361; *U. S. Industrial Alcohol Co.* v. *Director General,* 68 I. C. C. 389, 391; *North Packing & Provision Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 69 I. C. C. 235, 237; 80 I. C. C. 737, 739.

NASSAU SMELTING & REFINING WORKS, LTD. *v.* BRIGHTWOOD BRONZE FOUNDRY COMPANY.

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

No. 242. Argued April 28, 1924.—Decided May 26, 1924.

A creditor whose claim was included in the schedules is entitled to share in a composition offered by a bankrupt and duly accepted by the required majority, although his claim was not proved within a year after adjudication. P. 270.

286 Fed. 72, reversed.

CERTIORARI to an order of the Circuit Court of Appeals which affirmed an order of the District Court limiting the deposit to be made in satisfaction of a composition in bankruptcy to the amount required for claims proven within the year following adjudication.

Mr. Joseph B. Jacobs for petitioner.

Mr. Harry M. Ehrlich, with whom *Mr. Henry Lasker* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On November 19, 1920, the Brightwood Foundry Company was adjudged a bankrupt by the District Court of Massachusetts. On February 12, 1921, it made an offer of composition to its creditors. On February 25, 1921, the meeting to consider the offer was held.[1] The list of

[1] A voluntary assignment for the benefit of creditors had been made September 10, 1920. The creditors elected a trustee in bankruptcy at a special meeting held March 17, 1922, but he did not qualify. The assignee under the voluntary assignment remained in possession of the assets formerly belonging to the bankrupt.

creditors provided for in § 7(8) of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544, 548), had been filed by the bankrupt on February 16, 1921. Among those scheduled, was the Nassau Smelting & Refining Works, with a claim of $11,354.40. It had due notice of all proceedings; but failed to present its claim for proof until more than a year after the adjudication. No order was made either allowing or disallowing it. On March 27, 1922—more than a year after the meeting to consider the offer in composition—the bankrupt filed a petition in which it alleged that the offer had been accepted by the requisite majority of creditors, and that many who had been duly scheduled failed to prove their claims within the year after adjudication as provided by § 57n. It prayed for an order that only such sum be deposited as would be required to pay, in composition, claims seasonably proved. After due hearing, the prayer of the bankrupt was granted. Objection had been made by the Nassau Works; and it filed a petition to revise under § 24b. The order was affirmed by the Circuit Court of Appeals, Circuit Judge Anderson dissenting, 286 Fed. 72; and a petition for a writ of certiorari was granted. 261 U. S. 612. The question for decision is whether the deposit must include the amount required to pay creditors who were named in the schedule but failed to prove their claims within one year after the adjudication. In other words, are such creditors entitled to the benefit of the composition?

The Bankruptcy Act provides, in § 57n, that "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication;" in § 12a, that "a bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, . . . he has . . . filed in court . . . the list of his creditors required to be filed by bankrupts;" and that "action upon the petition for adjudication shall be delayed until

it shall be determined whether such composition shall be confirmed"; in § 12b, that the application for the confirmation of a composition may not be filed in the court until "it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors . . . have been deposited in such place as shall be designated by and subject to the order of the judge;" and in § 12e, that "upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed." [2]

Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings. *Cumberland Glass Co.* v. *DeWitt,* 237 U. S. 447, 454. It originates in a voluntary offer by the bankrupt; and results, in the main, from voluntary acceptance by his creditors. It cannot be confirmed unless there has been such acceptance by the requisite majority. When confirmed the bankrupt is discharged from all debts "other than those agreed to be paid by the terms of the composition and those not affected by a discharge." § 14c. Thus, the composition binds creditors with scheduled claims, although they do not prove. It may be effected before the adjudication.[3] Where the assets have passed to the trustee pursuant to the adjudication, they are revested in the bankrupt.

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[2] The official form [No. 61] of "Application for Confirmation of Composition" recites that after the bankrupt "had filed in Court . . . a list of his creditors, as required by law, he offered terms of composition to his creditors . . . ;" and "that the consideration to be paid by the bankrupt to his creditors . . . has been deposited, etc."

[3] See Act of June 25, 1910, c. 412, § 5, 36 Stat. 838, 839.

There is no provision in the act which declares, in terms, that the offer extends only to those who prove their claims. Why should proof, within the year, of the existence of the debt be required where, by including the claim in the schedule, it has been admitted by the bankrupt? Obviously, § 57n does not operate to exclude any creditor from the benefits of the composition, where the offer is made before there is an adjudication.[4] Section 57n would, also, have no application in a great majority of composition cases in which there has been an adjudication. For the offer is ordinarily made in order to enable the debtor to resume his business. In the normal case, the bankrupt is impelled by vital interests, not only to make the offer promptly, but to expedite confirmation. Interruption incident to delay necessarily impairs the value of a business as a going concern. Thus, the composition is usually carried through within the year. Creditors who have failed to prove their claims before confirmation (from inadvertence or because of their doubt whether it was worth the trouble and expense) are usually spurred to activity by notice that money on deposit awaits their application. The cases are rare in which a scheduled creditor who has had due notice fails to call, within the year, for the money awaiting him.

Where the distribution is of the bankrupt estate, each creditor has an interest in the claim which any other creditor may assert. He is interested in limiting the amount of claims to be allowed, because the greater the aggregate, the smaller (except where there is a surplus) will be his dividend. Each creditor is interested, also, in limiting the time within which others may prove, because distribution cannot be made until the close of that period. But where there is a composition, neither the amount

[4] Judge Anderson states (p. 75): "In recent years more than two-thirds of the composition cases in this district have been without adjudication."

which a creditor receives, nor the time when he receives it, can be affected by the amount of others' claims, or by the time of proof, or by their failure to prove.[5] The rights of each creditor are fixed by the terms of the debtor's offer, subject only to its confirmation and the judge's order of distribution. Nor can the time of proof of claims, as distinguished from their allowance, be of legitimate interest to the bankrupt.[6] His rights, also, are fixed by the offer, unless where the legality or the amount of a claim is questioned. No reason is suggested why Congress should have wished to bar creditors from participation in the benefits of a composition merely because their claims were not proved within a year of the adjudication. Failure to prove within the year does not harm the bankrupt. Why should he gain thereby? And why should the creditor be penalized by a total loss of his claim?

The language of the act tends to support the contention that proof within the year is not essential to participation in the benefits of the composition. Section 57n declares that " claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication." There is no " bankrupt estate " where there is no adjudication. And even where there is an adjudication, the proof made

[5] Prior to confirmation, he may have this remote interest in the allowance, as distinguished from the proof, of the claims of others. If he favors confirmation, he will be interested in having allowed the claims of other friendly creditors whose acceptance is needed to make up the requisite majority. If he opposes confirmation, he will be interested in having claims of friendly creditors disallowed and of having those of hostile creditors allowed. He may also be interested in enquiring whether a claim scheduled is fraudulent. This is equally true of cases where there has been and where there has not been an adjudication.

[6] He may conceivably be interested in having a claim allowed or disallowed because of its effect upon the acceptance of his offer by the requisite majority of creditors. Here, also, this remoter interest is the same whether there has been an adjudication or has not.

is not against the "bankrupt estate," if a composition follows. The claim is against funds deposited by the debtor pursuant to a bargain with his creditors. Allowance of a claim is necessary to qualify one as a voter on the question of acceptance. Hence, provision for such allowance had to be made. § 12a. But after the composition has been confirmed, allowance of a claim is not necessary for the purpose of establishing it as against the debtor, who is then alone interested, if he has already admitted the liability by including it in his schedule. Compare *Haley* v. *Pope,* 206 Fed. 266. Here the offer was made within three months of the adjudication. It confessedly extended to all scheduled creditors who should prove within the year. No reason is shown why it should be limited to these. *In re Atlantic Construction Co.,* 228 Fed. 571; *Matter of Fox,* 6 Amer. Bank. Rep. 525.

Where the offer of composition is not made until after the expiration of the year the question may be different.

Reversed.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

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

No. 456. Argued March 4, 1924.—Decided May 26, 1924.

1. An order made by a division of the Interstate Commerce Commission being operative, unless stayed by the division or the full Commission pending a rehearing by the latter, (amended Act to Regulate Commerce, §§ 16a, 17 [4],) a suit to enjoin enforcement of such an order is within the jurisdiction of the District Court, and whether relief should be denied until the plaintiff, through application for rehearing, shall have exhausted the administrative remedy, is a matter of judicial discretion. P. 280.
2. In a proceeding under § 15 (6) of the amended Interstate Commerce Act in which the Commission readjusted the divisions of joint rates as between a carrier and its several immediate con-

nections, the other carriers participating in the joint rates, whose shares were left unchanged, were not necessary parties. P. 282.

3. In determining just divisions, the Commission must consider relative cost of service; whether a particular carrier is an originating, intermediate or delivering line; the efficiency of operation of each carrier; the revenue it requires for operation expenses, taxes and a fair return; public importance of the transportation services involved; and any other facts which would ordinarily, without regard to mile haul, entitle one carrier to a greater or less proportion than another. P. 284.
4. The financial needs of a weaker road may also be taken into consideration in determining divisions of joint rates. *Id.*
5. The mere fact that increased divisions allowed a carrier were measured by percentages of the revenues of the several connecting carriers from the joint traffic, does not establish that the division is unjust or guided solely by relative financial ability. P. 285.
6. An order increasing the divisions of a carrier is not arbitrary merely because the corresponding decreases are confined to the carriers immediately connecting with it, these having the right to apply for further readjustment as between themselves and remoter carriers. P. 286.
7. An order of the Commission is not invalidated by the mere admission as evidence of matter which in judicial proceedings would be incompetent. P. 288.
8. But a finding without evidence is beyond the power of the Commission. *Id.*
9. Reports of carriers on the Commission's files cannot be treated as evidence when not introduced as such, in a proceeding which, though initiated by the Commission primarily to protect the public interest, may result in an order in favor of one carrier as against another. *Id.*
10. Rule XIII of the Commission does not purport to relieve the Commission from introducing, by specific reference, such parts of the reports of carriers, properly on file, as it wishes to treat as evidence. P. 289.
11. The right of carriers to insist that consideration by the Commission of matter not in evidence invalidates its order is not lost by their submission of the case without argument or their consent to omission of a tentative report by the examiner. *Id.*
12. A general notice given at the hearing by an examiner that the Commission would rely upon voluminous annual reports previously

filed with the Commission by plaintiff carriers pursuant to law, *held* tantamount to no notice whatever of evidence used against them. P. 289.

13. The divisions of joint rates may be determined on the basis of individual rates and divisions, shown by tariffs and division sheets and found sufficiently typical in character and ample in quantity to justify findings as to each division of each rate of every carrier involved, (*New England Divisions Case*, 261 U. S. 184;) but it cannot be inferred because the joint rates and divisions between particular carriers work injustice in the aggregate, that each particular division of each rate is unjust, and in like proportion. P. 290.

288 Fed. 102, affirmed.

APPEAL from a decree of the District Court perpetually enjoining the enforcement of an order of the Interstate Commerce Commission.

Mr. Clifford Histed, with whom *Mr. E. A. Boyd* was on the brief, for Kemper, Receiver of the Kansas City, Mexico & Orient Railroad Company, and Kansas City, Mexico & Orient Railway Company of Texas, interveners.

Mr. T. J. Norton and *Mr. M. G. Roberts,* with whom *Mr. Gardiner Lathrop* and *Mr. W. F. Evans* were on the briefs, for appellees.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Bringing suit before applying for a rehearing by the full Commission was not the "proper and orderly course," and was not in keeping with "equitable fitness and propriety." *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210. This Court should not be called upon to review orders of a division of the Commission, which the full Commission has authority to rehear and reverse (Interstate Commerce Act, §§ 16a, 17[4]), unless application has been made for such rehearing.

The question of the reasonableness of divisions was properly before the Commission.

The Commission, in fixing divisions, may consult, in the public interest, the financial needs of the carriers, and is

not restricted to a consideration of the amount and cost of transportation service performed by each carrier. Interstate Commerce Act, § 15(6); *New England Divisions Case,* 261 U. S. 184; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456; *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515.

The fact that the Commission considered certain information shown in the annual reports made by appellees to the Commission, which were not formally introduced in evidence, does not invalidate its order.

During the early part of the hearing, the examiner announced that the Commission would refer to these reports in its consideration of the case. The record leaves no doubt that his statement was well understood at the time.

What the Commission did was not in violation of Rule XIII.

The Commission is not bound by strict and technical rules of evidence such as prevail in the law courts. *Interstate Commerce Comm.* v. *Baird,* 194 U. S. 25; *Interstate Commerce Comm.* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88; *Spiller* v. *Atchison, etc., Ry. Co.,* 253 U. S. 117; *Interstate Commerce Comm.* v. *Chicago, etc., Ry. Co.,* 218 U. S. 88.

The evidence showed, for the period of a year, the amount of service jointly performed by the Orient and each of its connections, and the part of such service performed by each; the joint revenue arising from the joint service and how it was divided.

In this case the Commission came much nearer to specific treatment than in the *New England Divisions Case,* because here it dealt separately with each connection and considered, as between it and the Orient, the relative aggregate services and revenues therefrom and the relative average revenues per ton-mile.

The Commission made adequate provision to correct injustices which might be found to arise from the compre-

hensive manner in which it was necessary to deal with the subject. See *Wisconsin R. R. Comm.* v. *Chicago, etc. R. R. Co.,* 257 U. S. 563; *New England Divisions Case, supra.* It retained jurisdiction of the case for the express purpose of making such modifications of its order.

The Commission's finding did not rest solely upon evidence relating to the financial needs of the Orient and its several connections; the evidence relating strictly to transportation matters tended to show that the Orient's divisions were unjust.

The Court will not examine the facts further than to determine whether there was substantial evidence to sustain the order. *Interstate Commerce Comm.* v. *Union Pacific R. R. Co.,* 222 U. S. 541; *New England Divisions Case,* 261 U. S. 184.

The Commission is an expert body, informed by experience in matters of rates and railroad statistics. Its findings are fortified by presumptions of truth. *O'Keefe* v. *United States,* 240 U. S. 294; *Interstate Commerce Comm.* v. *Chicago, etc. Ry. Co.,* 218 U. S. 88; *New England Divisions Case, supra.*

The order is not arbitrary because the divisions of certain appellees were decreased by greater percentages than the divisions of others.

There is no showing that the Commission's order will result in confiscation. *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1.

Mr. Solicitor General Beck, Mr. Blackburn Esterline, Assistant to the Solicitor General, and *Mr. Clifford Histed,* Special Assistant to the Attorney General, filed a brief on behalf of the United States.

Mr. Justice Brandeis delivered the opinion of the Court.

This is an appeal by the United States and the Interstate Commerce Commission from a decree of the federal

court for Kansas which perpetually enjoined the enforcement of an order made by the Commission, on August 9, 1922, under § 15(6) of the Interstate Commerce Act, as amended by Transportation Act, 1920, c. 91, § 418, 41 Stat. 456, 486. The order relates to the divisions of interstate joint rates on traffic interchanged, within the United States, by the Kansas City, Mexico & Orient system with thirteen carriers whose lines make direct connection with it. The order provides that on all such interchanged traffic the existing divisions of these carriers shall be reduced by a fixed per cent.; and that the Orient shall receive the amount so taken from its connections.[1] The order, also, directed the Orient and the connecting carriers to make, at stated intervals, reports of the financial results of the divisions ordered; permitted any carrier to except itself from the order, in whole or in part, by proper showing; and retained jurisdiction in the Commission "to adjust on basis of such reports the divisions herein prescribed or stated, if such adjustment shall to us seem proper." *Kansas City, Mexico & Orient Divisions,* 73 I. C. C. 319, 329.

The order was entered after an investigation into the financial needs of the Orient system, undertaken by the

[1] The percentage of the reduction prescribed in respect to the several carriers ranges from 10 to 30 per cent. Thus, the Missouri Pacific's division was shrunk 20 per cent. It was estimated that the resulting reduction of its revenues would be $115,789.22. That amount, added to the existing share of the Orient on this traffic, would increase its division, on weighted average, over 14%. The Texas & Pacific's division was also shrunk 20%. The estimated resulting reduction of its revenues would be $121,140.81. But that amount added to the existing share of the Orient on this traffic would increase its division about 25%. The order differs from that upheld in *New England Divisions Case,* 261 U. S. 184, which prescribed a percentage increase of the division of the New England roads and directed that the amount of the increase be taken from the existing shares of the several connecting carriers.

Commission in April, 1922, pursuant to an application of the receiver of the Kansas City, Mexico & Orient Railroad Company and an affiliated Texas corporation. It appeared (and was not denied) that the public interest demanded continued operation of the railroad; that the revenues were insufficient to pay operating expenses; that the operation was being efficiently conducted; and that unless relief were afforded by increasing the Orient's division of joint rates and/or otherwise, operation would have to be suspended and the railroad abandoned.[2] The thirteen carriers who brought this suit participated in the investigation undertaken by the Commission; and supplied certain statistical information requested of them. But they introduced no evidence before the Commission; and the case was submitted there without argument. None of the connecting carriers made application to be excepted from the order. Nor did any of them apply for a rehearing. Before the effective date of the order, this suit was begun. On application for a temporary injunction, it was heard by three judges, pursuant to the Act of October 22, 1913, c. 32, 38 Stat. 208, 220; and a temporary injunction was granted. Upon final hearing, motions of the defendants to dismiss the bill were denied; the injunction was made permanent; and a rehearing was refused. 288 Fed. 102.

First. The Commission moved, in the District Court, to dismiss the bill on the ground that the suit was premature. The contention is that, under the rule of *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, orderly procedure required that, before invoking judicial review, the

[2] These needs had been the subject of repeated enquiries by the Commission in connection with the granting and the renewal of a loan from the United States under § 210 of Transportation Act, 1920. *Loan to Kansas City, Mexico & Orient Railroad,* 65 I. C. C. 36; *ibid,* 265; 67 I. C. C. 23; *Loan to the Receiver of Kansas City, Mexico & Orient Railroad,* 70 I. C. C. 639; *ibid,* 646.

carriers should have exhausted the administrative remedy afforded by a petition for rehearing before the full Commission. The investigation and order were made, not by the whole Commission, but by Division 4.[3] The order of a division has "the same force and effect . . . as if made . . . by the commission, subject to rehearing by the commission." Interstate Commerce Act as amended, § 17(4). Any party may apply for such rehearing of any order or matter determined. § 16a. Meanwhile, the order may be suspended either by the Division or by the Commission. In this case, the order, by its terms, was not to become effective until 37 days after its entry. There was, consequently, ample time within which to apply for a rehearing and a stay, before the plaintiffs could have been injured by the order.

Division 4 consists of four members. There are eleven members on the full Commission. Under these circumstances, what is here called a rehearing resembles an appeal to another administrative tribunal. An application for a rehearing before the Commission would have been clearly appropriate.[4] The objections to the validity of the order now urged are in part procedural. They include

[3] See Interstate Commerce Act as amended, § 17; Annual Report of the Commission (1920), pp. 3–6; *Chicago Junction Case,* 264 U. S. 258, 261, note 3.

[4] See Rules of Practice before the Commission, 1916, pp. 16, 23; 1923, pp. 18, 28. For instances of cases which were heard by a Division and later reheard by the Commission, see: *E. I. Dupont de Nemours Powder Co.* v. *Houston & Brazos Valley R. R. Co.,* 47 I. C. C. 221; 52 I. C. C. 538; *Rockford Paper Box Board Co.* v. *Chicago, M. & St. P. Ry. Co.,* 49 I. C. C. 586; 55 I. C. C. 262; *Steinhardt & Kelly* v. *Erie R. R. Co.,* 52 I. C. C. 304; 57 I. C. C. 369; *Quinton Spelter Co.* v. *Fort Smith & Western R. R. Co.,* 53 I. C. C. 529; 61 I. C. C. 43; *Empire Steel & Iron Co.* v. *Director General,* 56 I. C. C. 158; 62 I. C. C. 157; *John Kline Brick Co.* v. *Director General,* 63 I. C. C. 439; 77 I. C. C. 420.

questions of joinder of parties, of the admissibility of evidence, and of failure to introduce formal evidence. Most of the objections do not appear to have been raised before the Division. If they had been, alleged errors might have been corrected by action of that body or by the full Commission. The order involved also a far-reaching question of administrative power and policy which, so far as appears, had never been passed upon by the full Commission, and was not discussed by these plaintiffs before the Division. In view of these facts, the trial court would have been justified in denying equitable relief until an application had been made to the full Commission, and redress had been denied by it. But, in the absence of a stay, the order of a division is operative; and the filing of an application for a rehearing does not relieve the carrier from the duty of observing an order.[5] Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit. *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 48, 49. Compare *Chicago Rys. Co.* v. *Illinois Commerce Commission*, 277 Fed. 970, 974. Whether it should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion. We cannot say that, in denying the motion to dismiss, the discretion was abused.

Second. The plaintiffs contend that the order is void, because only a part of the carriers who participated in the joint rates were made parties to the proceedings before the Commission. Section 15(6) provides that where existing divisions are found to be "unjust . . . as between the carriers parties thereto . . . the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several

[5] See Interstate Commerce Act as amended, § 16a.

carriers." More than 170 carriers participated in the joint rates in question. Of these only 39 carriers, whose roads lie wholly west of the Mississippi River, were made respondents before the Commission. The argument is that all who are parties to the through rates are necessarily interested in the divisions of those rates; that failure to join some is not rendered immaterial by the fact that the order made affects directly only those before the Commission, since it would be open to a carrier whose division is reduced, to seek contribution later by a proceeding to readjust the divisions as between it and other carriers who were not parties to the original case; and that an order under this section is invalid unless it disposes completely of the matter in controversy. This argument is answered by what was said in *New England Divisions Case,* 261 U. S. 184, 201, 202. The order, in terms, affects only the 13 carriers whose lines connect directly with the Orient system. Only their divisions were reduced. The shares of all others who participated in the joint rates were left unchanged. All participating carriers might properly have been made respondents. But that was not essential. For it was not necessary that all controversies which may conceivably arise should be settled in a single proceeding. There was no defect of parties in the proceeding before the Commission.[6]

[6] The case is wholly unlike those in which it is held that where a shipper attacks a through rate all participating carriers must be made respondents, even though the through rate is made up of separately established elements. The complainant may wish to direct his attack only against one of these. But it is only the through rate which is in issue. It may be reasonable although one of its elements is not. It must stand or fall as an entirety. See *Stevens Grocer Co.* v. *St. Louis, Iron Mountain & Southern Ry. Co.,* 42 I. C. C. 396, 398; *McDavitt Bros.* v. *St. Louis, Brownsville & Mexico Ry. Co.,* 43 I. C. C. 695; *La Crosse Shippers' Assoc.* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 43 I. C. C. 605, 607; *E. I. Dupont de Nemours Powder Co.* v. *Pennsylvania R. R. Co.,* 43 I. C. C. 227. Compare *Star Grain & Lumber*

Third. The plaintiffs contend that the order is void because made on a basis which Congress did not and could not authorize.[7] The argument is that Transportation Act, 1920, requires earnings under joint rates to be divided according to what is fair and reasonable as between the parties; that what is so must be determined by the relative amount and cost of the service performed by each of the several railroads; and that the Commission, ignoring this basis of apportionment and making the determination in the public interest, gave to the needy Orient system larger divisions merely because the connecting carriers were more prosperous. Relative cost of service is not the only factor to be considered in determining just divisions. The Commission must consider, also, whether a particular carrier is an originating, intermediate or delivering line; the efficiency with which the several carriers are operated; the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property; the importance to the public of the transportation service of such carriers; and other facts, if any, which would, ordinarily, without regard to mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.[8] It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be

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Co. v. *Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 364, 371; *Indianapolis Chamber of Commerce* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 46 I. C. C. 547, 556; *Johnson & Son* v. *St. Louis-San Francisco Ry. Co.*, 51 I. C. C. 518, 520.

[7] Compare *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 443; *New England Divisions Case*, 261 U. S. 184, 189; *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 525.

[8] Compare *New England Divisions Case*, 261 U. S. 184, 193–195; *Wichita Northwestern Ry. Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 81 I. C. C. 513, 517.

given a division larger than justice merely as between the parties would suggest "in order to maintain it in effective operation as part of an adequate transportation system," provided the share left to its connections is "adequate to avoid a confiscatory result." *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 477; *New England Divisions Case,* 261 U. S. 184, 194, 195. It was not contended before the Commission that a reduction of the carriers' divisions would reduce their rates below what is compensatory.[9] There is in the record no evidence on which it could be determined that any of the divisions ordered will result in confiscatory rates. And there is nothing in the order which prohibits rate increases. Compare *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515, 526.

The assertion is made that the Commission was guided solely by the relative financial ability of the several carriers. In support of this assertion it is pointed out that the increase ordered of the Orient's share was measured, not by a percentage of its own divisions, as in *New England Divisions Case,* 261 U. S. 184, but by a percentage of the revenues of the several connecting carriers from the joint traffic.[10] It does not follow that such a basis of division would necessarily be unjust to the connecting carriers. The position of the Orient as the originating carrier, or as the delivering carrier, or as an indis-

[9] These joint rates had been recently raised. *Increased Rates, 1920, Ex parte 74,* 58 I. C. C. 220. There were reductions later. See *Reduced Rates, 1922,* 68 I. C. C. 676; 69 I. C. C. 138.

[10] This, they illustrate by an hypothetical case of a $1 rate from a station on the Orient to a station on the Santa Fe for which existing divisions are 20 cents to the Orient and 80 cents to the Santa Fe. An increase of the Orient's division 25 per cent. would have reduced the Santa Fe's division only 6¼ per cent.; while the order made, by reducing the Santa Fe's division 25 per cent., increases that of the Orient 100 per cent.

pensable intermediate carrier, might be such that the connecting carrier could not get the traffic but for the service which the Orient renders; and that this factor, together with others ignored in the existing divisions, would require the precise change directed to render the divisions just and reasonable as between the parties. It is, also, pointed out that the contributions to be made by the connecting carriers bore a direct relation to their prosperity. But it does not appear that the Commission based its finding solely on the financial needs of the Orient and the financial condition of the connecting carriers.

Invalidity of the order is urged on the further ground that the Commission made the incidental fact of physical connection with the Orient the sole test for determining which carriers should have their divisions reduced; and that such action is clearly arbitrary. It is true that the order affects, in terms, only the 13 carriers whose lines have direct connection with the Orient; but it does not follow that the action was arbitrary. These connecting carriers have a demonstrable interest in having the operation of the Orient continued. Other carriers doubtless have an interest; but it is less certain. It is open to any of these 13 carriers to institute proceedings before the Commission with a view to securing a partial distribution of their burden among other connecting carriers. Compare *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 526. The basis of division adopted by the Commission is not shown to be, in any respect, inconsistent with the rule declared in *New England Divisions Case,* 261 U. S. 184. Nor is it shown that the Commission ignored any factor of which consideration is required by the act.

Fourth. The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part,

upon data[11] taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence; that the parts containing the data relied upon were not put in evidence through excerpts; that attention was not otherwise specifically called to them; and that objection to the use of the reports, under these circumstances, was seasonably made by the carriers and was insisted upon. The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice. The contention of the Commission is that, because its able examiner gave notice that "no doubt it will be necessary to refer to the annual reports of all these carriers," its Rules of Practice[12] permitted matter in the reports to

[11] These include for each of the carriers the data showing for the year freight tons, one mile; passengers, one mile; all revenue car miles; all revenue train miles; the total operating revenue; total operating expenses; net revenue and investment in road and equipment; and they involved calculation of the respective gross revenues per ton mile, per car mile, per train mile; operating expenses per train mile, per car mile, per ton mile; net revenue per ton mile, per car mile, per train mile; the return per $1,000 of investment, on the gross revenue, the net revenue and the railway operating income; the percentage of return on the gross revenue, the net revenue and the operating income. The net railway operating income for each of the lines is in the record.

[12] Rule XIII, as in force prior to the Revision of December 10, 1923, provides, in part:

"Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be received, but the party offering the same shall present to opposing counsel and to the Commission true copies of such material and relevant matter, in proper form, which may be received in evidence and become part of the record.

"In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party

be used as freely as if the data had been formally introduced in evidence.

The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 44; *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 253 U. S. 117, 131. Compare *Bilokumsky* v. *Tod,* 263 U. S. 149, 157. But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. *New England Divisions Case,* 261 U. S. 184, 198, note 19. Nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91, 93; *Chicago Junction Case,* 264 U. S. 258. If the proceeding had been, in form, an adversary one commenced by the Orient system, that carrier could not, under Rule XIII, have introduced the annual reports as a whole. For they contain much that is not relevant to the matter in issue. By the terms of the rule, it would have been obliged to submit copies of such portions as it deemed material; or to make specific reference to the exact portion to be used. The fact that the proceeding was technically an investigation instituted by the Commission

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offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the Commission. When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in other proceedings than the one on hearing is introduced in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence copies should be furnished opposing counsel for use at the hearing."

would not relieve the Orient, if a party to it, from this requirement. Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another. Nor was the proceeding under review any the less an adversary one, because the primary purpose of the Commission was to protect the public interest through making possible the continued operation of the Orient system. The fact that it was on the Commission's own motion that use was made of the data in the annual reports is not of legal significance.

It is sought to justify the procedure followed by the clause in Rule XIII which declares that the "Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file". But this clause does not mean that the Commission will take judicial notice of all the facts contained in such documents. Nor does it purport to relieve the Commission from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence. It means that as to these items there is no occasion for the parties to serve copies. The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.[13]

The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument and

[13] Its observance will not hamper the Commission in the performance of its duties. For, if the materiality of some fact in a report is not discovered by the Commission until after the close of the hearing, there is power to reopen it for the purpose of introducing the evidence.

by their acquiescing in the suggestion that the presentation of a tentative report by the Examiner be omitted. While the course pursued denied to the Commission the benefit of that full presentation of the contentions of the parties which is often essential to the exercise of sound judgment, it cannot be construed as a waiver by the carriers of their legal rights. The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void.

Fifth. A further objection of the carriers should be considered. They point out that the record does not contain any tariffs showing the individual joint rates, or any division sheets showing how these individual joint rates are divided, nor any information concerning the amount of service performed by the Orient and its several connections under such individual joint rates. As justification for this omission, it is argued that there are in the record exhibits, furnished by the several carriers, containing data from which the Commission could reach a conclusion as to whether or not the divisions, taken as a whole, were equitable as between the Orient and its several connections[14]; that in a general rate case, evidence

[14] The exhibits showed for the year 1921, the volume of traffic moving on joint rates and interchanged between the Orient and each of its direct connections; the part of the joint service performed by the Orient and the part performed by its connection; the revenue arising from the joint service, and how that revenue was divided. For example: The exhibits showed that, during 1921, the Santa Fe and the Orient interchanged 26,278 tons of freight; that with respect to such freight the Orient performed 8,162,294 ton miles of transportation and the Santa Fe 5,793,098 ton miles; that the revenue arising from this joint service was $218,827.71, of which the Orient received $106,889.59 and the Santa Fe $111,938.12; that the per ton mile revenue of the Orient was 1.309 cents and the per ton mile revenue of the Santa Fe 1.932 cents.

"deemed typical of the whole rate structure" will support a finding as to each rate in the structure by raising a rebuttable presumption concerning each rate; that typical "evidence" in this sense means, not evidence directly representative of every individual rate, but evidence tending to show the general situation; that a like presumption arises in a division case; that the data dealing with the traffic in the aggregate, which was furnished by the exhibits, constituted such typical evidence; that, in this proceeding, information concerning individual rates and divisions was not essential; and that the course pursued by the examiner is, in substance, that upheld in the *New England Divisions Case,* 261 U. S. 184, 196–199.

The argument is not sound. The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the *New England Divisions Case,* tariffs and division sheets were introduced which, in the opinion of the Commission were typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review.

Affirmed.

UNITED STATES EX REL. CHICAGO, NEW YORK & BOSTON REFRIGERATOR COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

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

No. 288. Argued May 2, 1924.—Decided May 26, 1924.

A car company whose business consists in leasing its refrigerator cars to railroads on a car-mile basis, and which solicits freight, but which does not control or use the facilities necessary for performing carriage, or hold itself out to perform carriage by publishing rates therefor, or receive compensation from shippers whose shipments move in its cars, is not a "carrier by railroad," within the meaning of § 209 of the Transportation Act, 1920, which made a guaranty of income for six months after March 1, 1920, with respect to any carrier by railroad with which a contract had been made fixing the amount of just compensation under the Federal Control Act. P. 293.

288 Fed. 649; 53 App. D. C. 111, affirmed.

Error to a judgment of the Court of Appeals of the District of Columbia, which affirmed a judgment of the Supreme Court of the District dismissing a petition for mandamus.

Mr. William G. Wheeler and *Mr. Edward M. Hyzer* for plaintiff in error.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

By § 209 (c) of Transportation Act, 1920, c. 91, 41 Stat. 456, 464, the United States guarantees, for a period of six months after March 1, 1920, with respect to any car-

rier with which a contract has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier as a whole shall not be less than one-half the amount named in such contract as annual compensation.

By the same section, subdivision (a), the term "carrier" is defined to mean, "(1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, . . . and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates. . . ."

By subdivision (g), p. 466, the Interstate Commerce Commission is directed to "ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier."

On March 15, 1920, plaintiff in error, hereafter called the Car Company, filed with the Commission its written acceptance of the provisions of § 209, and at a later time applied to the Commission for the ascertainment and certificate mentioned in subdivision (g). The Commission denied the application upon the ground that the Car Company was not a carrier within the meaning of the act. Thereupon, a mandamus was sought from the Supreme Court of the District of Columbia, to compel the Commission to comply with the provisions of subdivision (g), but that court, after a hearing, discharged the rule and dismissed the petition. Upon appeal to the Court of Appeals this judgment was affirmed. 288 Fed. 649.

The single question presented is whether the Car Company is a "carrier by railroad." Immediately prior to federal control, the Car Company owned 1340 refrigerator cars, which were operated over various lines of railroad under contracts with the railroad companies.

The Car Company did not own or control any railroad property or facilities, aside from these cars. The contracts provided for payment of compensation for the use of the cars by the railroad companies on the basis of mileage—that is, a fixed sum for each mile over which the cars were run. The cars were under the control of the railroad companies, subject to the observance, on their part, of the directions of the Car Company as to the distribution of the cars. The Car Company solicited freight from shippers, for which it was generally paid commissions; and exercised a degree of supervision over the shipment. Sometimes cars containing shipments were delivered by non-contract railroads, from which the Car Company received payment of the mileage charges. Bills of lading covering shipments were generally made by the railroad companies; but a small percentage, perhaps ten per centum, of the shipments originating west of Chicago were re-billed on the forms of the Car Company, subject to tariffs and classifications of the railroad companies then in effect. Way bills were made out by the railroad companies; and all freight charges were paid to the railroad companies, no payment for transportation being made by the shippers to the Car Company. The Car Company was incorporated to manufacture, sell or rent freight cars, rolling stock and for other specified purposes; but nothing is said in its articles of incorporation in respect of any operation as a carrier. It filed no tariffs with the Commission, as interstate railroad carriers are required to do; nor did it keep its accounts in accordance with the rules of the Commission. The refrigerator cars were taken over and used by the Director General of Railroads during the period of federal control and compensation therefor paid to the Car Company. Upon the expiration of such control the cars were surrendered to the Car Company. The court below accurately summarized the testimony as showing, " that the Refrigerator Company is not

incorporated as a carrier, does not control or use the necessary facilities for performing carriage, does not hold itself out to perform carriage by publishing rates applicable thereto, and does not in fact perform carriage or receive any compensation from shippers whose shipments move in its cars. The cars are rented to railroad companies. They are subject to the control of the latter and are to all intents and purposes their property during the period of the lease. In a word, the Refrigerator Company carries nothing."

In *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 187–188, this Court defined the words "common carrier by railroad," as used in the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, to mean "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier." If this definition be applied here, it disposes of the question against the contention of the Car Company, since it is plain that it does not operate a railroad—that is, it is not a railroad company acting as a common carrier. The contention, however, is that this definition was confined to the words as used in the Employers' Liability Act, and that they are used in the Transportation Act in a different sense. It is quite true that because words used in one statute have a particular meaning they do not necessarily denote an identical meaning when used in another and different statute. But in the *Taylor Case,* the definition was not made to rest upon any peculiarity in the act under review, but was said to be "in accord with the ordinary acceptation of the words," and this ordinary meaning was enforced by a consideration of certain provisions of the act, which were enumerated.

In *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, 443-444, it was held that the Armour Car Lines, which owned, manufactured and maintained refrigerator, tank and box cars, and let them to railroads or to ship-

pers, was not a common carrier subject to the Act to Regulate Commerce, § 12, c. 104, 24 Stat. 379, 383. The facts in respect of ownership of cars, use, relation to the railroads, etc., were much the same as those in the present case. After reciting them, this Court said: "It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, &c., is to be effected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself." We need not review the arguments and contentions made here to the contrary. It is enough to say, that under the facts the Car Company is not a carrier by railroad, or, indeed, a common carrier at all, within the ordinary acceptation of the words, and there is nothing in the terms of the Transportation Act which suggests a different view. Such inferences as are to be drawn from the provisions of the act, as pointed out by the court below, are the other way. The guaranty itself is in respect "of railway operating income." The Car Company's income may be "operating income" but certainly it is not "*railway* operating income." The income arises not from operating a railway but from the use of facilities let to the railway companies for fixed compensation. Stress is laid on the assertion that there is no specific language in the contracts, except in one instance, to

the effect that the cars are leased. It is not necessary that there should be. In pursuance of the contracts the cars were delivered to, operated and controlled and their use as instrumentalities of transportation paid for by, the railroads. This is enough to establish a letting for hire; and there is nothing in the contracts or in any of the details of their performance which requires a different conclusion.

If the Car Company is a carrier by railroad, it would seem to follow that sleeping car companies and express companies are likewise included within the words. Evidently, however, Congress did not think so, since § 209 of the act contains special provisions in respect of these companies, which would have been entirely unnecessary if they had been so included. The contention that the Car Company, if not a carrier by railroad, is a " system of transportation " and hence within the words of the statutory definition, may be readily disposed of. The phrase forms part of the definition: " a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control," etc. It is plain that the words " whose railroad or system of transportation " etc., are not to be read independently but as qualifying the language immediately preceding; and they are to be taken distributively as though the clause had read " a carrier by railroad, whose railroad is under Federal control, or, a carrier partly by railroad and partly by water, whose system of transportation is under Federal control."

It follows that the judgment of the lower court is right and it is

Affirmed.

STATE OF MISSOURI ON THE RELATION OF BARRETT, ATTORNEY GENERAL, ET AL. *v.* KANSAS NATURAL GAS COMPANY.

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

KANSAS NATURAL GAS COMPANY *v.* STATE OF KANSAS ON THE RELATION OF HELM, ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATE OF KANSAS ON THE RELATION OF JACKSON, ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, ETC. *v.* CENTRAL TRUST COMPANY OF NEW YORK ET AL.

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

Nos. 155, 133 and 137. Argued April 21, 1924.—Decided May 26, 1924.

1. The business of piping natural gas from one State to another and selling it, not to consumers, but to independent distributing companies which sell it locally to the consumers, is interstate commerce free from state interference. *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U. S. 23, distinguished. P. 307.
2. An attempt of a State to fix the rates chargeable in this interstate business is a direct burden on interstate commerce, even in the absence of any regulation of it by Congress. P. 308.

282 Fed. 341, (No. 155) affirmed.
111 Kans. 809, (No. 133) reversed.
282 Fed. 680, (No. 137) affirmed.

In the first of these cases the appellants sought to enjoin the Kansas Natural Gas Company from increasing

its rates in Missouri without the consent of the Public Utilities Commission of that State. The decree of the District Court refusing the injunction is here affirmed.

In the second case the Kansas Supreme Court allowed a peremptory mandamus to compel the same company to reëstablish and maintain certain rates in Kansas until otherwise ordered by the Utilities Commission of that State. Reversed.

The third case was a suit in the federal court in Kansas to enjoin collection by the same company of increased rates in Kansas until allowed by the Kansas Utilities Commission. The injunction was denied. Affirmed.

Mr. J. W. Dana and *Mr. Frank E. Atwood,* with whom *Mr. L. H. Breuer* was on the brief, for appellants in No. 155.

I. The public welfare requires that the Kansas Natural Gas Company be regulated.

II. The Kansas Natural Gas Company is a public utility at common law. *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252; *San Joaquin Co.* v. *Stanislaus County,* 233 U. S. 454.

III. The Kansas Natural Gas Company is declared by statutes to be a public utility.

IV. Interstate commerce in natural gas is local in its nature, is peculiarly of local concern, makes provision for local needs, pertains to local public service, and is subject to reasonable state regulation.

The record shows that the Supply Company has a complete monopoly of the supply of natural gas to some forty cities, towns and villages in Eastern Kansas and Western Missouri, and serves one-half million people; that the distributing companies have no other source of supply of natural gas; that the primary undertaking and duty of the Supply Company is to furnish natural gas. It is

immaterial where that gas comes from. The duty, bottomed on the original supply-contracts maintained by the Receivers while the business was *in custodia legis* and continued by the Supply Company since, was to furnish natural gas. The furnishing is local to the Kansas City Gas Company and other distributing companies and at Kansas City and some forty other cities and communities served. It is for the inhabitants of the cities served as distinguished from the public at large. It "makes provision for local needs" by undertaking the supply of gas provided for in local natural gas franchise ordinances, granted to distributing companies; and "pertains to a local public service." It is delivered to and through the instrumentality of local licensed agencies, public service companies of the States.

This natural gas is so peculiarly local in its nature and restricted in its uses and method of handling, that it can not be reconsigned and transported on past the points of delivery to some other market but must be sold and consumed, if at all, in a comparatively restricted area.

Permanent physical connections are made and must be maintained between the plant and pipe line system of the Supply Company and the public service companies served.

Local measuring stations and meters are and must be maintained and operated at or within the town borders of the cities served, where the gas is continuously delivered and sold by the Supply Company to meet the consumers' instantaneous demands upon the distributing companies.

The Supply Company occupies the public highways of the States and exercises the power of eminent domain, and occupies the public streets at the point of delivery, with the license or acquiescence of the cities, towns and villages served.

There are no advance orders for natural gas but it is delivered "instanter" as required by the customers, singly

and in aggregate. The Supply Company offers service to all consumers, distributing companies, cities and towns on its lines who apply.

It has and makes no special contracts with any consumer or distributing company. Its original gas-supply-contracts were at its own suit annulled and set aside as to rates, but the service established under those contracts continues in full force and effect and it accepts the benefits and fruits of that business. It furnishes and sells natural gas not under private negotiation and contract, but upon promulgated and published schedules of uniform rates.

The foregoing facts of record clearly bring this case within the class of cases local in their nature and subject to state regulation as laid down in *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U. S. 23.

The character and classification of commerce, whether interstate or intrastate, national or local, is not determined or affected by the change of carriers. *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *South Covington Ry. Co.* v. *Covington*, 235 U. S. 537; *Atchison, etc. Ry. Co.* v. *Harold*, 241 U. S. 371.

It is equally well settled that such classification of commerce is not determined upon the basis of ownership or change of title of the commodity in transit. *Swift & Co.* v. *United States*, 196 U. S. 375; *Gulf, etc. Ry. Co.* v. *Texas*, 204 U. S. 403; *Atchison, etc. Ry. Co.* v. *Harold, supra.* See particularly *North Carolina Pub. Serv. Comm.* v. *Southern Power Co.*, 282 Fed. 837.

There is a line of analogous liquor cases which establish the principle that before the Supply Company can successfully claim that the business of furnishing and selling natural gas shipped interstate is free from state control, it must show that sales take place or are confirmed or consummated in the foreign State, and that it is not locally selling and locally delivering gas to meet

the immediate, instantaneous, simultaneous and indiscriminate demands of its customers or its customers' customers. *Heyman* v. *Hays,* 236 U. S. 178; *In re Rahrer,* 140 U. S. 545; *McDermott* v. *Wisconsin,* 228 U. S. 115.

The Supply Company's business is not capable of one uniform system of regulation. *State* v. *Flannelly,* 96 Kans. 372; *Manufacturers' Light & Heat Co.* v. *Ott,* 215 Fed. 940; *Jamieson* v. *Indiana Natural Gas Co.,* 128 Ind. 555; *Mill Creek Coal Co.* v. *Public Service Comm.,* 84 W. Va. 662.

The fixing of natural gas rates is the fixing of commodity rates—selling rates of a commodity locally. It must of necessity vary in each city served, depending upon the volume of business done, the character and classification of consumers and numerous other factors entering into and reflected in commodity prices. Transportation is a mere incident. *Mill Creek Coal Co.* v. *Public Service Comm., supra.*

The maintenance of the Supply Company's supply of gas within the city, its pipe lines in and upon the city's streets and its meters within or near the city, continuously ready to serve, constitutes an implied standing offer to deliver, measure and sell locally at reasonable and authorized rates; the turning of the consumers' burner cocks and the drawing of the gas from the mains of the distributing company, and in turn the delivery of the gas by the Supply Company into the mains of the distributing company, constitutes an acceptance of that offer and an implied promise to pay a reasonable or authorized city gates' rate. These entire transactions are purely local.

V. The specific exclusion of interstate commerce in natural gas from the Interstate Commerce Act, implies regulation by the States until Congress acts.

VI. An importer who employs a licensed agency of the State, a public utility, to sell and market products

shipped interstate, thereby consents to reasonable state regulation.

The Supply Company is and ever will be under the necessity of using and employing licensed agencies of the States, public utilities having franchises, to market its imports. Such an importer is not engaged in interstate commerce of a national character, but is engaged in local trade and traffic subject to state regulation. *Brown* v. *Maryland,* 12 Wheat. 419, 443.

The furnishing of gas to the inhabitants of the city is a state function kindred to building roads and paving streets over which the State alone has control. *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477; *Field* v. *Barber Asphalt Co.,* 194 U. S. 618.

The *reductio ad absurdum* of the Supply Company's claim is, that its right to import gas carries with it the unrestricted right not only to raise and lower its rates but, at its own will and caprice, to supply or refuse to supply gas, and to change its quality, and quantity and its service as to some forty public service corporations and forty or more cities, towns and villages, and one-half million people; for, if the State has no power to regulate the rates, it has none to regulate the quality or character of service or to determine the use of gas, or to exclude such use altogether.

VII. The decision in *Public Utilities Comm.* v. *Landon,* 249 U. S. 236, turned on the point that the Receiver had no cause of action for the reason that his rates were at that time consent rates, or fixed by contract, and the challenged rates, then before this Court, were made for distributing companies and not for the Receiver. It is no authority for the contention that the Kansas Natural Gas Company was then or is at this time, on the record now before this Court, free from state regulation.

VIII. A public utility, or one conducting a business affected with the public interest, may not arbitrarily dis-

continue service for the non-payment of a controverted bill. Injunction will issue to prevent such wrongful act.

IX. If the Kansas Natural Gas Company's rates are not subject to regulation, it is bound by contract, express and implied; first, to continue service until, after notice, a substitute can be provided; and second, at rates agreed upon.

Mr. Robert D. Garver, with whom *Mr. Herbert O. Caster* and *Mr. Richard J. Higgins* were on the briefs, for the Kansas Natural Gas Company, appellee in Nos. 155 and 137, and plaintiff in error in No. 133.

Mr. Fred S. Jackson for defendant in error in No. 133.

The Gas Company is a public utility under the laws of Kansas. Laws 1911, c. 238, § 3; *Cimarron* v. *Water, Light & Ice Co.,* 110 Kans. 812.

The sale of natural gas is local in its nature. *State* v. *Flannelly,* 96 Kans. 372; *State* v. *Gas Company,* 100 Kans. 593; *North Carolina Pub. Serv. Comm.* v. *Southern Power Co.,* 282 Fed. 837.

The rates charged by the gas company to the distributing companies at the gates of the cities are subject to regulation by the Public Utilities Commission. *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U. S. 23; s. c. 184 App. Div. 556; 225 N. Y. 397.

This Court, in the *Pennsylvania Gas Co. Case,* has expressly held that the State may regulate the sale of natural gas in interstate commerce where it is of a local nature. The sale of natural gas by the defendant to the distributing companies in no way differs from the sale by that company to cities, industries or large consumers of gas. In either case it is interstate commerce of a local nature which has not been regulated by Congress, and the principles of law which are applied to the interstate commerce at the burners' tips in the *Pennsylvania Gas*

Co. Case are equally applicable to the sale of gas measured by the flow meters to the distributing companies in Kansas.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were consolidated for argument. They present for decision the single question whether the business of the Kansas Natural Gas Company, hereinafter called the Supply Company, consisting of the transportation of natural gas from one State to another for sale, and its sale and delivery, to distributing companies, is interstate commerce free from state interference?

The facts necessary to be considered in reaching a conclusion are, shortly, as follows:

The Supply Company is a Delaware corporation, engaged in producing and buying natural gas, mostly in Oklahoma but some in Kansas, and, by means of pipe lines, transporting it into Kansas and from Kansas into the State of Missouri, and in each State selling and delivering it to distributing companies, which then sell and deliver it to local consumers in numerous communities in Kansas and Missouri. The gas originating in Kansas is mingled for transportation in the same lines with that originating in Oklahoma. The pipe lines are continuous from the wells to the place of delivery.

The three cases are alike in the fact that they arise from the action of the Supply Company in making an increase of rates from thirty-five cents to forty cents per thousand cubic feet,—in Missouri, without the consent and approval of the Public Utilities Commission of the State, and, in Kansas, notwithstanding a previous order of the federal court fixing a thirty-five-cent rate and the action of the Utilities Commission approving and fixing that rate. The power of the Utilities Commission of each State is challenged on the ground that the matter, under

the commerce clause of the Constitution, is not subject to state control.

In No. 155, appellants brought suit in the Federal District Court to enjoin the Supply Company from increasing its rates. The injunction prayed was denied. 282 Fed. 341.

In No. 133, the defendant in error filed a petition in the Kansas Supreme Court for a writ of mandamus to compel the Supply Company to reëstablish and maintain the rate of thirty-five cents per thousand cubic feet for gas furnished to the distributing companies, until otherwise ordered by the Utilities Commission. The case was presented to that court on demurrer to the return and answer. The demurrer was sustained and a peremptory writ of mandamus allowed, as prayed. 111 Kans. 809.

In No. 137, the suit was to enjoin the Supply Company from collecting or attempting to collect the increased rates from various gas distributing companies until the consent thereto of the Utilities Commission of the State should be secured. The Federal District Court denied the injunction but retained the bill for another purpose, not necessary to be stated. 282 Fed. 680.

The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities not for consumption but for resale to consumers. There is no relation of agency between the Supply Company and the distributing companies, or other relation except that of seller and buyer, *Public Utilities Comm.* v. *Landon,* 249 U. S. 236, 244–245; and the interest of the former in the commodity ends with its delivery to the latter, to which title and control thereupon pass absolutely. The question is, therefore, presented in its simplest form; and if the claim of state power be upheld, it is difficult to see how it could be denied in any case of interstate transportation and sale of gas. Both federal courts denied the power. The state

court conceded that the business was interstate and subject to federal control, but rested its decision the other way upon the fact that Congress had not acted in the matter and that, in the absence of such action, it was within the regulating power of the State. The question is controlled by familiar principles. Transportation of gas from one State to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. In *Public Utilities Comm.* v. *Landon, supra,* at p. 245, this Court said: "That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State." See *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596, and cases there cited.

The line of division between cases where, in the absence of congressional action, the State is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution, is not always clearly marked. In the absence of congressional legislation, a State may constitutionally impose taxes, enact inspection laws, quarantine laws and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce. *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477, 488–491. But the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce. In *Minnesota Rate Cases,* 230 U. S. 352, 396, Mr. Justice Hughes, speaking for the Court, said: "If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly re-

strained that which in the absence of Federal regulation should be free." The question is so fully discussed in that case, that nothing beyond its citation is required.

The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. See *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 493. With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. *Public Utilities Comm.* v. *Landon, supra,* p. 245. In such case the effect on interstate commerce, if there be any, is indirect and incidental. But the sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become part of the general mass of property therein. See *Brown* v. *Houston,* 114 U. S. 622, 634. There is nothing in *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U. S. 23, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York and sold it directly to the consumers. The service to the consumers, which was the theory for which the regulated charge was made, was essentially local and the decision rests upon this feature. Mr. Justice Day, in the

course of the opinion, said (p. 31): "The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." The commodity, after reaching the point of distribution in New York was subdivided and sold at retail. The *Landon Case,* so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on, not by the supply company, but by independent distributing companies.

In both cases the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon Case.* The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring

uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned. See, for example: *Welton* v. *Missouri,* 91 U. S. 275, 282; *Hall* v. *DeCuir,* 95 U. S. 485, 490.

That some or all of the distributing companies are operating under state or municipal franchises cannot affect the question. It is enough to say that the Supply Company is not so operating and is not made a party to these franchises by merely doing business with the franchise holders.

No. 155 Affirmed.
No. 133 Reversed.
No. 137 Affirmed.

COMMISSIONER OF IMMIGRATION OF PORT OF NEW YORK *v.* GOTTLIEB ET AL.

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

No. 221. Argued April 15, 16, 1924.—Decided May 26, 1924.

1. When the plain words of a statute leave no room for construction, the courts must follow it, however harsh the consequences. P. 313.
2. Section 3 of the Immigration Act of 1917 and § 2(d) of the Quota Law of 1921, as amended May 11, 1922, are both operative and should be construed as acts *in pari materia.* P. 312.
3. Section 3 of the Immigration Act of 1917, after an enumeration of excluded classes ending with the natives of a designated part of Asia and those of certain islands adjacent to that continent, declares that "the provision next foregoing" shall not apply to persons of various named occupations, including ministers of religion, nor to their legal wives or their children under 18 years, etc. *Held,* that the exception applies only to aliens coming from Asiatic regions referred to. P. 313.
4. Section 2(d) of the Quota Act provides that when the maximum number of aliens of any nationality shall have been admitted,

all others of such nationality applying during the same year shall be excluded, except (*inter alios*) ministers of religion, and gives preference, so far as possible, in the enforcement of the act, to the wives, children, etc., of citizens of the United States, of aliens here who have applied for citizenship, or of persons eligible to citizenship who have served in our military or naval forces. *Held,* that the wife and child of a minister have no right to admission when the quota allowed their nationality is exhausted. P. 313.

285 Fed. 295, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court discharging two aliens by *habeas corpus.*

Mr. George Ross Hull, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for petitioner.

Mr. Louis Marshall, with whom *Mr. Joseph G. M. Browne, Mr. Barnet E. Kopelman, Mr. J. Philip Berg* and *Mr. Max J. Kohler* were on the briefs, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The respondents are the wife and infant son of Solomon Gottlieb, a rabbi of a synagogue in New York City. They are natives of Palestine who sought admission to this country in December, 1921.

After a hearing before the Board of Special Inquiry at Ellis Island, they were ordered deported, on the ground that the quota of immigrants entitled to be admitted had already been filled. Upon *habeas corpus* proceedings in the Federal Court for the Southern District of New York it was held they were entitled to admission, irrespective of quota limitations, as the wife and child of a minister, who was already here under § 2 (d) of the Act of May 19, 1921, c. 8, 42 Stat. 5, as amended May 11, 1922, c. 187, 42

Stat. 540. Thereupon they were ordered discharged. This judgment was affirmed by the Court of Appeals. 285 Fed. 295.

That court reached its conclusion by considering § 3 of the Act of 1917, c. 29, 39 Stat. 874, 875, *in pari materia* with § 2 (d) of the Act of 1921. Section 3 of the earlier act enumerates various classes of aliens who are excluded from admission into the United States, among them all persons from certain Asiatic territory with specified exceptions. The Act of 1921, as amended, is an act to limit the number of aliens who may be admitted under the immigration laws to the United States, and is declared to be "in addition to and not in substitution for the provisions of the immigration laws." § 4. Section 2 (d), among other things, provides that when the maximum number of aliens of any nationality shall have been admitted, all others of such nationality applying during the same year shall be excluded, except as otherwise provided in the act. Following this, one of the provisos enumerates the aliens who are thus excepted, among them, ministers of any religious denomination. Another proviso is: "That in the enforcement of this Act preference shall be given so far as possible to the wives, parents, brothers, sisters, children under eighteen years of age, and fiancées, (1) of citizens of the United States, (2) of aliens now in the United States who have applied for citizenship in the manner provided by law, or (3) of persons eligible to United States citizenship who served in the military or naval forces of the United States," etc.

The court below, taking these various provisions together, held that under § 3 of the Act of 1917, these respondents were entitled to admission.

The lower court was right in holding that the acts are *in pari materia,* and that § 3 of the earlier act is still fully operative and may be considered as though it formed a part of the later act. The question then is

whether it includes aliens occupying the status of these respondents. The case, as the evidence shows, is one of peculiar and distressing hardship and it is not unnatural that any appropriate canon of construction should be laid hold of to justify a conclusion favorable to the respondents. But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but to follow it, without regard to the consequences. *Chung Fook* v. *White,* 264 U. S. 443; *Zartarian* v. *Billings,* 204 U. S. 170; *Low Wah Suey* v. *Backus,* 225 U. S. 460, 476. Section 3 of the Act of 1917 defines and enumerates the classes of aliens who are to be excluded—idiots, imbeciles, feeble-minded persons, paupers, professional beggars, diseased persons, criminals, polygamists, anarchists, prostitutes, and numerous others, the last in the enumeration being natives of islands not possessed by the United States adjacent to the continent of Asia and of the continent within certain described limits of latitude and longitude. The clause relied upon immediately follows: " The provision next foregoing, however, shall not apply to persons of the following status or occupations: Government officers, *ministers* or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travelers for curiosity or pleasure, *nor to their legal wives or their children* under sixteen years of age who shall accompany them or who subsequently may apply for admission to the United States. . . ."

The limited scope of this exception is apparent and no amount of discussion could make it plainer. It applies to " the provision next foregoing," namely, to that dealing with aliens coming from the barred Asiatic zone, and to that only.

Section 2 (d) of the Quota Law of 1921, as amended, in terms, permits the admission of " aliens returning from a

temporary visit abroad, aliens who are professional actors, artists, lecturers, singers, nurses, *ministers of any religious denomination,* professors for colleges or seminaries, aliens belonging to any recognized learned profession, or aliens employed as domestic servants," notwithstanding the quota of the same nationality has been filled. Then follows the further proviso already quoted that in the enforcement of the act " preference shall be given so far as possible to the wives . . . children," etc., of certain enumerated classes.

The respondents are not natives of the barred Asiatic zone and, therefore, are not entitled to admission under the exception in the Act of 1917. There is nothing in the later Act of 1921, as amended, which gives the wife or children of a minister any right of entry beyond that enjoyed by aliens generally, unless he falls within one of the classes specified in the proviso to § 2 (d), in which event they are to be given preference over other aliens within the limits of the quota. The quota having been exhausted, no case was presented calling for the application of the proviso, even if the respondents could otherwise have been brought within its terms. The contention that it is absurd and unreasonable to say that the wives and children of ministers from the barred Asiatic zone are to be admitted and those outside of it denied admission, does not require consideration, since the result we have stated necessarily follows from the plain words of the law, for which we are not at liberty to substitute a rule based upon other notions of policy or justice. That aliens from one part of the world shall be admitted according to their status and those from another part according to fixed numerical proportions, is a matter wholly within the discretion of the lawmaking body, with which the courts have no authority to interfere.

Reversed.

LYNCH, EXECUTRIX OF LYNCH, COLLECTOR OF INTERNAL REVENUE, DECEASED, *v.* TILDEN PRODUCE COMPANY.

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

No. 139. Argued January 25, 1924.—Decided May 26, 1924.

1. The Act of May 9, 1902, c. 784, § 4, 32 Stat. 193, defines adulterated butter, in part, as " any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream." *Held:*

(a) That the mere fact that butter contains 16% or more of moisture does not bring it within the statutory definition. P. 320.

(b) A regulation made by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury declaring that any butter having 16% or more of moisture is adulterated, conflicts with the above statutory definition, and is void. *Id.*

2. Section 20 of the Act of August 2, 1886, c. 840, 24 Stat. 212, which empowered the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make all needful rules and regulations for the carrying of that act into effect, was made applicable, by the above Act of 1902, to manufacturers of "adulterated butter," only in respect of the marking, branding, identification and regulation of exportation and importation. P. 321.

3. Rev. Stats., § 251, authorizing the Secretary of the Treasury to prescribe rules and regulations not inconsistent with law to be used under and in the execution and enforcement of the internal revenue laws, does not sustain a regulation defining " adulterated butter " which eliminates conditions, words and phrases contained in the statutory definition, and substitutes others. P. 321.

282 Fed. 54, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the

present respondent, in its action to recover an amount it was compelled to pay the Collector as stamp taxes, on butter seized by the Commissioner of Internal Revenue.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for petitioner.

It was error for the appellate court to construe the word "effect" as necessarily proceeding from a rational agent. The mental element can be wholly lacking.

Congress in using these words obviously intended to cover two phases of operation in connection with the manufacture of adulterated butter, to wit: (a) Where the law is violated by intent or design, and (b) where the law is violated as a result of carelessness, ignorance, or greed. The purpose of the law is to prevent deception and to insure that a buyer will get value for money spent.

When it is shown that butter offered for sale is found to contain 16 per cent. or more of moisture, a greater moisture content than is found to be the average water content, this indicates that in the manufacture or manipulation of the butter some process or material is used with the intent or the effect of causing it to absorb an abnormal quantity of moisture. It is just as much a violation of the law for the butter-maker to fail to manipulate the butter sufficiently after many washings and thereby leave an excessive moisture content in the product which he offers for sale as it is for him cunningly to devise and use a process to inject undue moisture into the butter.

Congress has delegated the power to make Regulation No. 9 by express enactment. Act of May 9, 1902; Act of August 2, 1886; Rev. Stats., §§ 251, 3447. It is well

established that Congress can submit the decision of contested matters of fact, on the determination of which hinges the application of the law, to an administrative official, and Congress has the power to make such administrative official's decision thereon final. *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 364.

In the absence of express delegation, that authority by necessary implication has been delegated. *United States* v. *Bailey,* 9 Pet. 238; *Coopersville Creamery Co.* v. *Lemon,* 163 Fed. 145.

In declaring that 16 per cent. of moisture in butter is an abnormal quantity, the Commissioner of Internal Revenue did no more than to state and establish a scientific fact concurred in by the Departments of Agriculture and Treasury.

Congress specifically provided that the Commissioner's finding on a question of fact on matters of taxation under the Adulterated Butter Act is final. Act of 1886, § 14, incorporated in Act of 1902.

Conceding that Regulation No. 9 is not a conclusive determination of what constitutes an abnormal moisture in butter, the question of fact should have been submitted to the jury.

Mr. George W. Peterson, with whom *Mr. William H. Oppenheimer, Mr. Frederick N. Dickson* and *Mr. Frank C. Hodgson* were on the brief, for respondent.

Mr. Justice Butler delivered the opinion of the Court.

This action was brought in the United States District Court for Minnesota by the Tilden Produce Company against petitioner's testator, E. J. Lynch, Collector of Internal Revenue for the District of Minnesota, to recover

$936 stamp taxes, which it was compelled to pay on 9360 pounds of butter seized as adulterated by the Commissioner of Internal Revenue. At the trial, a verdict was directed in favor of the company, and judgment was entered for the amount paid with interest. The Circuit Court of Appeals affirmed the judgment. 282 Fed. 54. The case is here on certiorari under § 240 of the Judicial Code. 260 U. S. 718.

The question for decision is whether the butter was adulterated within the meaning of the Act of May 9, 1902, c. 784, 32 Stat. 193.

In 1918, the company manufactured in its creamery at Saint Paul, 350 tubs of butter, which it shipped to Chicago. At the time it was made, the company tested the butter and found the moisture content to range between 15 and 16 per cent., and the average to be 15.68 per cent. Samples were taken at Chicago, and tested under the direction of the Commissioner of Internal Revenue. It was found that the moisture content of the butter in 156 tubs was 16 per cent. or more, that the range was between 16 and 17.93 per cent., and that the average was 16.76 per cent. The butter was made by the company by methods generally followed in the manufacture of butter in creameries. It was shown by the evidence that the moisture content in butter varies greatly; that the variation ranges from 9 to over 20 per cent., and that there is no fixed standard. The moisture content of milk is over 90 per cent. and of cream over 60 per cent. The making of butter involves the segregation of the fat and the elimination of water. After churning and draining off buttermilk, it is the general practice of buttermakers to use water to wash out curd and liquids remaining in association with the butter. While some of the water used for that purpose may remain, washing usually lessens the total moisture. Within certain limits, buttermakers are able to control water content. It is tested while the butter

is in the churn. It may be reduced by manipulation, or water may be incorporated into or mixed with the butter so as to increase the water content, by working the butter under conditions calculated to accomplish that purpose. In practice, makers sometimes reduce or increase moisture content in order to meet competition in the market.

Adulterated butter, as defined by § 4 of the Act of May 9, 1902, includes: (1) a grade produced by treatment of different lots of butter to which a chemical or other substance is added to deodorize it or to remove rancidity; (2) a butter product with which is mixed a foreign substance to lessen its cost; and (3) "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream."

In 1907, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Regulations No. 9, which contain the following: "Adulterated Butter Defined: The definition of adulterated butter as contained in the act of May 9, 1902, embraces butter in the manufacture of which any process or material is used whereby the product is made to 'contain abnormal quantities of water, milk or cream,' but the normal content of moisture permissible is not fixed by the act. This being the case it becomes necessary to adopt a standard for moisture in butter, which shall in effect represent the normal quantity. It is therefore held that butter having 16 per cent. or more of moisture contains an abnormal quantity and is classed as adulterated butter."

Petitioner contends that the promulgation of this regulation is authorized by § 20 of the Act of August 2, 1886, c. 840, 24 Stat. 209, 212, and Rev. Stats., § 251. It is provided by § 20 that, "the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act." To a limited extent, this section

was made applicable to the Act of May 9, 1902, by § 4 thereof, which provides that it "shall apply to manufacturers of 'adulterated butter' to an extent necessary to enforce the marking, branding, identification, and regulation of the exportation and importation of adulterated butter." Revised Statutes, § 251, authorizes the Secretary of the Treasury to "prescribe . . . rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws;" and to "give such directions to collectors and prescribe such rules . . . as may be necessary for the proper execution of the law; . . ."

The mere fact that the butter contains 16 per cent. or more of moisture does not bring it within the terms of the statutory definition of adulterated butter. Under the definition in § 4, there must be something in the manufacture or manipulation of the butter causing the absorption of abnormal quantities of water, milk or cream. This must result from the use of some material or process. The use must be with intent to cause such absorption, or must be calculated to produce that result. "Absorption" should be read to include the introduction of moisture from the outside and the incorporation of water into the butter, whether it is technically an absorption or not. Obviously, it does not include moisture originally contained in the cream or butter. The act does not prescribe the amount of moisture permissible or fix any rule or criterion by which to determine the amount that is deemed "abnormal" or that lawfully may be absorbed and incorporated.

The regulation makes water content the sole test of adulteration, without regard to other provisions of the act. In support of its validity, it is said that, in declaring 16 per cent. of moisture in butter is abnormal, the regulation does no more than to establish a scientific fact. But

it goes beyond that, and declares such butter to be adulterated. It omits essential elements of the statutory definition: namely, the use of a process or material in the manufacture of the butter, and the causing of absorption,—i. e., the incorporation or taking in from the outside,—of abnormal quantities of moisture.

Congress has not delegated power or authority to make such a regulation. Section 20 of the Act of August 2, 1886, does not apply. It is made applicable only in respect of the marking, branding, identification and regulation of exportation and importation of adulterated butter; it does not authorize a regulation establishing what shall be deemed to constitute excessive moisture or the "absorption of abnormal quantities of water, milk, or cream"; it grants no power to add to or take from the statutory definition of adulterated butter. Section 251 of the Revised Statutes confers upon the Secretary of the Treasury authority to make certain rules and regulations, but it grants no power to the Commissioner of Internal Revenue alone. To make any regulation by him on the subject effective, it must be approved by the Secretary, in which event it really becomes a regulation of the latter. Moreover, the rules and regulations authorized by § 251 are required to be "not inconsistent with law." The regulation prescribes a standard which Congress has not authorized the Commissioner or the Secretary to fix. It sets up a definition of adulterated butter which conflicts with that contained in the act. The two cannot be read in harmony. If given effect, the regulation would eliminate from the definition of adulterated butter the conditions specified in the act and strike out words and phrases and substitute others for them. In effect, it would depart from and put aside the statutory definition. In some of the lower courts the regulation has been held invalid. *United States* v. *11,150 Pounds of Butter,* 195 Fed. 657, affirming 188 Fed. 157; *Baldwin Co-operative Creamery Association* v.

Williams, 233 Fed. 607; *Henningsen Produce Co.* v. *Whaley,* 238 Fed. 650. But in *Coopersville Co-operative Creamery Co.* v. *Lemon,* 163 Fed. 145, it was held valid. We think that decision fails to take into account and give proper weight to the conflict between the act and the regulation. See *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Eaton,* 144 U. S. 677; *In re Kollock,* 165 U. S. 526; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Williamson* v. *United States,* 207 U. S. 425; *United States* v. *Grimaud,* 220 U. S. 506. It must he held that the regulation is invalid.

The act does not prescribe any standard for moisture in butter. In its manufacture, the variation of moisture ranges above as well as below the quantities found in the butter in question, and its moisture content cannot be said to be "abnormal". It was made in the usual way. There was no process or material used with intent or effect of causing absorption of abnormal quantities of moisture. It was not adulterated within the meaning of the act.

Judgment affirmed.

SWENDIG ET AL. *v.* WASHINGTON WATER POWER COMPANY.

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

No. 142. Argued February 21, 1924.—Decided May 26, 1924.

1. The Act of March 3, 1901, providing for granting rights of way for telephone lines, does not apply to wires strung on the poles of an electric power line and used only in connection with its operation and maintenance. P. 327.
2. The Act of February 15, 1901, authorizes the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, reservations and certain parks, for electric power lines, etc., and declares that such

permission may be revoked by the Secretary who gave it or his successor, in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. *Held:*

(a) The right of use continues until the permit has been revoked by the Secretary. P. 329.

(b) The Secretary has power to adopt a regulation that final disposition by the United States of any tract traversed by a permitted "right of way" shall revoke the permission *quoad* that tract; and to change the regulation by providing that tracts when so disposed of shall remain subject to a right of use previously permitted until the permission has been specifically revoked under the act. *Id.*

(c) Where lands of an Indian reservation on which an electric transmission line was constructed and in operation under such a permit, were thrown open and entered under the homestead law, at a time when a regulation provided that final disposition of the tracts should revoke the permit *pro tanto,* and were afterwards conveyed to the entrymen by patents making no reservation of the permit, but not until after the regulations had been amended to continue the permission in such cases until specifically revoked,—the patentees took subject to the permit. P. 330.

281 Fed. 900, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court enjoining the appellants from interfering with the operation and use of the appellee's (plaintiff's) electric power line, and quieting the appellee's right to use the land traversed by it, under permits from the Secretary of the Interior.

Mr. James F. Ailshie for appellants.

Under the act of Congress, appellee acquired no easement, interest or title, but only a license.

Its present rights must be construed as the rights of any other individual operating under a revocable license, and its rights may be extinguished in the same manner and under the same condition as those of a licensee under a private individual.

If the United States could revoke this permit or license at its option, clearly it is revoked by any act on the part

of the United States which shows an intent to revoke, or which is inconsistent with the continued existence of the license.

Any act of the Government which withdraws the lands from the category of "public land, reservation, or park" terminates the permit, since such a permit can only be granted over such lands.

It is an elementary principle of law that for a license to exist the licensor must have some right to or interest in the thing upon which the license is to operate, and that when such right or interest of the licensor is extinguished, so also is the license extinguished. It appears to have been uniformly held that an absolute conveyance of land revokes any license to the use thereof. *De Haro* v. *United States,* 5 Wall. 599; 18 Am. & Eng. Encyc. of Law, p. 1141.

When a patent, absolute upon its face, has been issued by the Land Department and delivered and accepted by the patentee, the title of the United States goes with it and all right to control the title or land, or to decide on the right to the title, has passed from the Executive Department of the Government. *United States* v. *Schurz,* 102 U. S. 378; *Moore* v. *Robbins,* 96 U. S. 530; *Iron Silver Min. Co.* v. *Campbell,* 135 U. S. 286; *United States* v. *Stone,* 2 Wall. 525.

At the time when the Indian Reservation was thrown open to settlement, the regulations of the Land Department provided that a patent issued to a settler would revoke any permit outstanding on the land under this statute. This regulation was in effect when these appellants made their homestead entries, and when one of them made final proof.

The Land Department changed the regulations (41 L. D. 152) later; but if it be granted that it could change the construction of the statute, it could not thereby affect the rights of these appellants.

Entry by a settler upon public land, and the receipt of a certificate of entry from the Land Department, instantly

segregates the land from the public domain; and a patent subsequently issued takes effect as of the date of the entry. *Witherspoon* v. *Duncan,* 4 Wall. 210; *Wirth* v. *Branson,* 98 U. S. 118; *Cornelius* v. *Kessel,* 128 U. S. 456.

This identical question came up before the Land Department in a case wherein appellee was also a party. *Nye* v. *Washington Water Power Co.* (April 23, 1921).

Mere occupation and improvement of public land does not confer a vested right in the land so occupied, so that the occupant can maintain a right of possession against the United States or the grantee of the United States. *Northern Pac. R. R. Co.* v. *Smith,* 171 U. S. 260; *Johnson* v. *Drew,* 171 U. S. 93.

The principle that one should be estopped from asserting a right to property about which he has, by his conduct, misled another, cannot be invoked against the United States, or by one who, at the time the improvements were made, was acquainted with the true character of his title or with the fact that he had none. *Steel* v. *Smelting Co.,* 106 U. S. 447.

The Act of March 3, 1901, 31 Stat. 1083, applies only to telephone lines operated for the use and benefit of the public at large, where the company operates them as a business and charges tolls, and not for its own private use as an accessory to some other business.

Appellee should pay just compensation for an easement.

Mr. Frank T. Post, with whom *Mr. John P. Gray* was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

Appellee is a corporation engaged in the generation and distribution of electrical energy in Washington and Idaho. It has a high tension power transmission line extending from Spokane, Washington, to Burke, Idaho, in the Cœur d'Alene Mining District. The line was constructed in 1902 and 1903. A portion of it was located across certain

lands then unsurveyed and constituting a part of the Cœur d'Alene Indian Reservation. Telephone wires were strung on the poles carrying the power line for use in connection with the operation and maintenance of that line. And there was constructed a patrol road necessary for the maintenance of the power line. Ever since its construction, the power line has been used to furnish electrical energy in that district.

July 7, 1902, the Secretary of the Interior under authority of the Act of February 15, 1901, c. 372, 31 Stat. 790, granted appellee a permit for the use of a right of way upon which to construct and maintain the power line through the reservation; and about the same time, he granted appellee a right of way for the construction and operation of a telephone line through the reservation, under authority of the Act of March 3, 1901, c. 832, 31 Stat. 1083.

An Act of Congress of June 21, 1906, c. 3504, 34 Stat. 335, provided for the allotment of lands within the reservation to members of the Cœur d'Alene Tribe, and authorized the opening to settlement and entry of the lands remaining undisposed of. Pursuant to the President's proclamation, this was done in May, 1910. Appellants respectively made homestead entries of certain of those lands across which the power line had been constructed, and later received patents therefor.[1] The patents are absolute in form and contain no exception or reservation in respect of the power line or privileges granted appellee. The appellants, denying the right of appellee after patents to operate and maintain the power line across the lands described in their patents, interfered with and threatened to prevent its use. Appellee brought a suit in the United

[1] Dates of filings and patents are as follows: Swendig filed May 2, 1910; patent issued October 30, 1913. Miller filed May 4, 1910; patent issued January 23, 1913 [1914]. Grab filed May 7, 1910; patent issued September 24, 1912. Kerr filed December 22, 1910; patent issued October 15, 1918.

States District Court for Idaho against each of the appellants to enjoin such interference, and to have it decreed that the patents did not revoke or affect the permits, and that they are in full force and effect. Jurisdiction was invoked on the ground that the suits arose under the laws of the United States above referred to. The four cases were tried together. The District Court granted appellee the relief prayed. Its decree was affirmed by the Circuit Court of Appeals. 281 Fed. 900. The case is here on appeal under § 241 of the Judicial Code.

The question to be decided is whether, as to the lands described therein, the patents issued to appellants revoked or canceled the permits theretofore granted to appellee by the Secretary.

The Act of March 3, 1901, 31 Stat. 1083, relating to rights of way for the construction of telephone lines does not apply. The telephone wires are used only in connection with the operation and maintenance of the power line. Appellee's rights are to be determined under the Act of February 15, 1901. Its material provisions are:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical

or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or [for] any one or more of the purposes herein named: . . . *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

When the homestead entries were made by appellants, the regulation of July 8, 1901, was in force. Paragraph 11 (31 L. D. 17) contains the following: "The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department." August 24, 1912, before the patents were issued, this provision was superseded by the following regulation (41 L. D. 152, par. 9): "The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act." At the same time, the Secretary by regulation required that all patents issued have on their face a notation of prior permits.[2]

[2] The order with respect to notations was recalled and vacated by the regulations approved April 14, 1915 (44 L. D. 6). See also 45 L. D. 477.

It was competent for Congress to make subsequent homestead entries subject to the Act of February 15, 1901, and to the regulations fixed by the Secretary. And undoubtedly the power and authority of the Secretary under the act may be so exercised as to affect the rights and limit the title of subsequent homestead entrymen. Within the scope of the authorization, he may make, and from time to time change, regulations for the administration of the act. The rights of appellants as entrymen were subject to the proper exercise of that power. The regulation in effect when appellants settled on the land expressly provided that permissions granted were subject to further and future regulation. At that time, the right of way was occupied and used for the operation of the power line. When the patents issued, that regulation had been superseded by the one of August 24, 1912.

Appellants contend that appellee acquired a mere license temporarily to use the right of way through the lands in question, and that the patents without more revoked the license and deprived appellee of its right of way over the lands therein described. In support of this contention, they stress the concluding clause of the act, stating that the permission given "shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." The purpose of the act is to grant to the Secretary power "to permit the use of rights of way" through the lands referred to. And, in order that control over them may be retained, it is provided that the Secretary in his discretion may revoke such permits. The enterprises mentioned in the act involve expensive and permanent construction. The use of land necessary for the undertakings specified is to be distinguished from mere licenses to travel over, graze cattle on, or otherwise use or occupy land without investment for construction or improvements. Plainly, the piecemeal revocation of the right of way, whenever a patent is

issued to a settler along the line, would increase the financial burden and add elements of risk to the investments, and so be inconsistent with the purpose of the act. The clause above quoted should be read to promote and advance, not to defeat, the legislative purpose to permit the use of rights of way through public lands for the industries and utilities mentioned. It is included from an abundance of caution to support and safeguard the Secretary's power of revocation. It means that the permissions given shall not be deemed to confer any right that may not be revoked by him in the exercise of his discretion. There is no other enactment providing for the termination of the use of the rights of way. The right to use continues until the permission given by the Secretary is revoked by him.

As the sole power of revocation was committed to his discretion, it was within the power of the Secretary to determine that final disposal of the lands would operate to revoke the permission; and it was also within his power, by the regulation of August 24, 1912, to declare that final disposal shall not be deemed to be a revocation, but shall be subject to the right of way until such permission shall have been specifically revoked. Upon elaborate consideration, in 1912, the Secretary held that the provision of the regulation first above quoted was directly contrary to the purpose of the statute. He said, "It discouraged development by making the title of the permittee subject to that of the final patentee of the land occupied under the permit, . . . To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute. . . . The regulations hereinbefore made [41 L. D., *supra*] will protect permittees from any demands that might

otherwise be made upon them by subsequent claimants of the lands over which the permits give a right of way." (Letter of August 23, 1912, from the Secretary of the Interior to the Commissioner of the General Land Office.)

The regulation is still in effect. The construction and application of the act so made and provided for have been followed since that time. If the meaning of the act were not otherwise plain, this interpretation would be a useful guide to the ascertainment of the legislative intention. It is a " settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan* v. *Davis,* 233 U. S. 613, 627.

Appellants contend, and it is true as a general rule, that when, conformably to the laws, entry is made and certificate given, the land covered ceases to be a part of the public lands (*Witherspoon* v. *Duncan,* 4 Wall. 210, 219), and that, when a patent issues in accordance with governing statutes, all title and control of the land passes from the United States. *United States* v. *Schurz,* 102 U. S. 378, 396. But we hold that, under the act and the regulation made pursuant to it and in force when the patents issued, these rules do not operate to strike down rights, subject to which, under the law, the lands are patented. Under the permission of the Secretary, the power line had been constructed and was maintained on the right of way over the lands in question for a long time before the reservation was opened for settlement. The entries were made subject to the regulations then in force, and were affected by the provision that " any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department." The fact that the patents did not have thereon a notation of the prior per-

mit is not controlling. Under the regulation then in force, final disposal did not revoke the permit, but was made subject to the use of the right of way for the power line. It was intended that the patent should not extinguish the earlier permission given by the Secretary. The issuing of the patents without a reservation did not convey what the law reserved. They are to be given effect according to the laws and regulations under which they were issued. See *Stoddard* v. *Chambers,* 2 How. 284, 318; *Jamestown & Northern R. R. Co.* v. *Jones,* 177 U. S. 125; *Smith* v. *Townsend,* 148 U. S. 490.

Decree affirmed.

ASAKURA *v.* CITY OF SEATTLE ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 211. Argued February 25, 1924.—Decided May 26, 1924.

1. The treaty-making power extends to all proper subjects of negotiation between our Government and foreign nations, including that of promoting friendly relations by establishing rules of equality between foreign subjects while here and native citizens. P. 341.
2. A rule of equality thus established stands on the same footing of supremacy as the Federal Constitution and laws, cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws, operates without the aid of legislation, state or national, and is to be applied and given authoritative effect by the courts. *Id.*
3. A treaty is to be liberally construed; when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. P. 342.
4. The Treaty of April 5, 1911, with Japan, provides that the citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other "to carry on trade, . . . to own or lease and occupy . . . shops, . . . to lease land for . . . commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established," and "shall

receive . . . the most constant protection . . . for their . . . property." *Held,* that pawnbroking, which is licensed and recognized as a business by the law of the State of Washington, is "trade" within the meaning of the treaty, and that a city ordinance in that State which undertook to confine the business to citizens of the United States was void as applied to a Japanese subject lawfully admitted to this country. P. 342.

122 Wash. 81, reversed.

ERROR to a decree of the Supreme Court of Washington which sustained an ordinance of the City of Seattle restricting the business of pawnbroking, in a suit brought by Asakura to prevent its enforcement.

Mr. Dallas V. Halverstadt, for plaintiff in error, submitted. *Mr. E. Heister Guie* was also on the brief.

A business can not be prohibited by a state legislature unless there is inherent in the business, irrespective of the character of some men who may engage in it, some evil or direct tendency to evil. *Cargill Co.* v. *Minnesota,* 180 U. S. 452; *Adams* v. *Tanner,* 244 U. S. 590. Distinguishing *Phalen* v. *Virginia,* 8 How. 163; *Mugler* v. *Kansas,* 123 U. S. 623; *Crowley* v. *Christensen,* 137 U. S. 86; *Austin* v. *Tennessee,* 179 U. S. 343; *Lottery Case,* 188 U. S. 321; *Otis* v. *Parker,* 187 U. S. 606; *Murphy* v. *California,* 225 U. S. 623; *McCray* v. *United States,* 195 U. S. 27; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342; *Tanner* v. *Little,* 240 U. S. 369; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311; *Wilson* v. *New,* 243 U. S. 332.

The same argument is made to sustain this ordinance as was made to sustain Initiative No. 8, of this State, which prohibited any employment agent from charging for securing employment for anyone or for furnishing information leading thereto; and the state court listened with approval to the argument. *Huntworth* v. *Tanner,* 87 Wash. 670; *State* v. *Rossman,* 93 Wash. 530. But those decisions were contrary to the Constitution of the United States. *Adams* v. *Tanner,* 244 U. S. 590.

The right to prohibit must be found in the inherent nature or characteristic of the business at which the legislative act is directed.

The business of pawnbroker is lawful and the legislature cannot prohibit any honest man from engaging therein.

If the business is not lawful, the City cannot license it. The City, however, is asserting the power to license the business, and it thereby is foreclosed from contending that the business itself is not lawful. Furthermore, the business is recognized as lawful by the statutes of the State.

The argument which is made to sustain this ordinance incontrovertably leads to the conclusion that any dishonesty occurring in a business justifies the legislature in abolishing the business.

The City cannot decline to grant a license to the plaintiff in error merely because he is a subject of the Emperor of Japan. Though an alien he is protected by the Equal Protection Clause of the Fourteenth Amendment. Citing many decisions, including *Terrace* v. *Thompson,* 263 U. S. 197; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33.

Again, the plaintiff in error has the right to engage in business as a pawnbroker by the express terms of § 1977, Rev. Stats. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *United States* v. *Wong Kim Ark,* 169 U. S. 649; *Whitefield* v. *Hanges,* 222 Fed. 745.

Nothing said by this Court in the case of *Terrace* v. *Thompson,* 263 U. S. 197, is in conflct with the foregoing. It must be remembered that the question before the Court in that case was the right of the State to prohibit aliens from owning or leasing real estate within the limits of the State, and that general language in an opinion must be restrained to the particular facts before the Court.

The Treaty between the United States and Empire of Japan does not permit of the refusal of the City to grant the plaintiff in error the license in question.

As for the scope of the term "trade," see *Schooner Nymph,* 1 Sumn. 517; *State* v. *North,* 160 N. C. 1010; *Smith* v. *Cooley,* 65 Cal. 46; *Chase National Bank* v. *Faurot,* 149 N. Y. 532; *State* v. *Phipps,* 50 Kan. 609; *Denny* v. *Bridges,* 19 Wash. 44; *Spotswood* v. *Morris,* 12 Idaho, 360; *State* v. *Tagami,* (Super. Ct. Calif., Los Angeles County, July 9, 1923).

Mr. Charles T. Donworth, with whom *Mr. Thomas J. L. Kennedy, Mr. Walter B. Beals* and *Mr. Edwin C. Ewing* were on the brief, for defendants in error.

The ordinance involved must be treated as a statute of the State of Washington. *Shepard* v. *Seattle,* 59 Wash. 363; *Crowley* v. *Christensen,* 137 U. S. 86.

Every legislative act is presumed to be constitutional, and if any state of facts can be reasonably conceived to exist which would sustain the act, the Court will presume such facts to have existed.

The motives of the legislators in enacting a law will not be inquired into by the Court.

No person has a vested right to engage in pawnbroking.

Because of the facilities that it affords for aiding in and concealing the commission of crime, it has always been regarded by the law as an inherently vicious occupation which may be prohibited entirely. It is not a necessary business and engaging in it is merely a privilege. *St. Joseph* v. *Levin,* 128 Mo. 588; *Grand Rapids* v. *Braudy,* 105 Mich. 670; *Levinson* v. *Boas,* 150 Cal. 185; *Elsner Bros.* v. *Hawkins,* 113 Va. 47; *Grossman* v. *Indianapolis,* 173 Ind. 157; *St. Louis* v. *Baskowitz,* 273 Mo. 543; *Seattle* v. *Barto,* 31 Wash. 141; 20 Encyclopedia Britannica, 11th ed., p. 973.

While, so far as our investigation discloses, this Court has never had occasion to pass upon the status of pawnbroking under the police power, it has discussed the power of the State to prohibit inherently vicious and non-useful occupations. *Crowley* v. *Christensen,* 137 U. S. 86.

In that decision it was strongly intimated that the municipal authorities might pick and choose between applicants for licenses and grant licenses only when deemed proper. *Booth* v. *Illinois,* 184 U. S. 425; *Murphy* v. *California,* 225 U. S. 623; *Terrace* v. *Thompson,* 263 U. S. 197.

The ordinance involved in this case merely restricts the privilege of engaging in this unnecessary and inherently vicious occupation to citizens of the United States. Since, under the authorities cited, the city council could have prohibited the occupation entirely, it can limit its exercise to citizens of the United States without violating the Fourteenth Amendment or the guarantees contained in the Japanese Treaty.

It has been held in numerous cases, that if the business is one that may be prohibited, alienage may justify the denial of the privilege, though of course a State cannot discriminate between aliens and citizens in respect to those useful businesses which every person may follow as of right. *Truax* v. *Raich,* 239 U. S. 33; *People* v. *Crane,* 214 N. Y. 154; *Crane* v. *New York,* 239 U. S. 195; *Heim* v. *McCall,* 239 U. S. 175; *Commonwealth* v. *Hana,* 195 Mass. 262; *Trageser* v. *Gray,* 73 Md. 250; *Bloomfield* v. *State,* 86 Oh. St. 253; *Morin* v. *Nunan,* 91 N. J. L. 506; *State* v. *Ames,* 47 Wash. 328; *Ozawa* v. *United States,* 260 U. S. 178; *Yamashita* v. *Hinkle,* 260 U. S. 199. That the classification adopted by the city council in the present case does not deny the plaintiff in error equal protection of the laws, is conclusively shown by *Terrace* v. *Thompson,* 263 U. S. 197. See also *Frick* v. *Webb,* 263 U. S. 326; *Webb* v. *O'Brien,* 263 U. S. 313.

The basis of classification between aliens and citizens being a proper one, the ordinance is not invalid because Congress has so far failed to make Japanese subject to naturalization.

Furthermore, the burden of showing that the classification complained of does not rest upon any reasonable

basis, is upon the plaintiff in error. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61.

The legislators had a right to presume that pawnbroking would be conducted by citizens with less harm to the public welfare than when conducted by aliens. In any event, this Court cannot substitute its judgment upon this question for that of the legislative body. *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245.

The Federal Government through the treaty-making power cannot restrict the police power of a sovereign State. *Missouri* v. *Holland,* 252 U. S. 416, discussed.

So far as our investigations disclose, the only opinion of this Court which squarely passes upon the relation between the treaty-making power of the Federal Government and the police power of the States, is that of Mr. Justice Daniel, in the *License Cases,* 5 How. 504. Chief Justice Taney, in his dissenting opinion in the *Passenger Cases,* 7 How. 283, expressed a similar view, and Mr. Justice Daniel in that case approvingly quoted from his former opinion. Although these were minority opinions, those of the majority do not seem to disagree with them upon this point.

Another expression of this Court to the effect that the treaty-making power is limited by the other provisions of the Constitution and by the peculiar nature of our form of government, is found in *Geofroy* v. *Riggs,* 133 U. S. 258.

Mr. Justice White rendered a special concurring opinion in *Downes* v. *Bidwell,* 182 U. S. 244, concurred in by Justices Shiras and McKenna, pointing out that the treaty-making power must be interpreted with reference to the nature of our government and in harmony with related provisions of the Constitution. See *Compagnie Francaise* v. *Board of Health,* 51 La. Ann. 645; s. c. 186 U. S. 380, 394; *In re Wong Yung Quy,* 2 Fed. 624; *Cantini* v. *Till-*

man, 54 Fed. 969; *People* v. *Naglee,* 1 Cal. 232; *Siemssen* v. *Bofer,* 6 Cal. 250; *Pierce* v. *State,* 13 N. H. 536.

If Congress and the President cannot enact a statute which violates the Tenth Amendment, how can the President and the Senate, together with some alien minister or other diplomatic representative, enter into a treaty which has that effect? The decision in *Missouri* v. *Holland, supra,* intimates that such is the case, but even if the broad statement referred to be correct, the facts of that case are distinguishable from the present case in that the subject-matter was not local and internal.

As was said in *Kansas* v. *Colorado,* 206 U. S. 46, 90: "The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. . . . This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

One of the powers reserved to the State (which is to be liberally construed), is the police power, pursuant to which a State may prohibit callings dangerous to the public.

If the treaty-making power should be declared to be not limited by the other provisions of the Constitution, then it becomes a convenient substitute for legislation in fields over which Congress has no jurisdiction. As this Court knows, a treaty is usually drafted secretly by the State Department or commissioners appointed by the President, in conference with some foreign representative.

This Court has always restrained attempts on the part of either the Federal Government or the States to encroach upon or impair the powers of the other. *Slaughter-*

House Cases, 16 Wall. 36; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20.

The Japanese Treaty does not guarantee the privilege of engaging in pawnbroking.

The term " trade " as used in the treaty, means dealing in commodities as a buyer or seller, but can not reasonably be held to include the indiscriminate loaning of money upon pledge of personal effects. *May* v. *Sloan,* 101 U. S. 231; *State* v. *Krech,* 10 Wash. 166; Bouvier, Law Dict., 8th ed.; Webster's Int. Dict.; 27 Encyclopedia Britannica, 11th ed., p. 127; *Terrace* v. *Thompson,* 263 U. S. 197; *Frick* v. *Webb,* 263 U. S. 326; *Webb* v. *O'Brien,* 263 U. S. 313.

While treaties must be construed liberally to make effective the intention of the parties, yet a strained construction such as suggested by plaintiff in error should not be indulged in. We agree that the word " trade " is used in the ordinary acceptation of the term, but where was the word " trade " ever used to describe the act of pawning, or the term " tradesman " to designate a pawnbroker?

It has already been demonstrated that pawnbroking is a privilege. This being so, the provisions of the treaty are inapplicable. *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Heim* v. *McCall,* 239 U. S. 175; *Bondi* v. *Mackay,* 87 Vt. 271.

Mr. Justice Butler delivered the opinion of the Court.

Plaintiff in error is a subject of the Emperor of Japan, and, since 1904, has resided in Seattle, Washington. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provides

" that no such license shall be granted unless the applicant be a citizen of the United States." Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the Superior Court of King County, Washington, against the city, its Comptroller and its Chief of Police to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stat. 1504; violates the constitution of the State of Washington, and also the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. He declared his willingness to comply with any valid ordinance relating to the business of pawnbroker. It was shown that he had about $5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The Superior Court granted the relief prayed. On appeal, the Supreme Court of the State held the ordinance valid and reversed the decree. The case is here on writ of error under § 237 of the Judicial Code.

Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions: " The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . . The citizens or subjects of each . . . shall receive, in the territories of the other, the most constant protection and security for their persons and property, ..."

A treaty made under the authority of the United States "shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." Constitution, Art. VI, § 2.

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy* v. *Riggs,* 133 U. S. 258, 266, 267; *In re Ross,* 140 U. S. 453, 463; *Missouri* v. *Holland,* 252 U. S. 416. The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous,[1] and make for good understanding between nations. The treaty is binding within the State of Washington. *Baldwin* v. *Franks,* 120 U. S. 678, 682–683. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. *Foster* v. *Neilson,* 2 Pet. 253, 314; *Head Money Cases,* 112 U. S. 580, 598; *Chew Heong* v. *United States,* 112 U. S. 536, 540; *Whitney* v. *Robertson,* 124 U. S. 190, 194; *Maiorano* v. *Baltimore & Ohio R. R. Co.,* 213 U. S. 268, 272.

The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it

[1] See "Handbook of Commercial Treaties," prepared by United States Tariff Commission, 1922.

makes it impossible for aliens to carry on the business. It need not be considered whether the State, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

It remains to be considered whether the business of pawnbroker is " trade " within the meaning of the treaty. Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein* v. *Lynham,* 100 U. S. 483, 487; *Geofroy* v. *Riggs, supra,* 271; *Tucker* v. *Alexandroff,* 183 U. S. 424, 437. The ordinance defines " pawnbroker " to " mean and include every person whose business or occupation [it] is to take and receive by way of pledge, pawn or exchange, goods, wares or merchandise, or any kind of personal property whatever, for the repayment or security of any money loaned thereon, or to loan money on deposit of personal property"; and defines "pawnshop" to "mean and include every place at which the business of pawnbroker is carried on." The language of the treaty is comprehensive. The phrase " to carry on trade " is broad. That it is not to be given a restricted meaning is plain. The clauses "to own or lease . . . shops, . . . to lease land for . . . commercial purposes, and generally to do anything incident to or necessary for trade," and " shall receive . . . the most constant protection and security for their . . . property . . ." all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word " trade " as used in the treaty.

By definition contained in the ordinance, pawnbrokers are regarded as carrying on a "business." A feature of it is the lending of money upon the pledge or pawn of personal property which, in case of default, may be sold to pay the debt. While the amounts of the loans made in that business are relatively small and the character of property pledged as security is different, the transactions are similar to loans made by banks on collateral security. The business of lending money on portable securities has been carried on for centuries. In most of the countries of Europe, the pledge system is carried on by governmental agencies; in some of them the business is also carried on by private parties. In England, as in the United States, the private pledge system prevails. In this country, the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century. We have found no state legislation abolishing or forbidding the business. Most, if not all, of the States provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not on that account to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above quoted provision, and it must be held that such business is "trade" within the meaning of the treaty. The ordinance violates the treaty. The question in the present case relates solely to Japanese subjects who have been admitted to this country. We do not pass upon the right of admission or the construction of the treaty in this respect, as that question is not before us and would require consideration of

other matters with which it is not now necessary to deal. We need not consider other grounds upon which the ordinance is attacked.

Decree reversed.

KENNEDY ET AL. *v.* UNITED STATES.

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

No. 222. Argued April 16, 1924.—Decided May 26, 1924.

That portion of the Act of July 23, 1892, as amended, which made possession of intoxicating liquor in the Indian Country an offense and fixed its punishment, was not repealed, superseded or modified by the National Prohibition Act. P. 345.

QUESTION certified by the Circuit Court of Appeals under Jud. Code, § 239.

Mr. James Patrick Gilmore, with whom *Mr. Phil D. Brewer, Mr. F. F. Nelson, Mr. J. H. Everest, Mr. Ed. S. Vaught* and *Mr. Robert K. Everest* were on the briefs, for Kennedy et al.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Byron M. Coon,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The Act of July 23, 1892, c. 234, 27 Stat. 260, and its amendments,[1] the Act of January 30, 1897, c. 109, 29 Stat. 506, and the Act of May 25, 1918, c. 86, 40 Stat. 563, make the possession of intoxicating liquor in the Indian Country, as therein defined, a criminal offense. The

[1] See *United States* v. *Wright,* 229 U. S. 226; *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531.

plaintiffs in error were indicted and convicted of having whiskey in their possession in the Indian Country, in Osage County, Oklahoma, on July 24, 1920, in violation of the acts above mentioned. The case was taken on writ of error to the Circuit Court of Appeals of the Eighth Circuit and that court, under § 239 of the Judicial Code, certified a question of law to this Court. It is this:

"Was that portion of the Act of July 23, 1892, Section 4136a, Comp. Stat., as amended by the Act of January 30, 1897, Section 4137, Comp. Stat., and by the Act of May 25, 1918, Section 4137a, Comp. Stat., which made possession of intoxicating liquor in the Indian Country a criminal offense and fixed the punishment therefor repealed, superseded or modified by the enactment of the National Prohibition Act, 41 Statutes at Large, 305, 308, Title II, Sections 3, 25, 29, 33 and 35?"

The Act of 1918 provides that "possession by a person of intoxicating liquors in the Indian country where the introduction is or was prohibited by treaty or Federal statute shall be an offense and punished in accordance with" the above mentioned Acts of 1892 and 1897. Mere possession is made criminal. The purpose of the possession or the intended use is not material. The particular place and its character, Indian Country, are essential. The evils aimed at are those which result from liquor traffic in localities where Indians live or which they are liable to frequent. These statutes apply locally for the special purpose of keeping whiskey and other intoxicants out of the reach of Indians.

By the Eighteenth Amendment, the manufacture, sale or transportation of intoxicating liquors, in the United States and all territory subject to the jurisdiction thereof, for beverage purposes is prohibited. The National Prohibition Act was passed to enforce that Amendment. Liquor for non-beverage purposes may be purchased, sold and possessed as specified in that act, but not in violation

of the legislation relating to the Indian Country. See Title II, §§ 3, 4, 6, 13, 25, 33, 37.

The offense charged against plaintiffs in error is not the same as any defined in the National Prohibition Act. Those portions of the Acts of 1892, 1897 and 1918, passed for the protection of the Indian Country, mentioned in the certificate of the Circuit Court of Appeals, do not conflict with the National Prohibition Act. Both may stand. The repealing clause contained in § 35 is: "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency . . . ." As no incompatibility exists, there is no repeal by implication. *Washington* v. *Miller,* 235 U. S. 422, 428; *United States* v. *Greathouse,* 166 U. S. 601, 605; *United States* v. *Healey,* 160 U. S. 136, 147; *Frost* v. *Wenie,* 157 U. S. 46, 58; *McClintic* v. *United States,* 283 Fed. 781.

The answer to the question certified is:

No.

LUCKING *v.* DETROIT & CLEVELAND NAVIGATION COMPANY.

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

No. 212. Argued March 11, 12, 1924.—Decided May 26, 1924.

1. A suit by a past and prospective passenger and shipper to compel continued operation of a steamboat route as a service required by the Act to Regulate Commerce, *held* within the jurisdiction of the District Court as one arising under the laws of the United States. P. 349.
2. A corporation organized under the Michigan Commerce and Navigation Act of 1867; c. 181, Comp. Laws 1897, to operate steamboats, no particular route being designated, and which had no power of eminent domain or special privilege respecting its business, *held* free, under the law of Michigan, in the absence of any restraining contract, to abandon operation of one of its routes. *Id.*

3. A common carrier by water owes no common law duty not to cease operating its boats. P. 350.
4. The duty of an interstate carrier by water under § 1, subdiv. (4) of the amended Interstate Commerce Act, to furnish transportation upon reasonable request, does not oblige it to continue operation of boats on a particular route; and § 1, subdiv. (18) of the Commerce Act, concerning abandonment, relates only to railroads. P. 351.

284 Fed. 497, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed, on the merits, a bill brought by the appellant to compel the appellee to continue operating a line of steamboats.

Mr. William Lucking for appellant.

This Court may grant plaintiff full relief, whether the right thereto is based upon the provisions of the Interstate Commerce Act or upon the common-law right to compel a carrier to perform its duties, or upon a statute of Michigan. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499; *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175; *Ohio Tax Cases*, 232 U. S. 576.

A common carrier by water is charged with the same obligations and duties as any other carrier. *The Maggie Hammond*, 9 Wall. 435; *The Lady Pike*, 21 Wall. 1; *The Niagara*, 21 How. 7; *Citizens Bank* v. *Nantucket Steamboat Co.*, 2 Story, 16.

The defendant is a common carrier, partly by railroad and partly by water, within the meaning of the Interstate Commerce Act, and is as specifically within the terms of that act as any other carrier named therein. *Interstate Commerce Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194; *Pipe Line Cases*, 234 U. S. 548; *Stevens* v. *Telephone Co.*, 240 Fed. 759; *United States* v. *Union Stock Yard Co.*, 226 U. S. 286; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Alaska S. S. Co.* v. *Association*, 236 Fed. 964.

That the appellee is clearly within the terms of the Interstate Commerce Act is shown by the different amendments to the act. *Pennsylvania Co.* v. *United States,* 236 U. S. 351; *Chicago, etc. Ry. Co.* v. *Hardwick Elevator Co.,* 226 U. S. 426; *Ellis* v. *Interstate Commerce Comm.,* 237 U. S. 434; *Pacific S. S. Co.* v. *Railroad Co.,* 251 Fed. 218.

Common carriers are often compelled to operate branch lines where the public necessity therefor appears.

That defendant enjoyed no right of eminent domain from the State of Michigan, does not relieve it from its duty to afford the public an admittedly necessary transportation service.

The public importance and necessity for this service cannot be doubted.

Mr. Alexis C. Angell, with whom *Mr. James Turner, Mr. Clifton G. Dyer* and *Mr. James B. Angell* were on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

March 25, 1921, appellant filed his complaint in the District Court for the Eastern District of Michigan, praying a mandatory injunction to compel appellee to operate its steamboats, Alpena II and Mackinac II, on the Detroit and Mackinac route in the navigation season of that year, as it had done in prior years.

Appellee is a corporation organized under the laws of Michigan, and has long been a common carrier of passengers and freight for hire on steamboats operated by it between Detroit, Michigan, and Cleveland, Ohio, between Detroit and Buffalo, New York, and between Detroit and Mackinac Island, Michigan. For many years, by arrangement with carriers by rail, it had carried some passengers and freight under joint lake and rail tariffs providing for continuous carriage, partly by railroad and partly by

water, to and from various ports reached by its steamers, and to and from points on lines of carriers by railroad. Appellee proposed to discontinue service on the route between Detroit and Mackinac Island. The complaint alleged that appellant had been in the past, and that he desired to become, in the season of 1921 and thereafter, a passenger and a shipper of freight on appellee's steamers on the Detroit and Mackinac route. It further alleged that it was appellee's duty to provide and furnish transportation for passengers and property during that season and thereafter over the route above named, and that to abandon such service would violate the Act to Regulate Commerce, as amended, and particularly subdivisions (1) (a), (3) and (4) of § 1. Appellee moved to dismiss the complaint on the ground that the court was without jurisdiction, and that appellant was not entitled to the relief prayed. The District Court held that the suit involved a federal question and was within its jurisdiction; and, on the merits, decided that appellant was not entitled to relief and dismissed the complaint. 273 Fed. 577. The Circuit Court of Appeals affirmed the decree. 284 Fed. 497. The case is here on appeal under § 241 of the Judicial Code.

On the allegations of the complaint, the suit is one arising under the laws of the United States, and particularly the Act to Regulate Commerce. Its decision involves the construction and application of certain provisions of that act. It was rightly held in the courts below that the District Court had jurisdiction. *Louisville & Nashville R. R. Co.* v. *Rice,* 247 U. S. 201, 203; *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499, 506, 508.

There remains the question whether appellee was bound to resume and maintain the service.

The obligation was not imposed by appellee's charter or the statutes of Michigan. The company was organized

under the Commerce and Navigation Act of 1867; c. 181, Compiled Laws 1897. By compliance with the provisions of that act, persons were authorized to become a body corporate "for the purpose of engaging in the business of maritime commerce or navigation within this state, or upon the frontier lakes or other navigable waters, natural or artificial, connected therewith, . . ." The General Corporation Act of Michigan of 1903; Compiled Laws 1915, c. 175; superseded the Act of 1867, but contained a saving clause as to rights which had been secured under the earlier act. The act under which appellee was organized does not prescribe or require the articles to specify any route over which such a corporation is to operate its boats, and does not require it to continue in business. Appellee's articles of association adopted the statutory language, and do not designate any route for the operation of its boats, or require it to continue operation. Appellee has no power of eminent domain or special privilege or right in respect of the business it is authorized to do, which a natural person owning a vessel and engaged in the same business does not have. It is under no contractual obligation to operate on the route in question. Act No. 56, Public Acts 1919, provides that no person, firm or corporation owning or operating any railroad shall abandon its main line or track or any portion thereof without the permission of the State Commission. There is no similar statute relating to carriers by water.

The obligation to continue is not imposed by any principle of the common law. Reasonableness of service on a route over which appellee operates boats is not involved. The duty to furnish reasonable service while engaged in business as a common carrier is to be distinguished from the obligation to continue in business. No case has been cited by counsel, and we know of none, in which it has been held that there is any common law duty

on a common carrier by water not to cease to operate its boats.[1]

The obligation to continue service is not imposed by any federal statute. Appellant relies on § 1, subd. (1) (a), of the Interstate Commerce Act (as amended by § 400, Transportation Act, 1920) which provides that the act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for continuous carriage or shipment; and a provision in subd. (3) defining "carrier" to mean "common carrier", and "transportation" to include locomotives, cars and other vehicles, *vessels,* and all instrumentalities of shipment or carriage; and a provision of subd. (4) making it the duty of every common carrier, subject to the act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor.

But in connection with these provisions, there should be read subd. (18) of the same section, which provides that no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment.

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[1]Appellant cited: *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Comm.,* 206 U. S. 1; *Missouri Pac. Ry. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612; *Bryan* v. *Louisville & N. R. Co.,* 244 Fed. 650; *Lee Line Steamers* v. *Memphis, H. & R. Packet Co.,* 277 Fed. 5; *Colorado & So. Ry. Co.* v. *R. R. Commission,* 54 Colo. 64; *State* v. *Dodge City M. & T. Ry. Co.,* 53 Kans. 377; *So. Ry. Co.* v. *Franklin R. R. Co.,* 96 Va. 693; *People v. Albany & Vt. R. R. Co.,* 24 N. Y. 261; *So. Ry. Co.* v. *Hatchett,* 174 Ky. 463; *State* v. *Spokane Street Ry. Co.,* 19 Wash. 518; *State* v. *Bullock,* 78 Fla. 321. And see note, 284 Fed. 500, 501. These cases are readily distinguishable.

Carriers by water, such as appellee, are within the terms of the Transportation Act for certain purposes; e. g., for the regulation of their accounts, the making of reports, the prevention of rebates, discrimination and the like. Certain provisions of the act are applicable to some carriers and not to others. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 208. The imposition of a duty upon a carrier by water to furnish transportation upon reasonable request does not create an obligation to continue to operate boats on a particular route. The provision of subd. (18) above referred to is specifically limited to lines of railroad. This indicates legislative intention that carriers by water are not required to continue and may cease to operate if they see fit.

No duty to continue to operate its boats on the Detroit and Mackinac Island route is imposed on appellee by its charter, the statutes of Michigan, the common law or federal statutes.

Decree affirmed.

ST. CLOUD PUBLIC SERVICE COMPANY *v.* CITY OF ST. CLOUD.

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

No. 10. Argued October 2, 1923.—Decided May 26, 1924.

1. A State may authorize a municipal corporation to establish by contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time; and the effect of such a contract is to suspend, during its life, the governmental power of regulating the rates. P. 355.
2. Where a public service corporation and a municipality, having power to contract as to rates, exert it by fixing them for a particular time, the rates are enforceable under the obligation of the contract, even though they become "confiscatory." *Id.*

3. In Minnesota, a city charter, by authorizing the common council to provide for and control the erection and operation of gas works for supplying the city and its inhabitants with heat and light, and to grant the right to erect, maintain and operate such works with all rights incident or pertaining thereto to one or more private corporations, empowered the City to enter by ordinance into a contract, in its proprietary capacity, with a private corporation, providing for the construction and operation of gas works for the period of thirty years, and fixing the rates for gas sold the City and its inhabitants. P. 359.
4. Where a municipality having both the power to contract as to rates and the power to prescribe rates from time to time, exercises the former, the power to regulate is suspended during the contract, and the contract is binding. P. 360.
5. The provisions of the Minnesota Constitution, Art. IV, § 33, prohibiting the legislature from enacting any special or private laws for granting corporate powers or privileges, except to cities, or for granting to any individual, association or corporation, except municipal, any special or exclusive privilege, immunity or franchise whatever, do not apply to contracts made by municipalities under charter powers granted them by the legislature. *Id.*
6. An ordinance under which a gas company, in consideration of rights and privileges granted, covenanted and agreed to erect and operate a plant and sell gas, etc., and which contained a clause by which the grantee was "authorized" to sell at not to exceed a price fixed—*construed* as a contract fixing that as the maximum rate. P. 361.
7. A law authorizing cities to regulate rates of public service corporations, cannot be invoked by a company to increase the rates fixed by its contract with a city before the law was enacted. P. 364.

Affirmed.

APPEAL from a decree of the District Court dismissing for want of equity a bill brought by a gas company to enjoin interference with a proposed increase in its rates.

Mr. J. O. P. Wheelwright for appellant.

Mr. R. B. Brower for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by the Public Service Company to enjoin the City from interfering with a proposed increase in the rates charged for fuel gas.

The allegations of the bill, shortly stated, are: The Company is a public service corporation organized under the laws of Minnesota, and the City, a municipal corporation of that State. In 1905 the City, by ordinance, granted the Company's predecessor, its successors and assigns, the right to construct and maintain for thirty years works for the manufacture, distribution and sale of gas to the City and its inhabitants, and authorized it to sell fuel gas at a rate not exceeding $1.35 per thousand cubic feet. The grantee's rights were assigned to the Company in 1915, and since then it has been engaged in manufacturing and selling fuel gas under the ordinance.[1] Since 1917 the Company has sold fuel gas at the maximum rate of $1.35 prescribed by the ordinance. This rate has not yielded, and cannot yield any return on the value of the property devoted to the gas business, has resulted in a constant loss and steadily increasing operating deficit, is inadequate and confiscatory, and deprives the Company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution. The City Commission has refused to entertain a petition to prescribe a rate yielding a reasonable return on the invested capital. To secure a fair and reasonable return, a rate of $3.39 per thousand cubic feet is necessary. The Company intends

[1] The ordinance also granted the right to construct and maintain for the same period works for the manufacture and sale of electricity. The bill alleges that the gas and electric operations are conducted as distinct and separate departments; and that neither the Company nor its predecessor has ever sold gas except for fuel purposes, there being no demand for illuminating gas.

to increase its rate to that price. The City, however, has threatened to interfere with the collection of the proposed increased rate, and, unless restrained, will attempt to force the Company to continue to sell gas at the prescribed maximum rate, resulting in controversies and multiplicity of suits, and inflicting irreparable loss and injury upon the Company.

The bill prays that the court adjudge that the maximum rate prescribed by the ordinance is confiscatory and violates the rights of the Company under the Fourteenth Amendment; and that the City be enjoined from interfering with the Company in raising the rate to $3.39, or attempting in any manner to force it to continue to sell gas at the ordinance rate.

A motion by the Company for a preliminary injunction was denied. Thereafter, on motion of the City, the court dismissed the bill for want of equity, on the ground that there was a "valid and subsisting contract between the City and the plaintiff Company governing the matter of a maximum rate for fuel gas." The Company, by reason of the constitutional question involved, has appealed directly to this Court. Jud. Code, § 238; *Columbus Ry. Co.* v. *Columbus,* 249 U. S. 399.

It has been long settled that a State may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265, 273, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are

confiscatory is immaterial. *Southern Iowa Elec. Co.* v. *Chariton,* 255 U. S. 539, 542, and cases there cited; *Paducah* v. *Paducah Ry. Co.,* 261 U. S. 267, 273; *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 438. The existence of a binding contract as to the maximum rate for fuel gas is therefore the controlling issue upon which this controversy depends. Its solution turns upon the questions whether the City had power to contract on this subject by the ordinance of 1905; and, if so, whether the ordinance constituted such a contract.

1. Was the City authorized to enter into a contract as to the rate to be charged for fuel gas? Such authority must clearly and unmistakably appear. *Home Telephone Co.* v. *Los Angeles, supra,* p. 273; *Paducah* v. *Paducah Ry. Co., supra,* p. 272. Whether it existed depends upon the laws of Minnesota in force at the time. The consolidated charter of the City (Special Laws of 1889, c. 6, p. 131) provided as follows: The City "shall be capable of contracting and being contracted with; and shall have all the powers possessed by municipal corporations at common law." C. 1, § 1. "The common council in addition to all powers herein . . . specifically mentioned, shall have full power and authority to make . . . all such ordinances . . . for the general welfare of the city and the inhabitants thereof, as they shall deem expedient." C. 4, § 4. "The common council shall have full power by ordinance: . . . To provide for and control the erection and operation of gas works, electric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporations . . ; to provide for and control the erection and operation of works for heating the public buildings of said city by

steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works . . ; provided, . . . that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned." C. 4, § 5, cl. 10.

In construing and giving effect to these provisions of the charter we look to the decisions of the Supreme Court of the State. In *Reed* v. *City of Anoka,* 85 Minn. 294, 297, 298 (1902) the city charter—likewise enacted in 1889—conferred upon the municipality the power "to make and establish public pumps, wells, cisterns and hydrants, and to provide for and control the erection of waterworks for the supply of water for the city and its inhabitants." The city, by ordinance, entered into a contract with individuals for the construction and operation of a system of waterworks for such purposes, for a term of thirty-one years: the city agreeing to pay the grantees a specified sum per year for each hydrant, and restrictions and limitations being imposed as to the charges to be made by the grantees for water furnished the inhabitants. In a suit brought by taxpayers to enjoin the performance of this contract the court said, that there could be "no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water. . . . The authorities are very uniform that contracts of this nature are not within the legislative or governmental prerogatives of the municipality, but rather within its proprietary or business powers. Their purpose is not to govern the inhabitants, but to secure for them and for itself a private benefit. . . . It was so held in . . .

Flynn v. *Little Falls E. & W. Co.*, 74 Minn. 180. . . . While this precise point of distinction was not made in that case, it is authority for the proposition that a municipality does not exercise its legislative functions in entering into contracts of this kind, but only its business or proprietary powers, to which the rules and principles of law applicable to contracts and transactions between individuals apply." In *City of St. Cloud* v. *Water Co.*, 88 Minn. 329, 332 (1903), there was involved an ordinance passed by the present appellee in 1887, providing for the sale of the City's waterworks to certain persons and granting them the right to maintain the system for the period of thirty years and to furnish water to its inhabitants at certain specified rates; in consideration of which the grantees agreed to extend the system, to furnish water without charge for certain purposes, and to supply a specified amount of pure water for domestic purposes. The original charter of the City (Special Laws of 1868, c. 28, p. 144) made it capable of contracting, vested it with all the general powers possessed by municipal corporations at common law, and gave it the power of establishing and constructing public pumps, wells, cisterns, reservoirs and hydrants. In a suit by the City to set aside the contract entered into by the ordinance for failure of the grantees to furnish pure water in the stipulated quantities, the court said: "The obligations of the parties, as set out in the ordinance, constitute a contract. The city was enabled to enter into such obligation by virtue of its charter powers and the general laws of the state, and was endowed with the right to construct, or cause to be constructed, a water system for the benefit of its inhabitants, and had control of its streets, and could contract with reference to their use for the purpose of extending the system. . . . The obligations thus entered into were mutual. Upon the one hand, the grantees, their successors and assigns, would be protected by the courts in the enjoyment of their

rights,—for instance, in the collection of the hydrant rentals; on the other hand, the courts of the state are open to the city to secure the enforcement of its rights. No serious question can arise as to the nature of the contract obligation. . . ."

In the light of these decisions of the Supreme Court of the State of Minnesota we think it is clear that the City had authority, in 1905, under its charter and the laws of the State, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed, under the doctrine of the *Reed Case,* under the provisions of the charter giving the council the power to provide for the control and erection of gas works for the purpose of supplying the City and its inhabitants with heat and light. And we do not think that this contractual power was limited by the proviso that the council should have the right to "regulate and prescribe" the rates and charges of the companies to which it might grant the right of constructing such works. It is true that, standing alone, this proviso, in the absence of any state decision to the contrary, would, under the construction given similar language in *Home Telephone Co.* v. *Los Angeles, supra,* p. 274, be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provision of the charter authorizing the city to contract as to rates. And in the present case, as the other provisions of the charter gave the City authority so to contract, we must regard the proviso as merely an alternative provision; that is to say, we think that the City might either contract as to the rates, as an incident to its

power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter "regulate and prescribe" the rates in the exercise of the governmental authority conferred by the proviso. One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding. *Paducah* v. *Paducah Ry. Co.*, *supra,* pp. 272, 273.

We find nothing in conflict with our conclusion as to the City's authority to contract in Section 33 of Article IV of the Minnesota Constitution, as amended in 1881, providing that: "The Legislature is prohibited from enacting any special or private laws in the following cases: . . . 7th. For granting corporate powers or privileges, except to cities. . . . 10th. For granting to any individual, association or corporation, except municipal, any special or exclusive privilege, immunity or franchise whatever." General Laws, 1881, p. 22. Clauses 7 and 10 read together plainly show that the prohibition against the granting of special or exclusive privileges by the Legislature does not apply to the granting of corporate powers or privileges to cities. It did not prohibit the Legislature from granting to the City by the consolidated charter of 1889, the power of contracting in its proprietary capacity in reference to the construction and operation of gas works. If it had had such an effect we cannot assume that it would have been overlooked by the Supreme Court of Minnesota in the *Reed Case,* in which no reference was made to this provision. It is unnecessary, therefore, to consider whether the provisions of the consolidated charter were authorized as an amendment to the original charter of

1862. See *Brady* v. *Moulton,* 61 Minn. 185. This constitutional provision is obviously entirely different from that involved in *San Antonio* v. *San Antonio Public Service Co.,* 255 U. S. 547, 549, providing "that *no irrevocable or uncontrollable grant* of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or *created under its authority,* shall be subject to the control thereof," which was held to prevent a municipality, acting under the authority of the Legislature, from entering into a binding contract as to public service rates. The provision of the Minnesota Constitution makes no reference either to irrevocable or uncontrollable privileges, or to privileges created by a municipality acting under the authority of the Legislature and is, as we view it, merely a limitation upon the direct authority of the Legislature itself, to the extent that we have indicated.

Nor do we find anything in the Laws of 1893, c. 74, p. 189 (General Statutes of 1913, § 6137) in conflict with the conclusion which we have reached as to the power of the City to contract as to rates.

2. Did the ordinance constitute a contract fixing the maximum rate for gas? The intention to so contract must clearly and unmistakably appear. *Paducah* v. *Paducah Ry. Co., supra,* p. 272. The essential provisions of the ordinance are: The right and privilege is granted to construct and maintain for thirty years works and instrumentalities for the manufacture and distribution of electricity and gas. § 1. The grantee is "authorized" to manufacture and sell electricity and gas to the City and its inhabitants during such period. § 2. The construction shall be done with the least practicable inconvenience to the public and individuals, and the "grantee shall restore" all places where excavated to their original condition as far as practicable, and repair all damage done by such excavation. § 3. In laying down pipes or

erecting wires the grantee "shall conform" to all reasonable regulations prescribed by the City. § 4. "In consideration of the rights and privileges herein granted, the grantee hereby *covenants and agrees* that it will . . . erect . . . an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power." § 5. "The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed . . . at the price of not to exceed" $1.85 per thousand cubic feet, "and fuel gas at the rate of not to exceed" $1.35 per thousand cubic feet, and shall be at liberty to cut off the supply from any person not paying for a period of thirty days. § 6. "The rights hereby granted are upon the express condition" that the City may purchase the electric and gas works of the grantee at specified intervals at the appraised value thereof, as determined by arbitrators to be chosen in a prescribed manner. § 7.

We think that the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the City and its inhabitants during the thirty-year period, at the maximum rate prescribed. Although § 6 "authorizing" the sale of fuel gas at a price not exceeding $1.35, is not phrased in the language of an agreement—as the preceding section whereby the grantee "agreed" to construct the plant and manufacture and sell gas to the City and its inhabitants—it is an essential part of the agreement. It is no less contractual than the provision in § 2 "authorizing" the grantee to manufacture and sell electricity and gas to the City and its inhabitants for thirty years—upon which the Company necessarily relies as the basis of the rights which it now

claims and is seeking to enforce—or than that in § 7 giving the City the right to purchase the plant at an appraised value. The provision that the grantee is "authorized" to sell fuel gas at a rate not exceeding $1.35, clearly implies that it shall not sell such gas at a higher rate. This is recognized by the bill itself.[2] In this respect the language has the same effect as that involved in *Vicksburg* v. *Waterworks Co.,* 206 U. S. 496, 508, 516. There the ordinance granted the right to make such charges for the use of water as the grantees might determine, provided that they should not exceed fifty cents for each thousand gallons. This was held to constitute a binding contract fixing the maximum rates for water supplied to private consumers for the period of thirty years as set forth in the ordinance. So in *Reed* v. *City of Anoka, supra,* p. 296, the ordinance imposed "restrictions and limitations" upon the charges to be made; and in *City of St. Cloud* v. *Water Co., supra,* p. 332, the ordinance "gave the right" to furnish water at specified rates. And provisions in ordinances granting franchises to street railway companies that the rate of fare shall not be more than five cents, or that the grantee shall not charge a higher fare, are contractual. *Detroit* v. *Detroit Citizens' Street Ry. Co.,* 184 U. S. 368, 369; *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517, 524; *Cleveland* v. *Cleveland Electric Ry. Co.,* 201 U. S. 529, 532; *Georgia Ry. Co.* v. *Decatur, supra,* p. 434. And the fact that here the parties intended to contract as to the gas rates is emphasized by the contrast between the provisions of the ordinance as to gas and electricity. While the grantee is authorized to maintain both gas and

[2] There are repeated references in the bill to this provision as fixing a maximum rate, thus: The "maximum rate fixed for the price of gas in the ordinance," par. 36; and similar references to the "maximum rate" in pars. 39, 41, 42 and 44, cl. 1.

electric works for the period of thirty years, the ordinance specifies the maximum rates for gas but contains no provision as to the rates for electricity; the apparent purpose being to establish definitely by contract the maximum rates for gas but to leave the rates for electricity to be thereafter "regulated and prescribed" by the council from time to time under the power given it by the proviso of the charter.

3. The general provision of the Laws of 1919, c. 469, p. 603, authorizing cities of the class of the appellee "through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service", has no application to the present case. Even if, in any aspect, it could otherwise be applicable, it is excluded from operating here by the specific proviso that it shall not be "construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation." The City, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the Company, conversely, cannot under it obtain higher rates. The contract is binding on both parties alike.

The decree of the District Court is

Affirmed.

MR. JUSTICE BUTLER took no part in the hearing or decision of this case.

Counsel for Parties.

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, *v.* BEAR, TRUSTEE IN BANKRUPTCY OF THE ESTATES OF W. L. BECKER, SR., AND W. L. BECKER, JR., PARTNERS, ETC.

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

No. 238. Argued April 25, 1924.—Decided May 26, 1924.

1. To invalidate the lien of a judgment under § 67f of the Bankruptcy Act, he who challenges it must show not only that the judgment was recovered within four months prior to the filing of the petition in bankruptcy, but also, by pleading and proof, that the judgment debtor was insolvent when the lien was obtained. P. 368.
2. Assuming (but not deciding) that an adjudication of the bankruptcy of a partnership necessarily adjudges the partners, as individuals, bankrupt, it raises no presumption that they were insolvent for any period before the petition in bankruptcy was filed. P. 370.
3. Nor does the fact that sales of the property of the partnership and partners, made some months later by the trustee in bankruptcy, did not realize enough to pay for the partnership or individual debts, establish that the partners were insolvent at a time anterior to the filing of the bankruptcy petition. *Id.*

285 Fed. 703, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court allowing the claims of the above named bank, as secured claims, in bankruptcy.

Mr. James D. Johnston for petitioner.

Mr. Harvey B. Apperson and *Mr. James A. Bear,* with whom *Mr. G. A. Wingfield* was on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case, which arises in proceedings in bankruptcy, involves claims by a judgment creditor to liens upon the real estate of the bankrupts.

On July 20, 1920, the Liberty National Bank recovered a judgment in a Virginia court against the Roanoke Provision Co., a partnership composed of the two Beckers, and against the Beckers individually. This judgment—which was duly docketed in the Judgment Lien Book and on which execution was issued—was under the laws of Virginia a lien upon the real estate of the judgment debtors. Code of 1919, § 6470.

Thereafter, on August 6, an involuntary petition in bankruptcy was filed in the Federal District Court against the Company, as a partnership composed of the two Beckers, alleging that it had committed an act of bankruptcy on August 4 by executing a general assignment for the benefit of creditors, and that it was insolvent. There was no allegation that the Beckers were individually insolvent or had committed acts of bankruptcy; and no prayer that they be adjudged bankrupt individually. They filed a joint answer admitting the allegations of the petition. On August 20, the Company, as a partnership composed of the two Beckers, was adjudged bankrupt by the District Judge; but they were not adjudged bankrupt as individuals. Thereafter, pursuant to an order of the referee, the Company and the Beckers filed schedules of their respective assets and liabilities.

In April, 1921—more than nine months after the recovery of the judgment—the Beckers filed separate voluntary petitions in bankruptcy; and each was adjudged bankrupt as an individual. Bear, the trustee in the partnership proceeding, was appointed trustee of their individual estates.

Thereafter the Bank filed proofs of claim on its judgment against the separate estates of the Beckers, alleging that it constituted a lien upon their individual real estate and was entitled to priority as such. The trustee filed objections to the allowance of these prior claims, on the ground, among others, that by virtue of the proceedings against the Company he had been vested with title to the property of the individual partners as well as that of the partnership, as of the date of the filing of the petition in bankruptcy against the partnership, and that as the judgment against the individual partners had been recovered within four months prior to the filing of that petition, it could not, under the provisions of the Bankruptcy Act, be enforced as a lien upon their separate estates. He did not aver, however, that either the Company or the Beckers were insolvent at the time the judgment was recovered.

The referee, holding that the liens created by the judgment upon the separate properties of the Beckers had been "annulled" by the proceedings under the petition against the partnership, disallowed the claims of the Bank as secured claims and allowed them as unsecured claims merely.[1] This order of the referee was reversed by the District Judge, on the ground that as the order of adjudication had merely adjudged the bankruptcy of the Company, and not the bankruptcy of the Beckers individually, the lien of the judgment upon their separate estates had not been "nullified." The trustee was thereupon granted an appeal to the Circuit Court of Appeals. The Bank moved to dismiss this appeal upon the ground, among others, that the trustee had not alleged, either in his objections to the allowance of its claims or elsewhere, that the Beckers were insolvent at the time the judgment was

[1] The referee at the same time disallowed another claim of the Bank to a lien upon the real estate of the partnership; but no steps were taken by the Bank to review his order in this respect.

recovered, nor had such insolvency been proven; and that allegation and proof of their insolvency at the time the lien of the judgment attached was "absolutely essential." The Circuit Court of Appeals—without ruling on this motion—reversed the decree of the District Court upon the ground that the "adjudication of the partnership was necessarily an adjudication of the bankruptcy of the individuals composing it, and that . . . the lien of a judgment obtained within four months of the filing of the petition against the partnership was lost by the adjudication." 285 Fed. 703. This decision was apparently based upon § 67f of the Bankruptcy Act,—upon which the trustee had relied at the hearing before the referee[2]—although no reference to it is made in the opinion; it being evidently assumed by the court that under that section a judgment lien obtained within four months prior to the filing of a petition in bankruptcy is dissolved by the subsequent adjudication of the bankruptcy of the judgment debtor, without reference to his solvency or insolvency at the time the lien was obtained.[3] This writ of certiorari was then granted. 261 U. S. 612.

Upon the question whether the adjudication of the bankruptcy of a partnership involves an adjudication of the bankruptcy of the individual partners, there appears to have been a diversity of opinion in the lower federal courts. The decision in *Francis* v. *McNeal,* 228 U. S. 695, upon which the Circuit Court of Appeals chiefly relied, did not involve a determination of this direct question. And we do not find it necessary to determine it now; since, even if the adjudication of the bankruptcy

[2] This appears from a statement in the opinion of the referee.

[3] The Court said: "The insolvency of the partnership at the date of the judgment seems to have been assumed in the court below. At any rate, no issue of solvency or insolvency at the date of the judgment appears to have been made. We express no opinion as to the existence of such insolvency or its effect." (p. 706.)

of the Company operated as an adjudication of the bankruptcy of the Beckers individually—which we do not intimate—nevertheless, in the absence of either pleading or proof as to their insolvency when the Bank recovered its judgment, there is no ground under § 67f of the act for annulling the lien thereby acquired upon their property.[4]

This section provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against *a person who is insolvent,* at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt. . . ." It applies only to liens obtained in legal proceedings against a person who was "insolvent" when the lien was acquired. If the debtor was then solvent the lien is not invalidated although it was obtained within four months prior to the filing of the petition in bankruptcy. *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426. To invalidate the lien the person challenging it must show that the debtor was insolvent when it was obtained. *Stone-Ordean-Wells Co.* v. *Mark* (C. C. A.), 227 Fed. 975, 978; *Martin* v. *Oliver* (C. C. A.), 260 Fed. 89, 93; *Simpson* v. *VanEtten* (C. C.), 108 Fed. 199, 201; *Keystone Brew'g Co.* v. *Schermer,* 241 Pa. St. 361, 365; *Jackson* v. *Valley Tie Co.,* 108 Va. 714, 718; *Newberry Shoe Co.* v. *Collier,* 111 Va. 288, 290; *Severin* v. *Robinson,* 27 Ind. App. 55, 61. And see *Re Richards* (C. C. A.), 96 Fed. 935; *Re Chappell* (D. C.), 113 Fed. 545; *Re Community Stores* (D. C.), 282 Fed. 328. Such

[4] There is neither averment nor proof bringing the case within § 67c or any other provision of the act relating to the annulment of prior liens.

insolvency must be both alleged and proved. *Stone-Ordean-Wells Co.* v. *Mark, supra,* p. 978.

In the present case the trustee neither alleged the insolvency of the Beckers at the time the judgment was recovered and became a lien on their properties, nor proved such insolvency. If the admission in their joint answer to the petition filed against the partnership that the Company was insolvent, was intended as an admission of their individual insolvency, it was, at the most, an admission of such insolvency on August 6, when the petition in bankruptcy was filed,[5]—a very different thing from insolvency at the time the judgment was recovered—and, in any event, would not have been binding on the Bank, which was not then a party to the bankruptcy proceeding. So, if the adjudication of the partnership as a bankrupt can be regarded as adjudging the insolvency of the individual partners at the date the petition in bankruptcy was filed—which we do not determine—such an adjudication, for like reason, would not be binding upon the Bank. *Gratiot State Bank* v. *Johnson,* 249 U. S. 246. And, generally, an adjudication in bankruptcy in no way determines whether or not the debtor was insolvent at the time a lien was obtained through legal proceedings against him; there being no presumption arising from the adjudication that he was insolvent for any period before the petition in bankruptcy was filed. *Keystone Brew'g Co.* v. *Schermer, supra,* p. 365; *Jackson* v. *Valley Tie Co., supra,* p. 719; *Newberry Shoe Co.* v. *Collier, supra,* p. 291. Nor does the fact that the sales of the partnership and individual properties made some months later by the trustee did

[5] The act of bankruptcy alleged, namely, the making of a general assignment on August 4, did not involve a question of the insolvency of the partnership at that date; the making of a general assignment being an act of bankruptcy without reference to the solvency or insolvency of the debtor. Bankruptcy Act, § 3a(4).

not realize enough to pay either the debts of the partnership or the debts of the individual partners, respectively, establish the insolvency of the partners at the time the lien was obtained.

There being neither allegation nor proof by the trustee of the insolvency of the Beckers when the Bank recovered its judgment and fastened its liens upon their real estate, the decree of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

R. E. SHEEHAN COMPANY ET AL. *v.* SHULER, AS STATE TREASURER OF THE STATE OF NEW YORK, ET AL.

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

No. 593. Argued January 9, 1924.—Decided May 26, 1924.

Amendments of the New York Workmen's Compensation Law (see *New York Central R. R. Co.* v. *White*, 243 U. S. 188,) provide that, when an injury causes the death of an employee leaving no beneficiaries, the employer or other insurance carrier shall pay the State Treasurer $500 for each of two special funds, one to be used in paying additional compensation to employees incurring permanent total disability after partial disability, the other in vocational education of employees so injured as to need rehabilitation, the use of the special funds for these purposes being additional compensation to employees thus injured over and above that prescribed as the payments to be made by their immediate employers. *Held:*

(1) That the due process clause of the Fourteenth Amendment does not require that this additional compensation be paid by the immediate employers of the employees to be benefited, nor prevent the legislature from providing for its payment out of general funds created as above described. P. 376. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219.

(2) The arrangement does not conflict with the equal protection clause. P. 378.

236 N. Y. 579, affirmed.

ERROR to a judgment affirming two awards under the New York Workmen's Compensation Law, entered in the Supreme Court of New York after affirmances by the Appellate Division and the Court of Appeals and remittitur of the record. See also the case next following, *post*, p. 379.

Mr. William H. Foster for plaintiffs in error.

Mr. E. Clarence Aiken, Deputy Attorney General, with whom *Mr. Carl Sherman,* Attorney General of the State of New York, was on the brief, for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case involves the question of the constitutionality of two recent amendments to the Workmen's Compensation Law of New York. Enacted, Laws, 1913, c. 816; reënacted, Laws, 1914, c. 41.

This is a compulsory law establishing in certain employments classed as hazardous an exclusive system governing compensation for injuries to employees resulting in disability or death, irrespective of negligence, and requiring compensation to be paid to injured employees or, in case of death, to designated beneficiaries,[1] according to prescribed scales gauged by the previous wages and the extent of the disabilities or dependency of the beneficiaries. The employer is required to insure the payment of such compensation in a state insurance fund or with an authorized stock association or mutual association, unless, upon proof of his financial ability, he is permitted to become a "self-insurer." The constitutionality of this law was sustained in *New York Central R. R. Co.* v. *White,* 243 U. S. 188.

[1]A widow (or dependent husband), children under eighteen years of age, or other dependent relatives.

The Compensation Law was amended by the Laws of 1922, c. 615 (Consol. Laws, c. 67), so as to include, as subdivisions 8 and 9 of § 15, the two provisions involved in this case, which read:

"8. *Permanent total disability after permanent partial disability.* If an employee who has previously incurred permanent partial disability through the loss of one hand," arm, foot, leg, or eye, "incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability"[2] and after the cessation thereof, "special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier[3] shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund, and the [industrial] commissioner shall direct the distribution thereof.[4]

"9. *Maintenance for employees undergoing vocational rehabilitation.* An employee, who as a result of injury is

[2] Subdivision 7 of § 15 provides that "an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." See note 4, *infra.*

[3] That is, the state fund, or corporation or association with which an employer has insured, or an employer permitted to become a "self-insurer." § 2.

[4] This subdivision, which was formerly subdivision 7 of § 15, was incorporated into the Compensation Law by the Laws of 1916, c. 622; the amount of the payment originally prescribed being one hundred dollars. Awards made to the state treasurer under this provision, in its original form, were sustained in *State Indust. Comm.* v. *New-*

or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state board of vocational education is being rendered fit to engage in a remunerative occupation,[5] shall

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man, 222 N. Y. 363, and *State Indust. Comm.* v. *Edsall,* 222 N. Y. 651 (affirming 179 App. Div. 481).

The history and purpose of this provision is thus stated in *State Indust. Comm.* v. *Newman, supra,* p. 366: "In March, 1914, the present Workmen's Compensation Law was finally enacted. . . . It did not then contain the provisions . . . of subdivision 7 of section 15. In November, 1915, we decided that a claimant, who became an employee under the act, having theretofore lost a hand, became entitled, upon the loss of the remaining hand while such employee, to the compensation for permanent total disability and not to the lesser compensation for permanent partial disability. . . . Manifestly, the law was a hindrance to those who, having lost a hand or other member, sought to become employees under the act, because the loss of the remaining member subjected the employer to the payment of a compensation substantially greater than it would in case the employee had had the two members. After the decision . . . the legislature by an amendment to subdivision 6 [now 7] of section 15 enacted that 'an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.' . . . The provisions of section 15 were supplemented in 1916 by the addition of subdivision 7. . . . The evident and clear purpose of the subdivision was to remove a condition, as between employers and partially disabled employees, inconsonant with the spirit of the act and, perhaps, unjust, through the creation of a state fund contributed to by the insurance carriers and, as the permanent total disability arose, accessible to any member of the entire prescribed class of employees so disabled."

[5] The Laws of 1920, c. 760, added to the Education Law as Article 47, a "Rehabilitation Law," by which the State accepted the provisions of the federal appropriation for vocational training of disabled persons, made an additional appropriation therefor to the state department of education, and required the industrial commission to report to that department all cases of injuries received by employees which might result in need of rehabilitation.

receive additional compensation necessary for his maintenance;" but not exceeding ten dollars a week. "The expense shall be paid out of a special fund created in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund and the industrial commissioner shall direct the distribution thereof." [6]

In February, 1923, an employee of the Sheehan Company in one of the hazardous occupations, sustained, in the course of his employment, accidental injuries resulting in his death. He left no survivors entitled to compensation. The State Industrial Board, in an appropriate proceeding under the Compensation Law, awarded the State Treasurer against the Sheehan Company, as employer, and the Aetna Life Insurance Company, as insurance carrier, two sums of five hundred dollars each, pursuant to subdivisions 8 and 9, respectively, of § 15. On successive appeals these awards were affirmed, without opinions, by the Appellate Division of the Supreme Court and by the Court of Appeals. 206 App. Div. 726; 236 N. Y. 579. The record was remitted to the Supreme Court, to which this writ of error was directed. *Hodges* v. *Snyder,* 261 U. S. 600.

The companies contend that these subdivisions are in conflict with the Fourteenth Amendment and that the awards made thereunder deprive them of their property without due process and deny them the equal protection of the laws.

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[6] This provision, which was formerly subdivision 8 of § 15, was incorporated into the Compensation Law by the Laws of 1920, c. 760; the amount of the payment originally prescribed being nine hundred dollars. The constitutionality of this subdivision, in its original form, was sustained in *Watkinson* v. *Hotel Pennsylvania,* 231 N. Y. 562 (affirming, without opinion, 195 App. Div. 624).

The substance of these two provisions is that when an injury causes the death of an employee leaving no beneficiaries, the employer or other insurance carrier shall pay the State Treasurer the sum of five hundred dollars for each of two special funds: one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disabilities; and the other, in the vocational education of employees so injured as to need rehabilitation. The use of such special funds for such purposes is an additional compensation to the employees thus injured, over and above that prescribed as the payments to be made by their immediate employers. Such additional compensation is neither unjust nor unreasonable. Thus, an employee who, having lost one hand in a previous accident, thereafter loses the second hand, is, obviously, not adequately compensated by the provision requiring his employer to make payment for the loss of the second hand, independently considered; [7] the total incapacity finally resulting from the loss of both hands working much more than double the injury resulting from the loss of each separate hand considered by itself. In such a case, however, as in the case of an injury requiring vocational rehabilitation, it is the theory of the law that such additional compensation to the injured employee should not be required of the particular employer in whose service the injury occurred, but should be provided out of general funds created by payments required of all employers when injuries resulting in the death of their own employees leaving no beneficiaries, do not otherwise create any liability under the Compensation Law.

We do not think that the due process clause of the Fourteenth Amendment requires that such additional compensation to injured employees of the specified classes,

[7] Note 2, *supra*, p. 373.

should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created. In *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 244, it was held that a Workmen's Compensation Act did not deprive the employers of due process, because the compensation to the injured employees and their surviving dependents was not made by their immediate employers, but out of state funds to which the employers were required to make stated contributions, based upon definite percentages of their payrolls, in different groups of industries classified according to hazard. On this question the Court said: "To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation."

So in the present case the State acted within its power, and neither arbitrarily nor unreasonably, in providing that a portion of the compensation to injured employees in cases coming within the provisions of subdivisions 8 and 9, should not be required in the form of direct payments by their particular employers but should be made from public funds established for that purpose by payments from employers whose own employees leave no beneficiaries.

The payments thus required are not unfair and unreasonable in amount. The aggregate for the two funds is one thousand dollars. This is much less than the maximum payment which may be required according to the scales in case the employee leaves survivors entitled to death benefits, and seems not to exceed, if it equals, the average amount of the payments required in such cases.

Nor are these provisions in conflict with the equal protection clause. The contention of the companies is that the prescribed awards are in the nature of a tax imposed upon the happening of a contingency, and are of unequal application; that is, that they are imposed only upon such employers as happen to have employees who are killed without leaving survivors entitled to compensation. However, this is not a discrimination between different employers, but merely a contingency on the happening of which all employers alike become subject to the requirements of the law. All are required to contribute, under identical conditions, to these special funds. *State Indust. Comm.* v. *Newman, supra,* p. 368.

The judgment of the Court of Appeals of New York is

Affirmed.

NEW YORK STATE RAILWAYS *v.* SHULER, AS TREASURER OF THE STATE OF NEW YORK, ET AL.

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

No. 103. Argued January 9, 1924.—Decided May 26, 1924.

Decided on the authority of *Sheehan Co.* v. *Shuler, ante,* 371. 233 N. Y. 681, affirmed.

ERROR to a judgment affirming an award under the New York Workmen's Compensation Law. The judgment was entered in the Supreme Court of New York after affirmances by the Appellate Division and the Court of Appeals and remittitur of the record.

Mr. S. A. Murphy, with whom *Mr. Robert E. Whalen* was on the brief, for plaintiff in error.

The compulsory payment of $900, prescribed by the statute under review, deprives the employer, without fault, of its property, in contravention of the due process clause of the Fourteenth Amendment. *New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *Arizona Employers' Liability Cases,* 250 U. S. 400; *Ball* v. *Hunt & Sons, Ltd.,* [1912] A. C. 496; *New York Central R. R. Co.* v. *Bianc,* 250 U. S. 596; *Ward & Gow* v. *Krinsky,* 259 U. S. 503.

The statute is not a reasonable exercise of the police power. *New York Central R. R. Co.* v. *White, supra; Mountain Timber Co.* v. *Washington, supra.*

The employer's enforced contribution of $900 to the rehabilitation fund will compensate neither McNamara, who has died, nor dependents of his, who do not exist, for the loss of earning power. It can be fairly regarded as nothing else than a penalty imposed, not for the benefit of the injured employee or his dependents, but as a levy

made upon the employer in furtherance of the rehabilitation of such employees of other employers as have been incapacitated in the course of hazardous work. No less arbitrary and unreasonable would be an enactment requiring a building contractor, should a structure in course of erection by him collapse, without resultant injury or death, to contribute $900 to a rehabilitation fund.

The subject of judicial inquiry, in such a case as this, is whether the statute under consideration " is arbitrary and unreasonable, from the standpoint of natural justice," *White Case,* at p. 202; or " so extravagant or arbitrary as to constitute an abuse of power." *Mountain Timber Case,* at p. 237. Such was the test applied in determining the validity of the Arizona Act. 250 U. S. 421–422, 426. As recently as in *Cudahy Packing Co. v. Parramore,* 263 U. S. 418, this Court examined the question whether the liability prescribed by the Utah Workmen's Compensation Act was imposed unreasonably, capriciously and arbitrarily.

How unreasonable, capricious and arbitrary was the action of the New York legislature in fixing $900 as the amount of the contribution compelled by the statute under review is demonstrated by the circumstance that, when it came to a general revision of the Workmen's Compensation Law, by c. 615, Laws of 1922, the compulsory contribution was changed to $500, a provision which is the subject of consideration in *Sheehan Co. v. Shuler,* to be argued herewith. See *ante,* p. 371.

There being no claim that any element of public health or of public safety is involved, and no real consideration of public welfare being presented, it follows that the act in question may properly be characterized as unreasonable and fundamentally unjust.

The compulsory payment denies to the employer the equal protection of the laws, in contravention of the Fourteenth Amendment.

Classification is not fairly made. It is only the employer whose deceased employee left no dependents that is singled out for involuntary contribution to the rehabilitation fund. Nothing but the fortuitous circumstance of absence of such dependents renders the employer liable to the exaction. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150; *State* v. *Haun,* 61 Kans. 146; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79; *Bryant* v. *Lindsay,* 94 N. J. L. 357; affd. 96 N. J. L. 268.

No mere regulation of the relation of employer and employee is involved.

In sustaining the principle of compulsory workmen's compensation legislation, this Court, in the *White Case, supra,* and in the *Mountain Timber Case, supra,* dwelt upon the reciprocal advantages inuring to both employer and employee by the substitution, in the case of the employer, of a definite but limited liability for the uncertain hazards of a verdict, and by the substitution, in the case of the employee, of a moderate but ascertained compensation for the doubtful remedy of a law suit in which the common-law defenses of assumption of risk, contributory negligence and negligence of a fellow servant were available. Here, however, in exchange for the liability imposed, this employer gains no relief from an action at law.

The Chief Justice observed in *Truax v. Corrigan,* 257 U. S. 312, 339: "It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so." Is it not even a more distant cry to classification based on the relation of an employer to those beneficiaries of the rehabilitation fund who, in the vast majority of instances, have never been in his employ?

In the Washington statute involved in the *Mountain Timber Case* the principle of classification was observed to the extent of compelling an employer to contribute to the state fund only for the benefit of workmen of other employers engaged in the same class of occupation. 243 U. S. 219, 236–7, 241–2.

Mr. E. Clarence Aiken, Deputy Attorney General, with whom *Mr. Carl Sherman,* Attorney General of the State of New York, was on the brief, for defendants in error.

Mr. Justice Sanford delivered the opinion of the Court.

This case, which was heard with *Sheehan Co.* v. *Shuler,* No. 593, just decided, *ante,* 371, likewise involves the question of the constitutionality of the amendment to the Workmen's Compensation Law of New York relating to the creation of a special fund for the maintenance of employees undergoing vocational rehabilitation.

The only difference between the two cases in this respect is that the present case arose under the Laws of 1920, c. 760, by which the amendment (then constituting subdivision 8 of § 15 of the Compensation Law), required the employer to pay the sum of nine hundred dollars to this special fund, while the *Sheehan Company Case* arose under the Laws of 1922, c. 615, by which the amendment (changed to subdivision 9) reduced the required payment to five hundred dollars.[1] The provisions are otherwise identical.

In March, 1921, an employee of the New York State Railways sustained, in the course of his employment, accidental injuries resulting in his death. He left no survivors entitled to compensation. The State Industrial Board, in an appropriate proceeding, awarded the State

[1] See the opinion in the *Sheehan Company Case,* note 6, *ante,* p. 375.

Treasurer against the Railways, a " self-insurer ", the sum of one hundred dollars, under subdivision 7 (now 8)[2] of § 15, for the total disability fund, and the sum of nine hundred dollars, under subdivision 8 (now 9), for the rehabilitation fund. The Railways did not appeal from the award under subdivision 7. On successive appeals the award under subdivision 8 was affirmed by the Appellate Division of the Supreme Court and the Court of Appeals, without opinions. 202 App. Div. 768; 233 N. Y. 681. The record was remitted to the Supreme Court, to which this writ of error was directed.

The Railways contend, as did the plaintiffs in error in the *Sheehan Company Case,* that subdivision 8 (now 9) of the Compensation Law and the award made thereunder, are in conflict with the due process and equal protection clauses of the Fourteenth Amendment.

This case is governed by the decision in the *Sheehan Company Case.* The difference in the amount of the required payment to the rehabilitation fund does not change the result. The amount required under the amendment of 1920 was neither unjust nor unreasonable. " The sum fixed in the statute is not great, is not larger than could readily be awarded, had the deceased left dependents. There is no evidence . . . that the sum fixed is so extravagant or arbitrary as to constitute an abuse of power." *Watkinson* v. *Hotel Pennsylvania,* 195 App. Div. 624, 627. And the aggregate of the required payments to the two special funds was then the same as that subsequently required under the amendments of 1922;

[2] This subdivision then required the employer, under the Laws of 1916, c. 622, to pay into the total disability fund, in the specified contingency, the sum of one hundred dollars; the amount being subsequently increased, under the Laws of 1922, c. 615, to five hundred dollars. See the opinion in the *Sheehan Company Case, supra,* note 4, *ante,* p. 373.

there being merely a different apportionment between the two funds.

The judgment of the Court of Appeals is

Affirmed.

HETRICK *v.* VILLAGE OF LINDSEY, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 231. Argued April 23, 1924.—Decided June 2, 1924.

Failure of the state law to provide for notice and hearing before the making of a special assessment by a village council, does not deprive the assessed owner of his property without due process, when the law affords him, and he accepts, opportunity to determine all questions of law and fact as to the validity, fairness, and proper amount of the assessment, by proceedings brought by him in the state courts. P. 387.

Affirmed.

ERROR to a judgment of the Supreme Court of Ohio which dismissed, as frivolous, a petition in error to review a judgment of the State Court of Appeals revising a special assessment.

Mr. Albert H. Fry for plaintiff in error.

Mr. W. J. Mead for defendants in error.

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

Hetrick owned two lots in the Village of Lindsey, Ohio, No. 175 and No. 176. He brought suit in the Common Pleas Court of Sandusky County against the Village and the Auditor and Treasurer of the county, to enjoin the collection of front foot street assessments levied by the village council against the two lots. He contended, first, that the assessment exceeded the benefits to the lots or either of them; second, that the assessment was in excess of the limit allowed by law to be levied upon property

for local improvement, which by the statute was one-third of its value; third, that the assessment was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that there was no provision for notice to be given to the owner of the property to be assessed and an opportunity to be heard before the tax was levied.

Evidence was taken on the question of benefits and the value of the lots. The Common Pleas Court sustained the assessment in its entirety and dismissed the petition. The plaintiff then appealed to the Court of Appeals of the county, and the case was reheard by that court on new evidence. Section 3819 of the General Code of Ohio, in part, is as follows:

"The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent of the actual value thereof after the improvement is made."

The Court of Appeals found that the value of the lots, after the completion of the improvement, was $2,600, and that they were especially benefited to the extent of one-third of this value, reduced the assessments from $1,040.60 on both lots to $866.67, and enjoined the collection of more than this amount. The Court of Appeals found other facts as follows:

Notice of the passage of the resolution of necessity for the improvement had been served by the clerk of the council in writing on the plaintiff personally within the time required by the statute. He had full knowledge of the work as it progressed and made no objection thereto. He appeared with his counsel before the village council, consulted with it as to the manner of the construction of the improvement and succeeded in having its char-

acter changed in front of his property to conform to his desire. He never requested a hearing before the council on the public necessity of the improvement or the validity or amount of the assessment.

In due time after the decree in the Court of Appeals, plaintiff filed a petition in error in the Supreme Court of the State. The defendants made a motion to dismiss it, on the ground that no leave to file it had been granted. The plaintiff claimed that no leave was necessary under the state practice, because the case involved a question under the Constitution of the United States as to the validity of the statutes of the State relating to special assessments for street improvements. The defendants answered that such statutes had been so long held constitutional by the courts of the State that their constitutionality could no longer be questioned, and therefore that the petition should be dismissed, presumably as frivolous. The court sustained the motion and dismissed the petition. A writ of error to bring the case here was allowed by the Chief Justice of the Supreme Court of the State.

The decisions of fact by the state Court of Appeals that the assessment did not exceed the benefit of the property and that it did not exceed one-third of the value of the property after the improvement was completed, are not questioned here. The only point of contention made is that the Ohio statutes relating to special assessments for street improvements do not require a notice to, and a hearing on behalf of, the owner of the property assessed by the village council and therefore permit the owner to be deprived of his property without due process of law.

Section 12075 of the General Code of Ohio has for many years provided as follows:

"Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and en-

tertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Under this section the plaintiff had two full hearings in two courts upon the merits of the assessments, that is, upon the question whether the special benefits conferred were greater than the value of the property, and second, whether the assessment exceeded one-third of the value of the property. This is in accord with the previous decisions of the Supreme Court of Ohio in reference to the power of the state courts in passing on the validity of assessments either in a suit to collect the same or in a suit by the assessment payer to enjoin them. *Walsh* v. *Sims,* 65 Oh. St. 211; *Griswold* v. *Pelton,* 34 Oh. St. 482. It thus appears that the plaintiff in this case had had opportunity by contesting the assessment in court to review all the questions of law and fact as to the validity and fairness of the assessment under the statutes of Ohio, that these facts were passed upon by the court and that the plaintiff had secured from that court a reduction of the assessment. In such a case it has been frequently decided that the judicial procedure constitutes due process of law and supplies every requirement for due notice and hearing. *McMillan* v. *Anderson,* 95 U. S. 37, 41; *Davidson* v. *New Orleans,* 96 U. S. 97, 104–5; *Spencer* v. *Merchant,* 125 U. S. 345, 355–6; *King* v. *Portland,* 184 U. S. 61, 70; *Ballard* v. *Hunter,* 204 U. S. 241, 255; *Embree* v. *Kansas City Road District,* 240 U. S. 242, 251; *Mt. St. Mary's Cemetery* v. *Mullins,* 248 U. S. 501, 506.

It is unnecessary for us to consider, therefore, the sufficiency of notice and opportunity for a hearing before the council under the statutes of Ohio for assessments, or the question whether plaintiff was estopped by his acquiescence and conduct from raising such an issue.

Decree affirmed.

GNERICH ET AL., COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF B. & S. DRUG COMPANY *v.* RUTTER, AS PROHIBITION DIRECTOR IN AND FOR THE DISTRICT OF CALIFORNIA.

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

No. 79. Argued March 10, 1924.—Decided June 2, 1924.

1. The "Prohibition Commissioner" and "Prohibition Directors", are no more than mere agents and subordinates of the Commissioner of Internal Revenue, provided for and designated under regulations adopted by him pursuant to the National Prohibition Act. P. 391.
2. Pharmacists sued to restrain a local prohibition director from refusing them permits to buy liquors to be dispensed for nonbeverage purposes in excess of a limit fixed in their permit to sell as issued by the Prohibition Commissioner, the plaintiffs denying the legality of the restriction even if authorized by regulations of the Commissioner of Internal Revenue. *Held*, that the Commissioner of Internal Revenue was a necessary party. *Id.*
3. A bill which is defective for want of a necessary party should be dismissed on that ground, and not upon the merits. P. 393.

277 Fed. 632, reversed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a bill brought to restrain a "prohibition director" from giving effect to a restriction contained in the plaintiffs' permit to sell intoxicating liquors.

Mr. Harry G. McKannay, with whom *Mr. Louis V. Crowley* was on the brief, for appellants.

The Commissioner of Internal Revenue was not a necessary party.

The "Prohibition Commissioner" is a creature of the regulations, published by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. Being a creature of the regulations, he had only

such powers as are specifically granted to him therein. The law or the regulations do not grant that officer any discretion to insert the restrictions in appellants' permit of which we complain. The regulations are the mode and the measure of his power, and unless they authorize him, in his official capacity, to determine the amount of liquor that can lawfully be used and dispensed by the appellants, then such an attempted limitation and prohibition was his personal action, without official sanction and as void as if it had been inserted in the permit as a prank or a joke by a total stranger.

The Circuit Court of Appeals expressed in its opinion the view that it is "the very purpose of this action to control the action of the Commissioner of Internal Revenue." This we submit is error, inasmuch as we are unable to attribute to that official responsibility for any of the acts of which we complain, and we know of no conduct on his part that in any manner infringes upon our rights, unless it be held that the acts of the National Prohibition Commissioner and the appellee are consistent with and authorized by the language and provisions of the regulations published by the Commissioner of Internal Revenue.

Furthermore, assuming, as we contend, that Congress had no power to place in the National Prohibition Act the restrictions and prohibitions set forth therein against the practice of medicine and pharmacy, then the enforcement of those restrictions can be enjoined as against any public officer attempting to enforce them.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Mahlon D. Kiefer* were on the brief, for appellee.

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

This is a suit for an injunction against the federal prohibition director for California restraining him from giv-

ing effect to a particular restriction embodied in a permit, issued under the National Prohibition Act, authorizing the plaintiffs, who are licensed pharmacists conducting a general drug business in San Francisco, to use and sell in such business intoxicating liquors for other than beverage purposes. The District Court dismissed the bill as not stating a cause of action, and the Circuit Court of Appeals affirmed the decree on the ground that the suit could not be maintained without making the Commissioner of Internal Revenue a party defendant. 277 Fed. 632. The plaintiffs prosecute this appeal.

The National Prohibition Act, c. 85, Title II, 41 Stat. 307, commits its administration to the Commissioner of Internal Revenue; authorizes him to prescribe regulations for carrying out its provisions, and declares, in clause 7 of § 1, that any act authorized to be done by the commissioner "may be performed by any assistant or agent designated by him for the purpose."

The act directly prohibits the manufacture, sale, etc. of intoxicating liquors for beverage purposes, and further provides, in § 3, that liquor for nonbeverage purposes may be manufactured, purchased, sold, etc., "but only as herein provided," and, in § 6, that no one shall manufacture, sell, purchase, etc., any liquor "without first obtaining a permit from the commissioner so to do"; that no permit shall be issued to anyone to sell at retail, unless the selling is to be through a pharmacist designated in the permit and licensed under the state law to compound and dispense medicine under a physician's prescription; that every permit shall be "signed by the commissioner or his authorized agent" and shall "designate and limit the acts that are permitted"; that the commissioner "shall prescribe the form of all permits", and that where he refuses a permit the applicant "may have a review of his decision before a court of equity."

The regulations prescribed provide for and designate a general agent of the Commissioner of Internal Revenue, called a prohibition commissioner, who is authorized, among other things, to issue and sign permits to sell liquor at retail for medicinal purposes through licensed pharmacists, and also a local agent in each State or district, called a prohibition director, who is authorized, among other things, to issue and sign permits to purchase liquor to be used and sold under the permits last mentioned. The regulations further contain a provision that "Every permit will clearly and specifically designate and limit the acts that are permitted and the time when and the place where such acts may be performed."

The permit held by the plaintiffs was issued and signed by the prohibition commissioner; and the restriction therein of which the plaintiffs complain says, "This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period." The director adhered to the restriction by refusing to give the plaintiffs permits to purchase in excess of those quantities. The plaintiffs allege that the restriction was put in the permit without any lawful authority; that, if it be authorized by the regulations, the latter are void, and that the director by giving effect to it is wrongfully subjecting the plaintiffs to irreparable injury.

The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given

opportunity to defend his direction and regulations. *Litchfield* v. *Register and Receiver,* 9 Wall. 575, 578; *Plested* v. *Abbey,* 228 U. S. 42, 50–51. In principle, *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, is well in point. There an injunction was sought against the Secretary of the Interior and the Commissioner of the General Land Office to prevent them from giving effect to prior orders of the Secretary alleged to be outside his powers and hurtful to the plaintiff. While the suit was pending the Secretary resigned his office and there was at that time no way of bringing his successor into the suit. So, the question arose whether it could be continued against the Commissioner alone. The answer was in the negative, the Court saying, p. 34:

"The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties, (2d ed.) bk. 3, c. 13.

"This is well exemplified by a decision of Lord Chancellor Hardwicke. Under acts of Parliament, appointing commissioners to build fifty new churches, appropriating money to support the ministers, and providing that the moneys appropriated should be paid to a treasurer, not one of the commissioners, but appointed by the Crown, and should be by him disbursed and applied according to orders of the commissioners, Lord Hardwicke held that a bill by a minister of one of the churches to recover his stipend, and to have a fund in the treasurer's hands invested as required by the acts, could not be maintained against the treasurer alone, without joining any of the

commissioners; and said: 'This is one of the most extraordinary bills I ever remember; and there is no foundation for relief, either in law or equity. It is brought against Mr. Blackerby, who is nothing but an officer under the commissioners for building the fifty new churches. It would be absurd if a bill should lie against a person who is only an officer and subordinate to others, and has no directory power.' 'I should think the commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make a person who acts ministerially the sole party.' *Vernon* v. *Blackerby*, 2 Atk. 144, 146; *S. C.*, Barnardiston Ch. 377."

We agree with the Circuit Court of Appeals that the Commissioner of Internal Revenue was a party without whose presence the suit could not be maintained; but the decree of the District Court should not have been affirmed. The decree was on the merits, and, as it was given in the absence of a necessary party, it should not have been permitted to stand.

On the record as brought here it is not certain that the amount requisite to give the District Court jurisdiction was involved, but that question becomes immaterial in view of the conclusion reached on the other point.

Decree reversed with directions to dismiss the bill for want of a necessary party.

GOTO ET AL. *v.* LANE, HIGH SHERIFF OF THE TERRITORY OF HAWAII.

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

No. 463. Argued February 28, 29, 1924.—Decided June 2, 1924.

1. In the federal courts a discharge on *habeas corpus* of a prisoner confined under a criminal accusation or conviction, is granted only in the exercise of a sound judicial discretion. P. 401.

2. The instances in which this remedy is granted, when the law has provided another remedy in regular course, are exceptional and usually confined to situations where there is a peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void. P. 401.
3. Petitioners were convicted of an infamous crime in the Circuit Court of Hawaii, under an indictment phrased disjunctively but which they stipulated should be construed conjunctively; on exceptions reserved at the trial they contended in the territorial Supreme Court that the indictment was bad for uncertainty, under the Sixth Amendment, and the stipulation void as an amendment of the indictment without resubmission to a grand jury, in contravention of the Fifth Amendment; following local practice, the Supreme Court overruled the exceptions without entering a judgment affirming the conviction which would have been reviewable here; and thereafter the petitioners renewed the constitutional objections by their petition for *habeas corpus* in the United States District Court for Hawaii.

Held: (a) That the territorial trial court had jurisdiction to decide upon the construction of the indictment, its sufficiency and the effect of the stipulation, and its judgment, if erroneous, was not void, even though the application of constitutional principles was involved. P. 402.

(b) The stipulation was not an amendment of the indictment. *Ex parte Bain,* 121 U. S. 1, distinguished. *Id.*

(c) Relief should have been sought by writ of error from the Hawaiian Supreme Court, whose judgment, if it affirmed the conviction, would have been reviewable here. *Id.*

(d) Allowing the time to elapse within which a writ of error might have been taken, gave no right to *habeas corpus* as a substitute. *Id.*

Affirmed.

APPEAL from a judgment of the District Court for Hawaii refusing a writ of *habeas corpus.*

Mr. Thomas W. Gregory for appellants.

The imprisonment of appellants under sentence of conviction based on an indictment amended without resubmission to the grand jury is in violation of the Fifth Amendment. *Ex parte Bain,* 121 U. S. 1; *Calvin* v. *State,* 25 Tex. 789; *People* v. *Campbell,* 4 Parker's Crim. Rep. (N. Y.) 386.

The respondent will not be heard to say that the prosecution in procuring the stipulation in question, and the circuit judge in writing his approval thereon, did an idle thing. It is clear, both from reason and authority, that this stipulation effected an amendment of the indictment just as much as if the word "or" wherever it occurs therein had been erased and the word "and" inserted in lieu.

The only difference between the *Bain Case* and this case, so far as the question under discussion is concerned, is that Bain was tried in a federal court while appellants were tried in a territorial court. If they had been tried in a state court this difference might have become important, but it will hardly be questioned that the Fifth Amendment applies to the courts of the Territory of Hawaii. See *Thompson* v. *Utah,* 170 U. S. 343; *Hawaii* v. *Mankichi,* 190 U. S. 197; *Rassmussen* v. *United States,* 197 U. S. 516; *Queenan* v. *Territory,* 11 Okla. 261; *Territory* v. *Blomberg,* 2 Ariz. 204; *Miller* v. *State,* 3 Okla. Cr. Rep. 457.

This is not a case where a constitutional right has been waived, but where a specific prohibition of the Constitution has been violated.

Appellants should not be remitted to a remedy by appeal to this Court from the Supreme Court of the Territory of Hawaii, or by writ of error from this Court to the Supreme Court of Hawaii.

After their conviction in the Circuit Court of the Territory of Hawaii, the defendants presented their case in the Supreme Court of the Territory on a bill of exceptions in the manner provided by the statutes of Hawaii, and said court overruled their said exceptions. *Territory* v. *Goto,* 27 Haw. 65.

From an order by the Supreme Court of the Territory overruling exceptions there is no right of appeal or writ

of error, and no method of having the order reviewed in any other court except by writ of *habeas corpus*. *Cotton* v. *Hawaii*, 211 U. S. 162; *Hutchins* v. *Bierce*, 211 U. S. 429; *Spreckels* v. *Brown*, 212 U. S. 208.

If a right to an appeal or writ of error from the action of the Supreme Court of the Territory of Hawaii existed, it has been lost, and had been lost when the application was made to the United States District Court for relief by *habeas corpus*.

The Supreme Court of Hawaii has repeatedly held, in civil as well as in criminal cases, that no writ of error can be taken after the six months elapsed. *Territory* v. *Wills*, 26 Haw. 478; *Ami* v. *Parke*, 7 Haw. 214; *Hennessy* v. *Bolles*, 2 Haw. 184; *Bowler* v. *McIntyre*, 9 Haw. 306.

After the exceptions had been overruled it was too late, under Hawaii Rev. Laws 1915, § 2518, to take the case to the Supreme Court of Hawaii by writ of error, and besides, that court, in dealing with the exceptions, had already decided against appellants the very point herein involved. When the petition for *habeas corpus* was filed in the United States District Court more than a year had elapsed since appellants had been sentenced by the Territorial Circuit Court.

Unless *habeas corpus* is available appellants are without a remedy, notwithstanding the prohibition of the Fifth Amendment and the provisions of §§ 755 and 761 of the Revised Statutes.

Under the exceptional circumstances of this case the United States District Court of Hawaii was authorized to grant and should have granted the relief sought by appellants through *habeas corpus*.

A person restrained of his liberty by the judgment of a court which is without jurisdiction is not barred from release by the writ of *habeas corpus* because he might have secured such relief by a writ of error but failed to

apply for it until it was too late. *Stevens* v. *McClaughry,* 207 Fed. 18; *Ex parte Craig,* 282 Fed. 138.

The following propositions are sound:

1. The United States courts have the power to grant relief by *habeas corpus* even when a state court having the applicant in custody has not finally determined the case, but do not exercise that power except "in cases of peculiar urgency," or "under special circumstances requiring immediate action." *Markuson* v. *Boucher,* 175 U. S. 184; *Ex parte Royall,* 117 U. S. 241.

2. After there has been a final determination by a state court of last resort, the general practice is to leave the defendant to his remedy of review by writ of error; but there is a discretion in a federal court to which the application for writ of *habeas corpus* is made to determine "whether under all the circumstances then existing . . . the accused shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of *habeas corpus.*" *Ex parte Royall,* 117 U. S. 241; *In re Frederich,* 149 U. S. 70; *Urquhart* v. *Brown,* 205 U. S. 179; *Appleyard* v. *Massachusetts,* 203 U. S. 222. See *Riggins* v. *United States,* 199 U. S. 547.

3. The discretion referred to is "a legal discretion to be controlled in its exercise by such principles as are applicable to the particular case in hand," *New York* v. *Eno,* 155 U. S. 89; and "to be subordinated to any special circumstances requiring immediate action." *Ex parte Royall,* 117 U. S. 241.

4. In a case where there is no right to review the decision of the highest state court by appeal or writ of error, there is no room for the exercise of discretion, and the federal court applied to must grant the writ of *habeas corpus,* since by denying it the applicant would be cut off from his only method of asserting his rights under the Constitution and §§ 755 and 761 of the Revised Statutes. *Markuson v. Boucher,* 175 U. S. 184; *In re Chapman,* 156

U. S. 211; *Riggins* v. *United States,* 199 U. S. 547; *Frank* v. *Mangum,* 237 U. S. 309.

5. This Court has approved relief by *habeas corpus* in a number of cases in which the circumstances calling for it were less persuasive than in this case. *Appleyard* v. *Massachusetts,* 203 U. S. 222; *Medley, Petitioner,* 134 U. S. 160; *Savage, Petitioner,* 134 U. S. 176; *Matter of Heff,* 197 U. S. 488; *Hawaii* v. *Mankichi,* 1 Estee's Rep. 304; s. c. 190 U. S. 197; *Minnesota* v. *Barber,* 136 U. S. 313; *In re Loney,* 134 U. S. 372; *In re Neagle,* 135 U. S. 1; *Minnesota* v. *Brundage,* 180 U. S. 499.

6. A conviction and punishment under an unconstitutional law is no more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. *Nielsen, Petitioner,* 131 U. S. 176; *Ex parte Wilson,* 114 U. S. 417; *Ex parte Lange,* 18 Wall. 163; *Ex parte Yarbrough,* 110 U. S. 651.

Mr. Frederick Milverton, with whom *Mr. Frank E. Thompson* was on the brief, for appellee.

Mr. Solicitor General Beck and *Mr. Geo. Ross Hull,* Special Assistant to the Attorney General, by leave of Court, filed a brief on behalf of the United States as *amici curiae.*

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

This is an appeal from a judgment of the District Court of Hawaii refusing a writ of *habeas corpus* sought by thirteen persons in custody under a judgment of conviction in a territorial circuit court on an indictment for an infamous crime against the laws of that Territory.

In stating the offense, the indictment used the disjunctive "or" in several instances where the conjunctive "and" doubtless would have been used by an attentive

draftsman. Had the matter introduced by the disjunctive been omitted in each instance, or had it been introduced by a conjunctive, the indictment plainly would have stated an offense against the statute under which it was drawn. But in the latter of these situations the accusation and the range of admissible proof would have been broader than in the former. The indictment was not assailed in the circuit court because of any uncertainty in the accusation. On the contrary, the defendants and their counsel stipulated in writing with the prosecuting officer that the indictment should be "considered and understood" as "reading in the conjunctive instead of in the disjunctive"; that it should be taken as "not uncertain" and that any defect arising from the use of the disjunctive was waived. The circuit judge endorsed his approval on the stipulation, and it was filed in the cause; but no change was made in the indictment itself. The trial was had thereafter, counsel and the court proceeding as if the disjunctive rightly should be construed and understood as a conjunctive.

After conviction, the petitioners took the case to the Supreme Court of the Territory on various exceptions reserved to rulings in the course of the trial. In that court one of their attorneys contended, over the disapproval of another, that the indictment was made so uncertain by the use of the disjunctive that it did not inform the petitioners of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution, and that the stipulation was void under the Fifth Amendment because the indictment was thereby amended without a resubmission to the grand jury. The Supreme Court, referring to these contentions, said:

"We are of the opinion that the stipulation in question can not be construed as amounting to an amendment of the indictment. The trial court did express its approval of the stipulation and of the waiver contained therein, but

it did not amend the indictment or attempt or purport to do so. . . . If it might under other circumstances reasonably be said that, by reason of the allegations in question being in the disjunctive instead of the conjunctive, there was some doubt as to what crime defendants were charged with, does it not expressly appear in this case that not a vestige of doubt exists, when the defendants themselves have distinctly and unequivocally said, and their counsel learned in the law have solemnly stipulated and agreed in writing, that neither the defendants nor their counsel had any doubt whatever of the nature of the accusation against the defendants?"

And again, "As to whether, if an indictment palpably stated no offense at all or the semblance of any offense, an accused could waive his right to be informed of the nature and cause of the accusation against him, under the facts in the present case we are not required to say. There are, indeed, many authorities to the effect that an indictment which, in seeking to inform the accused of the nature and cause of the accusation against him, charges the offense in the disjunctive instead of the conjunctive, is bad, upon the theory that it charges no offense at all. But, as pointed out in *Territory* v. *Kim Ung Pil,* 26 Haw. 725, even the courts which so hold concede that the rule is not without qualifications. Its merits need not be here considered. . . . When, as in the case at bar, the defendants and their able counsel have solemnly said to the court, after ample time for study and reflection, that they understand the indictment, that the presence of the word "or" does not mislead them or in any wise embarrass them in their defense and that the indictment fully informs them of the nature and terms of the charge against them, the alleged insufficiency or defectiveness of the indictment is one which may be constitutionally waived. Any other conclusion would, we think, be an affront to justice and common sense."

The Supreme Court overruled the exceptions, but did not render a judgment of affirmance, for under the local law that was not admissible in cases brought before the court only on exceptions reserved. Therefore that decision could not be brought to this Court for review. *Cotton* v. *Hawaii,* 211 U. S. 162; *Hutchins* v. *Bierce,* 211 U. S. 429. But had the petitioners so chosen, they could have taken the case to that court on writ of error instead of on the reserved exceptions, and in that event a judgment of affirmance, if involving the denial of a right asserted under the Constitution, could have been brought by writ of error to this Court for review in regular course. *Spreckels* v. *Brown,* 212 U. S. 208. The petitioners, however, elected to proceed the other way.

With this statement of the situation and proceedings in the territorial courts, we turn to the petition for *habeas corpus* presented in the District Court. In it the petitioners set forth the indictment, the stipulation and the judgment of the trial court, and then took the position, first, that the use of the disjunctive rendered the indictment so uncertain that it did not meet the requirement of the Sixth Amendment to the Constitution, and, secondly, that the stipulation effected a change in the indictment without a resubmission to a grand jury and that this was in contravention of the Fifth Amendment. The District Court denied the petition on the ground that the case was not one in which the relief sought should be awarded.

In the federal courts a discharge on *habeas corpus* of a prisioner held to answer a criminal accusation or confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. *Salinger* v. *Loisel, ante,* 224; *Storti* v. *Massachusetts,* 183 U. S. 138, 143. The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law

has provided another remedy in regular course, are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the process or judgment under which the prisoner is held is wholly void.

This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency and the effect to be given to the stipulation were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not for that reason void, *Ex parte Watkins,* 3 Pet. 193, 203; *Ex parte Parks,* 93 U. S. 18, 20; *Ex parte Yarbrough,* 110 U. S. 651, 654, but subject to correction in regular course on writ of error. If the questions presented involved the application of constitutional principles, that alone did not alter the rule. *Markuson* v. *Boucher,* 175 U. S. 184. And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute. *Riddle* v. *Dyche,* 262 U. S. 333. And see *Craig* v. *Hecht,* 263 U. S. 255.

The petitioners rely on *Ex parte Bain,* 121 U. S. 1, where it was held that an actual amendment of an indictment for an infamous crime without a resubmission to the grand jury rendered the indictment void and left the court without power to proceed to a trial. But, as was said by the Supreme Court of the Territory, the indictment here was not amended. The purpose of the stipulation was not to alter or change the indictment but to show that the parties construed and understood the accusation in a particular way and desired the court to do

the same. Had the court done so without the stipulation, that might have been an error in the exercise of jurisdiction, but it would not have worked an entire disability to proceed to a trial and judgment. And had the accused been acquitted it hardly would be said that the acquittal was void. The stipulation did not alter the situation in these respects.

We find no special circumstances in the case which should have required the District Court, in the exercise of a sound judicial discretion, to discharge the petitioners.

Judgment affirmed.

PACIFIC GAS & ELECTRIC COMPANY *v.* CITY AND COUNTY OF SAN FRANCISCO.

PACIFIC GAS & ELECTRIC COMPANY *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

PACIFIC GAS & ELECTRIC COMPANY *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

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

Nos. 34–36. Argued April 17, 1923; restored to docket for reargument November 27, 1923; reargued February 19, 1924.—Decided June 2, 1924.

1. The evidence supports a finding that a net return of 7 per cent. was necessary to avoid confiscation, in the fixing of the appellant company's gas rates by public authority. P. 405.
2. In determining the amount deductible for accrued depreciation when valuing the property of a public utility for the purpose of testing the adequacy of rates during a period already elapsed, estimates of competent experts based on examination of the plant subsequent to the depreciation are preferable to averages based on assumed probabilities. P. 406.

3. Where depreciation is due partly to physical causes and partly to obsolescence resulting from improvements in the plant, the amounts should be found separately if practicable. P. 406.
4. Rate-making is not a function of the courts; their duty is to examine results and uphold the guaranties which inhibit the taking under any guise of private property for public use without just compensation. P. 415.
5. In a suit to enjoin enforcement of rates as confiscatory, a claim of a public utility for past services can not be relegated to the consideration of a state commission in the future when it adjusts the rates for future years. *Id.*
6. Where a gas company acquired patent rights which proved very valuable in lessening the cost of producing gas, but necessitated new outlays and rendered parts of the existing plant obsolescent, *held:*

(a) That the true value of the patent rights, and not merely the money actually paid for them, must be allowed for as part of its property, in gauging the adequacy of rates fixed by a city. P. 415.

(b) As the obsolescence could not have been long anticipated it was not imperative, if possible, that the company should have provided for it out of the revenues of years preceding those in question. *Id.*

(c) To allow only the cash paid for the patent rights, and nothing for the obsolete property, in arriving at the rate base, resulted in confiscation. *Id.*

273 Fed. 937, reversed.

APPEALS from decrees of the District Court dismissing the bill in three suits brought by the appellant company to prevent the enforcement of ordinances passed by San Francisco in three successive years, to reduce the price of gas.

Mr. Louis Titus, with whom *Mr. Wm. B. Bosley* was on the briefs, for appellant.[1]

Mr. Robert M. Searls, with whom *Mr. George Lull* and *Mr. John J. Dailey* were on the briefs, for appellees.

[1]At the first hearing, the cases were argued by *Messrs. Titus* and *Bosley,* on behalf of the appellant.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Since 1905 appellant has been the sole producer and general distributor of heating and illuminating gas in the San Francisco district. By three separate ordinances passed in June of 1913, 1914 and 1915, the Board of Supervisors directed it to supply such gas during the fiscal year commencing July first thereafter at not more than seventy-five cents per thousand feet. Claiming that the rate so prescribed would not yield fair return, appellant brought suits in July, 1913, 1914 and 1915, to prevent enforcement of the respective ordinances. Restraining orders issued upon condition that monthly statements should show each consumer's account and bond should be given to secure proper repayments with interest. The maximum rate in the schedule thereafter maintained was eighty-five cents per thousand.

December 15, 1916, the causes were consolidated and referred to a master. After taking much testimony he presented an elaborate report, March 2, 1920, which recommended dismissal of the bills and repayment of whatever had been collected above the prescribed rate. The District Court affirmed the report and directed an appropriate decree.

The master found that not less than seven per centum net upon the value of the property devoted to public use was necessary for a fair return; also that if observed the prescribed rate would have yielded more than seven per centum—for 1913–1914, an excess of $21,402.95; for 1914–1915, $89,446.12; and for 1915–1916, $171,464.48.

We think the evidence supports the finding that a net return of seven per centum was necessary in order to avoid confiscation.

The inventory of the many items making up appellant's manufacturing and distributing plant with their reproduc-

tion cost new was agreed upon by the parties. In order to determine accrued depreciation and ascertain true values during the years 1913–1916, the master applied the "modified sinking fund method." Concerning this he said: It involves "an estimate of the lives of the different structural units, and an annual allowance set aside from the rates received as a reserve for future replacement on a 5 per cent. compound interest curve, the capital basis of return to the owner being depreciated each year in an amount exactly corresponding with yearly additions to the reserve. It is assumed that loss of plant units by obsolescence and inadequacy, as well as by physical decay, can be forecast with substantial accuracy and provided for in advance of abandonment and replacement."

Appellant objects to the application of this method and insists that depreciation should have been ascertained upon full consideration of the definite testimony given by competent experts who examined the structural units, spoke concerning observed conditions and made estimates therefrom. As these examinations were made subsequent to the alleged depreciation for the definite purpose of ascertaining existing facts, we think the criticism is not without merit. Facts shown by reliable evidence were preferable to averages based upon assumed probabilities. When a plant has been conducted with unusual skill the owner may justly claim the consequent benefits. The problem was to ascertain the probable result of the specified rate if applied under well known past conditions, not to forecast the probable outcome of a proposed rate under unknown future conditions.

Counsel do not insist that the estimated accrued depreciation is "grossly excessive," if confined to the result of physical causes. But they do maintain that the master should have ascertained and stated what depreciation was due to such causes and how much followed obsoles-

cence resulting from the introduction of certain patented inventions; and we think such a finding should have been made unless some undisclosed reason prevented. The claim is that in order to lower cost of production it became necessary to abandon certain valuable property under conditions not reasonably susceptible of anticipation. The material and relevant facts ought to be disclosed.

The objection to the report most seriously urged is that in his estimate of total value the master failed properly to appraise certain patent rights through which manufacturing costs had been greatly reduced; also, that he failed to make proper allowances for the successful use of such rights. This objection is well taken. The following excerpts from the master's long and rather involved report disclose the contested points with the relevant facts and indicate his conclusions.

"The company contends that its plant capital, as a basis of earnings, should suffer no deduction because of supposed depreciation due to age, but only, if at all, by the amount of 'deferred maintenance.' And where, as here, there have been abandonments of large units due to obsolescence, the loss should be reimbursed by amortization over a period of years after, rather than before, the replacement, this amortization being effected by dividing the economies resulting from new machines and processes between owner and consumer, thus allowing a partial reduction in the rate. . . .

"Until this case it had not occurred to me that, so far as theory is concerned, reimbursement of the owner could take place after abandonment. It would not seem fair if it involved a raise of rates. Physical depreciation, for example, if an accumulation is necessary to provide for replacement, ought to be provided beforehand from the rates of users of the service which caused the machine to wear out. But where replacement is made on account of obsolescence or inadequacy, and economy is effected in

costs, that economy can with fairness be devoted to reimbursement for the replacement cost, the rates remaining unchanged. I know of no well-considered method to meet this reimbursement after the fact. The installments would have to include interest on the unpaid principal and capital would thus not be depreciated for purposes of return. An estimate of the period of amortization would not have to be made if all economies of the new machine were devoted to the amortization; it would work itself out. If the economies were shared with the ratepayer, as plaintiff here suggests, the period should not extend beyond the estimated life of the new machine; a plan which is subject to the objection on the grounds of uncertainty common to all such estimates. . . .

"But where, as here, and as is generally the case, there is nothing to show what, if any, consideration has been given the question of depreciation methods by the state authorities, or anything beyond a bare schedule of rates to be charged, then the court must determine the proper methods by its own independent judgment. I have tried to make it clear that in the usual case the modified sinking fund method would seem most applicable. Notwithstanding this, in cases where it had not been the practice to accumulate a reserve, and where the cost of replacements has shown itself to be a fairly uniform amount, or a fairly uniform percentage of income or of capital, then there is no objection in sound reasoning, nor, as I believe, in the law as laid down, why the court should not adopt a replacement method in determining proper costs of production; and in such event it would rate at replacement cost new to determine the owner's reasonable return and include actual average replacement requirements in the yearly costs, without reserves. Or it might figure on a reserve for part of the plant, and a replacement method for the balance apparently adapted to it. Conceivably, also, the court might amortize the loss by obsolescence

after abandonment had taken place, as plaintiff urges here. But I imagine that any court will feel the same hesitation in so doing that I feel here, for it involves reimbursement as to structures no longer in the inventory of units in service, and is without precedent except where the rate-fixing body has laid it down as a proper policy. . . .

"Mr. E. C. Jones, chief gas engineer of plaintiff, also testified that the plant was worth cost new less only the deferred maintenance and the amount of abandonments immediately in prospect. He estimates the amount of this deduction at $828,916.41 (Exhibit 43), or 6.3 per cent. of his appraisement at $13,066,201.55 (Exhibit 3). His estimate includes no consideration of approaching obsolescence; it does include replacement reasonably in view, due to physical deterioration, and to ordinary inadequacy. . . .

"I have referred several times to plaintiff's contention that obsolescence should be amortized after rather than before abandonment of a unit of plant. Specifically applied, it is urged that when it is seen that Martin station or other obsolete generator has been superseded by new Jones generators, using the improved Jones process for oil-gas, the demonstrated economies thereby effected are justly to be devoted to reimbursing the company for the loss of capital occasioned by the obsolescence, continuing each year until the loss is made good, with interest. On this settled program the new generator would, of course, be rated for return at replacement cost new at all times. To give the consumer a part of the advantages of the improvement, the company proposes that only half of the very considerable economies of operation shall be devoted to its reimbursement. Many advantages are urged for this plan: That it throws upon the consumer, who has the benefit of the new equipment in the shape of reduced charges, the burden of the loss by supersession of equip-

ment otherwise in good condition; that it avoids the defect that is inherent in a system of setting aside reserves in advance of abandonment, namely, that while the life of a depreciable unit is difficult enough to estimate when physical decay alone is considered, it is practically impossible to forecast when we consider that obsolescence and inadequacy, which usually account for abandonments in a gas manufacturing plant, follow no rule as to time of their operation; that, finally, progress in service is promoted by giving a gas company an incentive to improvement of its machinery and its processes in the shape of increased profits. It must be admitted that if replacement of an old machine has not been sufficiently provided for by reserves in advance, a company will naturally defer installing a new machine, and so progress is halted. It is, furthermore, true that the application of the usual formula, fair return on fair present value of the plant in service, gives to the consumer all the advantages of economies in operating costs, which plainly is not entire justice. The City's counsel agrees (Argument 451) that if obsolescence had occurred suddenly, with no opportunity to create reserves for replacement, the loss should be amortized after abandonment; but he denies that the facts here conform to the hypothesis. . . .

" Mr. E. C. Jones, chief gas engineer of plaintiff, and his son, Mr. Leon B. Jones, assistant gas engineer, on an application filed May 23, 1912, were on March 10, 1914, granted United States Letters Patent for an improved apparatus for manufacturing oil-gas; and on October 19, 1915, on an application also filed May 23, 1912, were granted letters for the process. On November 30, 1915, they granted to plaintiff the exclusive right to use the process, and to make and use, but not to sell, the apparatus, together with future improvements in either process or apparatus made during the lives of the patents; the rights granted being transferable, but restricted as to place

to a number of named counties in northern and central California. Despite the late date of the grant, plaintiff's beneficial right covered the period in suit, for the prior installation of generators embodying the Jones patents at the Metropolitan and the Potrero stations, with the patentees' consent, conferred an implied license to use them during their life in the San Francisco district; but this license was not exclusive. The contract underlying the grants (Exhibit 61) recited that the Company had permitted the patentees to use its plant and facilities for experimentation and commercial demonstration of their inventions; had expended in alterations in its Metropolitan plant a sum exceeding $100,000, and also had expended in erecting two new gas generators at the Potrero station embodying the inventions a sum exceeding $215,000; that continued operation of all said new or altered apparatus under the patentees' direction had demonstrated the great utility and value of the inventions and that they could be utilized ' to the great pecuniary advantage ' of the plaintiff Company; that the Company had allowed the patentees to exhibit the apparatus to many persons interested in gas manufacture in this country and Europe as a demonstration of the utility and value of their inventions, and that the patentees regarded the privilege of future such exhibitions as of great value to them. It was then agreed that for the grants first above referred to the Company would pay the patentees the sum of $46,066.67, and would allow full opportunity for future exhibition of the generators, and so forth.

"The question is, at what figures these rights of the Company shall be taken into the rating base? It seems to be agreed that the amount actually paid in 1915 is already represented in the amount hitherto added as additions and betterments.

"The presentation of plaintiff's case in the form approved by its counsel does not primarily involve the giv-

ing of a value to these patent-rights. Counsel in argument stated in substance that the evidence as to their value seemed to involve such enormous sums that he preferred the more conservative course of giving them consideration in his conception of the proper treatment of losses by obsolescence. It will be remembered that his argument was that no new invention would be installed by a man of business unless its savings were available to him to recoup losses of capital abandoned to make way for it; that the patent monopoly would enable him to compel a price adequate for his recoupment; and that in a proceeding like this it was equitable to divide the savings with the consumer and apply the Company's share to reimbursement of the loss by abandonment, meanwhile rating the new property at value new. I have said that there was strength of reason in this plan, but that it involved a matter of administrative policy that was primarily for the State's regulatory body. I have not followed this plan for this reason and for the further reason that it appeared obsolescence could have been foreseen and provided for, and apparently had been provided for. This means that the question of value of the rights must be now considered.

"The evidence is not very full on the part of plaintiff. And due perhaps to plaintiff's position as to obsolescence, there was little cross-examination by the City and no contrary evidence. With oil at 68½ cents a barrel to plaintiff during the years 1912–16, Mr. Bridges estimates the savings under the Jones process at 2½ cents a thousand feet of gas manufactured. (Exhibit 62.) In Table X of his supplemental argument, Mr. Bosley estimates the savings shown by the evidence at 2+ cents for the first two years and over 4 cents for the year 1915–16; or, in sum total, $103,530.39 for 1913–14, $132,419.45 for 1914–15 and $258,557.81 for 1915–16. A just criticism of these estimates is that they give no influence to the

economies due to larger production. Mr. Britton, general manager of plaintiff, speaking of results attained in 1916–17, testifies that the new Jones generators effected a saving of two gallons of oil per thousand feet of gas and over one cent a thousand in labor costs of manufacture. (Tr., 2248 seq.) Projecting the savings over the sixteen remaining years of the letters patent, he computes the aggregate savings at $7,630,300. (Tr., 2251.) Mr. Vincent computes the present worth on June 30, 1916, of these future savings at $4,203,300. (Exhibit 67.) While apparently the estimates are made on conservative bases, it is, of course, true that forecasts like this are full of uncertainties; for example, oil may rise to a price prohibitive for gas consumption on the present scale, or other inventions or even substitutes for gas may diminish the value of the Jones patent.

"There is no doubt that these patents are property, and of great value. It is also true, I think, that justice demands that the utility company should profit in some substantial proportion by the economies brought about by its ability in management or its improvements in methods of manufacture. There is no good reason why the consumers should get all the advantages that are the fruit of the genius of these inventors. If by the terms of their employment Mr. Jones and his son had been bound to assign their patents to plaintiff without further compensation, and had done so, the City could not justly claim that the Company should have no part of the savings effected. The patents would have to be valued. But in view of the fact that the Company and the patentees, dealing presumably at arms' length, have reached a figure of about $46,000 as the value of exclusive rights throughout Northern California, I am as much embarrassed as was plaintiff's counsel in concluding that in San Francisco alone the rights are to be valued for purposes of return at four million dollars or any substantial

fraction of that sum. And how are we to compare in value the full rights obtained by express grant in 1915 and the restricted rights arising by implied license in the prior years? In view of the state of the evidence, it seems to me better to pass the whole matter for future consideration in connection with the rates of later years, when the State Commission can pass on it with full evidence before it. On the record before me I do not see my way clear to add any figure to the rating base on account of these patent rights. . . .

"Objections Nos. 8, 9 and 10 have to do with the valuation of plaintiff's rights under the Jones patents. Plaintiff is incorrect in stating that the Master failed to find the present value of the patent rights. These were allowed in capital value as stated, page 85, at $46,066.67, the amount paid the grantors in 1915. If the plaintiff had paid the inventors, say $500,000, or other considerable sum, for these patent rights, there is no reason to doubt that this figure would have been accepted as the valuation for purposes of return. It is not my view that a valuation must follow cost, although it is more apt to do so where the purchase was recently made. I have stated as fully as I could the reasons why I could not find the immensely greater figure which plaintiff claims. Briefly, the evidence was entirely too speculative. There is, after all, in such a policy no particular restriction to enterprise in denying to stockholders the fruits of valuable inventions, because the stockholders do not function in the direction of enterprise. The way to reward enterprise is to pay large sums to inventors, but that is not the question here. In a supplementary argument counsel asks me to apply here the rule which prevails in patent accountings, where, when damages cannot be ascertained by reference to an established royalty, the Master is permitted to determine from all the evidence what would have been a reasonable royalty. The qualification to this rule is, however, that

the Master must have some evidence upon which his mind can work and rely, and that is to a large degree lacking here, save in so far as it is given by the amount of the purchase price. The objections named are accordingly overruled."

Obviously, under the theory accepted below, appellant worsened its situation for rate-making purposes when it reduced the cost of manufacturing gas. Introduction of successful patented inventions enabled the public authorities to lower the rate base and gather all the benefits. The operating plant, made capable of producing gas at smaller cost, was declared less valuable than before. The result indicates error somewhere, either in theory or application of principle.

Obsolescence of one or more stations and perhaps other property theretofore of great value (possibly $800,000) followed installation of the patents, but the remaining plant plus the patents gave better results. As an operating unit the new combination had greater value than the old; but the court below disregarded the demonstrated worth of the element which wrought this change.

The obsolescence in question did not result from ordinary use and wear. Certainly it could not have been long anticipated—the patents were of recent conception; to provide for it out of previous revenues was not imperative, if possible. Former consumers were not beneficiaries; only subsequent ones could be advantaged.

Our concern is with confiscation. Rate-making is no function of the courts; their duty is to inquire concerning results and uphold the guaranties which inhibit the taking of private property for public use without just compensation under any guise. We may not, therefore, relegate appellant's claim for past services to the future consideration of the State Commission, as the master suggests. After adopting the reduced costs of manufacture for estimating net returns, the court gave no proper

valuation to the inventions which caused the reduction, and thereby permitted property to be taken without just compensation. The amount of money actually paid to the inventors was not the proper measure of worth. Experience had demonstrated a much higher one; and to obtain the benefit of their use appellant sacrificed much.

Installation of the inventions necessitated new outlay of money and abandonment of property theretofore valuable—both were necessary in order that the cost of manufacture might be reduced. If appellant's permissible profits depend upon the lowered costs and it is denied adequate return upon property which made the reduction possible, or recompense for the obsolescence, successful efforts to improve the service will prove extremely disadvantageous to it.

Whether, under the peculiar circumstances here presented, the rate base should be fixed by adding to the agreed inventory some fair valuation of the patent rights, or whether prompt recoupment should be allowed for the obsolescence caused by their introduction, or whether appellant should be saved from actual ultimate loss by some other feasible method, we will not undertake to determine upon the present record. To the end that the issues may be reconsidered in view of this opinion, the decree below is reversed and the cause remanded for such further proceedings as the circumstances require, including another reference to the master if deemed advisable.

Reversed.

MR. JUSTICE HOLMES, dissenting.

I am of opinion that the decree should be affirmed on the main point for reasons that will be stated by my Brother BRANDEIS.

MR. JUSTICE BRANDEIS, dissenting.

These cases were tried together. Each challenges as confiscatory an ordinance of the City of San Francisco

fixing, for a single year, the price to be charged for gas. The rule of *Smyth* v. *Ames,* 169 U. S. 466, was applied. The evidence, in condensed form, comes before us in a record of 943 pages. The master's original and supplemental reports occupy 131 pages. The master and the court found the rates to be compensatory. Three errors are assigned by the company which relate to depreciation. The facts applicable to the several years differ in part; but the same questions are presented in each. It will tend to clarity to discuss these with reference to the facts of No. 34, which involves the rate for the year beginning July 1, 1913.

First. The depreciation charge allowed for that year, for the plant as a whole, was $348,853. The company does not complain that this allowance is too small, if treated as an allowance for merely physical observed depreciation. Its claim is that an improved process, which had been introduced at the San Francisco works in 1912, resulted in a saving, during the year 1913–14, of $103,530 in oil and labor; that in 1913 it had become certain that this process would later render obsolete certain parts of the plant (called stations) which were in use throughout that year; and that, for the purpose of meeting this expected loss in capital through later abandonment of stations, the savings effected by the new process should have been charged against the earnings, and credited to a special depreciation reserve. If, as suggested below, the company's contention is that only one-half of the savings should be credited to this special depreciation reserve, the action of the District Court on this ground is obviously free from objection. For, in fact, there was included in the year's depreciation charge, for obsolescence of these stations, $64,962, which is more than one-half of the year's savings. But its claim here is that the whole of the savings of the year 1913–14 should have been so applied; and that, therefore, the balance thereof, namely, $38,568, should

also have been included in this special depreciation charge.[1]

The sum ($348,853) allowed as the depreciation charge for the year 1913–14 was nearly 3 per cent. of the then reproduction cost new of the whole plant, other than land. The master and the court found, as facts, that none of the plant was abandoned during that year; that the change in the process of manufacture was not revolutionary; that in view of the history of the art, such change or improvements, and resulting obsolescence of parts of the plants, should have been foreseen; that, in fact, there had been accumulated, during the four years preceding 1912, as a general reserve for depreciation, the sum of $2,116,433.95; that this reserve had been charged off by the company to surplus in November, 1911; and that, but for this fact, it would have been available to meet the loss of capital which occurred later through the abandonment of stations.

This alleged error does not present any question of law. Whether more of the savings of the year 1913–14 due to the introduction of the new process should have been allowed as a special depreciation charge for the obsolescence then known to be accruing, is clearly a question of fact. There is much conflict in the theories on which

[1] In this connection, the confiscatory character of the rate rests, according to the test applied, upon the allowance or disallowance of a much smaller sum. For master and court have found that the earnings of the year 1913–14 exceeded 7 per cent. upon the rate-base by more than $21,000. An additional allowance for depreciation of $17,000 would, therefore (even on the theory contended for by the company), have rendered the rate compensatory on a 7 per cent. basis. Moreover, a 6 per cent. rate was sustained in *Stanislaus County* v. *San Joaquin & Kings River Canal & Irrigation Co.*, 192 U. S. 201 (1904); *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1 (1909); and *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 670 (1912).

depreciation should be figured.[2] There was doubt when the obsolescence would culminate and what would be its extent. There was conflict in the evidence as to the rate to be deemed a fair return. Whether a return of 7 per cent. is the proper test of a compensatory rate must, obviously, depend in part upon whether the return includes any of the risk of obsolescence.[3] I cannot say that the master and the court erred in their conclusion of fact that, all things considered, the depreciation charge allowed was adequate. The same is true of the depreciation charges allowed for the years 1914 and 1915.[4]

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[2] The wide differences between engineers as to the proper method to be pursued is well known. See *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 294.

[3] See Gerard C. Henderson "Railway Valuation and the Courts," 33 Harv. L. Rev. 902, 916, 922, 923; John Bauer, "Valuation of Public Utility Properties," 30 Pol. Sci. Q., 254, 275; R. S. Hale, "Physical Valuation of Public Utilities," 45 Engineering Mag., 161, 163.

[4] Appellant contends here that, due to the new method of manufacture, property of which the reproduction cost was $844,355.74, would become obsolete; that the total depreciation allowance covering this property for the three years was only $275,096; and that the difference—called net loss to the appellant—should be amortized by applying the savings to be effected by the new method of manufacture. But the first abandonment of stations occurred at the end of June, 1915. The estimated loss on the Martin station, then abandoned, was $237,651. No further supersession occurred during the period of litigation. There was merely the prediction, made at the trial by the company's experts, that the Independent station would be abandoned in December, 1918, and the Potrero plant in December, 1920. Moreover, for the year 1914–15, the depreciation charge allowed was $372,680. Included in this amount is $68,198, directly attributable to loss caused by abandonments. The alleged savings from the new process for that period was $132,419. Thus, the amount allowed exceeded the one-half of the year's saving, which was suggested below as the proper measure of the appropriate charge. The increase in depreciation charge contended for here is $64,221. But the earnings for this year exceeded 7 per cent. on the

Second. As an alternative to allowing a larger depreciation charge out of the year's savings through the improved process and apparatus, the company urges that the rate-base should have been increased, by adding thereto the value of the right to use the new process at the San Francisco works.[5] The court apparently adopted this view of the law. It ruled that the company was entitled to a return upon the then value (as part of the rate-base) of the right to use the inventions. It differed from the company only in the estimate of the value. The company's experts declared that the value of this right might be ascertained by capitalizing the average annual savings expected to be effected thereby. So calculated, the value is $4,203,300. The court found specifically that it could not accept estimated savings as a measure of value; among other reasons, because the amount of savings was dependent in large measure upon the price of crude oil, and that this price fluctuates largely from time to time. It included in the rate-base for 1913–14 the value of the gas generators (at the Metropolitan plant) which had been reconstructed so as to embody the inventions; and found that there was in

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rate base by more than $89,000, leaving a difference more than sufficient to cover this claim. The year 1915–16 can be similarly disposed of. The depreciation charge allowed was $380,519. The alleged savings from the new process for that year were estimated at $258,557. The increase in depreciation charge contended for here is $208,319. But one-half of the year's savings is $129,279; and the earnings for the year exceeded 7 per cent. on the rate base by $171,464.

[5] The process and apparatus had been invented by the company's salaried engineers early in 1912. The cost of experiments were defrayed by it. The utility of the invention was proved in that year, at its expense, by reconstructing, during that year, two of its gas generators and making other changes in plant. In this way the company acquired an implied license to use the inventions. *Wade* v. *Metcalf*, 129 U. S. 202; *Dable Grain Shovel Co.* v. *Flint*, 137 U. S. 41. It did not acquire an express license until November 30, 1915; that is, shortly after the patent for the apparatus was granted.

the record no evidence on which it could give to the right to use the inventions a greater value than was allowed. So far as concerns the year 1913–14, the question is, merely, whether on the evidence in the record the value of the reconstructed generators (including, of course, the right to use them) was too small.[6] It appeared that for the right to use the inventions nothing was paid either during the year 1913–14 or during the year 1914–15; and that for the exclusive right to use them both in San Francisco and throughout a number of counties in nothern California, the company paid to the inventors, in November, 1915, $46,066.68. I cannot say that the master and the District Court erred in the finding of fact by which they valued this item for that year, or in the value assigned to the right in fixing the rate-base for either of the two following years.[7] This alternative contention of the company presents, obviously, no question of law.

Third. The reproduction cost new of the manufacturing and distributing plant, other than land, was found to be $12,794,008; the accrued depreciation, $1,518,390

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[6] The question is not one of continuing importance to the parties. Its correctness depends upon the state of the particular record. Any defect in this record can be avoided in proceedings concerning the rates for any year after June 30, 1916; and since October 29, 1917, the gas rates for San Francisco are fixed, not by city officials, but by the State Railroad Commission.

[7] The year 1914–1915 presents no change in the situation from the preceding year. For 1915–16 the value of the two new Jones oil gas generators installed in the Potrero plant at a cost of $241,812.59 is included in the rate-base; and as the value of the right to use the inventions, the $46,066.68 paid. For this period, therefore, the question is merely whether on the evidence in the record the patents should have been valued at a sum in excess of $46,066.68. But for both years only a large undervaluation would affect the result, as the master and the court found that during the year 1914–1915 the prescribed rate would yield $89,446 in excess of a seven per cent. return on the rate-base, and for 1915–1916, an excess of $171,464.

(as of June 30, 1914). Thus, the property was found to be worth 88.1 per cent. of its then reproduction cost. The company contends that the accrued depreciation should have been set at $828,916.41; so that the plant was worth 93.7 per cent. of its then reproduction cost. The master employed the "compound interest" or "modified sinking fund" method of estimating accrued depreciation. The plant is in part very old. The depreciation found is but a small percentage of the reproduction cost. The evidence bearing upon the amount to be deducted for accrued depreciation occupies 232 pages of the record. The discussion thereof in the master's report occupies 39 pages. There was a conflict of evidence.

No question of law is presented by this assignment of error.[8] The company's objection is not to the particular method selected, but that, in applying it, the master included as depreciation what is called theoretical inadequacy and obsolescence. Whether he did is a question of fact. The city denies that the reduction in value made by the master on account of accrued depreciation includes any sum representing expected loss through future abandonment of the stations. It is clear that, if any deduction was made on account of the probable abandonment of the stations, the obsolescence thus provided for was not theoretical. The new process had been introduced two years before the date as of which the valuation was made. On the facts then known, it was expected that the stations would have to be abandoned in the

[8] We have no occasion to undertake a legal delimitation of the function of a depreciation charge; or to define its legal relations to the depreciation reserves; or to determine whether the loss through the abandonment of a station in 1915 and that expected to result from later abandonments might be set off against the depreciation reserve accumulated shortly before the invention of the new process.

near future. Because it was to be expected (and was not theoretical) the company contended that to offset it more of the year's savings should have been charged against the income of that year. I cannot say that the master and the court erred in their findings of fact as to the amount of accrued depreciation.

This litigation has already extended over eleven years. The record discloses that the cases were presented below by competent counsel with the aid of competent experts, and that they received careful consideration by an able master and an able trial judge. Counsel, master and court have throughout endeavored to apply the rule of *Smyth* v. *Ames,* 169 U. S. 466. It is not shown that the rule has, in any respect, been departed from. This Court harbors a doubt whether, in applying it, some injustice may not have been done to the company. Is it probable that a nearer approach to justice, as between the parties, will be attained by a continuation of the effort to apply the same rule? To me it seems that the doubt is inherent in the rule itself. It can be overcome only by substituting some other rule for that found to be unworkable. Such other lies near at hand; and it is consistent with the Constitution.

It was settled by *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, that every public utility must, at its peril, provide an adequate amount to cover depreciation. A depreciation charge resembles a life insurance premium. The depreciation reserve, to which it is credited, supplies insurance for the plant against its inevitable decadence, as the life insurance reserve supplies the fund to meet the agreed value of the lost human life. To determine what the amount of the annual life insurance premium should be is a much simpler task than to determine the proper depreciation charge. For life insurance is a co-operative undertaking. The premium to be fixed is not that required by the probable duration of the life of a

single insured individual, but that required by the average expectancy of life of men or women of the given age. Moreover, for human lives, mortality tables have been constructed which embody the results of large experience and long study. By their use the required premium may be fixed with an approximation to accuracy. But, despite the relative simplicity of the problem, it was found that the variables leave so wide a margin for error that premiums fixed in accordance with mortality tables work serious injustice either to the insurer or to the insured. Although the purpose was to charge only the appropriate premium, the transaction resulted sometimes in bankruptcy of the insurer; sometimes in his securing profits which seemed extortionate; and, rarely, in his receiving only the intended fair compensation for the service rendered. Because every attempt to approximate more nearly the amount of required premium proved futile, justice was sought by another route. Ultimately, strictly mutual insurance was adopted. Under it, the premium charged is made clearly ample; and the part thereof which proves not to have been needed enures in some form to the benefit of him who paid it. Compare *Penn Mutual Life Insurance Co.* v. *Lederer,* 252 U. S. 523, 524, 525.

Legal science can solve the problem of the just depreciation charge for public utilities in a similar manner. Under the rule which fixes the rate base at the amount prudently invested, the inevitable errors incident to fixing the year's depreciation charge do not result in injustice either to the utility or to the community. If, when plant must be replaced, the amount set aside for depreciation proves to have been inadequate, and investment of new capital is required, the utility is permitted to earn the annual cost of the new capital. If, on the other hand, the amount set aside for depreciation proves to have been excessive, the income from the surplus re-

serve operates as a credit to reduce the current capital charge which the rates must earn. If a new device is adopted which involves additional investment (to buy a new plant or a patent right) the company's investment, on which the return must be paid, is increased by that amount. If the new device does not involve new investment, but the innovation involves increased current payments (like royalties for use of a process) the additional disbursement is borne by the community as an operating expense. The cost of a scrapped plant is carried as part of the investment on which a return must be paid unless and until it has been retired, that is fully paid for, out of the depreciation reserve. Thus, justice both to the owners of the utility and to the public is assured.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* AMERICAN RAILWAY EXPRESS COMPANY ET AL.

SOUTHEASTERN EXPRESS COMPANY *v.* AMERICAN RAILWAY EXPRESS COMPANY ET AL.

SOUTHERN TRAFFIC LEAGUE ET AL. *v.* AMERICAN RAILWAY EXPRESS COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

Nos. 666–668. Argued April 16, 17, 1924.—Decided June 2, 1924.

1. Section 15, par. 4, of the amended Interstate Commerce Act provides that, in establishing any through route, the Commission shall not "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route un-

reasonably long as compared with another practicable through route which could otherwise be established." *Held,* that an express company is not a "carrier by railroad" within the meaning of the paragraph. P. 430.

2. An appellee in support of the decree in his favor, may reassert grounds that were rejected by the court below, without taking a cross appeal. P. 435.
3. Under its power to establish through routes "whenever deemed by it necessary or desirable in the public interest" (Interstate Commerce Act, § 15, par. 3,) the Commission, for the sake of securing better service through competition, may reasonably require an express company to form joint routes with another express company between points already served by existing routes of the former over which delivery may be made as promptly as over the new routes. P. 436.
4. In such case, also, having the authority to fix "the terms and conditions under which such through routes shall be operated," (§ 15, par. 3, *supra*) the Commission reasonably may leave the direction of the routing to the shipper. P. 437.
5. A carrier has no absolute right to retain the traffic it originates for transportation to destination over its own line. *Id.*

293 Fed. 31, reversed.

APPEALS from a decree of the District Court temporarily enjoining enforcement of an order of the Interstate Commerce Commission establishing through routes for the American Railway and Southeastern Express Companies. The suit was brought by the former company. The Seaboard Air Line Railway intervened as plaintiff. The Commission, the other express company, the Southern Traffic League, and other shippers' associations, intervened as defendants.

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

Mr. Robert C. Alston and *Mr. T. M. Cunningham, Jr.,* with whom *Mr. H. S. Marx* was on the briefs, for the American Railway Express Company, appellee.

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

Mr. Sanders McDaniel, with whom *Mr. Charles J. Rixey* was on the brief, for the Southeastern Express Company, appellant.

Mr. Hollins N. Randolph and *Mr. Robert S. Parker* filed a brief on behalf of the Seaboard Air Line Railway Company, appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Transportation Act, 1920, c. 91, § 418, 41 Stat. 456, 485, amending Interstate Commerce Act, § 15, par. 3, directs that the Commission "shall whenever deemed by it to be necessary or desirable in the public interest . . . establish through routes." Paragraph 4 of that section provides: "In establishing any such through route the Commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established." That is, the Commission shall not compel the carrier to short haul its traffic. The main question for decision is whether the American Railway Express Company, which uses the railroads for its transportation service as described in *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 177, 178, is itself a "carrier by railroad" within the meaning of paragraph 4.

The American was organized, in June, 1918, as a war measure, to take over the express business done on the railroads which had come under federal control. After the Government relinquished such control, this consolidation of the transportation business and property of the express companies was approved by the Commission, under paragraph 7 of § 5 of the Interstate Commerce Act as amended by Transportation Act, 1920. *Consolidation of Express Companies,* 59 I. C. C. 459. Uniform contracts were entered into by the American with substantially all the railroads of the United States, *Express Contract, 1920,* 59 I. C. C. 518; and it enjoyed a practical monopoly of the railroad express business until May 1, 1921. On that day the Southeastern Express Company entered the field, by utilizing for that purpose the Southern Railway system and affiliated lines, in all about 10,000 miles of railroad. Many cities and towns in the southeastern States are now served both by the American and by the Southeastern. These are called common points. A larger number in those States are served only by one of the companies. These are called exclusive points. Except in the southeastern States, practically all railroad express offices in the United States are exclusive points of the American.

The Southeastern sought to have the American agree with it to establish through routes and joint rates between all points served by them respectively, whether common points or exclusive; and to permit the shipper to give the routing instruction. The American declined to do this; limiting its concurrence to routes between the exclusive points of one company and the exclusive points of the other. In this way, it attempted to secure to itself either the entire haul or the longest possible haul. Thereupon, the Southeastern instituted, before the Commission, proceedings against the American, praying that the Commission establish the through routes and joint rates sought. Another proceeding, seeking in part like relief, was brought against the two express companies by ship-

pers' associations. The cases were consolidated. The Commission ordered the establishment of some of the through routes prayed for,[1] finding that, in order to secure adequate service, it was necessary and desirable in the public interest that competitive joint routes be established, although the American had reasonable routes from origin to destination, or from origin to a point nearer destination than the joint through routes established.

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[1] The Commission found " that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Company and points on the lines of the Southeastern Express Company, regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established, in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company, and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established. . . ." See 78 I. C. C. 126, 143.

The order (81 I. C. C. 247) required the companies to establish, on or before October 20, 1923, through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Co. between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Co. from Washington to and including Birmingham, Ala., on the other, with transfer between the companies at Washington, D. C.; that the rates between these points shall not exceed the rates contemporaneously in effect between the same points over the routes now used; and that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments over the routes prescribed. No order was made fixing divisions of the joint rates.

Southeastern Express Co. v. *American Ry. Express Co.*, 78 I. C. C. 126; 81 I. C. C. 247.

Before the effective date of the order, this suit to enjoin its enforcement was brought by the American against the United States in the federal court for northern Georgia. The Seaboard Air Line Railway, one of the many railroads with which the American has a contract, intervened as plaintiff. The Commission, the Southeastern, the Southern Traffic League and other shippers' associations intervened as defendants. The case was heard on application for a temporary injunction by three judges, pursuant to the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220; the order was held void on the ground that the American is a "carrier by railroad" within the meaning of paragraph 4, and that, therefore, the Commission was, on the facts found, without power to make the order; and a temporary injunction [2] was granted, Circuit Judge Bryan dissenting. 293 Fed. 31. The case is here on separate appeals from that decision by the several respondents. The three appeals present the same questions of law.

First. The power to establish through routes is conferred broadly as to all carriers by paragraph 3 of § 15.[3] The limitation upon the power in respect to a "carrier by railroad" is imposed by paragraph 4. The language

[2] The opinion stated that the injunction would be "without prejudice to the right of the Commission to enquire whether, because the existing routes are unreasonably long, or for other cause particularly appearing, any of the proposed new routes can be established consistently with paragraph 4 of section 15 of the Interstate Commerce Act, and, if so, to order their establishment." 293 Fed. 31, 38.

[3] The Act to Regulate Commerce, of February 4, 1887, c. 104, 24 Stat. 379, did not confer upon the Commission any power to establish through routes. Compare *Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, 553. The amendment of June 29, 1906, c. 3591, § 4, 34 Stat. 584, 590, conferred power to do so "when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected

which embodies this limitation is not appropriate to describe the situation of an express company. It is that the Commission may not compel the carrier to embrace in the through route "substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless . . ." An express company has no railroad. It is served by many railroads, as it is served by water lines, by motor trucks and by horses and wagons. Moreover, the language of

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to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists." The amendment of June 18, 1910, c. 309, § 12, 36 Stat. 539, 552, struck out the proviso and substituted therefor the limitation now reenacted in paragraph 4 of § 15 of the Interstate Commerce Act as amended by Transportation Act, 1920. The latter act struck out, also, the clause in the Act of 1910 by which the Commission's power to establish the through routes was dependent upon failure of the carriers to establish them voluntarily.

Section 1, par. 3, provides that "the term 'common carrier' as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies, etc." Section 1, par. 4, imposes upon every carrier of property the duty to establish through routes. Section 15, par. 1, (which deals, among other things, with joint rates) confers the regulatory powers in respect to "any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act." Paragraph 2, of § 15, deals only with the time when the orders under par. 1 take effect. Paragraph 3 contains no words limiting the scope of the Commission's power to establish through routes to "carriers by railroad." The limitation imposed, as applied to "carriers by railroad," appears first in par. 4. Prior to Transportation Act, 1920, the existence of the unrestricted power to establish through routes and joint rates appears to have been assumed without question by the Commission in *In re Express Rates, etc.*, 24 I. C. C. 380, 392–4; 28 I. C. C. 131, 136. Compare *American Express Co.* v. *United States*, 212 U. S. 522, 531, 534.

paragraph 4 describes aptly a single railroad system, but not a system of express routes extending over many separate railroad systems. Practically every express company has had, as the American has now, routes over many separate railroad systems.[4] However numerous the railroads used, all the routes are parts of a single express system.[5] If an express company is a "carrier by railroad," the "entire length of its railroad" must, as the American argues, be construed to mean the entire length of all the lines of the railroads within the United States over which it has routes. Such a construction would, if adopted, tend to give permanency to an existing monopoly although it failed to give adequate service. For it would deprive the Commission of power to foster the competition found necessary to secure such service. There is nothing in Transportation Act, 1920, which evinces an intention on the part of Congress to accomplish such a purpose.

The natural meaning of the term "carrier by railroad" is one who operates a railroad, not one whose shipments are carried by a railroad. The term is not found in the original Act to Regulate Commerce which was applicable only to carriers "engaged in the transportation of pas-

[4] In 1911 there were 13 express companies of which the 10 important ones conducted their service over 218,013 miles of railway, 18,385 miles of steamship and stage lines, and 6,665 miles of electric lines. *In re Express Rates, etc.*, 24 I. C. C. 380, 384; 28 I. C. C. 131; 35 I. C. C. 3; *Proposed Increase in Express Rates*, 50 I. C. C. 385, 391. January 1, 1918, there were only 7 such express companies in the United States. *Consolidation of Express Companies*, 59 I. C. C. 459, 460. Compare *Express Rates*, 1922, 83 I. C. C. 606, 622.

[5] The American, which was the only express company doing business over the railroads when Transportation Act, 1920, was enacted, conducted its service over nearly all of the 235,234 miles of railroad of the first class in the United States. These were operated by 186 separate railroad companies. "Statistics of Railways of the United States" for 1920, p. x, (Interstate Commerce Commission); *Consolidation of Express Companies*, 59 I. C. C. 459, 460.

sengers or property wholly by railroad, or partly by railroad and partly by water." [6] When the amendment of 1906 extended the Commission's jurisdiction to express companies, sleeping car companies and pipe lines, and that of 1910 extended its jurisdiction to telegraph, telephone and cable companies, occasion for differentiating between carriers arose; as some of the provisions of the Act to Regulate Commerce were obviously not applicable to all the classes of carriers which had been made subject to regulation. But to what extent its provisions should be applied to any class was left, by those amendments, largely to construction. In Transportation Act, 1920, the phrase "carrier by railroad" seems to have been systematically employed to designate sections of the Interstate Commerce Act which apply only to carriers operating railroads.[7] The term was introduced by

[6] See § 1. The phrase used in all later sections of the original act is "any common carrier subject to the provisions of this act." See §§ 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 20. Compare § 22. The Commission held in *In re Express Companies,* 1 I. C. C. 349, that while express business conducted as a department of a railroad was subject to the original act, such business when conducted by an independent company, which had acquired rights by contract with the railroad, was not subject to the act. Nor is the term "carrier by railroad" found in the amendments of March 2, 1889, c. 382, 25 Stat. 855; of February 10, 1891, c. 128, 26 Stat. 743; or of February 19, 1903, c. 708, 32 Stat. 847. In the amendment of 1906, it appears in § 2 (34 Stat. p. 586); and in the amendment of 1910, it appears in §§ 8 and 9 (36 Stat. p. 548). But in connection with the establishment of through routes, the use of the term "carrier by railroad" appears for the first time in the amendment made by Transportation Act, 1920.

[7] See following provisions of Interstate Commerce Act as amended by Transportation Act, 1920, Title IV; § 1, pars. 10, 11, 12, 13, 14, 16, 17, 18, 20, 21, as compared with pars. 3, 4 and 6; § 3, par. 2, as compared with pars. 1 and 3; § 4, par. 2, as compared with par. 1; § 5, par. 6, as compared with par. 7 (also, 1 and 2); § 15, par. 4, as compared with pars. 1, 3, 6, 7, 11; § 15a; § 20a; § 25, pars. 2 and 4; § 26. See also § 204(a), 209(a), 210(a), 300(1).

it in paragraph 4 in place of the word "company" which had been used in the amendment of 1910.[8] The purpose of the substitution was to make it clearer that the prohibition against compelling a carrier to short-haul its traffic was limited to railroads. The same phrase had been adopted in the Federal Employers' Liability Act of April 22, 1908, c. 149, §§ 1, 2, and 3, 35 Stat. 65, 66.[9] As used in that act, it was held in *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 187, 188, not to include independent express companies doing business over railroads. In § 15(4) of Transportation Act, 1920, it should be given the same meaning. Compare *United States ex rel. Chicago, New York & Boston Refrigerator Co.* v. *Interstate Commerce Commission, ante,* 292.

Second. The American claims that the order is void, even if the limitation contained in paragraph 4 is not applicable to express companies. One contention is that the order exceeds the power conferred upon the Commission, because it is, as a matter of law, unreasonable to establish a second through route merely for the sake of securing

[8] Section 15, as amended by the Act of June 18, 1910, c. 309, 36 Stat. 539, read: "The Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad, etc."

[9] The phrase had been introduced in the Safety Appliance Act of March 2, 1903, c. 976, § 1, 32 Stat. 943; but it was not found in the original Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531; nor in the amendment thereof of April 14, 1910, c. 160, 36 Stat. 298. The term is used in the Hours of Service Act, March 4, 1907, c. 2939, 34 Stat. 1415; the Ash-Pan Act, May 30, 1908, c. 225, § 2, 35 Stat. 476; and the Boiler Inspection Act, February 17, 1911, c. 103, 36 Stat. 913. On the other hand, the 28 Hour Law, June 29, 1906, c. 3594, 34 Stat. 607, enumerates "railroad, express company, car company, common carrier other than by water." The Railway Mail Service Pay Provision, July 28, 1916, c. 261, § 5, 39 Stat. 412, 429, employs the phrase "railway common carriers"; and the Merchant Marine Act, June 5, 1920, c. 250, § 8, 41 Stat. 988, 992, the phrase "carrier by rail."

competition in service. Another contention is that the order exceeds the power conferred upon the Commission because it purports to authorize the shipper to give routing instructions. The further claim is made that the American has, as a matter of law, the right to carry, over its own lines, traffic which it originates, as long as this can be done without unreasonably delaying the delivery at destination; that this right to haul its traffic to destination is property protected by the Fifth Amendment; that to authorize the shipper to give routing instructions takes this property; and that the provision for making an equitable division of the joint rate does not afford the legal compensation for the taking to which it is entitled.

The Southeastern insists that these claims, although adequately presented in the bill of complaint, cannot be availed of in this Court, because they were overruled by the District Court and the American did not take a cross-appeal. The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.[10] By the claims now in question, the American does not attack,

[10] *The William Bagaley*, 5 Wall. 377, 412; "*The Stephen Morgan*," 94 U. S. 599; *Landram* v. *Jordan*, 203 U. S. 56, 62. Compare *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 111.

in any respect, the decree entered below.[11] It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined.

The competitive route ordered must, of course, be reasonable in character from the standpoint of transportation; and there must be reasonable cause for establishing it. In this case, no objection is made to the character of the routes ordered. The objection is that, as a matter of law, the competitive routes cannot be justified because the time required for delivery over the existing routes of the American is as short as it would be under the competitive joint routes. To this objection the action taken by Congress supplies an answer. Under the Act of 1906, the Commission could act only if no "reasonable or satisfactory through route exists." In *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.,* 216 U. S. 538, this Court set aside an order to establish a second through route because it deemed the existing one adequate. Thereupon, Congress, by the Amendment of 1910, struck out the proviso and empowered the Commission to establish through routes "whenever deemed by it to be necessary or desirable in the public interest." In transportation, the quality of the service furnished may be as important to the shipper as the rate. The Commission found, in the proceeding under review, that the service of the American, in some instances, had been inadequate; and that in "considering competition, time is not the only important element. Competition tends to make each company improve its general treatment of the public, its practices,

[11] The decision in *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528, 536, upon which the appellants rely, rests upon the peculiar character of the question raised. There the objection upon which the appellee relied was one of venue. The District Court overruled it; and then dismissed the bill on the merits. An objection to venue can be waived at any stage of the proceeding. This Court held that it was waived by failure to take a cross-appeal.

rules, and regulations in regard to its methods of doing business." It found, also, that the "service at common points has improved since the formation of the Southeastern." Its conclusion, that the establishment of the competitive routes was necessary and desirable in the public interest, is not shown to have been unreasonable.

The existence of a competitive route ordinarily implies an option in the shipper. To give him the privilege of directing the routing is a corollary of the establishment of competitive routes. Upon shippers of railroad freight this right was expressly conferred by Congress, in paragraph 8 of § 15, subject only "to such reasonable exceptions and regulations" as the Commission may prescribe. The rights, in this respect, of shippers by express, were not dealt with in terms. The matter was, therefore, left subject to regulation by the Commission under general provisions of the act. Paragraph 3, which empowers the Commission to establish through routes, authorizes it, also, to fix "the terms and conditions under which such through routes shall be operated." Its order that the shipper by express may direct the routing is not unreasonable.[12] As the American has no absolute right to retain traffic which it originates, and as the provision authorizing the shipper to direct the routing is reasonable,

[12] Rule 3 of the express classification, approved by the Commission, provided that the shippers "by designation in writing may route shipments by way of such established routes and transfer points as they may desire." See *In re Express Rates, etc.*, 24 I. C. C. 380, 392, 405; 28 I. C. C. 131. The Commission found that "the American refuses to obey shipper's routing instructions, and disregards rule 3 of the express classification." See *Southeastern Express Co.* v. *American Ry. Express Co.*, 78 I. C. C. 126, 140. The statements and practice of the Commission in the cases relied upon by the American are entirely consistent with this rule. See Annual Report, for 1909, p. 7. Also *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern R. R. Co.*, 20 I. C. C. 486, 490; *In re Express Rates, etc.*, 24 I. C. C. 380, 411.

the order does not violate any of its constitutional rights. We have no occasion to consider any of the other grounds urged in its support.

Reversed.

UNITED STATES *v.* NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY, CLAIMANT.

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

No. 559. Argued April 10, 11, 1924.—Decided June 2, 1924.

1. The purpose of the Food and Drugs Act in forbidding misbranding is to prevent the use of misleading statements as well as those which are false. P. 442.
2. Vinegar made from dried apples by adding water equivalent to that removed in the drying and fermenting the resulting solution, even though it be similar to vinegar produced directly from fresh apple cider and equally wholesome, is not the same thing; and a label describing it as "apple cider vinegar made from selected apples" is misleading to the public, and a misbranding within the meaning of the Food and Drugs Act. P. 443.

289 Fed. 181, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court condemning divers barrels of vinegar under the Food and Drugs Act.

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

Mr. L. C. Spieth, with whom *Mr. John G. White* and *Mr. A. V. Cannon* were on the brief, for respondent.

Mr. Judson Harmon, by leave of Court, filed a brief as *amicus curiae.*

Mr. Wm. W. Armstrong, by leave of Court, filed a brief as *amicus curiae.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case arises under the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. The United States filed information in the District Court for the Northern District of Ohio, Eastern Division, for the condemnation of 95 barrels of vinegar. Every barrel seized was labeled:

"Douglas Packing Company
Excelsior Brand Apple Cider Vinegar made
from Selected Apples
Reduced to 4 Percentum
Rochester, N. Y."

The information alleged that the vinegar was adulterated, in violation of § 7 of the act. It also alleged that the vinegar was made from dried or evaporated apples, and was misbranded in violation of § 8, in that the statements on the label were false and misleading, and in that it was an imitation of and offered for sale under the distinctive name of another article, namely apple cider vinegar.

The Douglas Packing Company appeared as claimant, and by its answer admitted that the vinegar was labeled as alleged, and that evaporated apples had been used in its manufacture. It averred that nevertheless it was pure cider vinegar and denied adulteration and misbranding. A jury was waived, and the case was submitted on the pleadings and an agreed statement of facts. The court found that the charge of adulteration was not sustained, but held that the vinegar was misbranded. Claimant appealed, and the Circuit Court of Appeals reversed the judgment. 289 Fed. 181. Certiorari was allowed. 263 U. S. 695.

The question for decision is whether the vinegar was misbranded.

The substance of the agreed statement of facts may be set forth briefly. Claimant is engaged in the manufacture of food products from evaporated and unevaporated apples. During the apple season, from about September 25 to December 15, it makes apple cider and apple cider vinegar from fresh or unevaporated apples. During the balance of the year, it makes products which it designates as "apple cider" and "apple cider vinegar" from evaporated apples. The most approved process for dehydrating apples is used, and, in applying it, small quantities of sulphur fumes are employed to prevent rot, fermentation, and consequent discoloration. The principal result of dehydration is the removal of about 80 per cent. of the water. Whether, and to what extent, any other constituents of the apple are removed is not beyond controversy; in the present state of chemical science, no accepted test or method of analysis is provided for the making of such determination. Only mature fruit, free from rot and ferment, can be used economically and advantageously.

In manufacturing, claimant places in a receptacle a quantity of evaporated apples to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A heavy weight is placed on top of the apples and a stream of water is introduced at the top of the receptacle through a pipe and is applied until the liquid, released through a vent at the bottom, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent. The liquid is then subjected to alcoholic and subsequent

acetic fermentation in the same manner as that followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples. Claimant employs the same receptacles, equipment and process of manufacturing for evaporated as for unevaporated apples, except that in the case of evaporated apples, pure water is added as above described, and in the process of fining and filtration, an additional chemical is used to precipitate any sulphur compounds present and resulting from dehydration.

The resulting liquid, upon chemical analysis, gives results similar to those obtained from an analysis of apple cider made from unevaporated apples, except that it contains a trace of barium incident to the process of manufacture. Vinegar so made is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by libellant that this trace of barium renders it deleterious or injurious to health. It was conceded that the vinegar involved in these proceedings was vinegar made from dried or evaporated apples by substantially the process above described. There is no claim by the libellant that the vinegar was inferior to that made from fresh or unevaporated apples.

Since 1906, claimant has sold throughout the United States its product manufactured from unevaporated as well as from evaporated apples as "apple cider" and "apple cider vinegar", selling its vinegar under the brand above quoted, or under the brand "Sun Bright Brand apple cider vinegar made from selected apples". Its output of vinegar is about 100,000 barrels a year. Before and since the passage of the Food and Drugs Act, vinegar in large quantities, and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as "apple cider vinegar" and "apple

cider," respectively, by many manufacturers. Claimant, in manufacturing and selling such products so labeled, acted in good faith. The Department of Agriculture has never sanctioned this labeling, and its attitude with reference thereto is evidenced by the definition of "apple cider vinegar" set forth in Circulars 13, 17, 19 and 136, and Food Inspection Decision 140.[1] It is stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar."

Section 6 of the act provides that, " . . . The term 'food', as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." Section 8 provides, "That the term 'misbranded', as used herein, shall apply to all . . . articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, . . . That for the purposes of this Act an article shall also be deemed to be misbranded: . . . In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. Second. If it be labeled or branded so as to deceive or mislead the purchaser, . . . Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular. . . ."

The statute is plain and direct. Its comprehensive terms condemn every statement, design and device which

[1] The definition referred to is, "Vinegar, cider vinegar, apple vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples. . . ."

may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is. *United States* v. *Schider,* 246 U. S. 519, 522; *United States* v. *Lexington Mill Co.,* 232 U. S. 399, 409; *United States* v. *Antikamnia Co.,* 231 U. S. 654, 665.

The vinegar made from dried apples was not the same as that which would have been produced from the apples without dehydration. The dehydration took from them about 80 per cent. of their water content,—an amount in excess of two-thirds of the total of their constituent elements. The substance removed was a part of their juice from which cider and vinegar would have been made if the apples had been used in their natural state. That element was not replaced. The substance extracted from dried apples is different from the pressed out juice of apples. Samples of cider fermented and unfermented made from fresh and evaporated apples, and vinegar made from both kinds of cider were submitted to and examined by the District Judge who tried the case. He found that there were slight differences in appearance and taste, but that all had the appearance and taste of cider and vinegar. While the vinegar in question made from dried apples was like or similar to that which would have been produced by the use of fresh apples, it was not the identical product. The added water, constituting an element amounting to more than one-half of the total of all in-

gredients of the vinegar, never was a constituent element or part of the apples. The use of dried apples necessarily results in a different product.

If an article is not the identical thing that the brand indicates it to be, it is misbranded. The vinegar in question was not the identical thing that the statement "Excelsior Brand Apple Cider Vinegar made from selected apples", indicated it to be. These words are to be considered in view of the admitted facts and others of which the court may take judicial notice. The words "Excelsior Brand", calculated to give the impression of superiority, may be put to one side as not liable to mislead. But the words, "apple cider vinegar made from selected apples" are misleading. Apple cider vinegar is made from apple cider. Cider is the expressed juice of apples and is so popularly and generally known. See *Eureka Vinegar Co.* v. *Gazette Printing Co.*, 35 Fed. 570; *Hildick Apple Juice Co.* v. *Williams*, 269 Fed. 184; *Monroe Cider Vinegar & Fruit Co.* v. *Riordan*, 280 Fed. 624, 626; *Sterling Cider Co.* v. *Casey*, 285 Fed. 885; affirmed 294 Fed. 426. It was stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar". The vinegar in question was not the same as if made from apples without dehydration. The name "apple cider vinegar" included in the brand did not represent the article to be what it really was; and, in effect, did represent it to be what it was not,—vinegar made from fresh or unevaporated apples. The words "made from selected apples" indicate that the apples used were chosen with special regard to their fitness for the purpose of making apple cider vinegar. They give no hint that the vinegar was made from dried apples, or that the larger part of the moisture content of the apples was eliminated and water substituted therefor. As used

on the label, they aid the misrepresentation made by the words "apple cider vinegar".

The misrepresentation was in respect of the vinegar itself, and did not relate to the method of production merely. When considered independently of the product, the method of manufacture is not material. The act requires no disclosure concerning it. And it makes no difference whether vinegar made from dried apples is or is not inferior to apple cider vinegar.

The label was misleading as to the vinegar, its substance and ingredients. The facts admitted sustain the charge of misbranding.

Judgment reversed.

THOMSON SPOT WELDER COMPANY *v.* FORD MOTOR COMPANY.

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

No. 120. Argued December 5, 1923.—Decided June 2, 1924.

1. The question whether an improvement in the arts involved invention or only mechanical skill, is a question of fact. P. 446.
2. The rule in this Court to follow concurrent findings of fact made by the District Court and the Circuit Court of Appeals unless clear error is shown, should not be strictly applied in a case brought here by certiorari to settle a conflict between decisions of two circuit courts of appeals concerning the validity of a patent for an invention. *Id.*
3. Patent No. 1,046,066 issued December 3, 1912, to Thomson Electric Welding Company, assignee of Harmatta, for improvements in electric welding, viz., for the process known as "spot welding", whereby sheets or plates of metal are welded together in spots, in lieu of riveting,—is void for want of patentable invention. P. 448.

281 Fed. 680, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court which held void a patent and dismissed a bill for infringement.

Mr. Frederick P. Fish, with whom *Mr. J. L. Stackpole* and *Mr. H. F. Lyman* were on the brief, for petitioner.

Mr. Melville Church for respondent.

Mr. Justice Sanford delivered the opinion of the Court.

This is a suit in equity brought by the Thomson Spot Welder Company in a Federal District Court in Michigan for the infringement of United States patent No. 1,046,066 for improvements in electric welding, issued December 3, 1912, to the plaintiff's predecessor in title, as assignee, upon an application filed by Johann Harmatta, December 3, 1903. The chief defenses were anticipation, lack of invention, prior public use, and estoppel. The District Court sustained all of these defenses, and dismissed the bill. 268 Fed. 836. The Circuit Court of Appeals—one judge dissenting—held the patent invalid for lack of invention, and, without considering the other defenses, affirmed the decree of the District Court. 281 Fed. 680. On account of a conflict with a prior decision of the Circuit Court of Appeals for the First Circuit, in *Thomson Electric Welding Co.* v. *Barney & Berry,* 227 Fed. 428, in which the patent had been held to be valid, this writ of certiorari was granted. 260 U. S. 718.

In the present case both the District Court and the Circuit Court of Appeals have held that Harmatta's improvement involved merely the exercise of mechanical skill and not invention. The question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention, is one of fact; and in an action at law for infringement is to be left to the determination of the jury. *Keyes* v. *Grant,* 118 U. S. 25, 36, 37; *Holmes* v. *Truman* (C. C. A.), 67 Fed. 542, 543; *Hall* v. *Wiles* (C. C.), 2 Blatchf. 194, 11 Fed. Cas. 280, 283; *Poppen-*

husen v. *Falke* (C. C.), 5 Blatchf. 46, 19 Fed. Cas. 1052, 1054; *Shuter* v. *Davis* (C. C.), 16 Fed. 564, 566; *Blessing* v. *Copper Works* (C. C.), 34 Fed. 753, 754. Ordinarily, therefore, the case would call for the application of the well settled rule that the concurrent findings of the lower courts on questions of fact will be accepted by this Court unless clear error is shown. *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, 402; *United States* v. *State Investment Co.,* 264 U. S. 206, and cases there cited. We think, however, that this rule should not be strictly applied in cases brought here because of a conflict of decision in the different circuit courts of appeal, and have therefore given consideration to the question as to which of the decisions upon this question of fact, in the light of the prior art, is based upon the sounder reasoning. At the outset it is to be noted that in the First Circuit there was not a concurrent finding on the question of patentability; the District Court having found, as did the two courts in the present case, that the patent was invalid for want of invention. 227 Fed. 428, 433.[1]

Welding is the art, practised immemorially, of uniting two pieces of metal in one piece by heating those portions which are to be welded to a temperature at which they become plastic and then pressing them strongly together so as to effect a union; as exemplified by a blacksmith when heating in a forge the two pieces to be welded and hammering them together.

The art of electric welding, which was invented in 1886, was well advanced when Harmatta filed his application, having been disclosed in various prior patents for uniting the abutting ends of metal bars, wires, etc., uniting the over-lapped edges of metal sheets, plates, etc., and other purposes.

[1] The opinion of the District Court is published with that of the Circuit Court of Appeals.

The patent in suit relates to that branch of electric welding known as spot welding, by which two sheets or plates are welded together face to face, in spots, as a substitute for riveting; this being accomplished by placing the two sheets between two pointed electrodes applied to their exterior surfaces, opposite to one another, which heat the sheets to the welding temperature and exert the required pressure in the line between the points of the electrodes, resulting in welding together the inside faces of the sheets in the spot on that line.

The reasons for which the petitioner claims that this improvement is patentable are thus summarized in its brief: "Harmatta produced a new result, namely a small round weld (a spot weld) uniting two plane sheets of metal at any place in their meeting faces. This was radically new . . . 2. To make this spot weld Harmatta manipulated the articles with which he dealt, namely the sheets, in a new way by indiscriminately superimposing one upon the other and he made his electrodes perform a function, which no electrodes, used in electric welding, had ever before performed. 3. In so doing he carried out a new technical process, that is, the electric current, which generates the welding heat, behaved and operated in an entirely new way, . . . and he applied the welding pressure to a condition, which seemed to make such application impossible."

The opinions of the two District Courts and of the Circuit Court of Appeals for the Sixth Circuit holding that the patent in suit was lacking in invention, are based, in each instance, on a detailed and analytical consideration of the prior art. We take the following extracts from the well considered opinion of the Circuit Court of Appeals:

"The art of electric resistance welding was old and far advanced in 1903, when the Harmatta patent was applied for. Prof. Elihu Thomson . . . was a pioneer in

that art. In 1886 he obtained process and apparatus patents . . . for so-called butt welding, which involved the uniting of the abutting ends of metal wires, bars, etc., by applying heat at the joint and the adjacent surfaces by means of electrodes, and pressing the two pieces together when heated to welding temperature. There was here true resistance welding, with pressure of the parts involved, although the electrode did not exert the welding pressure. In 1889 Thomson obtained a patent . . . for electric riveting, which involved the heating of the rivet when in place by means of a current passed through it by the use of electrodes, under pressure thereon, the effect being not only to swage the rivet and weld it to the adjoining metal, but apparently (when desired) to weld together, in part at least, the portions of the plates immediately adjoining the rivet. In 1891 Thomson obtained a patent . . . for what is called lap-welding. While the specification states that the invention is specially adapted to the welding of the overlapped edges of plates, it . . . expressly includes 'welding together strips, sheets, plates, or bars of metal where it is desirable to form a joint of considerable length.' According to the specification, 'the surfaces to be welded are pressed together to form a union,' the work being fed in the longitudinal direction of the joint 'through suitable pressure devices (preferably roller electrodes), the work being properly arranged, so that the pressure devices will press the surfaces to be welded together and simultaneously passing the electric current through the work *at the point of pressure.*' The electrodes were employed to exert the welding pressure. The specification further states that 'as the work is passed through such rolls with a continuous motion *each point,* as it comes between the rolls, is heated and the surfaces pressed together.' . . . In 1893 Thomson obtained a patent . . . relating particularly to soldering sheet metal pieces flatwise, either

by the use of solder or (when applied to tin plates) by melting the tin sufficiently to establish union thereby. The electrodes, in the form of clamps or otherwise, served not only to supply the necessary heat, but to exert sufficient pressure upon the overlapped sheets to effect their union. A roller electrode is disclosed, performing the double function of heating and pressing, and having its periphery corrugated or grooved . . . This was, to say the least, electric resistance spot soldering. In 1897 Robinson received a patent . . . on so-called projection welding, as specially applied to the welding of a splice bar to the web of a railroad rail, the splice bar having upon its inner face a number of projections which by the application of the heating current are fused, and by pressure made to form welds between the projections on the bar and the fused opposing portions of the rail. Kleinschmidt, in 1898, took out a patent . . . for a similar process, and by methods not essentially unlike those of Robinson.

"Whether or not the Thomson so-called lap-welding invention should be regarded as an absolute anticipation of the Harmatta patent, we think the state of the art to which we have referred left no room for invention in Harmatta. . . . We see no distinction upon principle between plane-face welding and lap-welding; the former certainly embraces the latter. If Thomson's roller electrode device was capable of welding a line or seam in a metal lap joint, it was readily adaptable to line-welding together coterminous plane-face plates. . . . We think Thomson's lap-welding invention was in essence a welding in points. In fact, his line seam was merely a succession of adjoining points. . . . It satisfactorily appears that, although Thomson's roller electrodes in the form shown in the patent were not practicably adapted to commercial spot-welding as disclosed by the Harmatta patent, they could readily be made to do such spot-

welding by the use of suitable projections upon the face of the rolls (Thomson later did spot-soldering by the use of such projections); and assuming that pin electrodes were essential to successful commercial spot-welding, that form of electrodes was old, as illustrated by Thomson's electric soldering patent. . . . In our opinion the art of soldering is analogous to that of welding. . . . By the use of enough more heat Thomson's soldering device could readily have effected spot-welding. . . . No essential difference in principle between heating at points and heating in spots is apparent. Projection welding partakes, though not in so pronounced a sense, of the nature of spot-welding. . . . We agree with Judge Dodge [227 Fed. 428] that Harmatta's idea of 'making his electric welds small in area rather than large in comparison with the areas of the opposed surface to be joined and isolating them, so as to leave each surrounded by a comparatively large area of unwelded surface,' does not involve invention in view of the prior art. In other words, given the desire for a welding in spots, naturally enough suggested by the prior art and by its commercial development, we think Harmatta's specific application of the principles of that prior art involved only the skill of the expert mechanic. Not only every principle, but every electric and mechanical process, involved in the Harmatta claims, was well known in the prior or directly analogous arts, or in mechanical arts generally. We cannot think, in view of the prior art, that invention is to be found in the considerations, separately or collectively, that in Harmatta no bodily movement of the sheets is required, that the current is localized and pressure exerted solely by the electrodes, or by the difference in the form of the electrodes, or by the difference in amount of extruded metal, as compared with some of the earlier applications of resistance welding. Although invention is not necessarily negatived by the fact that each element of the

combination is old, the question of fact whether the combination itself involves invention in view of the prior art is always present.

"Our conclusion of noninvention, based upon a review of the prior art, is materially strengthened by the serious doubt whether Harmatta thought, when he filed his patent application, that he had patentably invented anything by the disclosure of spot-welding, as a process or product distinct from point-welding or line-welding, as well as by the fact that others previous to the grant to Harmatta, and apparently in ignorance of Harmatta's claimed invention, successfully practiced the art of spot-welding. . . .

"The patent issued nine years after the application was filed, and after numerous vicissitudes and amendments (including the entire elimination of the roller-electrode feature), and after the application had been placed in interference with the claims of Adolph Rietzel, to whom a patent had previously been issued on July 20, 1909. . . . From the beginning Rietzel's application was owned by plaintiff's predecessor. The interference was declared in favor of Harmatta, for Rietzel's failure, as the junior party to the interference, to take testimony in support of his claim of priority; plaintiff's predecessor at the time owning both the Harmatta application and the Rietzel patent.[2] . . . But the fact that the award of priority was not based upon an adjudication on the merits tends to weaken its force. It, however, convincingly appears . . . that in 1898 (and about five years before Harmatta's application) Rietzel, while in the employ of plaintiff's predecessor, in several instances successfully joined two pieces of lapped metal at isolated spots by means of a Thomson butt-welding machine; the

[2] The proceedings in the Patent Office are set forth at length in the opinion of the District Court (pp. 855 *et seq.*).

sheets of metal being united by pressing them together and at the same time passing the heating current from one electrode (or so-called contact) to the opposite electrode, at the selected spot on the meeting surface of the plates, the spots being restricted in area, so as to leave well-defined and comparatively extensive areas of no-union completely surrounding the spots—one of the electrodes or contacts used being of standard size and form, the other being reduced by cutting down to a diameter of about three-eighths of an inch. . . . Rietzel's experience strongly discredits inventive quality in what Harmatta did several years later, including his disclosure of the use of pin-electrodes. The fact also appears . . . that at various times, ranging from two years to five or six years, before the issue of the Harmatta patent, and apparently in ignorance of his asserted invention, various manufacturers put out or used spot-welding machines with commercial success. . . . These experiences also tend to discredit invention in Harmatta. It follows, in our opinion, from what has been said, that the effect of the great commercial success of the Harmatta invention in the hands of plaintiff is entitled to little weight upon the question of the invention, even were that question otherwise in doubt, which we think it is not." (pp. 682 *et seq.*).

The opinion of the Circuit Court of Appeals for the First Circuit, on the other hand, contains only general allusions to the prior art and no analysis of the prior patents. While, in considering the defense of anticipation, it is said that the soldering art was remote, the only statement in the opinion bearing directly upon the defense of want of invention, is that "in view of the further proposition that the presumptions in favor of the patent are so far supported in this case by the insistency of the defense, and the comparatively enormous expense involved in maintaining it, we cannot question the present

validity of the patent with reference to all propositions involved in the word 'patentability'". (p. 436.)

The conclusion of fact reached by the Circuit Court of Appeals for the Sixth Circuit, as set forth in its opinion, that in the light of the prior art Harmatta's improvement was lacking in invention, commends itself to our judgment. It involves no error in law. Therefore, without considering the other defenses presented, the decree of that court is

Affirmed.

UNITED STATES & CUBAN ALLIED WORKS ENGINEERING CORPORATION *v.* LLOYDS, A CORPORATION, AS TREASURER OF LLOYDS UNDERWRITERS SYNDICATE NO. 601, ET AL.

ON TRANSFER FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 940. Motion to dismiss or remand submitted May 26, 1924.—Decided June 9, 1924.

A case cannot be transferred to this Court from the Circuit Court of Appeals, under the Transfer Act of September 14, 1922, if the writ of error from that court was sued out after the expiration of the period allowed by the Act of September 6, 1916, for applying to this Court for process to review the judgment of the District Court. *McMillan Co.* v. *Abernathy*, 263 U. S. 438. P. 456.

Case remanded to Circuit Court of Appeals.

A JUDGMENT of the District Court, quashing the service of summons in an action on a marine insurance policy, was taken by writ of error to the Circuit Court of Appeals, which, believing itself without jurisdiction, ordered the case transferred to this Court.

Mr. Herbert Barry and *Mr. Archibald G. Thacher*, for defendants in error, in support of the motion to dismiss or remand.

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

Averring that it was the owner of a floating dry dock at Havana, Cuba, which had sunk and become a total loss, plaintiff in error, a Delaware corporation, filed its bill of complaint in the District Court of the United States for the Southern District of New York to recover upon a policy of marine insurance covering the dock. The policy was alleged to have been issued by certain enumerated Lloyds Underwriters Syndicates, each transacting business as an unincorporated association of more than seven persons under the name and style of Lloyds Underwriters, Lloyds, Lloyds London, or Underwriting Members of Lloyds. The service of process was made upon one Fowler, agent in New York City for Lloyds, a corporation alleged to be the treasurer, or acting as the treasurer, for each of the underwriting associations. The corporation Lloyds, appearing specially, moved to quash the service on the grounds that the policy sued upon constituted the separate and not joint contracts of the individual underwriters who had signed the same; that Lloyds was not the treasurer or acting in the capacity of treasurer for the underwriters upon said policy or for any association or associations of underwriters, and that the service on Fowler, as its agent, was therefore null and void. Plaintiff challenged these assertions and urged that the service in question was valid under the provisions of a New York statute authorizing service to be made upon unincorporated associations consisting of more than seven persons by delivery of process to the president or treasurer of the association or upon the person acting in such capacity.

The District Court, being of opinion that defendant's objections were well taken, made and signed an order on April 10, 1923, quashing the service as of no effect. More

than three months thereafter, to wit, on October 11, 1923, plaintiff was allowed a writ of error from the Circuit Court of Appeals to review said order. When the writ of error came on for hearing in the Court of Appeals, that court held that it was without jurisdiction to entertain it as the sole question presented by the record concerned the jurisdiction of the District Court and review could be had only in this Court. It accordingly ordered the case transferred to this Court pursuant to the Act of September 14, 1922, c. 305, 42 Stat. 837, which provides that where on appeal or writ of error a case is taken from a district court to the wrong appellate court, that is, to a circuit court of appeals, when it should have been taken directly to this Court, or to this Court when it should have been taken to a circuit court of appeals, the appeal or writ of error shall not for that reason be dismissed but shall be transferred to the proper court, which shall thereupon proceed with the case as though review had originally been sought in that court.

Appellee now moves in this Court to dismiss the writ of error, or in the alternative to remand the cause to the Circuit Court of Appeals, because the writ was not sued out until after the expiration of the three months' period following entry of the judgment or decree complained of within which, under § 6 of the Act of September 6, 1916, c. 448, 39 Stat. 726, 727, a writ of error, appeal, or writ of certiorari must be applied for to give this Court jurisdiction to entertain it. In support of its motion, appellee relies upon the recent decision of this Court in *McMillan Co.* v. *Abernathy,* 263 U. S. 438, wherein it was said (p. 443):

"We do not think the Act of 1922 applies to any case in which the appeal to the Circuit Court of Appeals is taken after the period for appeals to this Court has expired. Otherwise the act will enable one who negligently allowed his right of appeal to this Court to go by,

to take his appeal to the Circuit Court of Appeals and by transfer get into this Court, and thus lengthen the time for direct appeals to this Court from three to six months. This result we can not assume Congress intended."

In view of this ruling, it is obvious that the failure in the present case to sue out the writ of error until after the expiration of three months from the entry of the District Court's order deprives this Court of jurisdiction to entertain the writ, and that the transfer of the case from the Circuit Court of Appeals to this Court was without sanction in the Act of 1922. We can only send the case back to the Circuit Court of Appeals for its disposition.

The motion to dismiss is therefore denied, and the cause is remanded to the Circuit Court of Appeals.

UNITED LEATHER WORKERS INTERNATIONAL UNION, LOCAL LODGE OR UNION NO. 66, ET AL. *v.* HERKERT & MEISEL TRUNK COMPANY ET AL.

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

No. 233. Argued April 24, 25, 1924.—Decided June 9, 1924.

1. A strike by employees, intended to prevent through illegal picketing and intimidation of workers the continued manufacture of goods by their employer and having that effect, is not a conspiracy to restrain interstate commerce, within the Anti-Trust Act, even though the strikers know that the products when made are to be shipped in interstate commerce to fill orders already received and accepted from the employer's customers in other States; provided there be no actual or attempted interference with the free transport of the products, when manufactured, from the factory to their destination in other States, or with their sale in those States. *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344. P. 464.

2. The mere reduction of the supply of an article to be shipped in interstate commerce, by illegal and tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce; it is only when the intent or the necessary effect is to enable those preventing the manufacture to monopolize the supply, control prices, or discriminate as between would-be purchasers, that the unlawful interference can be said directly to burden interstate commerce. P. 471.

284 Fed. 446, reversed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a final decree of the District Court, granting an injunction in a suit by divers manufacturers of trunks and leather goods against striking employees and labor unions.

Mr. John P. Leahy for appellants.

Mr. Charles A. Houts and *Mr. Mat J. Holland,* with whom *Mr. Walter Gordon Merritt* was on the briefs, for appellees.

The formation of this conspiracy, and the acts done in pursuance thereof, were violative of the Anti-Trust Act, because a direct restraint was intended and placed upon the interstate business of the plaintiffs.

To accomplish this destruction the defendants had a choice of means available. They could have boycotted plaintiffs' goods in the hands of their customers. This would have been more difficult and less effective. Or they could have attempted to prevent the transfer companies from hauling plaintiffs' goods to the railroads for shipment. This they were probably not strong enough to do, and besides, such a course would have brought them into more certain conflict with the police. Or they could do, as they did do, assault and abuse those who desired to continue at work, and those who sought employment with plaintiffs, and thereby prevent plaintiffs' factories from operating. This latter was the easiest, safest and

most certain method of destroying plaintiffs' business. It was completely successful.

The evidence conclusively established the existence of the conspiracy to destroy plaintiffs' interstate business, and the unlawful means charged. Two courts have so found. See *Washington Securities Co.* v. *United States,* 234 U. S. 76.

Is a conspiracy to destroy an established interstate business, by preventing the manufacture of goods which are being sold and shipped in such interstate business, prohibited by the Sherman Act?

In *Eastern States Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600, this Court said: "It [the Sherman Act] broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce."

The purpose of § 1 of the act was to prevent any direct and unreasonable interference with interstate commerce. It condemns any plan, scheme or device, adopted as a part of a combination or conspiracy which has that effect. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Northern Securities Co.* v. *United States,* 193 U. S. 197; *United States* v. *Reading Co.,* 226 U. S. 324.

The deduction to be made from these cases is that the Sherman Act will reach any act, however remote (standing alone) it may be from interstate commerce, if it is made an effective part of a combination to restrict such commerce.

The pertinency of these cases is made to appear when the reasoning of the appellants in this case is kept in mind. Their reasoning may be roughly stated thus:

The Sherman Act deals only with interstate commerce. Manufacture is not interstate commerce. Therefore, the Sherman Act is not concerned with the stoppage of manufacture. With equal propriety might the defendants in the *Northern Securities Co. Case* have reasoned: The

Sherman Act deals only with interstate commerce. The purchase of shares of stock of interstate railroads is not commerce. Therefore, the Sherman Act has no concern with such purchase.

The comprehensiveness of the Sherman Act is no longer a question. It forbids any means by which a combination or a conspiracy may seek to restrict interstate commerce. If stoppage of manufacture is resorted to as such a means, the act prohibits it. *Pennsylvania Sugar Refg. Co.* v. *American Sugar Refg. Co.,* 166 Fed. 254; *American Column Co.* v. *United States,* 257 U. S. 377; *Loewe* v. *Lawlor,* 208 U. S. 274; *United States* v. *Workingmen's Council,* 54 Fed. 994; *United States* v. *Elliott,* 62 Fed. 801; *Thomas* v. *Railway,* 62 Fed. 803; *United States* v. *Debs,* 64 Fed. 724.

In *Loewe* v. *Lawlor,* 208 U. S. 274, the boycott was directed at the manufacturers' goods after transportation had ended and the hats had lost their status as a part of interstate commerce. They were boycotted as a means of destroying the interstate business of the manufacturers. The means employed operated at one end, after transportation ceased. In this case they operated at the other end, before transportation commenced. The purpose in each case was identical.

See *Duplex Co.* v. *Deering,* 254 U. S. 443; *Stafford* v. *Wallace,* 258 U. S. 495; *United States* v. *Ferger,* 250 U. S. 199; *Lamar* v. *United States,* 260 Fed. 561; s. c. 250 U. S. 673.

The conspiracy in *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344, was between the union coal operators and the International Union to restrain interstate commerce in coal and to monopolize it. As pointed out by Judge Sanborn, in the court below, the conspiracy alleged and proved in the present case is entirely different from that involved in the *Coronado Case.*

In *Hammer* v. *Dagenhart,* 247 U. S. 251, the restrictions placed on the manufacture of the goods had absolutely

no effect upon the goods themselves or upon the commerce into which they flowed, and the sole purpose of the act was to regulate the employment of children within the State.

In the present case the restraint imposed was not negligible; it was complete as to all commerce flowing from St. Louis in this particular line. It was not an indirect and incidental restraint on interstate commerce. The conspiracy charged was one to destroy this interstate business. The destruction of this business was the direct object of the conspiracy. Both the District Court and the Court of Appeals have so found. Such being its object, it cannot be said that the restraint was incidental. The stoppage of plaintiffs' interstate commerce by the means employed in this case was just as effectively a restraint upon interstate commerce, and just as violative of the Sherman Act, as would be the act of plaintiffs' competitors in Chicago, for instance, should they, for the purpose of destroying competition, purchase the stock of the plaintiff companies and by their control, thus secured, stop the manufacture of all goods in plaintiffs' factories.

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

This suit was begun by a bill in equity filed in the District Court for the Eastern District of Missouri by the Herkert & Meisel Trunk Company and four others, all corporations of Missouri, engaged in making trunks and leather goods in St. Louis, against the United Leather Workers Union, Local Lodge or Union No. 66, an unincorporated association, its officers and agents and a number of its members. The bill averred that each of the complainants had built up a valuable business in making, selling and shipping in interstate commerce trunks and leather goods, that each received large quantities of raw material by interstate commerce, and employed a large

number of persons, men and girls, that on February 28, 1920, defendants demanded that their shops be unionized and conducted as closed shops and announced that if complainants refused they would ruin the interstate commerce business of each of them, that on April 10, 1920, the defendants, acting individually and on behalf of the defendant union, in order to destroy the complainants' business and to prevent their employees from continuing in their employment unless complainants would yield to their demands, began a strike, assaulted and threatened complainants' employees, and intimidated them so as to force them against their wills to quit complainants' employment, and that they thereby prevented complainants from engaging in and carrying on their interstate business and interfered with and obstructed them in the manufacture and shipment of the products of their factories sold to be shipped in interstate commerce. The bill charged that defendants were carrying out their illegal conspiracy and purposes by mass picketing and intimidation, that the interference with complainants' interstate commerce was intentional and malicious and was intended to destroy it, that it was in violation of the Anti-Trust Law and the Clayton Act, and that they had already inflicted, and unless restrained would continue to inflict, irreparable injury upon such business. The bill shows that each complainant's damage threatened exceeded three thousand dollars. The prayer was for a temporary and then a final injunction to prevent the intimidation, illegal picketing and other interference with complainants' manufacturing and interstate business and with their employees or would-be employees engaged in carrying it on. Certain of the defendants answered the bill and denied the picketing, intimidation, and violence and the purpose to interfere with complainants' interstate business as charged, and averred that they and the fellow members of the Union had lawfully quit the employment of complainants

because they could not agree upon the terms of a new agreement. The District Court upon preliminary hearing granted a temporary injunction and upon final hearing granted a final decree enjoining defendants as prayed. The case was taken on appeal to the Circuit Court of Appeals where the decree of the District Court was affirmed, one Judge dissenting. 284 Fed. 446. The cause now comes before us on appeal under § 241, Judicial Code.

The evidence adduced before the District Court showed that the defendant, the Local Union No. 66 of the United Leather Workers, having declared a strike against the complainants and withdrawn its members from their employ, instituted an illegal picketing campaign of intimidation against their employees who were willing to remain and against others willing to take the places of the striking employees, that the effect of this campaign was to prevent the complainants from continuing to manufacture their goods needed to fill the orders they had received from regular customers and would-be purchasers in other States, that such orders covered ninety per cent. of all goods manufactured by complainants, that the character of their business was known to the defendants, and that the illegal strike campaign of defendants thus interfered with and obstructed complainants' interstate commerce business to their great loss. There was no evidence whatever to show that complainants were obstructed by the strike or the strikers in shipping to other States the products they had ready to ship or in their receipt of materials from other States needed to make their goods. While the bill averred that defendants had instituted a boycott against complainants and were prosecuting the same by illegal methods, there was no evidence whatever that any attempt was made to boycott the sale of the complainants' products in other States or anywhere or to interfere with their interstate shipments of goods ready to ship.

The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the Anti-Trust Act because such products when made were, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other States, in the absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products when manufactured from the factories to their destination in other States, or with their sale in those States.

We think that this question has already been answered in the negative by this Court. In *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, a coal mining company in Arkansas changed its arrangement with its employees from a closed shop to an open shop. The local union resented the change and the avowed purpose of the company to protect non-union employees by armed guards. Violence, murder and arson were resorted to by the union. Seventy-five per cent. of the output of the mine was to be shipped out of the State and a car of coal prepared for interstate shipment was destroyed by the mob of strikers and their sympathizers. It was contended that, as the result of the conspiracy was to reduce the interstate shipment of coal from the mines by 5,000 tons or more a week, this conspiracy was directed against interstate commerce, and triple damages for the injury inflicted could be recovered under the Federal Anti-Trust Law. But this Court held otherwise and reversed a judgment for a large amount on the ground that the evidence did not disclose a conspiracy against interstate commerce, justifying recovery under the law. The language of the Court was (p. 407):

"Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer* v. *Dagenhart,* 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce." The same rule was followed in *Gable* v. *Vonnegut Machinery Co.,* 274 Fed. 66, 73, 74.

The same general principles are affirmed in *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129, 136; *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 151; *McCluskey* v. *Marysville Ry. Co.,* 243 U. S. 36, 38; *Diamond Glue Co.* v. *U. S. Glue Co.,* 187 U. S. 611, 616; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 245; *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 12, 13; *Kidd* v. *Pearson,* 128 U. S. 1, 20, 21; *Coe* v. *Errol,* 116 U. S. 517, 528.

The Circuit Court of Appeals seems first to have based its conclusion on cases like *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Brennan* v. *Titusville,* 153 U. S. 289; and *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 497. These dealt directly with the sale of goods in interstate commerce. They were cases of state taxation upon the solicitation and acceptance of orders of goods to be sent from one State to another. The subject matter taxed was contracts of sale proposed or made for deliveries of goods in interstate commerce. It is a far cry from such cases to a strike to induce the employers to make better terms with their employees when no interference with the transportation or

future sale of the goods by the strikers is attempted or shown.

The Circuit Court of Appeals found further justification for its conclusion in cases like *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, and *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50. They present the practical conception of interstate commerce elaborated in *Swift & Co.* v. *United States,* 196 U. S. 375, hereafter to be discussed, as a flowing stream created by a course of business to be protected against State invasion, but it must be a real and direct invasion and not something incidental or remote. Thus in the *Pipe Line Company* and *Gas Company Cases,* the State of West Virginia sought to tax a stream of oil and gas flowing constantly through the State and out of it. It was held that the mere power of those who directed the stream to divert it from interstate commerce when as a course of business it was constantly interstate with only incidental and minor diversions to intrastate commerce, did not expose to the taxing power of the State that part of the flow which crossed state lines. The burden and invasion of interstate commerce was direct. In the *Bondurant Case,* a Tennessee Milling Company bought a crop of grain in Kentucky, to be delivered on board the cars in Kentucky for shipment to Tennessee in accord with a course of business between the parties. It was held that an effort by the State of Kentucky to require a license of the Tennessee Company before it could buy and ship grain from Kentucky to Tennessee was a burden on, and invasion of, interstate commerce even though the Milling Company might have stopped the grain in Kentucky contrary to the usual course.

In *Lemke* v. *Farmers Grain Co.,* a state law of North Dakota subjected the purchase price of all grain flowing in a regular course of business from that State to the

market in Minneapolis, Minnesota, to a North Dakota inspector who was required to fix the price and determine thereby the profit the buyer should make after paying the freight to Minneapolis at the market price in that city. This was held to be a direct burden and restraint upon the interstate commerce in the grain from one State to the other. It was a direct limitation on that commerce.

None of these cases, although they all illustrate the practical conception of interstate commerce as a flowing stream from one State to another formed by a regular course of business, can properly be said to support the argument that mere intentional cutting down of manufacture or production is a direct restraint of commerce in the product intended to be shipped when ready, or to be any departure from the general rule last announced in the *Coronado Case* and uniformly applied in all the cases referred to above, which it followed. The effect upon interstate commerce in the four cases just cited on the other hand was directly burdensome and restraining.

Then the Circuit Court of Appeals found sustaining precedent in *Swift & Co.* v. *United States,* 196 U. S. 375. In that case the defendants were charged with a conspiracy to monopolize interstate commerce in cattle, step by step from the purchase of them on the western plains, in the transportation of them by the railroads through to the stockyards at Chicago, their sale and distribution there, their slaughter and preparation as meats in the packing houses of that city and their distribution and sale in the East. This Court held that such a conspiracy was a violation of the Federal Anti-Trust Law because it was an intended obstruction to the flow of interstate commerce which Congress in the Anti-Trust Law intended to keep free and untrammeled. It held that the intent to monopolize and restrain the stream of interstate commerce

and the probability that by such methods and steps as were attempted the purpose of the conspiracy could be effected, brought the whole machinery of the conspiracy within the federal jurisdiction. The case rested wholly on the probably effective intent of the conspirators directed against interstate commerce.

The case of the *Addyston Pipe Co.* v. *United States,* 175 U. S. 211, was an agreement between those who made and sold iron pipe in different States to fix prices as between themselves and not sell and deliver pipe from their foundries across state lines in competition with each other. Their intent and ability to control prices and prevent the public from having the benefit of competition in interstate trade brought them within the Federal Anti-Trust Act.

So in the case of *Montague & Co.* v. *Lowry,* 193 U. S. 38, manufacturers in eastern States of tiles and grates agreed with manufacturers and dealers in California not to sell tiles and grates to local dealers who would not agree to keep up prices. The intent to control commerce between the eastern States and local dealers in California, and thus to maintain prices, was held to constitute a conspiracy in restraint of interstate commerce.

On the other hand, *Hopkins* v. *United States,* 171 U. S. 578, *Anderson* v. *United States,* 171 U. S. 604, and *United States* v. *E. C. Knight Co.,* 156 U. S. 1, were held not to come within the Federal Anti-Trust Law because the facts of those cases were not thought to reveal the probably effective intent directly to compass the restraint on interstate commerce.

The *Knight Case* has been looked upon by many as qualified by subsequent decisions of this Court. The case is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to

control its making. As intimated in the *Swift Case* (196 U. S. 397), the *Knight Case* was very near the line. See also the distinction pointed out by the Circuit Court of Appeals in *Pennsylvania Sugar Refg. Co.* v. *American Sugar Refg. Co.*, 166 Fed. 254, 256, between that case and the *Knight Case*. The *Knight Case* emphasizes the difference between manufacture and interstate commerce. But the *Knight Case* was a far stronger case for federal jurisdiction under the Anti-Trust Law, because of the probable relation between the monopoly of manufacture and sale in interstate commerce, than the case at bar, in which there is present no element of intended and probable monopoly or discrimination in interstate commerce. The same element was lacking in the *Coronado Case*.

In *Loewe* v. *Lawlor*, 208 U. S. 274, and in *Duplex Co.* v. *Deering*, 254 U. S. 443, members of labor unions having a controversy with their employers sought to embarrass the sales by their employers of the product of their manufacture in other States by boycott and otherwise. They were held guilty of a conspiracy against interstate commerce because of their palpable intent to achieve their purpose by direct obstruction of that commerce.

The cases of *Stafford* v. *Wallace*, 258 U. S. 495, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, are also supposed in some way to sustain the view that a strike against the manufacture of commodities intended to be shipped in interstate commerce is a conspiracy against that commerce. What those cases decided was that when Congress found from investigation that more or less constant abusive practices and a course of business, usually only within state police cognizance, threatened to obstruct or unduly to burden the freedom of interstate commerce, it could by law institute supervision of such course of business in order to prevent the abuses having such effect. As said in *Stafford* v. *Wallace* (p. 520):

"The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint."

In *United States* v. *Patten,* 226 U. S. 525, 543, running a corner in the available supply of a staple commodity, normally the subject of interstate commerce, in order to enhance its price artificially in the whole country, although the corner was carried on only in New York by sale of cotton futures, was held to be a monopoly of interstate commerce in violation of the Federal Anti-Trust Act. It was the intent to monopolize such commerce and its probability of success which sustained the indictment.

In the *Coronado Case, supra,* (p. 410), this Court referred to the *Patten Case* and the difference between that and the *Coronado Case* as follows:

"The difference between the *Patten Case* and that of *Ware & Leland* v. *Mobile County,* 209 U. S. 405, illustrates a distinction to be drawn in cases which do not involve interstate commerce intrinsically but which may or may not be regarded as affecting interstate commerce so directly as to be within the federal regulatory power. In the *Ware & Leland Case,* the question was whether a State could tax the business of a broker dealing in contracts for the future delivery of cotton where there was no obligation to ship from one State to another. The tax was sustained and dealing in cotton futures was held not to be interstate commerce, and yet thereafter such dealings in cotton futures as were alleged in the *Patten Case* where they were part of a conspiracy to bring the entire cotton trade within its influence, were held to be in restraint of

interstate commerce. And so in the case at bar, coal mining is not interstate commerce and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred."

This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce.

The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product.

We concur with the dissenting Judge in the Circuit Court of Appeals when, in speaking of the conclusion of the majority, he said: "The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce." (284 Fed. 446, 464.)

We can not think that Congress intended any such result in the enactment of the Anti-Trust Act or that the decisions of this Court warrant such construction.

Decree reversed.

MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE BUTLER, dissent.

UNITED STATES *v.* TITLE INSURANCE & TRUST COMPANY ET AL.

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

No. 358. Argued February 28, 1924.—Decided June 9, 1924.

1. Where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter dictum,* but each is the judgment of the court, and of equal validity. P. 486.
2. A long-standing decision of a doubtful question, which has become a rule of property affecting many land titles, should not be disturbed. *Id.*
3. The United States sued to establish a perpetual right of Mission Indians to use, occupy and enjoy part of a confirmed Mexican land grant in California, claiming that the right originated before the grant was made, and had been asserted by open, notorious and adverse occupancy ever since. The grant had long before been confirmed, and patented by the United States to defendants' predecessors, under the Act of March 3, 1851, c. 41, 9 Stat. 631, which provided for adjudication of private land claims by a commission, with review by the District Court and this Court, and declared that claims not presented to the commission within two years should be deemed abandoned and that patents issued on confirmed claims should be conclusive between the United States and the claimants but should not "affect the interests of third persons." The claim of the Indians was never presented to the commission by them or by the United States on their behalf. *Held,* on the authority of *Barker* v. *Harvey,* 181 U. S. 481, that the claim of the Indians was abandoned. *Id.*

288 Fed. 821, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a bill to quiet title brought by the United States on behalf of certain Indians.

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

At the time when California passed under the sovereignty of the United States, the Tejon Indians possessed, under Spanish and Mexican law, an undisputed right and title of possession and use of the land actually occupied by them, being the Indian tract described in the complaint. Recopilacion de las Indias, Bk. 4, Tit. 12, Laws 5, 7, 9, 14, 18; Bk. 6, Tit. 3, Law 9; Hall, Mexican Law, §§ 36, 38, 40, 45, 49, 165; 2 White's New Recopilacion, pp. 50, 52, 242.

All these Spanish laws survived as a portion of the fundamental law of the Mexican Republic. Hall, Mexican Law, §§ 85, 159; Rockwell, Spanish and Mexican Law, pp. 17, 18; *American Ins. Co.* v. *Canter,* 1 Pet. 511; *Mitchel* v. *United States,* 9 Pet. 711; *Chouteau* v. *Molony,* 16 How. 203; *Johnson* v. *McIntosh,* 8 Wheat. 543.

This Indian right was aboriginal, antedated the sovereignty of Spain and Mexico, and was not derived from either, but was recognized and protected by the laws of both. *Holden* v. *Joy,* 17 Wall. 211; *Worcester* v. *Georgia,* 6 Pet. 515.

The Indian title was further acknowledged and fortified in the case at bar, before the transfer of sovereignty, by the special provision for the protection of these Indians, found in the Mexican grant: "They [the grantees] must not interfere with the cultivation and other advantages which the Indians who are found established in said place have always enjoyed." *Chouteau* v. *Molony,* 16 How. 203; *United States* v. *Arredondo,* 6 Pet. 691; *United States* v. *Armijo,* 5 Wall. 444.

By the Treaty of Guadalupe Hidalgo, the United States contracted to preserve and protect all existing rights of property recognized by Mexico, including the foregoing title and right possessed by the Tejon Indians at the date of that treaty. *United States* v. *Auguisola,* 1 Wall. 352; *Knight* v. *United States Land Assn.,* 142 U. S. 161; *United States* v. *Moreno,* 1 Wall. 400; *Beard* v. *Federy,* 3 Wall. 478; *Astiazaran* v. *Santa Rita Mining Co.,* 148 U. S. 80; *Ely's Admr.* v. *United States,* 171 U. S. 220; *Barker* v. *Harvey,* 181 U. S. 481.

This Indian title presented no novelty under American law, because at all times in the history of our jurisprudence the law of the United States was, and still is, practically identical with that of Spain and Mexico in this regard, namely, that Indians have an original right and title of occupancy, possession and use prior to the right or title of Spain, Mexico or the United States, which can be extinguished only by the sovereign, and which, until so extinguished, is as sacred as the sovereign title or the fee title.

The Indian title is both legal and equitable in its nature and has been variously likened to an easement, life estate, trust or use with which the fee is charged. *Johnson* v. *McIntosh,* 8 Wheat. 543; *Marsh* v. *Brooks,* 8 How. 223; *United States* v. *Cook,* 19 Wall. 591; *Buttz* v. *Northern Pacific R. R.,* 119 U. S. 55; *Kennedy* v. *Becker,* 241 U. S. 556.

Further, when the fee passes from the Government into private hands under a general conveyance, it is, for the time being, only a naked fee. The private grantee has the title, but the Indians have the beneficial use until the sovereign, which alone has the power to interfere, extinguishes such use. *Seymour* v. *Freer,* 8 Wall. 202; *Jones* v. *Byrne,* 149 Fed. 457; *Corbin* v. *Holmes,* 154 Fed. 593.

The Indian title is not extinguished by an unconditional grant in fee by the sovereign. *United States* v.

Arredondo, 6 Pet. 691; *Johnson* v. *McIntosh,* 8 Wheat. 543; *United States* v. *Fernandez,* 10 Pet. 303; *Buttz* v. *Northern Pacific R. R.,* 119 U. S. 55.

The Indian title is extinguished only by words or acts distinctly indicating such purpose, of which there have been none in this case on the part of Mexico or the United States; and in the history of the United States, has been abrogated always under some terms of compensation to the Indians. There has been no compensation here.

The Act of March 3, 1851, 9 Stat. 631, not only does not require tribal Indians to appear before the Commission created by that act, there to assert their right to occupancy under penalty of losing it by nonappearance, but distinctly shows a contrary intent. The affirmative action it requires is not by the Indians but by the Commission, which is instructed to investigate that right or title and given power to report thereon but not to adjudicate.

The Act of 1851 contemplated primarily nothing more than the separation of the lands which were owned by individuals from the public domain. *United States* v. *Morillo,* 1 Wall. 706; *United States* v. *Fossat,* 20 How. 413; *Meader* v. *Norton,* 11 Wall. 442; *Thompson* v. *Los Angeles Farming Co.,* 180 U. S. 72; *Botiller* v. *Dominguez,* 130 U. S. 238.

The act did not intend to require tribal Indians to present their occupancy title to the Commission under penalty of its extinguishment.

This Court has specifically held it improper for the holders of titles subordinate to the fee to present their claims to the Commission. *United States* v. *Fossat,* 20 How. 413; *Townsend* v. *Greeley,* 5 Wall. 326.

In view of the ignorant, dependent and helpless state of the Indians and the assumption of the Government toward them of the high obligation of guardian to ward, statutes and treaties are invariably construed liberally in their favor. *Marks* v. *United States,* 161 U. S. 297.

General acts of Congress do not apply to them at all unless so worded as clearly to manifest an intention to include them. *Elk* v. *Wilkins,* 112 U. S. 94; *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733; *United States* v. *Nice,* 241 U. S. 591.

Their rights were within the ample guaranty given by the United States in the Treaty of 1848.

Appellees' theory is that by the Act of 1851 the Government under form of law in effect falsified its pledge by making the preservation of the Indian title conditional upon wild savages, or at best semi-civilized children, becoming aware of the proceedings of Congress; and thereupon within a limited time convening from distances of hundreds of miles, through wild and unsettled country, extensively occupied by suspicious or warring tribes, at San Francisco, and there appearing unaided before a white man's court, and making formal proof in a foreign language according to a prescribed procedure. This is, indeed, " to keep the word of promise to the ear and break it to the hope." It makes Congress cloak the purposeful confiscation of a title it had undertaken to preserve by means of a dishonorable subterfuge.

Statutes must not be so construed as to accuse the United States of bad faith. *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733; *United States* v. *Kirby,* 7 Wall. 482.

Throughout American history the Indian title has never been abrogated inferentially or without compensation.

The presumption is against a departure from a long-established and uniform course of policy. *Morton* v. *Nebraska,* 21 Wall. 660; *United States* v. *Munday,* 222 U. S. 175.

Contemporaneous legislation, both of the United States and the State of California, and subsequent legislation of the United States, support our construction of the Act of 1851 and show that both Nation and State regarded the

Indian possession as an admitted right which not only was not to be inferentially extinguished, but was to be affirmatively protected.

Barker v. *Harvey,* 181 U. S. 481, is distinguishable in fact and in law. (1) It was officially determined by the Mexican authorities that the Indians there involved had voluntarily abandoned their occupancy before Mexico granted the land; (2) as a natural result the grant which the Commission confirmed contained no recognition of Indian possession, or protective provision in their favor; (3) the Indian claim was presented as though founded on a protective clause in an earlier grant, which grant, however, the Commission had rejected (probably because unconfirmed by the Departmental Assembly,) and its true basis, viz: the tribal possessory title, was apparently not emphasized; (4) the Indian title was presented as permanent in the sense that no one, not even the United States, could extinguish it. Cf. *Minnesota* v. *Hitchcock,* 185 U. S. 373.

What, then, is the effect of the legal discussion forming the first half of the opinion? One of two things is true: (1) That discussion was perhaps invited by erroneous contentions that the protective clause in the first grant founded or created a title, and that that title was fixed and permanent beyond the power of the Government to cancel it. If so, the remarks have no bearing whatever on the case at bar. (2) In so far as the general possessory title was under consideration, the discussion was "unnecessary to the decision and in that sense extrajudicial," *Hans* v. *Louisiana,* 134 U. S. 1, because that title had been extinguished by the sole fact of voluntary abandonment.

Now, however, the United States comes with a set of facts vitally different and for the first time requiring a decision on the points of law academically discussed in the earlier case. Under such circumstances this Court has repeatedly announced that the extrajudicial discussion

is not controlling. *Carroll* v. *Carroll's Lessee,* 16 How. 275; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Brooks* v. *Marbury,* 11 Wheat. 78; *Hans* v. *Louisiana,* 134 U. S. 1; *McCormick Co.* v. *Aultman,* 169 U. S. 606; *United States* v. *Wong Kim Ark,* 169 U. S. 649; *Downes* v. *Bidwell,* 182 U. S. 244; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244; *Joplin Co.* v. *United States,* 236 U. S. 531; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275.

There are two statements of law in the *Barker Case* which are hard to discuss, because it is impossible to be certain whether, as we believe, they apply only to the peculiar sort of title there apparently claimed, or whether, as appellants contend, they announce a general rule applicable even to an Indian tribal title, such as is presented here, protected but not created by a Mexican grant.

One is that "public domain" is the same as "public lands;" that lands encumbered with the Indian easement or use cannot be treated or considered as "public lands" in the ordinary sense; and that, therefore, when § 13 of the Act of 1851 made lands to which claims had not been presented part of the public domain, it intended to extinguish the Indian title wherever unpresented.

While these expressions are sometimes loosely used as equivalent, it is perfectly obvious that they are not in fact synonymous. A national park, or a forest reserve, or an Indian reservation is certainly part of the public domain, and as certainly not a part of the "public lands of the United States" in the sense of lands subject to sale or disposal under general laws. What is really meant by "public domain" is seen in *Missionary Society* v. *Dalles,* 107 U. S. 336. See *Buttz* v. *Northern Pacific R. R.,* 119 U. S. 55; *St. Paul, etc. Ry. Co.* v. *Phelps,* 137 U. S. 528.

But the same result would be reached even if Congress had said "public lands of the United States," since land may be and often has been treated as public land of

the United States, although admittedly subject to the Indian title of occupancy and possession. *Kindred* v. *Union Pacific R. R. Co.,* 225 U. S. 582. Lands subject to the ordinary Indian title, here claimed, have over and over again been treated as public lands both of Mexico and the United States and have been granted subject to that title.

Section 15 of the Act of 1851 reading: "That the final decrees . . . or any patent to be issued under this act shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons," in plain and simple language preserves the Indian title under decree and patent alike until the Government itself affirmatively acts to extinguish it. The Commission itself so held in this very case.

And if this decree, thus affirmed, expressly states that it does not affect Indian rights, how can the patent which followed it, and which the act puts on the same footing as the decree, affect them?

We confidently submit that *Barker* v. *Harvey,* 181 U. S. 481, is demonstrably wrong if it means that the Indians here concerned are not protected by the provision that decrees and patents shall not affect third persons.

The term "third persons" necessarily has a general signification outside of the restricted application required by the narrow and unusual facts of *Beard* v. *Federy.* It necessarily includes exactly the sort of persons of whom the tribal Indians are examples. This view is confirmed by repeated decisions of this Court. *Townsend* v. *Greeley,* 5 Wall. 326; *Meader* v. *Norton,* 11 Wall. 442; *Carpentier* v. *Montgomery,* 13 Wall. 480; *Adam* v. *Norris,* 103 U. S. 591; *Boquillas Co.* v. *Curtis,* 213 U. S. 339; *Los Angeles Milling Co.* v. *Los Angeles,* 217 U. S. 217; *Wilson Cypress Co.* v. *Del Pozo,* 236 U. S. 635.

A rule of property can be no wider than the facts ruled on. The only rule founded on the essential facts of the

Barker Case is that Indians who voluntarily abandon their possession lose their possessory title.

A rule of property is not established by a single decision. *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Chicago* v. *Robbins*, 2 Black, 418; *Yates* v. *Milwaukee*, 10 Wall. 497; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349.

The passages in the *Barker Case* construed by appellees as favorable to them are contradicted in *Minnesota* v. *Hitchcock*, 185 U. S. 373, and very recently in *Cramer* v. *United States*, 261 U. S. 219.

The doctrine of *stare decisis* is not inflexible. *Hertz* v. *Woodman*, 218 U. S. 205; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429.

The disastrous effect on titles anticipated as the result of a reversal is imaginary.

Mr. Walter K. Tuller, with whom *Mr. Henry W. O'Melveny*, *Mr. E. E. Millikin* and *Mr. Sayre Macneil* were on the brief, for appellees.

The law governing this case is settled by numerous decisions of this Court and has become a rule of property. *Barker* v. *Harvey*, 181 U. S. 481; *Minnesota Co.* v. *National Co.*, 3 Wall. 332; *United States* v. *Heirs of Waterman*, 14 Pet. 478; *McDougal* v. *McKay*, 237 U. S. 372; *Beard* v. *Federy*, 3 Wall. 478; *Botiller* v. *Dominguez*, 130 U. S. 238; *Knight* v. *United States Land Assn.*, 142 U. S. 161; *Thompson* v. *Los Angeles Farming Co.*, 180 U. S. 72.

The claim of appellant that the rights of the Indians, whatever they may have been, during the time Spain or Mexico held sovereignty of California, were not derived from the Spanish or Mexican law, is unsound. Title to or rights in or over real property exist only by virtue of law, and that law is the law of the country which is sovereign over the territory. *Johnson* v. *McIntosh*, 8 Wheat. 543.

The most that can possibly be claimed is that the Indians had a temporary right of occupancy revocable at the will of the sovereign; in other words, a mere license revocable at the pleasure of the Government. This is the most even under the laws of Spain. If anything, the Indians had even less rights under the laws of Mexico. *Hayt* v. *United States*, 38 Ct. Clms. 455, 461–462.

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

This is a suit by the United States as guardian of certain Mission Indians to quiet in them a "perpetual right" to occupy, use, and enjoy a part of a confirmed Mexican land grant in southern California, for which the defendants hold a patent from the United States. The District Court dismissed the bill as not showing a cause of action, and its decree was affirmed by the Circuit Court of Appeals. 288 Fed. 821.

The grant was made by Mexico in 1843. After California was ceded to the United States, Congress, in 1851, passed an act providing for the ascertainment and adjudication of private land claims in the ceded territory, c. 41, 9 Stat. 631. The act created a commission to consider and pass on such claims, provided for a review in the District Court of that district, and for a further review in this Court; required that the claims be presented to the commission within two years, in default of which they were to be regarded as abandoned; provided for the issue of patents on such as were confirmed, and declared the patents should be "conclusive between the United States and the said claimants," but should not "affect the interests of third persons." This grant was presented to the commission, and, after a hearing in which the United States participated, was confirmed. On an appeal by the United States the District Court affirmed that decision, and a further appeal to this Court was aban-

doned and dismissed. Thereafter, in 1863, the patent under which the defendants claim was issued.

The bill alleges that under the laws of Mexico the Indians in whose behalf the bill is brought became entitled to the "continuous and undisturbed" occupancy and use of a part of the lands in the grant before it was made; that the Indians were in open, notorious, and adverse occupancy of such lands at the date of the grant, and that they ever since have remained in such occupancy, save as they have been more or less disturbed by the defendants and their predecessors at different times since the patent issued. The bill was brought in 1920. It does not question the validity of the grant or of the patent, but proceeds on the theory that the grant was made, and the title under the patent is held, subject to a "perpetual right" in the Indians and their descendants to occupy and use the lands in question. The Indians never presented their claim to the commission, nor did the United States do so for them.

The courts below held that the claim of the Indians, if they had any, was abandoned and lost by the failure to present it to the commission, and that the patent issued on the confirmation of the grant passed the full title, unencumbered by any right in the Indians. In so holding, those courts gave effect to what they understood to be the decision of this Court in *Barker* v. *Harvey*, 181 U. S. 481.

The questions to be considered here are whether the decision in that case covers this case, and, if it does, whether it should be followed or overruled. That was a suit by the owner of a Mexican grant in southern California against Mission Indians to quiet his title under a confirmation and patent against their claim to a permanent right to occupy and use a part of the lands. In the state court where the suit was brought, the plaintiff had a decree, which the Supreme Court of the State affirmed.

In the right of the Indians the United States then brought the case here and took charge of and presented it for them. This Court sustained the decision of the state courts.

In the trial court the Indians had produced evidence tending to show that they and their ancestors had been occupying and using the lands openly and continuously from a time anterior to the Mexican grant, and that while they remained under the dominion of Mexico that government protected them in their right and recognized its permanency. But at the conclusion of the trial that evidence had been stricken out over their objection, because it appeared that their claim had not been presented to the commission under the Act of 1851. On the evidence remaining the decree necessarily had been against them. Thus the question presented was whether there was error in striking out the evidence of their prior occupancy and use and of the permanency of their right as recognized by Mexico.

This Court, after observing that under the treaty with Mexico and the rules of international law the United States was bound to respect the rights of private property in the ceded territory, said there could be no doubt of the power of the United States, consistently with such obligation, to provide reasonable means for determining the validity of all titles within the ceded territory, to require all claims to lands therein to be presented for examination, and to declare that all not presented should be regarded as abandoned. The Court further said the purpose of the Act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and that it not only permitted but required all claims to be presented to the commission, and barred all from future assertion which were not presented within the two years. Earlier decisions showing the effect theretofore given to patents issued under the act were cited and approved; and, com-

ing to the provision that the patent shall not "affect the interests of third persons," the Court held, as it had done in a prior case: "The term 'third persons', as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." The Court then proceeded:

"If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, 'resist successfully any action of the government in disposing of the property'. If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provision of section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal. Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

"Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the Act creating the land commission the commissioners were required (sec. 16) 'to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.' It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action."

Enough has been said to make it apparent that that case and this are so much alike that what was said and

ruled in that should be equally applicable in this. But it is urged that what we have described as ruled there was *obiter dictum* and should be disregarded, because the Court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. The premise of the contention is right but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, "the ruling on neither is *obiter,* but each is the judgment of the court and of equal validity with the other." *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.,* 199 U. S. 160, 166; *Railroad Companies* v. *Schutte,* 103 U. S. 118, 143.

The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results. Besides, the government and the scattered Mission Indians have adjusted their situation to it in several instances. As long ago as *Minnesota Co.* v. *National Co.,* 3 Wall. 332, this Court said, p. 334: "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting

the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

That rule often has been applied in this and other courts and we think effect should be given to it in the present case.

Decree affirmed.

WALTON *v.* HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA ET AL.

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

No. 689. Submitted April 11, 1924.—Decided June 9, 1924.

A court of the United States, sitting as a court of equity, is without jurisdiction of a suit to enjoin the prosecution of a proceeding to remove a state official from office. P. 490.

Affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit by the Governor of Oklahoma to enjoin the prosecution of impeachment proceedings in the state legislature as based on improper motives and as infringing his rights to due process and equal protection of the law, under the Fourteenth Amendment.

Mr. Finis E. Riddle and *Mr. Henry B. Martin* for appellant.

A federal court has no jurisdiction in equity generally, where a contest over, or the title to, a state office, or a question of removal of an officer in accordance with state law, is involved; but will lend its aid against a wrongful interference or removal under a void judgment, which

involves complainant's federal constitutional rights. *Marbury* v. *Madison,* 1 Cr. 137; *Kennard* v. *Louisiana,* 92 U. S. 480; *Missouri* v. *Andriano,* 138 U. S. 496; *Foster* v. *Kansas,* 112 U. S. 201; *Wilson* v. *North Carolina,* 169 U. S. 586; *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *MacMath* v. *United States,* 248 U. S. 151; *Nicholas* v. *United States,* 257 U. S. 71.

A court of equity has jurisdiction to entertain and adjudicate upon the subject matter when any actionable rights are involved and where there is no adequate, complete remedy at law. Where there is a wrong, equity will furnish a remedy. A federal court in equity has jurisdiction in such cases where the complainant's constitutional rights are invaded. *In re Sawyer,* 124 U. S. 200; *Moore* v. *Dempsey,* 261 U. S. 86; *Board of Liquidation* v. *McComb,* 92 U. S. 531; *Terrace* v. *Thompson,* 263 U. S. 197.

The protection of the Federal Constitution securing rights to individuals operates equally upon every state agent, who is the repository of state power. *Home Telephone Co.* v. *Los Angeles,* 227 U. S. 278.

While a federal court in equity will not enjoin proceedings in a state court generally, it will enjoin the execution of a void or fraudulent judgment after the suit is ended, when complainant has no adequate and complete remedy at law. *Simon* v. *Southern Ry. Co.,* 236 U. S. 115.

Where the issue involved is not a contest over the title to an office, but involves a question of forfeiture on account of alleged violation of specific grounds provided in the state constitution, and the trial provided for is before a court, and the judges are required to be sworn to try the cause according to the law and the evidence, then the subject-matter and the trial are judicial and not political. Okla. Rev. Laws, 1910, § 2084; *Rhode Island* v. *Massachusetts,* 12 Pet. 657.

Mr. George F. Short, Attorney General of the State of Oklahoma, for appellees. *Mr. Leon S. Hirsh,* Assistant Attorney General, *Mr. Irvin Wilson* and *Mr. J. D. Lydick* were also on the brief.

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

This is a suit in equity brought in a District Court of the United States to enjoin the prosecution of articles of impeachment against a state officer. The plaintiff is the officer against whom the articles are directed, and the principal defendants are officers designated to conduct the prosecution before the Chief Justice and Senate of the State sitting as a court of impeachment. The allegations of the bill are very general, wanting in precision and usually made on information and belief. In substance the grounds on which the injunction is sought are that the articles of impeachment were prompted by wrongful motives and prejudice on the part of most of the members of the House of Representatives of the State; that many members of the Senate who will sit in the court of impeachment have the same wrongful motives and prejudice, and will be controlled by them instead of by the evidence; and that to subject the plaintiff to a trial before a body so constituted will work a denial of the due process and equal protection to which he is entitled under the Fourteenth Amendment to the Constitution of the United States. In the District Court the defendants challenged the bill by a motion to dismiss, and after a hearing on that motion the court entered a decree of dismissal. The plaintiff appealed to this Court.

The trial before the court of impeachment proceeded, and the plaintiff was found guilty on some of the articles and removed from office. While the impeachment proceeding was in an early stage, its validity was sustained by the Supreme Court of the State, *State* v. *Chambers,*

96 Okla. 78; and, after the proceeding was carried to judgment, petitions for certiorari were denied by that court and by this Court, 263 U. S. 721.

We think the District Court rightly dismissed the bill. A court of equity has no jurisdiction over the appointment and removal of public officers, *White* v. *Berry*, 171 U. S. 366; and particularly are the courts of the United States sitting as courts of equity without jurisdiction over the appointment and removal of state officers. *In re Sawyer*, 124 U. S. 200, 210. And see *Taylor* v. *Beckham*, 178 U. S. 548, 570. That the removal is through a proceeding in the nature of a criminal prosecution does not alter the rule. *In re Sawyer, supra*, pp. 210, 219.

Decree affirmed.

STATE OF OKLAHOMA *v.* STATE OF TEXAS.

UNITED STATES, INTERVENER.

IN EQUITY.

No. 15, Original. Rule to show cause issued May 5, 1924; response to rule filed May 26, 1924.—Decided June 9, 1924.

1. A claim for reimbursement from funds held by the receiver appointed by this Court, not based on legal right but allowable under an order of this Court, in the discretion of the receiver, cannot be enforced against him by an action in a state court, and such action may be enjoined by this Court consistently with Jud. Code, § 265. P. 491.
2. Section 66 of the Judicial Code, providing that every receiver of property appointed by a federal court may be sued, without leave of the court, "in respect of any act or transaction of his in carrying on the business connected with such property," does not apply to a suit based on acts occurring before the receivership for the cost of which he has been given discretionary authority by the court to make reimbursement. P. 492.

Injunction granted.

UPON return of an order heretofore issued to the respondents Duhon and Kebideaux (*ante,* p. 76,) to show cause why they should not be enjoined from maintaining an action in a state court against the receiver in this cause.

Mr. Arch Dawson and *Mr. H. O. Williams* for respondents.

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

In a recent report of the receiver in this case, he called attention to an action brought against him in the District Court of Wichita County, Texas, by J. H. Duhon and H. J. Kebideaux, the object of which is to enforce payment by him of the claim hereinafter described. On examining the report, this Court ordered the plaintiffs in that action to show cause why they should not be enjoined from maintaining it. In due time they submitted a response.

The claim sought to be enforced is one for reimbursement for the cost of drilling an oil well in the river bed, and, if paid, must be paid out of an impounded fund in the receiver's custody. The well was drilled prior to the receivership, and without right. In no possible view did the drilling give rise to an enforceable claim against the receiver or against any property in the receivership.

The right asserted against the receiver is based on a subsequent order of this Court, 256 U. S. 607. That order is not imperative or mandatory; nor does it purport to give any operator or driller a right to be reimbursed. On the contrary, it commits the question of reimbursement to the receiver's discretion. Its words are, "is hereby authorized, in his discretion," etc. Obviously the receiver's action in a matter committed to his discretion by this Court can not be controlled by any other court. The plaintiffs say that the receiver recognized their claim. Even so, they assert and reassert that there has been no

reimbursement. If this be true, the matter still rests in the receiver's discretion. A mere recognition of the claim would not terminate his discretion. He would be free to reconsider until there was an actual reimbursement.

If the plaintiffs desired to enforce reimbursement regardless of the receiver's discretion, they should have applied to this Court for a mandatory order. No other court could change the existing order, or require the receiver to surrender his discretion under it; and yet that is what the plaintiffs seek to accomplish by their action against the receiver. They rely on § 66 of the Judicial Code which reads as follows:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Whether the section rightly understood applies to a receiver appointed by this Court in a suit within its original jurisdiction we need not consider. In terms it is confined to suits against a receiver in respect of his acts or transactions while carrying on the business of the receivership. Here the receiver is not sued in respect of any act or transaction of his in the course of the business, but in respect of acts occurring prior to the receivership, for the cost of which this Court by a subsequent order authorized him, in his discretion, to make reimbursement. Under the plaintiffs' showing, the receiver's only connection with the matter has been a refusal to exercise his discretion favorably to them. That, in our opinion, is not such an act or transaction as the section intends. *Buchannon & Northern R. R. Co.* v. *Davis*, 135 Fed. 707, 711.

Our conclusion is that an injunction should issue restraining the plaintiffs from maintaining their action. Such an injunction, in the circumstances disclosed, may issue consistently with § 265 of the Judicial Code. *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175.

Injunction granted.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 15, Original. Order that reports by commissioners respecting running of boundary line, etc., be filed, and limiting time for objections or exceptions, entered April 25, 1924; exceptions filed May 22, 23, 1924.—Decided June 9, 1924.

1. An application for an oil and gas lease, under the Act of March 4, 1923, which is subject to approval by the Secretary of the Interior and grantable only after the Texas-Oklahoma boundary line and the medial line of Red River shall have been settled by this Court and the property released from the existing receivership, does not confer a present and certain interest entitling the applicant to object to the report of the commissioners herein respecting the survey and location of the boundary. P. 495.
2. A practical construction of the decree herein (261 U. S. 340) adopted by the commissioners in locating the boundary along the south bank of Red River at the Big Bend Area, *held* reasonable and correct. P. 496.
3. Where, through gradual accretion occurring since the receiver took possession, the south bank of the river was extended northward, the boundary was properly located along the bank as so altered. P. 498.
4. A river-bank boundary follows natural accretion to the bank in which an artificial structure was a minor factor. P. 499.

Reports of commissioners approved.

UPON a hearing of exceptions and protests to the report of the commissioners on their survey, marking, &c., of a part of the boundary between Oklahoma and Texas.

Their report on the location of the medial line of Red River was submitted at the same time but was not objected to. See 261 U. S. 340; 262 U. S. 505; 264 U. S. 565. The decree approving the report and fixing the boundary will be found in this volume, p. 500, *et seq.* The boundary report is recited in that decree. For approval and establishment of the medial line, see post, pp. 513, 514.

Mr. George F. Short, Attorney General of the State of Oklahoma, for complainant.

Mr. E. E. Blake and *Mr. R. L. Cole* for Grand Oil and Developing Company, intervener.

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

On April 25 last the commissioners appointed to run, survey, and mark portions of the boundary between the States of Texas and Oklahoma along the Red River under our decree of March 12, 1923 (261 U. S. 340) submitted their report covering the portion of the boundary along the Big Bend Area, and at the same time submitted their report of the survey and platting of the medial line of the river in the vicinity of the river-bed oil wells pursuant to a supplemental order of June 4, 1923 (262 U. S. 505). When the reports were received, general leave was given to parties in interest to except to the reports, or either of them, within a period of four weeks. 264 U. S. 565. Exceptions to the boundary report were presented by the State of Oklahoma, the Grand Oil and Developing Company, and William A. Fondren; and informal protests against its confirmation were received from Frank W. Thaison and J. E. Lester. No exceptions were taken to the medial line report. On May 26 a hearing before the Court was had on the boundary report; but nothing of

an evidential nature was offered in support of any of the exceptions or protests.

The informal protests by Mr. Thaison and Mr. Lester require only passing notice. They neither show that their authors have any legal interest in the location of the boundary, nor state any facts indicative of error in the work or report of the commissioners.

The exceptions of the Grand Oil and Developing Company and Mr. Fondren show that the exceptors have at best only a conjectural future interest in the location of the boundary. It is a conjectural interest because it is founded on the hope that applications which the exceptors have made for oil and gas leases of parts of the southerly half of the river bed, under the Act of March 4, 1923, c. 249, 42 Stat. 1448, will be granted by the Secretary of the Interior. And it is a future interest because it has not come into existence as yet, and because the sixth section of the act precludes the Secretary from granting such leases before the property is released from the existing receivership. Even after the release, the Secretary's authority will extend to such lands only as may lie between the interstate boundary and the medial line of the river, as the two are settled by this Court. Under present conditions, the United States has the sole proprietary interest in whatever may be within those limits, and it is not excepting to the boundary reported by the commissioners. Plainly these exceptors do not have such a present or certain interest in the subject as entitles them to complain.

We deem it proper, however, to notice one feature of Mr. Fondren's exceptions. In them he asserts that the commissioners were selected as representing respectively the United States and the State of Texas, and that counsel for the State of Oklahoma were remiss in not insisting on the selection of a third commissioner representing that State. The assertion rests on a misapprehension of what

occurred. Originally there was a purpose to select three commissioners and to direct that the boundary be surveyed and marked for its full length along the river, 539 miles. But as the southerly cut bank, held by the Court to be the true boundary, afterwards was conceded to be so well defined throughout the greater part of the distance that it need not be surveyed or marked (Par. 12 of decree, 261 U. S. 343), the Court deemed it better and in the interest of economy to commit the work on the portions of the boundary not covered by that concession to two commissioners instead of three. The two were selected by the Court as its representatives, not as representatives of any of the parties. The commissioners so understood. Counsel for Oklahoma were not remiss in the matter. Shortly after the two commissioners were selected, counsel for that State, including the Attorney General, requested that a third commissioner be selected, and the request was denied.

The State of Oklahoma of course has a legal interest in the location of the boundary and a right to except to the report, for her territorial jurisdiction is involved. Her exceptions are on two grounds. The first is, that the commissioners have not given proper effect to the sixth paragraph of the decree, 261 U. S. 340, which, with the opinion on which it was based, 260 U. S. 606, was to be their guide. A right understanding of that paragraph requires that it be read with the fifth and seventh. The three are as follows:

"5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

"6. The boundary between the two States is on and along that bank at the mean level attained by the waters

of the river when they reach and wash the bank without overflowing it.

"7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it."

To sustain the exception, the State relies entirely on the introductory part of the report where, after setting forth the three paragraphs just quoted, the commissioners say:

"The foregoing specifications applied in the light of the opinion, admit of, and require the exercise of practical judgment in determining the line intended; but certain fundamentals, such as the following, obviously must form the final basis for the exact location of the line.

"The boundary line is a gradient of the flowing water in the river. It is located midway between the lower level of the flowing water that just reaches the cut bank, and the higher level of it that just does not overtop the cut bank. The physical top of the cut bank being very uneven in profile, cannot be a datum for locating the boundary line, but a gradient along the bank must be used for that purpose. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity. The boundary line has been determined accordingly."

We find nothing in what was thus said which indicates that the commissioners misapprehended the decree or failed to give proper effect to it; and after examining their report and the accompanying maps we think the decree was rightly construed and given full effect. The gradients used as representing the ordinary high and mean levels of the waters, when washing but not overflowing

the bank, were not unbroken lines arbitrarily projected from one end of the Big Bend Area to the other, but were broken lines adjusted to prevailing levels in relatively short sections. That course was both reasonable and practical. Within the sixteen miles along that area the river varies in width from 2200 feet to 6000 feet. Naturally the waters when entering the narrower sections choke and attain higher levels, and when entering the broader sections spread out and fall to lower levels. There is nothing in the decree to prevent a reasonable and practical solution of the problem incident to these varying water levels. And so of the problem incident to the irregularities in the elevation of the bank. The State, although excepting to the solution adopted by the commissioners, does not attempt to point out a better one. In our opinion the exception is not tenable.

The second exception is that the commissioners regarded an extensive addition to the south bank as an accretion caused by natural processes, whereas it was caused by an artificial structure placed in the river by the receiver and should have been disregarded. The facts relating to this addition to the bank, as shown by the record in this cause, various photographic exhibits produced in evidence on former hearings, and the maps accompanying the report of the commissioners are as follows:

In 1920, when the receiver took possession, a definite channel and active current were near the south bank. Four oil wells had been drilled, or were in process of drilling, in the river bed close to that bank. A short wing dam had been extended into the river above the wells. The receiver made a change in the wing dam and extended it down stream in front of and near the wells. Winds in dry weather and the water during rises in the river commenced to deposit sand and other material behind the dam and about the wells. But quite inde-

pendently of the dam the river shortly thereafter washed away a large section of the opposite bank on the north and shifted its principal channel to that side. The channel on the south side soon filled with sand. The river continued gradually to erode the north bank, and at the same time there was a gradual but slower accretion to the south bank. In this way the river moved northward, the north bank being cut away as much as 1400 feet from where it was in 1920 and an accretion from 60 to 80 feet in width being added to the south bank of that period. The change is apparent when Map Exhibit No. 26 produced by the United States and Oklahoma on the principal hearing in this case is compared with the maps accompanying the commissioners' report. The 60 or 80 feet of accretion has come to be of the same elevation as the former bank, has similar vegetation on it where oil or oil operations have not been in the way, and otherwise appears to be stable land. The process of accretion is still active and now the new formation slopes, for 200 feet beyond the stable accretion, into the river bed and has the appearance of a sandy shore. The commissioners regarded the south bank as carried to the outer line of the 60 or 80 feet, and located the boundary accordingly. Their location was based on the situation existing December 31, 1923.

On the facts disclosed, we think the commissioners were right. The boundary between the two States is not an unswerving line, but a river bank; and where through the natural and gradual processes of erosion or accretion the bank is changed the boundary follows the change. We so said in the opinion and decree which were to guide the commissioners. The wing dam was at most a minor factor in producing the accretion and does not take the change out of the general rule. *County of St. Clair* v. *Lovingston,* 23 Wall. 46. We accordingly overrule the exception.

Both reports will be approved and a decree will be entered giving effect to the boundary along the Big Bend Area as run, surveyed and marked by the commissioners.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 15, Original.

DECREE RELATING TO STATE BOUNDARY, ENTERED JUNE 9, 1924.

Decree: (1) reciting the report of the commissioners heretofore appointed showing that they have run, located and marked the boundary in question, along the Big Bend Area of Red River; (2) overruling protests and exceptions and confirming the report; (3) adjudging that the line delineated in the report and on maps accompanying it be established and declared to be the true boundary between Texas and Oklahoma along the part of Red River designated in the report subject to future changes by erosion and accretion; and (4) directing that copies of this decree and of the said maps be transmitted to the Chief Magistrates of the two States.

On consideration of the report of the commissioners, heretofore selected to run, locate and mark portions of the boundary between the States of Texas and Oklahoma along the south bank of the Red River, showing that they have run, located and marked the portion of such boundary along the Big Bend Area, such report being as follows:

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

"As commissioners designated in the decree of March 12, 1923, in the above entitled cause, we have run, located and marked upon the ground the boundary between the

States of Texas and Oklahoma along the Red River in what is known as the Big Bend Area (Area 'A') in accordance with that decree and the principles announced in the opinion delivered January 15, 1923, and we have the honor to submit the following joint report respecting that part of our work, with field notes and maps.

" Paragraphs 5, 6 and 7 of the decree follow:

" ' 5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

" ' 6. The boundary between the two States is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

" ' 7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it.'

" The foregoing specifications applied in the light of the opinion, admit of, and require the exercise of practical judgment in determining the line intended; but certain fundamentals, such as the following, obviously must form the final basis for the exact location of the line.

" The boundary line is a gradient of the flowing water in the river. It is located midway between the lower level of the flowing water that just reaches the cut bank, and the higher level of it that just does not overtop the cut bank. The physical top of the cut bank being very uneven in profile, cannot be a datum for locating the boundary line; but a gradient along the bank must be

used for that purpose. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity. The boundary line has been determined accordingly.

"We have marked the boundary line by wooden posts called 'witness posts' set along the bank at varying short distances from the boundary, and from each other. A bearing and distance has been taken from each witness post to one or more points on the boundary.

"Permanent reference monuments are located at varying intervals on the Texas bluff overlooking the river valley. Other permanent reference monuments are located on the Oklahoma bluff, and these overlook the river valley.

"By accurate surveys the witness posts are joined to each other and to the monuments on the Texas bluff. Similarly the Texas monuments are joined to each other and to the Oklahoma monuments, which in turn, are joined to each other and to the witness posts. Permanent bench marks located near the boundary are also joined to the witness posts and to the reference monuments.

"All oil wells within three hundred feet of the boundary have been accurately located upon the ground, and the position of each, whether in Texas or in Oklahoma, is stated. From each oil well, a bearing and distance is given to a point on the boundary.

"The boundary line is shown by the usual symbol and appropriate wording on the accompanying maps, which also show the positions of the witness posts, the oil wells, the reference monuments, the bench marks and other information usually appearing on such maps. These maps are made part of this report and are identified as follows:

"Map No. 1: Cadastral Map of the Big Bend Area, scale 2,000 feet to the inch;

"Map No. 2: Cadastral Map of the oil field region, in two sheets, Nos. 1 and 2, scale 500 feet to the inch; and,

"Map No. 3: Topographic Map of the Big Bend Area, in four sheets, Nos. 1, 2, 3 and 4, scale 500 feet to the inch, contour interval 2 feet.

"The survey was begun April 16, 1923, and completed February 17, 1924. The location of the boundary, reported herewith, is that position which existed on December 31, 1923.

"The surveying has been done with painstaking care in accordance with approved modern methods. The results have been subjected to one or more tests to verify their accuracy. The field notes have been reduced to the minimum, consistent with the proper record of the boundary location.

"The geographic positions are on the standard datum of the United States Coast and Geodetic Survey; the datum of the elevations is mean sea level.

"The field notes of the boundary, location of oil wells, description of reference monuments and witness posts, and tables of azimuths, distances, geographic positions and sea level elevations, follow:

[The matter here referred to occupies many pages of technical description, and hence is omitted from this report.]

"On March 26, 1923, before entering upon our work, we appeared before C. Elmore Cropley, Notary Public of the District of Columbia, in the office of the Clerk of the Supreme Court of the United States, and subscribed to the following oath:

"'I, (Arthur D. Kidder and Arthur A. Stiles, subscribed individually), having been appointed one of the Commissioners to run, locate and mark the state line between the States of Oklahoma and Texas in accordance with the Partial Decree Relating to State Boundary en-

tered March 12, 1923, and the opinion of this Court delivered January 15, 1923, do solemnly swear that I will faithfully and impartially perform the duties of the office upon which I am about to enter, to the best of my abilities, and that I will support the Constitution of the United States. So help me God.'

"A statement of the time employed and the expense incurred in the performance of the work will be the subject of a later report.

" Five copies each of the report and maps have been to-day sent by registered mail to the Attorney General of the United States, the Attorney General of Texas and the Attorney General of Oklahoma. We also have filed with the clerk of the court fifty copies of the report and maps for the use of such private interveners as may apply for them. Thirty additional copies of the report and maps have been filed with the clerk for such disposition as the court may direct.

" The originals of the three maps hereinbefore named are bound with the original report, and appear in the following order: Map No. 1, Map. No. 2, Sheets Nos. 1 and 2, and Map No. 3, Sheets Nos. 1, 2, 3 and 4.

" Respectfully submitted.

"ARTHUR D. KIDDER,
"ARTHUR A. STILES,
"Commissioners.

" WASHINGTON, D. C., April 25, 1924."

And on consideration of the exceptions presented to such report and of the protests made against the same:

It is now adjudged, ordered and decreed that the exceptions and protests be overruled and that the report be in all respects confirmed.

It is further adjudged, ordered and decreed that the line delineated and set forth in the report and on the maps accompanying the same and referred to therein be

established and declared to be the true boundary between the States of Texas and Oklahoma along the part of the Red River designated in such report, subject however to such changes as may hereafter be wrought by the natural and gradual processes known as erosion and accretion as specified in the second, third and fourth paragraphs of the decree rendered herein March 12, 1923, 261 U. S. 340.

It is further ordered that the Clerk of this Court do transmit to the Chief Magistrates of the States of Texas and Oklahoma copies of this decree, duly authenticated under the seal of this Court, together with copies of the maps which accompanied the report of the commissioners.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 15, Original. Order fixing time for filing suggestions, etc., entered May 5, 1924; argued on suggestions, etc., May 26, 1924.—Decided June 9, 1924.

1. Where a receivership was necessary for the protection of oil and gas lands whose ownership depended upon the establishment of an interstate boundary,—the primary object of the suit,—and the boundary, as finally established, lay between the lines claimed by opposing parties, *held*, that the general expenses of the receivership were apportionable against the several funds derived by the receiver from operation of oil and gas wells, whether on one side or the other of the boundary established, and that funds arising from wells operated by claimants under the receiver's supervision, causing less expense, should be assessed on a lower basis than funds arising from wells operated by him directly. P. 507.
2. In apportioning general receivership expenses against funds derived by the receiver from oil and gas wells operated under his supervision by lessees of the owners, *held*, that the charge should be against each fund as an entirety and be deducted from the owner's and lessee's shares thereof *pro rata*. P. 511.
3. The expense or loss of work done by the receiver in this cause on unremunerative wells in the "River Bed Area,"—said area belong-

ing wholly to the United States,—may be charged against receivership funds derived from remunerative wells in that area. P. 511.

4. Trespassers who drilled productive and unproductive wells for oil in land of the United States before it was put into the receivership, have no equitable claim to be reimbursed for the cost of the unproductive out of funds derived by the receiver from the productive wells. *Id.*

5. The order hereinbefore made authorizing the receiver, where any well in the said "River Bed Area" was drilled to production prior to the receivership, to repay the cost of the work, (see 256 U. S. 607,) should be amended to include a certain well which was excluded from the order. P. 512.

6. Where private claimants drilled productive oil wells on land afterwards taken into a receivership and adjudged the exclusive property of the United States, *held,* that a person who, as contractor, participated in drilling one of the wells and whose equipment, so used, was taken and sold by the receiver, was entitled to an order authorizing the receiver to pay him the proceeds of such sale; but that a wrong committed against him by one of the claimants before the receivership in taking forcible possession of the well and converting part of his equipment could not be adjudicated in this litigation and compensated from funds derived by the receiver from the wells claimed by the aggressor. *Id.*

UPON consideration of certain questions arising upon a report of the receiver in this cause.

Mr. W. A. Ledbetter, with whom *Mr. H. L. Stuart, Mr. R. R. Bell, Mr. Wm. O. Beall* and *Mr. Edward H. Chandler* were on the briefs, for Sinclair Oil & Gas Company, Oklahoma Petroleum & Gasoline Company, National Oil Company and Arkansas City Pipe Line Company.

Mr. A. H. Carrigan, with whom *Mr. J. W. Bailey, Mr. Leslie Humphrey, Mr. A. H. Britain, Mr. W. H. Bonner* and *Mr. W. C. Witcher* were on the briefs, for certain owners of patented land.

Mr. R. H. Ward for Kirby Petroleum Company.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Mr. Attorney General Stone* and

Mr. Solicitor General Beck were on the brief, for the United States.

Mr. E. P. Hill for the State of Oklahoma.

Mr. E. E. Blake and *Mr. R. L. Cole* for Grand Oil and Developing Company.

Mr. Leslie Humphrey for C. T. Taylor.

Mr. W. A. Keeling, Attorney General of the State of Texas, for defendant.

Suggestions were also filed by the following: *Mr. Jesse B. Roote,* for Burke Divide Oil Company Consolidated; *Mr. J. H. Cline,* for Tom Testerman; *Mr. K. C. Barkley,* for J. G. Leavell, Receiver of the General Oil Company, and National Petroleum & Refining Company; *Mr. Ben Bruce Blakeney* and *Mr. Francis Marion Etheridge,* for J. B. Lawton, and Ewing Clagett, Receiver for Delta Oil Company; *Mr. H. Rozier Dulany, Jr.,* and *Mr. Alexander H. McCormick,* for the Continental Oil Company; *Mr. Bernard Martin* and *Mr. Ben G. Oneal,* for the Southwest Petroleum Company, the Buckeye Petroleum Company, and James L. Duffy; *Mr. William M. Cannon,* for the Wichita Petroleum Company; and *Mr. T. P. Gore,* for the Melish Consolidated Placer Oil Mining Association and the Double Triangle Petroleum Association et al.

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

By the order of May 5 last, *ante,* 76, certain questions suggested in the twelfth report of the receiver in this case were propounded to the parties in interest. Many responses were received, a hearing on them was had, and the Court is now prepared to announce its ruling.

The first question is, to what extent and in what manner shall the general expenses of the receivership be

spread over the several impounded funds in the receiver's custody?

Two areas are within the receivership, one designated as the south half of the river bed and the other as the flood plain. The latter consists of a stretch of low ground between the river bed and the Texas bluffs, and is divided into several relatively small tracts. The impounded funds consist, in the main, of proceeds from oil and gas taken, during the receivership, from wells in the two areas. Accurate accounts have been kept showing the production, proceeds, and special expenses pertaining to each well. But as yet there has been no allocation or apportionment of the general expenses.

At the inception of the receivership both areas were in controversy. Texas and her grantees were claiming title to both; the United States was doing the same, and Oklahoma was claiming title to the river-bed area. These proprietary controversies were largely incidental to a pronounced controversy respecting the true boundary between the two States. Texas was insisting that the boundary was along the middle of the river; Oklahoma and the United States that it was along the foot of the Texas bluffs. All of the controversies were real and were earnestly pressed on the Court's attention. In the progress of the case the Court has considered and decided all of them. As a result it now is settled that the interstate boundary is not along the middle of the river nor along the foot of the Texas bluffs, but on and along the south bank of the river, that the flood-plain area belongs to Texas or her grantees, that the river-bed area belongs to the United States, and that Oklahoma has no proprietary interest in either area.

Most of the river-bed wells were drilled and brought in by the receiver; all wells in that area have been operated by him, and he now holds the net proceeds derived from them. Most of the flood-plain wells were drilled

and brought in before the receivership by claimants asserting grants from the State of Texas or leasehold rights under such grants. Under a provision in the original receivership order (par. 4, 252 U. S. 374) and a provision in a succeeding order (par. 2, 253 U. S. 466) most of the flood-plain wells have been operated by such claimants and their assigns under arrangements whereby the receiver was to direct and supervise the operation, was to receive and hold three-sixteenths of the gross proceeds, and could take over the operation if the arrangement was not respected. The receiver now holds the accumulated three-sixteenths of such proceeds. A few exceptional flood-plain wells—we mean wells south of the interstate boundary as now established—have been operated throughout by the receiver and he now holds the full net proceeds derived from them.

The parties in interest differ about the apportionment to be made of the general expenses. The Texas claimants, both owners and lessees, take the position that, as they have prevailed in the controversy over the flood plain, the funds derived from that area should be exempted from the apportionment. On the other hand, the United States insists that the apportionment should extend to all the funds, flood-plain as well as river-bed, and be on a *pro rata* basis. There is also a difference among the Texas claimants, in that the owners insist that, if the apportionment be made to cover the flood-plain funds, these expenses should be charged against the moneys going to the lessees, while the latter ask that the charge be against the moneys going to the owners.

Obviously we are not here concerned with a situation where the outcome of the matter in litigation should be given controlling significance. The controversy over the flood-plain was real, as much so as that over the river-bed area; and there was ample reason for including both areas in the receivership. Its purpose was to conserve the

oil and gas values in those areas for the benefit of whoever might prove to be entitled to them; and that purpose has been accomplished. That the Texas claimants have prevailed as to the flood-plain is no reason for exempting it from the general expenses. A like reason would require that the river bed be also exempted, for as to it the United States prevailed. The usual rule in such receiverships is to charge the general expenses ratably against all the impounded funds, unless there be special circumstances making it inequitable to do so. Here there are no circumstances calling for an exemption of the flood-plain funds; but there are circumstances making it equitable to charge against them a smaller proportion of the general expenses than is charged against the river-bed funds. Taking the full period of the receivership, the work and responsibility of the receiver's force has been perceptibly less in respect of the flood-plain wells than in respect of those in the river bed. Fairly estimated, we think the difference has been about one to two on each dollar impounded. But this difference in favor of the flood-plain wells applies only to such as have been operated by private claimants. The exceptional ones operated by the receiver are in this particular on substantially the same footing as the river-bed wells.

We conclude that the general expenses should be spread over all the funds in such way that the charge against each dollar impounded from river-bed wells, or from flood-plain wells operated by the receiver,—in all of which the impounding has covered the full proceeds, less special expenses,—shall be double what is charged against each dollar impounded from flood-plain wells operated by private claimants,—where the impounding has covered only three-sixteenths of the proceeds.

As to the Texas owners and lessees, we perceive no ground for making one rather than the other bear the

charge for general expenses. The interests of both have been conserved, and the charge to be made against the total moneys going to both in any instance should be deducted ratably from what goes to each separately.

The second question is, how shall the expense or loss incident to work done by the receiver on river-bed wells which proved unremunerative be distributed or cared for?

The river-bed area is a single tract belonging to the United States. Others have no present interest in it. The United States concedes that the expense or loss indicated may be charged against funds derived from remunerative wells in that area. We think the concession is right and that effect should be given to it.

The third question is, whether the order of June 1, 1921, 256 U. S. 607,—authorizing the receiver, where any river-bed well was drilled and brought into production prior to the receivership, to reimburse the operator for the actual cost of that work out of the proceeds from such well,—shall be enlarged so as to permit the receiver, where the same operator had drilled another river-bed well which proved unremunerative, to reimburse him for the cost of the latter out of the proceeds of the remunerative well. The United States objects to the change suggested, and we think it should not be made. All drilling for oil in the river-bed area was without right and without encouragement from the United States, the owner of the soil. Apart from the trespass involved, the operator assumed the risk of the venture; and if the well proved unremunerative it was his loss. On no equitable principle can he ask to be reimbursed. The order referred to is confined to wells which were utilized by the receiver and enriched the estate in his custody. Even in that form the order is one of marked liberality, considering the entire absence of any right to drill in the river-bed area. The situation requires, we think, that each well be regarded in this matter as a distinct venture.

The fourth question is, should the order just mentioned be changed so as to cover river-bed well No. 139, known as the Burk-Senator well?

This well was expressly excepted from the order because there was a bitter controversy as to who drilled it and brought it into production. The well had been drilled and was producing oil when the receiver took possession. It is the only one of that class where the operator has not been reimbursed. We think the excepting clause should be eliminated from the order to the end that the receiver may effect an equitable adjustment of the matter, if the contesting operators are so disposed.

Two phases of another matter connected with that well should be disposed of at this time. Under a contract with one of the contesting operators Tom Testerman participated in drilling the well. Some equipment belonging to him and used in that work came into the possession of the receiver and afterwards was sold by the receiver. Testerman asks that the receiver be authorized to pay over to him the money received for the property. That authority should be given. Testerman also asserts that the Bass Petroleum Company, another of the contesting operators, forcibly took possession of the well and converted a part of his equipment to its use, and he asks that he be reimbursed for that wrong out of impounded funds derived from flood-plain wells claimed by that company. This request cannot be entertained. The right to redress for such a wrong, committed prior to the receivership, is not a matter which can be considered or determined in this suit.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 15, Original. Orders entered June 9, 1924.

Orders: 1. Granting Texas leave to file an amended counterclaim and fixing time for answer.

2. That an injunction issue directing dismissal of a certain action against the receiver herein. [See *ante*, p. 490.]

3. Approving survey, etc., of medial line of part of Red River; and as to expenses, etc., of the commissioners. [See *ante*, p. 493.]

4. Authorizing the receiver to pay a Texas production tax, upon stated conditions.

5. As to distribution of interest, discounts and other profits from general operations of receivership.

6. As to collection by receiver of claims and accounts and report of those uncollected.

7. Directing publication of final notice to claimants and limiting time for presenting claims against receiver or receivership.

8. Forbidding reimbursement by receiver for work on unremunerative wells prior to receivership, and overruling applications therefor.

9. Directing receiver how to spread general expenses over impounded funds.

10. Expenses and losses of receiver's work on unremunerative river-bed wells to be charged to funds derived from remunerative river-bed wells.

11. Authorizing a certain payment to one Testerman.

12. Denying another claim of Testerman.

13. Amending order of June 1, 1921, by authorizing reimbursement by receiver for well No. 139, on certain conditions.

14. Authorizing receiver to surrender south half of river bed, with wells, etc., to Secretary of the Interior, as representative of the United States.

15. Authorizing receiver to deliver certain other property to said Secretary, as representative, etc., with provisions for valuation, for crediting receiver and for charging United States.

16. Authorizing receiver to pay said Secretary, as representative, etc., part of net funds from river-bed wells.

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17. Authorizing receiver to surrender to their several owners and lessees flood-plain (Texas) wells, with pipe lines, etc., in absence of controversy or doubt as to persons entitled.
18. Instructing receiver to publish notice to claimants of funds from flood-plain wells, limiting time for presenting claims; with provisions as to payment, or, in case of controversy or doubt, report to the Court.
19. Directing audit of receiver's accounts.

1. The motion of the defendant, the State of Texas, for leave to file an amended counter-claim relating to the interstate boundary along the one-hundredth meridian is granted; and the complainant, the State of Oklahoma, and the intervener, the United States of America, are severally given until and including the first Monday of October next within which to answer such amended counter-claim.

2. On consideration of the response made by J. H. Duhon and H. J. Kebideaux to the order to show cause issued against them on May 5, 1924, such response is found insufficient and it is ordered that an injunction be issued directing that they dismiss the action brought by them against the receiver in this cause in the District Court of Wichita County, Texas, and that they refrain from taking any other proceeding or step in that action.

3. The report of the boundary commissioners of the survey and platting of the medial line of Red River in the vicinity of the river-bed wells, pursuant to the order of June 4, 1923, 262 U. S. 505, is approved and adopted. The report of such commissioners of the time employed and expense incurred in that work is also approved, and the receiver is directed to pay the sums specified in such report and to charge the same against the impounded funds derived from the river-bed wells.

4. On consideration of the motion of the State of Texas that the receiver pay out of the proceeds of the receivership wells south of the interstate boundary the production tax prescribed by the laws of that State, it is ordered that

the receiver be authorized, out of the impounded proceeds from every such well, to pay such tax in respect of such impounded proceeds and to charge the same against such well as an expense specially pertaining to it. But before making any such payment the receiver shall request the Attorney General of the State of Texas, and the parties interested in the fund from which the payment is to be made, to submit to him definite statements showing the amount of the tax and whether it has been otherwise paid. If in any instance the receiver is in doubt respecting the propriety of the payment he shall withhold it and report the matter to this Court for further instructions.

5. The receiver is instructed to distribute *pro rata* over the impounded funds in his custody all interest received on receivership moneys, all discounts collected and all other similar items of profit arising from the general operations or business of the receivership, and not from particular wells.

6. The receiver is authorized to take all proper steps to obtain payment of all accounts and claims that may be due or owing to him as such receiver and to report to the Court at its next term all of such accounts and claims as then may remain unpaid with his recommendations respecting the measures to be taken to enforce payment.

7. The receiver is directed to publish a final notice to all persons asserting or holding claims against him or the receivership arising out of matters accruing since the claims' notice of June 1, 1921, to present such claims within forty days after the first publication of such notice, in default of which the claims will be barred.

8. The receiver is instructed to make no reimbursement, under the order of June 1, 1921, 256 U. S. 607, or otherwise, to any operator or driller for work done on any river-bed well prior to the receivership where the well has proved to be a dry hole or unproductive; and all

applications and suggestions that reimbursement be made for such work are overruled.

9. The receiver is instructed to spread the general expenses of the receivership over all the impounded funds in his custody in such way that each dollar in the funds derived from river-bed wells, and in those derived from flood-plain wells which have remained in the operation of the receiver, will bear twice as much of such expenses as each dollar in the funds derived from flood-plain wells which have been operated by private claimants will bear. The spreading shall be made evenly over all moneys in the funds bearing the lesser share of the expenses, and evenly over all moneys in the funds bearing the larger share. No distinction shall be made between moneys going to owners of flood-plain wells and moneys going to lessees of such wells. Neither shall be exempted and the spreading over the two shall be on a *pro rata* basis. [See *ante*, 505.]

10. All expenses and losses incident to work done by the receiver on river-bed wells which proved unremunerative shall be charged against the funds derived from remunerative wells in the river bed.

11. The receiver is authorized to pay to Tom Testerman the sum received by the receiver on the sale by him of equipment belonging to Mr. Testerman which had come into the possession of the receiver.

12. The petition of Tom Testerman asking that he be reimbursed out of funds enuring to the Bass Petroleum Company, its successor or assigns, for the conversion by such company, prior to the receivership, of property claimed by Mr. Testerman is denied.

13. Notwithstanding the exception of well No. 139, known as the Burk-Senator well, from the order of June 1, 1921, 256 U. S. 607, the receiver is authorized, in his discretion, to reimburse the operators who drilled that well prior to the receivership for the cost of that work,

if the operators who participated therein are disposed to adjust the differences between them and to accept a reimbursement which is satisfactory to the receiver.

14. The receiver is authorized to surrender to the Secretary of the Interior, as the representative of the United States, the possession of all of the south half of the river bed, now in the receivership, with all oil wells, pipe lines and other property pertaining to such river bed,—the surrender to be made at the close of business on the 30th of June, 1924, or as soon thereafter as the Secretary of the Interior is prepared to take over that property.

15. The receiver is authorized to deliver to the Secretary of the Interior, as the representative of the United States, at the time of the surrender named in the last paragraph the office buildings, equipment and supplies belonging to the receivership and intended for use in its oil and gas operations,—the delivery to be at a valuation agreed upon between the Secretary of the Interior and the receiver. The agreed price shall be charged to the United States and credited to the receiver as a partial payment to the former of the money enuring to it as proceeds of river-bed wells.

16. The receiver is authorized to pay over to the Secretary of the Interior, as the representative of the United States, at the time of the surrender and delivery named in the last two paragraphs approximately two-thirds of the net impounded funds derived from the river-bed wells.

17. The receiver is authorized to surrender to the several owners or lessees entitled thereto, as soon as arrangements therefor satisfactorily can be made, the possession of the flood-plain wells which he is now operating, together with the pipe lines and fixtures pertaining to them. If there be controversy or doubt as to who is entitled to any particular well the receiver shall withhold its sur-

render for the time being and pursue the course indicated in the next paragraph of this order.

18. The receiver is instructed to publish notice to all claimants to funds in his custody derived from flood-plain wells (meaning wells south of the interstate boundary as now established) to present their claims to such funds within forty days after the first publication of such notice,—the presentation to be in the form of a definite statement of what is claimed and of the claimant's title. After the expiration of twenty days more the receiver shall be authorized, where there are no conflicting claims, to pay the proceeds from any well or wells, less expenses and charges, to the proper claimant or claimants. If there be controversy or doubt as to who is entitled to the proceeds from any well the receiver shall withhold action as to such proceeds and report the matter to this Court at its next term for further instructions.

19. The receiver is directed to have all of his accounts audited as of the close of business on June 30, 1924, by an expert public accountant designated by the Chief Justice.

IDAHO IRRIGATION COMPANY, LTD., ET AL. *v.* GOODING ET AL.

GOODING ET AL. *v.* IDAHO IRRIGATION COMPANY, LTD., ET AL.

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

Nos. 324 and 336. Argued April 11, 14, 1924.—Decided June 9, 1924.

1. A contract by a water company in Idaho granting a water right of so much water per acre is to be read with and controlled by statutes of the State limiting allowances to the amount used for beneficial purposes, and forbidding a water-right owner to use more than good husbandry requires. P. 523.

2. A State, through contract with an irrigation company, undertook to reclaim public lands under the Carey Act, and applied for and obtained from the Secretary of the Interior a patent for an area fixed by him, upon evidence that an ample supply of water was actually furnished to reclaim it as contemplated by the act. *Held*, that the action of the Secretary, regarded as an adjudication that the supply was adequate for all the land included, did not bind settlers on the project who purchased water-rights from the company and who sought to enjoin it from violating their contracts by selling more rights in excess of the water actually available. P. 523.
3. Owners of water-right shares in a Carey Act project in Idaho, *held* bound to share water proportionately with others who were sold like shares by the water company in excess of the water supply, but entitled to enjoin the company from disposing of additional rights. P. 524.
4. An Idaho water company which sold water rights on a Carey Act project in excess of the water supply, *held* properly to be enjoined from reselling other shares which it had sold and reacquired through foreclosure, even though appurtenant, under Comp. Stats., Idaho, § 3018, to land owned by itself, since, under the Carey Act and the Idaho law, water rights are distinct property not inseparably attached to the land for the irrigation of which they were acquired. P. 525.

285 Fed. 453, affirmed in part and reversed in part.

APPEAL and cross appeal from a decree of the Circuit Court of Appeals affirming, with modifications, a decree of injunction entered by the District Court in a suit brought by owners of water rights (with whom the State of Idaho joined, by intervention,) to prevent the above-named Irrigation Company, and other defendants, from disposing of further water rights in an irrigation "project", in violation of the plaintiffs' contracts. The suit came into the District Court by removal from a court of Idaho.

Mr. Gordon M. Buck, with whom *Mr. Raymond J. Scully* was on the briefs, for the Idaho Irrigation Company, Ltd.

Mr. Harrison Tweed for the Equitable Trust Company of New York et al., Trustees.

Mr. W. G. Bissell, with whom *Mr. Branch Bird* and *Mr. Karl Paine* were on the briefs, for Gooding et al.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These are separate appeals by the respective parties from the same decree, 285 Fed. 453, in part affirming and in part reversing the Federal District Court for Idaho.

The Idaho Irrigation Company, Limited, is a corporation organized as a construction company for the purpose of reclaiming lands under the Carey Act, c. 301, § 4, 28 Stat. 422. The other appellants in No. 324 (appellees in No. 336) are trustees for bondholders of the Irrigation Company and certain intervening individual owners of land, who had purchased water rights after this suit was brought and a *lis pendens* filed. Appellees (appellants in No. 336) are individual owners of water rights, purchased from the Irrigation Company under the Carey Act, and the State of Idaho, which intervened as a party plaintiff.

The water rights are represented by shares of stock in the Big Wood River Reservoir & Canal Company, organized as an operating company by the Irrigation Company in pursuance of contracts with the State of Idaho.

The suit, brought in a state court and removed to the Federal District Court, was to enjoin the Irrigation Company and the trustees from selling, disposing of or transferring upon the books of the company any shares of the Reservoir and Canal Company held as assets of the Irrigation Company or as trustees for the benefit of bondholders; and to enjoin the Irrigation Company from making further contracts for the sale of water rights, or selling, disposing of or transferring any shares of the Reser-

voir & Canal Company which the Irrigation Company owned or controlled.

By the Carey Act the United States binds itself to donate, grant and patent to a State, complying with stated conditions, desert lands, which the State may cause to be irrigated, reclaimed and occupied. The State is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts to cause the lands to be reclaimed, and to induce their settlement and cultivation. Upon satisfactory proof the Secretary of the Interior is directed to issue patents to the State or its assigns. In pursuance of the Carey Act and of its own statutes to carry that act into effect, c. 136, Idaho Comp. Stats., 1919, p. 848, the State of Idaho entered into contracts with the Irrigation Company for the reclamation of approximately 167,000 acres of land; and the Company entered into contracts with appellees and other settlers to furnish water for lands to be acquired by them in the project, to be represented by shares of stock in the Reservoir & Canal Company.

By these contracts, made on January 2, 1909, and prior dates, the Irrigation Company, understood to be the owner of the right to divert 6,000 cubic feet per second of time of water, agreed that it would furnish and deliver to the owners of such shares all of the appropriated waters to the extent of one-eightieth of a cubic foot per second of time per acre; and that water rights or shares should not be sold beyond the carrying capacity of the canal system or in excess of the waters appropriated. Shares of stock of the Reservoir & Canal Company were to be issued in the proportion of one share for each one-eightieth of a cubic foot per second of time. It was further agreed that the irrigation works should be completed within five years from the date of the contracts, at which time the obligation to furnish the full one-

eightieth of a cubic foot per second of time per acre should be in force and effect.

Upon application of the State of Idaho and evidence to the effect that an ample supply of water was actually furnished and in sufficient quantity to reclaim the lands as contemplated by the Carey Act, the Secretary of the Interior fixed the area of the project at 117,677.24 acres and caused a patent of the United States therefor to be issued and delivered to the State.

The injunction was sought upon the ground that the water, appropriated and available, was wholly insufficient to irrigate the entire area and was no more than sufficient to irrigate 40,939 acres, and that water rights had been sold for lands largely in excess of this area. A *lis pendens* was filed for record in the various counties where the property was situated, which had the effect of imparting constructive notice to all of the pendency of the suit. Comp. Stats. 1919, § 6674. The answer of the Irrigation Company alleges that water right shares had been sold for more than 87,000 acres; that the supply of water appropriated and available was sufficient for the lands represented by these shares and over 25,000 acres in addition. The answer avers as a further defense that the action of the State and of the Secretary of the Interior and the issuance of the patent thereon, constituted a determination by the State of Idaho and the Secretary of the Interior that the water supply and the capacity of the irrigation works were sufficient and that this was binding and conclusive in the case.

It was stipulated at the trial that the total outstanding shares of the Reservoir & Canal Company were 88,835.71. Of these 12,722.64 shares, originally sold to individuals, had been purchased by the trustees at foreclosure sale, out of which 3,143.61 shares were sold to the intervenors after the commencement of the suit and the filing of the *lis pendens*.

The District Court took evidence in open court under Equity Rule 46 and delivered an opinion in favor of appellees, upon which a decree was entered. It determined from the evidence that the reasonable duty of water was 2¾ acre feet per acre for the entire area, without deduction for roads or other non-irrigable tracts; and, without attempting to determine the exact quantity of available water, found that the supply was and would continue to be insufficient to meet the demands of the outstanding contracts, exclusive of those which the Company had acquired through foreclosure proceedings. These findings have support in the evidence and the conclusion is justified that the available water will fall short of supplying as much as 50,000 acres of land. The allowance of 2¾ acre feet per acre is much less than the quantity stipulated in the contract, but the reduction by the court was properly made under the Idaho statute, which requires that the amount of water allowed shall never be in excess of the amount used for beneficial purposes, Comp. Stats., 1919, § 7033; and the statute which forbids the use by any water right owner of more water than good husbandry requires. § 5640. These provisions are to be read into the contracts. *State* v. *Twin Falls, etc., Co.,* 30 Idaho, 41, 77. By statute it was made unlawful for the Irrigation Company to contract to sell more water than it had. § 5636. *State* v. *Twin Falls, etc., Co., supra,* 65; *Gerber* v. *Nampa, etc., Irrigation District,* 16 Idaho, 1, 17.

We cannot accept the contention of appellants that the application of the State and the issuance thereon of a patent to the lands by the Secretary of the Interior constituted a determination binding on the individual water right owners that an ample supply of water was available for the entire 117,677.24 acres. Whatever may be the effect of this action as between the United States and the State of Idaho, it is perfectly clear that it can have no

effect upon the rights of the individual land and water owners. Their rights are to be measured by the contracts; and by these contracts the Irrigation Company bound itself to furnish one-eightieth of a cubic foot per second of time per acre. We fully agree with the District Court that the individual appellees, not being parties to these proceedings, are not bound by them, and in saying: "They hold contracts imposing upon them heavy obligations, and in turn conferring upon them valuable rights. It would be shocking to hold that these rights could be taken away or substantially impaired by a finding of fact or conclusion of law (we are not advised which) made by an administrative officer in an ex parte proceeding in which they did not have an opportunity to be heard." See also *Twin Falls Oakley Land & Water Co.* v. *Martens,* 271 Fed. 428, 433.

As among the individual owners the water rights conveyed by the Irrigation Company are vested and under the contracts must be shared proportionately; but the Irrigation Company is without right to continue to contract to sell and deliver water from a supply that has already been exhausted, thereby compelling these owners to still further diminish their proportionate rights. As said by the Supreme Court of Idaho in *Sanderson* v. *Salmon River Canal Co.,* 34 Idaho, 303, 310: "It is one thing to prevent any more rights vesting, in order to avoid a hardship to those whose rights have already vested, and it is another thing to wipe out rights which have already vested through the issuance of contracts and the use of the water." *State* v. *Twin Falls Land & Water Co.,* 37 Idaho, 73, 85; *Boley* v. *Twin Falls Canal Co.,* 37 Idaho, 318, 331–332; *Caldwell* v. *Twin Falls, etc. Co.,* 225 Fed. 584, 592–595.

We think the District Court was also right in including in the injunction the 12,722.64 shares of stock purchased by the trustees at foreclosure sale. These shares were

the property of the Irrigation Company, and, representing an excess of available water supply, should be extinguished and their resale enjoined. They are subject to the same principle that was applied to the issuance and sale of additional original shares in excess of such supply. The conclusion of the District Court was based upon the theory that the ownership and control of these shares were in the Irrigation Company and this is supported by the evidence. Indeed, it was so stipulated between counsel at the trial. See *Childs* v. *Neitzel,* 26 Idaho, 116, 127, 129–131.

The Court of Appeals, however, held that the decree of the District Court in this respect was erroneous to the extent of 5,322.26 shares, which were appurtenant to the lands owned by the Irrigation Company and its trustees when the suit was commenced and *lis pendens* filed; but we are unable to see that these shares occupy any different status from the others. The stipulation of ownership and control included all. If the injunction was bad as to the 5,322.26 shares, it was bad as to all. The Irrigation Company, having oversold the available water supply, exclusive of the shares purchased at foreclosure sale, cannot be permitted to sell additional shares, whether still unissued, or issued and sold but re-acquired, and whether acquired before the suit and *lis pendens* or afterwards. It may be conceded that the water rights represented by these shares were appurtenant to the lands for the irrigation of which they had been acquired, Comp. Stats. Idaho, § 3018; but they were not, under the Carey Act and the laws of Idaho, inseparably appurtenant to the lands, but constituted distinct and separable property rights. *Bennett* v. *Twin Falls, etc. Co.,* 27 Idaho, 643, 653. To permit the use and enjoyment of these water rights by the Irrigation Company, with the consequent further reduction of individual rights purchased from the Company, would be to ignore the distinction between the wrongdoer

and the innocent, and is not to be suffered by a court of equity.

In so far as the decree of the Court of Appeals agrees with that of the District Court it is affirmed; but in respect of the matter last discussed it is reversed and the decree of the District Court affirmed in all particulars.

No. 324, Affirmed.
No. 336, Reversed.

WILLIAM R. WARNER & COMPANY *v.* ELI LILLY & COMPANY.

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

No. 32. Argued April 28, 29, 1924.—Decided June 9, 1924.

1. Names which are merely descriptive of the ingredients, qualities, or characteristics of an article of trade,—such as the names "Coco-Quinine" and "Quin-Coco," applied to a liquid preparation of quinine in combination with chocolate and other things,—cannot be appropriated as trademarks. P. 528.
2. The use of a name similar to that already employed by another, truthfully to describe one's own product, is not a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of that product. *Id.*
3. A first made and marketed a liquid preparation containing quinine and other drugs compounded with chocolate to give it color and flavor and to aid in suspending the quinine. B then, using chocolate, produced an article of the same taste and appearance, but sold cheaper; and to reap A's trade suggested to retail druggists the feasibility and economy of passing off the one for the other, when dispensed out of the bottle; which was done in many and divers instances.

Held: (a) That B was guilty of unfair competition. P. 528.
(b) He who induces another to commit a fraud and furnishes the means, is equally guilty. P. 530.
(c) When several acts of unfair competition are shown, there is warrant for concluding that they will continue, and equity will afford adequate relief by injunction. P. 531.

(d) The injunction in this case should forbid B and his agents from directly or indirectly representing or suggesting to his customers the feasibility or possibility of passing off B's product for A's, and may well require that his original packages sold to druggists shall bear labels not only distinguishing B's bottled product from A's, but also stating affirmatively that B's preparation is not to be sold or dispensed as A's, or be used in filling prescriptions or orders calling for the latter. P. 531.

(e) But the use by B of chocolate as an ingredient of his preparation should not be forbidden. *Id.*

275 Fed. 752, reversed.

Certiorari to a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing on the merits a suit brought by the above named respondent to enjoin the petitioner from continuing to manufacture a medicinal preparation called Quin-Coco, if flavored with chocolate, and from continuing the use of that name.

Mr. George W. Wickersham and *Mr. Francis Rawle,* with whom *Mr. Roger S. Baldwin* and *Mr. Joseph W. Henderson* were on the briefs, for petitioner.

Mr. E. W. Bradford for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

Respondent is a corporation engaged in the manufacture and sale of pharmaceutical and chemical products. In 1899 it began and has ever since continued to make and sell a liquid preparation of quinine, in combination with other substances, including yerba-santa and chocolate, under the name of Coco-Quinine.

Petitioner also is a pharmaceutical and chemical manufacturer. The Pfeiffer Chemical Company, Searle & Hereth Company and petitioner are under the same ownership and control. The first named company in 1906 began the manufacture of a liquid preparation which is substantially the same as respondent's preparation and

which was put upon the market under the name of Quin-Coco. Two years later the Searle & Hereth Company engaged in the manufacture of the preparation, which ever since has been sold and distributed by petitioner.

This suit was brought in the Federal District Court for the Eastern District of Pennsylvania by respondent to enjoin petitioner from continuing to manufacture and sell the preparation if flavored or colored with chocolate; and also from using the name Quin-Coco, on the ground that it was an infringement of the name Coco-Quinine, to the use of which respondent had acquired an exclusive right. The District Court decided against respondent upon both grounds. 268 Fed. 156. On appeal the Court of Appeals ruled with the District Court upon the issue of infringement but reversed the decree upon that of unfair competition. 275 Fed. 752.

The entire record is here and both questions are open for consideration.

First. We agree with the courts below that the charge of infringement was not sustained. The name Coco-Quinine is descriptive of the ingredients which enter into the preparation. The same is equally true of the name Quin-Coco. A name which is merely descriptive of the ingredients, qualities or characteristics of an article of trade cannot be appropriated as a trademark and the exclusive use of it afforded legal protection. The use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of the product. *Canal Co.* v. *Clark,* 13 Wall. 311, 323, 327; *Standard Paint Co.* v. *Trinidad Asphalt Co.,* 220 U. S. 446, 453; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 140.

Second. The issue of unfair competition, on which the courts below differed, presents a question of more difficulty. The testimony is voluminous, more than two

hundred witnesses having been examined; but, since the question with which we are now dealing is primarily one of fact, we have found it necessary to examine and consider it. Nothing is to be gained by reviewing the evidence at length, and we shall do no more than summarize the facts upon which we have reached our conclusions.

The use of chocolate as an ingredient has a three-fold effect: It imparts to the preparation a distinctive color and a distinctive flavor, and, to some extent, operates as a medium to suspend the quinine and prevent its precipitation. It has no therapeutic value; but it supplies the mixture with a quality of palatability for which there is no equally satisfactory substitute. Respondent, by laboratory experiments, first developed the idea of the addition of chocolate to the preparation for the purpose of giving it a characteristic color and an agreeable flavor. There was at the time no liquid preparation of quinine on the market containing chocolate, though there is evidence that it was sometimes so made up by druggists when called for. There is some evidence that petitioner endeavored by experiments to produce a preparation of the exact color and taste of that produced by respondent; and there is evidence in contradiction. We do not, however, regard it as important to determine upon which side lies the greater weight. Petitioner, in fact, did produce a preparation by the use of chocolate so exactly like that of respondent that they were incapable of being distinguished by ordinary sight or taste. By various trade methods an extensive and valuable market for the sale of respondent's preparation already had been established when the preparation of petitioner was put on the market. It is apparent, from a consideration of the testimony, that the efforts of petitioner to create a market for Quin-Coco were directed not so much to showing the merits of that preparation as they were to demonstrating its practical identity with Coco-Quinine, and, since it was sold at a

lower-price, inducing the purchasing druggist, in his own interest, to substitute, as far as he could, the former for the latter. In other words, petitioner sought to avail itself of the favorable repute which had been established for respondent's preparation in order to sell its own. Petitioner's salesmen appeared more anxious to convince the druggists with whom they were dealing that Quin-Coco was a good substitute for Coco-Quinine and was cheaper, than they were to independently demonstrate its merits. The evidence establishes by a fair preponderance that some of petitioner's salesmen suggested that, without danger of detection, prescriptions and orders for Coco-Quinine could be filled by substituting Quin-Coco. More often, however, the feasibility of such a course was brought to the mind of the druggist by pointing out the identity of the two preparations and the enhanced profit to be made by selling Quin-Coco because of its lower price. There is much conflict in the testimony; but on the whole it fairly appears that petitioner's agents induced the substitution, either in direct terms or by suggestion or insinuation. Sales to druggists are in original bottles bearing clearly distinguishing labels and there is no suggestion of deception in those transactions; but sales to the ultimate purchasers are of the product in its naked form out of the bottle; and the testimony discloses many instances of passing off by retail druggists of petitioner's preparation when respondent's preparation was called for. That no deception was practiced on the retail dealers, and that they knew exactly what they were getting is of no consequence. The wrong was in designedly enabling the dealers to palm off the preparation as that of the respondent. *Coca Cola Co.* v. *Gay-Ola Co.*, 200 Fed. 720; *N. K. Fairbank Co.* v. *R. W. Bell Manuf'g. Co.*, 77 Fed. 869, 875, 877–878; *Lever* v. *Goodwin*, L. R. 36 Ch. Div. 1, 3; *Enoch Morgan's Sons Co.* v. *Whittier-Coburn Co.*, 118 Fed. 657, 661. One who induces another to commit a

fraud and furnishes the means of consummating it is equally guilty and liable for the injury. *Hostetter Co.* v. *Brueggeman-Reinert Distilling Co.*, 46 Fed. 188, 189.

The charge of unfair competition being established, it follows that equity will afford relief by injunction to prevent such unfair competition for the future. Several acts of unfair competition having been shown, we are warranted in concluding that petitioner is willing to continue that course of conduct, unless restrained. *Hennessy* v. *Wine Growers' Ass'n*, 212 Fed. 308, 311. It remains to consider the character and extent of this relief.

Respondent has no exclusive right to the use of its formula. Chocolate is used as an ingredient not alone for the purpose of imparting a distinctive color, but for the purpose also of making the preparation peculiarly agreeable to the palate, to say nothing of its effect as a suspending medium. While it is not a medicinal element in the preparation, it serves a substantial and desirable use, which prevents it from being a mere matter of dress. It does not merely serve the incidental use of identifying the respondent's preparation, *Coca Cola Co.* v. *Gay-Ola Co.*, *supra*, p. 724, and it is doubtful whether it should be called a non-essential. The petitioner or anyone else is at liberty under the law to manufacture and market an exactly similar preparation containing chocolate and to notify the public that it is being done. *Saxlehner* v. *Wagner*, 216 U. S. 375, 380; *Chadwick* v. *Covell*, 151 Mass. 190. But the imitator of another's goods must sell them as his own production. He cannot lawfully palm them off on the public as the goods of his competitor. The manufacturer or vendor is entitled to the reputation which his goods have acquired and the public to the means of distinguishing between them and other goods; and protection is accorded against unfair dealing whether there be a technical trademark or not. The wrong is in the sale of the goods of one manufacturer or vendor as those

of another. *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665, 674. If petitioner had been content to manufacture the preparation and let it make its own way in the field of open and fair competition, there would be nothing more to be said. It was not thus content, however, but availed itself of unfair means, either expressly or tacitly, to impose its preparation on the ultimate purchaser as and for the product of respondent.

Nevertheless, the right to which respondent is entitled is that of being protected against unfair competition, not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of the sale of a preparation which everyone, including petitioner, is free to make and vend. The legal wrong does not consist in the mere use of chocolate as an ingredient, but in the unfair and fraudulent advantage which is taken of such use to pass off the product as that of respondent. The use dissociated from the fraud is entirely lawful, and it is against the fraud that the injunction lies. But respondent being entitled to relief, is entitled to effective relief; and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer and against the petitioner, which has shown by its conduct that it is not to be trusted. Clearly, the relief should extend far enough to enjoin petitioner, and its various agents, from, directly or indirectly, representing or suggesting to its customers the feasibility or possibility of passing off Quin-Coco for Coco-Quinine. The Court of Appeals held that petitioner should be unconditionally enjoined from the use of chocolate. We think this goes too far; but, having regard to the past conduct of petitioner, the practices of some druggists to which it has led, and the right of respondent to an effective remedy, we think the decree fairly may require that the original packages sold to druggists shall not only bear labels clearly distinguishing petitioner's bottled product from the bottled product of

respondent, but that these labels shall state affirmatively that the preparation is not to be sold or dispensed as Coco-Quinine or be used in filling prescriptions or orders calling for the latter. With these general suggestions, the details and form of the injunction can be more satisfactorily determined by the District Court. The decree of the Court of Appeals is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* NEW RIVER COMPANY ET AL.

SLAB FORK COAL COMPANY ET AL. *v.* NEW RIVER COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Nos. 627 and 628. Argued April 24, 1924.—Decided June 9, 1924.

1. An order of the Interstate Commerce Commission, in form dismissing a complaint of shippers but the effect of which was to require the observance of a rule of car distribution attacked in the proceedings as arbitrary, illegal and unconstitutional, *held* not a "negative" order, (*Procter & Gamble Co.* v. *United States*, 225 U. S. 282, distinguished,) and reviewable in the District Court. P. 539.
2. The courts cannot substitute their judgment for the findings and conclusions of the Commission made within the scope of its power to regulate the distribution of coal cars. P. 541.
3. A rule fixing the number of cars distributable to coal mines in proportion to the daily capacity of each to produce, *held* not arbitrary, unreasonable, or violative of due process, as applied to mines served by more than one carrier. P. 542.

293 Fed. 460, reversed.

APPEALS from a final decree of the District Court enjoining the enforcement of an order of the Interstate Commerce Commission respecting distribution of coal

cars. The suit was brought by the New River Company and other coal mine operators, (appellees), against two railroad companies, the United States and the Commission. Other coal operators intervened to defend the order. The United States and the Commission took one appeal, and the interveners another. The carrier defendants abstained.

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

Mr. George T. Bell for appellants in No. 628.

Mr. James W. Carmalt, with whom *Mr. Addison C. Burnham* and *Mr. August G. Gutheim* were on the brief, for appellees.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought by the appellees against the Chesapeake & Ohio Railway Company and the Virginian Railway Company, competing interstate carriers by railroad, the United States and the Interstate Commerce Commission to enjoin the carriers from applying a certain rule (Rule 4 of Circular CS-31, Revised) for the distribution of coal cars and to set aside the decision and order of the Commission of December 11, 1922, in certain proceedings instituted by the appellees against the defendant carriers.

For convenience, a mine served by one carrier is called a "local mine", and a mine served by two or more carriers a "joint mine". Each appellee is the operator of a joint mine served by the defendant carriers, and each appellant mining company is the operator of a local mine

served by one or the other of the carriers. The car service rules were promulgated to govern uniformly the "ratings" of coal mines, other than anthracite, and car distribution to such mines during periods of car shortage. The daily rating of a local mine for any month is based on its tonnage shipped during the preceding month, and is identical with its daily capacity to produce coal. The rating of a joint mine is calculated in the same way that the daily rating of a local mine is determined, except that its shipments over all carriers serving it are considered in determining its total capacity to produce coal. The figure so ascertained is called the "gross daily rating," in recognition of the fact that the rating of a joint mine does not represent its capacity to ship over each carrier on days when it uses more than one, but on the contrary represents its total daily capacity to ship over all lines which serve it. Rule 4 provides: "Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine". Under the rules, when a mine orders less than its rating, distribution to it is on the basis of its orders.

These rules were established during the period of federal control of the railroads. After the expiration of that period, the Commission issued a notice, dated March 2, 1920, recommending to carriers and shippers that the rules be continued in effect until experience and further study demonstrated that others would be more effective and beneficial. They were continued by carriers generally. July 8, 1920, the Chesapeake & Ohio Railway Company and the Virginian Railway Company asked for permission to discontinue rule 4 and to substitute for it the "150 per cent. rule", which the Commission in 1912 had found to be a reasonable rule for the Illinois Central Railroad Company (*In re Irregularities in Mine Ratings*, 25

I. C. C. 286, 295), but which had never been followed by the railroads generally or by the defendant carriers. Under this rule, a joint mine may order 100 per cent. of its gross daily rating from either carrier serving it and is entitled to receive its pro rata share of that carrier's available cars. If it so orders, it is not entitled to any cars from the other carrier. In this respect, it does not differ from rule 4. However, if a joint mine served by two carriers orders cars from both on the same day, it is entitled to order from each carrier 75 per cent. of its gross daily rating, making its combined orders 150 per cent., but subject to the limitation that it is not entitled to receive in the aggregate more than its gross daily rating. The Commission declined to give permission to substitute the 150 per cent. rule for rule 4.

January 11, 1921, appellees filed separate complaints with the Commission against the Chesapeake and Ohio Railway Company and against the Virginian Railway Company, attacking rule 4 as unjust and unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines. Certain operators of joint mines intervened in support of the complaints. Certain operators of local mines intervened in support of rule 4. The complaints were consolidated with each other and with similar complaints. June 21, 1921, Division 5 of the Commission reported as follows: ". . . We find that rule 4 of Circular CS-31, Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per cent. of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois Case [*In re Irregularities in Mine Ratings, supra*] . . ." *Fairmont & Cleveland Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 62 I. C. C. 269, 276. The Com-

mission referred to its authority under § 1 (13) of the Interstate Commerce Act by general or special orders to require carriers by railroad to file their rules and regulations with respect to car service, and to direct that such rules and regulations be incorporated in the schedules showing rates, fares and charges for transportation, and be subject to the provisions of the act relating thereto; and added, "We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us." No formal order was entered, but the defendant carriers amended their rules to conform to the findings in the report, and put in force and applied the 150 per cent. rule.

Subsequently, on petition of the intervening operators of the local mines, the case was reopened and considered by the full Commission. December 11, 1922, it reversed the findings of Division 5 and found that rule 4 was not unreasonable or unduly prejudicial. *Bell & Zoller Coal Co.* v. *Baltimore & Ohio Southwestern R. R. Co.*, 74 I. C. C. 433. It said: "Our former conclusions in the Fairmont Case, based upon a mistaken adherence to and extension of the decision in the Illinois Case, are reversed." The Commission made a formal order, reciting that it had "made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed." Following the report and order, the Chesapeake & Ohio Railway Company and the Virginian Railway Company gave notice to the appellees that they would put rule 4 in effect again.

Thereupon this suit was brought. The complaint alleged that the carriers put the rule in effect because of the order of the Commission, and in fear of the penalties imposed by law for violation of its orders. It attacked the order and rule on the ground that they are beyond the power which the Commission can constitutionally exercise; and are in excess of the power conferred upon it by statute; and that they are arbitrary and unreasonable. The Chesapeake & Ohio Railway Company answered that the effect of the order upon it was necessarily the same as though the order had been in affirmative form, requiring it to cease and desist publishing and observing the Illinois rule (150 per cent. rule) and in lieu thereof to publish and observe rule 4; and that, facing the danger of suits for heavy damages, supported by a decision and reparation orders which it believed would follow its failure to observe the rule prescribed by the Commission, it undertook to cancel the existing rule and to restore rule 4. The Virginian Railway Company answered that in the matter of distribution of cars, it was subject to the orders of the Commission, and that the Commission having decided that rule 4 is not unreasonable or unduly prejudicial, and in the same decision having expressly reversed its conclusion in the *Fairmont Case,* that company considered itself legally bound to put rule 4 in effect on its railroad. The United States and the Interstate Commerce Commission moved to dismiss the complaint for want of jurisdiction and want of equity. The interveners moved to dismiss and later answered.

The case was presented to and heard by a court of three judges. Act of October 22, 1913, c. 32, 38 Stat. 220. The operation of the order of the Commission was stayed and suspended. After trial, final decree was entered setting aside the Commission's order and rule 4 and enjoining the United States, the Commission and the defendant carriers from restricting the rights of appellees in accord-

ance with the order and rule or through any other order or rule to the same effect. 293 Fed. 460. The United States and the Interstate Commerce Commission appealed. No. 627. The interveners appealed. No. 628. The carriers did not appeal.

The questions for decision are: Whether the order was subject to review by the District Court; and, if so, whether it should be set aside.

1. The District Courts have jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Act of June 18, 1910, c. 309, 36 Stat. 539; Judicial Code, § 207, Act of March 3, 1911, c. 231, 36 Stat. 1148; Act of October 22, 1913, c. 32, 38 Stat. 219. The appellants contend the order is negative and therefore not subject to review by the court. They cite *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302, and *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412. In the first of these cases, application was made by the Procter & Gamble Company, a shipper and owner of tank cars, to be relieved from paying demurrage charges, in accordance with demurrage rules applied by the carrier. The Commission dismissed the complaint. As shown by the report (19 I. C. C. 556, 560), the reason for dismissal was that the tank cars were made subject to the demurrage rules, by an arrangement between the shipper owning the cars and the carrier hauling them. The question before this Court (p. 292) was whether the Commerce Court had power to exert its own judgment by originally interpreting the administrative features of the Act to Regulate Commerce, and upon that assumption to treat the refusal of the Commission to grant the relief prayed for as an affirmative order, and accordingly to pass on its correctness. *Hooker* v. *Knapp* and *Lehigh Valley R. R. Co.* v. *United States* were decided on the authority of the *Procter & Gamble Case.*

The opinion in that case, when viewed in the light of the report of the Commission, furnishes no support for appellants' contentions here. In all of these cases, affirmative relief sought was denied by the Commission. Judicial review was refused on that ground. The taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission, in the exercise of its powers, should be granted. See *The Chicago Junction Case,* 264 U. S. 258. The authority conferred upon the Commerce Court by § 207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. *Kansas City Southern Ry. Co.* v. *United States,* 231 U. S. 423, 439; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 483, 489. See also *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 547; *Intermountain Rate Cases,* 234 U. S. 476, 490; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 562.

The mere fact that the order of the Commission dismisses the complaint of shippers against rule 4 does not make it a negative order. That rule, promulgated during federal control, was continued in effect upon the recommendation of the Commission until it decided, June 21, 1921, that the rule was unduly prejudicial to joint mines and unduly preferential of local mines, and that the carriers should distribute cars to joint mines on the basis of the 150 per cent. rule. The Commission refrained from making an order that the rule be filed as a tariff schedule, but announced that it expected the carriers

promptly to amend their car service rules to conform with its findings. Accordingly, the carrier ceased to apply rule 4 and applied the 150 per cent. rule in its place. When the case was reopened before the Commission, the contest was between the operators of local mines attacking the 150 per cent. rule and the operators of joint mines supporting that rule and objecting to rule 4. The Commission reversed its former findings and decided in favor of rule 4 and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. It is not merely negative. Clearly, the order permits and authorizes the carriers to apply rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside. *The Chicago Junction Case, supra.* Plainly it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150 per cent. rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction.

2. Appellees contend that each operator of a joint mine has a legal right to its fair share of the car supply of each carrier serving the mine; that the operator on any day may offer the prospective output of the mine to any carrier serving it and is entitled on that basis to its share of the carrier's available cars, and that, if any portion of the output remains, the operator may offer it to the second carrier and is entitled to a fair share of that carrier's available cars. This practice is forbidden by rule 4, approved by the order of the Commission. The court below held the order invalid as discriminatory in that it deprived the operator of a joint mine of an advantage to which it has a legal right.

The Interstate Commerce Act confers power on the Commission to regulate the distribution of cars. See § 1, (3), (4), (6), (10), (11), (12), (14); § 3 (1); § 15 (1).

And its jurisdiction over the subject is exclusive. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra,* 472; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 493; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 304, 313; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121, 131, 133; *Pennsylvania R. R. Co.* v. *Clark Coal Co.,* 238 U. S. 456, 468; *Pennsylvania R. R. Co.* v. *Stineman Coal Co.,* 242 U. S. 298, 300. The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra,* 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* 547; *Kansas City Southern Ry. Co.* v. *United States, supra,* 456; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States, supra,* 488.

Under rule 4, an operator of a local mine is entitled on the basis of its daily rating to its pro rata share of the available cars of the carrier serving it. An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier, but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which at the time has the better car supply and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections and markets it desires to have. The determination of the Commission in favor of rule 4 cannot be said to be so arbitrary or unreasonable as to transcend the power conferred upon it in respect to car distribution. The contention that the order of the Commission deprives operators of joint mines of their property without due process of law is without merit.

Decree reversed.

MR. JUSTICE McKENNA, dissenting.

Let me state the proposition of the opinion denuded of the confusion of its words. It is that the owner of property—a "joint mine," to use the designation of the case—having available to him the car facilities of two carriers, must yield his advantage or some of it to the owner of a "local mine" (to use the designation of the case) who is not so situated.

I am unable to assent and yet I hesitate to dissent,—certainly hesitate to do so by unsupported declaration. I am, however, puzzled to go beyond declaration. Exposition seems to be that of demonstrating the certainty and self-evidence of an axiom. The doctrine of the opinion is that the Interstate Commerce Commission, and this Court in sustaining it, can take from property an attribute, almost as tangible an attribute as its physical substance—that is, its position, that which avails and makes wealth of its products. This, in my opinion, is a deprivation of property. I repeat, to have it intimately in our attention and estimation, that the doctrine of the opinion is that the owner of a "joint mine" may not avail of the cars accessible to his situation—cars of two carriers—only in a degree—he must yield in other degree the full advantage of his position to the owner of a "local mine" that the latter may have accommodation. And why? Is it the dictate of public interest? And if public interest may so dictate, may it not dictate other constituents and conditions of property,—whatever contributes to its value and is formidable to a competitor?

Position of property is as much a constituent of its value as its composition. A market for its products is as necessary as its products. There must be demand for the products and means of their supply, and both, I repeat, are attributes of property. Indeed, they constitute its value aside from its utility. Take them away or limit

them and you take away or limit its value—its right and exercise—its existence.

Property has adversaries in this world and different forms excite different degrees of antagonism, but we have not yet attained to that subserviency of regulation that one owner of property must surrender the advantage of his position to every other owner, giving up what is of value to him, and what was of cost to him.

And what is the justification—the interest of the public? Is it an exercise of eminent domain? Under the fundamental law it is a condition of the exercise of eminent domain that it recompense the detriment it causes or the property it takes. This would seem so elementary as to require no exposition. If one property owner may be required to share his means of reaching markets with another property owner, why not the markets; and having customers of a definite portion of the alphabet, be required to remand the rest of it to other property owners?

One residing in this town should need no illustration of the advantage of position. One can not step out on the streets without having thrust upon him the evidence of the eager push of business to advantageous positions, recognizing their value and paying with eager competition the increase of price.

According to the doctrine of the opinion, the inducement does not exist in a coal mine, but whatever advantage of instrumentalities it has it must share in the public interest with a competitor. If so, why not all instrumentalities—those it owns as well as those that by its position it is able to obtain.

Nor is the proposition of the opinion justified because it is the disposition of an instrumentality of a public service corporation. I repeat, that an owner of property is entitled in the exercise of his rights and satisfaction of his needs to demand service of the carriers to which he

has relation according to his rights and needs, and in the order of their requisition, and the ability of the carrier.

I concur in the reasoning of Commissioner Potter. "We may not restrict the use of transportation facilities in order to equalize mine operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal. . . ."

The question in the case is made obscure by an attempt at its simplification. It seems the prompt assurance of self evidence that a mine owner with the facilities of two railroads may order such number of cars from both railroads as he may need, this being a right relative to his property, indisputably an element of its value, represented in its price and the cost to him.

I think, therefore, the decree should be affirmed.

JAMES EVERARD'S BREWERIES *v.* DAY, PROHIBITION DIRECTOR OF THE STATE OF NEW YORK, ET AL.

EDWARD AND JOHN BURKE, LIMITED, *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE, ET AL.

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

Nos. 200 and 245. Argued March 4, 5, 1924.—Decided June 9, 1924.

1. Section 2 of the Supplemental Prohibition Act of November 23, 1921, in so far as it prevents physicians from prescribing intoxicating malt liquors for medicinal purposes, is constitutional. P. 557.
2. This provision does not violate the Tenth Amendment, since it is not an invasion of power reserved to the States. P. 558.
3. It is supported both by the implied power of Congress to make laws necessary and proper for executing powers expressly granted

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(Const., Art. I, § 8, cl. 18,) and by the clause of the Eighteenth Amendment specifically conferring power to enforce by "appropriate legislation" the prohibition of traffic in intoxicating liquors for beverage purposes. P. 558.

4. The Court cannot say, in face of the contrary affirmation by Congress, that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment. P. 560.
5. Nor can it be held that the act is an arbitrary and unreasonable prohibition of the use of valuable medicinal agents, in view of the determination of Congress, and the evidence supporting it, that intoxicating malt liquors possess no substantial and essential medicinal properties, which, as respects the public health, cannot be supplied by permitting physicians to prescribe spirituous and vinous intoxicating liquors in addition to non-intoxicating malt liquors. P. 561.
6. Dealers in beer, ale and stout, who were prevented by the act from disposing of stocks acquired before it was passed, were not thereby deprived of property without due process of law in violation of the Fifth Amendment. P. 563.

Affirmed.

APPEALS from decrees of the District Court which dismissed the bills, for want of equity, in two suits brought by manufacturers and dealers in intoxicating malt liquors, to enjoin the Commissioner of Internal Revenue, and other officials, from enforcing a Supplemental Prohibition Act.

Mr. Samuel W. Moore, with whom *Mr. Marcus L. Bell* was on the briefs, for appellant in No. 245.

I. The allegation that Guinness's Stout is a valuable medicinal agent, is to be taken as true, for the purposes of this appeal, notwithstanding the provisions of the Willis-Campbell Act, being admitted by the motion to dismiss.

How can Congress, acting under a constitutional grant of authority to prohibit the manufacture and sale of intoxicating liquor for beverage purposes, prohibit the sale of a recognized medicinal agent for medicinal pur-

poses? The National Prohibition Act itself recognizes the value of malt as well as other liquor for medicinal purposes, and contains carefully drawn provisions which permit the use of intoxicants for medicinal purposes.

The sale and use of sacramental wines, the use of liquor in hospitals and sanitariums, and the use of industrial alcohol are also permitted. A great number of regulations have been made by the Commissioner, with the approval of the Treasury Department, throwing safeguards and restrictions around the sale and prescription of intoxicating liquor for medicinal purposes.

The Eighteenth Amendment did not clothe Congress with the general power to invade the domain of medical authority, or to substitute its judgment for the judgment of the attending physician. Much less may it select a recognized therapeutic agent, such as Guinness's Stout, and declare that it may not be prescribed for a patient, even though the attending physician regards it as essential or indispensable in bringing about a restoration to health. If Congress can select one recognized medical agent, and lawfully prohibit its use, there is no limit to which it may not go. *United States* v. *Freund,* 290 Fed. 411; *Lambert* v. *Yellowley,* 291 Fed. 640.

The determination of questions of fact is a judicial and not a legislative question. *Block* v. *Hirsh,* 256 U. S. 135; *Shoemaker* v. *United States,* 147 U. S. 282; *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

II. The grant of power contained in the Eighteenth Amendment is limited by the reservations of the Tenth Amendment. The two amendments effect a division of legislative power over intoxicating liquor, the Congress and state legislatures being vested with concurrent legislative power over intoxicating liquor for beverage purposes, and the legislatures of the several States retaining

exclusive legislative power over intoxicating liquor for non-beverage purposes. *United States* v. *Lanza,* 260 U. S. 377.

It is true that Congress in the exercise of a delegated power, such as the power to prohibit the use of intoxicating liquor for beverage purposes, possesses the incidental power to enact such laws and make such regulations as will effectively prevent the manufacture, sale or transportation of intoxicating liquor for the prohibited purposes; but the exercise of this incidental power must stop short of the actual prohibition of the manufacture and sale of intoxicating liquor for non-beverage purposes. Otherwise the legislative control of the several States over intoxicating liquor for non-beverage purposes, reserved to them by the Tenth Amendment, would be nullified.

The incidental power of Congress to give full effect to a delegated power cannot, consistently with the Tenth Amendment, wholly deprive the States of the power which that amendment reserves to them. In other words, judicial construction cannot write into the Eighteenth Amendment authority to prohibit the manufacture and sale of intoxicating liquor for non-beverage purposes, as well as for beverage purposes. To do so would be to strike the words " for beverage purposes " from the amendment. Had the amendment when submitted to the legislatures of the several States contained a delegation of authority to Congress to prohibit the manufacture, sale or transportation of intoxicating liquor for non-beverage, as well as beverage, purposes, there is no reason to suppose that it would have received the ratification it did.

It is of the utmost importance to bear in mind that the power over the manufacture and sale of intoxicating liquor, similar to the power to regulate intrastate and interstate commerce, is a divided power, a part of this power being vested in the general government and a part

being reserved to state governments. The state powers may not encroach upon the power of Congress, nor may the power of Congress encroach upon the state power to the extent of occupying the entire legislative field. The Constitution itself creates a dividing line which neither may cross.

It should also be borne in mind that this is not a case where Congress acts in the exercise of a power covering the entire legislative field, as it did in *Ruppert* v. *Caffey,* 251 U. S. 264.

Nor is it like the case of *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, where an act of the Legislature of Mississippi prohibiting the sale of malt liquors was upheld. There the state authority was exclusive, covering the entire legislative field, and it could regulate or prohibit as its public policy might require. In neither case was there any constitutional division of power between national and state governments.

III. The incidental power possessed by Congress to make effective its power to prohibit the sale of intoxicating liquor for beverage purposes, cannot be constitutionally exercised so as wholly to prohibit its sale for non-beverage purposes.

There are well-recognized limitations upon the incidental power of Congress to make effective the exercise of its authority under an express or delegated power. *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44. The right to control this subject matter has been exclusively reserved to the several States. While it may be incidentally affected by proper congressional action, it cannot be wholly destroyed. *Employers' Liability Cases,* 207 U. S. 463.

The Tenth Amendment is a limitation imposed by the Constitution upon the action of Congress, and this limi-

tation should receive a liberal, and not a narrow construction. *Fairbank* v. *United States,* 181 U. S. 283; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312; *Boyd* v. *United States,* 116 U. S. 616; *Adair* v. *United States,* 208 U. S. 161; *United States* v. *Dewitt,* 9 Wall. 41; *Collector* v. *Day,* 11 Wall. 113; *Keller* v. *United States,* 213 U. S. 138; *Kansas* v. *Colorado,* 206 U. S. 46.

Congress may go no further than is reasonably necessary to put an end to traffic in intoxicating liquor for beverage purposes. *Wisconsin R. R. Comm.* v. *Chicago, etc., R. R. Co.,* 257 U. S. 563.

The effect of the Eighteenth and Tenth Amendments, considered together, is to vest in the several States the power to regulate or prohibit the use of malt liquors for non-beverage purposes. The effect of this act, if valid, is to divest the States of every shred of authority over the subject.

IV. The enforcement of the act will deprive the appellant of its property without due process of law, and take its property for public use without just compensation, in violation of the Fifth Amendment. *Chicago & N. W. Ry. Co.* v. *Nye Schneider Fowler Co.,* 260 U. S. 35; *Truax* v. *Corrigan,* 257 U. S. 312; *Davidson* v. *New Orleans,* 96 U. S. 97; *Missouri Pacific Ry. Co.* v. *Humes,* 115 U. S. 512; *Scott* v. *Toledo,* 36 Fed. 385; *Caldwell* v. *Texas* 137 U. S. 692; *Leeper* v. *Texas,* 139 U. S. 462; *Giozza* v. *Tiernan,* 148 U. S. 657; McGhee, Due Process of Law, p. 60; Willoughby, Const., pp. 873, 874.

The act made no provision for compensating the appellant for the loss which it would sustain from its enforcement, nor did it postpone the effective date of the act for a period during which the appellant might dispose of its stock. Immediately upon its passage it was approved, and at once became effective. *Ruppert* v. *Caffey,* 251 U. S. 264, and *Mugler* v. *Kansas,* 123 U. S. 623, distinguished.

Mr. Nathan Ballin, with whom *Mr. William M. K. Olcott* and *Mr. Walter E. Ernst* were on the brief, for appellant in No. 200.

I. The Eighteenth Amendment prohibited the use of intoxicating liquors for beverage purposes only. Op. Atty. Gen., March 3, 1921; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Ruppert* v. *Caffey,* 251 U. S. 264; *National Prohibition Cases,* 253 U. S. 350.

In *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, it was decided only that the State might in the exercise of its police power prohibit the use of non-intoxicating malt liquors in order effectually to carry out its state prohibition. There cannot, in the course of that opinion, be found any specific authority to hold that what was permitted to the States, was likewise delegated to Congress, for the prohibition of liquors for medicinal purposes was not included in the delegation of power covered by the Eighteenth Amendment. It is apparent that the power of the States to enforce prohibition, resting on the general rights of the State to regulate the health of its citizens, was a broader function, and not subject to the limitation which has been fastened upon Congress by the express language of the Eighteenth Amendment.

The distinction between national and state functions still remains, and the powers which are undelegated still rest in the States.

Among these functions, the power to regulate health was never delegated by the States to Congress, and is, therefore, a power expressly reserved to the States. It is apparent that the right to practice medicine, the right to manufacture drugs, and the right to manufacture liquors for medicinal purposes, still exist undisturbed, and that Congress has no express power to interfere with these rights. If, in the regulation of national prohibition for beverage purposes, it becomes necessary to establish certain restrictions upon the manufacture of intoxi-

cating liquors for non-prohibited purposes, these restrictions must always be taken in connection with the constitutional right of the individual to enjoy those privileges of life, liberty and pursuit of happiness, which are guaranteed to him under the Constitutions not only of the United States, but also of the States.

In the decisions of this Court, this distinction is manifested in the cases in which acts of Congress have been held to be unconstitutional because they violate state functions, or because Congress has transcended its power. *Marshall* v. *Gordon,* 243 U. S. 521.

That the exercise of the regulation of health is purely a matter of state control is exemplified in *Keller* v. *United States,* 213 U. S. 138; and *Hoke* v. *United States,* 227 U. S. 308.

More recently this Court has held that the power of Congress, even though intended to be beneficial, may not be asserted in respect to a purely state function. *Child Labor Tax Case,* 259 U. S. 20.

The power of the State in respect of health has also been recognized by such cases as *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Dent* v. *West Virginia,* 129 U. S. 114; and *Watson* v. *Maryland,* 218 U. S. 173, in all of which the power of the State to regulate vaccination and the practice of medicine is distinctly asserted and established as a state and not a national function. See also *Hammer* v. *Dagenhart,* 247 U. S. 251. *United States* v. *Doremus,* 249 U. S. 86, distinguished.

A striking illustration of the constitutional right of a person to be treated medicinally as he chooses, or in fact, not to be treated at all, appears in *People* v. *Cole,* 219 N. Y. 98.

II. The prohibition of intoxicating malt liquors for medicinal purposes is neither an appropriate nor a reasonable exercise of the prohibitory power of Congress.

The power to prohibit the use of liquors as a beverage does not extend to the power to prohibit them as a medi-

cine. *Sarrls* v. *Commonwealth,* 83 Ky. 427; Freund, Police Power, p. 210; *Lambert* v. *Yellowley,* 291 Fed. 640; *United States* v. *Freund,* 290 Fed. 411.

May a legislature declare a scientific fact because it has instituted some investigation? Because of such investigation, may Congress arbitrarily assume that malt liquors have no medicinal properties? In its last analysis, the scientific or medicinal value of the product should rest with the physician. Congress has transgressed not only the constitutional right of the physician to determine what is beneficial for his patients, but also the constitutional right of the patient to receive from the physician the prescription of malt liquors, if the physician deems it best for the health of his patient. In this enactment Congress assumed a function which it did not constitutionally possess. The power to define what is intoxicating, namely, the limitation to an alcoholic content of ½ of one per cent., may not be extended so as to give Congress power, also, to declare non-medicinal a form of liquor which has been recognized by leading physicians as having marked medicinal and therapeutic properties.

Mr. Joseph S. Auerbach, with whom *Mr. Martin A. Schenck* was on the brief, on behalf of Samuel W. Lambert, by special leave of Court, as *amicus curiae.*

Mr. Solicitor General Beck, with whom *Mrs. Mabel Walker Willebrandt* and *Mr. Mahlon D. Kiefer* were on the brief, for appellees.

Mr. H. H. Griswold, on behalf of the Attorneys General of the States of Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, West Virginia and Wyoming, by special leave of Court, as *amicus curiae.*

MR. JUSTICE SANFORD delivered the opinion of the Court.

These two cases were heard together. They involve the single question whether § 2 of the Supplemental Prohibition Act of November 23, 1921, c. 134, 42 Stat. 222, is constitutional, in so far as it prevents physicians from prescribing intoxicating malt liquors for medicinal purposes. This section of the act provides: "That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void."

The Eighteenth Amendment to the Constitution provides that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes is hereby prohibited" (§ 1); and that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." (§ 2.)

The National Prohibition Act (41 Stat. 305), enacted in pursuance of this Amendment, provides that no person shall "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor" except as authorized in the act, and that all its provisions shall be liberally construed to the end that "the use of intoxicating liquor as a beverage" may be prevented, Tit. II, § 3; that intoxicating liquor "for nonbeverage purposes" may be manufactured, sold, etc., "but only" as provided in the act, and the Commissioner of Internal Revenue may issue permits therefor, *Ib.*, § 3; that no one shall manufacture, sell or prescribe intoxicating liquor without first obtaining a permit from the Commissioner, § 6; that no permit shall be issued for the sale of intoxicating liquor at retail except through a pharmacist licensed to dispense medicine prescribed by physicians,

§ 6; that no one shall be given a permit to prescribe intoxicating liquor except a licensed practicing physician, § 6; that no one but a physician holding such permit shall issue any prescription for intoxicating liquor, § 7; and that not more than a pint of "spirituous liquor" shall be prescribed for the same person within any period of ten days, § 7.

Under the Regulations adopted by the Treasury Department after the passage of the act, physicians obtaining permits were authorized to prescribe only distilled spirits, wines, and certain alcoholic medicinal preparations. T. D. 2985. In October, 1921, pursuant to an opinion of the Attorney General that the Commissioner might issue permits for the manufacture of beer and other intoxicating malt liquors, as well as whisky and vinous liquors, for medicinal purposes (32 Ops. Atty. Gen. 467), the Regulations were amended so as to authorize the Commissioner to issue permits for the manufacture of intoxicating malt liquors for medicinal purposes, and to permit physicians to prescribe them. T. D. 3239.

In November Congress passed the Supplemental Act now in question, containing in § 2, as has been stated, the provision that "only spirituous and vinous liquor may be prescribed for medicinal purposes," and that all prescriptions for any other liquor[1] and permits therefor shall be void. The direct effect of this provision is to prohibit physicians from prescribing intoxicating malt liquors for medicinal purposes, and the Commissioner from issuing permits authorizing such prescriptions. This section also limits prescriptions for vinous liquor to one-

[1] The word "liquor" is used as meaning "intoxicating liquor" as defined in the Prohibition Act (Tit. II, § 1), including beer, ale, porter, and any malt liquor containing one-half of one per centum of alcohol by volume and fit for use for beverage purposes. Supp. Act, § 1.

fourth of a gallon, containing not more than 24 per centum of alcohol, and provides that the vinous and spirituous liquor prescribed for any person within any period of ten days shall not contain more than one-half pint of alcohol.

James Everard's Breweries, the plaintiff in the first case, is a New York corporation. Prior to the passage of the Prohibition Act it had been engaged in the manufacture and sale of beer and other intoxicating malt liquors. After the Treasury Regulations had been amended, it obtained a permit for the manufacture of intoxicating malt liquor for medicinal purposes, and brewed a large quantity of beer, ale and stout for sale to pharmacists for resale on physician's prescriptions. When the Supplemental Act was passed it had on hand a large quantity of these intoxicating malt liquors which it could not thereafter sell in the conduct of its business, and of which it could only dispose, after de-alcoholization, at a heavy loss.

Edward and John Burke, Limited, the plaintiff in the second case, is a British corporation, engaged in bottling and distributing an intoxicating malt liquor known as Guinness's Stout. Prior to the passage of the National Prohibition Act it had maintained a branch of its business in New York. Early in November, 1921, the Commissioner refused it a permit to sell such stout for medicinal purposes because of the pendency in Congress of the Supplemental Prohibition Bill. At the time of the passage of the act it had on hand a large quantity of stout.

Each of these corporations brought a suit in equity in the District Court to enjoin the Commissioner of Internal Revenue and other federal officers from enforcing the provision of the Supplemental Act prohibiting the prescribing of intoxicating malt liquors for medicinal purposes, alleging that it was not authorized by the Eighteenth Amendment and was in conflict with other provisions

of the Constitution.[2] Each of these bills was dismissed by the District Court, for want of equity.[3] The plaintiffs then appealed directly to this Court. Jud. Code, § 238.

The contention that this provision of the Supplemental Act is unconstitutional, is based primarily upon the grounds: That the Eighteenth Amendment merely delegates to Congress the authority to prohibit the traffic in intoxicating liquors for beverage purposes, and the control of the traffic in such liquors for non-beverage purposes is reserved to the several States; that while Congress possesses the incidental power to regulate the traffic in intoxicating liquors for non-beverage purposes so far as is reasonably necessary to make effective the prohibition of the traffic in such liquors for beverage purposes, this incidental power is limited to reasonable regulation and does not extend to complete prohibition; and that the prohibition of prescriptions for the use of intoxicating malt liquors for medicinal purposes is neither an appropriate nor reasonable exercise of the power conferred upon Congress by the Amendment and infringes upon the

[2] In the Everard case the bill prayed that the Supplemental Act be declared unconstitutional; and that the defendants be enjoined from interfering with the plaintiff in manufacturing intoxicating malt liquors for medicinal purposes and selling the same to pharmacists; from interfering with pharmacists in purchasing and physicians in prescribing such liquors for such purposes; and from refusing to issue permits to pharmacists and physicians for such purposes. In the Burke case the bill prayed that the defendants be enjoined from enforcing the act and Treasury Regulations in so far as they prohibited the plaintiff from selling stout to pharmacists for medicinal purposes; from interfering with the plaintiff in making such sales; and from refusing to issue to the plaintiff and to pharmacists and physicians permits for the sale, purchase and prescribing of such stout.

[3] In the Everard case there was no opinion. In the Burke case the opinion was mainly based on the earlier opinion of the same court in *Piel Bros.* v. *Day,* 278 Fed. 223, which had been affirmed by the Circuit Court of Appeals, *per curiam.* 281 Fed. 1022.

legislative power of the States in matters affecting the public health.

It is clear that if the act is within the authority delegated to Congress by the Eighteenth Amendment, its validity is not impaired by reason of any power reserved to the States. The words "concurrent power" as used in the second section of the Amendment "do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them"; and the power confided to Congress, while not exclusive, "is in no wise dependent on or affected by action or inaction on the part of the several States or any of them." *National Prohibition Cases,* 253 U. S. 350, 387. And if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States "powers not delegated to the United States by the Constitution." See *McCulloch* v. *Maryland,* 4 Wheat. 316, 406; *Lottery Case,* 188 U. S. 321, 357.

We come then to the question whether this act is within the power conferred upon Congress by the Eighteenth Amendment. By its terms the Amendment prohibits the manufacture, sale or transportation of intoxicating liquors for beverage purposes, and grants to Congress the power to enforce this prohibition "by appropriate legislation." Its purpose is to suppress the entire traffic in intoxicating liquor as a beverage. See *Grogan* v. *Walker,* 259 U. S. 80, 89. And it must be respected and given effect in the same manner as other provisions of the Constitution. *National Prohibition Cases,* 253 U. S. 350, 386.

The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Art. I, § 8, cl. 18. In the exercise of such non-enumerated or "implied" powers it has long been settled that Congress is

not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *United States* v. *Fisher*, 2 Cranch, 358, 395; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326; *McCulloch* v. *Maryland, supra*, pp. 421, 422; *Ex parte Curtis*, 106 U. S. 371, 372; *Legal Tender Case*, 110 U. S. 421, 440; *In re Rapier*, 143 U. S. 110, 134; *Logan* v. *United States*, 144 U. S. 263, 283; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 712; *Lottery Case, supra*, p. 355; *Hoke* v. *United States*, 227 U. S. 308, 323. Furthermore, aside from this fundamental rule, the Eighteenth Amendment specifically confers upon Congress the power to enforce "by appropriate legislation" the constitutional prohibition of the traffic in intoxicating liquors for beverage purposes. This enables Congress to enforce the prohibition "by appropriate means." *National Prohibition Cases, supra*, p. 387.

It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. *McCulloch* v. *Maryland, supra*, p. 423; *Legal Tender Case, supra*, p. 450; *Fong Yue Ting* v. *United States, supra*, p. 713. Nor may it enquire as to the wisdom of the legislation. *Legal Tender Case, supra*, p. 450; *McCray* v. *United States*, 195 U. S. 27, 54; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 141. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion. *Ex parte Curtis, supra*, p. 373.

It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence. *Lottery Case, supra,* p. 363; *Hamilton* v. *Kentucky Distilleries Co., supra,* p. 161. And it has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264.

The ultimate and controlling question then is, whether in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, Congress has exceeded the constitutional limits upon its legislative discretion.

In enacting this legislation Congress has affirmed its validity. That determination must be given great weight; this Court by an unbroken line of decisions having "steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544.

We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious. *Crane* v. *Campbell,* 245 U. S. 304, 307. The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States. *Ruppert* v.

Caffey, supra, p. 297. The opportunity to manufacture, sell and prescribe intoxicating malt liquors for "medicinal purposes," opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; aids evasion: and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment. A provision in a revenue act which tends to diminish the opportunity for clandestine traffic in avoidance of the tax, has a reasonable relation to its enforcement. *United States* v. *Doremus,* 249 U. S. 86, 94.

Nor can it be held that the act is an arbitrary and unreasonable prohibition of the use of valuable medicinal agents.

When the bill was pending in Congress the Judiciary Committee of the House of Representatives held an extended public hearing, in which it received testimony, among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal properties. Hearings before House Judiciary Committee on H. R. 5033, Serial 2, May 12, 13, 16, 17, 20, 1921. On the information thus received the Committee recommended the passage of the bill. H. R., 67th Cong., 1st sess., Rep. No. 224.[4] And in the light of all the

[4] In its report the Committee said: "The evidence presented to the committee to the effect that beer has never been recognized as a medicine was overwhelming. The United States Pharmacopœia has never listed it as a medicine. One hundred and four of the leading physicians and scientists in the Nation signed the following statement: 'The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopœia as official medicinal remedies. They serve no medical purpose which can not be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of an alcoholic liquor.' Several thousand other physicians signed the

testimony Congress determined, in effect, that intoxicating malt liquors possessed no substantial and essential medicinal properties which made it necessary that their use for medicinal purposes should be permitted, and that, as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act.

Neither beer nor any other intoxicating malt liquor is listed as a medicinal remedy in the United States Pharmacopœia. They are not generally recognized as medicinal agents. There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medicinal agents; and while there is some difference of opinion on this subject the question is, at the most, debatable. And their medicinal properties, if any, may, it appears, be supplied by the use of other available remedies. That the opinion is extensively held that the prohibition of prescription of malt liquors is a necessary and proper means to the suppression of the traffic in intoxicating beverages likewise appears from the legislation in many States, under which such prescriptions are not permitted.

The distinction made by Congress between permitting the prescription of spirituous and vinous liquors while prohibiting the prescription of malt liquors is not plainly

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above, or a similar statement, and presented it to the committee. The attorney for the Anheuser-Busch Co. (Inc.) appeared before the committee and called attention to the fact that if beer was permitted as a medicine it would be impossible to enforce the prohibition law. There was only one doctor who appeared before the committee in favor of beer as a medicine, and the New York County Medical Association, the official medical association of New York, denied that he spoke for them in favoring beer for medicinal purposes."

unreasonable or without a substantial justification, based upon their essential differences.

We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes. See *Radice* v. *New York,* 264 U. S. 292.

It cannot be said that its action in this respect violated any personal rights of the appellants protected by the Constitution. That it did not take their property in violation of the Fifth Amendment, is clear. *Ruppert* v. *Caffey,* 251 U. S. 264, 301, and cases there cited.

We are unable to say that the provision of the Supplemental Act is an arbitrary and unreasonable exercise of the power vested in Congress by the Eighteenth Amendment or that it is not "appropriate legislation" for its enforcement.

The decrees of the District Court are

Affirmed.

AMENDMENT OF RULE 26.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923.

ORDER: It is ordered that sections 1 and 9 of Rule 26 of this Court be amended so that said sections shall, respectively, read as follows:

"1. The court, on the first day of each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and, if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless the court shall otherwise order."

"9. If, after a case has been continued under section 1, both parties shall desire to have it heard at the same term, they may, not later than three days before a regular motion day, file with the Clerk their joint request to that effect accompanied by their affidavits or those of their counsel giving the reasons why the case was continued and why it should be reinstated. Reinstatement shall be made by the court only when it appears to the court that there was good reason for the previous continuance and that the reinstatement can be made without prejudice to parties in other cases coming on regularly for hearing."

Promulgated June 9, 1924.

DECISIONS PER CURIAM, FROM APRIL 28, 1924, TO AND INCLUDING JUNE 9, 1924, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 235. HENRY D. OWENS *v.* UNITED STATES. Appeal from the Court of Claims. Submitted April 22, 1924. Decided April 28, 1924. *Per Curiam.* Suit for damages against the United States under a contract for the removal of garbage from Camp Meade. Judgment for claimant for part of claim. Appeal to secure larger recovery. Question turns on the constructions of contract. This Court concurs in the view of the Court of Claims and the judgment is affirmed. *Mr. Horace S. Whitman* and *Mr. William L. Marbury* for appellant. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Wm. M. Offley* for the United States.

No. 236. BROMWELL BRUSH AND WIRE GOODS COMPANY *v.* STATE BOARD OF CHARITIES AND CORRECTION OF KENTUCKY. Error to the Circuit Court of Appeals for the Sixth Circuit. Submitted April 22, 1924. Decided April 28, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Shulthis* v. *McDougal,* 225 U. S. 561, 568, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.,* 237 U. S. 575, 577, 578; *Norton* v. *Whiteside,* 239 U. S. 144, 147; (2) *Miller* v. *Cornwall R. R. Co.,* 168 U. S. 131, 134; *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. *Mr. Harvey Myers* for plaintiff in error. *Mr. Thomas B. McGregor* and *Mr. Swager Sherley* for defendant in error.

No. 239. E. L. PIERCE ET AL. *v.* DRAINAGE DISTRICT No. 17, MISSISSIPPI COUNTY, ARKANSAS. Error to the Supreme Court of the State of Arkansas. Argued April 25, 1924. Decided April 28, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Arthur T. Brewster,* with whom *Mr. Jesse C. Sheppard* was on the brief, for plaintiffs in error. *Mr. G. B. Rose,* with whom *Mr. D. H. Cantrell, Mr. J. F. Loughborough* and *Mr. A. W. Dobyns* were on the brief, for defendant in error.

No. 230. WILLIAM BERNARD DUKE ET AL. *v.* UNITED STATES. Appeal from the Court of Claims. Argued April 22, 23, 1924. Decided April 28, 1924. *Per Curiam.*

On consideration of the record and arguments in this cause the judgment of the Court of Claims is set aside and the cause is remanded to that court with the following directions, one purpose of which is to elicit additional findings on questions of fact bearing on the right application to the cause of certain statutes of the United States, notably §§ 5, 7, 8 and 9 of the Act of September 7, 1916, c. 451, 39 Stat. 728, as amended by the Act of July 15, 1918, c. 152, 40 Stat. 900:

1. To find (a) the nature, terms and conditions of the offer to sell on the part of the United States Shipping Board which is mentioned in the court's second finding, (b) whether that offer was based on any appraisement of the vessels to be sold and whether there was any public advertisement of the offer, (c) whether the offer contemplated a sale of the vessels free from the conditions and restrictions referred to in § 8 of the Act of 1916 and specified in § 9 thereof as amended, (d) whether the letter of December 15, 1919, by W. L. Mercer, Acting Manager

of Ship Sales, which is set forth in the sixth finding, was written pursuant to a direction or authorization on the part of the Shipping Board, (e) whether the Shipping Board's resolution of December 19, 1919, which is set forth in the eighth finding, was intended to rescind the resolution of December 12, 1919, on the ground that the latter was void or that it was not an effective acceptance of W. Bernard Duke's proposal of December 5, 1919, but only a qualified acceptance which was as yet ineffective because Mr. Duke had not assented to the qualification, and (f) the amount of damages to which the plaintiffs are entitled if they have a right to recover damages.

2. To take further evidence, if need be, on which to base such additional findings.

3. To qualify or alter any of the existing findings, if need be, to bring them and the additional findings into accord.

4. To render upon all the findings when completed such judgment as shall appear to be right under the law, subject to the usual right of appeal. Remanded for additional findings, etc.

Mr. Conrad H. Syme for appellants. *Mr. Henry M. Ward,* with whom *Mr. Solicitor General Beck* and *Mr. Chauncey G. Parker* were on the brief, for the United States.

No. 607. Standard Oil Company of New Jersey *v.* Southern Pacific Company et al. Certiorari to the Circuit Court of Appeals for the Second Circuit. Motion submitted April 28, 1924. Order entered May 5, 1924. The motion for leave to take additional testimony is granted, such testimony to be taken, however, in accordance with Rule 12, paragraph 2, of the rules of this Court, to be limited to the subject matter specified in the motion, and to be upon interrogatories presented and

served upon the opposite party by the petitioner on or before the 1st day of June next, and upon cross-interrogatories to be filed on or before the 20th day of June next. The commission with the interrogatories for the taking of said testimony shall issue to the clerk of the Circuit Court of Appeals for the Second Circuit, and the interrogatories and the evidence taken shall be forwarded to this Court on or before the 1st day of September next. The costs of the commission, when incurred, shall be paid by the petitioner. *Mr. John M. Woolsey* and *Mr. W. H. McGrann,* for petitioner, in support of the motion. *Mr. Charles C. Burlingham, Mr. Ray Rood Allen* and *Mr. A. Howard Neely,* for respondents, in opposition to the motion.

No. 194. C. E. Bulloch et al. *v.* Dermott-Collins Road Improvement District et al. Error to the Supreme Court of the State of Arkansas. Submitted January 25, 1924. Decided May 5, 1924. *Per Curiam.* Reversed upon the authority of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis,* 224 U. S. 503; *Board of Public Utility Commissioners* v. *Compañia General,* 249 U. S. 425, 426, 427; *Heitmuller* v. *Stokes,* 256 U. S. 359, 362; *Atherton Mills* v. *Johnston,* 259 U. S. 13, 15–16, on the ground that the question in the case has become moot, with direction to remand to the Chancery Court of Chicot County with direction to that court to dismiss the suit without prejudice. *Mr. Joe S. Harris* for plaintiffs in error. No appearance for defendants in error.

No. 227. United States *v.* James Reed. Appeal from the Court of Claims. Submitted April 16, 1924. Decided May 5, 1924. *Per Curiam.* Affirmed upon the authority of *United States* v. *Andrews,* 240 U. S. 90, 94. *Mr.*

Solicitor General Beck and *Mr. George Ross Hull* for the United States. *Mr. George A. King, Mr. Wm. B. King* and *Mr. George R. Shields* for appellee.

No. 241. JAMES C. DAVIS, AS AGENT, ETC. *v.* CHARLES HAREFORD. Error to the Supreme Court of the State of Arkansas. Argued April 28, 1924. Decided May 5, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 326, 334; *St. Louis & San Francisco R. R. Co.* v. *Shepherd,* 240 U. S. 240, 241; *Godchaux* v. *Estopinal,* 251 U. S. 179, 181; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117. *Mr. A. A. McLaughlin,* with whom *Mr. Thos. B. Pryor* and *Mr. Vincent M. Mills* were on the brief, for plaintiff in error. *Mr. C. A. Starbird,* with whom *Mr. Robert A. Rowe* was on the brief, for defendant in error.

No. 257. PEOPLE OF THE STATE OF NEW YORK EX REL. CITY OF BUFFALO *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. Error to the Supreme Court of the State of New York. Argued April 30, 1924. Decided May 5, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195; (2) *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178; *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182; *Newark* v. *New Jersey,* 262 U. S. 192, 196. *Mr. George Clinton,* with whom *Mr. William S. Rann* was on the brief, for plaintiff in error. *Mr. Henry W. Killeen,* with whom *Mr. James C. Sweeney* was on the brief, for defendants in error.

No. 259. J. W. Neil *v.* Utah Wholesale Grocery Company. Error to the Supreme Court of the State of Utah. Submitted April 28, 1924. Decided May 5, 1924. *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. William R. Andrews* and *Mr. Joseph Chez* for plaintiff in error. *Mr. Jacob Evans* and *Mr. Mahlon B. Wilson* for defendant in error.

No. 260. Missouri Pacific Railroad Company *v.* A. M. Burnett. Error to the Supreme Court of the State of Arkansas. Submitted April 28, 1924. Decided May 5, 1924. *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. Petition for certiorari dismissed for lack of submission under the rule. *Mr. Thomas B. Pryor* and *Mr. Edward J. White* for plaintiff in error. *Mr. Joe T. Robinson* for defendant in error.

No. 270. Charles Boettcher et al., Receivers, etc., *v.* Public Utilities Commission of the State of Colorado et al. Error to the Supreme Court of the State of Colorado. Argued May 1, 1924. Decided May 5, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Elmer L. Brock,* with whom *Mr. Charles R. Brock* and *Mr. Milton Smith* were on the brief, for plaintiffs in error. *Mr. Robert E. More* and *Mr. Kenaz Huffman,*

with whom *Mr. Peter H. Holme* and *Mr. Tison S. Dines* were on the brief, for defendants in error.

No. 734. PLUTO OIL & GAS COMPANY ET AL. *v.* H. C. MILLER. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted April 28, 1924. Decided May 5, 1924. *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. Petition for certiorari denied. *Mr. L. O. Lyle, Mr. W. V. Pryor,* and *Mr. D. A. McDougal,* for defendant in error, in support of the motion. *Mr. Henry B. Martin* and *Mr. B. B. Blakeney* appeared for plaintiffs in error.

No. —, Original. *Ex parte:* IN THE MATTER OF THE LEHIGH VALLEY RAILROAD COMPANY, PETITIONER. (Action No. 1.) Submitted May 5, 1924. Decided May 12, 1924. Motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus herein denied. *Mr. Charles A. Boston* and *Mr. Lindley M. Garrison* for petitioner.

No. —, Original. *Ex parte:* IN THE MATTER OF THE LEHIGH VALLEY RAILROAD COMPANY, PETITIONER. (Action No. 2.) Submitted May 5, 1924. Decided May 12, 1924. Motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus herein denied. *Mr. Charles A. Boston* and *Mr. Lindley M. Garrison* for petitioner.

No. 15, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS. In Equity. May 12, 1924. Order entered allowing compensation to receiver and counsel.

No. —, Original. *Ex parte*: IN THE MATTER OF THE CITY OF NEW YORK ET AL., PETITIONERS. Submitted May 12, 1924. Decided May 26, 1924. Motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus herein denied. *Mr. George P. Nicholson* and *Mr. William G. Fullen* for petitioners.

No. 562. LORENZ REICH *v.* ALEXANDER SMITH COCHRAN ET AL., ETC., AS EXECUTORS, ETC. Error to the Supreme Court of the State of New York. Motion to dismiss or affirm submitted May 26, 1924. Decided June 2, 1924. *Per Curiam.* Dismissed for the 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. And see *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444. *Mr. Samuel Untermyer* and *Mr. Percy H. Stewart,* for defendants in error, in support of the motion. *Mr. Alton B. Parker,* for plaintiff in error, in opposition to the motion.

No. 739. WILSON CLINTON, AN INCOMPETENT, ETC., ET AL. *v.* GYPSY OIL COMPANY. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted May 26, 1924. Decided June 2, 1924. *Per Curiam.* Dismissed for the 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. J. B. Diggs,* for defendant in error, in support of the motion. *Mr. Horace H. Hagan,* for plaintiffs in error, in opposition to the motion.

No. 892. CITY OF NEW YORK ET AL. *v.* LINDLEY M. GARRISON, AS RECEIVER, ETC., ET AL. Appeal from the District Court of the United States for the Southern District of New York. Motion to dismiss submitted May 26, 1924. Decided June 2, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Heike* v. *United States,* 217 U. S. 423, 429; *Rexford* v. *Brunswick-Balke Collender Co.,* 228 U. S. 339, 346; *Collins* v. *Miller,* 252 U. S. 364, 365; *Oneida Navigation Corporation* v. *Job & Co.,* 252 U. S. 521, 522. *Mr. Charles P. Howland,* for appellees, in support of the motion. *Mr. George P. Nicholson* and *Mr. William G. Fullen,* for appellants, in opposition to the motion.

No. —. *Ex parte:* IN THE MATTER OF JULIUS SHAPIRO ET AL., INDIVIDUALLY AND AS COPARTNERS, DOING BUSINESS AS SHAPIRO & COMPANY, BANKRUPTS, PETITIONERS. Submitted June 2, 1924. Decided June 9, 1924. Motion for a stay herein denied. *Mr. Jerome C. Jackson* and *Mr. Melvin H. Dalberg* for petitioners.

No. 1002. TWOHY BROTHERS COMPANY *v.* CLARENCE KENNEDY. Error to the Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss submitted June 2, 1924. Decided June 9, 1924. *Per Curiam.* Dismissed for the 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; *Barnett* v. *Kunkel,* 264 U. S. 16. *Mr. W. T. Sprowls,* for defendant in error, in support of the motion. *Mr. E. C. Brandenburg, Mr. G. P. Bullard* and *Mr. Samuel White,* for plaintiff in error, in opposition to the motion.

No. 738. GREAT INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* J. W. GREEN. Error to the Supreme Court of the State of Alabama. Motion to dismiss or affirm submitted June 2, 1924. Decided June 9, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. J. T. Stokely,* for defendant in error, in support of the motion. *Mr. J. J. Mayfield,* for plaintiff in error, in opposition to the motion.

PETITIONS FOR CERTIORARI GRANTED, FROM APRIL 28, 1924, TO AND INCLUDING JUNE 9, 1924.

No. 861. MODERN WOODMEN OF AMERICA *v.* JENNIE VIDA MIXER. April 28, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska granted. *Mr. Nelson C. Pratt* for petitioner. No appearance for respondent.

No. 971. EDWARD HINES YELLOW PINE TRUSTEES *v.* ANNA F. C. MARTIN ET AL. May 12, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. T. J. Wills* and *Mr. T. W. Davis* for petitioners. *Mr. Clayton D. Potter* for respondents.

No. 991. AMERICAN RAILWAY EXPRESS COMPANY *v.* GEORGE C. DANIEL. May 12, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Georgia granted. *Mr. Robert C. Alston* for petitioner. No appearance for respondent.

No. 750. FULTON NATIONAL BANK OF ATLANTA *v.* I. S. HOOSIER ET AL., RECEIVERS, ETC. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. John D. Little, Mr. Arthur G. Powell, Mr. Marion Smith* and *Mr. Max F. Goldstein* for petitioner. No appearance for respondents.

No. 785. JAMES C. DAVIS, AGENT, ETC., *v.* L. D. ALEXANDER ET AL. June 2, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. C. O. Blake* and *Mr. W. R. Bleakmore* for petitioner. *Mr. Fred E. Suits* for respondents.

No. 986. MUNICIPAL ASSEMBLY OF ARROYO, PORTO RICO, *v.* SUCCESSORS OF C. AND J. FANTAUZZI. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. E. B. Wilcox* and *Mr. C. Dominguez Rubio* for petitioner. *Mr. Francis E. Neagle* and *Mr. Eugene Congleton* for respondents.

No. 987. JUAN PEREZ CAMI, MUNICIPAL COMMISSIONER OF FINANCE, *v.* CENTRAL VICTORIA, LIMITED. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. E. B. Wilcox* and *Mr. Juan B. Soto* for petitioner. *Mr. Francis G. Caffey* for respondent.

No. 891. MISSOURI PACIFIC RAILROAD COMPANY *v.* REYNOLDS-DAVIS GROCERY COMPANY. June 2, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas granted. *Mr. Vincent M. Miles* and *Mr. Thomas B. Pryor* for petitioner. No appearance for respondent.

No. 1017. R. H. CLEMMER, ATTORNEY IN FACT, ETC., ET AL., *v.* ARTHUR L. ROSS ET AL. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. H. H. Rumble* for petitioners. *Mr. R. Randolph Hicks* and *Mr. Arthur Leonard Ross* for respondents.

No. 1029. GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, *v.* ROAD IMPROVEMENT DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. G. B. Rose, Mr. D. H. Cantrell, Mr. J. F. Loughborough* and *Mr. A. D. Dobyns* for petitioner. *Mr. Henry D. Ashley* for respondent.

No. 1008. GREAT NORTHERN RAILWAY COMPANY *v.* CHARLES W. REED ET AL. June 9, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Washington granted. *Mr. F. G. Dorety* for petitioner. No appearance for respondents.

No. 1012. CHARLES SHERWIN ET AL. *v.* UNITED STATES. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. B. Scott* for petitioners. No brief filed for the United States.

No. 1033. UNITED STATES *v.* NEW YORK & CUBA MAIL STEAMSHIP COMPANY. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Davis, Mr. Alfred A. Wheat* and *Mr. Harry S. Ridgely* for the United States. *Mr. John Tilney Carpenter* for respondent.

No. 1063. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* ERNEST J. GONEAU. June 9, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. Marshall A. Spooner* and *Mr. John E. Palmer* for petitioner. *Mr. Samuel A. Anderson* for respondent.

No. 1071. JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, ETC. *v.* JOHN L. ROPER LUMBER COMPANY. June 9, 1924. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia granted. *Mr. A. A. McLaughlin* and *Mr. R. M. Hughes, Jr.,* for petitioner. No appearance for respondent.

No. 1073. THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, ET AL. *v.* BENJAMIN GUINNESS ET AL. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck* and *Mr. Dean H. Stanley* for petitioners. No appearance for respondents.

No. 1074. BENJAMIN GUINNESS ET AL. *v.* THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, ET AL. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Alexander B. Siegel* for petitioners. No brief filed for respondents.

No. 1075. CHICAGO GREAT WESTERN RAILWAY COMPANY *v.* A. D. SCHENDEL, SPECIAL ADMINISTRATOR, ETC. June 9, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. Asa G. Briggs* for petitioner. *Mr. Tom Davis* and *Mr. Ernest A. Michel* for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM APRIL 28, 1924, TO AND INCLUDING JUNE 9, 1924.

No. 984. HARRY A. HORINE ET AL. *v.* UNITED STATES. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. April 28, 1924. Motion for leave to file petition for a writ of certiorari herein, without a certified copy of the record, granted, the case docketed, and the petition denied. *Mr. Harry A. Horine* and *Mr. Sam Goslinsky* for petitioners. No brief filed for the United States.

No. 887. CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* ALVIN R. DURHAM COMPANY ET AL. April 28, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied for lack of jurisdiction, there being no final decree. *Mr. Robert H. Widdicombe* and *Mr. R. N. Van Doren* for petitioner. *Mr. Julius J. Patik* for respondents.

No. 906. DAISY M. SCOTT ET AL. *v.* CITY OF COLUMBUS, OHIO. April 28, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Timothy S. Hogan* for petitioners. *Mr. Charles A. Leach* for respondent.

No. 910. PRAIRIE OIL & GAS COMPANY *v.* LOUIS F. SHANBLUM ET AL. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. S. Arnold* for petitioner. No appearance for respondents.

No. 918. PATRICK MCGOVERN ET AL., ETC. *v.* CITY OF BOSTON. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John F. Cronan* for petitioners. *Mr. E. Mark Sullivan* and *Mr. Samuel Silverman* for respondent.

No. 923. NEW CREEK COMPANY *v.* EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE, ETC. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James Wilson Bayard* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. Sewall Key* for respondent.

No. 935. KAWASAKI ZOSENSHO, OWNER, ETC. *v.* COSULICH SOCIETA TRIESTINA DI NAVIGAZIONE OF TRIESTE, ITALY, OWNER, ETC. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Whitefield Betts, Jr., Mr. George C. Sprague* and *Mr. H. C. Hughes* for petitioner. No appearance for respondent.

No. 936. HETTRICK MANUFACTURING COMPANY *v.* JAMES A. SHEPHERD & COMPANY, LTD. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George Roscoe Davis* for petitioner. *Mr. Charles H. Brady* for respondent.

No. 937. FACER FORGED STEEL CAR WHEEL AND LOCOMOTIVE WHEEL COMPANY *v.* CARNEGIE STEEL COMPANY. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles E. Townsend, Mr. Joseph R. Edson* and *Mr. Thomas G. Steward* for petitioner. *Mr. D. Anthony Usina* for respondent.

No. 946. WILLIAM A. BROWN & COMPANY ET AL. *v.* UNITED STATES. April 28, 1924. Petition for a writ of certiorari to the United States Court of Customs Appeals denied. *Mr. B. A. Levett* and *Mr. Allan R. Brown* for petitioners. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Hoppin* for the United States.

No. 949. NANCY ROBERTS ET AL. *v.* ATLANTIC OIL PRODUCING COMPANY. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harvey Riddell* for petitioners. No appearance for respondent.

No. 950. NEW YORK CENTRAL RAILROAD COMPANY *v.* JOSEPH C. DUNBAR. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles C. Paulding* for petitioner. *Mr. John B. Rogers* for respondent.

No. 955. ALFRED EMERSON ET AL. *v.* RADIO CORPORATION OF AMERICA ET AL. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel H. Wandell* for petitioners. *Mr. L. F. H. Betts* for respondents.

No. 957. LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* ROBERT E. MORRILL, SR. April 28, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied. *Mr. C. P. McIntyre, Mr. E. Perry Thomas* and *Mr. George W. Jones* for petitioner. *Mr. William M. Williams* for respondent.

No. 961. UNITED STATES EX REL. DONG YICK YUEN *v.* JOHN F. DUNTON, CHINESE INSPECTOR, ETC. April 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roger O'Donnell* for petitioner. *Mr. Solicitor General Beck* and *Mr. George Ross Hull* for respondent.

No. 260. MISSOURI PACIFIC RAILROAD COMPANY *v.* A. M. BURNETT. [See *ante*, 572.]

No. 734. PLUTO OIL & GAS COMPANY ET AL. *v.* H. C. MILLER. [See *ante*, 573.]

No. 570. W. F. GRAVINS *v.* WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, ETC. May 5, 1924. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. Robert H. Talley* and *Mr. Joseph W. Cox* for petitioner. *Mr. David H. Leake* and *Mr. Walter Leake* for respondent.

No. 841. JOHN G. CROSLAND *v.* UNITED STATES. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Bart A. Riley* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 932. SAN JOAQUIN LUMBER COMPANY *v.* R. H. DODD, TRUSTEE, ETC., ET AL. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Percy S. Webster* for petitioner. *Mr. Arthur L. Shaw* for respondents.

No. 941. KOPPEL INDUSTRIAL CAR & EQUIPMENT COMPANY *v.* ALBERT E. LEE, RECEIVER. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Henry E. Warner* for petitioner. *Mr. Philip N. Jones* for respondent.

No. 942. M. J. BASHARA *v.* GEORGE C. HOPKINS, COLLECTOR OF INTERNAL REVENUE. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Harvey B. Cox* for respondent.

No. 947. MANFRED W. EHRICH, TRUSTEE, ETC., ET AL. *v.* CHARLES J. EISENLOHR. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur Garfield Hays* and *Mr. Saul S. Myers* for petitioners. *Mr. Owen J. Roberts* for respondent.

No. 953. FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE, ETC. *v.* WEST VIRGINIA PULP & PAPER COMPANY. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Solicitor General Beck* for petitioner. *Mr. John W. Davis* for respondent.

No. 954. EMILY R. CADWALADER ET AL., EXECUTORS, ETC. *v.* EDWARD L. STURGESS, ETC., COLLECTOR OF UNITED STATES INTERNAL REVENUE, ETC. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Herbert Noble* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Harvey B. Cox* for respondent.

No. 960. ARTHUR E. DONEGAN *v.* UNITED STATES. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alexander Akerman* and *Mr. W. M. Toomer* for petitioner. No brief filed for the United States.

No. 962. EMPIRE GAS & FUEL COMPANY *v.* LONE STAR GAS COMPANY. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. M. Etheridge* for petitioner. *Mr. Harry Preston Lawther* for respondent.

No. 965. BELDING BROS. & COMPANY *v.* BENJAMIN L. ARMSTRONG. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert B. Honeyman* and *Mr. Henry B. Twombly* for petitioner. *Mr. Livingston Gifford* for respondent.

No. 970. OLD COLONY TRUST COMPANY *v.* LAWYERS TITLE & TRUST COMPANY. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Eugene W. Leake* and *Mr. William C. Breed* for petitioner. *Mr. Frederick P. King* for respondent.

No. 978. J. P. EVANS *v.* PAT MARR, INDIVIDUALLY AND AS TRUSTEE, ETC. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. D. Wilkinson* and *Mr. C. Huffman Lewis* for petitioner. No appearance for respondent.

No. 982. LOUIS MILAM ET AL. *v.* UNITED STATES. May 5, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Talley* for petitioners. No brief filed for the United States.

No. 707. MOLSIE BAILEY *v.* CLAUDE JONES ET AL. May 12, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Guy H. Sigler* for petitioner. No appearance for respondents.

No. 909. T. R. BENNETT, SUPERINTENDENT OF BANKS FOR THE STATE OF GEORGIA, *v.* JOHN E. SCHWARZ ET AL. May 12, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied. *Mr. Paul E. Seabrook* for petitioner. *Mr. H. Wiley Johnson* for respondents.

No. 928. NICHOLAS A. DAWSON *v.* MRS. CHARLES D. GONDRAN ET AL. May 12, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles T. Wortham* for petitioner. *Mr. Percy S. Benedict* for respondents.

No. 951. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* H. L. COCKERHAM, ADMINISTRATOR, ETC. May 12, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. Charles N. Burch* and *Mr. H. D. Minor* for petitioners. No appearance for respondent.

No. 952. SEABY PHILLIPS *v.* UNITED STATES. May 12, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Max Isaac* for petitioner. No brief filed for the United States.

No. 956. UNITED STATES, OWNER OF STEAMSHIP LAKE FAIRLIE, ETC. *v.* SUGARLAND INDUSTRIES ET AL. May 12, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. J. Frank Staley* for the United States. No appearance for respondents.

No. 967. OLIVER M. TUCKER ET AL. *v.* KARL E. PEILER ET AL. May 12, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George W. Ramsey* for petitioners. *Mr. Vernon M. Dorsey, Mr. Sidney F. Parham* and *Mr. John P. Bartlett* for respondents.

No. 975. GEORGE H. MILES *v.* UNITED STATES. May 12, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ely Rosenberg* for petitioner. No brief filed for the United States.

No. 969. ALGE HOWELL *v.* UNITED STATES. May 26, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George J. Gulotta* for petitioner. No brief filed for the United States.

No. 972. RANDOLPH WHITMAN, AS CHAIRMAN, ETC., ET AL. *v.* BONDHOLDERS COMMITTEE OF DECEMBER 1, 1921, ET AL. May 26, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert Szold* for petitioners. *Mr. Mark Hyman* for respondents.

No. 976. DENNISON BRICK & TILE COMPANY *v.* CHICAGO TRUST COMPANY ET AL. May 26, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Smith W. Bennett* for petitioner. *Mr. George W. Reed* and *Mr. Brooklyn Bridge* for respondents.

No. 983. MARY BRAFMAN *v.* BENJAMIN BRAFMAN ET AL., ADMINISTRATORS, ETC. May 26, 1924. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland denied. *Elizabeth F. Vilkomerson* for petitioner. No appearance for respondents.

No. 999. CLEVELAND & WESTERN COAL COMPANY *v.* MAIN ISLAND CREEK COAL COMPANY. May 26, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. F. Taplin* for petitioner. *Mr. John H. Holt* and *Mr. Murray Seasongood* for respondent.

No. 576. DENISON-PRATT PAPER COMPANY *v.* NEWS PUBLISHING COMPANY. June 2, 1924. Supplemental petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. Clarence W. Dealtry, Mr. Charles D. Merrick* and *Mr. Buford C. Tynes* for petitioner. *Mr. C. M. Hanna* for respondent. [See 263 U. S. 714.]

No. 806. E. R. PORTUCHECK *v.* UNITED STATES. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will C. Austin* and *Mr. R. E. Taylor* for petitioner. No brief filed for the United States.

No. 890. PETER SAIN ET AL. *v.* CYPRESS CREEK DRAINAGE DISTRICT. Error to the Supreme Court of the State of Arkansas. June 2, 1924. Petition for a writ of certiorari herein denied. *Mr. Lamar Williamson,* for plaintiffs in error, in support of the petition. *Mr. Charles T. Coleman* appeared for defendant in error.

No. 943. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL. *v.* JOSEPHINE C. KEPLER. June 2, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied. *Mr. Wymer Dressler* and *Mr. R. L. Kennedy* for petitioners. *Mr. Edward P. Smith* and *Mr. Francis S. Howell* for respondent.

No. 989. B. W. NEAL, INC., ET AL. *v.* ALVIN N. POWELL ET AL. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. James F. Terry* for petitioners. *Mr. Joseph B. Jacobs* for respondents.

No. 994. COMMERCE TRUST COMPANY *v.* F. ALEXANDER CHANDLER ET AL., CO-RECEIVERS. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert G. Dodge* and *Mr. Harold S. Davis* for petitioner. *Mr. Judd Dewey* for respondents.

No. 995. EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE, *v.* REAL ESTATE TITLE INSURANCE & TRUST COMPANY OF PHILADELPHIA. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Solicitor General Beck* for petitioner. *Mr. Maurice Bower Saul* for respondent.

No. 996. SAMUEL T. WIGGINS, ASSIGNEE, ETC., ET AL. *v.* F. E. HUMMEL, RECEIVER. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. R. N. McConnell* for petitioners. No appearance for respondent.

No. 998. W. A. GENTRY *v.* JAMES C. DAVIS, AGENT, ETC. June 2, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. Charles Stephens* and *Mr. Frank Doster* for petitioner. *Mr. W. W. Brown* and *Mr. Alfred G. Armstrong* for respondent.

No. 1006. JOHN BEAL SNEED ET AL. *v.* UNITED STATES. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James E. Gresham* for petitioners. No brief filed for the United States.

No. 1007. FREDERICK KEIGHLEY, TRUSTEE, ETC. *v.* AMERICAN TRUST COMPANY. June 2, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Silbiger* for petitioner. *Mr. Morgan J. O'Brien* for respondent.

No. 454. UNITED STATES EX REL. SOO HOO HONG *v.* ROBERT E. TOD, COMMISSIONER OF IMMIGRATION, ETC.; and

No. 482. UNITED STATES EX REL. JOSEPH SINGLETON, NEXT FRIEND OF LUI KAH, *v.* ROBERT E. TOD, COMMISSIONER OF IMMIGRATION. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. June 9, 1924. Suggestions to strike petitions for writs of certiorari in these causes from the docket granted. *Mr. Walter Bates Farr* for petitioners. *Mr. Alfred A. Wheat* for respondent.

No. 992. EDWARD H. CHILDS, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. June 9, 1924. Suggestion to strike the petition for a writ of certiorari in this cause from the docket granted. *Mr. Moses Cohen* for petitioner. *Mr. Solicitor General Beck* and *Mr. Alfred A. Wheat* for the United States.

No. 1077. CATHERINE G. BRANAN, JUNIOR, AN INFANT, ETC. *v.* WILLIAM A. WIMSATT, TRADING AS JOHNSON AND WIMSATT. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia. June 9, 1924. The Court having considered the petition for a writ of certiorari filed in manuscript and the brief presented by the petitioner in support of the same, denies the petition for a writ of certiorari; and therefore denies the motion of the petitioner for leave to proceed *in forma pauperis* and to have the record printed at public expense. *Mr. Sidney F. Taliaferro* and *Mr. Thomas P. Littlepage* for petitioner. No appearance for respondent.

No. 751. J. E. WILLIAMS ET AL. *v.* UNITED STATES. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George E. Wallace* for petitioners. *Mr. Solicitor General Beck* and *Mr. Assistant to the Attorney General Seymour* for the United States.

No. 973. NORTH PACIFIC STEAMSHIP COMPANY *v.* WILLIAM T. SOLEY. Error to the Supreme Court of the State of California. June 9, 1924. Petition for a writ of certiorari herein denied. *Mr. Ernest Clewe,* for plaintiff in error, in support of the petition. *Mr. Henry Heidelberg,* for defendant in error, in opposition to the petition.

No. 974. BALTIMORE & OHIO RAILROAD COMPANY *v.* ANNA W. GILL, ADMINISTRATRIX, ETC. June 9, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Ralph J. Kramer, Mr. Edward C. Kramer, Mr. Bruce A. Campbell, Mr. Walter R. Mayne, Mr. Morison R. Waite* and *Mr. William A. Eggers* for petitioner. *Mr. Sidney Thorne Able* and *Mr. Charles P. Noell* for respondent.

No. 1009. S. H. POMEROY COMPANY ET AL. *v.* FRANK F. SMITH HARDWARE COMPANY. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William B. Greeley* and *Mr. William A. Redding* for petitioners. *Mr. Stephen J. Cox* for respondent.

No. 1010. EMILE VITAL ET AL., COPARTNERS, ETC., *v.* HENRY F. KERR, TRADING AS KERR STEAMSHIP LINE; and

No. 1011. ISAAC J. BIGIO *v.* HENRY F. KERR, TRADING AS KERR STEAMSHIP LINE. June 9, 1924. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Catesby Jones* and *Mr. James W. Ryan* for petitioners. *Mr. Elkan Turk* for respondent.

No. 1021. MERRIAM & MILLARD COMPANY *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward P. Smith* and *Mr. Francis S. Howell* for petitioner. *Mr. Bruce Scott, Mr. Byron Clark* and *Mr. Kenneth F. Burgess* for respondent.

No. 1024. ELMYR A. LAUGHLIN ET AL. *v.* BURRY RAILWAY SUPPLY COMPANY ET AL. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Joshua R. H. Potts* and *Mr. Brayton G. Richards* for petitioners. *Mr. George L. Wilkinson* for respondents.

No. 1025. GEORGE W. REED ET AL., TRUSTEES, *v.* FEDERAL FINANCE CORPORATION. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George W. Reed* for petitioners. *Mr. Alexander Britton* for respondent.

No. 1027. CHICAGO PNEUMATIC TOOL COMPANY *v.* WILLIAM H. KELLER, INC., ETC. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John W. Davis* and *Mr. Samuel E. Hibben* for petitioner. *Mr. Edward S. Rogers, Mr. George T. Buckingham* and *Mr. Marquis Eaton* for respondent.

No. 1035. RUDOLPH DE MARCO *v.* UNITED STATES. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Moe Levy* and *Mr. Henry Bowden* for petitioner. No brief filed for the United States.

No. 1046. HERMAN WOLFF ET AL., EXECUTORS, ETC., *v.* JOHN G. WILLIAMS. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Hugh W. Ogden* and *Mr. Hollis R. Bailey* for petitioners. *Mr. Mark W. Horblit* for respondent.

No. 1000. SAMUEL S. LEWIS ET AL. *v.* UNITED STATES. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harvey H. Pratt* for petitioners. No brief filed for the United States.

No. 1001. MRS. F. W. LEATHERBURY, COMMUNITY ADMINISTRATRIX, *v.* GULF, COLORADO & SANTA FE RAILWAY COMPANY. June 9, 1924. Petition for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas denied. *Mr. Winbourn Pearce* and *Mr. A. L. Curtis* for petitioner. *Mr. J. W. Terry* for respondent.

No. 1015. LEDA K. MAYFIELD *v.* EQUITABLE TRUST COMPANY OF NEW YORK. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. G. Mayfield* for petitioner. *Mr. Alfred Huger* for respondent.

No. 1016. LEDA K. MAYFIELD *v.* FEDERAL RESERVE BANK OF ATLANTA. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. G. Mayfield* for petitioner. *Mr. Hollins N. Randolph* and *Mr. A. B. Lovett* for respondent.

No. 1030. FRED S. HOBACK *v.* UNITED STATES. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. A. B. Hunt* and *Mr. Walter R. Staples* for petitioner. No brief filed for the United States.

No. 1034. AMERICAN CENTRAL INSURANCE COMPANY *v.* MRS. G. W. SIMS. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. Lee Bartels* for petitioner. No appearance for respondent.

Nos. 1039 and 1040. DIAMOND COAL & COKE COMPANY *v.* HAZELWOOD DOCK COMPANY ET AL. June 9, 1924. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward B. Burling* for petitioner. *Mr. Lowrie C. Barton* appeared for respondents.

No. 1041. AMERICAN CREOSOTE WORKS, INC., ET AL. *v.* EDWIN L. POWELL. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William B. Grant* and *Mr. Charlton R. Beattie* for petitioners. *Mr. Monte M. Lemann* appeared for respondent.

No. 1049. LANDERS COMPANY, INC., ET AL. *v.* LINCOLN-ALLIANCE BANK. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Howard* and *Mr. Sewall Myer* for petitioners. *Mr. Palmer Hutcheson* appeared for respondent.

No. 1054. COMMERCIAL NATIONAL BANK OF HUTCHINSON, KANSAS, *v.* HEID BROTHERS, INC. June 9, 1924. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas denied. *Mr. I. N. Watson* and *Mr. Charles R. Loomis* for petitioner. *Mr. Joseph U. Sweeney* for respondent.

No. 1062. IRVING NATIONAL BANK, ETC. *v.* THOMAS M. BLAKE ET AL., RECEIVERS, ETC. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving L. Ernst* for petitioner. *Mr. Herman Aaron* for respondents.

No. 1065. FORESTGLEN LAND COMPANY *v.* GEORGE R. SCRUGHAM ET AL. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter L. Clark* and *Mr. M. W. Acheson, Jr.,* for petitioner. *Mr. A. Leo Weil* for respondents.

No. 1066. JOE R. IRWIN *v.* UNITED STATES. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Huling P. Robertson, Jr.,* for petitioner. No brief filed for the United States.

No. 1069. J. G. WHITE & COMPANY, INC. *v.* BALL ENGINEERING COMPANY. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Kemp Bartlett* and *Mr. Harry W. Reynolds* for petitioner. *Mr. Charles D. Lockwood* and *Mr. William M. Parke* for respondent.

No. 1079. W. W. WILKINSON, TRUSTEE, ETC. *v.* J. L. WALKER. June 9, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Mark McMahon* for petitioner. No appearance for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 28, 1924, TO AND INCLUDING JUNE 9, 1924.

No. 985. UNITED STATES TO THE USE OF SUE P. GATES *v.* FRANK M. HARSHBERGER ET AL. Error to the District Court of the United States for the Western District of Washington. April 28, 1924. Docketed and dismissed, on motion of *Mr. Solicitor General Beck* for defendants in error. No appearance for plaintiff in error.

No. 838. WILLIAM F. QUESSE ET AL. *v.* PEOPLE OF THE STATE OF ILLINOIS. On petition for a writ of certiorari to the Supreme Court of the State of Illinois. April 28, 1924. Petition dismissed, on motion of *Mr. Willard M. McEwen* for petitioners. No appearance for respondent.

No. 278. MAGNUM IMPORT COMPANY, INC. *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 279. MAX L. COHN, TRADING AS MACLEN IMPORT COMPANY, *v.* FRANCOIS JOSEPH DE SPOTURNO COTY;

No. 280. ARTHUR BAUM ET AL., TRADING AS BEAUTEX COMPANY, *v.* FRANCOIS JOSEPH DE SPOTURNO COTY; and

No. 281. MAGNUM IMPORT COMPANY *v.* HOUBIGANT, INC. On writs of certiorari to the Circuit Court of Appeals for the Second Circuit. May 1, 1924. Dismissed with costs, on motion of *Mr. Charles H. Tuttle* and *Mr. Wm. J. Hughes* for petitioners. *Mr. F. D. McKenney, Mr. Hugo Mock, Mr. Asher Blum, Mr. George S. Hornblower, Mr. Raoul E. Desvernine* and *Mr. Lindley M. Garrison* for respondents.

No. 1018. ORINOCO COMPANY, LIMITED, ET AL. *v.* ORINOCO IRON COMPANY. Appeal from the Court of Appeals of the District of Columbia. May 12, 1924. Docketed and dismissed with costs, on motion of *Mr. William R. Harr* and *Mr. Edward S. Duvall* for appellee. *Mr. George N. Baxter* for appellants.

No. 867. S. H. KRESS & COMPANY ET AL. *v.* BESSIE LEE CROSBY. Error to the Supreme Court of the State of Mississippi. May 12, 1924. Dismissed with costs, on motion of *Mr. Wade H. Ellis* and *Mr. Thomas J. Wills* for plaintiffs in error. *Mr. J. W. Cassedy* and *Mr. Clayton D. Potter* for defendant in error.

No. 488. MARGARET C. LYNCH, EXECUTRIX, ETC. *v.* CLARA B. CONGDON ET AL., EXECUTORS, ETC. Error to the District Court of the United States for the District of Minnesota. May 26, 1924. Dismissed with costs, on motion of *Mr. Solicitor General Beck* in behalf of plaintiff in error. *Mr. A. L. Agatin* and *Mr. Francis A. De Groat* for defendants in error.

No. 993. UNITED STATES *v.* WASHINGTON MARKET COMPANY. On petition for a writ of certiorari to the Court of Appeals of the District of Columbia. May 26, 1924. Dismissed, on motion of *Mr. Solicitor General Beck* for the United States. *Mr. Charles A. Douglas* and *Mr. Alexander Wolf* for respondent.

No. 407. ARKANSAS NATURAL GAS COMPANY *v.* W. N. MCFARLAND, SUPERVISOR OF PUBLIC ACCOUNTS. Error to the Supreme Court of the State of Louisiana. May 26, 1924. Dismissed per stipulation. *Mr. W. B. Smith* and *Mr. W. M. Phillips* for plaintiff in error. *Mr. A. V. Coco, Mr. Harry P. Sneed* and *Mr. S. L. Herold* for defendant in error.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1923.

Original Docket.

Cases pending at beginning of term	24
New cases docketed during term	6
Cases finally disposed of	6
Cases not finally disposed of	24

Appellate Docket.

Cases pending at beginning of term	368
New cases docketed during term	725
Cases finally disposed of	655
Cases not finally disposed of	438

The number of pending cases, original and appellate, was thus increased by 70.

Interlocutory decisions, and adverse decisions upon applications for leave to file, as in mandamus, prohibition, etc., are not here included.

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